ORIGINAL

In the

Supreme Court of the United States

CITY OF MESQUITE	)	
	)	
Appellant.	)	
	)	
v.	)	NO. 80-1577
	)	
ALADIN'S CASTLE, INC.,	)	
	)	
Appellee	)	

Washington, D. C.

November 10, 1981

Pages 1 thru 49

ALDERSON REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF MESQUITE,

Appellant,

v. No. 80-1577

ALADDIN'S CASTLE, INC.,

Appellee.

Washington, D. C.

Tuesday, November 10, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:04 o'clock p.m.

APPEARANCES:

ELLAND ARCHER, Esq., City Attorney, Mesquite Texas; on behalf of the Appellant.

PHILIP W. TONE, Esq., Chicago, Ill,; on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in City of Mesquite against Aladdin's Castle, Incorporated.

Mr. Archer, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ELLAND ARCHER, ESQ.

ON BEHALF OF THE APPELLANT

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

The primary question in this case is whether or not the playing of coin-operated machines is a fundamental right. There are other questions, of course. The second important question is which rules of law are applicable to adults and which are applicable to children.

With your permission, I'd like to discuss the fundamental right question first. We think in finding a fundamental right on a par with freedom of speech and religion, right to travel and other important rights that the Court of Appeals used an extremely broad interpretation of the term "association."

Of course, in its broadest terms "association" would encompass all commercial transactions. We realize that. If you rent an automobile, of course, there may be some associational aspects. If you rent a boat, if you rent a motel room, you may have guests in.

QUESTION: Well, if you associate together to fix prices, I suppose that's freedom of association.

MR. ARCHER: Yes, yes. What we're saying is that you can't just take the term "association" in its ordinary sense and apply it as the association that is protected by the Constitution. We feel that there is something more than just mere physical proximity to constitute association protected by the Constitution.

For instance, if you go in a bank to make a loan you're going to talk with people, you're going to meet friends and acquaintances. When you go in the supermarket, when you're at work, you have association with your fellow workers. But these are all matters governed by the law of contract.

I'd like to discuss for just a moment the nature of the transaction that is regulated. What we have here is a simple rental agreement. Generally a customer pays 25 cents for use of a machine, generally from one to three minutes or whatever time it takes. No different from renting a lawn mower or renting a power saw or any other machine.

Now, if this type of transaction is the association that is protected by the Constitution under the decisions of this Court, then every commercial transaction known to man becomes a First Amendment activity. This we feel will weaken the values that have traditionally been upheld by

this Court.

Going to the question of which rules of law are applicable to adults and which are applicable to children, we say children are simply not the same as adults. We don't mean to imply that children have no constitutional rights. Certainly they do. But the rights of children are not always the same as the rights of adults.

I think in the words of Justice Frankfurter's concurring opinion in May versus Anderson, he said it much better than I can: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a state's duty towards children."

As we read the opinion of the Court of Appeals, we feel that the Court of Appeals has relied upon cases that are good cases, but they are cases dealing with something other than children. They deal with race, they deal with adults, they deal in suspect areas, they deal with the right to decide whether or not to bear a child. But they don't deal with the facts at hand. Therefore we feel that these cases are inapplicable.

QUESTION: Mr. Archer, is it the City's position that playing these games is per se harmful to children?

MR. ARCHER: No, I don't think that's our

position. That may be correct, but I don't know that that's our position. I don't know that we have evidence to that effect.

We think that playing them, playing the machines in the actual setting in which it takes place in many cases is harmful, not in every case. We don't claim that in every case there is harm. But we also say that we cannot tailor a law that will fit every establishment in town. There's just no way it can be done.

QUESTION: Is the age matter still in this case?

MR. ARCHER: Yes. In fact, we consider the age question --

QUESTION: The paramount question?

MR. ARCHER: -- the paramount question. We do have a question regarding some language in the ordinance and I don't intend to waive that --

QUESTION: Let me ask you: Didn't the -- wasn't the ordinance declared unconstitutional on both state and federal grounds?

MR. ARCHER: On the language part? No.

QUESTION: On the age, on the age, on the age part.

MR. ARCHER: No, the state court has never reviewed the age question -- or, I'm sorry. Maybe I misunderstood your question.

QUESTION: I thought the claim was being made in this case by your colleague that we can't reach the age issue because it was declared unconstitutional under the state constitution.

MR. ARCHER: Oh, I understand. I thought you meant the state court.

QUESTION: Well, what about that? What about that?

MR. ARCHER: All right. The provision of the state constitution is identical to the federal Constitution. The words may be slightly different, but there's no --

QUESTION: Well, so what if they are? But nevertheless the court -- it was nevertheless held that the state constitution invalidated this position.

MR. ARCHER: Well, but that's not an independent state ground.

QUESTION: Why isn't it an independent ground?

MR. ARCHER: Well, because it's identical. In other words, if a state adopted a constitution --

QUESTION: You wouldn't say that the state court -- would you say the state courts have a rule that they will always interpret their constitutional provisions identically with the federal? Is there such a rule?

MR. ARCHER: Texas has such a rule.

QUESTION: So that they're just forbidden

independently to construe their own constitution?

MR. ARCHER: Oh, I don't think they're forbidden to, but I think since they are similar and since they were patterned after the federal Constitution --

QUESTION: Well, I know. But would you say that it would be a departure from the regular Texas rule if the Texas court said, well, I know the federal courts are holding -- would permit this kind of an ordinance, but we just construe our constitution differently?

MR. ARCHER: I think that would be a substantial departure, because one constitution is patterned after the other and the cases construing one are authorities for the other, and that is the rule of law in Texas. And I think I've covered that in my brief, but I can go into that further if you'd like.

