

In the  
**Supreme Court of the United States**

MICHAEL HEFFRON, ETC., ET AL., )

PETITIONERS, )

V. )

INTERNATIONAL SOCIETY FOR KRISHNA )  
CONSCIOUSNESS, INC., ET AL. )

No. 80-795

Washington, D.C.  
April 20, 1981

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ORIGINAL



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INTERNATIONAL SOCIETY FOR KRISHNA :  
CONSCIOUSNESS, INC., ET AL. :  
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Washington, D. C.  
Monday, April 20, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 1:11 o'clock p.m.

APPEARANCES:

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Cambridge, Massachusetts 02138; on behalf of the  
Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Heffron v. International Society for Krishna Consciousness. Mr. Harbison.

MR. HARBISON: Thank you, Your Honor.

ORAL ARGUMENT OF KENT G. HARBISON, ESQ.,  
ON BEHALF OF THE RESPONDENTS

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

My name is Kent Harbison and I represent the petitioners in this case, those Minnesota officials charged with the responsibility of managing the annual Minnesota State Fair. The question before this Court is whether that State Fair, consistent with the First Amendment, may enforce a rule that essentially provides that all those persons or organizations who participate in the annual affair who desire to sell products, solicit monetary donations, or distribute literature or any other materials, whether it be flags, flowers, or whatever, may do so, but only from rented booths or similar fixed locations on the ground.

This case began in August of 1977 when the respondents, the Krishna Society, commenced a lawsuit in the state district court and obtained a temporary restraining order from that court enjoining the fair from enforcing that rule as it applies to them during that year's fair. The restraining order,



1 however, also enjoined the Krishnas themselves from selling any  
2 of these items that I've mentioned on a peripatetic basis  
3 throughout the fairgrounds. In other words, the effect of that  
4 restraining order was to say, the state fair cannot require  
5 these respondents to engage in these activities only at a  
6 booth, but they must be permitted to do it throughout the fair-  
7 grounds.

8 QUESTION: Mr. Harbison, does the record show what  
9 happened in succeeding years?

10 MR. HARBISON: Since that restraining order?

11 QUESTION: You spoke of the 1977 fair. What about  
12 '78, '79, '80?

13 MR. HARBISON: Your Honor, the restraining order ap-  
14 plied to the '77 fair. In 1978, just before the 1978 fair,  
15 the state district court granted summary judgment in favor of  
16 the state fair. Therefore, the booth rule was applied during  
17 the 1978 fair because the state had received a favorable deci-  
18 sion. That was then appealed by the respondents to the Minne-  
19 sota Supreme Court which reversed that decision in a 5-to-3  
20 opinion. That decision did not come down until, as I recall it,  
21 just before the 1980 fair. This court then accepted the case to  
22 review it in January of this year.

23 QUESTION: Well, let me ask specifically, did the  
24 Krishna group have a booth in '78, '79, or '80, and did they solicit  
25 at all on the grounds during those years?

1 MR. HARBISON: Your Honor, they did not have a booth  
2 and the record doesn't indicate whether or not they solicited  
3 during the '78 or '79 or '80 fairs, in part because the record,  
4 the trial court record was closed at that time.

5 QUESTION: Mr. Harbison, following up on Justice  
6 Blackmun's question, at pages 35 and 36 of your brief, at  
7 the bottom of the page you make the statement, "in fact, even  
8 under current state fair policy, Krishnas could proselytize  
9 among and speak with fairgoers and then direct interested donors  
10 or purchasers to their booth."

11 Now, does that represent a change in the regulation or  
12 does that represent your definition of proselytize as opposed  
13 to solicit? The words "proselytize" and "solicit" have been  
14 used kind of interchangeably and confusingly, given all the  
15 court opinions and briefs in the case.

16 MR. HARBISON: I'll attempt to see if I can add some  
17 definition to that. The policy has always been, not just at  
18 that time or even now, under the booth rule -- and that's the  
19 rule we're talking about here -- that the state fair would not  
20 try to prevent anyone from engaging in oral conversations, and  
21 the phrase "proselytizing," the way I've intended to use it in  
22 the brief and I think the way the Minnesota Supreme Court viewed  
23 it, meant the practice of talking to someone and trying to con-  
24 vert them to a particular group's religious or political beliefs.  
25 That statement on pages 35 and 36 is not meant to indicate that

1 that's somehow a change of policy. That's the way it has al-  
2 ways been under the booth rule.

3 QUESTION: That is, other fairgoers could -- ?

4 MR. HARBISON: Anyone, Your Honor. In fact --

5 QUESTION: Or anybody inside the premises could try to  
6 convince anybody else of the wisdom of his religious or other  
7 ideological beliefs and direct such a person to the Krishna  
8 booth?

9 MR. HARBISON: Exactly right, Your Honor. In fact,  
10 the only prerequisite to gaining entrance to access inside the  
11 fairgrounds is the payment of a customary admission fee. That's  
12 the only prerequisite. Once a person gets into the fairgrounds,  
13 the booth rule has no relationship to them whatsoever so long  
14 as they engage in the activities you're describing.

15 QUESTION: So long as they don't try to collect money  
16 or sell something?

17 MR. HARBISON: So long as they don't try to collect  
18 money or sell things or distribute things in that connection.

19 QUESTION: Well, but, it does prevent the distribu-  
20 tion of any piece of paper? If the man -- if one of the solici-  
21 tors makes a speech to somebody, which you say he can do, but  
22 then says, here's a copy of what I said, he may not do that?

23 MR. HARBISON: That he may not distribute literature  
24 or any other kinds of materials.

25 QUESTION: Yes, all right.



1 MR. HARBISON: And part of the reason as indicated  
2 in this case, the record shows that with respect to these  
3 respondents -- and I think they indicate this in paragraph 11  
4 of the stipulation -- that they don't merely want to just dis-  
5 tribute the flowers and the books and the magazines and the  
6 buttons or whatever it may be, but indeed, they want to collect  
7 money for them. So there is always the monetary exchange that  
8 accompanies that sort of activity.

9 I'd like to give the Court a little bit of a factual  
10 outline of what the fair is like and the types of crowds and  
11 congestion that we're describing in our brief. The fair is held  
12 every year for a 12-day period in a permanently enclosed fair-  
13 grounds occupying about 125 acres in St. Paul, Minnesota.

14 QUESTION: How many acres of that are actually devoted  
15 to booths?

16 MR. HARBISON: Your Honor, only about 40 to 45 of  
17 those acres, or about one-third of that area, comprises that  
18 part of the fairgrounds where most of the booth operations and  
19 the fairgoing traffic occurs. The rest of it is parking lots  
20 and storage facilities and so forth.

21 QUESTION: What else is there? An athletic field?  
22 Or a racetrack, anything like that?

23 MR. HARBISON: There's a racetrack, Your Honor.  
24 There's a racetrack that's connected with the grandstand that  
25 -- I don't think the record indicates -- but it seats several

1 thousand people. There are in an average year more than 1.3  
2 million people who attend this 12-day event and I emphasize it's  
3 not merely just a location, but it is an event that the state  
4 stages for a limited period each year. That breaks down to  
5 about 115,000 people per day during the week in this 40-to-45  
6 acre area, and approximately 160,000 people per day on weekends.

7 And as I said, the only requirement for those people  
8 to get into the fairgrounds is if they pay the customary admis-  
9 sion fee.

