

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1724

TITLE NEW YORK, Petitioner v. ROBERT UPLINGER AND  
SUSAN BUTLER

PLACE Washington, D. C.

DATE January 18, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK, :  
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Petitioner :  
:  
v. :  
:  
ROBERT UPLINGER AND SUSAN BUTLER :  
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No. 82-1724

Washington, D.C.  
Wednesday, January 18, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United  
States at 2:14 p.m.

APPEARANCES:

RICHARD J. ARCARA, ESQ., District Attorney, Erie  
County, Buffalo, New York; on behalf of the  
Petitioner.  
WILLIAM H. GARDNER, ESQ., Buffalo, New York; on  
behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

RICHARD J. ARCARA, ESQ.,  
on behalf of the Petitioner

3

WILLIAM H. GARDNER, ESQ.,  
on behalf of the Respondents

22



1 but -- Now, you are speaking to the State of New York in  
2 this case, not him, I take it.

3 MR. ARCARA: That is correct, Your Honor.

4 Generally that statute prohibits individuals  
5 from --

6 QUESTION: You are not speaking for the Attorney  
7 General of New York though?

8 MR. ARCARA: No, I disagree with the Attorney  
9 General.

10 QUESTION: I know, I know you do, but he --

11 MR. ARCARA: Your Honor, he doesn't have the  
12 responsibility of enforcing this law either. I would also  
13 like to point that back out. I have the responsibility of  
14 enforcing this law and I have no knowledge --

15 QUESTION: You have the authority to represent  
16 -- You can't speak for the State of New York, can you?  
17 Can't you just speak for the county or what?

18 MR. ARCARA: No, Your Honor, I am speaking on  
19 behalf of the State of New York.

20 QUESTION: For the state, because you have the  
21 authority to do that?

22 MR. ARCARA: That is correct, Your Honor.

23 QUESTION: But, only he has to run for election.

24 MR. ARCARA: I have to run also, Your Honor.

25 QUESTION: But not statewide.

1 MR. ARCARA: That is correct, Your Honor.

2 And, by the way, I might add that I had no  
3 knowledge that the Attorney General was going to file  
4 their brief until the day in which the Respondents were to  
5 file their brief. That is the first time that I had any  
6 notice at all that the Attorney General was going to take  
7 this position, contrary to mine. In fact, he was invited  
8 to participate in this case at the Court of Appeals and he  
9 refused. So, this case came --

10 QUESTION: Mr. Arcara, do you have some state  
11 requirement that the Attorney General has to be vouched in  
12 whenever there is an attack on the constitutionality of a  
13 New York statute?

14 MR. ARCARA: Under the executive law, Your  
15 Honor, it says that the Attorney General can appear in  
16 court to defend the constitutionality of a statute.

17 QUESTION: No. My question was -- Some states  
18 have statutes which provide that in any action in the  
19 state, a question of the constitutionality of a state  
20 statute is raised, then the parties must vouch the  
21 Attorney General into the case to let him come in and  
22 defend the constitutionality of the statute.

23 MR. ARCARA: Your Honor, he has that option. He  
24 can either appear to defend the --

25 QUESTION: Are you required to give him notice?

1           MR. ARCARA: We did give him notice in this  
2 case, Your Honor.

3           QUESTION: Aren't you required to if the  
4 constitutionality of a law is at stake and then he has the  
5 option.

6           MR. ARCARA: That is correct, Your Honor. He  
7 has refrained from exercising that option until the case  
8 came before this Court.

9           QUESTION: So, after he got the notice, he never  
10 told you he was going to appear in the case?

11          MR. ARCARA: No, he didn't, Your Honor. I had  
12 no knowledge.

13          This statute, generally referred to as the  
14 loitering statute, prohibits individuals from loitering or  
15 remaining in a public place for the purpose of soliciting  
16 or engaging in deviate sexual intercourse or other sexual  
17 behavior of a deviate nature.

18          Now, briefly the fact underlying the two cases  
19 before the Court are as follows:

20          The Respondent Butler, who was a known  
21 prostitute by the Buffalo Police Department, was observed  
22 for approximately ten minutes on a public street in the  
23 City of Buffalo waving at passing automobiles. She  
24 ultimately entered one of those automobiles which then  
25 proceeded down a side street.

1           The police officer who was making those  
2 observations then went to where that car was parked and  
3 observed the Respondent Susan Butler engaged in an act of  
4 oral sodomy with the driver of that vehicle. She was then  
5 arrested under the loitering statute.

6           Mr. Uplinger was arrested on a public street in  
7 a quiet residential area of the City of Buffalo following  
8 a direct and overt solicitation to a plain clothes Buffalo  
9 police officer to engage in an act of oral sodomy.

10           The police action in both of these cases was the  
11 result of a reaction by the Police Department to citizen  
12 complaints of these type of activities occurring in those  
13 two respective neighborhoods.

14           I will go into a little more detail of the facts  
15 of the case during the course of my argument.

16           At issue here is whether or not this statute  
17 represents a valid attempt by the state to control public  
18 order.

19           Our position as the Petitioner is that the state  
20 enactment is valid. It is based upon a legitimate and a  
21 compelling interest in the control of the conduct that it  
22 prescribes.

23           Now, with regard to the compelling state  
24 interest, first I submit that the solicitations we are  
25 talking about here constitute a real harassment. They are



1 a real annoyance to a general public. They are  
2 conversations of the most intimate nature. They are the  
3 most private of matters and they are delivered in a public  
4 form.

5 QUESTION: Well, Mr. Arcara, that may be true,  
6 but apparently the New York Court of Appeals placed the  
7 construction on the purpose of this statute that was more  
8 limited than that said that it was not a statute intended  
9 to protect the harassment of other people in the vicinity,  
10 but rather was in the nature of the companion attempt  
11 statute to another law which New York, of course, had held  
12 unconstitutional.

13 Are we bound by the determination of the state  
14 court as to the purpose of this statute?

15 MR. ARCARA: No, Justice O'Connor. I dealt with  
16 that issue on page four of my reply brief.

17 QUESTION: Well, I was afraid you might have  
18 dealt with it incorrectly and that is why I asked the  
19 question.

20 MR. ARCARA: Well, Your Honor, I submit that the  
21 Court of Appeals applied no statutory construction to that  
22 statute. They merely invalidated it in toto and then they  
23 gave some reasons for it which I submit --

24 QUESTION: Well, the Court gave -- spelled out  
25 what it said the purpose was and was not. Are we bound by

1 that?