QUESTION: No.

QUESTION: Well, here in any event the holding that both the federal and state Constitutions were violated was a holding of the Fifth Circuit, wasn't it?

MR. ARCHER: Yes.

QUESTION: Not of any Texas court?

MR. ARCHER: No, that's correct.

QUESTION: Does that make a difference on whether or not this rests on an adequate state ground?

MR. ARCHER: I don't think so, because again I

think the Fifth Circuit was simply stating that the two constitutions were identical and that, of course, if it violated one it would obviously violate the other.

QUESTION: Well, to the extent that the judgment rests on the holding that it violates the state constitution, what's the case doing here?

MR. ARCHER: Well, again I don't think it's an independent state ground. I think that they are identical. The state constitution and the federal Constitution mean exactly the same thing. So you couldn't have a federal question without it also -- I mean, you couldn't have violation of the federal Constitution without it also violating the state constitution.

But I don't think that that is the meaning of the jurisdictional statute. I don't think it's --

QUESTION: Well, you're not suggesting, are you, that if indeed you had a state, Texas state court determination of a state constitutional question solely based on the state constitutional question, that that would raise a federal question because the state constitutional provision was the same as the federal Constitution?

MR. ARCHER: Oh, no. I think the state court would have to actually rule on a federal question before it could come to this Court, obviously.

QUESTION: Well, how about a federal court? Would

an action lie under any of the jurisdictional provisions were a federal court to invalidate an ordinance such as this on the grounds that it violated the constitution of a state?

MR. ARCHER: Well, in a diversity case, yes.

QUESTION: Was this case a diversity case?

MR. ARCHER: Yes, this was a diversity case.

Again, the federal question -- the federal rule of law involved is the application of the strict scrutiny test. Now, that is not a state question. There is no state rule of law to that effect.

The Court of Appeals, even in their discussion of the "rational basis," first found that there was a fundamental right, that of association, and then reasoned backwards by placing the burden of proof on the City, saying the City failed to produce evidence to show this and that. Therefore throughout the opinion -- and I realize that we're not appealing from the opinion, we're appealing from the judgment. But I think the judgment is incorrect because of a body of federal law that the Court of Appeals misapplied, not any state law.

There's no state law, strict scrutiny test versus rational basis test doctrine.

Looking at the application of law to children, as I say, I think the Court of Appeals improperly applied rules

of law pertaining to adults or to race and other matters, instead of confining it to children. Obviously, children do not have all the rights that adults have. Children do not choose their domicile. They do not choose the school they wish to attend. They do not in all cases choose the church that they wish to attend.

And while this may be considered private action, it is buttressed at every point by state action. For instance, if a child refuses to reside in the domicile chosen by his parents, he's treated by the state as a runaway. If he refuses to attend the school that his parents choose, he's treated as a truant. If he refuses to do the other things that his parents require him to do, the state makes an exception and allows physical punishment that wouldn't be permissible for an adult.

Of course, many states require a parent's signature for the issuance of a driver's license. Others require a parent's signature for a minor to marry. This is all state action. Of course, there are countless other things in which the state buttresses the action of the parent in not allowing the same rights to minors as adults.

I think the failure of the Court of Appeals to give consideration to these facts is what caused the improper judgment.

QUESTION: Well, this ordinance I gather does make

the distinction, doesn't it, between this kind of entertainment center and other centers where teenagers gather?

MR. ARCHER: This ordinance itself does not. This ordinance simply does not deal with those other questions. But this Court has said many times that we were not required to address all the ills existing in one law or one enactment. I don't think we single out any particular establishment and say, this establishment cannot do this but all others can. We just fail to say anything about the others.

QUESTION: Well, the ordinance does make a distinction, though, doesn't it, between teenagers who play these games and teenagers who are present in the same establishment?

MR. ARCHER: Well, yes. The ordinance does not address the question of being present, but we don't deny that denying them the right to play the games will discourage their presence. We've never denied that.

QUESTION: What is the interest, then, that the City is trying to achieve with the ordinance?

MR. ARCHER: Well, I think it's twofold. I think the first is a financial impact. I think the city fathers feel that the children are spending money on these games that they can ill afford, money that they need --

QUESTION: It's to prevent the children from spending their money?

MR. ARCHER: We think that that is one concern. I think another concern, and the concern that was emphasized by our police department, was some of the things that take place at these establishments, such as drug transfers, fights, contacts by runaways.

QUESTION: But the ordinance doesn't prevent them from going to the centers, right?

MR. ARCHER: Well, not directly. But we assume they go there because they want to play the machines. I don't think they'd go there if they couldn't play the machines, or not in any large number.

QUESTION: Mr. Archer, I want to be sure about a statement I thought you made. You take the position this ordinance is not directed at Aladdin's?

MR. ARCHER: Well, no. It's directed at every establishment in the city.

QUESTION: Isn't it really directed at Aladdin's, period?

MR. ARCHER: No. We had this ordinance in 1973, before we had ever heard of Aladdin's. Now, if they're talking about the amendment, the amendment probably affected Aladdin's and one other place in the city, Funfare, I believe, in another shopping center.

QUESTION: I'm speaking of 1353, enacted just two days after a significant event.

MR. ARCHER: Yes, that ordinance -- there had been a previous ordinance that made an exception to places located in a shopping center. Now, to the extent that it closed that loophole, if you may, then I guess it would be directed to all establishments in shopping center malls, which Aladdin's and I believe one other at that time were the only ones there. Now there are several. At that time Aladdin's and one other were the only ones.

Now, the age regulation that we're seeking to uphold applies to every establishment in town, the Seven Eleven stores that maybe only have one machine and where there are no other customers present, where there's no association involved whatsoever.

