In the

Supreme Court of the United States

Hugh Carey, and Others, Et Al,

Appellants

v.

Population Services International

Et Al

No. 75-443

Washington, D. C.
January 10, 1977

Pages 1 thru 52

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

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POPULATION SERVICES INTERNATIONAL

Et Al

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Monday, January 10, 1977

The above-entitled matter came on for argument at 10:03 o'clock a.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 PAUL STEVENS, Associate Justice

APPEARANCES:

MISS ARLENE R. SILVERMAN, Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047

MICHAEL N. POLLET, Esq., Karpatkin, Pollet & Lebioult, 1345 Avenue of the Americas, New York, New York 10019

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 first this morning in No. 75-443, Carey and Others against Population Services International.

Miss Silverman, you may proceed whenever you are ready.

ORAL ARGUMENT OF MISS ARLENE R. SILVERMAN

ON BEHALF OF THE APPELLANTS

MISS SILVERMAN: Thank you, your Honor.

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

Appellants appeal from an order of a three-judge district court in the Southern District of New York which enjoined the operation of Section 6811 (8) of the New York State Education Law.

This law did three things -- and we are talking here only in the context of nonprescription contraceptives as opposed to prescription contraceptives.

The first thing this law did was to limit the sale of contraceptives by licensed pharmacists only in the context of those 16 years and older.

It also forbade the sale by pharmacists to children under 16 and the statutory scheme provides that these particular individuals have to obtain their nonprescription contraceptives from a physician.

This is provided by Section 6807(1B) of the

Education Law.

And finally, the statutory scheme proscribed the advertisement and display of contraceptive products.

Before turning to the merits of Appellees claims, I would just like briefly to address myself to the question of standing of the different Appellees to maintain this lawsuit.

The district court held that Population Planning Associates and Hagen had standing to raise the First Amendment and privacy rights of users of non-prescription contraceptives.

We disagree.

As for Plaintiff Populations Planning Associates, as well as Hagen, it is our position that there is no realistic or that they have demonstrated no realistic fear of prosecution under the statute that is currently being attacked.

As we have pointed out, there have been no prosecutions under this statute in New York State since 1965. We feel that this is even recognized by Populations Planning Associates itself since, although they received two letters from the State Board of Pharmacy with regard to their advertisement of contraceptives, they waited over a year before ever initiating this lawsuit in the district court.

Although there was a visit to their premises in September 1974 after this lawsuit was started, this visit was for informational gathering purposes only and is not sufficient to confer standing on Population Planning Associates.

As for the Reverend Hagen, there is not even an allegation in the complaint that he received the letter and we would say that he also is without standing and without standing even less than Population Planning Associates to maintain this lawsuit.

Even if Appellees had demonstrated a realistic fear of injury under the statute, we also feel they are not suitable representatives to raise the privacy rights of third parties, which is what they are both attempting to do in this lawsuit.

Plaintiff Population Associates is a commercial firm and under these circumstances, we feel they are not a proper party to raise the privacy rights of users of non-prescription contraceptives where there is no party to the lawsuit and never was a party to the lawsuit who maintained that they wanted these particular products sold in places other than licensed pharmacies.

With respect to Plaintiff Population Planning Associates raising the First Amendment rights of others, we also feel they are an improper party.

The district court, in holding that they had standing to raise the First Amendment rights of others, relied on the Procunier and the New York Times cases. We feel that neither of these cases support that position.

Procunier was not an assertion of third party rights

case. The court in that case was careful to state that "We do not deal here with the difficult questions of the so-called 'right to hear' and 'third party standing,' but with a particular means of communication in which the interests of both parties are inextricably meshed."

That is in Procunier at page 409.

As for the New York Times case, we would submit that those are very special kinds of standing cases because in that type of case, a third party is not permitted to raise the rights of those who would receive the communication, the receivers of the communication not knowing about the communication would, of course, be in no position to bring the lawsuit themselves.

That is quite different from the case here where there is a statute on the book and those who would benefit from Appellees' argument in this Court would be in a position to attack this statute.

As for Hagen, he does not allege any interference with his receipt of information regarding contraceptives, nor does he allege that he wishes to advertise or display contraceptives and for these reasons we would also feel he is not an appropriate party to raise the third-party interests -- to raise third-party interests.

There are other plaintiffs in the district court. The district court did not reach the question of their standing.

We would submit that they, in any event, do not have any standing. The doctors, as we have pointed out, are exempted from the operation of Section 6811(8) by another provision of the Education Law, PSI alleged no threat of prosecution and as the district court pointed out, their exact relationship to the New York State law was not at all clear.

As for John Doe, he was never identified and we would submit that an analysis of the complaint would indicate that his claims in any event are speculative.

Turning now to an analysis of the merits of the claims advanced by the Plaintiffs in the district court, the district court analyzed the New York statutory scheme from a right of privacy standpoint. They held that access to contraceptive products was, if not an aspect of the right of privacy, it was close enough for them to consider it as such and they therefore found that the state could not regulate in this area unless there was a fundamental reason for it to do so.

It is our position, however, that in reaching this conclusion, the district court applied an inappropriate standard to the New York State statutory scheme.

There is no right of access to contraceptive products, even assuming there is a right to use contraceptive products, which was the case in Griswold v. Connecticut.

New York, in providing that only licensed pharmacists or physicians, where children under 16 are concerned, may

distribute contraceptives, has merely regulated the sources from which individuals may obtain contraceptives.

QUESTION: Perhaps I misunderstood. I thought that it was illegal for a pharmacist to sell contraceptives to those under 16.

MISS SILVERMAN: Yes, your Honor, it is. I just said that New York, in providing that licensed pharmacists were physicians where children under 16 were concerned -- that is true -- may only sell contraceptives. Only physicians may distribute contraceptives.

QUESTION: Pharmacists may not.

MISS SILVERMAN: That is correct.

QUESTION: Unless prescribed by a physician.

MISS SILVERMAN: Not prescribed. Unless obtained from a physician. We are talking about nonprescription contraceptives.

QUESTION: Pharmacists may not sell to those under 16, period.

MISS SILVERMAN: Exactly. They would have to obtain a nonprescription contractive from a clinic where a physician is employed or works for a physician directly.

However, there are no individuals in New York State that are denied outright the ability to obtain non-prescription contraceptive products.