2 QUESTION: No, Your Honor, because the Court, in  
3 making its finding, relied upon the Onofre decision and  
4 that decision relied upon the right of privacy and the  
5 equal protection clause. And, they interpreted the  
6 federal Constitution regarding the applicability of that  
7 statute to the state law. I submit that this court is the  
8 final arbiter as to whether or not the federal  
9 Constitution, as it is applied to a state court, was  
10 applied correctly. And, I submit they did not apply it  
11 correctly.

12 QUESTION: Do you think in interpreting the New  
13 York Court of Appeals opinion we may read the opinion in  
14 this case in the light of its Onofre opinion?

15 MR. ARCARA: Well, Your Honor, I don't think you  
16 have to. I think we are talking about here a public  
17 nuisance and I personally think that the Onofre decision  
18 was totally another matter. The right of privacy they use  
19 in that case -- that dealt with private acts, adults in a  
20 private setting. Here we are talking about a harassment  
21 statute on a public street in a public area that is  
22 annoying to the public at large and it is so offensive.

23 I submit the legislature had a right to enact  
24 this law and to protect the public from these types of  
25 infringements on their rights.

1           QUESTION: Counsel, here we are dealing with an  
2 opinion of New York's highest court that is a little over  
3 a page long.

4           MR. ARCARA: That is correct, Your Honor.

5           QUESTION: And, it doesn't cite any  
6 constitutional provision. It cites the penal law. Unless  
7 one is to go back and look at People versus Onofre, which  
8 they refer to, it is almost impossible to tell on what  
9 grounds they did away with this statute.

10          MR. ARCARA: It is very difficult, Your Honor, I  
11 agree.

12          QUESTION: So then don't you think People  
13 against Onofre sheds some light on it?

14          MR. ARCARA: Well, People versus Onofre dealt  
15 with the right of privacy and equal protection. And, I  
16 don't believe the right of privacy, the home, in the  
17 private setting of a home between consenting adults would  
18 apply to the privacy that a person is entitled to on a  
19 public street.

20          And, secondly, the equal protection clause, I  
21 don't think, has any application here whatsoever.

22          QUESTION: Well, this Court denied cert on that.

23          MR. ARCARA: That is correct, Your Honor.

24          QUESTION: Do you think the New York Court of  
25 Appeals held this statute was unconstitutional?

1 MR. ARCARA: It would have to, Your Honor.

2 QUESTION: Well, I would think it would have to,  
3 but it doesn't say so.

4 MR. ARCARA: Well, it is very difficult. I  
5 wrestled with that decisions for many, many hours as to  
6 what they were trying to say. I don't think they did  
7 anything to try to construct that statute in harmony with  
8 the Constitution. They didn't look to what the intent of  
9 the law was. They didn't care what the purpose of the law  
10 was. They just kind, in a summary fashion, of just said  
11 this was an act that was anticipatory of a legal act and,  
12 therefore, we are going to cite it as unconstitutional.

13 QUESTION: What did the dissenting judge think  
14 they acted on?

15 MR. ARCARA: He thinks that they acted on the  
16 overbreadth; that they felt -- Justice Jasen felt that the  
17 Court was applying the law from the setting of a private  
18 setting of a home or private residence to the street and  
19 he felt it was an overbroad interpretation of the statute.

20 QUESTION: Well, possibly the Court based it on  
21 either the right of privacy inquiry or possibly a First  
22 Amendment problem, is that right?

23 MR. ARCARA: I don't believe there is any  
24 reference at all to the First Amendment. I don't believe  
25 that was the case at all, Your Honor. It is strictly

1 dealt with the right of privacy -- Well, in conjunction  
2 with the First Amendment, I am sorry -- And, as far as  
3 the equal protection clause is concerned.

4 QUESTION: Now, the only intimation I find in  
5 the opinion of the New York Court of Appeals in this case  
6 as to some constitutional ground is it says this statute,  
7 therefore, suffers the same deficiencies as did the  
8 consensual sodomy statute. Now, that takes you back to  
9 Onofre and there they are talking about federal  
10 Constitution rights.

11 It seems to me that your best chance to get a  
12 review of this decision on the merits in this Court is to  
13 agree that this decision should be looked at in the light  
14 of Onofre.

15 MR. ARCARA: I agree, Your Honor.

16 QUESTION: Okay.

17 (Laughter)

18 MR. ARCARA: Secondly, these types of  
19 solicitations could also lead to a violent reaction. And,  
20 beyond the fact that they are forced upon an individual in  
21 a public setting, they are so intimate in nature that I  
22 submit that a violent reaction could be generated by a  
23 solicitee when some one addresses his sexuality in a  
24 public street.

25 I further believe regarding the compelling state

1 interest here that there is a real effect on minors.  
2 There is an incident in the record -- and I make this  
3 claim based upon what is in the record -- that a mother  
4 was concerned about her son being apprehensive about going  
5 out into the street being solicited to engage in an act of  
6 oral sodomy.

7 I submit that there is a potential harm when the  
8 sexuality of a minor is addressed in a public street, not  
9 with the consent of the minor or his parent, but strictly  
10 is to the arbitrariness and discretion of a pure stranger.

11 Thirdly, I submit that this law acts as a  
12 deterrent to those minors who would solicit, either  
13 voluntarily or through coercion. And, further, it  
14 prevents minors from being exploited by those who would  
15 seek to satisfy their own sexual desires.

16 Lastly I submit that we are dealing here with a  
17 public nuisance. The record clearly establishes that  
18 businessmen were concerned about congregating groups of  
19 solicitors. They believe that there was a problem that  
20 senior citizens and elderly people were somewhat  
21 apprehensive about going into the neighborhood to  
22 the stores and the to the restaurants that are located in  
23 that area. And, the citizens were apprehensive about  
24 walking outside their homes for fear of being solicited.

25 What you have in the posture of this case here

1 is that these individuals have taken over the area of  
2 Genesee Street in the City of Buffalo and taking over the  
3 area of North Street and Delaware and North Street and  
4 Irving Place.

5 Having set out these compelling interests of the  
6 state, the speech and the conduct we are here now can be  
7 examined as it relates to the First Amendment.

