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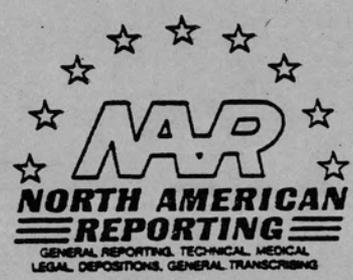
Supreme Court of the United States

UNITED STATES POSTAL SERVICE,)
)
) APPELLANT,)
)
) V.)
)
) COUNCIL OF GREENBURGH CIVIC)
) ASSOCIATIONS ET AL.)

No. 80-608

Washington, D.C.
April 21, 1981

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202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 UNITED STATES POSTAL SERVICE, :

4 Appellant, :

: No. 80-608

5 v. :

6 COUNCIL OF GREENBURGH CIVIC :
7 ASSOCIATIONS ET AL. :

8 Washington, D. C.

9 Tuesday, April 21, 1981

10 The above-entitled matter came on for oral ar-
11 gument before the Supreme Court of the United States
12 at 10:17 o'clock a.m.

13 APPEARANCES:

14 EDWIN S. KNEEDLER, ESQ., Office of the Solicitor
15 General, U.S. Department of Justice, Washington,
16 D.C. 20530; on behalf of the Appellant.

17 JON H. HAMMER, ESQ., 330 Madison Avenue, New York,
18 New York 10017; on behalf of the Appellees.

C O N T E N T S

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on behalf of the Appellees 24

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- - -

1 MR. KNEEDLER: Well, in general, the boxes are fur-
2 nished by the mail customer but the Postal Service regulations
3 require the furnishing of an appropriate receptacle for the
4 receipt of mail as a condition to the delivery of mail --

5 QUESTION: At the customer's expense?

6 MR. KNEEDLER: At the customer's expense. There are
7 circumstances, I am informed by the Postal Service, in which
8 the Postal Service itself will construct letter boxes. This is
9 a program of relatively recent origin. It occurs particularly
10 in new subdivisions where the builder has perhaps neglected to
11 put in what are called cluster boxes, which are groups of boxes
12 at the end of the block to serve all the houses up the block.

13 QUESTION: And who pays for those?

14 MR. KNEEDLER: The Postal Service will pay for those
15 letter boxes because there occasionally have been disputes as
16 to whether the builder or the homeowners or whoever --

17 QUESTION: And the Postal Service has the keys?

18 MR. KNEEDLER: The Postal Service has the keys; that's
19 correct.

20 QUESTION: And the owner does not have the keys?

21 MR. KNEEDLER: Excuse me?

22 QUESTION: The owner does not have a key to the back
23 of it. He only has a key for the door.

24 MR. KNEEDLER: Right. The owner would -- the person
25 to whom the mailbox pertains would only have a key to his own

1 individual piece of the box.

2 QUESTION: And these cluster boxes have to be lockable,
3 do they not?

4 MR. KNEEDLER: That's correct.

5 QUESTION: There has to be a key on them? It can't be
6 one that you just pull open?

7 MR. KNEEDLER: That's right. The cluster boxes --
8 that's correct.

9 QUESTION: Well, now, what about those that you can
10 just pull open? I'm thinking of rural delivery.

11 MR. KNEEDLER: Well --

12 QUESTION: They don't have locks on them.

13 MR. KNEEDLER: No, they don't.

14 QUESTION: Everyone drops newspapers and everything
15 else in them.

16 MR. KNEEDLER: Well, under the statute, other persons
17 are not permitted to deposit other materials into those boxes.

18 QUESTION: Even in those? Even though they're not
19 lockable?

20 MR. KNEEDLER: That's correct. Yes, this statute
21 applies to boxes, whether they are locked or unlocked. It
22 applies --

23 QUESTION: Well, what are non-lockable bins or troughs
24 under that regulation?

25 MR. KNEEDLER: Well, the non-lockable bins and troughs

1 are really a very narrow category of situations. It occurs in
2 apartment buildings where there is frequently a line of boxes,
3 one for each individual apartment, where letters are received.
4 But if the carrier brings larger parcels that won't fit into
5 the box, then they are frequently deposited in a trough or occa-
6 sionally on a table to be picked up by the customer, much as a
7 letter carrier might leave a package on someone's stoop if it
8 was otherwise protected, or -- Even though it won't fit in the
9 mailbox, it can still be delivered. So that is not regarded as
10 a receptacle or a letter box.

11 QUESTION: Therefore, I take it, a civic association
12 that drops a leaflet on that trough or table doesn't violate
13 the statute?

14 MR. KNEEDLER: That's correct. That's correct. And
15 there was testimony in the record in this case, in fact, that
16 several civic associations had left leaflets on the trough or
17 on tables available for the furnishing of mail.

18 QUESTION: I believe that a person may go into almost
19 any hardware store and buy a metal box which has imprinted on
20 it in some way, usually by relief, "U.S. Mail." Now, are those
21 -- I seem to recall, they have some indication that they are
22 approved by the Postal Service?

23 MR. KNEEDLER: Right. The Postal Service in its
24 domestic mail manual which contains the regulations for these
25 and a number of other functions of the Service, provides

1 specifications for mailboxes, the size, et cetera, and also
2 contains provisions for approval of certain models of letter
3 boxes, although there are --

4 QUESTION: But this statute doesn't apply to those?

5 MR. KNEEDLER: Excuse me?

6 QUESTION: This statute doesn't apply to those?

7 MR. KNEEDLER: Yes, it does. It applies to any mail-
8 box which is either put up by the Postal Service or any letter
9 box that is furnished by the individual postal customer to
10 receive the mail.

11 QUESTION: Even though it's not locked?

12 MR. KNEEDLER: Even though it's not locked. That's
13 correct.

14 QUESTION: Well, what's the reason for that?

15 MR. KNEEDLER: Well, the reports on the statute when
16 it was enacted in 1934 -- that's when it was adopted -- specify
17 several reasons. One was the protection of the mail revenue.
18 What was happening in the 1930s is that a number of business
19 concerns were delivering their own bills or circulars, that
20 type of thing, which they were authorized to do under the pri-
21 vate express statutes. Those statutes permit a person to carry
22 his own mail to a home, and what happened is these companies
23 were having their circulars and bills delivered to premises
24 outside of the mails, but they were using the letter box that
25 had been established or erected on mail routes for the receipt

1 of the U.S. mail, and Congress determined that this practice
2 of delivering things outside of the mail, yet using the mailbox,
3 was depriving the Postal Service of revenue.

4 QUESTION: Suppose you've got two doors side by side,
5 one has a "mail box" on it like the Chief Justice was talking
6 about, and the other has a mail slot. What would the difference
7 be?

8 MR. KNEEDLER: The statute does not extend to mail
9 slots.

10 QUESTION: Well, I'm asking, what would the difference
11 be? You could put anything you want in the slot, but you
12 couldn't put anything in the -- What is the reason for
13 singling out the box as compared to the slot?

14 MR. KNEEDLER: Well, I think one practical difference
15 is that there is really no receptacle, no equivalent of a
16 mailbox when something is put through the slot. It just goes
17 into the home.

18 QUESTION: The receptacle is the home.

19 MR. KNEEDLER: That's right. The receptacle is the
20 whole home and I think the --

21 QUESTION: The slot is just an aperture in the door,
22 isn't it?

23 MR. KNEEDLER: Yes, exactly. And there is a recogni-
24 tion, I think, of there being some alternative way of the home-
25 owner getting other things through the mail.