Thus, the statutory scheme under attack here --

QUESTION: Why do you say that -- that last sentence?

MISS SILVERMAN: Well, because under the New York State statutory scheme, adults could go into a pharmacist and from him they could purchase nonprescription contraceptives and a child under the age of 16 could go to a clinic or to a physician and would be able to obtain nonprescription contraceptives so there is no category of individuals in the State of New York that does not have some means of obtaining nonprescription contraceptives.

And for this reason, your Honor --

QUESTION: Does the record tell us how available they are to people under 16 who go to clinics and the like?

MISS SILVERMAN: No, it doesn't, your Honor. This was decided on a motion for summary judgment and this was not at all -- there was no evidence in the record, really, which would indicate one way or the other.

QUESTION: And you did not offer any evidence to show that they were, in fact, available through doctors or clinics?

MISS SILVERMAN: Well, your Honor, we said that they were available through doctors. I would say that the Plaintiff offered no evidence to show that this was not realistic.

QUESTION: Well, you said that they were available.

By that you mean, there is no statutory objection.

MISS SILVERMAN: Exactly.

QUESTION: But maybe doctors don't have a stack of contraceptives in their office but the clinic does. How do we know?

MISS SILVERMAN: Well, your Honor, we don't know and that was one of our objections to the granting of summary judgment by the district court. It seemed to us that --

QUESTION: Well, if you wanted to prove that they were available, why would you object to the summary judgment? You could have put in evidence to the contrary.

MISS SILVERMAN: Well, your Honor, we did object to summary judgment. It would seem to me that the Plaintiffs were the ones maintaining this lawsuit and therefore, the burden was on them in attacking the state statute to establish, not on the Defendants, that they were unavailable and therefore, not having done so, we feel that the district court properly granted summary judgment to the Plaintiffs in this matter.

In other words, I don't see the burden on the state. To me, the burden was on the Plaintiff to prove their case.

QUESTION: You are making the argument that they are available. And I think if you are going to make that argument, you should be pointing to something in the record to show they are.

MISS SILVERMAN: Well, your Honor, we had no

opportunity. If we were permitted to go to trial on this case, we would have been able, or would have at that time proved what the actual practice was under New York law.

However, we were not given that opportunity. We opposed the motion for summary judgment and summary judgment was granted. And we feel that there was not sufficient evidence in the record to warrant a holding by the district court that they were unavailable since there are clinics maintained by one of the amicus in this Court and I understand that they do employ physicians and therefore children could go to these clinics as well as to their own physicians and obtain non-prescription contraceptive products. So -- yes, sir?

QUESTION: Excuse me, I didn't mean to interrupt you.

MISS SILVERMAN: I was through, your Honor.

QUESTION: The only statute at issue here is the one quoted on page 2 of your brief, New York State Education Law Section 6811(8). Is that correct?

MISS SILVERMAN: Yes, sir.

QUESTION: It doesn't say anything about physicians.

MISS SILVERMAN: Well, your Honor, there is another provision of the education law which we cited. It is in that same article. It is 68 -- let me just get the right cite -- Section 6807(10) of the education law.

QUESTION: Is that quoted anywhere?

MISS SILVERMAN: I don't believe it is, your Honor.

I think it is set forth in the brief of the opinion of the district court which is, I believe, in the jurisdictional statement.

QUESTION: Does it paraphrase what it provides?

MISS SILVERMAN: Yes, it says that nothing in this article shall prohibit a physician from distributing any instruments or anything that he feels is appropriate in the course of his practice. That is, an instrument and whatever other words are used are then defined in another section of the education law as items that would obviously include non-prescription contraceptives and I might say that the State Board of Pharmacy has always interpreted Section 6811(8) to exempt physicians from its operation.

QUESTION: The distribution must be directly by the physician.

MISS SILVERMAN: That is true, your Honor.

Yes?

QUESTION: Miss Silverman, would it violate the statute for a parent to give his child a contraceptive?

MISS SILVERMAN: Well, I think, your Honor, that it would violate the terms of the statute the same as, probably, as much as a parent should not give any sort of a drug that is obtainable by a prescription to a minor.

I don't know if that is a realistic kind of thing to consider because how is anybody going to know this type of

thing? And I don't know if that type of a distribution is meaningful under the statute but I think by its terms it probably would be.

QUESTION: Well, maybe the statute makes is illegal for anybody to give or sell a contraceptive to anybody, whether it be parent or child or whatever --

MISS SILVERMAN: It does, by its terms.

QUESTION: Unless the distributor or seller is a pharmacist.

MISS SILVERMAN: Yes.

QUESTION: Or his agent.

MISS SILVERMAN: I would agree, your Honor.

In any event, since we have just been discussing, since contraceptives are available to all in the State of New York, we would say that the claims raised here by the Appellees do not reach the level of governmental intrusion into matters so affecting the decision whether to bear or beget a child and therefore we would say that the issue before this Court is not one involving the right to use contraceptive products, but is merely a safe statute which tends to regulate the sale of contraceptive products and does not establish any independent constitutional right.

I believe that this was pointed out by this Court in Griswold v. Connecticut, where this Court held that the statutory scheme in issue in that case was violative of the

Constitution because it forbade the use of contraceptives.

The Court specifically noted at page 485 that the statutory scheme did not simply regulate manufacture or sale, which is the case with this particular statute, of course.

In short, then, we would simply state that the right of access to contraceptive products is not a right within the right of privacy, is not a right within the Constitution and therefore, the district court, in invalidating the statutory scheme, implied an inappropriate and unwarranted Constitutional standard.

We would point out, however, that even if they were right in applying this particular standard, that the reasons for the statutory scheme are such that the regulation is permissible.

I would just, at this point, though, like to note with respect to the claim that only licensed pharmacists may distribute nonprescription contraceptives, that we feel that this is an argument that cannot really be taken seriously by this Court since there are many pharmacies in New York and it does not seem to the Appellants that this really raises a realistic claim.

There is no proof in the record and we do not believe it could seriously be shown by the Appellees that an individual in New York State could not obtain nonprescription contraceptives if they did not want to. There are many, many

pharmacies in New York and to us it seems a highly specious argument to claim that there is not a supply of these contraceptives or that they are unavailable to particular individuals wishing to purchase them.

