ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1590

TITLE WILLIAM F. BOLGER, ET AL., Appellants
v. YOUNGS DRUG PRODUCTS CORP.

PLACE WASHINGTON, D. C.

DATE January 12, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM F. BOLGER, ET AL., :

Appellants :

v. : No. 81-1590

YOUNGS DRUG PRODUCTS CORP. :

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Washington, D.C.

Wednesday, January 12, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

APPEARANCES:

DAVID A. STRAUSS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.

JEROLD S. SOLOVY, ESQ., Chicago, Illinois.

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 first this morning in Bolger against Youngs Drug Products Corporation.

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

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.

MR. STRAUSS: Thank you, Mr. Chief Justice, and may it please the Court.

Section 3001(e)(2) of Title 39 of the United States Code prohibits the mailing of unsolicited advertisements for contraceptive products. Section 3001(e)(2) does not prohibit any mailing that the recipient has indicated a desire to receive. The issue in this case is whether that statute violates the First Amendment.

This action was brought by the appellee, which has been a manufacturer of contraceptive products for some 60 years, and is by its own account the leader in the field.

Until 1979, appellee promoted its products by means of a sales force and advertisements in magazines. In 1979, after what appellee describes as business discussions, appellee inaugurated a new marketing strategy that included in addition to its other

traditional means of advertising a campaign of mass unsolicited mailings to members of the general public at large.

The Postal Service advised appellee that these mailings would violate Section 3001(e)(2), and appellee then brought this suit in the United States District Court for the District of Columbia, alleging that Section 3001(e)(2) violated the Constitution, and seeking declaratory and injunctive relief.

The District Court found that appellee's mailings are commercial solicitations and promotional materials in which appellee has a commercial interest. It accordingly declared that they are commercial speech, entitled to lesser protection under the First Amendment. The District Court also concluded that Section 3001(e)(2) directly furthers specific and important government interests.

But the District Court nonetheless declared Section 3001(e)(2) unconstitutional because it believed that it could devise an alternative that, while not protecting the government's interests quite as well, struck what the District Court viewed as a better balance. That alternative was highly elaborate. Its central feature was a series of warnings in large letters on the outside of appellee's unsolicited

mailings.

The District Court ordered its alternative into effect and enjoined the enforcement of Section 3001(e)(2). We then brought this appeal.

Unlike restrictions on commercial expression that this Court has invalidated in the past, Section 3001(e)(2) is a narrow and specific limitation, and its effect on First Amendment rights can only be described as minimal. It has no application to any form of non-commercial speech. For that reason, organizations that advocate birth control or family planning as a social or moral matter are free to do so by using the mails, even by using the mails on an unsolicited basis.

Section 3001(e)(2) also has no application to a wide range of advertising, including all the methods of advertising that appellee itself has used so successfully for so long. It does not have any application to advertising that does not use the mail, and it does not have any application to much advertising that does. For example, it does not apply to advertisements in magazines or other publications that are sent through the mail so long as the recipient has indicated a desire to receive the publication.

And it has no application even to unsolicited advertising that is mailed to persons with a

professional interest in conctraception, such as physicians and pharmacists and dealers. These people, of course, particularly physicians and pharmacists, can counsel and advise others on the use of contraception.

But most important, Section 3001(e)(2) does not prevent any person from receiving any of appellee's mailings if appellee only obtains his consent, and appellee can even use the mail in an effort to obtain his consent, because Section 3001(e)(2) as interpreted by the Postal Service does not prohibit a premailing in which an advertiser asks a postal customer to consent to receiving a line of contraceptive advertisements.

QUESTION: Of course, in the real world, I suppose that when you are asking for what is basically consent to receive junk mail, most people would say, no, I don't want to receive it, whereas if they could send it directly, there is some chance, I suppose, that the advertisement might sell them on getting the stuff.

MR. STRAUSS: Well, that may be right, and I assume that is why Youngs Drug is so interested in sending unsolicited mailings, but there is no First Amendment interest in forcing publications or information on people who don't want to receive it.

QUESTION: Do you think that Congress could prohibit the mailing of any kind of junk mail without

the consent of the recipient? All kinds, let's say?

MR. STRAUSS: All kinds of commercial mailings?

QUESTION: Yes.

MR. STRAUSS: I think Congress may well have that power. Of course, such a measure would present issues not presented here, because it would be far broader, and it would answer to far less specific government interests, but I think Congress may --

QUESTION: Now, in this instance there are other types of so-called potentially offensive material that could be mailed under this statute and aren't prohibited, right?

MR. STRAUSS: There are other -- other materials that don't pertain to contraception that could be mailed under the statute. That's right.

These premailings efforts by an advertiser to obtain consent to mail its products could be a separate mailing, or they could be a part of another mailing advertising other products so that the advertiser wouldn't have to spend the extra postage, or of course they needn't be mailed at all. They could be distributed with a product or distributed at a drug store.

The only effect therefore of the statute that

the District Court struck down is to require advertisers like the appellee to use some means, any means to see whether the persons to whom they are sending their ads are willing to receive them.

At the same time, as even the District Court acknowledged, Section 3001(e)(2) directly advances important government interests. First, parents can legitimately wish that if they so desire, they, and not appellee, or some other advertiser trying to sell its wares, will be the first to introduce their children to contraception and related subjects. But if unsolicited advertisements for contraception -- for contraceptive products are allowed in the mails, it is simply inevitable that some of them will fall into the hands of children, against the wishes of their parents.

The second, in the area of commercial speech, and particularly commercial speech that enters the home, Congress has the power to regulate expression on the ground that it may be offensive to its audience. It would be a significant expansion and an unwarranted expansion of the protection the Court has accorded to commercial speech to say that it cannot be regulated on the basis of its offensiveness.

