

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1795

TITLE CAPITAL CITIES CABLE, INC., ET AL., Petitioners v.
RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE

PLACE CONTROL BOARD
Washington, D. C.

DATE February 21, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CAPITAL CITIES CABLE, INC., ET AL., :

4 Petitioners, :

5 v. : No. 82-1795

6 RICHARD A. CRISP, DIRECTOR, OKLAHOMA :

7 ALCOHOLIC BEVERAGE CONTROL BOARD :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, February 21, 1984

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:48 o'clock p.m.

14 APPEARANCES:

15 BRENT N. RUSHFORTH, ESQ., Washington, D.C.; on behalf

16 of the Petitioners.

17 MICHAEL W. MC CONNELL, ESQ., Office of the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the FCC as amicus curiae, pro hac vice.

20 ROBERT L. MC DONALD, ESQ., First Assistant Attorney

21 General of Oklahoma, Oklahoma City, Oklahoma; on

22 behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Capital Cities Cable against Richard A. Crisp.

Mr. Rushforth, I think you may proceed when
you are ready.

ORAL ARGUMENT OF BRENT N. RUSHFORTH, ESQ.,
ON BEHALF OF THE PETITIONER

MR. RUSHFORTH: Mr. Chief Justice, and may it
please the Court, this case presents a challenge to
Oklahoma's requirement that cable TV operators delete
wine advertising from programming they bring into the
state of Oklahoma.

The District Court found that it is infeasible
for cable TV operators to delete the advertising from
their programming. The Court of Appeals did not
overturn that finding. Indeed, it emphasized the
finding by stating that Oklahoma's advertising ban would
place cable TV operators in a particularly difficult
position.

The crux of this case is the crushing economic
burden, the technical infeasibility, and the illegality
under federal law to delete advertising from a multitude
of program signals that --

QUESTION: What is the technical difficulty?

MR. RUSHFORTH: The technical difficulty,

1 Justice Erennan, is that the cable TV operators get no
2 notice regarding the time or content of the advertising
3 signals in their programming. Contrary to broadcasters,
4 cable TV operators pick up signals as they find them
5 over the air or over satellite, and they receive no
6 notice of advertising.

7 QUESTION: Well, if network television
8 producers can give advance notice, why can't the
9 producers of the cable broadcast do the same?

10 MR. RUSHFORTH: There is a very marked
11 difference, your honor, between cable TV operators and
12 broadcasters. An affiliate of a network station in
13 Oklahoma receives a great deal of advance notice
14 regarding the advertising that will be on that network
15 feed from New York City or wherever it comes from. Not
16 only do they receive notice, but through the affiliation
17 agreement with the network, they have control over the
18 signal. They can delete advertising as they see fit,
19 and further, they have --

20 QUESTION: Is there any technical reason, I
21 guess I am asking, why the producers of the cable
22 broadcast couldn't do the same for their -- for the
23 stations that use their broadcasts?

24 MR. RUSHFORTH: By not receiving notice, Your
25 Honor, the cable TV operator would be required to

1 station one employee at some monitor for each signal
2 coming in to the cable TV operator. There are a
3 multitude of signals coming --

4 QUESTION: Is there any technical reason why
5 the cablecasters couldn't furnish that information to
6 you, to your client?

7 MR. RUSHFORTH: There is no technical reason
8 why they could not furnish the information, Your Honor.
9 If the cablecasters were to give notice to cable TV
10 operators, nevertheless, the cable TV operators would be
11 in a position, having a multitude of signals coming in
12 simultaneously, of placing an employee at each of those
13 signals, one for each signal, and without full notice of
14 what is in that signal, it cannot be done automatically.

15 QUESTION: There is no encoding mechanism that
16 could be employed?

17 MR. RUSHFORTH: Your Honor, the technology is
18 simply not there. This must be done manually. We are
19 dealing here in terms of seconds, not in terms of
20 minutes, and unless they have full notice as to what is
21 in the advertising, when it is going to come precisely,
22 then they will have to wait a number of seconds before
23 they even know what is in the advertising, and they
24 would have to delete it manually.

25 QUESTION: Does the cable operator have to

1 participate in the compulsory licensing system provided
2 by the Copyright Act? Or can you opt out?

3 MR. RUSHFORTH: Well, if the cable TV operator
4 wishes to carry programs from television stations, then
5 as Congress found, the only feasible way for the cable
6 TV operator to do that is to participate in the
7 compulsory licensing scheme. I wish to emphasize here
8 that many of the TV signals picked up by cable
9 television operators are so-called reluctant television
10 stations. There is no economic incentive for television
11 stations to cooperate with cable TV operators, and
12 indeed many of them have expressly stated they will not
13 so cooperate.