10 QUESTION: Has it always been that size, or was it  
11 expanded after the automobile age came along?

12 MR. HARBISON: Your Honor, I personally don't know  
13 that and I don't think the record indicates that but my under-  
14 standing is that the Minnesota State Fair has for many years  
15 been among the top two or three state fairs in the country in  
16 terms of size and number of fairgoers. The booth rule that  
17 we're talking about is an inherent inseparable part of the  
18 state fair, and that's in part because the state fair has a  
19 system called the space rental system. And under that the  
20 state fair enters into lease agreements with all these organiza-  
21 tions and people who desire to sell and solicit and distribute  
22 materials. Under these lease agreements these people and  
23 organizations are required to conduct these activities at a  
24 booth that requires them to post an identification sign that  
25 clearly in some manner informs the fairgoing public as to who

1 they are or at least gives them some idea of the nature of the  
2 booth operation.

3 QUESTION: When you speak of the booths, are you in-  
4 cluding under that term the halls and areas where they have  
5 farm machinery and other machinery?

6 MR. HARBISON: Yes, Your Honor. The booth rule in a  
7 sense is somewhat of a misnomer in that we're not talking only  
8 about little stands and booths but I am using the term to mean  
9 fixed locations generally. Sometimes it's inside buildings,  
10 sometimes it's a location known as Machinery Hill that perhaps  
11 Your Honor is referring to.

12 QUESTION: Is the statement in your joint appendix at  
13 A-49 - A-52 listing all the organizations, the Seventh Day  
14 Adventists, the Lutheran Council, Abortion Rights Council, the  
15 American Association for Retired Persons, et cetera, are those  
16 all people who have rented booths?

17 MR. HARBISON: Your Honor, these are all organizations  
18 that have rented booths for a number of years from the state  
19 fair. In fact, there are approximately 1,400 booth operations  
20 on the fairgrounds during the period covered by this case, and  
21 these organizations that you're referring to, Your Honor, repre-  
22 sent at least 40 of the organizations who at the time were con-  
23 sidered to qualify probably as religious or political or news  
24 media type organizations. I think under the respondents'  
25 current proposal in their brief, that this be expanded to



1 include charitable and noncommercial organizations as well.

2 I think it's likely that a significant number, in  
3 addition to these, of the 1,400 booth operators would qualify  
4 under that definition, whatever the definition may be.

5 But the rule, again, doesn't have any effect whatso-  
6 ever on the ability or the right of anyone to engage in some  
7 communications or proselytizing, however you want to phrase it.  
8 It relates primarily to the distribution and the monetary ac-  
9 tivities. The respondents in this case are a religious organi-  
10 zation whose members engage in an activity known as Sankirtan.  
11 That consists of a number of aspects, singing, dancing, chant-  
12 ing, selling not only books but other tokens, and soliciting  
13 donations.

14 The first aspects of that, the first three, the sing-  
15 ing, dancing, and chanting, the respondents don't claim or aren't  
16 pressing this Court or any other court that we're aware of as  
17 covered by their First Amendment arguments. In other words,  
18 they're not -- perhaps they would be covered by it, I suppose,  
19 but they're not pressing those claims. We're only worried  
20 about the latter three.

21 QUESTION: Suppose the American Legion Drum and Bugle  
22 Corps wanted to have a parade through the streets and through  
23 the area to stimulate patriotic reactions, could they do that  
24 under these regulations?

25 MR. HARBISON: Your Honor, they would not be able to

1 do that, I think. And not only so much because of the booth  
2 rule but because of the state fair management's inherent respon-  
3 sibility, as this Court recognized in Cox v. New Hampshire,  
4 which involved public streets, the responsibility to maintain  
5 some order so that they're not overlapping parades, if you will.  
6 And I suggest that in this case there is even more evidence than  
7 there was in Cox v. New Hampshire that that sort of conflict  
8 would be posed. The state fair would have a right and an obli-  
9 gation, in fact, to the public to control that sort of activity.  
10 It doesn't mean that it couldn't occur. It just means it would  
11 have to be done in an orderly fashion so that there would be  
12 some order in an already crowded area, 40 to 45 acres, which on a  
13 typical day would have between 100,000 and 200,000 people.

14 I'd like to mention one more factual point here,  
15 I think that is of interest to this case, and that is, after  
16 the 1977 restraining order, there were about 17 or 18 members  
17 of ISKCON or Krishnas who did participate in the fair and  
18 engage in these activities outside the confines of a booth.  
19 That was consistent with the restraining order. What was not  
20 consistent, however, was the fact that they did sell, they did  
21 engage in sales. The restraining order basically said that if  
22 you wish to sell something you still have to do that from a  
23 booth, but the other aspects of the booth rule we enjoin --  
24 the court, meaning "we" -- enjoin as to the Krishnas.

25 In addition, the record shows that even just during

1 this five or six-day period when these sales and solicitations  
2 were taking place, the Krishnas represented -- I should say, mis-  
3 represented themselves to the potential donors and purchasers,  
4 indicating that they represented something called the Division  
5 of Natural Resources, and schools for needy and handicapped  
6 children, drug treatment programs, and indeed the state fair it-  
7 self. And there is also evidence that these sorts of things  
8 took place with respect to donors who were minors.

9       It's been suggested by the respondents that this booth  
10 rule is a totally preclusive regulation, and it strikes me that  
11 if that were the case it would be virtually impossible ever to  
12 have any sort of regulations that weren't preclusive in some  
13 way, and it would be impossible to apply the balancing test, the  
14 reasonable time, place, and manner test, because there was al-  
15 ways going to be some preclusion. In fact, I refer the Court  
16 to the alternative suggested by the Minnesota Supreme Court and  
17 by the respondents themselves as alleging, allegedly, less  
18 restrictive alternatives. They themselves involve some preclu-  
19 sive aspects and again, the booth rule, not only does and  
20 doesn't do what I've already discussed, but it doesn't give  
21 the state fair or any state official any discretion whatsoever  
22 to determine whether or not someone shall abide by the rule or  
23 whether they shall not. It's applied nondiscriminatorily on  
24 its face, and as applied it has absolutely no relationship to  
25 the ideology or the content of anyone's political or religious



1 beliefs. And as I said, it doesn't prohibit any sort of oral  
2 proselytizing or oral conversations at all.

3 One of the things at this stage of the case that I  
4 think is critical is that the respondents have now abandoned  
5 what I believe to be the basis, the key basis, for the Minne-  
6 sota Supreme Court's decision. That is, they're no longer  
7 making a claim that they are entitled to a single exemption  
8 from the booth rule because of some unique status that they have  
9 because of this practice of Sankirtan.

10 QUESTION: You mean they've abandoned the Sankirtan  
11 argument, do you think?

12 MR. HARBISON: It may be overstating it to say they  
13 have totally abandoned it. It sounds to me in their brief now  
14 as if they're making some sort of an alternative argument.  
15 But what sticks out to me, Your Honor, is the fact that I think  
16 they are recognizing that those aspects of Sankirtan that in-  
17 volve religious solicitations or whatever are no different than  
18 those of any other political or religious organization.

19 QUESTION: Well, at page 47 of their brief they  
20 say, "Respondents seek no unique treatment within this category."

21 I would take that to mean that they would agree that  
22 other organizations should be treated the same as they should.

23 MR. HARBISON: Exactly, Your Honor, and that's my  
24 point.

25 QUESTION: Or a candidate for a political office?

1 MR. HARBISON: Pardon me?

2 QUESTION: Or a candidate for a political office, I  
3 suppose.

4 MR. HARBISON: I would think so, Your Honor. I don't  
5 see how the free exercise rights could be elevated over free  
6 speech or free association rights.

7 QUESTION: Do the candidates and the parties have  
8 booths?

9 MR. HARBISON: Yes, Your Honor, they do. There are  
10 absolutely no exceptions to the booth rule with respect to the  
11 sales and monetary exchanges and distributions of materials.