In any event, we would submit further that the limitations on sale which permit only licensed pharmacists to sell nonprescription contraceptives is eminently reasonable.

QUESTION: There are other products that, under New York law, may be sold only by licensed pharmacists, aren't there?

MISS SILVERMAN: That is true, your Honor and also, I believe, under federal regulation.

We would say that the reasons for the statute are among the following: That by permitting only licensed pharmacists to sell nonprescription contraceptives, this assures that only persons of mature years will be involved in the sale of such products.

It also permits an area of expertise in the types of products to be developed which permits purchasers to inquire as to the relative qualities of the different products.

QUESTION: Miss Silverman, let me follow through on your response to Mr. Justice Stewart. Are there other nonprescription products the sale of which, under New York statute, is restricted to licensed pharmacists?

MISS SILVERMAN: Nonprescription?

QUESTION: Yes.

MISS SILVERMAN: At the moment, your Honor, I cannot think of any. That is not to say there are not any. I am not familiar with the complete range but I would think that if one needs a prescription, then one would have to obtain it from a licensed pharmacist. I can't imagine, if it were a prescription item, that would, by definition --

QUESTION: No, we are speaking of nonprescription products.

MISS SILVERMAN: Oh, I am sorry. If they --

QUESTION: Nonprescription products. My question is whether you know of any other such product the sale of which is restricted to licensed pharmacists in New York?

MISS SILVERMAN: I do not know of any, your Honor. As I say, that does not mean there aren't any, but I at the moment do not know of any now. As far as I know, this is one of the items, though, that does fall in that category.

QUESTION: And you justify this on the ground that a licensed pharmacist has some particular expertise in the dispensation of these products?

MISS SILVERMAN: Well, we justify it on various grounds, your Honor and one of them is that permitting a licensed pharmacist to sell these products does permit an area of expertise to develop at least whereby he would have some idea of what particular product might be best-suited for some

particular individual and with his training, would be in a better position than the average individual to answer any questions, since presumably a pharmacist would have been to a specialized school and would have a background in chemicals, et cetera.

We feel there are other justifications, however. By limiting this sale by licensed pharmacists, this prevents anyone from tampering with the item and also, if the statutory scheme which forbids display of contraceptives and limits the sale to minors by physicians only, since the state board of pharmacy employs investigators, these provisions are capable of realistic enforcement.

If contraceptives were sold anywhere, of course, there would be no way, really, to enforce these particular provisions.

The Appellees raise an argument in this court which they mentioned recently in their complaint but did not pursue thereafter and I took it as abandoned, that the fact that only licensed pharmacists may sell these products keeps the prices of the products artificially high.

We would submit that there is no proof in the record of that particular point but even if there were, that that in and of itself is not a reason to overturn the statutory scheme.

QUESTION: Well, this isn't an antitrust case,

anyway.

MISS SILVERMAN: That is another point, your Honor.

As for the limitation on the way minors under the age of 16 may obtain nonprescription contraceptives, we would also submit that even if there is a right of access to contraceptive products, that the New York statutory scheme is, again, constitutional, that the reason the legislature had advanced for this particular statutory scheme is the morality of the youth of the State of New York and we would submit that the morality of the youth of the State of New York warrants this particular legislation.

We have cited in our brief various studies and statistical analyses that we feel support the position that even if nonprescription contraceptives were more widely available, youngsters 13, 14, 12, 11 -- whatever age you like -- would not use them.

However, by making them widely available we would, in effect, be sanctioning sexual activity by this particular group of youngsters.

Under these circumstances, we feel it was reasonable for the state legislature to determine that permitting youngsters to obtain these products from a physician was in the best interests of these youngsters and was consistent with the morality -- the standards of morality of the state.

QUESTION: At what age can people get married in

New York?

MISS SILVERMAN: I believe it is 16 and 14.

QUESTION: Fourteen for the girl?

MISS SILVERMAN: I believe that is correct.

QUESTION: Does New York have a statutory rape provision?

MISS SILVERMAN: Yes, there is, your Honor.

QUESTION: What is the age of consent?

MISS SILVERMAN: I believe it is either 16 or 18. I am not absolutely sure.

Seventeen. Excuse me. Mr. Pollet has corrected me.

QUESTION: In a married couple, the wife, 14 or 15, could not buy any of these things except from a physician.

MISS SILVERMAN: Exactly, your Honor.

As we have again pointed out in our brief, just to go a little further with this point, that family planning assumes both a family context and the possibility of rational planning and studies with respect to very young children seem to point out that youngsters, that their sex is often episodic and unanticipated, that passion tends to triumph over reason and that therefore, even assuming that these products were available, they would not be used.

My discussion up to this point has been in the context of the right of privacy which is really the vantage

point from which the district court analyzed the Appellees' claims. I must submit, though, that even from a standard equal protection analysis, that the constitutional scheme which I have been discussing passes constitutional muster; assuming there were proper parties to this lawsuit to raise the equal protection claim, we would submit that for the same reasons we have advanced with regard to the right of privacy that, again, the equal protection standard is not violated by the statutory scheme.

Now, the final part of the district court's opinion deals with the statutory prohibition on advertisement and display of contraceptive products. The district court held that this was violative of the First Amendment.

Again, we disagree. The statutory scheme under attack here applies only to commercial advertisements. We would submit that even if commercial advertisements are protected by the First Amendment, that the state may regulate, nonetheless, a commercial advertisement to a greater extent than a communication which merely sets forth an idea and viewed in this context, we would say that it was proper for the legislature to pass this particular statute.

As we have pointed out in our brief, this statute was motivated by the belief that the advertisement and display of contraceptive products would again lead to the legitimazation of sexual activity by very young people in the state, which

would be contrary to the policy of the State of New York.

There was also a concern by the legislature that the sensibilities of adults might be offended if the advertisement and display of contraceptive products were permitted.

QUESTION: Are there any other products that may be legally sold in the State of New York that New York says may not be displayed or advertised?

MISS SILVERMAN: Well, none that I know of, your Honor, but I would point out that there are limitations on cigarettes and alcoholic beverages and those, of course, may legally be sold in the state and there are limitations, of course, as to those particular products.

QUESTION: Under New York law?