14 So that in order, as Congress found, in order
15 for the cable TV operator to carry this type of program,
16 which is, of course, the kind of programming most
17 interesting to its subscribers, the only feasible way
18 for the cable TV operator to do that is by participating
19 in the compulsory licensing scheme.

20 Now, Oklahoma permits the sale and consumption
21 of wine within the state.

22 QUESTION: They could exclude it, could they
23 not?

24 MR. RUSHFORTH: They could exclude it, but
25 they do not.

1 QUESTION: Could they exclude all advertising?

2 MR. RUSHFORTH: We don't believe so. We
3 believe that no case, no decision of this Court holds
4 that the Twenty-First Amendment includes the power to
5 ban interstate advertising by someone not a liquor
6 licensee of the state of Oklahoma.

7 QUESTION: Could they exclude all cable
8 operations?

9 MR. RUSHFORTH: Well, we believe -- no, they
10 could not, Your Honor. Oklahoma until 1980 did not
11 apply its advertising ban to cable TV operators. In
12 that year, abandoning a decade's practice, the Attorney
13 General of Oklahoma held that the advertising ban would
14 apply to cable TV operators.

15 The District Court found that by applying the
16 advertising ban to cable TV, the state would not
17 directly advance its interest in promoting temperance.
18 To the contrary, the District Court found that in light
19 of the pervasive advertising in newspapers, magazines,
20 and other media, and beer advertising that is pervasive
21 throughout the state --

22 QUESTION: And allowed on TV.

23 MR. RUSHFORTH: And allowed on TV. That all
24 this incremental advertising on cable would do is inform
25 Oklahomans of what they already knew from other

1 sources. The Court of Appeals did not overturn those
2 findings, but in the face of them, deferred to the
3 legislative judgment of Oklahoma, and upheld the
4 advertising ban as it applies to cable TV.

5 It did so because it misinterpreted this
6 Court's decisions under the Twenty-First Amendment.
7 Oklahoma rests its entire case on the proposition that
8 the Twenty-First Amendment empowers it not only to
9 regulate or ban the importation, transportation of wine
10 into the state of Oklahoma, but also to ban interstate
11 advertising by someone who is not a liquor licensee, but
12 who is engaged in the business of communication. No
13 decision of this Court has so held. To the contrary,
14 this Court's decisions have limited the scope of the
15 Twenty-First Amendment.

16 In the case of California Liquor Retail
17 Dealers Association versus Midcal Aluminum, this Court
18 held that even in the area of liquor commerce, the
19 federal government retains a substantial interest, and
20 in that case, the Court struck down a California retail
21 pricing scheme. The Court said that the state's
22 interest in that scheme was unsubstantiated and far
23 outweighed by the federal government's interest in
24 maintaining competition.

25 QUESTION: Does the Midcal decision indicate

1 that where the Twenty-First Amendment is a factor, that
2 some kind of balancing has to be employed in determining
3 whether there is preemption?

4 MR. RUSHFORTH: I think, Your Honor, it does
5 when we are talking about the area of liquor commerce.
6 When we go beyond that area, as we certainly do here,
7 because the impact of the state's regulation is upon
8 people not engaged in liquor commerce, but people
9 engaged in an entirely different element of commerce,
10 then this Court's decisions in Craig versus Boren and in
11 Larkin versus Grendel's Den, for example, say that the
12 Twenty-First Amendment does not alter constitutional
13 analysis.

14 Here, there is a pervasive, a comprehensive
15 federal scheme of regulation of cable television. Its
16 purpose is to ensure that cable television becomes an
17 integral part of a national communications network.

18 QUESTION: Was this argument ever made in the
19 District Court?

20 MR. RUSHFORTH: Yes, it was, Your Honor. The
21 argument regarding preemption of Oklahoma's statute by
22 federal law was in the complaint, and the trial judge
23 made a finding in his findings upholding his issuance of
24 a preliminary injunction that cable TV operators could
25 not comply both with state and federal law.

1 The reason the trial court judge decided the
2 summary judgment motion on First Amendment grounds as
3 opposed to preemption grounds, I believe, was because he
4 asked the parties to brief and argue those elements in
5 the case that were common to both the broadcasters and
6 the cable TV operators, and that meant he wanted
7 briefing of the First Amendment issue, because by that
8 time the broadcasters were with us.