12 QUESTION: Incidentally, your justifications have  
13 been, as I recall it, safety and the prevention of fraudulent  
14 practices. On the latter, prevention of fraudulent practices,  
15 how does a prohibition against distribution of literature fur-  
16 ther that interest? I'm not speaking now of the fund raising  
17 but the distribution of --

18 MR. HARBISON: Your Honor, in this case it's impor-  
19 tant. It still has a relevance.

20 QUESTION: I gather a political candidate can't dis-  
21 tribute a little --

22 ME. HARBISON: Stickers or --

23 QUESTION: Sticker; whatever.

24 MR. HARBISON: Yes, Your Honor, that's right. But in  
25 this case there is still some relevance regarding the control

1 on fraudulent practices. Because if you look at the record,  
2 and even the stipulation, again, in paragraph 11, the Respon-  
3 dents don't merely want to just distribute the books or the  
4 flowers or the incense or the flags. They want to get money  
5 for them. Now, whether that call that a sale or a donation,  
6 it's not just a pure distribution activity.

7 QUESTION: Well, I don't quite -- how does that make  
8 it fraudulent?

9 MR. HARBISON: Because of the fact that there is  
10 money involved, Your Honor, and the record already indicates  
11 that they have in getting this money have represented them-  
12 selves to be agents of organizations for which they are not.  
13 And beyond that, with respect --

14 QUESTION: Couldn't they do that in a booth?

15 MR. HARBISON: Your Honor, they could do that in a  
16 booth and we don't mean to suggest that deceptive sales don't  
17 take place at booths, they surely do. But what the booth  
18 rule does is provide some accountability, some control of the  
19 fair, because the booth operators have a contract with the  
20 fair, the fair knows who the owners and operators of the booth  
21 are, they know where they're located, the booths must have iden-  
22 tification signs identifying who they are and what their pur-  
23 poses are.

24 QUESTION: Well, I gather, Mr. Harbison, your answer  
25 to me is that prevention of deceptive practices in connection



1 with the distribution of circulars and that sort of thing, is  
2 only when joined with effort to sell. Is that it? I mean, the  
3 political candidate who does nothing but pass them around, you  
4 would not defend that as necessary to -- ?

5 MR. HARBISON: Your Honor, I think that it's possible  
6 that in a pure distribution setting without any monetary exchange  
7 that it's still possible to have some misrepresentation as to  
8 what it is, whether it be a record, as it was in the New York  
9 case, or --

10 QUESTION: Well, again, I go to the political candi-  
11 date. He just wants to hand out something with his picture on  
12 it and something about his biography or something like that.

13 MR. HARBISON: I think, Your Honor, it's still possi-  
14 ble to have that but beyond that there are other public purposes  
15 that this booth rule serves. And in fact, the Minnesota Supreme  
16 Court expressly found that even the public purpose, the govern-  
17 mental interest of providing order and in traffic control and  
18 minimizing congestion in an already crowded place is a substan-  
19 tial governmental interest that is significantly furthered by  
20 the booth rule.

21 QUESTION: How about littering? Is there any -- ?

22 MR. HARBISON: Your Honor, littering would be a  
23 problem under that, but we don't advance that as a justifica-  
24 tion for the rule.

25 QUESTION: Well, P. T. Barnum would roll over in his

1 grave if deception were absolutely prohibited at state fairs.

2 QUESTION: P. T. Barnum wouldn't be the only one.

3 MR. HARBISON: We wouldn't have egresses, I suppose,  
4 Your Honor. Well, I think -- we know that, we recognize that,  
5 Your Honor. But what I'm saying is, to the extent that happens,  
6 and we acknowledge it, the state fair is more able to control  
7 that sort of thing at a booth because they know who the people  
8 are. But, if one has a roving solicitor or vendor walking  
9 among 150,000, 200,000 people on a given day, in a 40- to 45-  
10 acre area, and sells somebody a record that's supposed to be a  
11 religious record and it turns out to be something totally dif-  
12 ferent, or any other example, by the time that the purchaser  
13 or the donor is aware of that, there's no way you can do any-  
14 thing about it. Now, it might be a little bit easier to pick  
15 out somebody in this kind of a crowd if they somehow appeared  
16 unique, but the indications are that these roving vendors and  
17 solicitors look pretty much like everyone else.

18 QUESTION: Mr. Harbison, I understand what you're  
19 saying when the money changes hand. But part of the attack on  
20 the rule is an overbreadth attack, that it's overbroad because  
21 it covers the handout of written material even though these  
22 people want to get money for it. How do you defend the prohi-  
23 bition if you don't rely on littering? How do you defend the  
24 prohibition of handing out material for no money?

25 MR. HARBISON: With respect to the overbreadth attack

1 even, it seems to me, under this Court's decisions such as in  
2 Broadrick, even in First Amendment cases, that should not auto-  
3 matically be applied and in fact, I think, the phrase, "sub-  
4 stantial" --

5 QUESTION: Well, let's assume for the moment -- I mean,  
6 one argument you make is there should be no overbreadth analy-  
7 sis. But assume for a moment we were going to say, yes, we'll  
8 look at it under overbreadth. Do you defend the rule to --  
9 say, the plaintiffs here just wanted to hand out leaflets like  
10 a political candidate. Do you defend the rule as applied just  
11 to that and, if so, why, if it's not based on littering?

12 MR. HARBISON: Well, Your Honor, that is just one com-  
13 ponent of it. But beyond that --

14 QUESTION: I want to know what your justification  
15 for that component is.

16 MR. HARBISON: Our argument is that it -- especially  
17 in contrast with the way the fairgrounds and the fair is set up  
18 now, if you have someone walking around the fairgrounds handing  
19 out materials -- and I think that it would be very difficult to  
20 start drawing lines between the kinds of things that would be  
21 distributed, but it seems to me that if you had that sort of  
22 activity going on with not just the Krishnas but 10 or 20 or 30  
23 representatives from perhaps 30 to 60 or 70 groups, that inevi-  
24 tably is going to draw more attention and going to cause or  
25 create more or less moving pockets or moving congested crowds,



1 because of the fact that someone is doing something unique on  
2 the fairgrounds, especially giving something away free, I think  
3 that's going to --

4 QUESTION: It's a card that says, vote for me for  
5 county assessor, or something, but it's a --

6 MR. HARBISON: Your Honor, but my point would be, with  
7 respect to that, that those fairgoers may not know that right  
8 away until they actually get up there and receive it, but if all  
9 of a sudden the crowd becomes aware of the fact that dozens of  
10 people are walking around passing out materials and they're  
11 going to inevitably be attracted by that. Whereas, they wouldn't  
12 be if people were just talking. That's how --

13 QUESTION: Well, you -- I take it that if the county  
14 officer who is running for office puts a sign on his back, vote  
15 for me, with his picture on, or on his hat, on his straw  
16 hat, you'd let him do that, and you'd let him stop people and  
17 try them into voting for him. And it might even be that it  
18 would be simpler to let him pass out a card rather than to  
19 try to buttonhole people and talk to them.

20 MR. HARBISON: Your Honor, that sort of thing, to my  
21 knowledge of the record, hasn't happened, and my point would  
22 be that the booth rule doesn't have to be perfect. What it has  
23 to be is a reasonable attempt to accommodate a number of con-  
24 flicting interests.

25 QUESTION: So, in short, your answer to my brother

1 Stevens, I gather, is you justify it on the basis of crowd con-  
2 trol or traffic control. Is that it?

3 MR. HARBISON: Yes, Your Honor. It is also related,  
4 I would think, to the protection of the fairgoers' rights of  
5 privacy themselves, particularly when we're talking about the  
6 potential of dozens or maybe several hundred solicitors.