8 First, in regard to the context of the  
9 solicitation, I don't think it can be disputed that the  
10 communications we are dealing with here are not ideas,  
11 they are not discussions of the issues or of opinions.  
12 There is no search for the truth here. These are in no  
13 way at all a pursuit by man for his higher pursuits. I  
14 submit that at the minimum these solicitations are lewd  
15 and perhaps they may be obscene. These are not  
16 four-letter, sexual explicit epithet emblazed on the  
17 jacket of an individual to denote some political position.  
18 These are solicitations which are wholly erotic in nature  
19 and they are merely meant to satisfy the personal and the  
20 selfish sexual desires of the solicitors.

21 Much of the conversations that we are dealing  
22 with here deal with the crime of prostitution and I submit  
23 are clearly not protective.

24 We submit that certainly an argument can be  
25 made, a strong argument I submit, that this type of speech

1 should be denied, all constitutional protection based upon  
2 the content. However, if somehow this speech is minimally  
3 protected with respect to the content, then I submit that  
4 in the context of which it is uttered clearly prohibits  
5 the implication of a First Amendment.

6 We are talking about a public street here.  
7 There is no right to privacy involved here. The  
8 solicitations are not occurring in one's home. These are  
9 in a public area that belong to the citizens of their  
10 community.

11 They are delivered indiscriminately, with the  
12 key here that they are delivered without any indication at  
13 all on the receptiveness on the part of the solicitee.

14 As noted earlier, these solicitations involve  
15 the most intimate of matters and they are made without the  
16 consent of the solicitee.

17 Last and most importantly here, the solicitees'  
18 rights of privacy have been infringed upon. He is not  
19 only a captive listener here, but he is forced to respond  
20 even if by abrupt avoidance. Some directs a solicitation  
21 at that person, I would say that is much more intimidating  
22 than even in Colfax or in Laramie where the conversation  
23 was not directed at your personally. Your sexuality now  
24 becomes a topic of conversation with someone who may be a  
25 total stranger to you.



1                   Now, with regard to the overbreadth, Mr.  
2 Uplinger claims here and suggests that the statute  
3 overreaches with respect to his conduct as reflected in  
4 the record.

5                   QUESTION: Well, the Court of Appeals didn't  
6 deal with -- denied it was placing its decision on  
7 overbreadth.

8                   MR. ARCARA: But, the Respondents raise that  
9 issue, Your Honor, in their brief, so I thought that the  
10 Court here may want to deal with that.

11                   I would like to go back to the facts regarding  
12 the solicitation by Mr. Uplinger.

13                   We have a Buffalo police officer who is standing  
14 on the steps in a private or in a quiet residential area  
15 of the City of Buffalo. Mr. Uplinger approached the  
16 Buffalo police officer and after the initial greetings  
17 then said to him, do you want to get high? The police  
18 officer responded in the negative, no. Then a group of  
19 other individuals came over and they were involved in a  
20 conversation when a police vehicle arrived and the police  
21 officers inside asked the individuals to get off the steps  
22 and to leave the area.

23                   At the time the Buffalo police officer separated  
24 himself from Mr. Uplinger and walked away from Mr.  
25 Uplinger. Mr. Uplinger then followed or pursued the

1 police officer and asked him if he would come over to his  
2 house. The police officer responded -- He said, why don't  
3 you come over? The police officer then said I am afraid  
4 with the police, I just want to leave. This was the  
5 second time that the police officer refused an offer by  
6 Mr. Uplinger.

7 At this point in time, and I submit in an  
8 offensive way and I submit without any receptiveness on  
9 the part of the police officer, Mr. Uplinger asked the  
10 police officer to come over to his house to engage in an  
11 act of oral sodomy.

12 I submit here that the real argument that my  
13 opponent is addressing with his overbreadth question is  
14 that they are saying that since these type of  
15 solicitations don't both them, therefore, the public must  
16 tolerate them similarly to a publicly intoxicated person  
17 who would say that public intoxication doesn't bother me,  
18 why should it offend you?

19 If there is one instance where there may be a  
20 possible overbreadth, I submit, that is if an individual  
21 were to loiter in a public place with another person and  
22 that person is not a minor and he knows that the solicitee  
23 is receptive. And, that one instance, I submit, there  
24 could be a possible overbreadth.

25 QUESTION: Well, Mr. Arcara, I still don't

1 understand why we are talking about overbreadth in view of  
2 the Court of Appeals' clear statment that it wasn't basing  
3 its decision on that. And, I assumed we were here to  
4 review their decision.

5 Now, for purposes of your argument, do you  
6 assume that there is a right of privacy as articulated in  
7 Onofre? Do you make that assumption and nevertheless urge  
8 that this statute need not be held invalid?

9 MR. ARCARA: That is correct, Your Honor.

10 QUESTION: Well, certainly the assumption that  
11 Onofre was correctly decided is contrary to our summary  
12 affirmance of the Doe case in 1976 from the Eastern  
13 District of Virginia, isn't it?

14 MR. ARCARA: That is correct, Your Honor.

15 QUESTION: But, the merits of the Onofre case  
16 were not briefed here in this Court or argument by --

17 MR. ARCARA: No. We submitted a petition for  
18 cert and it was denied.

19 QUESTION: Right. So, that really, I assume,  
20 wasn't before us. You were assuming somehow that Onofre  
21 was correct and there was the right found in that Court of  
22 privacy, but that this statute, the attempt statute, if  
23 you will, was nevertheless valid, right?

24 MR. ARCARA: Yes, Your Honor.

25 I would like to go on at the time with the

1 question of vagueness.

2 QUESTION: May I ask you a question before you  
3 proceed?

4 MR. ARCARA: Yes, Your Honor.

5 QUESTION: Is there any legislative history that  
6 sheds light as to the purpose of this statute?

7 MR. ARCARA: No, Your Honor. I do cite in my  
8 brief the Model Penal Code that indicates what the purpose  
9 of this statute was and that is that it was a harassment  
10 statute.

11 QUESTION: Well, was there any evidence in the  
12 legislative history that that was its purpose?

13 MR. ARCARA: No, Your Honor, there wasn't.

14 QUESTION: In the dissenting opinion there is a  
15 statement that every indication is that this statute was  
16 designed to regulate public conduct which would be  
17 considered offensive. There is no citation or  
18 documentation of that. Do you have any in mind?