1 QUESTION: Isn't there another factor? It happens
2 that my mailbox is some distance from my house. Our outgoing
3 mail is placed in the box in the morning before the mailman
4 arrives on the assumption, correctly, I think, that the mailman
5 will take that mail and put it in the stream of outgoing mail.
6 You can't do that with a mail slot.

7 MR. KNEEDLER: With a mail box or a slot? Yes, you
8 can --

9 QUESTION: You can't do it if it's inside the slot.
10 You'd have to have it protruding.

11 MR. KNEEDLER: Right. That would be protruding.
12 Otherwise, it can be placed in the letter box. But the statute
13 does only apply to the letter boxes. This statute, as an --

14 QUESTION: Would not the revenue protection rationale
15 apply equally to the door slots?

16 MR. KNEEDLER: It could conceivably but this statute
17 has to be considered against, for this purpose, the private
18 express statutes which have -- Traditionally the Postal Service
19 has had a monopoly in the areas where it operates since the
20 1790s, but these private express statutes allow other persons,
21 as I mentioned, to deliver their own mail, and the carrier can
22 deliver, the private carrier can carry the mail and the mail
23 slot provides a reasonable way for the delivery of the mail.
24 But this again --

25 QUESTION: In any event, we don't have an equal

1 protection claim in this case, do we?

2 MR. KNEEDLER: No, we don't. And there's another fac-
3 tor I would like to mention, though, and that is that, as I men-
4 tioned, the domestic mail manual requires the customer to fur-
5 nish a letter box as a condition to receiving the mail, and as
6 a result of that acceptance of the letter box by the Postal
7 Service, that letter box in effect becomes part of the postal
8 delivery system. For example, as a result of that acceptance
9 both the sender and recipient of mail benefit from federal crim-
10 inal statutes which bar a person from destroying a letter box
11 that is on the outside of the house or by the curb and also from
12 tampering with the mail that is inside such a letter box.

13 QUESTION: Now, there's one other thing, Mr. Kneedler,
14 I gather. This statute is violated only when the deposit is of
15 mailable matter?

16 MR. KNEEDLER: That's correct.

17 QUESTION: Without having stamped it?

18 ME. KNEEDLER: Without --

19 QUESTION: Which I gather would not include porno-
20 graphic material, for example? That's not mailable matter, is
21 it?

22 QUESTION: Or explosives, or snakes.

23 MR. KNEEDLER: Well, I would think on -- perhaps on
24 a literal reading of the statute. I'm not aware that the statute
25 has come up, or has been applied in that fashion.

1 QUESTION: Well, I know, but isn't there a definition
2 in the statute of what constitutes mailable matter?

3 MR. KNEEDLER: Right. There is -- and --

4 QUESTION: And it says pornography is not mailable
5 matter.

6 MR. KNEEDLER: That is correct.

7 QUESTION: So I gather you can drop that in without
8 violating this statute at least. Is that right?

9 MR. KNEEDLER: Yes, I would -- well, I suppose that's
10 correct. As I say, I don't know that the description's been --

11 QUESTION: You might have to get a declaratory judgment
12 from some court before you knew whether it was pornographic
13 material or not.

14 QUESTION: Mr. Kneedler, in our place of residence in
15 Fairfax County we have a curbside mailbox and the morning news-
16 paper is, every day, stuck in the mailbox. I take it that's a
17 technical violation of the statute?

18 MR. KNEEDLER: Well, if it's mailed it would not be.
19 I mean, some newspapers are mailed by second class postage,
20 which is available for a publication.

21 QUESTION: Is the recipient of this illegal mail guilty
22 of any offense?

23 MR. KNEEDLER: No. It prohibits only the deposit.
24 But if it is placed in the letter box without the payment of the
25 established postage, then that would be --

1 QUESTION: If it's simply brought by a carrier and
2 stuck in the box?

3 MR. KNEEDLER: You mean, by private carrier?

4 QUESTION: Yes.

5 MR. KNEEDLER: Yes. That would be a violation of the
6 statute.

7 QUESTION: Even if the owner says to the carrier,
8 please put it in the box, it's raining, and he -- the consent of
9 the owner doesn't make any difference to the violation?

10 MR. KNEEDLER: That's correct. There are alternatives.
11 For example, in the case of newspapers, there are two alterna-
12 tives that come to mind. One is a number of --

13 QUESTION: You can have another box.

14 MR. KNEEDLER: That's right. A number of newspapers
15 furnish a little tube they can --

16 QUESTION: That's easy. But what if you'd just as soon
17 have one box? Then that's against the rules?

18 MR. KNEEDLER: That is against the law. The statute
19 -- it would also be possible in the case of a newspaper, for
20 example, if it was inclement weather, to wrap the newspaper in
21 a plastic bag which is frequently done.

22 QUESTION: Well, I suppose we could take judicial
23 notice of the fact, since we see it as we drive down the roads,
24 that the newspapers furnish a circular mail chute with the name
25 of the newspaper on it.

1 MR. KNEEDLER: That's correct.

2 QUESTION: Well, that's not true everywhere,
3 Mr. Kneedler. If you've ever been on Nantucket Island you will
4 discover that there's only one box. The newspaper and every-
5 thing else goes into it.

6 MR. KNEEDLER: Right.

7 QUESTION: And it's not locked. And I gather that --
8 are those depositors violating this statute?

9 MR. KNEEDLER: Yes.

10 QUESTION: Well, when I get up there this summer I'll
11 tell them.

12 QUESTION: What makes you think we'll return?

13 MR. KNEEDLER: As I mentioned, the statute was enacted
14 in 1934, but the Postmaster General had adopted regulations
15 going back as far as 1907 to prohibit the deposit of mailable
16 matter in postal boxes without the payment of postage. One of
17 the purposes that I mentioned of the statute has been to raise
18 revenue but there are others. Another purpose noted by Congress
19 in 1934 when it enacted the statute was to prevent the accumula-
20 tion of clutter in mailboxes. And this concern is elaborated
21 upon in a statement issued by the Postmaster General in that
22 same year when he adopted a similar prohibition by regulation
23 for city and village routes.

24 The Postmaster General stated that the Post Office
25 Department -- this statement, incidentally, is in the appendix

1 to our brief. The Postmaster General stated that the Post
2 Office Department had been deluged with complaints by citizens
3 that their private mailboxes were being filled with political
4 advertisements, other advertisements, circulars, bills, and
5 the Postmaster General noted that this clutter particularly in
6 urban areas had caused some delay for the letter carriers, and
7 because of difficulties of placing the mail --

8 QUESTION: That wouldn't be good today? You couldn't
9 use that as a reason for the delay today, could you?

10 MR. KNEEDLER: Well, there may --

11 QUESTION: The delay is just built in today, isn't it?

12 MR. KNEEDLER: Well, there are --

13 QUESTION: Still, I mean, it wouldn't matter, would it?

14 MR. KNEEDLER: No, I'm talking about the delay in the
15 letter carrier's making his rounds. There was testimony at
16 trial in this case that if a letter carrier had to come up to a
17 box and it's filled with circulars and other items that have
18 been deposited by others, the letter carrier could not simply
19 deposit the incoming mail into the mailbox. He would have to
20 withdraw the other materials, sort through them, and see if per-
21 haps some of them had been left by the postal customer to be
22 taken away, and also sort through them to see whether there
23 might be violations of the private express statute.