7 QUESTION: Incidentally, Mr. Harbison, when did the  
8 Krishnas first request booth space at this fair?

9 MR. HARBISON: Your Honor, I don't recall if the re-  
10 cord indicates that, but to my knowledge it was sometime in  
11 May or June of 1977.

12 QUESTION: And was this after this booth rule had  
13 first been promulgated?

14 MR. HARBISON: Your Honor, this booth rule has been  
15 in existence since 1966, at least, and that's before the  
16 Krishnas were even in this country.

17 QUESTION: So that at least its promulgation had  
18 nothing to do with the arrival of the Krishnas?

19 MR. HARBISON: Absolutely nothing. In fact, Your  
20 Honor, they did not apply for booth space. They were informed  
21 that the booth rule existed and they informed the fair that  
22 they didn't feel they had to submit to it.

23 I'd like to make one comment about another argument  
24 that's raised in the respondents' brief, and that is that the  
25 primary purpose, despite what I've just gone through on these

1 other purposes, the primary purpose of this rule is alleged to  
2 be to insulate potentially receptive listeners or audiences  
3 from all communications. They have to take some affirmative  
4 step. That is just plain wrong. First, it seems to me that  
5 there is implicit in that some sort of improper motivation and  
6 I think the comment I just made about when the booth rule was  
7 enacted cuts against that. But, the only difference with  
8 respect to that context, the only difference between a booth  
9 operator and a roving vendor is the ability to pursue and follow  
10 an unwilling audience or listener or purchaser or donor.

11 A booth operator cannot go after a fairgoer who walks  
12 by the booth and declines the sales pitch or the solicitation.

13 QUESTION: Does the record show whether barkers are  
14 permitted outside of the booths or inside the booths?

15 MR. HARBISON: It doesn't show, Your Honor. But I  
16 would think that under the booth rule it's pretty clear that  
17 whether they're standing in front of it or behind it they've  
18 got to stay generally in that location.

19 QUESTION: Who owns the fairgrounds?

20 MR. HARBISON: The State of Minnesota does, Your  
21 Honor.

22 QUESTION: Is this a -- and the booth rule involves  
23 the charge of rentals for the booths, doesn't it?

24 MR. HARBISON: Yes, Your Honor.

25 QUESTION: Is this a revenue raising measure of



1 any consequence?

2 MR. HARBISON: This is, Your Honor. The record is  
3 pretty much silent on that but to my knowledge the state fair  
4 does not even receive a legislative appropriation from the State  
5 of Minnesota. It's a self --

6 QUESTION: Self-supporting?

7 MR. HARBISON: -- sustaining, self-supporting enter-  
8 prise.

9 QUESTION: And how much is raised by these booth  
10 rentals?

11 MR. HARBISON: Your Honor, I don't know and the  
12 record doesn't indicate that. I am sure the total gross  
13 revenues -- and I don't know how it would be broken down, would  
14 be well over a million dollars.

15 I'd like to emphasize one final point here and then  
16 reserve some time for rebuttal, and that is that it seems to me  
17 that the booth rule does not prohibit booth operators from  
18 talking to fairgoers as they walk around, or trying to sell them  
19 something or solicit donations. Roving solicitors simply have  
20 moving booths, that's all it is. But the booth operator doesn't  
21 have the advantage to follow, pursue, harass, however you'd  
22 like to characterize it, fairgoers who aren't interested. And I  
23 submit that's not enough of a justification.

24 The alternatives to the booth rule that are alleged  
25 to be less restrictive are both unworkable and I suspect

1 constitutionally suspect because they would turn what is now a  
2 a non-content-directed rule into a regulation that inherently  
3 is going to require the state fair to look into the content and  
4 the religious basis of the organizations. They're suggesting  
5 that the state fair could do this by registering all organiza-  
6 tions who are charitable or noncommercial, whomever they may be.

7 The problem with that is, how does the fair determine  
8 that? That sounds to me like the kind of regulation this Court  
9 struck down in Cantwell v. Connecticut. I don't think the state  
10 fair, even if they're qualified, would constitutionally be able  
11 to do that. The numerical limitations that have been suggested,  
12 the requirement to wear identification badges, sound nice in  
13 the abstract but in practice they wouldn't work; the state fair  
14 would have no way to guarantee that they were being complied  
15 with. What we have here is not an attempt to suppress communi-  
16 cation but an attempt by the state fair along this less re-  
17 strictive continuum to draw the line.

18 MR. CHIEF JUSTICE BURGER: If you wish to save any  
19 rebuttal time, this is the time to do it.

20 MR. HARBISON: Thank you, Your Honor.

21 MR. CHIEF JUSTICE BURGER: Mr. Tribe.

22 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

23 ON BEHALF OF THE RESPONDENTS

24 MR. TRIBE: Mr. Chief Justice, and may it please the  
25 Court:

1           The state in this case seeks to expel from the open  
2 and public areas of the state fair and to corral in these fixed  
3 booths, which indeed, as Mr. Harbison points out, are sometimes  
4 inside buildings, exercises of speech, press, and religion,  
5 which clearly lie at the very core of the First Amendment.

6           Now, I think a number of the questions that have been  
7 directed to Mr. Harbison expose in a way that perhaps the  
8 record and the briefs alone would not have done quite so drama-  
9 tically the sweep and breadth of this rule. Mr. Justice White  
10 asked, what about a politician walking around with information  
11 on a sign? And Mr. Harbison says, perhaps that would be allowed.  
12 But it appears, in the stipulated facts, as one might expect,  
13 since a rule against exhibiting or distributing literature can  
14 hardly draw much of a line between what you wear on your back  
15 and what you put in your palm and what you hand to someone, it  
16 appears that that might not be allowed at all.

17           QUESTION: Do we have to decide that issue here?

18           MR. TRIBE: I think we needn't urge this Court to  
19 reach that issue, but it does make clear how broad the rule is.

20           QUESTION: When someone puts one of these boards on  
21 back and front like advertising for a restaurant, then we'll  
22 decide that case.

23           MR. TRIBE: Well, the overbreadth position that we  
24 take here, Mr. Chief Justice, we think is well founded in the  
25 Schaumburg case itself. That is, we are dealing here with



1 activity that is hardly at the periphery of the First Amendment.  
2 We're dealing here with core First Amendment activity, distri-  
3 buting literature, and the fact that the law does reach that  
4 far is one of the reasons that this Court should strike it  
5 down.

6 QUESTION: But aren't there going to be a large number  
7 of people, as suggested in Justice Todd's dissent, at A-73 of  
8 the Joint Appendix, who are going to be able to make the same  
9 claim as your clients, that they should be able to freely roam  
10 and proselytize? And he comments there that under the existing  
11 rule fair officials cannot arbitrarily determine that some  
12 exhibitors are free to roam the fair grounds while others are  
13 not.

14 MR. TRIBE: No, it's not arbitrary. It's simply a  
15 flat exclusion, and I think that, Mr. Justice Rehnquist, the  
16 dissent below rightly pointed out that we were not claiming  
17 any special treatment. Others would potentially be eligible  
18 to seek exemption. But as this Court last month said in  
19 Thomas v. Indiana Review Board, simply conjuring up an unmanage-  
20 able number of requests for exemptions without proof in the  
21 record that it would indeed be unmanageable through some neutral  
22 feeling on numbers, is not a permissible basis for suppressing  
23 protected activity.

24 QUESTION: But when you have it in the record, all  
25 that list of people who have previously paid for booths,

1 presumably all of them would do the same thing your clients  
2 have done.

3 MR. TRIBE: I'm afraid, Mr. Justice Rehnquist, I can't  
4 share that presumption. The business of wandering around in  
5 the heat of a Minnesota State Fair hoping to attract attention  
6 is not an obviously pleasant alternative to a nicely rented,  
7 probably air-conditioned booth.