19 MR. ARCARA: No, Your Honor.

20 QUESTION: But, apparently the majority of the  
21 New York Court of Appeals felt that it did not view the  
22 legislative purpose to be the deterrence of harassment,  
23 but, nonetheless, I suppose you would perhaps say that  
24 this statute that we are looking at was an effort to  
25 control certain public conduct rather than conduct in

1 private.

2 MR. ARCARA: That is correct, Your Honor.

3 With respect to the vagueness question, I submit  
4 that there is no possibility for arbitrary enforcement of  
5 this statute. Police officers, I submit, would not be  
6 able to arrest strictly on a whim or a guess if someone  
7 were merely standing on a street corner, but that they --

8 QUESTION: Are you arguing vagueness because  
9 your opposition has said the statute is vague?

10 MR. ARCARA: that is correct, Your Honor.

11 QUESTION: Not because the Court of Appeals said  
12 it was?

13 MR. ARCARA: No, Your Honor.

14 QUESTION: Because as the Respondent they have  
15 raised vagueness and on that ground they urge it be  
16 affirmed?

17 MR. ARCARA: That is correct, Your Honor.

18 QUESTION: Or the Appellee or whatever you are.

19 QUESTION: Respondent.

20 MR. ARCARA: Due process would require that for  
21 an arrest that there be an articulable, overt conduct  
22 which would demonstrate the individual's mental state  
23 before arrest could occur.

24 In the case of Mr. Uplinger, we have a direct  
25 solicitation. In the case of Susan Butler, we have her

1 loitering, waving at an automobile, followed by an  
2 observation that she was engaged in an act of oral sodomy.

3 Furthermore, due process would require that  
4 before a conviction that there would be proof beyond a  
5 reasonable doubt.

6 I submit that there would be no discriminatory  
7 enforcement based solely upon anyone's status regarding  
8 this case. There is no indication in the record or the  
9 face of the law that is directed at anyone's status. The  
10 fact the clear language of the statute relates only to  
11 conduct and activity and not sexual preference or any  
12 criminal reputation.

13 The Respondents also raise the question  
14 regarding notice and they allude to the other behavior of  
15 a deviate nature which is the second severable part of  
16 that statute.

17 I submit that this challenge to the portion of  
18 the law under which he was not charged is not a facial  
19 challenge. It is a challenge to a severable part of the  
20 law which has not been charged, and, therefore, she is  
21 precluded from raising that question under precedent of  
22 this Court.

23 In regard to the last issue, and this is  
24 under-inclusiveness, the opponent suggests that the New  
25 York statutory scheme is flawed because it prohibits

1 solicitations or deviate sexual intercourse and not normal  
2 sexual intercourse.

3 I submit that New York does prohibit  
4 solicitations for normal sex under the general harassment  
5 statute and that statute, however, does require an intent  
6 to harass.

7 I believe that what occurred here is that the  
8 legislature felt that this type of conduct was so  
9 offensive to the general public that they decided to make  
10 this a strict liability statute.

11 In conclusion, I ask that this Court act on  
12 behalf of the citizens of New York and their right not  
13 only to privacy but tranquility in their neighborhood and  
14 I ask that you reverse the judgment of the New York State  
15 Court of Appeals.

16 CHIEF JUSTICE BURGER: Mr. Gardner?

17 ORAL ARGUMENT OF WILLIAM H. GARDNER, ESQ.

18 ON BEHALF OF THE RESPONDENTS

19 MR. GARDNER: Mr. Chief Justice, and may it  
20 please the Court:

21 I agree with my opponent that this was a  
22 constitutional adjudication below. I don't believe that  
23 needs to be proved, but if there is any need for proof of  
24 it, one only need look at the record. The only issue that  
25 was raised in the lower courts and presented to the Court

1 of Appeals was a constitutional challenge.

2 QUESTION: Based on the United States  
3 Constitution?

4 MR. GARDNER: It was based -- The challenge was  
5 based on both the United States Constitution and the State  
6 Constitution.

7 QUESTION: Then what was the case adjudicated  
8 on?

9 MR. GARDNER: One can't determine that by  
10 looking at the Uplinger decision by itself.

11 QUESTION: No, but Onofre? How about Onofre?

12 MR. GARDNER: The Onofre decision was  
13 adjudicated solely under the United States Constitution.

14 QUESTION: Right. And, here they relied on  
15 Onofre?

16 MR. GARDNER: Yes, that is what they said in  
17 their decision. And, I have no doubt, therefore, that  
18 they made this adjudication under the federal Constitution  
19 as well.

20 I think that some of the problems we have  
21 procedurally at this point is that both counsel for both  
22 parties have some difficulty, as I am sure the Court does,  
23 in the brief opinion that was written by the Court of  
24 Appeals in knowing exactly what they were saying.

25 However, there were some things that they were



1 saying that come through very clearly and while that has  
2 been mentioned briefly, I want to emphasize that the state  
3 is asking this Court to go beyond its jurisdiction.

4 I might also say that the state has varied its  
5 position with regard to whether the court below construed  
6 the statute or not. If you will look at the petition for  
7 certiorari at page six you will find the following  
8 quotation:

9 The state argued there that the statute, and I  
10 am quoting, "Contrary to the conclusion of the New York  
11 Court of Appeals was not limited just to consensual sodomy  
12 anticipatory conduct."

13 In other words, in the petition for certiorari,  
14 they were saying what I say which is that the Court of  
15 Appeals did construe the statute.

16 When they got into the main brief, they were  
17 saying somewhat the same thing as I indicate in my  
18 responding brief, and then when they got to the reply  
19 brief, as a result, I believe, of my having raised the  
20 issue in Point Two of my brief. They come up with the  
21 concept that I am not certain I fully understand that is  
22 based upon, I believe, a misreading of the decision Ward  
23 and Gaugh versus Krinsky. They suggest in the reply brief  
24 by a quotation from that case that this Court, while it  
25 may be bound by a construction of state statute, is not

1 bound by the reasoning in reaching the decision that this  
2 Court reaches, and then they state in their brief that,  
3 therefore, if the legislature's intent was different from  
4 what the Court of Appeals said it was, that this Court is  
5 not bound by the Court of Appeals decision.

6 QUESTION: Let me ask you this. Suppose a  
7 person on the street in a public place solicits two people  
8 engage in an act of oral sodomy or act of sodomy and both  
9 of them say, please leave me alone, you are annoying me,  
10 and they immediately call a policeman and say this man is  
11 soliciting me contrary to the statute. Now, on what  
12 ground under the Court of Appeals decision would you say  
13 that that person could not be convicted?