24 QUESTION: Is it fair to infer, Mr. Kneedler, that
25 the clutter problem that gave rise to the statute maybe hasn't

1 been solved. Does the record tell us whether there's any less
2 clutter after the statute was passed than before? Are people
3 obeying the statute, I suppose is what I'm asking?

4 MR. KNEEDLER: Well, Volume III of the record in this
5 Court contains dozens of copies of letters sent out by the
6 Postal Service just in the Northeast Region to people who had
7 deposited materials in postal boxes without the payment of
8 postage on them, and what the Postal Service will typically do
9 rather than prosecuting someone is to demand the payment of
10 postage on these materials. There was testimony in the record
11 that in the overwhelming number of cases the person who had
12 deposited the materials will comply and pay the postage. So
13 that the record does establish a pattern of enforcement. That's
14 not to say that there are not some occasions in which the
15 statute is perhaps violated, but there's nothing in the record
16 to suggest that it is being ignored in a wholesale fashion.

17 QUESTION: Are there many prosecutions

18 MR. KNEEDLER: There have -- I'm informed that there
19 has just been one attempted prosecution, and as I understand it
20 did not result in a judgment of conviction.

21 QUESTION: Doesn't anybody move around at election time
22 and see four and five things stuck in people's mailboxes? I mean,
23 you're losing a lot of money. You could lock them up. I mean,
24 any election time you get four and five every day.

25 MR. KNEEDLER: Right. And those circulars under the

1 statute, if they're to be deposited in the letter box, are to
2 have the proper postage attached to them. Also, the fact that
3 there are no criminal prosecutions does not reflect a lack of en-
4 forcement effort by the Postal Service under this statute. I should
5 make that clear. So the Postal Service has attempted to recover
6 the postage from those persons who deposit the mail into the
7 receptacle. I should also point out --

8 QUESTION: Mr. Kneedler, I wasn't familiar with that
9 part that you called my attention to, about all the requests
10 for paying postage on unmailable matter. Does the record tell
11 us how much in dollars the Government has collected in that
12 manner?

13 MR. KNEEDLER: No, it does not.

14 QUESTION: But is it in the millions of dollars?
15 Or is it a few hundred?

16 MR. KNEEDLER: No, it's more than a few hundred.
17 As I recall, there's a discussion of a thousand or several thou-
18 sand in just one postal inspection area. The difficulty with
19 statistics, though, is that the responsibility for enforcing
20 the prohibition at the first level rests with the postmaster of
21 each post office, and it's frequently done on an informal
22 basis, even a telephone call to the person who deposited the
23 material, and then that person may pay in several dollars, or
24 if it's just several pieces, it may be less than a dollar. So
25 that to my knowledge there was no collection of this information

1 from all post offices around the country. What evidence there
2 was in the record concerned situations where the postmaster,
3 individual postmaster had been unable to collect by this method
4 and it was referred to the Postal Inspection Service for addi-
5 tional efforts to collect.

6 QUESTION: Is it a federal crime to steal a piece of
7 mail after it's once inside that box?

8 MR. KNEEDLER: Yes, when --

9 QUESTION: Whether it's outgoing or incoming mail?

10 MR. KNEEDLER: Yes, yes, it is.

11 QUESTION: What about theft of some of the junk that's
12 put in there? Is that a federal crime?

13 MR. KNEEDLER: Well, that I think would not be because
14 the statute, I believe, specifically refers to theft of the mail.
15 I don't believe these other materials would be regarded as the
16 mail.

17 QUESTION: What if the homeowner put up a regulation
18 mailbox and then in the center of his yard put up a bushel
19 basket and said, non-mailable matter, and all the political
20 circulars and civic meeting notices and so forth were supposed
21 to go in there? Would it be any violation of any federal
22 statute to take something out of that bushel basket?

23 MR. KNEEDLER: No, it would not. And in fact the
24 alternative of furnishing a separate receptacle for the receipt
25 of items other than the mail was one of the alternatives that

1 was mentioned during the debates in 1932 on a predecessor bill
2 to the one, the statute eventually enacted in 1934 that all
3 the Congress has done is limit the use of the mailbox, which
4 after all exists because of the Postal Service. Congress has
5 not sought in this statute in any way to regulate any other
6 means of delivery by a person to another home or to a business.

7 QUESTION: Getting back, Mr. Kneedler, to your answer
8 to the Chief Justice, I gather junk mail which is stamped, if
9 stolen, that's a crime, isn't it? I mean, it might be third
10 class or whatever it may be, but if it's revenue producing,
11 it can be junk mail but as long as it's been revenue producing,
12 whatever the rate may be, its theft is a crime, isn't it?

13 MR. KNEEDLER: I believe -- it certainly is if it's
14 mailed. My uncertainty is whether materials that are deposited
15 with the postage into the letter box with a permanent postage --

16 QUESTION: I'm not speaking to that. I'm speaking
17 only to that which is stamped.

18 MR. KNEEDLER: Right, right.

19 QUESTION: Lord knows all of us get a lot of stamped
20 junk mail --

21 MR. KNEEDLER: Right, right. Yes, that is a crime,
22 too. It is a crime.

23 QUESTION: It's going just as far as the first waste-
24 paper basket.

25 MR. KNEEDLER: Right. It is a crime. It is a crime

1 to steal that. Now, the appellees challenge this statute under
2 the First Amendment, but -- and the district court held the
3 statute unconstitutional as applied to appellees. What the
4 district court did was balance what it perceived to be the
5 Postal Service's need to enforce this statute against these
6 particular civic associations, against what it perceived to be
7 the limitations on their First Amendment rights if the appellees
8 were forced to comply with the statute.

9 In our view this ad hoc balancing approach fails to
10 give sufficient deference to Congress's judgment regarding the
11 need for the statute in the generality of cases and it would
12 also make vulnerable many statutes or regulations of general
13 applicability adopted by the Postal Service or by Congress to
14 regulate a mail delivery system of nationwide scope. The dis-
15 trict court apparently believed that it was required to balance
16 the need for the statute against the asserted infringement --

17 QUESTION: Mr. Kneedler, may I ask you one procedural
18 question now? As I remember, when we first took the case it
19 was from the court of appeals when it remanded for trial, is
20 that right? Or did we take it directly from the district court?

21 MR. KNEEDLER: The district court dismissed the com-
22 plaint for failure to state a claim. That was appealed to the
23 court of appeals which remanded to the district court saying it
24 should not have been dismissed.

25 QUESTION: And wasn't your appeal from that order?

1 MR. KNEEDLER: Yes, from the district court's order
2 after the --

3 QUESTION: From the district court's order after -- ?

4 MR. KNEEDLER: From the district court's, after the court
5 of appeals remanded with instructions to reinstate the complaint.

6 QUESTION: I was under the impression we had taken
7 the case from the court of appeals' remand order but that's
8 incorrect?

9 MR. KNEEDLER: No, it was remanded to the district court.

10 QUESTION: I know it was remanded, but I --

11 MR. KNEEDLER: Yes, and there was a trial. So this case,
12 this appeal is directly from the district court. Now, the dis-
13 trict court apparently believed that some balancing was appro-
14 priate here because the statute infringed on appellees' First
15 Amendment rights. This assertive infringement could have two
16 aspects. One, that the statute somehow inhibits other alterna-
17 tive means other than deposit of something in the mailbox, for
18 communicating. Or it could be a contention that charging postage
19 for the use of the mailbox itself violates the First Amendment.
20 The district court seems to have believed that because there
21 was testimony for appellees that these other methods of delivery
22 were unsatisfactory, that the statute somehow inhibited or
23 infringed on the appellees' right to deliver materials.