Contraception is a subject of particular intimacy and privacy and delicacy, so much so that it

has a special constitutional status, and there is no doubt that many people will find commercial solicitations about such a subject to be offensive.

QUESTION: Your view is -- I know the statute permits it, but supposing the statute prohibited the mailing of its promotional material by a charitable foundation or something like Planned Parenthood. Do you think Congress could constitutionally prohibit it on the same grounds, that it might fall into the hands of children?

MR. STRAUSS: That would depend on whether the mailings constituted commercial speech, which would be --

QUESTION: What I am really asking you is, if you get out of the commercial speech category, do you think the statute would stand?

MR. STRAUSS: We don't claim that such a prohibition could be applied to non-commercial speech, no.

QUESTION: In fact, you acquiesced in a holding in some other case.

MR. STRAUSS: Yes, Associated Students, a District Court decision. That's right. The appellees --

QUESTION: Could the legislative branch accomplish the same objective of the statute along the

lines of the statute that we dealt with in the Rowan case, where they could put up a barrier and say, we don't want any mail from this company? Would that accomplish this purpose?

MR. STRAUSS: That particular statute, of course, would not achieve this purpose, since people would have to certify that they found these advertisements sexually arousing.

QUESTION: Well, I don't mean to make a carbon copy of the statute, but to just give each householder the privilege of saying, I don't want any mail from Sears Roebuck Company, or from Montgomery Ward, or from anybody.

MR. STRAUSS: Well, it wouldn't accomplish the legislature's purposes for a number of reasons. In the first place, of course, someone would have to receive at least one mailing from that company before he knew that he didn't want any further mailings from that company, so he would be open to at least one mailing from every advertiser for these products.

And second, that -- such a measure might very well have the effect of being a greater burden on the values that the First Amendment is designed to protect than the statute at issue here, because presumably the advertiser, which in the case of a drug company is

likely to have many other items of importance to advertise, would cut off all mailings to that customer. In fact, in the statute you suggest, Mr. Chief Justice, that seems to be precisely what it would require.

And since the point of the constitutional protection for commercial expression is to ensure that information reaches potential consumers, such a statute would defeat the purpose of that protection to a large degree.

And the third thing --

QUESTION: Mr. Strauss, you have advanced two goals, anyway. What evidence is there in the record that these goals were in the minds of Congress?

MR. STRAUSS: Well, we have two pieces of evidence. The first is Congress's explicit statement in the legislative history that contraception is a matter of personal choice, which statement accompanied the repeal of sweeping prohibitions on the circulation of information about contraception and the replacement of those sweeping prohibitions with this much more narrow and specific limitation.

And the second, again, the best possible evidence of Congress's intent, which is the statute itself, permits unsolicited mailings to persons like physicians and pharmacists who are in a position to give

out advice to those who seek it. The statute is tailored entirely to prevent commercial solicitations from reaching those who do not want to receive them, while permitting the broadest possible circulation of information about contraception to those who do want to receive it.

QUESTION: Maybe there are some physicians who don't want to receive it.

MR. STRAUSS: Well, that may be right, although Congress apparently made a judgment that the importance of putting this information into the hands of physicians so that they could pass it on was great enough, and that physicians in their professional capacity would be less likely to be offended and less likely to have children who could --

QUESTION: Is there anything in the record to the effect that these are offensive to recipients?

MR. STRAUSS: That was not an issue litigated below, but again, Justice Blackmun, on an issue like that, it is difficult to see what sort of evidence could be introduced in a trial court that would measure up to the judgment of Congress, which after all is in an excellent position to report on what its constituents find offensive.

QUESTION: Well, all you have to do is bring

in 100 people who say, it's offensive to me. That is -- We do it every day in trial.

MR. STRAUSS: Well, it might be possible for the other side to bring in 100 people -- or a Gallup poll.

QUESTION: Of course.

MR. STRAUSS: I think -- I mean, I understand the point, Justice Blackmun, but I think the underlying question is that the underlying thing to keep in mind is that Congress is uniquely well positioned to express a judgment on a question like what are people likely to find offensive, and what sorts of materials do people want to keep out of the hands of their children, certainly at least as well positioned to express a judgment on an issue like that as it is to express a judgment on a technical factual issue on which this Court would unhesitatingly defer to it.

QUESTION: Of course, an argument could be made it is rather underinclusive, isn't it?

MR. STRAUSS: Because it excludes --

QUESTION: Because it doesn't exclude a lot of other, much more offensive material.

MR. STRAUSS: Well, there are a couple of possible categories of material that appellees have argued about. They have argued about solicited

mailings. They have argued about non-commercial mailings. As far as non-commercial mailings are concerned, in light of -- by following the logic of the Court's decision in Metromedia, or at least the plurality's opinion in Metromedia, it is open to Congress simply to decide that non-commercial mailings are more valuable, and for that reason have to be allowed even if they are equally offensive, and equally likely to interfere with the lines of communication between parents and children.

And beyond that, I think it is quite reasonable for Congress to say that an effort by an organization interested in the subject as a moral matter to contribute to the debate and enlighten people simply is less likely to be the kind of interference parents would want to resist than the commercial soliciations of someone whose only interest is in selling its products.

QUESTION: Mr. Strauss, would it arguably, at least, be less restrictive if Congress provided a means whereby any homeowner could say, don't mail to me or to deliver to my home anything related to contraceptive advertisements or other specific categories? Is that less restrictive, to let people do that?