8 QUESTION: I thought that Minnesota was a cool state.

9 MR. TRIBE: Well, I guess that the decision will not  
10 turn on the temperature of Minnesota in the summer.

11 QUESTION: Mr. Tribe, did I understand you just to sug-  
12 gest that you've abandoned the uniqueness, Sankirtan argument?

13 MR. TRIBE: No, we certainly haven't abandoned the  
14 argument that the claim is stronger here, nor did we argue be-  
15 low, which is suggested by some notion of abandonment, that a  
16 special exemption was warranted. As Justice Todd pointed out  
17 in his dissent, on page 72 --

18 QUESTION: Your position now is not that you're en-  
19 titled to special consideration based on the Sankirtan argument,  
20 is that right?

21 MR. TRIBE: That's correct. We think that that makes  
22 the claim even more dramatic, but we believe that it would not  
23 be principled to limit the exemption just to one religious group.

24 QUESTION: While I have you interrupted, do you agree  
25 with your colleague that this booth rule has nothing to do with

1 the arrival, chronologically, with the -- ?

2 MR. TRIBE: The language of the rule, we agree, pre-  
3 dates their arrival, but it's interesting to note that the rule  
4 on its face says nothing about solicitation. It's simply been  
5 interpreted to encompass solicitation now. And the record  
6 doesn't itself illuminate the question of why the rule has been  
7 broadened to deal with solicitation. In light of the problem  
8 suggested, Mr. Justice Rehnquist, by your question, about the  
9 degree to which one is genuinely free in the State Fair of  
10 Minnesota under this rule, looked at on its face, to wander  
11 around and proselytize orally.

12 We are assured by the Attorney General of Minnesota  
13 that one could quite freely indicate verbally, as long as one  
14 didn't have a sign on or hand out anything, that one repre-  
15 sented a certain religion which was in need of funds, that  
16 there was a booth back there, that contributions might be made  
17 at the booth. I am at a loss to know where the line is ever  
18 going to be drawn between that and solicitation.

19 QUESTION: Mr. Tribe, I read recently, and I wouldn't  
20 want to vouch for what I read in the newspaper, but it suggested  
21 that there were 153 religious organizations in the State of  
22 California alone that would qualify under this category. Now  
23 assume that's very high. Could we take judicial notice, do you  
24 think, that there must be at least 100 religious organiza-  
25 tions in the United States that could avail themselves of what



1 you are urging?

2 MR. TRIBE: I am certain you could, Mr. Chief Justice.  
3 And if you added political and charitable organizations, there  
4 might be more still. But even if you take the Attorney Gene-  
5 ral's representation and attempt to paint the chaos at its  
6 worst, that perhaps there would be a thousand proselytizers  
7 and solicitors and distributors in an area where there are over  
8 115,000 visitors a day, even if we assume at worst that one out  
9 of 100 people is trying to persuade someone else to give money  
10 to a fledgling religion or to a rising candidacy, it seems to  
11 me the proposition that that in itself is the sort of specter  
12 the state can shut down protected speech and religious exercise  
13 to avoid will be consistent with the judgments of this Court.

14 QUESTION: That to me isn't a specter. I mean, the  
15 primary purpose of state fairs in their origin was pie contests  
16 and corn contests and so forth.

17 MR. TRIBE: So it isn't all that bad.

18 QUESTION: What?

19 MR. TRIBE: So it isn't all that bad if all this  
20 should materialize, I suppose.

21 QUESTION: Well, if you have all of these roving  
22 groups around the pedestrian malls, they will come to take over  
23 the state fair and the kind of agricultural aspect of the thing  
24 will totally disappear.

25 MR. TRIBE: But I'm curious why that hasn't happened

1 in state fair after state fair where the lower courts have  
2 ruled at the behest of the Krishna Consciousness group that it  
3 was unconstitutional to ban solicitation and distribution.

4 QUESTION: What about the New York district court  
5 ruling?

6 MR. TRIBE: Well, it is true that the New York dis-  
7 trict court ruling now pending in this Court seeking certiorari  
8 before judgment has gone the other way, but in the majority of  
9 cases, in the 4th Circuit, in the 7th Circuit, in the Northern  
10 District of Texas, in a number of cases over the past four or  
11 five years, I would say the trend has been to say that because  
12 this is obviously a public forum, a literal marketplace of ideas,  
13 and because the concerns about congestion and fraud can be more  
14 narrowly met, that there has to be a relaxation of the rule  
15 when it comes to a religious group.

16 QUESTION: Well, is a fairground a "marketplace of  
17 ideas" as much as a marketplace for wares?

18 MR. TRIBE: Well, historically, the fairs of Europe  
19 and Leipzig and in other places surely were primarily religious  
20 activities. They did become more secular but the history of  
21 the Minnesota State Fair, not atypical in this country, shows  
22 that it has been a literal crossroads of cultural, religious,  
23 political, as well as commercial activity. It was the favorite  
24 stopping point of presidential candidates in the early 20th  
25 century. There's no suggestion here that it is a less

1 appropriate place for the exchange of ideas than streets and  
2 parks where people usually go to get someplace or to enjoy  
3 themselves. There is no suggestion that it is less appropriate  
4 in any sense than the other places that this Court has suggested  
5 are public fora. And in this kind of public forum to have a  
6 total ban on even distribution of literature with no commercial  
7 element, as Justice Stevens points out, with no problem of  
8 littering, when there are other methods of dealing with fraud  
9 and congestion, seems to us to be grossly overbroad.

10 QUESTION: Well, Mr. Tribe, would you think the fair  
11 could say, well, there's 150,000 a day, perhaps we could put up  
12 with 500 wandering people who are soliciting and we'll put the  
13 names in a hat and draw by lot as to who gets in that day?

14 MR. TRIBE: I think that putting some reasonable  
15 ceiling numerically, as the respondents in this case have said  
16 they would be willing to live with, is perfectly constitutional.  
17 The fact that something is a public forum -- a courtroom -- a  
18 public forum in which people can come and listen, doesn't mean  
19 that more people than can be accommodated for its purpose must  
20 be permitted to be there.

21 QUESTION: Well, would people be permitted to walk  
22 around this courtroom or any courtroom?

23 MR. TRIBE: It would be so incompatible with the func-  
24 tion and decorum of this courtroom, for the people here to walk  
25 around, in contrast with the state fair, that I'm sure the



1 answer's no.

2 QUESTION: How about out in the halls, where we have  
3 exhibits, and the museum downstairs?

4 MR. TRIBE: I think the quiet and tranquillity and  
5 the educational function of these halls is incompatible with  
6 that kind of wandering, although I must admit I haven't careful-  
7 ly enough thought about it to want to be held to that. A state  
8 fair is at the other end of the spectrum, surely.

9 QUESTION: Is not a state fair fundamentally an edu-  
10 cational function and in a state like Minnesota, agriculture  
11 and agricultural machinery, and a great many other things?

12 MR. TRIBE: But educational, not in the sense that a  
13 library is, where people wander and carefully, quietly, calmly  
14 select. It's educational in the sense that the cross-fire of  
15 ideas and options and opinions makes it a saturation place for  
16 exposure. It's for that very reason that respondents find it such  
17 an attractive and important place to expose people to the possi-  
18 bility that what the respondents believe in really merits their  
19 attention.

20 QUESTION: Well, the lower Great Hall here, to pursue  
21 that, is a museum of sorts and people look at the pictures of  
22 the Justices of times gone by and read their biographies at-  
23 tached, and look at a great many things relating to the Court's  
24 history. They are free to talk about it all they want as long  
25 as they don't create a disturbance. How would the peripatetic

1 missionary be any more or less a problem downstairs than at the  
2 state fair?