24 QUESTION: Do you think the district court held that
25 the appellees had a right to have the Post Office Department

1 carry their circulars free of postage?

2 MR. KNEEDLER: No, it did not, but it did hold
3 that appellees have a right of access to a part of the postal
4 system, not the entire part, not the delivery part, but to the
5 letter box, which is the terminus or the end of the delivery
6 process. And as to that, the district court clearly held that
7 these appellees have a right of access to that without paying
8 the established postage.

9 QUESTION: And the Post Office will carry any of
10 appellees' circulars if they just pay some postage on it?

11 MR. KNEEDLER: Yes, it will. Now --

12 QUESTION: Well, there's no general prohibition
13 against anybody but a mailman putting anything in the box?
14 I take it this statute wouldn't be violated if somebody put a
15 stamp on it and delivered it himself?

16 MR. KNEEDLER: That's correct.

17 QUESTION: Because, just because he doesn't trust the
18 Postal Service to get it there.

19 MR. KNEEDLER: That's right. Or, one of the justifi-
20 cations appellees advanced below for using, for depositing items
21 in letter boxes free of charge was that if they used the mail
22 the process would be too slow and they couldn't inform residents
23 of the need to attend meetings that were coming up very quickly.
24 And that rationale --

25 QUESTION: All they have to do is put a stamp on it?

1 MR. KNEEDLER: That's right. And they could deliver
2 it as quickly as they wanted. So that certainly is no reason
3 why the statute violates the First Amendment.

4 QUESTION: But it does sort of undercut the notion
5 that one of the reasons for this statute is that it clutters
6 up the mailbox. You can clutter it up as much as you want if
7 you put a stamp on it?

8 MR. KNEEDLER: No, Mr. Justice White, I don't believe
9 it does undercut that rationale, because one of the concerns
10 is that it will increase the cost to the Postal Service if the
11 letter carrier has to go to the box and sort through materials.
12 But if the person who deposits something in the letter box
13 pays postage on it, then the Postal Service is being reimbursed
14 to the extent of the postage for the additional effort of the
15 letter carrier going through the box.

16 QUESTION: But still part of your argument is that he
17 has to sort it out, sort out this stuff that is dropped in. He
18 has to sort that out from the outgoing mail?

19 MR. KNEEDLER: That's correct, but --

20 QUESTION: That part of it is not -- he'd still have
21 to sort out the mail?

22 MR. KNEEDLER: He still has to do it but the basis
23 of that argument was that this would increase the cost of the
24 mail delivery system. But to the extent someone puts postage
25 on the letter, then the Government is being reimbursed for

1 that extra effort. I did want to make one point, though, re-
2 garding the asserted infringement on First Amendment rights.
3 And that is that the other alternatives that are available to
4 appellees, such as placing circulars on doorknobs, or behind a
5 screen door, or knocking on the door and handing a circular
6 directly to the customer or to the resident, these other al-
7 ternatives exist whether or not the resident erects a mailbox.
8 And therefore the erection of the mailbox and the Postal Ser-
9 vice's approval or acceptance of that mailbox for delivery of
10 mail has absolutely no effect on all the other alternatives
11 that are open to an individual for the delivery of messages.
12 So the erection of a mailbox cannot be said in any respect to
13 infringe upon the appellees' First Amendment rights. So the
14 claim would have to be reduced to the assertion that appellees
15 have a right of access to the mailbox itself irrespective of
16 how available other alternatives may be to them. It's a claim
17 that they have a right of access to the mailbox itself, and this
18 Court has never held that Congress cannot establish reasonable
19 postage fees for the use of facilities related to the mail.

20 The Postal Service has existed as long as the First
21 Amendment in this country and has charged postage for the use
22 of the mails, and it is too late in the day in our view to sug-
23 gest that significant First Amendment questions are raised when
24 Congress establishes a rate classification system for the use
25 of postal facilities that is nondiscriminatory, as this one is,

1 and is reasonable. I would like to reserve the balance of my
2 time.

3 MR. CHIEF JUSTICE BURGER: Mr. Hammer.

4 ORAL ARGUMENT OF JON H. HAMMER, ESQ.,

5 ON BEHALF OF THE APPELLEES

6 MR. HAMMER: Mr. Chief Justice, and may it please the
7 Court:

8 We believe that there are significant First Amendment
9 issues presented by this case.

10 QUESTION: Do you think you have a First Amendment
11 right to -- does anyone have a First Amendment right to walk
12 into a private property and open the door and put something be-
13 hind the screen door?

14 MR. HAMMER: We don't believe, Mr. Chief Justice,
15 that the rights that we seek to assert permit us to invade any-
16 body's sacred rights of privacy. I believe that the decision
17 of this Court in Rowan indicates that the homeowner may make
18 that decision. There are local law devices such as no trespas-
19 sing signs and things of that nature whereby the homeowner can
20 preclude any type of distribution.

21 QUESTION: Must the homeowner put a no trespassing
22 sign up in order to preserve his right to privacy?

23 MR. HAMMER: I think, with respect to the mailbox,
24 the answer is yes, Mr. Chief Justice.

25 QUESTION: Under Village of Schaumburg, I would think,

1 even under circulars, he would have to, wouldn't he?

2 MR. HAMMER: That's correct. I believe that's cor-
3 rect, Mr. Justice Rehnquist.

4 QUESTION: Or under most state trespass laws.

5 MR. HAMMER: That's correct, Mr. Justice White.

6 QUESTION: And Hynes v. Oradell.

7 MR. HAMMER: Yes. I believe, however, Mr. Chief
8 Justice, that this case can be decided on nonconstitutional
9 issues if the Court sees fit. And I would like to allude to
10 that briefly.

11 My adversary indicated in referring to 1725, the
12 various provisions of the statute; but he did not refer to
13 the fact that it requires an intent to avoid the payment of
14 the postage, an intent, a criminal statute requiring intent.
15 The companion section of this chapter, 18 USC 1696, provides
16 an exemption to the private express statute which permits an
17 uncompensated individual to deliver mail.

18 QUESTION: Where is that in the appendix?

19 MR. HAMMER: The statute is 18 USC, Section 1696.
20 I believe it's quoted in the brief of the amici, of the Civil
21 Liberties Union, at page 21, Mr. Justice Rehnquist.

22 QUESTION: What color?

23 MR. HAMMER: That's green. And I believe that that
24 section provides that in effect a noncompensated volunteer
25 may deliver postage, may deliver matter. If that is the case,

1 anybody distributing material under 1725 --

2 QUESTION: May I ask, Mr. Hammer, that starts out
3 with "This Chapter." Is that the chapter that includes 1725?

4 MR. HAMMER: Yes, it is. It is, Mr. Justice Brennan.
5 It's the same chapter. And our argument is that if there is
6 no need to require the payment of postage for a noncompensated
7 individual, how can he possibly under 1725 have the intent to
8 avoid the payment of postage if no postage is required? I be-
9 lieve that the record is clear that the civic individuals in
10 this case, and all those such as the amici and the representa-
11 tive civic groups throughout the United States, and we believe
12 that we are representative of them, are volunteers acting with-
13 out compensation. So I submit that 1725 --

14 QUESTION: Does that affirmatively appear in this
15 record that those who made this distribution --

16 MR. HAMMER: Are volunteers without -- ?

17 QUESTION: Are volunteers without compensation?

18 MR. HAMMER: Yes, Mr. Justice.

19 QUESTION: Where?

20 MR. HAMMER: I believe that is in the Appendix. I'm
21 not certain, Mr. Justice Rehnquist, that I can cite you to the
22 direct page, but I believe that the testimony of numerous civic
23 experts indicated that none of these individuals were ever paid,
24 and that is the normal procedure for civic associations in
25 terms of their modus operandi.