MR. STRAUSS: I don't think it is. That, of course, bears some resemblance to the hypothetical

statute that the Chief Justice asked me about earlier. I don't think that's less restrictive even of First Amendment rights. The effect of that, apart from the obvious administrative burdens and the obvious problem that people would have to know to invoke that prerogative under the statute, even from the point of view of First Amendment values, it might very well be that an advertiser or a drug company would not find it profitable to maintain two mailing lists, one a mailing list of people who didn't want contraceptive advertisements, and the other one a mailing list of people who did.

QUESTION: Well, but under this very scheme you are offering, they have to do something like that for anyone under the legislation that has already been approved in some areas. Mailers have to do exactly that. Isn't that the case?

MR. STRAUSS: Well, if they choose to acquire solicitations. Of course, as long as you are going to protect the interest of unwilling recipients in not receiving these materials, two mailing lists would be necessary, but that is why this -- the alternative you suggest, Justice O'Connor, might well not be less protective of First Amendment rights, because it might have the effect of cutting off access to a lot of other

information, very useful information about drugs to people who want to receive them but don't want to receive contraceptive advertisements.

Also, I think it was part of Congress's --

QUESTION: I don't know why you can argue that it would be less restrictive than a total ban. I am curious.

MR. STRAUSS: Well, it would be less -- well, it would be more restrictive to the extent that it would not only keep people from receiving information about contraceptives, but also information about other products advertised by or manufactured by the same mailer, because that mailer might not find it useful to send out any -- profitable to send out any -- efficient to send out any advertisements at all to that recipient.

Also, I think it was part of Congress's purpose clearly to take the burden off the unwilling recipients who don't want these materials in their homes, and leave it to be assimilated in the costs of advertising on the advertiser. I mean, it is true, as appellee suggests, that people can do a variety of things if they don't want these materials falling into the hands of their children. They can get a locked mailbox, or they can make sure that they instead of the children bring in the mail every morning, or they can

carefully read through all of this material when it arrives, all their junk mail, as it is known.

QUESTION: Was there any testimony before Congress that it is a usual thing that children open their parents' mail?

MR. STRAUSS: Not that I know of, Justice Marshall, no.

QUESTION: That is what you are assuming, don't you?

MR. STRAUSS: Well, that's right. That's what we're assuming, but I think --

QUESTION: But what is the basis for that?

MR. STRAUSS: Well, I think that is a sort of --

QUESTION: I know what would happen if a child of mine opened my mail.

MR. STRAUSS: Well, it is not even so much a matter of opening mail. A lot of these materials are not sealed. There is certainly no requirement that they be sealed.

QUESTION: I don't think a child has a right to look at mail that is not sealed.

MR. STRAUSS: I think Congress --

QUESTION: Is that normal?

MR. STRAUSS: Well, I think Congress could

reasonably conclude that it occurs in a high enough --

QUESTION: How could they reasonably conclude when there is no evidence whatsoever that I know of?

MR. STRAUSS: Well, Congress frequently reaches conclusions as a basis for legislation without having hearings or -- like an administrative agency.

QUESTION: Or having any bases.

MR. STRAUSS: Well, no, it doesn't, at least --

QUESTION: You are not going to say that, are you?

MR. STRAUSS: No, but without having a record comparable to an administrative agency, there is no requirement that Congress compile evidence, especially, Justice Marshall, on a common sense judgment about people's habits of living and mores like this. This isn't a technical matter.

QUESTION: Mr. Strauss, on the exhibits in the record, anyway, they were all inside envelopes, weren't they?

MR. STRAUSS: I believe --

QUESTION: The pamphlets certainly couldn't have been just sent -- the promotional materials. At least, just my impression would be you've got to get an address on somewhere.

MR. STRAUSS: I actually don't know the answer to that, Justice Stevens, except I think the flier was a flier.

QUESTION: The one with all the different products. But if that is the problem, Justice O'Connor suggested one less restrictive means may be just to require them to send them in sealed envelopes.

MR. STRAUSS: Well, that is one of the things the District Court required, but again, I don't think there is any assurance that after a sealed envelope is opened, it is not going to fall into the hands of a child, or even --

QUESTION: But people who consider it offensive and are concerned about their children getting it are not the ones who are apt to put it on the dining room table in a prominent place, are they?

MR. STRAUSS: Well, if they know that it is contraceptive advertising, of course, if they don't want their children to get it, they will dispose of it promptly, but a lot of these materials come into the home in large quantity, advertisements of various kinds, mixed in with various other sorts of mail, and they may come into the home when the parents aren't there. The parents may not even know that it is coming into the home. I suspect --

QUESTION: Maybe most people get more mail than I do.

(General laughter.)

MR. STRAUSS: Well, the District Court noted, as this Court did in Rowan, that this mail arrives in, I think the term is avalanche proportions. That is, unsolicited commercial mailings.

QUESTION: Mr. Strauss, to what extent is the least restrictive alternative analysis applicable to commercial speech?

MR. STRAUSS: I think in instances --

QUESTION: Is it sort of a relative of overbreadth?

MR. STRAUSS: I think --

QUESTION: It reaches more, it reaches farther than it need to?

MR. STRAUSS: I think that's right, and I think for some of the same reasons that the Court has said overbreadth does not apply to -- the overbreadth doctrine does not apply to commercial speech, there is good reason not to apply the less restrictive alternative approach as vigorously.

QUESTION: Well, is the least restrictive approach, is that one of the rules applicable to commercial speech as you find these rules in our cases?

MR. STRAUSS: The Court has said that on occasion, but always in the context of emphasizing that the basic question is whether the intrusion into First Amendment values is justified by the government interests at stake.