3 MR. TRIBE: Well, I suppose, Mr. Chief Justice, that  
4 because people come to this Court for a much more specific  
5 purpose and with a particular event or set of events in mind,  
6 it would not be nearly so difficult to justify the proposition  
7 that the purposes of the Court, like the purposes of a library  
8 or of the White House or of some other special building, are  
9 incompatible with quite the same kind of robust, wide open dis-  
10 cussion and distribution and solicitation that clearly is com-  
11 patible with the function of a fair. But again this Court  
12 needn't decide exactly how many institutions and fora are  
13 brought within the principle. There's no claim made by the  
14 State of Minnesota in this case, and no proposition adduced by  
15 the Supreme Court of Minnesota, to the effect that the purposes  
16 of the fair are compromised by the very presence of these peo-  
17 ple. What is claimed, rather, is that if they engage in certain  
18 kinds of excessive or abusive behavior, which incidentally has  
19 not been found here -- there are simply some unverified com-  
20 plaints and four signed complaints -- if they engage in that  
21 kind of behavior, or if they blocked entranceways or get in the  
22 way of certain queues and lines, that they then may pose an  
23 administrative problem.

24 QUESTION: Well, if we felt bound by the Supreme Court  
25 of Minnesota's decision, presumably we would not have granted

1 certiorari.

2 MR. TRIBE: Well, that's -- certainly, Mr. Justice.  
3 And the only kind of deference that I would suggest even re-  
4 motely to that court's decision in this case is that its proxi-  
5 mity to the situation and its sensitivity to the purposes that  
6 the State of Minnesota seeks to advance are at least as likely  
7 to be reflected in its judgment as this Court indicated was  
8 true in *Michael M. v. Superior Court of Sonoma County*, not  
9 long ago, when deference was to the Supreme Court of California  
10 where that Court had upheld rather than struck down a law of  
11 the state that seemed appropriate. We simply suggest that if  
12 the Supreme Court of Minnesota sees no difficulty with less  
13 restrictive modes of achieving the state's goals and if the  
14 Attorney General of Minnesota doesn't indicate that this state  
15 fair is somehow more like the Supreme Court of the United States  
16 than like the fairs of early America and of Europe, that there  
17 is no reason for the Court to view the case in other than the  
18 context of a conventional public forum.

19 QUESTION: Well, would this be different if it came  
20 from the 8th Circuit rather than the Supreme Court of Minne-  
21 sota?

22 MR. TRIBE: I would not have one additional argument  
23 that I think is one that strengthens the case. I think the  
24 result ought to be the same. But I think in this case the fact  
25 that the Supreme Court of Minnesota viewed the record as it did



1 is helpful. It makes it less problematic than it otherwise  
2 might for this Court to speculate on the purposes of the rule  
3 and the way in which it operates. Now, as to the way in which  
4 the rule --

5 QUESTION: Mr. Tribe, I think a minute ago you con-  
6 ceded that a reasonable limitation on numbers would be consti-  
7 tutional?

8 MR. TRIBE: Yes.

9 QUESTION: Would you say the same thing about a rea-  
10 sonable limitation on area?

11 MR. TRIBE: Well, as long as the limitation on area  
12 did not, was not designed to shunt the devotees into places  
13 where in effect they could neither be seen nor heard, as long  
14 as in effect they were prevented simply from blocking access,  
15 then we do think that area limitations, as have been upheld  
16 before, would be okay.

17 QUESTION: Well, what about -- what if they were ex-  
18 cluded from other booths?

19 MR. TRIBE: Excluded from other booths? I suppose  
20 interference with what's going on in other booths is something --

21 QUESTION: Well, I mean, just keep them out. Say, if  
22 they're permitted to solicit, or -- you cannot solicit in some-  
23 body else's booth?

24 MR. TRIBE: I think as long as all people are granted  
25 some --

1 QUESTION: Or in somebody else's -- or in the queues  
2 lined up at somebody else's booth?

3 MR. TRIBE: I think that probably would be all right,  
4 Mr. Justice White.

5 QUESTION: Well, certainly, they can be heard and seen  
6 in a booth that they have.

7 MR. TRIBE: They can be heard and seen, but that's an  
8 important, I think, additional point, and that is, we suggested  
9 that the primary operation of the booth rule, since it's so  
10 obviously overbroad and imprecise with respect to the goals of  
11 fraud, safety, congestion, and the like, is to limit distribu-  
12 tion and receipt of religious literature and solicitation and  
13 the making of religious contributions, to those people who  
14 already know about, feel some sympathy toward, and are willing  
15 to be publicly associated with the very kinds of groups that  
16 are going to need most to engage in a kind of outreach program.  
17 And the response of the Attorney General of Minnesota to the  
18 suggestion that people might actually feel stigmatized at going  
19 over to and publicly indicating interest in the Hare Krishnas,  
20 was interesting. Their response is that it's preposterous to  
21 suppose any such thing, page 15 of their brief; that alleged  
22 fear, they say, does not seem to prevent fairgoers from going  
23 to the carnival freak shows and similar attractions. That is,  
24 they are comparing those who assert fundamental First Amendment  
25 rights to freak shows.

1 QUESTION: Isn't there another response to that argu-  
2 ment, and that is that they do have the opportunity to try to  
3 persuade orally the people to go over to the booth?

4 MR. TRIBE: To some extent. But if they persuade too  
5 effectively, might they not be guilty of soliciting? That is,  
6 as this court thought in Thomas v. Collins, there may not be  
7 any very bright line between saying the union is your only real  
8 source of protection and saying, join the union.

9 QUESTION: I thought it was clear -- maybe I missed  
10 it, but I thought it was clear that it would be perfectly per-  
11 missible to accost somebody in the common grounds of the fair  
12 and say, we would like to sell you some literature which you  
13 must purchase over at our booth. You don't think that's clear?

14 MR. TRIBE: Well, because -- I don't think it is  
15 clear, Mr. Justice Stevens. The reason I don't is that just as  
16 this Court in Primus thought that a representation by the  
17 Attorney General was not necessarily conclusive on the point  
18 when the rule itself is vague, so, too, here, if someone were to  
19 walk around and say, devotion to Krishna Consciousness means  
20 sacrifice of the material things to which you are enslaved,  
21 and that's where you can give money, it would not at all sur-  
22 prise me if that were to be regarded as solicitation. But I  
23 think there is a dilemma here. Because if that is not a forbid-  
24 den form of solicitation, then we fail to understand any con-  
25 ceivable purpose that can be served by banning solicitation and



1 not banning that kind of advocacy. That is, as the court below  
2 in the dissenting opinion, parts of --

3 QUESTION: Well, the purpose is you confine the ex-  
4 change of money to booths.

5 MR. TRIBE: It's not just the exchange of money.  
6 That is, this Court has -- we're not dealing here with a sugges-  
7 tion that although the solicitation may occur out in the fair-  
8 ground, the final transaction must occur in the booth. That was  
9 the compromise suggested by the dissenting opinion, and that is  
10 the solution that one other lower federal court proposed. What  
11 is proposed and defended here is not a rule that you can say  
12 anything you want and hand out literature as long as the money  
13 doesn't change except back at the booth.

14 QUESTION: Well, no, they prohibit the handing out  
15 literature --

16 MR. TRIBE: And even solicitation.

17 QUESTION: But no physical transfer of any chattel one  
18 way or the other except at the booth.

19 MR. TRIBE: And also, but also solicitation. That is,  
20 they also forbid oral as well as written solicitation of con-  
21 tributions in the fairgrounds.