1 QUESTION: Well, you can talk about the normal proce-
2 dure for the Sawmill Valley Civic Association, presumably, but
3 do you think you can speak uniformly of the civic associations
4 for 50 states?

5 MR. HAMMER: Well, Mr. Justice, I believe that what
6 we have tried to do in this action, even though we could not
7 bring a class action for logistical purposes -- the problems
8 were too great, that the testimony of the civic representatives
9 who testified in this case were not simply from Sawmill Valley
10 or from Greenburgh. They were from other areas, Connecticut,
11 New Jersey, White Plains, Queens --

12 QUESTION: All over the country.

13 MR. HAMMER: Yes. And in addition, Mr. Justice
14 Rehnquist, on the prior court of appeals proceeding, which was
15 remanded back, Mr. Justice Stevens, as you point out, there
16 were affidavits submitted in that case from civic representa-
17 tives in New Hampshire and in Colorado who testified, this is
18 the common procedure, the way it is pursued throughout the
19 United States. So I believe, even though we have not obtained
20 testimony from civic representatives from 50 states, we have
21 obtained testimony from representative groups of civic associa-
22 tions.

23 QUESTION: What do you mean, paid for? They weren't
24 paid for delivering, then?

25 MR. HAMMER: They do it as a voluntary service to --

1 QUESTION: Who does?

2 MR. HAMMER: The members of the civic associations,
3 Mr. Justice.

4 QUESTION: Well, what if the executive secretary,
5 the paid executive secretary of one of them did it?

6 MR. HAMMER: Well, then, Mr. Justice, the provisions
7 of Section --

8 QUESTION: Well, he's just on a salary. This just
9 happens to be part of his job.

10 MR. HAMMER: That -- it is possible that there could
11 be, in an affluent area, there might be such a paid executive,
12 although we --

13 QUESTION: An awful lot of civic associations have
14 rather large staffs.

15 QUESTION: Well, Sawmill Valley isn't exactly a poor
16 area, is it?

17 MR. HAMMER: It's a middle class area, Mr. Justice,
18 and I might state that it has an average treasury that runs
19 approximately \$150. Its family dues are about \$2 to \$5 per
20 year.

21 QUESTION: Is that in the record?

22 MR. HAMMER: Yes, it is, Mr. Justice.

23 QUESTION: The borough or township of Sawmill Valley
24 is not below the poverty line?

25 MR. HAMMER: Mr. Justice, in the town of Greenburgh,

1 which is within, the Sawmill Valley is included within, there
2 are upper income areas, there are middle income areas, and there
3 are lower income areas. Indeed, in my own civic association,
4 there is a public housing project of people who are required to
5 be of low income. Those people pay no dues to our civic asso-
6 ciation because they cannot afford to pay any dues, even \$2 or
7 \$5 a year.

8 QUESTION: Mr. Hammer, who is E. Payson Clark, Jr.?

9 MR. HAMMER: E. Payson Clark, Jr., Mr. Justice, is
10 sitting here at the counsel table. He is an attorney. He was
11 a civic representative in the town of Greenburgh --

12 QUESTION: Well, the reason I ask, I notice at page
13 38 of the transcript, there's his testimony. "Now, Mr. Clark,
14 can you tell us in terms of these hand distributions, who makes
15 them? The people who make them, can you tell us?"

16 The answer: "The people who are active in the affairs
17 of the civic association, of which I am only one representative,
18 go from door to door and insert these civic community notices
19 in the private mailboxes of the homeowners."

20 Next question: "To your knowledge, are any of these
21 people ever paid?"

22 Answer: "No adult, to my knowledge, has ever asked
23 for or received any compensation for this activity, but young-
24 sters in the community, by their parents, and sometimes possibly
25 from the civic association, would be given 50 cents or a dollar

1 or so, a little family stipend, for going down one side of the
2 street while the parent is working the other side of the
3 street." Is that the testimony you're talking about?

4 MR. HAMMER: Well, thank you, Mr. Justice for --

5 QUESTION: Well, I know the youngsters get paid though,
6 don't they?

7 MR. HAMMER: That's true, they might. Sometimes, it's
8 a family necessity, Mr. Justice, to make this payment.

9 QUESTION: Is that the only testimony we have? Is
10 it --

11 MR. HAMMER: No, Mr. Justice Brennan, there are testi-
12 mony from other civic representatives, not all of which is in-
13 cluded in the Joint Appendix, but all of which is obviously in-
14 cluded in the trial transcript, from other civic associations,
15 in other areas, that people never receive any compensation of
16 any material nature other than these de minimis payments,
17 Mr. Justice.

18 QUESTION: Has this argument ever been surfaced in
19 this case before?

20 MR. HAMMER: The question about payment? Or this
21 particular -- ?

22 QUESTION: The statutory issue,

23 QUESTION: Was it presented to the district court or
24 the court of appeals?

25 MR. HAMMER: No, it was not. It was obvious that it

1 was not presented to the court of appeals, because that came up
2 on the court's motion, granting of the motion to dismiss the
3 complaint.

4 QUESTION: What relation does that have to the First
5 Amendment?

6 MR. HAMMER: That statute?

7 QUESTION: No. That people get paid.

8 MR. HAMMER: It doesn't have any, Mr. Justice Marshall.

9 QUESTION: I don't think so.

10 MR. HAMMER: It's just that I was attempting to give
11 the Court a possible basis for determining this case on non-
12 constitutional grounds.

13 QUESTION: Well, are you saying that someone who is
14 not paid for violating a statute doesn't violate it?

15 MR. HAMMER: Because the private express statute
16 exemptions state that a person may deliver if he receives no
17 compensation. And if he receives no compensation, and if he
18 may thereby deliver, how under the section which is before the
19 Court may he have an intent to avoid the postage?

20 QUESTION: Well, I suggest one thing, Mr. Hammer.
21 What this statute says, the chapter shall not prohibit the con-
22 veyance or transmission of letters or packets by private hands
23 without compensation. It doesn't say, shall not prohibit the
24 deposit in mailboxes.

25 MR. HAMMER: Well, I understand that, Mr. Justice

1 Brennan, but it would seem, as a matter of logic and common
2 sense, that if it says, you may transport or convey, that would
3 imply that you would have to convey it to the place where the
4 homeowner may be likely to receive it, and the entire frame of
5 testimony in this case was such that the only logical appropri-
6 ate traditional historical place where homeowners could expect
7 to receive these public interest civic distributions --

8 QUESTION: I gather you agree you'd have a stronger
9 argument if the word, "nor deposit in mailboxes" --

10 MR. HAMMER: That's true. It would be much stronger
11 in that case, Mr. Justice.

12 QUESTION: What about if the utility company, the
13 utility company hires a special messenger to deliver its bills,
14 it would not violate the statute either under your view of --

15 MR. HAMMER: Well, he would be compensated, Mr.
16 Justice --

17 QUESTION: Well, the statute says, "or by special
18 messenger employed for the particular occasion." That's your
19 very same statute that you're relying on.