QUESTION: Isn't that one of the central Hudson tests, in fact?

MR. STRAUSS: That's right. That's a case where it was mentioned, although there have been other cases in which the Court didn't place as much emphasis on it. It is really a question, of course, of what the particular facts of the case present.

QUESTION: Mr. Strauss, does the reason why the material is offensive bear on the issue at all?

MR. STRAUSS: I am sorry?

QUESTION: Does the reason why the material is offensive bear on the issue at all? In other words, supposing someone is a Christian Scientist, doesn't believe in using drugs in any kind. Could you say, well, because of that potential for offending a person of that religious faith, we will have a statute prohibiting the advertising of any kind of pharmaceutical products?

MR. STRAUSS: I think when offensiveness is an asserted justification for a statute, the Court has to

scrutinize what Congress has done to some degree to make sure that it is at least a common sense judgment.

QUESTION: Does it have to be a viewpoint neutral kind of offensiveness, or can the offensiveness lie in the fact that there are many people who as a matter of religious faith don't believe contraceptives should be used? Is that the kind of offensiveness we are talking about, or is it there is something about the human body that is referred to that makes it offensive?

What is it that makes this offensive?

MR. STRAUSS: I don't know --

QUESTION: Or permissively offensive?

MR. STRAUSS: I don't know if it's possible to distinguish among kinds of offensiveness on their psychological bases. Maybe I can answer your question this way, Justice Stevens. If there were an indication that the legislature were acting out of antipathy to a particular point of view --

QUESTION: Well, we do have that history here, don't we?

MR. STRAUSS: No, I don't think we do.

QUESTION: Isn't the Comstock Act, the history of that that this gentleman was very much opposed to the use of these products?

MR. STRAUSS: He certainly was, but most of --

QUESTION: This is the survival of that statute, isn't it?

MR. STRAUSS: It was survival after most of his handiwork and certainly the parts he would have considered vastly more important were repealed in 1971.

QUESTION: Well, but what is offensive about this material other than the aspects of it that Mr. Comstock thought were offensive?

MR. STRAUSS: Well, there are a variety of things that might be offensive. Some people might simply object -- are likely simply to object to any commercial treatment of a subject of such importance and intimacy. Some people might find that -- the very fact of commercial treatment of it a corruption of the subject, even if they are very much in favor of the practice of contraception.

Had Congress wanted to discourage people from practicing contraception, or to restrict the flow of information so that people would be less likely to practice contraception, it is unthinkable that Congress would have done what it did when it passed this statute, which is to sweep away all of the most important restrictions on the circulation of information.

QUESTION: Well, but even what remains certainly restricts the flow of information on this

subject, does it not?

MR. STRAUSS: Well, it only restricts the flow of information to people who are unwilling to receive it. Any person who wants to receive it will receive it.

QUESTION: Well, how? By writing in and saying, I want some junk mail? Didn't Justice Rehnquist answer that?

MR. STRAUSS: Well, if appellee is willing to seek a soliciation, yes.

QUESTION: Well, if this were not commercial mail, say it were, again, Planned Parenthood, do you think that if they sent out a flier saying, we would like to mail you a pamphlet about contraceptives if you send in and say you want to receive it, do you think there would be the same audience receiving it as if they just sent it out directly?

MR. STRAUSS: Well, obviously, fewer people would receive it than if they sent it out directly.

QUESTION: And do you think that would be a permissible restraint? Say we get out of the commercial area again. Do you think it would be a permissible restraint to say all promotional materials by a charitable organization must first get the consent of the recipient? Would that be an abridgement of speech?

MR. STRAUSS: Out of the commercial area, it

might well be, because out of the commercial area it is not only the informational value and the value to willing recipients that matters. Planned Parenthood might want to express itself on the subject, but in the commercial area, the Court's decisions make it plain that there is no First Amendment interest in forcing information on unwilling recipients.

QUESTION: Where did we say that, that no First Amendment --

MR. STRAUSS: Well, the Court has said on many occasions that the importance of the protection of First Amendment -- of commercial speech is based on its informational function. The Court said that in Central Hudson.

QUESTION: In Central Hudson, weren't there -- those two cases that came down, weren't there people in the audience there who the Court assumed didn't particularly want the material. It was offensive to them. Nevertheless the utility was permitted to send it.

MR. STRAUSS: Well, in Consolidated Edison --

QUESTION: Consolidated Edison, I guess.

QUESTION: -- it was not commercial speech, and in Central Hudson it wasn't anything that --

QUESTION: Consolidated Edison is the one I am

thinking of.

MR. STRAUSS: I will save the --

QUESTION: Mr. Strauss, do you concede that restrictions on commercial speech have to be content neutral?

MR. STRAUSS: I think the application of that rule of Mosely and Carey against Brown and cases like that to commercial speech is different. I think it is quite clear that the fact that advertising for one product is regulated differently from advertising for another product does not constitute a content based restriction that requires special scrutiny.

Otherwise, Congress would have to apply the same regulations to groceries as it does to used cars, and the Court's decisions have never suggested that.

Thank you.

QUESTION: Well, when you say that, that almost implies to me that it is not content neutral.

MR. STRAUSS: There is a sense in which it distinguishes between speech of one content and speech of another, but it cannot be the case that that distinction requires a higher level of scrutiny or makes the statute suspect. Otherwise, the legislature would be handcuffed, and the Court's decisions from Virginia Pharmacy on down have made it clear that the legislature

can keep in mind the practicalities of regulating different sorts of advertising in different ways.

CHIEF JUSTICE BURGER: Mr. Solovy?

ORAL ARGUMENT OF JEROLD S. SOLOVY, ESQ.