QUESTION: Then you can't justify that on the fact that you don't want the children to go to these places where there are drug transactions.

MR. ARCHER: Well, I think that -- well, of course, I say one. You know, I don't know that there's cases where there's never more than one present.

QUESTION: But your point is, the ordinance applies to the Seven Eleven stores, the hotel lobby, and everyplace there's one of these?

MR. ARCHER: Yes. And that would be based more on

the financial impact. But I think most of the establishments have more than one machine, to be candid with you.

But what I'm saying is that there doesn't have to be any association involved because it could just be one machine and it could just be one person present. And I don't know how you'd read association into that.

Frankly, I don't know how you read association into a hundred people being present unless they go there for a common purpose, they're acquainted with each other or they become acquainted after they get there or something.

QUESTION: Well, I wasn't really as concerned with the association point as the reason for the ordinance. The reason for the ordinance has to be, I think, limited to the fact that you don't want the under 17-year-olds to spend 25 cents without the consent of their parents.

MR. ARCHER: Well, unfortunately that's the term that the Appellee uses, spending 25 cents. But there's nothing in the record --

QUESTION: Well, over and over again, maybe they'll spend 25 cents.

MR. ARCHER: Right. In other words, just like if you smoke one cigarette you may smoke another cigarette. If you take one drink you may take a lot of drinks.

QUESTION: Well, why doesn't that rationale apply

to miniature golf courses and the like?

MR. ARCHER: Well, I don't know that we have negated regulation of miniature golf courses. This particular ordinance does not. But I don't think that we have said we do not have the power to regulate miniature golf courses.

I can see distinctions, and again the record is not as strong in this case. We thought we were trying it on the rational basis question rather than the higher level test. But officers can drive by and see people playing on the miniature golf course. They're exposed to public view at all times. I don't know how much difference that makes, but our police department says it makes a difference.

Now, that's not in the record and I don't know if I should even be saying it. But those are some of the things that could have been in the record had we known that we would be held to this type of test.

QUESTION: Well, I can understand that if you're talking about an amusement center. But the ordinance isn't limited to amusement centers. That's why I made the analogy to the miniature golf course. It seems to me it's amusement machines, wherever located -- Seven Eleven, hotel lobbies, pizza joint, whatever it might be.

MR. ARCHER: Yes, I think where it applies to just one machine it is primarily the financial impact. But I

think you'll find in most cases it'll be more than one machine. I don't think any of the places just have -- well, there may be a few. But I think most of them have from two to four, you know, that are not arcades.

QUESTION: Counsel, do you have any doubt that a state or municipality could totally outlaw the use of coin-operated machines?

MR. ARCHER: The state could under the holding of this Court, I believe, in Murphy versus California. The state has not seen fit to do so, and of course we're merely a part of the state. And until we are given permission by the state to totally outlaw them, I don't think we can. The state has given us permission to "regulate" them.

QUESTION: But the Fifth Circuit didn't base its holding of unconstitutionality on the grounds that you had exceeded your power under state law, did it?

MR. ARCHER: Well, to the extent that the state constitution is identical to the federal Constitution, I guess I'd have to say yes. But I don't think they indicated that there was an independent state law grounds, but merely that it was the same as the federal Constitution.

QUESTION: Suppose over a period of time, counsel, the police reported to the authorities, to the council, that a great deal of drug traffic was taking place in three city parks, and there were only three city parks in the city.

Could the council pass an ordinance saying that 17-year-olds could not be in the city parks?

MR. ARCHER: I think we would be a lot closer then to what they're saying here. For one thing, when they go into the park it's not a financial transaction, it's not a business matter. I think that that is more closely akin to, say, being on the streets, a curfew. I doubt that we could. I think we could regulate our parks and we certainly do regulate our parks, regardless of whether anyone may say that we've neglected that area. But we do regulate our parks.

I'd like to speak just a moment on the vagueness question. I think both the District Court and the Court of Appeals failed to read the language "connections with criminal elements" in the context in which it's used.

QUESTION: Has that provision been stricken from the ordinance?

MR. ARCHER: It has, Your Honor. But we do agree with Appellee that it's not moot. We would like to have it --

QUESTION: Why isn't it moot? What controversy is there now about it?

MR. ARCHER: Well, we would like to put it back in if this Court sees fit to allow us to.

QUESTION: Do you want an advisory opinion from us

on that?

MR. ARCHER: Well --

QUESTION: Well, the ordinance just doesn't exist in the form that it was when this case began.

MR. ARCHER: Well, that is correct. But it --

QUESTION: And when the Court of Appeals rendered its judgment.

MR. ARCHER: Yes. But it's only because we're not allowed to by the order of the District Court, and then in turn which was made an order of the Court of Appeals.

QUESTION: Well, you were still appealing. You're the one who brought this case up, aren't you?

MR. ARCHER: Well, we brought it from the --

QUESTION: Court of Appeals to here.

MR. ARCHER: -- Court of Appeals to here.

QUESTION: But meanwhile you amended your ordinance.

MR. ARCHER: Yes, we had already amended the ordinance because we were prohibited from using it.

QUESTION: Well, but certainly you didn't have to amend the ordinance. You could simply comply with the Fifth Circuit's opinion and seek certiorari and get a judgment from this Court seeking to overturn the Fifth Circuit.

MR. ARCHER: Well, yes. But in the meantime we would have other applications and it would be unclear as to

what the status of these applications were.

QUESTION: If you thought you had to obey the order, you didn't need to repeal the ordinance to do it. You could just not have enforced this, that particular criminal elements provision.

MR. ARCHER: That is correct. I realize we could. We felt at the time that that was the best thing to do. But as I say, we would like to reinstate it if this Court should find either that the Appellee had no standing to question the language or that the language is not vague, or both.