20 MR. HAMMER: Yes, Mr. Justice, but I would have to
21 read that as meaning --

22 QUESTION: I think you would. You would have to read
23 it some way. Like read it out.

24 MR. HAMMER: Well, I would have to assume that the
25 statutory intendment was to provide that this special messenger

1 was to be compensated. And I think there would be a violation
2 of the statute in that case.

3 QUESTION: Well, that isn't what this statute says.

4 MR. HAMMER: Well, this statute is somewhat ambiguous.
5 I think 1725 is somewhat ambiguous. I think the questions with
6 respect to slots created ambiguity, both at the course of
7 trial where one government witness testified it was covered by
8 the statute and one testified it was not. The Post Office
9 issued post-trial regulations deleting the problem of the slot.

10 QUESTION: Mr. Hammer, if the Federal Express or
11 United Parcel Service delivering some piece of material -- I
12 suppose we can't use the word "mail" -- put it in one of these
13 boxes, they'd be violating the statute, wouldn't they?

14 MR. HAMMER: That's correct, Mr. Chief Justice.

15 QUESTION: Well, aren't they direct competitors?
16 Haven't they taken hundreds of millions of dollars worth of
17 business away from the Post Office?

18 MR. HAMMER: Mr. Chief Justice, I would state this.
19 I think the answer is probably yes, but I think that it's clear
20 from the --

21 QUESTION: Probably? Well, if you rely on the Wall
22 Street Journal on the revenues of Federal Express and United
23 Parcel Service, there can't be any question about it, can there?

24 MR. HAMMER: No, I think you're correct, Mr. Chief
25 Justice, but I would state this, that we are dealing here not

1 with commercial distributions but with the core First Amendment
2 distributions of political, civic, and community-minded infor-
3 mation. The type of information upon which --

4 QUESTION: But your posture would be the same, I
5 should think, on the First Amendment, if you wanted to be sure
6 to get delivery and couldn't depend on the mail, the Postal
7 Service, that you engaged United Parcel Service or Federal
8 Express to make your deliveries for you.

9 MR. HAMMER: In terms of reliability of delivery, yes.
10 That's correct, Mr. Chief Justice, but what -- I think --

11 QUESTION: And that's taking business away from the
12 Postal Service and using one of their facilities, is it not?

13 MR. HAMMER: That's correct. And I would have two
14 answers to that, Mr. Chief Justice. One is a statutory con-
15 struction point. I think that the provisions of this statute
16 which refer to circulars, statements of account, and sale bills,
17 and the legislative history confirms this, indicate that this
18 statute was intended in 1934 to cover only commercial material,
19 not noncommercial material. I think the plain language of the
20 statute indicates that. And this Court could determine this
21 issue without regard to the questions of commercial distribu-
22 tions. That's one answer, Mr. Chief Justice. The second
23 answer is that I think that this Court in the cases last term,
24 the Consolidated Edison case and the Central Hudson case, indi-
25 cate that even though commercial distributions do have a First

1 Amendment right and I believe that the trend of the decisions
2 in this Court confirms that, there is still a greater degree of
3 protection necessarily afforded to noncommercial distributions:
4 the political, civic, and public interest material which we seek
5 to distribute, which the amici seek to distribute, and which
6 all the representative civic groups throughout the United States
7 seek to distribute. I believe that the compelling government
8 interest, if any, which the Post Office seeks to assert here,
9 is not well taken. They assert a loss of revenue, and I think
10 there are several answers to that. If a person can deposit, or
11 distribute as a volunteer under 1696, regardless of how ambigu-
12 ous that statute may be, then there cannot be any concern for
13 loss of revenue.

14 In the second case, and in answer to your question,
15 Mr. Justice Stevens, I believe that there has been wholesale
16 violation of this statute for many years. We don't claim any
17 invidious discriminatory nonenforcement, but the trial judge
18 took judicial notice of the fact that this statute appears to
19 be more honored in the breach than in the enforcement since
20 its enactment in 1934. And if that be the case, then I think
21 there is very little possibility of any revenue or adverse
22 revenue --

23 QUESTION: What was the basis for that judicial notice?
24 Or, I should say, what if any?

25 MR. HAMMER: Well, I wouldn't want to read into the

1 minds of the trial court, Mr. Justice, but I would --

2 QUESTION: I mean, what did he say? Did he give any
3 basis for it?

4 MR. HAMMER: Well, only in view of the fact that --

5 QUESTION: Or did it come out of the clear blue?

6 MR. HAMMER: Well, I think Judge Conner gave it ser-
7 ious thought but he also based it on the testimony in the case,
8 because he commented that people testified before him that for
9 a period of many years they had been violating this statute,
10 knowingly and out of necessity. In fact, the appellee Council
11 of Greenburgh Civic Associations knowingly violated this
12 statute in order to distribute public interest material on a
13 referendum.

14 QUESTION: You say, "of necessity." What do you mean
15 by that?

16 MR. HAMMER: Well, of necessity, Mr. Justice Rehnquist,
17 I think turns on the question of dollars and cents. I think
18 that if we are to enforce this statute, and if this Court sees
19 fit to enforce this statute, the practical First Amendment for
20 the great mass of the citizenry who seek to become involved in
21 their community, who seek to exercise their rights as citizens,
22 to become involved in the civic and political process, which I
23 think are commingled as one, would be denied.

24 QUESTION: Well, then, would you say that a person
25 could take an unstamped letter to the Post Office and say,

1 I have had kind of a bad year this year, I can't afford a stamp,
2 but the First Amendment requires you to deliver it for me?

3 MR. HAMMER: No, Mr. Justice, I would not make that
4 point and I would not submit that that is our point.

5 QUESTION: Because it doesn't follow inevitably.

6 MR. HAMMER: We do not ask to utilize the postal fa-
7 cilities.

8 QUESTION: Yes, but you are saying that financial
9 status of your association is a factor to be determined relative
10 to access to mailboxes.

11 MR. HAMMER: Not -- I state that financial considera-
12 tions are a crucial consideration, Mr. Justice Blackmun, in
13 terms of considering whether this Court shall deprive individual
14 citizens and civic groups of their only practical historical
15 means of distribution.

16 QUESTION: Well, therefore, if I am an indigent and
17 cannot afford to buy a stamp, the mail should be carried free
18 for me.

19 MR. HAMMER: That indigent individual can do as our
20 civic appellees can do, he can -- as we submit they should be
21 able to do -- he can take that distribution and deposit it in
22 the recipient's mailbox if it is a public interest civic or
23 political distribution.

24 QUESTION: Even though his recipient lives in Chicago,
25 which is west of the Hudson? I noticed in your list of

1 interested associations, only one was west of the Hudson.

2 MR. HAMMER: Well, Mr. Justice, we were somewhat
3 encumbered with the question of economics and logistics in
4 proceeding to trial, but as I mentioned previously, there were
5 affidavits on the previous summary judgment proceedings from a
6 civic representative from the vicinity of Denver, Colorado. So
7 we did --

8 QUESTION: That's the only one, that I mentioned.

9 MR. HAMMER: That was -- yes. That's correct,
10 Mr. Justice Blackmun.

11 QUESTION: Mr. Hammer, you suggested earlier that
12 1725 as a matter of legislative history, I thought you said,
13 could be limited as a matter of interpretation and construction.
14 The words, statements of accounts, I guess that's just the
15 ordinary bills I get, isn't it?