MR. SOLOVY: Mr. Chief Justice, and may it please the Court, it is our position that this is really a very simple case. The margin of the decisions of this Court in the First Amendment area command, we believe, the affirmance of Judge Penn's decision invalidating this statute.

The government speaks about the statute as if it had specific purposes and it were specially confined. The fact of the matter is, as the government concedes in its brief, there is no legislative history supporting the asserted purposes the government has put forth, namely, sensitivity in the protection of minors. Indeed, the government says that the statute was carefully drawn to exclude the non-commercial advertiser, Planned Parenthood, but for three years the government interpreted the statute to exclude all unsolicited communication concerning contraception, because it was the vestige in the antagonism of the Comstock Act. You could not speak in the twentieth century, in the year 1973, to the listener about contraception.

QUESTION: Do you think Congress could pass essentially a Rowan statute in this context, as I suggested to your friend?

MR. SOLOVY: I am glad you asked the question, Mr. Chief Justice, because Congress passed the Rowan statute, and what the government overlooks is, this is part of the same title of the same section of the Post Office Reorganization Act of 1970. They passed these two sections at the same time, and although the government says that Section 3008, which is the Rowan statute, doesn't apply to this situation, it applies directly.

Congress resolved the problem. What does Section 3008 say? It says that if I, the recipient, receive material which I find to be provocative, as this Court says, salacious, I in my unfettered discretion can say to the sender, send me no more of this material.

QUESTION: And you have no trouble with that on the First Amendment?

MR. SOLOVY: None whatsoever. Youngs is delighted with that position, because what does Section 3008 do? What does Rowan do? It balances the First Amendment interest of Youngs, the person trying to convey information, and the addressee. This Court held that the reason that 3008 was constitutional because it

struck a perfect balance between the interest of the sender and the interest of the recipient, and it gave this sweeping power to the addressee because it did not allow the government to be the censor as to what we would receive in the mail.

QUESTION: Then are you suggesting that without any additional legislation, the addressee, any householder could operate under the Rowan section of the statute and stop the mailings?

MR. SOLOVY: Exactly, Your Honor. That is what Section 3008 says. It is part of the same title. And the interest that the government put forth in favor of this iron curtain of unsolicited mail that Section 3001 forwards, it did not put forward in the Associated Student case. Indeed, the district judge, and the government acquiesced in that decision, found that 3001 was the opinion of Congress that the subject of contraception was immoral.

QUESTION: Well, the finding of a District Court in another case certainly isn't binding on the government in this case. Do you contend otherwise?

MR. SOLOVY: Justice Rehnquist, I don't contend otherwise. I am pointing out, however, that in the Associated Student case, they did not put forth any legislative history.

QUESTION: Well, they do put it forth in this case. What point do you seek to draw from that?

MR. SOLOVY: The point I draw from it is that the legislative history that there is does not speak to Section 3001, but speaks to Section 3008, because that is where Congress said that people were offended by certain types of mail, and that the recipient should have the right to cut off that mail, and --

QUESTION: You can certainly make that point without relying on the findings of a district judge in some other case, can't you?

MR. SOLOVY: I think a judge, be he a district judge, an appellate judge, or a Supreme Court judge, if there is reason to what he says, commends repetition. That is my sole point.

QUESTION: Can Congress go further and say that a homeowner can take his name off the mailing list for certain categories of items before having received any in that category?

MR. SOLOVY: Well, Congress has not done so. Congress has only acted --

QUESTION: I realize that. I am asking you whether you think constitutionally that could be done.

MR. SOLOVY: I think that Congress, so long as it is content neutral and speaks across the board,

Congress could say that no mailer can send any unsolicited mail of a commercial nature to any household. Just asking the question, though, shows that it is a difficult constitutional question, but certainly Congress could not single out, as it does in 3001, a specific content subject, namely, the subject of contraception, and say this may not go to the household. Now --

QUESTION: I wonder if that is true. Supposing they thought it was unhealthy to smoke, and they singled out cigarettes, and say, we won't have any cigarette mailings advertising cigarettes. Do you think that would be impermissible?

MR. SOLOVY: Well, as a smoker I suppose I would have some hesitation, but they banned it from television. They don't ban it from the print media. I think -- I don't speak for the tobacco industry, but I would have some problem with that. Yes, Justice Stevens.

QUESTION: Assuming that there was a legitimate governmental interest in discouraging smoking, it seems to me it would be proper, but I would suppose you would have suggested there is not such a legitimate governmental interest with regard to contraception.

MR. SOLOVY: There is no such -- It is quite the obverse. When you have a situation where you have venereal disease of epidemic proportions in this country, 20 million cases of herpes, when you have unwanted pregnancies, when you have problems with abortions, the problem is the obverse. The problem is the obverse of the smoker who shouldn't smoke. I shouldn't smoke. I know that. But at least if I were educated and the country were educated in the field of contraception and venereal disease prevention, we could avoid a lot of mischief and a lot of grief in this country.

This Court has repeatedly said that the theory of the First Amendment is antipaternalism. The government shouldn't tell the people what they should think and what subjects they should think about. That is the theory of the First Amendment, and that's the strength of the First Amendment.

Now, what is offensive? The government says this material is offensive. We have in Appendix 25 of our brief Plain Talk About Venereal Disease. Well, is that offensive? It is offensive if you contract a venereal disease, but this pamphlet tells you what to do to avoid venereal disease, and there is nothing commercial about this pamphlet. All it says on the back

of it is, "Contributed by Youngs Drug Products Corporation. You could take that off and put Planned Parenthood on the back of it, and indeed, under the government's interpretation, Planned Parenthood could mail this brochure, Youngs cannot.