The reason we say they have no standing in the context in which this is used, this is not a standard upon which a license is granted. The standard upon which a license is granted is good character. This is simply a direction to the chief of police as to how he is to gather certain intelligence, no different from Laird versus Tatum.

QUESTION: Is there any dispute about that, Mr. Archer, from the other side, your present analysis? It is directed to the chief of police?

MR. ARCHER: Yes. They claim that -- well, no. But they claim because it is directed toward the chief of police that his recommendation in turn will influence the city manager, which in turn will influence the city council and the District Court, and ad infinitum.

We also say, of course, in the context in which

it's used it's not unconstitutionally vague because nobody has to know what it means except the chief of police, and he obviously knows what it means.

If there are no further questions, I'll save the rest of my --

QUESTION: Do you -- well, I can ask the other side. Where is the principal place of business of the Appellee?

MR. ARCHER: The home office? Chicago.

QUESTION: All right, thank you.

MR. ARCHER: Thank you.

CHIEF JUSTICE BURGER: Mr. Tone?

ORAL ARGUMENT OF PHILIP W. TONE, ESQ.,

ON BEHALF OF THE APPELLEE

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

With the Court's permission, I would like to first address the matter of the existence of independent state grounds for the decision. The judgment of the Court of Appeals on the age restriction claim is supported not only by the federal constitutional ground, but by independent state law grounds. The court expressly that the ordinance violated the equal protection and due process clauses of the Texas constitution.

QUESTION: Well, Mr. Tone, suppose that the only

claim that you had made or that your client had made in the federal District Court was under the laws of Texas. Now, certainly in a diversity suit there would be jurisdiction.

MR. TONE: Yes.

QUESTION: And certainly the Court of Appeals could have reviewed it.

MR. TONE: That's correct.

QUESTION: And certainly we could review it here.

MR. TONE: You could on certiorari, Your Honor.

QUESTION: Yes.

MR. TONE: The problem here is that this is here on appeal under Section 1254.

QUESTION: Well, would you say it's an improper appeal?

MR. TONE: No, not so long as this Court --

QUESTION: So the adequate state ground argument is a jurisdictional argument?

MR. TONE: Yes, it's a jurisdictional argument and it says --

QUESTION: But we surely have jurisdiction in a diversity case to pass on state law questions. We hardly ever do. I don't know since I've been here where we ever --

MR. TONE: Your Honor is quite right. But the mechanism by which you would reach the state law question, I

submit, would be to dismiss the appeal under 1254(2) and treat the jurisdictional statement as a petition for certiorari --

QUESTION: Why is that? In a diversity case the Court of Appeals has stricken down a state law.

MR. TONE: Right.

QUESTION: Now, why isn't that a proper appeal here?

MR. TONE: It is a proper appeal. But Section 1254(2) provides specifically that in such an appeal the review on appeal shall be restricted to the federal questions presented. So Congress in 1254(2) has prohibited the Court from considering the state ground.

QUESTION: I see. But if we dismissed the appeal and granted cert?

MR. TONE: Then Your Honors could -- in fact, if the appeal is dismissed, the appropriate procedure according to Stern and Gressman, and I think that's correct, would be to treat the jurisdictional statement as a petition for certiorari under 2103, which commands the Court to do that.

QUESTION: Well, don't you want it both ways, though? You don't want us to consider that, to be able to reach the state ground here, but you want to use the state ground to say we shouldn't reach anything.

MR. TONE: Well, I want to rely on the state

ground, Your Honor, because I --

QUESTION: To avoid reaching any ground, to say that we haven't any jurisdiction.

MR. TONE: No. I say you don't have jurisdiction on appeal. I say also that you do have jurisdiction, if you choose to exercise it, to grant certiorari.

QUESTION: But then have we not, on granting certiorari, on treating it as a cert, denied on the grounds that it was supported by an adequate state grounds?

MR. TONE: Adequacy in that sense, Your Honor, simply means that it is sufficient to support the judgment if correct. It doesn't mean that you have reviewed the merits of the state ground. The point I make is illustrated, if the Court please, by the Hastings case, in which Chief Justice Hughes addressed this very point in the context of a statute allowing appeal by the Government from an order dismissing an indictment where the indictment -- where the order held the indictment invalid either on the ground of the invalidity of the underlying statute or the construction of the statute on which the indictment was based.

And the Chief Justice said in that case that in order to -- that the Court should first examine whether there was an independent ground for the order of the district court. If there was an independent ground that

didn't relate to either the validity of the statute or the construction of the statute, he said the Court would be rendering an advisory opinion by ruling on the questions that were appealable.

And he said that review of a judgment we cannot disturb because it rests on grounds we cannot examine would be an anomaly. And then he used as an analogy the appeal statute which provides for appeal from the highest court of a state. And he said the practice of this Court with respect to such appeals when there is an independent state ground on which the judgment -- which adequately supports the judgment, is to dismiss the appeal.

QUESTION: Do you think Cox Broadcasting has changed that analysis at all?

MR. TONE: I do not think it has, Your Honor. I believe, as I said, Stern and Dressman's position is consistent with mine, and I think that's a correct reading. It seems to me the analysis has to be that it has to be that way.

We are, as the Appellee -- we're entitled to rely on whatever state grounds are available to support the judgment. We're entitled to rely on state grounds even though the Court of Appeals didn't rule on them. And yet when it comes up here under 1254(2) we would be precluded from relying upon state grounds that support the judgment

because this Court is not allowed to examine those grounds under this proviso of 1254(2) that we've been talking about.