22 QUESTION: Do you agree that your adversary doesn't  
23 read the rule that way?

24 MR. TRIBE: I think he probably does but we will see.  
25 That is, the difference between us is on what constitutes

1 solicitation --

2 QUESTION: On page 35 and 36 of his brief he says,  
3 "In fact, even under current state fair policy, Krishnas could  
4 proselytize among and speak with fairgoers and then direct  
5 interested donors or purchasers to their booth."

6 MR. TRIBE: That's correct, Mr. Justice Rehnquist.  
7 But what I'd be curious to know is whether the Attorney General  
8 of Minnesota can square with this record the proposition that  
9 if the devotees of the Krishna Society were specifically to say  
10 orally in the fairgrounds, please give us one dollar, whether  
11 that would not clearly violate this rule? We believe that  
12 there's no doubt on this record that it would, and the line  
13 drawing --

14 QUESTION: Even if they said, give it at the booth?

15 MR. TRIBE: I think there's nothing in the record to  
16 suggest that the place at which it is ultimately given deter-  
17 mines whether the solicitation of contributions is protected or  
18 unprotected.

19 QUESTION: Well, what's in the record to show that it  
20 is forbidden?

21 MR. TRIBE: Well, that's the whole point of the dis-  
22 agreement between the majority and the dissent.

23 QUESTION: Well, that's not an answer to my question.

24 MR. TRIBE: Well, I suppose the --

25 QUESTION: Just tell me what's in the record.

1 MR. TRIBE: The stipulated facts say that soliciting  
2 in the fairgrounds is forbidden as well as --

3 QUESTION: But not soliciting for membership?

4 MR. TRIBE: Soliciting for contributions, not member  
5 ship.

6 QUESTION: So you can solicit for support?

7 MR. TRIBE: Apparently. Although the line between  
8 soliciting for support and soliciting for contributions is too  
9 vague.

10 QUESTION: So there's nothing in the argument, there's  
11 nothing in the record any more than that. To say that soli-  
12 citing -- does the stipulation say it's permitted or forbidden?

13 MR. TRIBE: It says it's forbidden. Soliciting, by  
14 which it is clear is meant soliciting for contributions, is  
15 forbidden in the fairgrounds outside a booth, and the entire  
16 disagreement between the majority and the dissent below is whe-  
17 ther that is too broad. But even if one were to look at a much  
18 narrower rule that says, it's okay to solicit contributions as  
19 long as the ultimate donation is made at the booth. Nothing has  
20 been shown here to justify that. There is speculation, surely  
21 not meeting this Court's standard in *Thomas v. Indiana Review*  
22 *Board*, that maybe there'd be some confusion if money were to  
23 change hands in the middle of a fair. Well, I find that pre-  
24 posterous. The idea that it would be confusing or a source of  
25 congestion for people to hand money to one another in the



1 thoroughfares of a state fair is rather hard to believe; and  
2 moreover, the notion that it is permissible to limit donations  
3 to a religion to those people who are willing not only to make  
4 the donation but walk a mile in order to make it; that is, go  
5 all the way over to the booth and give their 25 cents or one  
6 dollar. It's also incompatible with the protected nature of  
7 the right to solicit donations. It's as though we were to tell  
8 an ordinary church that it couldn't pass a collection plate but  
9 could only take pledges for remote contributions.

10 QUESTION: Do you think a state is forbidden from  
11 enacting an ordinance that prohibits a devotee of a religion  
12 from suddenly grabbing a pedestrian off the mall and saying,  
13 listen, I want to talk to you about my religion for three or  
14 four minutes. You stay here and listen to me.

15 MR. TRIBE: Yeah. Grabbing? Surely, the state can  
16 forbid that. And in this case there's nothing to suggest that  
17 the right the respondents seek is the right to do anything  
18 coercive or intrusive. There is no denial in the record that  
19 the religion in question teaches that that kind of coercive  
20 behavior is immoral and impermissible.

21 QUESTION: But there are also affidavits of some mis-  
22 representation.

23 MR. TRIBE: Well, there are four sworn affidavits  
24 which have not been subjected to the process of cross-examina-  
25 tion or trial.

1 QUESTION: Were you denied -- did you request and  
2 were denied that opportunity?

3 MR. TRIBE: No, we think that the issue is one of the  
4 facial validity of this rule, and we think it would be far more  
5 pernicious to sacrifice the principle that the validity of the  
6 rule cannot be sustained by a few episodes, even if true, of  
7 misconduct, than to get involved in a sideshow of disputing  
8 those particular episodes. But I simply point out that it's not  
9 as though we have here a finding by the courts below that the  
10 organization is guilty of some kind of systematic misconduct.  
11 It's not as though we have a record on the basis of which such  
12 a finding could be made, and it's not as though we have a rule  
13 that is narrowly targeted to any kind of misconduct. This is  
14 not a rule which specifically forbids particular kinds of  
15 abusive behavior. This is a rule which says, you can't solicit  
16 in the fairgrounds at all. You can't distribute or exhibit  
17 literature in the fairgrounds at all.

18 QUESTION: So is it your position that the rule, the  
19 booth rule, is unconstitutional on its face?

20 MR. TRIBE: On its face with respect to a certain  
21 category of protected behavior, that is, we don't challenge it --

22 QUESTION: Well, isn't every prospective booth ren-  
23 ter's behavior protected by the First Amendment? Aren't we all,  
24 in other words?

25 MR. TRIBE: I suppose there would be some -- well,

1 we're all protected by the First Amendment.

2 QUESTION: Yes.

3 MR. TRIBE: But the distinction this Court drew in  
4 Village of Schaumburg v. Citizens for a Better Environment  
5 between the category of activities as applied to which the  
6 75 percent rule in that case was unconstitutional, and other  
7 kinds of activities, raising money for more conventional  
8 charities unconnected with advocacy as to which it might not  
9 be unconstitutional, is exactly the same kind of distinction as  
10 the one we seek to draw here. That is, just as this Court in  
11 the pair of cases represented by Martin v. Struthers and Breard  
12 v. Alexandria, suggested that it's permissible to forbid door-  
13 to-door distribution of purely commercial material but not per-  
14 missible to do so with respect to religion and politics, so  
15 that kind of a distinction, we think, is vital here.

16 QUESTION: So this booth rule might, you think, be  
17 constitutionally valid as it applied to purely commercial booth  
18 renters?

19 MR. TRIBE: We think it would be. We certainly don't  
20 challenge it.

21 QUESTION: Well, what did the -- didn't the Minnesota  
22 court strike it down on its face?

23 MR. TRIBE: Well, the Minnesota court's opinion said  
24 that it could not constitutionally be applied to these respon-  
25 dents.



1 QUESTION: And therefore what?

2 MR. TRIBE: And therefore, that it was not valid --

3 QUESTION: Isn't your overbreadth argument, though,

4 isn't the bottom line that it's unconstitutional on its face

5 and that if they want to apply it to a permissible category

6 of activity, they should redraw it?

7 MR. TRIBE: Redraw it or more narrowly construe it.

8 That is, I don't think that -- so, this Court --

9 QUESTION: We can't do that. They can't proceed --

10 MR. TRIBE: That's right. We're not asking this

11 Court to do it, but I think that even in Schaumburg --

12 QUESTION: Oh, yes.

13 MR. TRIBE: It was not clear that one had to go back

14 to a legislative drawing board. It might be clearer that a lower

15 court might be able to redraw it.

16 QUESTION: So -- but you don't know what the Minnesota

17 court did?

18 MR. TRIBE: We don't know what they would do. As

19 matters now stood, they said that the rule -- in a footnote

20 they indicated the rule could constitutionally be applied to

21 commercial vendors of literature and of other materials.