MISS SILVERMAN: Well, of course, federal law and I do not know if New York had the identical statute or regulation but of course, there are examples of other governmental regulation of products that are legal but on the other hand, may not be advertised.

QUESTION: In your discussion of the -- or consideration, rather, of the standing of this organization, the commercial one, you phrase the equal protection claim. Have you considered our opinion just a couple of weeks ago in Boren and Craig ?

MISS SILVERMAN: Yes, I have, your Honor. I have it right here and I think that that case is somewhat different

from this case for the reason that they have, at least at one point, there was a male who was between the ages of 18 and 21 who desired to purchase the beverages under consideration in that case. I think one of the problems with this case is that you have the sellers or the vendors of these products raising claims for people who are not parties and it may very well be that there was nobody in the State of New York that wishes to have these products advertised or wishes them sold to children under the age of 16.

So it seems to me that in a sense, in this particular case, without any demonstration ever of a category of people who would benefit from the ruling or that benefited from the district court's ruling that this case is quite different from the Craig case.

QUESTION: Well, I assume there are.

MISS SILVERMAN: Well, if there are, your Honor, then I think this case does go a little further than Singleton, for instance, but I do think that that is a distinction.

QUESTION: But in Boren and Craig we ended up with the commercial licensee, did we not?

MISS SILVERMAN: Yes, that is true.

QUESTION: And held that she had standing to assert the equal protection claims --

MISS SILVERMAN: Yes, that is true.

QUESTION: -- of males 18 to 21 who wanted to buy beer.

MISS SILVERMAN: That is true, your Honor. Again, of course --

QUESTION: How do you differ this one?

MISS SILVERMAN: Well, your Honor, I think that first of all, they have the equal protection claim. Here you have --

QUESTION: Well, I am speaking -- I am addressing the equal protection claim . We have that here, don't we?

MISS SILVERMAN: Well --

QUESTION: We have an equal protection claim asserted by this same commercial dispenser, do we not?

MISS SILVERMAN: Well, I think we do, your Honor. I am not quite sure. The Plaintiffs mentioned it tangentially in their complaint and never really urged it thereafter but assuming that there is, as I say, I think the distinction is that, at least in Craig, there was a feeling at least, or at least the Court knew that there was at least somebody who at some point in time --

QUESTION: So the standing argument would not depend on whether it is equal protection or privacy, would it? Would not you get the same answers to both?

MISS SILVERMAN: Well, I think that would depend on analysis of how well the party could raise the particular claim. In other words, if there was no difference between the equal protection, the position --

QUESTION: Didn't Eisenstadt permit a commercial dispenser to raise the equal protection claim?

MISS SILVERMAN: Well, I didn't think so.

QUESTION: That was equal protection too, wasn't it?

MISS SILVERMAN: That was an equal protection claim but --

QUESTION: That was also contraceptives.

MISS SILVERMAN: Yes, but I don't think that there he was looking, really, to sell the contraceptives. I viewed him more as a genuine advocate and someone with an interest that was more akin to those that would benefit or at least that they alleged would benefit from the ruling, whereas here, you have somebody really just looking to make a profit and I question whether someone looking to make a profit should be permitted to stand in the same position as those whom they claim would benefit.

QUESTION: Well, certainly we permitted someone in the business of making a profit to assert the third-party claims in Craig and Boren.

MISS SILVERMAN: Yes, you did, your Honor.

QUESTION: And we did also, I think, in Eisenstadt.

MISS SILVERMAN: Well, as I said -- you know, I think that is different. I don't think there there was really -- I don't see him as a commercial entity but with respect to Craig, I would say that the difference between Craig and this

case is one, that the standing claim was never really raised in the court below and in reading --

QUESTION: Where? In this case?

MISS SILVERMAN: In Craig. And in reading Craig, I have a sense that perhaps that that went somehow to the Court's determination as to whether that was really a sincere claim raised by the Defendants in that particular case.

But again, I would point out that to me the more serious problem --

QUESTION: What is it you are saying?

MISS SILVERMAN: In Craig, this Court noted --

QUESTION: We did what?

MISS SILVERMAN: The Court noted that initially and despite having had the opportunity to do so, Appellees never raised before the district court any objection to Wittner's reliance upon the claimed unequal treatment to 18 to 20 year old males.

QUESTION: And you think that controlled our decision?

MISS SILVERMAN: No, I don't, your Honor. I merely point that out as one factor. I feel --

QUESTION: There was a plaintiff in Craig initially who was --

MISS SILVERMAN: Exactly. Exactly.

QUESTION: -- an under-21-year-old male.

MISS SILVERMAN: Exactly. So at least the Court wasn't dealing with an unrealistic sort of claim.

Here I feel that there is -- at this juncture, I don't think that we really know that there is any individual in the State of New York who is particularly anxious to have nonprescription contraceptives advertised. Nor do I know if there are any youngsters under the age of 16 who are particularly anxious to go into pharmacies.

I mean, the point is, there is nothing in the record in this case which would warrant that particular finding. That is the way I feel Craig differs from this case.

QUESTION: No person has ever been identified in this litigation.

MISS SILVERMAN: That is true, other than a John Doe. But, again, he --

QUESTION: He is 42 years old.

MISS SILVERMAN: He has never been identified and I am not quite sure John Doe exists and I don't know who he is.

QUESTION: Well, whether or not he exists, he is 42 years old, according to the allegation.

MISS SILVERMAN: Apparently so and I believe he has two children, your Honor.

In any event, in conclusion, then, I would ask that the order of the district court which granted summary judgment to the Plaintiff be reversed and at the very least, judgment be

entered for the Appellant.

QUESTION: What would you ask at the very most?

MISS SILVERMAN: Your Honor, at the very least I would ask that the judgment be reversed. At the very most, I suppose -- at the very least I would ask us to be given an opportunity or at least the Plaintiffsshould be required to prove their claims and we should have a proper opportunity to refute them.

What the district court did, I think, was just take a bunch of citations to questionable studies, I don't know who did the studies or on what basis they did the studies and reached all these fabulous conclusions. I think this is one of the problems with this kind of case, that courts are sitting as legislators. I don't think this is the kind of case that is appropriate for resolution, really, by a court at all.

But at least if the Court is going to undertake the task, then I think that the Defendant should be given a proper opportunity to hear what their case is and be given an equal opportunity to show their case.