QUESTION: What do you think the proper disposition is if we agree with -- if we happen to agree with you? To dismiss the appeal and then, treating it as a cert, to deny cert and dismiss it?

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

QUESTION: Dismiss it as improvidently granted?

MR. TONE: Yes, Your Honor.

QUESTION: Or just deny it?

MR. TONE: Deny it, right. Yes.

Your Honor is correct, the correct disposition in our view would be to dismiss the appeal, to treat the jurisdictional statement as a petition for certiorari, and deny certiorari on the grounds that there are adequate state grounds.

QUESTION: Mr. Tone, that means that we just have no jurisdiction to grant the cert and decide and review the question of state law.

MR. TONE: No, it doesn't, Your Honor, because you could elect in your discretion, if you chose to do so -- the case is properly in the federal court as a diversity case. And this Court has discretion to review state questions that come up that way if it chooses to do so.

As Mr. Justice White pointed out, it rarely if ever does. But it would have authority to do that under its certiorari jurisdiction.

QUESTION: And you urge in this case what?

QUESTION: Deny it, just deny cert?

MR. TONE: Yes, just deny cert.

QUESTION: And if we disagree and grant it, then we go on and review the state law question?

MR. TONE: If you disagree and grant cert, then I submit to the Court that you would and should review the state law question, because as Respondents --

QUESTION: Well, also, could we not if we took it as a cert -- I understand you're arguing we must dismiss the appeal. But if we took it as a cert, could we not do what we did in the Ohio-Zacchini case and say, well, the state and federal law is parallel and we will decide the federal question and send it back to the Court of Appeals to review the state law question in the light of what we say about the federal law? We'd have power to do that.

MR. TONE: You would have power to do that, Your Honor. I would question, however, whether that disposition would be consistent with the Ashwander admonition about not reaching federal constitutional questions unless necessary to do so.

QUESTION: Mr. Tone, is there some evidence -- in

the Zacchini case, the evidence was, or there was indication, that the state courts felt compelled by the federal rules. But here is there any evidence that Texas feels bound to follow the federal Constitution in applying its own?

MR. TONE: No, there is no indication that Texas feels bound to follow the federal.

QUESTION: And the Court of Appeals didn't say so.

MR. TONE: That's correct. The Court of Appeals treated the state law and the federal law --

QUESTION: As independent.

MR. TONE: -- questions as independent questions.

QUESTION: And incidentally, to follow my Brother Stevens' suggestion, it's only to get them to do over again what they've already done.

MR. TONE: That's correct.

QUESTION: They've already said what the state law is.

MR. TONE: That is correct.

QUESTION: There's nothing to suggest that they'd change their minds because we decided the federal question one way or another.

MR. TONE: That's exactly correct. They've already decided the state law question.

QUESTION: If they're wrong about the federal law

and if they think the state and federal rules are the same, as your opponent argues -- now maybe he's wrong -- then if we corrected their analysis of federal law, conceivably they could say, well, that means that the state law result will be different.

MR. TONE: They could, Your Honor.

QUESTION: This is all hypothetical. But it's at least conceivable.

MR. TONE: But there is nothing in the opinion of the Court of Appeals, I submit, to suggest that they felt that state law and federal law were identical on these issues.

QUESTION: Or different. Really, all they do is have a phrase in there saying it violates both provisions.

MR. TONE: That's correct.

We, however, have cited some state law cases in our brief which indicate that the Texas courts, although they phrase the standards approximately the same as this Court does and cite this Court's cases, nevertheless reach results which I think this Court would not reach on the same facts. So I think that the Texas law, although it was not analyzed by the Court of Appeals, is not identical with the federal law, and the Court of Appeals did rule on that grounds.

There are also, I might add, two other grounds of Texas law, one a Texas common law ground which the Appellee

has so far not been able to get a ruling upon. The Court of Appeals deemed it unnecessary to reach these two other state law grounds which we argue in our brief. And if this Court were to take the case we would at some point be entitled to an adjudication on those grounds which defend the judgment. And ordinarily we would be able to argue those grounds to this Court because they are grounds for affirmance. This Court can affirm on any grounds that it finds supported in the record.

QUESTION: That you urged below.

MR. TONE: Yes.

QUESTION: That you did urge and they didn't pass upon.

MR. TONE: That's correct. Both were urged below.

QUESTION: Mr. Tone, you say if we were to take the case. Probable jurisdiction here was noted in May.

MR. TONE: Yes, Your Honor.

QUESTION: You mean take it as a cert.

MR. TONE: I was speaking to the supposition suggested in the colloquy with Mr. Justice White and Mr. Justice Brennan and the Mr. Chief Justice that if the Court agrees with our position that the appeal should be dismissed for the reasons stated earlier and treats the jurisdictional statement as a petition for cert, then it would have -- then it was on that basis that I said, if the Court takes the

case, my view is that the case should not be here on appeal for the reasons I've stated previously.

QUESTION: You would be quite content, I take it, if we held that this was not an appropriate appeal, but treated as cert we would deny it? I want to be sure.

MR. TONE: Yes, Your Honor, that is the relief we ask for in the first point in the brief.

QUESTION: Just to be sure I understand one point, you're also arguing that unless we treat it as a cert and if we just act on a noting of probable jurisdiction under 1254(2), you would agree then we don't have the power to listen to any state law argument?

MR. TONE: Then you do not have the power to listen to the state law arguments. But then I submit you don't have power to decide the federal question either, because your decision would be an advisory one.

QUESTION: Yes, I understand that.

MR. TONE: Right. And as to the state law questions the Court of Appeals didn't rule on, it would be unfair to the Appellee because we would never have a chance to present those arguments anyway.