QUESTION: This Court in cases such as Pacifica Foundation, though, has said that Congress can or the government can prohibit the intrusion of so-called offensive materials in the home. For example, daytime programming of certain so-called offensive programs on television, right?

MR. SOLOVY: Yes. Again, though, that becomes very subjective. I say the standard. If any of you have the misfortune to watch daytime television, you will see they apply a very loose standard, and what I see on television is much more offensive to me than the Youngs ads, because you see subjects of extramarital behavior --

QUESTION: Yes, but Congress has made the judgment with respect to the contraceptives that that is offensive as brought into the home.

MR. SOLOVY: But the question is, did Congress make a judgment based upon any interest, or was it the vestige of the Comstock Act, and we submit that it was only the vestige of the Comstock Act. Now, going to the

Pacifica case, this Court dealt with that in Consolidated Edison, and distinguished the airwave media as being different because, Number One, there was sort of a monopoly. You could only get a certain number of channels. Number Two, that was particularly intrusive, and you could not control it.

Unlike Section 3008, you, either to protect yourself or your children from affront, you either have to throw your radio or TV out the window, or you have to stop watching it, or you have to be subject to the affront, whereas under the Rowan solution, once you receive one mailing which you deem to be offensive, you can cut that mailing off forever by advising the post office, and you never get offended again. That is very unlike the radio and TV media, and we submit that that's entirely different.

Now, this Court has stated repeatedly, and the government concedes that in this area of contraception, this is an area of specially protected constitutional value. The decision, this Court has held, of a person whether to bear or beget a child is a basic right of privacy. That was the foundation for this Court's decision in Griswald, Eisenstadt, Bigelow, and Carey, and indeed, in Bigelow, which as you will recall was an advertisement dealing with abortion services, this Court

said that the advertisement does much more than propose a mere commercial transaction. It contains material of clear public interest.

Now, the government is trying to apply in this case a commercial speech test. We believe that that is incorrect. Number One, there is no bright line between commercial and non-commercial speech. If you look at the materials in our appendix, you are going to see an admixture of information, some commerical, some non-commercial, and a combination of both. But this Court held in Bigelow that information of this type in this area, in the area of contraception and family planning, has a special constitutional status, and before the government may intrude upon that area, they must show a compelling governmental interest.

And indeed, even if there were not this specially protected constitutional value, because this statute is content related, it is not content neutral, and because it discriminates against speakers, that is, Planned Parenthood can speak where we cannot speak, then this governmental restriction is still subject to the most compelling interest test.

However, if you retreat from that test and just say that they have to show a substantial interest, nevertheless, the law is clear that even in the

commercial speech area the government must restrict the speech in the least restrictive manner, and this is not the least restrictive manner. Congress struck that balance in Section 3008. That is the least restrictive manner. And that is why this Court in Rowan affirmed Section 3008. That is the least restrictive manner, because it gives Youngs the right to mail and Mr. Strauss the right if he does not want to receive the mail to cut off the mail.

And this statute, whether you measure it on a compelling interest test, a substantial interest test, will not pass constitutional muster on any basis, because it is not the least restrictive means.

QUESTION: Mr. Solovy, do you think the -- Can you live with what the District Court did?

MR. SOLOVY: Yes.

QUESTION: Do you think it is constitutional?

MR. SOLOVY: Well, Justice White, I am not sure that Judge Penn's --

QUESTION: I would think you would think it was unconstitutional, in view of your argument you just made.

MR. SOLOVY: Well, my partners and I, when we received the decision, said, this is not a perfect decision, but in this age of litigation and costs, we

certainly could live with that decision, because Youngs is not in the --

QUESTION: But you didn't cross-petition?

MR. SOLOVY: We were quite satisfied with Judge Penn's solution.

QUESTION: Let me ask you again. Do you think it is constitutional?

MR. SOLOVY: What he did? I think the statute is unconstitutional. I think he thought it an unnecessary burden on us.

QUESTION: Well, an unconstitutional burden on you?

MR. SOLOVY: Yes. But I did not choose to cross-appeal, because I could live with the result. My client could live with the result. We are not interested in offending anyone, and it did not bother us to put this material in an envelope. It did not bother us to say, this is contraceptive information. It did not bother them -- us to tell them that they had a statutory right under Section 3008.

It probably was an unconstitutional burden, but in a practical world we didn't care, because my client is not interested in offending anyone. We are not interested in drowning people with mail they don't want to have. We think it is important information.

Why was that condition that Judge Penn had posed unconstitutional? Because it doesn't apply to other mailers. It doesn't apply to Planned Parenthood. It doesn't apply to the purveyor of salacious material.

Indeed, if you look at the Congressional balance, if you look from Section 3008 to Section 3010, that borders on really hardcore material, and even there, as to Section 3010, which talks about advertisements depicting intercourse in natural and unnatural acts and human genitalia, even there Congress struck the balance by saying that the government may not act as a censor, may not cut off the mail. It is the right of the recipient.

Now, to get back -- that is a longwinded answer to a very short question, Justice White. Yes, I think it was unconstitutional, the condition he imposed, but he held the statute unconstitutional. It opened up our line of communication, and we are willing to live with that.

I don't think you have to appeal every time you win because you don't get perfect justice.

QUESTION: Do you think you are free to challenge such restrictions in some other form?

MR. SOLOVY: You mean the conditions he imposed? No, I think we are bound by that. That is the

law of the case as to us. We were the litigants, and he said we must abide by these conditions. We accepted those. I don't think we are free to contest that.