QUESTION: Miss Silverman, when the request was presented, you didn't raise any question about the summary judgment procedure, did you, in your jurisdictional statement?

MISS SILVERMAN: Well, if I didn't in absolute terms, your Honor, I felt that it was implied in my reply brief as well as throughout.

MR. CHIEF JUSTICE BURGER: Mr. Pollet.

I'll ask you a question before you get started.

MR. POLLET: Yes, sir.

QUESTION: On this matter of the age of marriage, in New York State may a 14-year-old girl get married without the consent of her parents?

MR. POLLET: I believe that requires parental consent, your Honor.

QUESTION: Yes. And 16 -- it is the same for the males who are 16.

MR. POLLET: I believe that is accurate, Mr. Chief Justice.

ORAL ARGUMENT OF MICHAEL M. POLLET, ESQ.

ON BEHALF OF THE APPELLEES

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

It is the Appellees' view and it was the conclusion and holding of the three-judge district court, that New York's anti-contraceptive law invades an established personal privacy right, namely, the fundamental right of individual choice with freedom from state interference in matters of family planning and birth control.

This constitutional privacy right, it has been held, encompasses not only the abortion decision but it also includes the right to obtain nonmedical products used to prevent

conception and the right to convey and receive information about such products.

This statute, which impinges upon the right of reproductive freedom, is, as Judges Friendly, Pierce and Connor of the three-judge court below held, a law which harms rather than benefits the citizens of New York State.

QUESTION: Why do you limit to nonmedical products?

MR. POLLET: Because, in our view, there is no health rationale which supports the state's restriction and limitation on the sale of nonmedical contraceptives.

QUESTION: I know, but what you said there was there was a right to obtain nonmedical products. Isn't that what you said?

MR. POLLET: No. If I did, I misspoke, your Honor. The right to obtain would, of course, include the right to obtain medical as well as nonmedical products. We make no contention here that the imposition of requirements of prescriptions for drugs and compounds which require such restrictions are illegal. This case is limited to the sale and distribution of nonmedical contraceptives.

QUESTION: You say the three-judge district court said that this law harmed rather than helped the citizens of New York.

MR. POLLET: That is correct.

QUESTION: Is that the kind of a decision that a

three-judge district court ordinarily makes in a constitutional case?

MR. POLLET: I don't think it was necessary, Mr. Justice Rehnquist, for the court to make that argument, to make that finding, but on the record that was put before them, that finding was well-justified.

QUESTION: Yes, but how, possibly, was that a permissible issue in a federal district court which was properly concerned only with the constitutionality of this law?

MR. POLLET: Well, I believe the constitutionality or determining of the constitutionality requires that those factors be brought in directly if not peripherially.

QUESTION: Well, if the decision was that it constitutionally harmed them, that it evaded or violated some rights or freedoms of theirs protected or guaranteed by the Constitution, that was one thing, but finding that this law was a bad law, that it did more harm than good, was no business of the federal court's.

MR. POLLET: Well, I think the federal court below did what this Court did in Roe v. Wade and that is, in order to determine the fundamentality of the right asserted, it looked at the harm and consequences which would befall the citizens if that activity were denied to them and in so doing it found dire, devastating and tragic consequences which would result from the limitations and denial of access to contraceptives.

QUESTION: Mr. Pollet, what portion of the Constitution do you rely on?

MR. POLLET: We relied primarily on the 14th Amendment and the right of privacy derived therefrom from the 14th Amendment's concept of personal liberty and --

QUESTION: Do you mean just the 14th Amendment in gross, or do you have some provision in the 14th Amendment?

MR. POLLET: The restrictions on state action and the --

QUESTION: Well, which one? Which one?

QUESTION: They are all restrictions on state action in the 14th Amendment.

MR. POLLET: That is correct.

QUESTION: Well, which ones? Is it the due process clause or equal protection? What is it?

MR. POLLET: Well, both due process and equal protection are involved on different levels in this case. We also rely, of course, on reservations in -- excuse me --

QUESTION: Well, where do you find privacy in that, in those provisions?

MR. POLLET: I believe that those rights are implicit in the 14th Amendment and that this Court has --

QUESTION: Has said so.

MR. POLLET: Has said so, yes.

QUESTION: And do you think the Court has tied it

to the due process clause?

MR. POLLET: No, I think in Roe --

QUESTION: Well, where do you find it?

MR. POLLET: I think I find it -- I think I feel the same way the Court does in Roe v. Wade, that while there is a slight preference for the 14th Amendment, it has also been held by this Court in Griswold that such rights also derive from emanations of the First, Third, Fourth, Fifth and Ninth Amendments.

QUESTION: You feel the way the Court does?

MR. POLLET: Yes, exactly.

[Laughter.]

QUESTION: And you shouldn't be permitted to find it anywhere else?

MR. POLLET: Well, no, we are not seeking to establish new law or break through new frontiers in this case. I don't believe that there is a valid criticism of unstructured substantive due process here.

QUESTION: In your view, then, it would follow almost automatically, although not presented in this case, that the New York statute requiring parental consent for marriage at age 14 and 16 is equally unconstitutional?

MR. POLLET: No, I don't think that necessarily follows from our view. Our view is based upon holdings of this Court -- holdings of this Court in Griswold, Eisenstadt v.

Baird, Roe v. Wade and those lower district courts which have interpreted and applied those three decisions to cases involving restrictions upon contraceptives.

QUESTION: So in other words, in answer to the Chief Justice's question, your submission would be that it is not constitutionally impermissible for New York to discourage teenagers to get married, but it is unconstitutional for New York to have sexual intercourse without getting married? Is that it?

MR. POLLET: No, it is just that the first issue is not before us here.

QUESTION: Well, but you answered his question as though the issue was before you.

MR. POLLET: Well, I don't believe that New York constitutionally has the right to foster a moral climate or to regulate morals in the fashion which it intends to do in this statute.

QUESTION: I thought you agreed earlier and said that there was no connection between sexual activities and the receipt of contraceptives, anyway.

MR. POLLET: That is correct. The state has made that concession throughout all the proceedings below, that there was no proof and nothing, no facts have been marshalled by the state --

QUESTION: I thought you just asserted a right to

obtain contraceptives?

MR. POLLET: There is a right to obtain contraceptives.