Now I should like -- although, as I have said, it's our position that the Court should not reach the federal constitutional question, I am sure the Court does not want me to argue the Texas law points and so I think I should

proceed to discuss the federal constitutional question as if it were to be reached on this appeal. And I shall proceed to do that.

This Court has recognized that entertainment is a form of communication and expression protected by the First Amendment. It has also recognized that the communication and expression need not be verbal to be protected. Thus, musical compositions and dancing, including nude dancing, are protected.

The First Amendment protects both the right to communicate and the right to receive the communication.

QUESTION: Mr. Tone, do you question that a state could totally outlaw pinball machines which require insertion of coins to operate?

MR. TONE: I do question that, Your Honor. I do question that. I think that these games, at least, involve First Amendment expression on the part of the author of the game and on the part of the player of the game. They are complex electronic devices that present a series of audio and visual effects through complex electronic circuitry. They call upon the player to respond --

QUESTION: Mr. Tone, who is the author, the mechanic?

MR. TONE: Pardon?

QUESTION: Who is the author?

MR. TONE: The author, Your Honor --

QUESTION: The mechanic?

MR. TONE: -- is the person who designs the electronic circuitry.

QUESTION: That's a mechanic.

MR. TONE: I think he's more than a mechanic, if the Court please. He is -- I guess it depends on how broad one's definition of "mechanic" is. But he is a person skilled in electronics and in the visual and the video arts.

QUESTION: Well, suppose this factory also puts out adding machines. Would they also be protected?

MR. TONE: I don't think so, Your Honor.

QUESTION: But say it is the author -- they had the same author.

MR. TONE: I think an adding machine does not convey a message to anyone.

QUESTION: But it's the same author. I'm just worried about your word "author."

MR. TONE: Well, let me call him the originator of the game. He does get a copyright on it. The federal courts have uniformly recognized that these games are protected by copyright.

QUESTION: But so is the adding machine.

MR. TONE: I'm not sure about the adding machine.

I would not dispute Your Honor's statement, but I --

QUESTION: I'm not sure. I just raise the question.

MR. TONE: All right.

QUESTION: Likely a patent, would it not be?

MR. TONE: The adding machine might have a patent.

QUESTION: Well, Mr. Tone, supposing that in the electrical antitrust cases, certainly the person who thought up the phase of the moon element of that and the complicated parts of it in the early 60's was putting in a good deal of intellectual input and confiding it to a number of other people who were in the same position he was. Were their activities protected against the Sherman Act?

MR. TONE: Well, Your Honor, I think his right to communicate what he had dreamed up was protected. Their conspiracy was forbidden by other laws. But the right to communicate I think would be protected.

Our position is that these games do involve communication. They involve a receipt by the player of the ideas of the designer of the game. He has -- the game responds in certain ways, in very complicated ways, to matters that the player does. These are not -- the games I am describing now are not so-called pinball machines, but those machines which make up most of the market now, audio-video games, which are very complicated affairs.

And there is a very complicated interrelationship and interaction between the machine and the player. And I would submit to Your Honor that these are a form of expression and communication.

One of the amicus briefs quotes at length from Marshall McLuhan. We have a small quote from his statement about games being communication. And he says, speaking of all games generally, that they are a media of communication and that that should now be plain. And as media of communication, we submit that they fall within the protection of the First Amendment.

Like the composer of a musical composition or dance, the author of the game has a protected right to present his creation to people who want to receive it, and they have a right to receive the expression.

QUESTION: How about the Red Lion case, where certainly people are communicating, but a Government agency is telling them that they have to present the other side too?

MR. TONE: That much is true. But there is a special governmental interest in regulation of speech over the restricted channels available for radio and television.

QUESTION: That's because they're using the public highway, is it not? Isn't that the rationale of the Red Lion and related cases?

MR. TONE: Yes, Your Honor.

QUESTION: Well, is there any other place, any place in the city that people under 17 can be entertained?

MR. TONE: The record in this case, Your Honor, is very skimpy, but there is an indication that there is one other coin-operated game center in the city. And I think there isn't any real dispute that --

QUESTION: Well, certainly reasonable time and place restrictions are available, are legal, or not necessarily invalid, anyway?

MR. TONE: That's correct. And a reasonable time limitation would be valid here. But this regulation --

QUESTION: What about a place limitation?

MR. TONE: If it were a zoning ordinance limiting the places where commercial establishments, including games, could be played, that would be reasonable.

QUESTION: You mean a half a mile prohibiting games, a half a mile from a school, that sort of thing?

MR. TONE: That might well be reasonable, although that's somebody else's case and I wouldn't want to --

QUESTION: Or prohibiting 17-year-olds to go in and play these machines in a bar, a barroom?

MR. TONE: I think that would be reasonable, for a different reason, because the state has a right to prohibit 17-year-olds from going into a bar.

QUESTION: It's a place.

QUESTION: It would also survive First Amendment analysis.

MR. TONE: Well, but remember, the fact that it is a fundamental right does not mean that the state has no power whatsoever to regulate it. It merely means that it must regulate it only based upon a compelling state interest, and that the regulation must be reasonably tailored to protect that interest and must not be unnecessarily intrusive on the fundamental right.

QUESTION: Do you think that rule applies, that every time, place and manner restriction has to satisfy that test?

MR. TONE: I guess that would be too broad a statement, Your Honor. I don't think it would. But this is more than a time, place and manner statement -- or restriction before you at the present time. As to youths who are unable to persuade their parents to accompany them or who cannot -- whose parents both work, it's a flat prohibition. They can't play the games at all.

QUESTION: Can one gamble on these games?

MR. TONE: No, Your Honor. Gambling is expressly forbidden, and these are not gambling devices under Texas law. There is no -- you do not have the old free games or anything, and so on. They are not gambling devices.