14 MR. GARDNER: I would say that the ground would  
15 be that the Court of Appeals has construed the statute as  
16 being limited to a smaller -- if I may use the word  
17 "geographical" area -- than what you are talking about.  
18 It was not designed to reach offensiveness per se. It was  
19 designed as one of the levels of inchoacy behind the  
20 consensual sodomy statute. Behind the consensual sodomy  
21 statute originally you had --

22 QUESTION: So, you are saying you couldn't be  
23 convicted under the statute even if you were annoying  
24 people by your soliciation?

25 MR. GARDNER: Well, Your Honor, I haven't --

1 QUESTION: Is that right or not?

2 MR. GARDNER: I haven't thought that through, I  
3 am not sure, but you could be convicted under another  
4 statute which is the harassment statute.

5 QUESTION: I want to know whether you could be  
6 convicted under this statute.

7 MR. GARDNER: If you take the construction of  
8 the New York Court of Appeals --

9 QUESTION: I can see that perhaps -- Suppose the  
10 person first solicited, a person who says, please leave me  
11 along, you are annoying me, and refused. He solicits  
12 another person who is very willing. He is then charged  
13 with two counts of illegal solicitation under this  
14 statute. Now, could he be convicted under the New York  
15 Court of Appeals opinion? Could he be convicted on either  
16 one or both?

17 MR. GARDNER: I believe that the way this  
18 statute is written and the way the New York Court of  
19 Appeals has construed it he would not be convicted under  
20 this particular statute at the present time.

21 QUESTION: On either count?

22 MR. GARDNER: On either count. However, the New  
23 York Court of Appeals has made it clear that that kind of  
24 conduct could be subject to conviction.

25 I cite the Phipps versus Ohio case as an example

1 the kind of fact pattern, Your Honor, that you have cited.

2 QUESTION: Then I can't believe that you say  
3 this is a constitutional decision. All you are saying is  
4 that -- In my example, you are just saying, well, neither  
5 of those acts under either of those counts is covered by  
6 the statute. The New York Court of Appeals just construed  
7 the statute not to cover either one of them, and yet you  
8 say this is a constitutionally-based decision.

9 MR. GARDNER: What I have said is this --

10 QUESTION: And, you can't have it both ways. It  
11 can't be both ways. I don't blame you for arguing this is  
12 just a case of statutory construction, but I thought you  
13 said that -- I certainly read the Court of Appeals opinion  
14 as having a constitutional issue in it.

15 QUESTION: Well, I thought counsel did too.

16 MR. GARDNER: I don't believe -- First of all, I  
17 am convinced that the Court of Appeals decision was a  
18 constitutional adjudication. It had no jurisdiction to --

19 QUESTION: Why did it have to reach a  
20 constitutional issue if it just construed the statute not  
21 to cover either one of the situations that I outlined in  
22 those two counts?

23 MR. GARDNER: Well, because, Your Honor, it was  
24 faced with a fact pattern that is totally different from  
25 what you were talking about. It was faced with a fact

1 pattern of an individual who extended a private invitation  
2 to go to his home and engage in --

3 QUESTION: It may be private, but can you  
4 imagine holding that when he solicited an undercover  
5 police officer that it was sort of a consensual matter?

6 MR. GARDNER: I don't think that the  
7 determination of the consensual matter can be judged on  
8 the identity of the police officer which was not known to  
9 the Respondent at that time. It has to be gaged in terms  
10 of the kind of the role the police officer was playing.

11 QUESTION: You mean he can just take his  
12 chances, solicit anybody he wants to as long as he doesn't  
13 know. He isn't annoying anybody just by soliciting  
14 anybody on the street?

15 MR. GARDNER: Your Honor, that is not what I say  
16 at all and that is not the facts in this case.

17 QUESTION: Well, I --

18 MR. GARDNER: What the people are saying is that  
19 there is a per se absolute prohibition which is  
20 constitutionally permissible that no man or woman can ever  
21 have this kind of a conversation with any other person  
22 anywhere in the State of New York under any circumstances.

23 QUESTION: Well, that is an overbreadth  
24 argument, isn't it?

25 MR. GARDNER: I believe that overbreadth is

1 necessary here and I don't understand --

2 QUESTION: Well, if it is necessary, the Court  
3 of Appeals didn't think it was.

4 MR. GARDNER: I understand.

5 QUESTION: That is not the state's case. The  
6 state says it can't be done in public.

7 MR. GARDNER: The state makes the claim, Your  
8 Honor, that it can't be done in public under any  
9 circumstances except in what it says is a limited  
10 circumstance, if two people were in a remote place and no  
11 one else was around, which, I submit, is the general  
12 situation, in these kinds of situations, as pointed out in  
13 the UCLA Law Review Article cited in a couple of the  
14 amicus briefs.

15 I think that the problem that we are facing here  
16 has to do with the kind of characterization that the state  
17 gives the Court, the thought that homosexuals have taken  
18 over this particular area or what-have-you. The fact is  
19 if two homosexuals had met -- First of all, that is not  
20 true, but be that as it may, if two homosexuals had met  
21 each other and had a private conversation in that  
22 particular area with no one around who could hear  
23 anything, under the state's analysis, the problem they are  
24 facing is that he sees it that they have taken over.

25 QUESTION: How would that case ever come up if

1 no one is around and they both consenting?

2 MR. GARDNER: It would only come up --

3 QUESTION: You are talking about a hypothetical  
4 that can't occur.

5 MR. GARDNER: It would only come up in the way  
6 that this case has come up, through an undercover police  
7 officer, which is another way of indicating that the only  
8 way that you have offensiveness in the typical situation  
9 is where somebody has blatantly posed the question right  
10 up front at the very beginning and has not, through a  
11 process of acquaintanceship, become attuned to the fact  
12 that the other person is receptive to the conversation  
13 that is going to occur.

14 QUESTION: Mr. Gardner --

15 MR. GARDNER: Yes, Your Honor.

16 QUESTION: -- do you agree with me on my  
17 understanding of the New York Court of Appeals opinion  
18 which I am about to state to you that -- They say in  
19 Onofre we held that you cannot criminalize the act of  
20 deviate sexual intercourse and that is their language.

21 The statute under consideration in Uplinger  
22 prohibits solicitation of that sort of intercourse. Since  
23 you can't criminalize the act, the state can't prohibit  
24 the solicitation either.