QUESTION: Why did the case come up in this jurisdiction?

MR. SOLOVY: Because my partner, Mr. Graham, said I had to sue here because this was the proper venue. I would have preferred to sue in Chicago, but he told me I had to sue here. The Post Office was here.

QUESTION: If you mail -- This is of nationwide application?

MR. SOLOVY: Yes.

QUESTION: So if you mail something without complying with this injunction, you are in contempt, I take it.

MR. SOLOVY: That's right. We do not intend to stand in contempt of Judge Penn or any other court, particularly this Court.

(General laughter.)

MR. SOLOVY: Now, you know, we did not raise the question of whether Judge Penn could impose this condition. The government did. If the government wants to remove that restriction, then we would be subject to the provisions of 3008. We would do it still in the same tasteful manner. We are going to put it in

envelopes, except for the drug store flier.

As I think the Court pointed out and the amicus pointed out, the drug store flier contains material that might be offensive to people other than our own product. It talks about sanitary napkins, et cetera. And what is offensiveness, as we say in our brief, like beauty, is in the eye of the beholder.

I may be much more offended by Consolidated Edison's discussion of nuclear energy and feel that that intrudes upon my rights to rear my children much more than I may be on contraceptive material. So, it is very dangerous for the government to act as a censor on the notion of offensiveness. If that is the hallmark of the First Amendment's offensiveness, we would be in deep trouble. And I don't believe that the decisions of this Court stand for that proposition.

Now, we talked about the Comstock Act. The Comstock Act was passed in 1873, and it was clear that it was the moral judgment of Mr. Comstock and the people at that time that you should not speak about contraception.

QUESTION: Well, it was the moral judgment of Congress at that time, was it not?

MR. SOLOVY: Yes, after one hour of debate --

QUESTION: Well, maybe they thought it was

quite a clear issue that didn't require any more debate.

MR. SOLOVY: Well, interestingly enough, in my research, I found that Mr. Comstock had as his legislative assistant the Justice of the Supreme Court who drafted the statute.

QUESTION: Who was that?

MR. SOLOVY: I can't remember the name. Can you? We will have to look it up, but it was a Justice of the Supreme Court. He did Mr. Comstock's handiwork, and Congress passed it. And it was the -- So I guess we all here somewhat share the blame of this statute.

(General laughter.)

MR. SOLOVY: Not looking at anyone in particular, however.

Now, that statute remained in effect with various minor changes until the Post Office Reorganization Act of 1970.

QUESTION: I am sorry. I am curious. What year was this?

MR. SOLOVY: The original Act?

QUESTION: No, the Act in which the Justice of this Court --

MR. SOLOVY: 1873. We can find the name. It is somewhere.

QUESTION: You weren't here then.

(General laughter.)

MR. SOLOVY: I meant no personal aspersion, Justice Brennan.

QUESTION: Where was the Senator from?

MR. SOLOVY: The Senator?

QUESTION: Comstock.

MR. SOLOVY: He was from New York City.

I might add as another historic antecedent that it is interesting, not only -- when this 1873 Act was passed, not only could women not vote, but in the city of New York, to get the historical perspective correct, women in New York City could not go to a restaurant unaccompanied by a male. Otherwise, they would be violating the law. And Mr. Comstock, of course, was a mortal enemy of the birth control movement, and particularly Margaret Sanger.

But moving from 1873 to 1970, when they changed the Act, it was originally proposed that all vestiges against prohibiting unsolicited mail concerning contraceptives be eliminated. The Post Office took that view, the Department of Health, Education, and Welfare, and the Department of Labor. Somewhere along the line, the Post Office changed its mind and recommended to Congress that they retain the restriction on unsolicited -- Justice Strong, I am told, is the author. Justice

Strong.

QUESTION: And he was from Pennsylvania, as I recall, not New York.

MR. SOLOVY: Pardon?

QUESTION: I think he was from Pennsylvania, not New York.

MR. SOLOVY: Well, I think that is correct, Justice Brennan, but Mr. Comstock took his friends where he could find them.

(General laughter.)

MR. SOLOVY: He might even have taken a Justice from Illinois. We don't know.

In any event, the Post Office changed its mind, and said, retain this restriction on unsolicited contraceptive advertisement. Congress adopted that without any discussion. The Post Office gave no reason. Congress gave no reason. But at the same time, and under the same title, it did discuss and it did adopt Section 3008, which balanced the right of the sender and the right of the recipient, and struck the balance on the side of the mailer to mail and on the side of the recipient to cut off.

Now, if Rowan itself were not dispositive of this case, then we should look at the decision of this Court in Carey versus Population Services International,

because there, the state of New York in banning contraceptive advertisement put forth the very same reason that the government puts forth here. One, sensitivity, and two, the protection of minors.

And this Court held, and I think most of the Court joined in this expression, but these are not classically justifications validating the suppression of expression protected by the First Amendment. The government's asserted interests in this case were expressly rejected by this Court in Carey, and going on, foreshadowing this case, this Court stated at Page 678, "Appellant suggests no distinction between commercial and non-commercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression, the core of First Amendment values."

And that is what we have here. We have hostility to the ideas conveyed and the form of expression. And Justice Powell, I believe, stated it very well in his concurring opinion in Carey when he talked about the privacy of the home as being the best place for one to consider and study this important

subject, that the marketplace, no matter how impersonal, was not anomymous, and that the home was the proper place for this subject, and indeed, Justice Powell pointed out in a footnote that although at the home one bore the risk of this material and information falling into the hands of minors, that did not justify cutting it off from the home, because that would burden the rights, constitutional rights of adults.