22 QUESTION: Did they say whether the ordinance was

23 severable in the sense -- ?

24 MR. TRIBE: They didn't address severability.

25 QUESTION: All they did was enjoin its enforcement

1 against these litigants.

2 MR. TRIBE: That's right. They did not strike it  
3 down on a ground as broad as we think would be appropriate for  
4 this Court.

5 QUESTION: Well, even under their holding I don't  
6 think the candidate for political office could get the benefit  
7 of this rule.

8 MR. TRIBE: Well, the dissenting justices didn't quite  
9 agree. Justice Todd, joined by two other members of that court,  
10 said that although the majority might not have adverted to it,  
11 because the respondents here made no claim for some special  
12 treatment and because no principled line could be drawn between  
13 religion and politics in this context, indeed, other groups  
14 would be exempt.

15 QUESTION: And you agree with that -- ?

16 QUESTION: I'm not sure that the dissenting opinion  
17 is the best guide as to what the majority meant.

18 MR. TRIBE: No, except the majority didn't disagree.

19 QUESTION: Well, yes, their order is very specific  
20 on A-68. It just enjoins the application of the rule to these  
21 litigants.

22 MR. TRIBE: That's right. That is the only order  
23 we think this Court needs to affirm.

24 QUESTION: And it also emphasized the special charac-  
25 ter of these litigants in its opinion.

1 MR. TRIBE: Insofar as that made it easier to decide  
2 the case. What we are --

3 QUESTION: What I'm saying is, they clearly have not  
4 decided anything other than the fact that these litigants are  
5 entitled to relief.

6 QUESTION: But you agree with the dissenters to that  
7 extent?

8 MR. TRIBE: To that extent, Mr. Justice Stewart.  
9 I think it's right that we agree that no principled line could  
10 be drawn and we don't urge this Court on what we think would be  
11 a disingenuous basis to uphold what would be a very narrow de-  
12 cision. We think it really is broader, broader than that,  
13 necessarily.

14 QUESTION: No, we got into this because Justice White  
15 asked you if the rule was invalid on its face or if the lower  
16 court had so held, and I say, it clearly did not so hold.

17 MR. TRIBE: It clearly did not so hold. We think it  
18 clearly is, however, invalid on its face.

19 QUESTION: Would it give you more relief than you got  
20 if it were stricken down on its face?

21 MR. TRIBE: No, not -- I don't think it would give us  
22 any more relief. It might give more solace to a number of  
23 other organizations that believe that the rule inhibits their  
24 First Amendment rights and because we are making an overbroad  
25 attack.



1 QUESTION: Well, why are you entitled to urge us to  
2 declare it unconstitutional on its face?

3 QUESTION: As long as it's unconstitutional as to you?

4 MR. TRIBE: I suppose that it would be an ironic --

5 QUESTION: Overbreadth usually applies when it's not  
6 unconstitutional as to you but it may be as to others, doesn't  
7 it?

8 MR. TRIBE: Well, I suppose the answer is that we are  
9 arguing that whether or not all of the activity in which  
10 respondents have engaged and seek to engage come within the  
11 protected core, we are entitled to have the rule struck down in-  
12 sofar as its enforcement against us with respect to the pro-  
13 posed activities is contemplated. In that sense, even though  
14 clearly we are not among the many other organizations whose  
15 rights we would seek to champion, and even though we are not,  
16 as perhaps the Citizens for a Better Environment was in the  
17 Schaumberg case, in the troublesome position of not even being  
18 able to plausibly claim, or at least not being able convincingly  
19 to show that we are likely to be in the core, we are not invok-  
20 ing overbreadth out of necessity, but it's not a gratuitous  
21 invocation because we do think it important to explain why all  
22 of the allegations about possible misconduct are irrelevant.  
23 They're irrelevant because the claim made here is that it would  
24 not be constitutional to apply the booth rule to prevent the  
25 activities that we in our complaint sought to engage in.

1 QUESTION: But it seems to me there's a refinement  
2 here and that is that theoretically, at least, and I don't know  
3 whether this is the correct answer, the rule might be overbroad  
4 only to the extent that it prohibited the free handing out of  
5 literature. And if the ruling on that ground was the ultimate  
6 decision, that wouldn't do your clients any good.

7 MR. TRIBE: It would do them some good, but they --

8 QUESTION: As I understand it, they don't want to do  
9 that. Part of their mission is to get money --

10 MR. TRIBE: They would much rather do more.

11 QUESTION: Isn't it part of their religious mission  
12 to get the money at the time --

13 MR. TRIBE: It is their religious -- it is --

14 QUESTION: -- they engage in this transaction because  
15 they don't give these things away.

16 MR. TRIBE: That is part of their religious mission,  
17 but it would not be incompatible with the religion if that was  
18 the best that one could possibly do, to hand out literature  
19 which exposed people to the religion and informed them of how  
20 they might make subsequent contributions.

21 I see my time is up. Thank you.

22 MR. CHIEF JUSTICE BURGER: Do you have anything fur-  
23 ther, counsel?

24 MR. HARBISON: Yes, Mr. Chief Justice.

25 MR. CHIEF JUSTICE BURGER: Very well.

1 ORAL ARGUMENT OF KENT G. HARBISON, ESQ.,  
2 ON BEHALF OF THE PETITIONERS -- REBUTTAL

3 MR. HARBISON: I'd like to take up, may it please  
4 the Court, on that very point.

5 Under Minnesota statutes, every law in Minnesota is  
6 severable unless it's expressly provided not to be. Further-  
7 more, the comment that the Minnesota Supreme Court suggested  
8 some lesser restrictive alternatives to the rule has to be taken  
9 with the understanding that their decision was based upon the  
10 assumption that they were dealing only with one organization,  
11 not with potentially 30, 40, 50, 100, whatever it might be.  
12 I suggest that in light of the fact that they found substantial  
13 public purposes furthered by the rule, they would have concluded  
14 very likely that in a different way, because their allegedly  
15 less restrictive alternatives would not fit in the same context.  
16 So the basis for those alternatives is no longer there.

17 Without the booth rule I'm suggesting that the entire  
18 nature of the state fair would be changed drastically and  
19 that's one of the factors this Court has typically looked at,  
20 the nature of the forum here. And I'd like to emphasize that  
21 the event of the annual state fair is not on the same plane,  
22 it's not the same as a public park or a public street corner.

23 QUESTION: Mr. Harbison, can I ask you one question  
24 about the meaning of the rule? I thought I understood it before  
25 but I'm not sure I do now. In the stipulation, the rule is in



1 quoted and it refers to "sale or distribution of any merchandise,  
2 including printed or written material, except under license  
3 issued for /from/ the society and/or from a duly licensed loca-  
4 tion." Now, as I read that, it does contemplate some licenses  
5 for distribution that are roving licenses, in effect. Is that  
6 right?

7 MR. HARBISON: I think the literal language of it on  
8 the face would indicate that, but it's never been applied out-  
9 side the booth context in the Minnesota Supreme Court inter-  
10 pretive --

11 QUESTION: You don't even have any roving hot dog  
12 vendors or anything like that or -- ?

13 MR. HARBISON: No, Your Honor, there are no roving --

14 QUESTION: Good Humor man or anything like that?

15 MR. HARBISON: -- sales activities whatsoever.

16 Thank you.

17 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
18 The case is submitted.

19 (Whereupon, at 2:12 o'clock p.m., the case in the  
20 above-entitled matter was submitted.)  
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CERTIFICATE

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No. 80-795

MICHAEL HEFFRON, ETC., ET AL.

V.

INTERNATIONAL SOCIETY FOR KRISHNA  
CONSCIOUSNESS, INC., ET AL.

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