QUESTION: The state --

QUESTION: I mean, that is what is at issue here, isn't it?

MR. POLLET: That is correct.

QUESTION: Can the state regulate it at all?

MR. POLLET: Only as it is supported by proper health rationale, your Honor.

QUESTION: It can be regulated?

MR. POLLET: I would believe that if regulation is necessary to achieve a compelling state interest, the state can regulate it.

QUESTION: Well, you can't yes or no it, can you?

MR. POLLET: It can't --

QUESTION: You can't yes or no it.

MR. POLLET: Excuse me, your Honor?

QUESTION: You can't yes or no it.

MR. POLLET: No, we cannot. It may be possible that statutes --

QUESTION: You are not going to admit that the state can regulate it.

MR. POLLET: I do say that the state can regulate if it can demonstrate --

QUESTION: Well, could the state say that you can't sell contraceptives in courtrooms?

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

QUESTION: Does the State of New York still have a statute that makes fornication a misdemeanor?

MR. POLLET: There is no fornication statute in New York. There is --

QUESTION: Did it ever have one?

MR. POLLET: I believe it did at one time. It was repealed several years ago. There is an adultery statute and there is also statutory rape penal provisions.

QUESTION: Well, is there anything wrong with the statutory rape provision constitutionally in your view that presumably prohibits a 16-year-old male from having sexual intercourse with a 15-year-old female though both of them consent?

MR. POLLET: That would, in my view, be unconstitutional. That is not the question before us here.

QUESTION: So New York cannot in any way discourage sexual promiscuity among children 14, 15, 13 years old, in your view?

MR. POLLET: It cannot do it as it is done here, by potentially punishing them with the threat of unwanted birth, pregnancy, abortion, venereal diseases.

QUESTION: Well, but you say it can't do it by

making it a criminal offense for the man to have intercourse with the woman when they are that age.

MR. POLLET: Again, that is not the question before us but it is my view that that would be constitutionally impermissible, that that would also be --

QUESTION: Excuse me, just with respect to the issues that are before us, do you contend that a 15-year-old has a constitutional right to put these products to their intended use?

MR. POLLET: Yes, we do. The fundamental privacy right of access to contraceptives is even more important for minors than it is for adults. Minors have been shown in substantial and significant numbers to engage in sexual intercourse despite the state's ban. The harm that befalls them --

QUESTION: The state's ban is unconstitutional under what you just said.

MR. POLLET: That is right.

QUESTION: Because the minor has the constitutional right to do this free of any state's restriction whatsoever.

MR. POLLET: That is correct, your Honor.

QUESTION: Is your answer the same without regard to the age of the minor? Suppose the statute said 14 rather than 16?

MR. POLLET: I think the answer would be the same regardless of the age. It would depend upon the onset of

sexual activity of the minor. As long as a minor is sexually active, I believe it would be unconstitutional an invasion -- an intolerable invasion of his or her privacy right to prohibit or limit his access or her access to contraceptive products.

QUESTION: Which one of these youngsters are we talking about?

MR. POLLET: Excuse me, your Honor?

QUESTION: Which one of the youngsters are we talking about, 12, 14 or 16? Who are we talking about in this case?

MR. POLLET: There is no minor plaintiff in this case. As we turn -- if you like, turn and discuss the standing issue, I believe the question of standing is foreclosed by this Court's December 20th decision in Craig v. Boren. The Appellees, who were found to have standing by the three-judge district court, are Population Planning Associates and the Reverend John Hagen. They are vendors and advocates of the sale and distribution of nonmedical contraceptive products.

The law operates directly against them. It threatens them with imprisonment or fine for partaking in their constitutionally protected activities. If they abstain, they will suffer economic loss and we believe that that is sufficient under Craig v. Boren where a saloonkeeper was permitted to assert third party constitutional rights to sustain the court's standing -- the three-judge court's upholding of the standing

of the Plaintiffs in this case.

QUESTION: There is this difference. In Craig against Boren, we knew that there was at least one person in the State of Oklahoma who complained about the law as it affected him, i.e., a young man under 21 -- between 18 and 21.

In this litigation, nobody has been identified whose constitutional rights are directly affected and who is being represented by these third-party vendors.

MR. POLLET: Well, of course, the statute in this case prohibits distribution not use. It doesn't operate against the intended recipients of the contraceptives.

QUESTION: Well, so, indeed, did the statute in Craig against Boren, if I am not mistaken. It operated against the vendor.

MR. POLLET: I don't believe that that was --

QUESTION: But it was the rights of the young man that were involved and decided in the case in Craig against Boren.

MR. POLLET: Of course, he was not a proper party at the time.

QUESTION: And presumably -- well, he was when he first brought the lawsuit.

MR. POLLET: That is correct.

QUESTION: And at least there was evidence that there was such a person. Here, as counsel for the state says,

there is no such -- no such person has been identified.

MR. POLLET: Well, there -- one of the Plaintiffs whose standing was not considered by the three-judge district court --

QUESTION: John Doe.

MR. POLLET: -- is John Doe.

QUESTION: Who is 42 years old.

MR. POLLET: That is correct. And he also asserted that he was the father of two minor children who were sexually active.

QUESTION: Well, he was sexually active. He didn't say anything about the children in the complaint.

MR. POLLET: Well, that is a basic problem in privacy litigation in this area. By asserting the claim, there is the very loss of privacy which one seeks to protect. There is embarassment and it is for those reasons that the Court has relaxed third-party standing in its past privacy cases. In many of the cases, in Eisenstadt and indeed, even in Griswold, none of the users were parties.

In Griswold, one of the --

QUESTION: You don't even have a John Doe, minor, here, do you?

MR. POLLET: No.

QUESTION: Or a Mary Doe.

MR. POLLET: That is because the least awkward

challenger is the vendor and the distributor.

QUESTION: Well, wasn't any comparable individual involved in Eisenstadt? I don't think there was any party in Eisenstadt.

MR. POLLET: No. There was --

QUESTION: And Baird was allowed to assert third-party interests of people none of whom were represented in that case.

MR. POLLET: That is correct, Mr. Justice Brennan. And I believe the same is true in Griswold.

QUESTION: And then Craig and Boren indicate that after the 21-year-old was out of the case, the whole issue of standards turned on saloonkeepers.