25 MR. GARDNER: I am not sure that they said this

1 prohibits the solicitation.

2 QUESTION: That is a quote.

3 QUESTION: It is pretty close to a quote, not  
4 quite.

5 MR. GARDNER: All right. I was only going to  
6 draw the point that it is a loitering statute. I didn't  
7 recall that they claimed that it was a solicitation  
8 statute.

9 But, what is clear is that it is an inchoate  
10 invitation to engage in an act of conduct in a private  
11 place which was not illegal.

12 And, the question I think they were facing is --

13 QUESTION: It is not illegal only in the sense  
14 that the New York Court of Appeals has opined that the  
15 legislature can't make it illegal in Onofre.

16 MR. GARDNER: I pointed out in my brief, Your  
17 Honor, that it is not illegal after the Onofre decision,  
18 as a matter of adjudication in that case, whatever the  
19 rule may be in this Court's opinion with regard to the  
20 correctness of that case. I don't believe you need to  
21 reach that issue.

22 QUESTION: Well, I don't know that I agree with  
23 you, because if one of the pins of the New York Court of  
24 Appeals opinion in this case is the validity of its Onofre  
25 decision -- We obviously can't review Onofre, but we can



1 certainly review the constitutional law that is laid down  
2 in Onofre.

3 MR. GARDNER: I would agree that you have that  
4 power. What I would say is that it may not be appropriate  
5 to do it under the circumstances that you are presented  
6 with in this case.

7 I have referred to the Gates decision in my  
8 brief and I submit that that should be reviewed and  
9 thought about. The one thing that I would emphasize,  
10 please, is that we do not have a record here that would  
11 give Your Honor and the Court sufficient information to  
12 make the kind of judgments and evaluations as to whether  
13 the Onofre decision was correct in terms of the social  
14 impact, in terms of the degree of participation in the  
15 kinds of sexual activities that we are talking about,  
16 things of that sort.

17 QUESTION: Well, Mr. Gardner, assuming that that  
18 is correct and we shouldn't address the correctness of the  
19 Onofre decision, nevertheless, if there is any right, as  
20 recognized in Onofre, and assuming for this purpose that  
21 there is, does that right extend to prohibiting the state  
22 from controlling attempts made in public? And, why should  
23 the right to privacy to do things in private extend on to  
24 do the same or some portion of those things in public?  
25 That is my question.

1           MR. GARDNER: Your Honor, I don't believe that  
2 the right of sexual privacy that Onofre talked about is  
3 the right that protects my client in terms of his  
4 conversation with someone else in a public place. I  
5 believe that the right we are dealing with here falls  
6 under the rubric of the First Amendment freedom of speech  
7 subject to all the power of regulation that is appropriate  
8 under that particular Amendment.

9           There has been suggestions in some of the amicus  
10 briefs that the right of sexual privacy may be impaired or  
11 burdened in some way if the Court does not allow some very  
12 limited controlled public conversation about the private  
13 right.

14           I would suggest to you that if you limit it, if  
15 you balance the interest as between the right of the  
16 speaker to speak and the right of the hearer to have an  
17 acceptable environment, as Justice Stevens indicated in  
18 the Bolger case last year. If you balance those interests  
19 in the area of sex, it is going to be obvious that any  
20 exercise of the right of free speech is going to have to  
21 be subject to consideration for the acceptability of the  
22 that speech to the person you are speaking to,  
23 consideration for the sensitivity of the public at large.

24           I would only point out to you that what the  
25 state wants to say is that you can't talk about it at all,

1 you can't discuss this subject if it includes and  
2 invitation to come home.

3 I am saying that this Court has never --

4 QUESTION: In public.

5 MR. GARDNER: In public.

6 QUESTION: That is all the statute is dealing  
7 with.

8 MR. GARDNER: It says in public, Your Honor, but  
9 a conversation between two people on a street with no one  
10 within hearing distance at all, I submit, is still a  
11 private conversation, just as the telephone conversation  
12 in a public place in Katz was a private --

13 QUESTION: Your submission has to include, I  
14 suppose, that a person must, when he is walking down the  
15 street, put up with people accosting him or her for  
16 deviate sexual purposes?

17 MR. GARDNER: Absolutely not, absolutely not.

18 QUESTION: Well, --

19 QUESTION: That is just about what you said a  
20 minute ago.

21 QUESTION: Do you think the -- The solicitation  
22 may be very private, very quiet, very polite, but  
23 nevertheless there is a person walking down the street who  
24 doesn't care to be solicited for a deviate sexual purpose  
25 and is very annoyed by it. Now, may the state forbid that

1 or not?

2 MR. GARDNER: The state may forbid it. And, in  
3 the hearing --

4 QUESTION: How could it forbid it?

5 MR. GARDNER: The state may forbid it by, in  
6 effect, adopting the kind of a statute which was approved  
7 in Commonwealth versus Sefranka and in Pryor, the  
8 California decision, which I cite in my brief.

9 QUESTION: Would you say that it is illegal --  
10 You have committed a criminal act if you solicit a person  
11 on the street and he turns you down?

12 MR. GARDNER: What you can say is --

13 QUESTION: Would that be all right?

14 MR. GARDNER: No, no. The result --

15 QUESTION: So, anyone must put up with being  
16 solicited on the street?

17 MR. GARDNER: No, Your Honor. In Commonwealth  
18 versus Sefranka -- I refer you to that case -- and in the  
19 Pryor decision, what the Court said was that you could not  
20 be convicted unless there was some reason to believe or  
21 some indication that there was someone present who would  
22 be offended thereby.

23 QUESTION: The person who is solicited is the  
24 one who is most offended.

25 MR. GARDNER: But, let me pose these facts, if I

1 may. Suppose I meet an individual and we have a  
2 discussion for 30 minutes, 45 minutes, whatever, and it  
3 quickly becomes apparent that we are both homosexuals and  
4 that he is interested and, therefore, I extend an  
5 invitation. How can there be offense?

6 QUESTION: That may be fine, but I am talking  
7 about the person who turns him down and he is very annoyed  
8 by it. Can the man then be convicted for annoying this  
9 other person?

10 MR. GARDNER: He can if there was an element  
11 harassment or if there was an element of recklessness.

12 QUESTION: Well, an element of harassment -- He  
13 says I am harassed, I don't like to be walking down the  
14 street and be accosted by a homosexual.