If Rowan doesn't solve the problem, and if Carey does not lay this problem to rest, then certainly this Court's decision in Consolidated Edison is on all fours with this case, because there, you had a person commercially interested talking about nuclear power. Here we have Youngs, who is in the business of birth control and prevention of venereal disease. That is the heart and essence of our business in a protected area.

But in Consolidated Edison, that regulation was struck. This Court applied the compelling interest test, because the regulation was content based, and it was speaker discrimination. This Court held that the corporate speaker may not be discriminated against, and we submit that Youngs may not be discriminated against.

New York, like the government here, said, oh, this is content neutral, because we are banning all speech on this subject, just like the government says

here, this is content neutral. We don't have any hostility towards contraception. You just can't talk about that. But in Consolidated Edison, this Court pointed out that the First Amendment, if it means anything, means the government cannot prohibit speech of an entire topic.

In Consolidated Edison, the state of New York, like the government here, alleged captive audience, intrusiveness upon the home, and this Court held, well, you could take the advertisement, put it from your hand, and put it in the wastepaper basket. Indeed, this Court averted to a Rowan type solution.

And this Court in Consolidated Edison pointed out that because a speaker has alternative means of communcation, that does not justify a content based ban on discussion. The government talks about a premailer, that Youngs should make a premailer. Well, part of the power to communicate is the power to communicate. If I wrote you and said, I mean, how many of those just advertisements do you throw away? Do you want to learn more about a Cadillac? Do you want to know about an RCA television? Well, you are not going to pay attention unless you are a particular buyer.

But the government's solution of the premailer was expressly rejected by this Court's decision in

Lamont versus Postmaster General. Now, I have to add that I don't understand how Youngs would not violate the statute and be subject to five years in the penitentiary by writing and saying, do you wish to receive contraceptive advertisements? Because I think that is an advertisement unto itself. But assuming that I could send a premailer, this Court held in Lamont versus Postmaster General that by requiring the addressee to do an affirmative act, you are chilling the addressee's First Amendment rights.

Number Two, under Linmark, you are burdening Youngs's First Amendment right, and certainly in Lamont they pointed out that there was a less restrictive means available, namely, as under 3008, the addressee could say he or she did not want to receive the mail, and do not send it to any person in the household under the age of 19.

In summary, we have a content based ban on speech, a ban on speech which is speaker discrimination. It makes no sense to say that Planned Parenthood could send these materials into the home on an unsolicited basis, but Youngs is barred from the adult population of the United States.

I do think that in the year 1983, with the problems that beset our community, our country, and the

world, that that type of restriction comes very late in the day. But certainly Section 3008 solves the problem. If the person doesn't want to use the wastebasket method of treatment, and I agree with Justice Marshall, we should not presume that children are going to read the mail of the parents -- we are not trying -- Youngs is not and did not ask for the right to send these materials to minors. We want to address and educate the adult population of this country. If the wastepaper basket isn't enough, certainly the least tailored restriction is found under the same title passed by Congress to address the needs that the government has suggested here, namely, the right under 3008, approved by this Court in Rowan, to say, send no more mail of this type to my household.

We ask that the decision of Judge Penn in all respects be affirmed.

CHIEF JUSTICE BURGER: Mr. Strauss?

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.

REBUTTAL

MR. STRAUSS: Thank you, Mr. Chief Justice.

Three points. First, this statute was passed in the 1970's, not the 1870's. When it was passed, Congress swept away all restrictions on mailings, non-commercial mailings, all restrictions on solicited

commercial mailings, and many important restrictions on unsolicited commercial mailings, and Congress did so while it was avowing that contraception is a matter of individual personal choice.

I would also point out that in 1970, when Congress considered and passed the statute, it was five years before Bigelow and six years before Virginia Pharmacy. At that time it was black letter law that all commercial speech could be regulated without regard to the First Amendment, and had Congress wanted to come as close as it could to --

QUESTION: Black letter law from what, Valentine against Christianson?

MR. STRAUSS: From Valentine against Christianson, the first --

QUESTION: Would you call that black letter law?

MR. STRAUSS: Well, it was so considered in 1970.

QUESTION: By whom?

MR. STRAUSS: Well, by all the lower courts, and presumably by Congress had it wanted to see it close to the line, Justice Blackmun. We all recognize the validity of subsequent criticisms, but even in Pittsburgh Plate Glass in 1973, the Court still treated

Valentine against Christianson as the law.

Had Congress wanted to suppress as much information about contraception as it possibly could have or had it wanted to act out of antipathy to contraception, it would have -- it would not have eliminated so many restrictions on commercial expression as it did.

Second, Lamont, which was just introduced now by appellee, involved -- required -- the statute in that case required a willing recipient to acknowledge to the government that he wanted to receive political mailings that the government had declared to be subversive. That is obviously worlds removed from a premailing to a private advertiser in this case.

Third, appellee insists that he doesn't want to send these to unwilling recipients, or so it seems. And that this problem could be constitutionally solved by allowing unwilling recipients to cut off the mailings. If that is right, then the only question in this case is, who is going to bear the burden? Does an unwilling recipient have to buy a locked mailbox or make an extra trip to the post office, certify that these materials are sexually arousing and erotically provocative, closely monitor his mail, or do something else, or does an advertiser who is already engaged in

continual mass mailings and is in the business of reaching the public and finding out what the public thinks, does the advertiser just have to take some measure, at most one additional mailing, to see if the persons to whom he is sending his advertisements are willing to receive them?

Thank you.

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

(Whereupon, at 11:01 o'clock a.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:
William F. Bolger, et al., Appellants v. Youngs Drug Products Corp. - 81-1590

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