MR. POLLET: That is correct.

QUESTION: Without regard to whether or not there had ever been an individual, 18 to 21 in there.

MR. POLLET: That is correct. I don't believe that that was a determinant in the holding in Craig v. Boren.

QUESTION: Two of the plaintiffs, main plaintiffs, are corporations based in North Carolina. One is described as a nonprofit corporation. Is the other one a profit corporation?

MR. POLLET: Yes, the Plaintiff, Population Planning Associates, which was found to have standing, is a business corporation incorporated in the State of North Carolina for profit.

QUESTION: To what extent are the two affiliated?

MR. POLLET: I don't believe that there is any direct affiliation. There may be some connection in that some of the people who are officers in one are officers in another.

QUESTION: The names are quite similar. To what extent do the boards overlap?

MR. POLLET: I am not directly sure of the answer to that, your Honor.

QUESTION: Which one do you represent?

MR. POLLET: We represent both of them. I believe -- my associate just informs me that there is one overlapping member on the boards of the two.

QUESTION: As a matter of curiosity, how did you assemble this rather extraordinary group of plaintiffs? An Episcopal minister, profit corporation, nonprofit corporation, various doctors, a 43-year-old John Doe sexually active but with three children. How did you get them all together?

MR. POLLET: These were people who were brought to us by our clients, Population Planning Associates and Population Services International.

QUESTION: Your client assembled them.

MR. POLLET: Yes.

QUESTION: Not that it matters, but are these two corporations qualified to do business in New York?

MR. POLLET: Yes, they are.

QUESTION: And they are under the jurisdiction of the Supreme Court of New York?

MR. POLLET: Yes.

We believe and urge strenuously that access to contraceptives is encompassed by the constitutional privacy right. In a series of decisions commencing with the Griswold case in 1965, this Court has made it plain that there exists a fundamental right of personal privacy which prohibits the state from improperly intruding into a citizen's private decision whether to procreate.

Griswold held that a state could not prohibit use of contraceptives by a married couple.

QUESTION: Isn't it limited by that definition that you have just suggested?

MR. POLLET: Yes, the Griswold case on its face is limited in that fashion.

QUESTION: Anything in the Griswold opinion that suggests to the contrary or suggests any doubt about it?

MR. POLLET: Well, the Court's next decision in this area, Eisenstadt v. Baird, suggests an expansion --

QUESTION: I was just talking about Griswold itself. Griswold suggested no such limitation, did it?

MR. POLLET: No, I don't believe it did. In Eisenstadt v. Baird, though, although the case was ultimately decided on equal protection grounds, the Court held that the

right of privacy existed and was not dependent on marital status but also applied to unmarried persons. In Roe v. Wade, the court held that the privacy right protected a woman's decision to terminate her pregnancy.

In making that determination, whether any particular personal decision is included within the privacy right, there was required a judicial finding that the right asserted was fundamental or implicit in the concept of liberty.

In Roe, in holding that the abortion decision was a fundamental personal right which could be abridged only by a compelling state interest, guidelines were established which, in the lower court's view, made it indisputable that access to contraceptives also was fundamental and also was included within the privacy guarantee.

QUESTION: What do you have to say about the power of the State of New York or of any state to put an age limit on the aquisition of intoxicating beverages or even marginally intoxicating beverages like beer?

MR. POLLET: Those --

QUESTION: New York has such a statute.

MR. POLLET: New York has such a statute and most other states do as well.

QUESTION: Yes. What is the limit in New York, 18 or 21?

MR. POLLET: I believe it is 18, your Honor.

No serious argument has ever been urged that the intake of intoxicating beverages is beneficial.

QUESTION: No, but it has been suggested in Constantino that it is a constitutional freedom to purchase intoxicating beverages, Constantino against Wisconsin.

QUESTION: Well, did the Constantino case suggest that or did it suggest that if the right is to be deprived -- taken away, there must be some due process?

MR. POLLET: I am not familiar with the Constantino decision, Mr. Chief Justice.

Here, denying access to contraceptives demonstrably results in harm rather than benefit to the citizens of New York and particularly to minor citizens of New York.

The same trauma faced by denying a woman an abortion in the Roe case was found here, the same detrimental consequences to mother and child are present here in even more aggravated fashion.

QUESTION: Who is the mother and who is the child? Are you talking about the teenager as the child or the mother?

MR. POLLET: Unfortunately, the effect of this law is to make many children mothers.

QUESTION: Well, so you are talking in that context.

MR. POLLET: Well, both to --

QUESTION: Not parent and teenager who wants to acquire contraceptives.

MR. POLLET: Yes, Mr. Justice.

QUESTION: Or you are talking about the teenager as the parent.

MR. POLLET: What I am talking about is the teenager as the parent.

QUESTION: Yes.

MR. POLLET: If, under Griswold, individuals have a right to use contraceptives, they must be held to have a fundamental right to obtain them. Otherwise, the right of use is hollow and meaningless. These two rights are inextricably enmeshed and the right of use cannot exist unless a right to obtain is recognized.

QUESTION: It is a fundamental right, then, that the material be supplied by the state to indigent minors under age -- persons under age 16?

MR. POLLET: I don't believe that would be constitutionally mandated. It does, in fact, exist under current New York law as mandated by various federal programs under AFDC and Medicaid that minors who are sexually active and ask for it shall be provided with family planning services, including contraceptives.

QUESTION: In Stanley against Georgia, the Court held that you had the right to read whatever books you had without being intruded on and yet in the Miller and Arrito cases a year or two later, they held that you didn't have any

right to obtain those materials so at least those two cases would tend to cut against your argument that if you have a right to use them, you must have a right to obtain them.

MR. POLLET: No, I don't believe so, Mr. Justice REhnquist. Those cases are obscenity cases and obscenity is not protected by the First Amendment nor, again, as with alcohol --

QUESTION: Obscenity is no longer what it was, pro tanto.

MR. POLLET: Well, that case has been severely limited.

QUESTION: Pro tanto it said it was. That was my brother Rehnquist's point.

MR. POLLET: I believe the subsequent decisions of this Court have turned what was a First Amendment case into a very limited privacy case.

QUESTION: Well, and you are arguing a privacy case here.

MR. POLLET: That is right and here again, the difference being that no argument has been made seriously that obscenity is benaficial or of positive use to the recipient whereas that has been established in this case.