16 MR. HAMMER: Yes, sir.

17 QUESTION: Circulars. That's rather broad, isn't it?

18 MR. HAMMER: Well --

19 QUESTION: Are you suggesting circulars ought to be
20 limited to commercial advertisements and that sort of thing, is
21 that it?

22 MR. HAMMER: I think the answer to that, Mr. Justice
23 Brennan, is, yes. I think if we proceed on the normal statutory
24 construction principles, in this case the principle of noscitur
25 a sociis, that language is known by the company it keeps,

1 I believe that it clearly indicates that statements of account --

2 QUESTION: Well, of course, this is, deposit any
3 mailable matter, and then such as -- in other words, for example.
4 Isn't that right?

5 MR. HAMMER: Well, that gets into the gist of generis
6 concept, which I think leads to the same conclusion, Mr. Justice
7 Brennan, that it should be commercial only. Indeed, the legis-
8 lative history which is before this Court indicates that the
9 reason this statute was enacted was because utility companies
10 in the 1930s were using this as a device to distribute their
11 bills. I don't believe that there is any record of any civic
12 violations, and I believe that there is an exhibit in the
13 Appendix which shows that there has never been any record of a
14 civic association violation of this statute until the enforce-
15 ment threats which precipitated this litigation.

16 QUESTION: How about election circulars? Candidates?
17 Has the statute been enforced against them?

18 MR. HAMMER: I believe that it has in a happenstantial
19 fashion, Mr. Justice White. In other words, there have been
20 evidences --

21 QUESTION: Well, your construction, in any event -- if
22 you win this case, there will be a good many other people be-
23 sides civic associations that would benefit?

24 MR. HAMMER: I would believe that all noncommercial
25 public interest and civic-oriented material, which would include

1 certainly political candidates, because we --

2 QUESTION: How about commercial? After Virginia Board
3 of Pharmacy, aren't they entitled to First Amendment rights?

4 MR. HAMMER: Under Virginia Board? Yes, they are,
5 Mr. Justice Rehnquist, but I believe that under the Central
6 Hudson case there is still an indication by this Court, and in
7 the opinion, I believe, by Mr. Justice Powell, that the commer-
8 cial First Amendment rights are still of a lower priority, and
9 entitled to a lesser degree of constitutional protection than
10 these rights which we are now arguing before this Court. I be-
11 lieve that commercial entities have the financial wherewithal
12 and the financial desire to find alternative means of distribu-
13 tion. We have none. --

14 QUESTION: The statute certainly doesn't speak in
15 terms of who can afford it and who can't.

16 MR. HAMMER: No, it does not, but but I believe that
17 in construing a statute under the First Amendment, Mr. Justice
18 Rehnquist, we have to look -- and we don't maintain that the
19 statute is facially invalid -- the statute, the Government ar-
20 gues, is content neutral. And that is a label that they seek to
21 attribute to it. But I submit that the statute should be con-
22 strued in terms of its practical application, the practical
23 realities of how it is applied. The particular environment to
24 which I believe this Court referred in Tinker v. Des Moines
25 School District, that I think is the threshold question which

1 this Court has to answer.

2 QUESTION: Let me take you back a moment. You made a
3 statement, something to the effect that if you can't put it in
4 the mailbox you are denied access to delivery. Now, what do
5 you mean by that?

6 MR. HAMMER: We are denied, Mr. Chief Justice --

7 QUESTION: Why can't you put it behind the screen
8 door, put it on the porch, put it in a dozen other places?

9 MR. HAMMER: Mr. Chief Justice, throughout the course
10 of the trial and as a result of the remand from the U.S. Court
11 of Appeals for the 2nd Circuit, which asked the trial court to
12 go into these questions, a great deal of the testimony, perhaps
13 almost 90 percent of it, from the civic association side, was
14 taken up with exploring these alternative devices, and civic
15 experts from a great variety of areas, admittedly not west of
16 the Hudson except in one case, showed that these other methods
17 were not practicably feasible.

18 QUESTION: If the Twelve Apostles said black was
19 white, no court has to believe it. These experts don't know
20 any more about it than anyone else in the world.

21 MR. HAMMER: Well, except --

22 QUESTION: There are not unlimited, but a dozen other
23 places to make this delivery.

24 MR. HAMMER: Two answers, I might submit, Mr. Chief
25 Justice. In the first case, these civic experts were

1 individuals who had spent a great part of their adult lives on
2 weekends and on various times in the community distributing
3 materials and considering alternatives. They found these other
4 alternatives --

5 QUESTION: Do you know of any other expert that only
6 works on weekends?

7 MR. HAMMER: Well, I believe probably judicial experts
8 are forced to work on weekends.

9 QUESTION: I said, only on weekends?

10 MR. HAMMER: Well --

11 QUESTION: You said these people got their ex-
12 pertise on weekends.

13 MR. HAMMER: Well, I meant, Mr. Justice, that the
14 distributions of this type of material is generally done on
15 weekends because --

16 QUESTION: Aren't you really asking for an exception
17 to the statute?

18 MR. HAMMER: No, no, Mr. Justice, except --

19 QUESTION: Well, what do you call it?

20 MR. HAMMER: We state that noncommercial distributions
21 are not covered by the statute. That's --

22 QUESTION: If that had been written into the statute,
23 it would be all right?

24 MR. HAMMER: I believe it is there, Your Honor.

25 QUESTION: Neither that statutory issue nor the one

1 that was mentioned at the start of your argument was considered
2 at all, either by the district court or the court of appeals?

3 MR. HAMMER: The statutory construction issue, in
4 terms of commercial-noncommercial, was alluded to by the court
5 of appeals in its decision on remand. The district judge did
6 not consider it after the trial.

7 QUESTION: And the only issue, the only question men-
8 tioned in the jurisdictional statement is the constitutional
9 question, and that was the only question actually decided by the
10 district court, wasn't it?

11 MR. HAMMER: That's correct, Mr. Justice Stewart.

12 QUESTION: So, even if we thought there were a possi-
13 bility of merit in either this question of statutory construc-
14 tion or in your earlier statutory issue, perhaps the appropriate
15 thing for us to do would be, if we disagree with you on the con-
16 stitutional question, to remand the case so that those statutory
17 questions can be considered by the district court. Is that
18 correct?

19 MR. HAMMER: That may well be, Mr. Justice Stewart,
20 but I would certainly hope that this court would be able to pro-
21 vide the district court with some guidance, perhaps as to the
22 construction of the statute. I would also like to --

23 QUESTION: May I ask, on the construction point of
24 1696, I notice the next sentence of the statute after the one
25 quoted in the amicus brief says that whenever more than 25 such

1 letters or packets are conveyed or transmitted by such special
2 messenger, the requirements of Section 500, Title 39, should be
3 met. Were they more than 25 letters typically delivered by
4 these young people?

5 MR. HAMMER: In some cases there might be. In many
6 cases a young person might, or with a parent might cover ten or
7 twelve homes on a particular block or a particular street.
8 A particular civic association --

9 QUESTION: The exemption -- but then the exemption
10 would not necessarily -- I don't know what Title 39, Section 500,
11 is, do you know what -- ?