And one could gamble on the games only in the sense that he could gamble on any competitive endeavor.

QUESTION: You could bet on the outcome?

MR. TONE: You could bet on the outcome, just as you could bet on the outcome of a football game or on who can run faster. Some of these games are played by individuals alone, some are played by more than one or a group of individuals. So it is possible to gamble with the games, but that is not their purpose and there is no evidence in the record that these games have been used for gambling, and they are not gambling devices under Texas law, which does prohibit gambling devices.

I submit that the only distinction that can be made between these games and various other forms of expression, including some that this Court has held to be protected, is in their social utility. And that is a matter of value judgment. It's easy to deprecate or jocularly put down the social utility of various forms of expression, including some form this Court has held protected.

But the Court has also held that the level of protection to be given any form of expression does not turn on its importance or its social utility.

QUESTION: Well, how about a chug-a-lug contest. Could a state or a city forbid that?

MR. TONE: I'm sorry, Your Honor, I missed the

first part.

QUESTION: A chug-a-lug contest, who could chug-a-lug the most glasses of beer.

MR. TONE: I guess I would not view that as rising to the level of protected expression.

We also --

QUESTION: There may be some 17-year-olds who would disagree with you.

(Laughter.)

MR. TONE: That's possible.

Also --

QUESTION: Mr. Tone, these games are very lucrative.

MR. TONE: Are very?

QUESTION: Lucrative.

MR. TONE: Your Honor is correct.

QUESTION: Even at 25 cents a shot.

MR. TONE: Yes, that's correct, they are lucrative. That is to say the owner and operator of the game collects 25 cents for each play.

QUESTION: Do I understand that more than twice as much money is spent on these in this country today than on motion pictures?

MR. TONE: I have read those statistics, Your Honor, and I understand them to be correct.

QUESTION: That's a powerful speech.

MR. TONE: Pardon? It's powerful speech, yes, sir.

QUESTION: Would you say -- in seriousness, who is doing the speaking there, the player or the originator?

MR. TONE: Well, Your Honor, I think both.

QUESTION: It's a colloquy, is it?

MR. TONE: The player has to respond to a great variety of challenges that the game presents which are invoked by what the player does. So there's an interplay between this computer-programmed game and the player. So it's an expression by the designer of the game of the idea of the game, and there is interaction by the player to the various, numerous variables that are presented by the game.

And of course, the owner and operator of the game I suppose is in a position analogous to the movie theater operator. He too is in the stream of communication. He's the conduit through which the communication goes.

QUESTION: What about the little one at home? Same kind of machines you have at home now.

MR. TONE: It's essentially -- Your Honor is correct. It's essentially the same as the videogame that you play on the television set, except that it is much more elaborate. It's a heavier and more durable --

QUESTION: And much more expensive.

MR. TONE: -- machine, and more expensive, exactly. It's much more expensive. The ones that are sold at home I think are sold on the order of a few hundred -- the cost is a few hundred dollars, while these games --

QUESTION: These machines are several thousand.

MR. TONE: That's correct, that is correct.

We also have argued in our brief that the right of association is implicated, and the court -- the case came here on the question stated in the jurisdictional statement of whether there exists a right of social association. That was the principal issue stated.

I submit that there is. This Court has -- although it hasn't ruled on that point expressly, I submit that there ought to be such a right, just as there is -- just as entertainment enjoys First Amendment protection as expression.

And in the case at bar, at least the stated purpose of the ordinance is to prohibit young people from congregating. The preamble says in fact that congregation of youthful patrons creates problems of policing due to the need to protect the patrons from the influence of those who promote gambling, sales of narcotics, and other unlawful activities. So the purpose of this, although as Justice Stevens points out it's directed to individual games as well as places where there are more than one game, the purpose,

the stated purpose, is to prevent congregating, which is an exercise of the right of association.

The method chosen is to prevent them from playing the games when they get there. So it's perhaps an ineffectual method of preventing them congregating, but that is its purpose.

I should also like to say in the few minutes left available that constitutional guarantees apply to minors as well as adults. The scope of the particular right may be reduced in the case of a minor by one or more of the factors identified by Justice Powell in Bellotti II. These factors are taken into account in defining the state interest to justify the regulation limiting a fundamental right.

But nevertheless, even though minors are involved, the fundamental right should enjoy the strict scrutiny -- the protection of the strict scrutiny test, having in mind that the state may have a stronger interest or a different interest in regulating the conduct of children than adults.

But nevertheless, the strict scrutiny test should apply and the restriction should bear some -- should serve some substantial purpose in regulating the evil to which it's directed, and it should be reasonably limited -- the means should be limited to that which is necessary to protect the interest.

QUESTION: How about truancy laws, Mr. Tone, where

a group of youths say, we want to congregate at this particular pool hall during school hours rather than go to school?

MR. TONE: I would say, Your Honor, that the state's compelling interest in requiring children to attend school is sufficient to justify the truancy law and prohibiting children from congregating elsewhere during school hours. But that doesn't mean that their congregating is not a fundamental right. It just means that that fundamental right has to be balanced against the compelling interest of the state, and in that instance I believe the state -- the compelling interest prevails.

As we point out in our brief, if the Court agrees that the games involve expression and a fundamental right, then there is, in addition to the fundamental right analysis, strict scrutiny analysis that I have already stated, a similar analysis under the equal protection clause.

I think I shall leave to my brief the vagueness issue.

QUESTION: Let me just ask you something about that. If you think the issue is moot, which I take it you do -- do you?

MR. TONE: No, Your Honor. We've argued that it is not moot.

QUESTION: Well, why is that?