15 MR. GARDNER: The word "accosted" and the  
16 word --

17 QUESTION: Well, solicited by a homosexual.

18 MR. GARDNER: If there is --

19 QUESTION: He came up to me very politely, very  
20 politely and said, would you like to come over to my  
21 house? Now, I take it you say the state may not forbid  
22 that.

23 MR. GARDNER: I say that the state may not pass  
24 a law which blanketly forbids it in all circumstances  
25 without regard to --

1 QUESTION: Well, may it forbid exactly what I  
2 said?

3 MR. GARDNER: Yes, it may, if it is a narrowly  
4 drawn statute.

5 QUESTION: So, the state could say it is illegal  
6 to solicit anybody -- You have committed a criminal act if  
7 you have solicited somebody who turns you down?

8 MR. GARDNER: No, no, no. I am sorry.

9 QUESTION: Or who turns you down and is annoyed.

10 MR. GARDNER: No, it is not the result of the  
11 individual. It is illegal for you to solicit somebody,  
12 if, under the circumstances, you had no reason to believe  
13 that they would be consensual towards that kind of a  
14 solicitation in terms of receiving the information.

15 QUESTION: So, if a fellow comes up and says let  
16 me ask you a few questions, is he off the hook then?

17 MR. GARDNER: I think it is a factual question  
18 in every case, Your Honor. We can pose hypotheticals, but  
19 the real issue here is whether or not you can blanketly  
20 proscribe speech without requiring that there be some --

21 MR. GARDNER: It is a state overbreadth  
22 argument?

23 MR. GARDNER: It may be. It may be. I would  
24 point out in that connection, someone asked the District  
25 Attorney what he was doing, whether he was just responding

1 to our arguments in that regard. If Your Honors will look  
2 at the brief, you will see that the District Attorney, and  
3 I don't fault him for this, has argued association,  
4 overbreadth, underinclusiveness and vagueness in his  
5 original brief to the Court. On the basis that those  
6 issues were submitted to the court below and it is  
7 difficult to determine whether they had an impact on the  
8 decision below or whether they would be before this --

9 QUESTION: Well, an overbreadth argument  
10 certainly didn't have much of an impact.

11 QUESTION: That is the only one that you can say  
12 that might not have had an impact, I think, because the  
13 only constitutional doctrine which the Court of Appeals  
14 mentions is one which it says it didn't use.

15 QUESTION: Either implicitly or overtly.

16 MR. GARDNER: I think that the argument I  
17 make --

18 QUESTION: Although the dissent said that they  
19 were really, in effect, applying overbreadth and the  
20 majority the dissent couldn't be more misguided.

21 MR. GARDNER: We have to go back one step, If I  
22 may. We have to go back to determine what it was the  
23 Court was doing. I submit to you that what the Court below  
24 was doing was saying that the ultimate act had been  
25 converted into a legal constitutionally protected act and

1 that, therefore, you couldn't forbid discussion about that  
2 act.

3 Now, what we do not know is whether their  
4 statement to that effect is a First Amendment speech  
5 statement or whether it is an extension of the privacy  
6 concept.

7 QUESTION: But, the Court of Appeals didn't say  
8 discussion. It said antecedent --

9 MR. GARDNER: Solicitation.

10 QUESTION: Yes. It certainly didn't use the  
11 term discussion which might have lent some support to the  
12 idea that it was a First Amendment.

13 MR. GARDNER: The whole case was about  
14 solicitation. The Court of Appeals was dealing with an  
15 actual solicitation. We don't know what the Court of  
16 Appeals meant or whether they were thinking in First  
17 Amendment terms because they didn't express it. What they  
18 did say was that since the ultimate act was not criminal,  
19 you can't punish the discreet invitation for that act.

20 QUESTION: What about heterosexual solicitation  
21 to get to a question of somewhat different circumstances?  
22 Can the state ban a prostitute of either sex from  
23 soliciting intercourse in public or soliciting money for  
24 intercourse I should say?

25 MR. GARDNER: Yes, I believe they can. I



1 believe that when you get into commercial sex, that is a  
2 different area. I am not arguing that prostitution is  
3 constitutionally protected at all.

4 QUESTION: Could it ban simply solicitation on  
5 the public streets of heterosexual sex not for money?

6 MR. GARDNER: You have the sample principle,  
7 Your Honor, if I may. Quite apart from whether they could  
8 effectively do it or not, the fact is that they do not  
9 attempt to ban solicitation of heterosexual sex unless  
10 it is harassing.

11 QUESTION: Well, the statute does exactly that  
12 as I understand it. That is precisely what this statute  
13 does and you have two Respondents here, one of which  
14 apparently was involved in a heterosexual solicitation and  
15 that is precisely what this statute does.

16 MR. GARDNER: That gets into the area of the  
17 discrimination argument, Your Honor. We started out -- if  
18 you look at the trial court memorandum and opinion, it  
19 says that they only started going after the prostitutes  
20 after Onofre was decided.

21 Although the statute is broadly written and  
22 could theoretically apply to any heterosexual sex, it is  
23 not applied to anyone else at all.

24 QUESTION: What difference does it make what the  
25 motivations were or what triggered the Constitution

1 program? What has that got to do with the constitutional  
2 question?

3 MR. GARDNER: Well, it has to do with the  
4 underinclusiveness and denial of equal protection argument  
5 which I made in my brief. But, on this particular point,  
6 with Justice Rehnquist inquiry, my response is the same.  
7 The state could prohibit public solicitation in a singles  
8 bar or elsewhere in heterosexual situations. Put aside  
9 the commercial aspect. I think that is a different  
10 question.

11 If you had a situation either where the  
12 individual was coming up announced blantly to somebody  
13 and issuing an invitation in what would have to be a  
14 harassing situation under the facts, but I don't think  
15 that they could extend it to the point of two  
16 acquaintances, for example, who happen to be sitting in a  
17 bar and one invited the other to go home for consensual  
18 sex.

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1                   Again, you get to the point that there must be  
2 some type, when you're not dealing with ultimate  
3 criminal conduct, you get to some point where there has  
4 to be some type of freedom of speech and the narrowing  
5 of the writing of statute which is going to restrict  
6 that freedom of speech.

7                   QUESTION: Mr. Gardner, how do you present  
8 your issues? How do you make clear what issues you are  
9 presenting to the New York Court of Appeals? In your  
10 briefs or do you file a paper initially petitioning for  
11 review?