If I may turn briefly to the pharmacy limitation. In contrast to what learned counsel for the state has said, the number of pharmacies that exist in New York is small and is

decreasing. In the New York Times of November 18 it was stated that the number of pharmacies in New York decreased from 3,380 in 1962 to 1,832 in 1976, which was a 45 percent decrease.

In that same article, the Defendant Secca, who is the executive secretary of the New York State Board of Pharmacy, was quoted as stating that New York State has lost 2,500 drugstores in the last 20 years. In any event --

QUESTION: What has that to do with this? Isn't that a market condition? Corner grocer stores have disappeared in the face of supermarkets. You have a similar reduction in the number of outlets of grocery stores, too, don't you?

MR. POLLET: Yes, but there is no proper reason why these products should be limited to drugstores. There is no health reason and I cannot see any reason why the state could permissably make licensed pharmacists model guardians of New York citizens. It is to demonstrate that the restriction is a very real restriction, that the number of drugstores is small, that those that are open are not accessible always, they are not always open, that there is --

QUESTION: The statute applies to pharmacists, not to pharmacies. Isn't that correct?

MR. POLLET: That is correct.

QUESTION: And do the figures indicate whether the number of pharmacists also is shrinking in New York State?

MR. POLLET: No, but I believe that the pharmacist

availability would primarily be limited to pharmacies.

QUESTION: Maybe in fewer locations but there may be more of them available, like the supermarkets.

MR. POLLET: But the end result for New York citizens is the same. There are fewer outlets whereby they can obtain nonprescription contraceptives.

QUESTION: Yes.

MR. POLLET: And there is no proper health reason why such products should be limited to sale or distribution in pharmacies. They are prepackaged. There is no need for the state to insist upon quality control. The state has failed to demonstrate in any way that pharmacists have any expertise in this area.

QUESTION: But you said that it didn't regulate anyway. Isn't that what you said?

MR. POLLET: I believe I said, Mr. Justice Marshall, that if they could demonstrate a compelling state interest, it could be regulated. The burden is not upon the Plaintiffs once they have shown that a fundamental right has been involved.

QUESTION: Could they -- well, to get back to another one, could the State of New York prevent them from selling them in public schools?

MR. POLLET: If they could demonstrate that there was a proper public health interest, I believe that they could. Or if, as they have failed to do so here, they could demonstrate --

QUESTION: So the limitation is public health?

MR. POLLET: I believe that the limitation would be a public health one. In this case --

QUESTION: Is that the usual criteria for limiting the sale of products by a state?

MR. POLLET: Products which affect a fundamental constitutional activity would have to be supported by a compelling state interest. The state interest in regulating morals, if it existed at all --

QUESTION: Well, suppose the state said that to sell contraceptives walking up and down the aisles shaking them could possibly disrupt the court? Would that be good enough?

MR. POLLET: Yes, your Honor, I believe that that would suffice.

QUESTION: Thank you.

MR. POLLET: The state has, of course, not made any such a narrow, limited findings in this case. The statute in almost all respects is overbroad. The pharmacy limitation --

QUESTION: May I try and understand you, your theory a little better?

MR. POLLET: Yes.

QUESTION: Is it your view that it is wholly impermissible for the state to assert as an interest or justification for a statute of this kind an interest in discouraging sexual activity among minor children?

MR. POLLET: That is our view, yes.

QUESTION: It is wholly impermissible. Well, then, if that is your view, then you don't really need any of these legislative facts because that is the purpose that the state relies on.

MR. POLLET: That is the purpose --

QUESTION: You say it is per se bad.

MR. POLLET: We say it is per se bad. We also say that even if one were to assume arguendo that this were a valid purpose, it is not one which can support the statute in this case because there has been no showing that the statute achieves that objective. In fact, the showing, in the concession of the state --

QUESTION: Well, there was showing that the legislature thought was sufficient. But you say we should disagree with the legislative finding on that.

MR. POLLET: Well, only if the Court applies the most lenient, uncritical, rational basis test could it rely upon the amorphous, supposed legislative aim.

QUESTION: Well, you really -- you have alternative positions. One is, it is wholly impermissible to rely on this in discouraging sexual activity as justification, secondly, that at most that is really a rational basis and not a compelling basis. Those are your two arguments.

MR. POLLET: Yes, your Honor.

QUESTION: I see.

QUESTION: If we adopt your rationale as you have just expressed it, wouldn't we invalidate every statutory rape statute in the United States?

MR. POLLET: Not necessarily.

QUESTION: Why?

MR. POLLET: We are talking here about a different issue, the ability to legislate indirectly rather than directly. I think if the state wants to -- if, again assuming arguendo that the state has a legitimate purpose in regulating morality, that it could do so only in a fashion which does not punish in a way that is, in a sense, akin to cruel and unusual punishment with pregnancy, abortion and venereal disease, that it should be honest and open in its purpose and legislate directly.

QUESTION: The punishment for rape is not inconsequential, is it?

MR. POLLET: No, it is not inconsequential. But that, again, is a different case.

QUESTION: Of course, but I was thinking about how far your rationale would reach, namely, that there could be no valid regulation of sexual activity regardless of age.

MR. POLLET: Well, I don't think that our rationale carries to that extent or that far. The ability to legislate directly is not in question here. What is in question here is

the effects of an indirect attempt to legislate morality and to create a moral climate.

QUESTION: Suppose that in a statutory rape case it is only the man, in the absence of an aider or abettor, who can be prosecuted.

MR. POLLET: That is the case in New York.

QUESTION: And anybody under 16 would not be prosecuted for statutory rape but would rather be dealt with in a juvenile court. Isn't that right?

MR. POLLET: Yes.

QUESTION: So it would have to be somebody over 16 who would be subject to the criminal sanctions of statutory rape -- a man over 16.

MR. POLLET: That is correct.

QUESTION: Well, wouldn't his claim to this field of privacy and sexual activity be even stronger than someone under 16? I mean, presumably an adult has a stronger claim in that area than a minor.

MR. POLLET: In the sense that the state may have a narrower area in which it can impose restrictions, yes.

Thank you, your Honors.

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

Thank you.

The case is submitted.

[Whereupon, at 11:05 o'clock a.m., the case was submitted.]