12 MR. HAMMER: I do not, Mr. Justice Stevens.

13 QUESTION: So this is really a pretty new argument,
14 then, isn't it?

15 MR. HAMMER: Yes, it is, and I --

16 QUESTION: This was a civil action, was it not?

17 MR. HAMMER: Yes, it was, Mr. Justice --

18 QUESTION: Brought by your clients?

19 MR. HAMMER: Yes.

20 QUESTION: For declaratory judgment -- ?

21 MR. HAMMER: For declaratory judgment.

22 QUESTION: You didn't raise the statutory argument
23 in your lower court argument?

24 MR. HAMMER: We raised the statutory construction
25 argument, commercial as opposed to noncommercial.

1 QUESTION: But not the statutory argument you've
2 raised here?

3 MR. HAMMER: No, Mr. Justice Rehnquist, not that one.
4 I would like to respond to the Chief Justice's comments before
5 I conclude, about the civic experts. The trial judge specifi-
6 cally made findings of fact with respect to these alternative
7 means of delivery, and he found they were not viable methods of
8 delivery. I believe that under Rule 52 of the Federal Rules of
9 Civil Procedure that we should accept these findings of fact
10 by the trial court, and I believe that much of our brief was
11 devoted to that discussion.

12 QUESTION: You submit they're clearly erroneous,
13 isn't that it?

14 MR. HAMMER: That's correct, Mr. Chief Justice.
15 I think that the record clearly indicates that they are not only
16 not clearly erroneous, they are clearly supported by every piece
17 of evidence that was submitted. Because the Post Office submit-
18 ted no evidence to the contrary.

19 QUESTION: Well, do you try a statute the way you
20 litigate ordinary individuals? Isn't there a presumption of
21 validity in favor of every federal statute that Congress chooses
22 to enact?

23 MR. HAMMER: Not when a statute has been the subject
24 of wholesale violation for a period of 40 years or 45 years
25 since its enactment, Mr. Justice Rehnquist.

1 QUESTION: What's your authority for that?

2 MR. HAMMER: The authority for that is the testimony
3 of the --

4 QUESTION: I mean a case authority from this Court.

5 QUESTION: That the ordinary presumption is inappli-
6 cable.

7 MR. HAMMER: There's -- I don't believe there's any-
8 thing in our brief to cover that. It was a factual point that
9 was brought out --

10 QUESTION: Well, I was asking for a case.

11 MR. HAMMER: I don't have one at my fingertips,
12 Mr. Justice Rehnquist.

13 QUESTION: What you're suggesting is that if a statute
14 isn't enforced some kind of a special doctrine of laches runs
15 against the Government.

16 MR. HAMMER: I concede there is no doctrine of laches
17 against the United States of America or even against the United
18 States Postal Service. But I would submit also that we have to
19 look at this case in its cumulative effect. The cumulative
20 effect of this case is to deny distributions under the First
21 Amendment, the core distributions under the First Amendment.
22 The participatory democracy which is essential if the average
23 citizen is to have any say and any responsibility in the opera-
24 tions of his governments, and I submit that if this method is
25 denied, the facts demonstrate that there are no alternatives,

1 that there are no effective alternatives except the alternatives
2 which are available by reason of the dollar, and I submit that
3 is not feasible. I see my time is concluded. Thank you.

4 QUESTION: This was not just a preliminary injunction
5 that was entered by the district court?

6 MR. HAMMER: No, Mr. Justice Stewart, it was a per-
7 manent injunction that was entered. There was no preliminary
8 injunction.

9 QUESTION: And a finding on the merits that the stat-
10 ute was unconstitutional as applied to your client?

11 MR. HAMMER: That's correct; that's correct.

12 MR. CHIEF JUSTICE BURGER: Do you have anything fur-
13 ther, Mr. Kneedler?

14 MR. KNEEDLER: Yes, thank you, Mr. Chief Justice.

15 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

16 OR BEHALF OF THE APPELLANT -- REBUTTAL

17 MR. KNEEDLER: I'd like to make several points. One,
18 earlier when I was questioned about the criminal statutes pro-
19 hibiting the taking of materials out of a letter box, I looked
20 back at 18 United States Code 1702 and 1708, which both refer
21 to the taking of a letter from an authorized receptacle without
22 regard to whether that letter was sent through the mail. So,
23 according to the terms of these statutes, it would appear that
24 even appellees' materials once placed in a letter box would
25 then, if they had placed postage on them, would then be protected

1 by these federal statutes, and so they would in effect --

2 QUESTION: Is the word "letter" defined as something
3 with postage on it? An envelope with a stamp on it?

4 MR. KNEEDLER: These criminal statutes do not contain
5 -- they just refer to -- well, "letter" is among
6 several. They refer to "parcel" and other --

7 QUESTION: They don't differentiate between something
8 that was carried in first class mail and something carried
9 third or fourth.

10 MR. KNEEDLER: It just says, "letter, postal card, or
11 package," without qualification. But also, with respect to the
12 argument based on the private express statutes, 18 United States
13 Code 1694 and 1696, I think it's important to keep in mind that
14 Section 1725, which was involved here, was enacted against
15 the background of private utility companies who were relying on
16 the private express statutes to carry or transmit their own
17 materials outside of the mail. And yet Congress enacted this
18 statute to prohibit those companies from using a facility of the
19 mail, in this case, the letter box, to effectuate the delivery
20 of the materials they had carried. So, as a matter of statutory
21 construction, there's, I think, simply no room for the argument
22 that letters that are delivered to a home under the private
23 express statutes are somehow exempt from the prohibition of
24 1725. That would be directly contrary --

25 QUESTION: Well, that question hasn't been briefed

1 and is brought up here for the first time in oral argument.

2 It was never considered by the district court or the court of
3 appeals.

4 MR. KNEEDLER: Mr. Justice Stewart, that was Footnote
5 4 on page 31a of our jurisdictional statement, and there the
6 district court did reject those arguments. Now, this was in
7 the district court's first opinion before the case was appealed
8 to the court of appeals.

9 One last point I would like to make is that our argu-
10 ment regarding the validity of the statute does not depend on
11 factual showings in the district court regarding the adequacy
12 of alternatives. In fact, we believe the district court pro-
13 perly dismissed the complaint the first time around. And that
14 is because the effectiveness of the alternative means of
15 delivery that appellees have is totally unaffected by the
16 presence or absence of a mailbox. Congress is not obligated by
17 the First Amendment to provide a postal service or mailboxes
18 and in the absence, if Congress declined to do so, there could
19 be no First Amendment argument that Congress was somehow re-
20 quired to furnish postal boxes for the delivery of mail. And
21 since the mere placement of a postal box on a residence does not
22 change the effectiveness of the available alternatives.

23 I see my time has expired. Thank you.

24 MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The
25 case is submitted.

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(Whereupon, at 11:18 o'clock a.m., the case in the
above-entitled matter was submitted.)

CERTIFICATE

1
2 North American Reporting hereby certifies that the
3 attached pages represent an accurate transcript of electronic
4 sound recording of the oral argument before the Supreme Court
5 of the United States in the matter of:

6 No. 80-608

7 UNITED STATES POSTAL SERVICE

8 V.

9 COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS ET AL.

10
11 and that these pages constitute the original transcript of the
12 proceedings for the records of the Court.

13 BY: Will T. Wilson

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