MR. TONE: Well, we say that there is a reasonable expectation of recurrence, and we argue that there is some indication of that from the fact that the city has never seen fit to tell any court that it repealed the old ordinance and replaced it with another one. And the city says it would like to go back to it.

Now, that's the --

QUESTION: Do you know of any other instances where, in a situation like that, we've recognized this exception to the mootness doctrine, capable of repetition, yet evading review; is that it?

MR. TONE: That's it -- no, not -- I'm sorry. The tests are, under the Los Angeles County case, whether there is any reasonable expectation of recurrence of the violation or whether events during the pendency of the litigation have completely eradicated the effects of the violation. That's the test of mootness.

QUESTION: Let me ask you, suppose that, however, we disagree with you and say that it's moot. Shouldn't we then to that extent vacate the opinions below and dismiss the case to that extent?

MR. TONE: We argue that you should not, Your Honor, and the reason is explained in the very last section of our brief. That would be the more usual disposition.

QUESTION: If we thought it was moot.

MR. TONE: If you thought it was moot, yes.

QUESTION: But unless we do that, if I understand it, the City is now disabled from re-enacting the ordinance it wants to enact, by the Court of Appeals' judgment.

MR. TONE: That would be correct, the Court of Appeals' judgment would stand. The alternative --

QUESTION: If we vacate everything, presumably they'll just reinstate it.

MR. TONE: That would be -- they would be free to reinstate the ordinance all over again. And they apparently would like to do that. So I think there is good reason to treat this as the exceptional case in which determination of mootness should not result in the vacating of the judgment of the Court of Appeals.

QUESTION: It really isn't -- it's a jurisdictional question.

QUESTION: It's a case or controversy question.

MR. TONE: I think the question of whether -- the question of whether this Court decides the case is a case or controversy question. The question of whether this Court leaves standing the judgment of the Court of Appeals is not, in our submission.

QUESTION: Well, I don't know. There's no longer a -- the Court of Appeals judgment isn't final.

QUESTION: We have to do something. We've noted probable jurisdiction, so we have to do something with the case.

QUESTION: That judgment isn't final, and it's moot.

MR. TONE: You could dismiss the appeal on the ground the issue is moot, Your Honor. We're speaking now of the vagueness issue.

QUESTION: But there's nothing then to -- there's nothing then for the Court of Appeals' judgment to operate on. The issue it decided is gone.

MR. TONE: That's -- there's nothing for it to operate on, but the ordinance was in existence. And at least there is a determination that that ordinance, which has now been replaced, was void for vagueness. So at least the city can't re-enact that ordinance.

QUESTION: Well, so you think that our practice of vacating moot judgments in moot cases is just prudential?

MR. TONE: I think it is prudential, yes.

QUESTION: Would your first option take care of all these problems?

MR. TONE: I'm sorry, Your Honor?

QUESTION: Your first option that you argued today.

MR. TONE: The first option would take care of all

of the problems except for the vagueness issue. The first option takes care of the age restriction. On the vagueness issue, I would submit that the Court, if it determines that the case is moot since the ordinance is no longer in existence, then simply has to decide whether to vacate the judgment or simply dismiss the appeal.

We argue in our brief -- and I do not, of course, have time to argue it here -- that the judgment is not moot because it meets the tests of the Los Angeles County case.

QUESTION: Well, do you have anything further, Mr. Archer? You have a few minutes.

ORAL ARGUMENT OF ELLAND ARCHER, ESQ.

ON BEHALF OF THE APPELLANT -- REBUTTAL

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

I don't agree with counsel's idea of how the case may be treated as the only alternatives either to dismiss the appeal and then deny certiorari or grant it. I think this Court could remand the case back to the District Court or to the Court of Appeals for clarification as to whether they are making a decision based upon an independent state ground or whether they consider the provisions identical.

I think that it would be a terrible thing if the case does go off on that point, because even though you're reviewing a judgment and not an opinion, that opinion of the

Court of Appeals is in the books. And that means that the cities throughout the Fifth Circuit that desire to have this type of ordinance, whether there's any diversity jurisdiction between their operators in the city or not, are going to be harmed by this opinion on the books, assuming of course that you disagree with it.

Of course, if you agree with the opinion I assume that that would become the law of the land and it wouldn't make any difference which circuit you were in. But assuming that you did disagree with the opinion of the court, but you felt that you must deny certiorari, then as I say I don't think that's the only alternative. I think it can be remanded back for clarification as to whether or not this was an independent state ground or whether it was just mere verbiage to the effect that, yes, the state constitution is similar to the federal Constitution.

I think the overriding question was federal law, and I think that's how the Court of Appeals decided the case, based on the level of review to be accorded this type of activity. In other words, whether it should be a rational basis --

QUESTION: Let me ask you, under your view if this problem of state-federal law had been threshed out more fully in the Court of Appeals during argument, which -- should it have based the decision on state law or federal

law, if it had to choose between the two?

MR. ARCHER: Well, I think they could have based it on both, all right, if they --

QUESTION: No, if they have to choose. They decide they ought to take one. Is there a doctrine they should take the state law ground in order to avoid the unnecessary decision of a federal Constitution question?

MR. ARCHER: I would think that they should, yes. I think this Court does that and I would think that the Court of Appeals -- maybe they're not required to, but I would think that would be a proper disposition. But I don't think it was their intent to determine that there was separate state and federal law. I think they just mentioned that, yes, there --

QUESTION: They really just cited federal cases except for one state case that had nothing to do with the issues.

MR. ARCHER: Yes, I think that's correct.

I would yield the remainder of my time. Thank you.

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

(Whereupon, at 2:07 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

CITY OF MESQUITE vs. ALLADIN'S CASTLE, INC.
No. 80-1577

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

BY Sharon Ryan Connelly