12                   MR. GARDNER: No, you file the briefs. There  
13 is a petition. Excuse me. There is a petition for  
14 leave to appeal to the Court of Appeals.

15                   QUESTION: Right. And do you state your  
16 grounds?

17                   MR. GARDNER: You state your grounds therein.  
18 But that does not become a part of the appeal record  
19 that the case is decided on.

20                   QUESTION: So the grounds are your briefs?

21                   MR. GARDNER: That is correct.

22                   QUESTION: And is your New York Court of  
23 Appeals brief in the record here, do you know?

24                   MR. GARDNER: No. I was told it couldn't  
25 properly go into the record, but that the Court could

1 call for it if it wished to do so. And I have  
2 summarized in my brief the arguments that were raised  
3 and pointed to the pages of the brief before the Court  
4 of Appeals where those arguments were raised.

5 QUESTION: Did the rules of the New York Court  
6 of Appeals require the parties to state what is the  
7 question presented on the first page, as we do here?

8 MR. GARDNER: Yes, they do, Your Honor.

9 QUESTION: And what did they say the question  
10 was? How did they define --

11 MR. GARDNER: Well, in the opening of the  
12 briefs the questions are stated.

13 QUESTION: In other words, is it set out as we  
14 do here?

15 MR. GARDNER: No. I'm sorry, Your Honor.

16 QUESTION: It might help the Court find out  
17 what they are deciding.

18 MR. GARDNER: In the petition for certiorari,  
19 Your Honor, you have a request for what the issues are  
20 that will be appealed. In our procedure, when you apply  
21 for permission to go to the Court of Appeals you  
22 indicate what the issues are that are involved in this  
23 case that make it significant. You do not have to  
24 specify what the issues are specifically that will be  
25 decided.

1           In your brief that you file with the Court of  
2 Appeals, you indicate those questions in detail. If the  
3 Court calls for my brief, you will see how I have  
4 indicated those questions.

5           I want to get back for just a moment to the  
6 construction argument. I would suggest to you that once  
7 there had been a construction of the statute in a  
8 narrowing way indicating, in effect, that if you're  
9 looking for the problem of harassment of other people  
10 and if you're looking for some of those other types of  
11 concerns that the state talks about, the problem with  
12 minors and things of that sort, there are other  
13 statutes.

14           What the Court of Appeals said was this  
15 statute doesn't deal with that, this statute is part of  
16 the statutory scheme which was involved in the  
17 consensual sodomy law, and the legislature of the State  
18 of New York is free to deal with those other problems  
19 any time they want to, as long as they write, to the  
20 extent that it imposes free speech restrictions,  
21 narrowly, narrowly stated statutes that do not unduly  
22 impinge upon free communication.

23           QUESTION: Mr. Gardner, in that connection, I  
24 thought I understood you to say at the outset of your  
25 argument that the constitutional issue was here, and now

1 I understand you to say that we're bound by the  
2 construction of the New York Court of Appeals, which --

3 MR. GARDNER: Justice Powell, I think that  
4 what has happened --

5 QUESTION: -- would not leave us free,  
6 perhaps, to consider any other question.

7 MR. GARDNER: Justice Powell, what I'm saying  
8 is that the Court of Appeals has defined the scope of  
9 the statute.

10 QUESTION: Yes.

11 MR. GARDNER: And they've limited that. Then  
12 they have declared that statute as so defined  
13 unconstitutional. The issue as to whether it is  
14 constitutional as construed is before this Court. But  
15 the Court is bound by the construction, which does not  
16 encompass all of these other concerns with regard to  
17 harassment, offensiveness, children, and things of those  
18 other types of things that would be very critical in the  
19 correct case and involving the correct statute.

20 In the brief that the State filed there is a  
21 considerable amount of, I would call, slipperiness as to  
22 whether we're dealing with speech or conduct. When  
23 we're dealing with a question of whether vagueness has  
24 been violated, the State tends to refer to the fact that  
25 there can only be an arrest of there's actual speech,

1 actual solicitation. When we're dealing with a  
2 situation, however, where I'm challenging the statute as  
3 being vague -- correction -- I'm challenging the statute  
4 as being a violation of the First Amendment rights, then  
5 we talk about the fact that it really deals with  
6 conduct.

7 I would respectfully refer the Court and  
8 recommend the reading of a case which was published  
9 after the briefs were filed. The name of the case is  
10 Wirtz versus Risley, published in the Ninth Circuit  
11 Court of Appeals in November 1983. I have a citation.  
12 The pocket part came out in late December. It is 719  
13 Fed. Second 1438.

14 That was a statute that dealt with the  
15 question of a threat and of conduct that tended toward  
16 intimidation, and the court specifically talked in terms  
17 of the fact that the ultimate act could generally only  
18 be committed by some type of communication and therefore  
19 it tended toward pure speech. And therefore, dealing  
20 with the issues under the First Amendment, dealing with  
21 the problem of overbreadth being thrown up as an  
22 argument against the appellant, the court stated that:  
23 first, there is pure speech and we don't have to worry  
24 about overbreadth; and even if we did, there is  
25 substantial overbreadth here.

1 I would submit to the Court that there is  
2 substantial overbreadth here as well because, although  
3 we have specifically here facts in this case regarding  
4 solicitation on North Street in Buffalo, what the State  
5 is arguing for is a general power to forbid any type of  
6 sexual invitation to come home, even in a gay bar, which  
7 is the fact pattern postulated in the reply brief.

8 QUESTION: You're defending the Court of  
9 Appeals on a ground that they didn't rely on.

10 MR. GARDNER: I am responding to the -- I  
11 think the Court of Appeals relied on First Amendment  
12 free speech, although they didn't articulate it. And  
13 I'm anticipating that either my opponent or someone on  
14 this Court will feel that I cannot argue that the First  
15 Amendment is involved beyond the narrow facts of my  
16 client's case because of the overbreadth doctrine.

17 I see the overbreadth doctrine not as  
18 something which I raise in support of my case, but which  
19 others will raise against my position, and I'm pointing  
20 out to you that I do not believe it applies in this case  
21 in that manner.

22 Thank you very much.

23 CHIEF JUSTICE BURGER: Do you have anything  
24 further, counsel?

25 MR. ARCARA: Your Honor, I will waive my



1 rebuttal.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 3:09 p.m., the oral argument in  
5 the above-entitled matter was submitted.)

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