9 QUESTION: And is it the broadcasters or the
10 cable TV people that are not -- cannot take advantage of
11 the federal preemption argument?

12 MR. RUSHFORTH: The broadcasters, Your Honor,
13 may have a federal preemption argument, but it would be
14 an entirely different argument. It is not the argument
15 that we present here.

16 QUESTION: Then, on appeal to the Tenth
17 Circuit, did the cable people whom you represent urge
18 the federal preemption ground as an independent or an
19 alternative ground for upholding the judgment of the
20 District Court?

21 MR. RUSHFORTH: Your Honor, we urged upon the
22 Court of Appeals in defense of the District Court's
23 ruling primarily First Amendment grounds. In a motion
24 for rehearing, we did urge the Court to consider all the
25 issues before the trial court, and then, of course, as

1 Your Honor knows, this Court requested us to brief and
2 argue the issues of preemption.

3 QUESTION: It is a little hard to understand
4 how the Court would be able to resolve the
5 non-commercial speech First Amendment argument or issue
6 as well as the preemption issue without some kind of a
7 factual record. I just wonder how that could be done.

8 MR. RUSHFORTH: Your Honor, if I may point to
9 the record before the District Court, the District Court
10 explicitly asked the parties whether they wished any
11 further factual evidence placed into the record, and
12 both parties, the state of Oklahoma and my clients,
13 suggested that they did not wish more evidence, and on
14 that record the District Court made certain findings,
15 including which are findings that cable TV operators
16 here cannot comply with both state and federal law.

17 Included in those findings is a finding that
18 the advertising ban goes beyond the place where it needs
19 to go to --

20 QUESTION: How does the District -- Was there
21 evidence taken on these subjects in the District Court?

22 MR. RUSHFORTH: There is evidence, Your Honor,
23 before the District Court, testimony in the record --

24 QUESTION: When you say testimony, is this
25 testimony in open court?

1 MR. RUSHFORTH: Yes, Your Honor.

2 QUESTION: At a hearing?

3 MR. RUSHFORTH: Yes, Your Honor, it is, and it
4 is included in the joint appendix. It includes
5 testimony on the technical infeasibility and the
6 economic infeasibility of this rule as it applies to
7 cable TV operators.

8 QUESTION: And it was on the basis of this
9 testimony that the District Court made its finding?

10 MR. RUSHFORTH: That's correct.

11 This pervasive federal scheme is for the
12 purpose of encouraging the development of cable
13 television. Here, there is no dispute that there is a
14 direct conflict between state and federal law. Indeed,
15 the deletion of advertising that Oklahoma seeks would
16 constitute copyright infringement under the Copyright
17 Act, would subject the cable TV operator to criminal and
18 civil penalties, and would force him to lose the
19 compulsory license.

20 It would also directly conflict with rules of
21 the Federal Communications Commission requiring that
22 television signals carried by cable TV operators not
23 delete advertising. In these circumstances, this
24 Court's decisions compel that the state law must give
25 way.

1 The Oklahoma advertising ban also must fall
2 under the principles of the First Amendment. It follows
3 directly from the District Court finding that the
4 advertising ban here will operate to restrain
5 programming classically protected by the First
6 Amendment, news, entertainment, sports programming, with
7 a broad array of cultural, artistic, and informational
8 content that is classically protected by the First
9 Amendment, and the state has not come close to
10 sustaining the burden that it must sustain in order to
11 restrict and restrain such programs.

12 QUESTION: What if some cable TV operator
13 chose to run some commercials about murder for hire in
14 Oklahoma, and the state of Oklahoma says, no, it is
15 against our laws to have that kind of commercial on, so
16 we are not going to be able to show it in Oklahoma, and
17 you say, well, look at all the good stuff people are
18 missing because we just can't delete those commercials
19 from the channel we have taken them from. Would you
20 make the same argument in that kind of a case?

21 MR. RUSHFORTH: Well, Your Honor, certainly if
22 that were the situation, it would not pass the tests
23 that this Court has established for the protection of
24 commercial speech. It would violate the first principle
25 set out by this Court in the Central Hudson case,

1 because it would be about activity that is illegal, and
2 so in that sense it would not be entitled to protection.

3 QUESTION: Are you saying, then, that
4 Oklahoma's ban on advertising of liquor simply can't
5 pass the test for commercial speech, quite apart from
6 its appearance on cable television? What if Oklahoma
7 says, you can't put up billboards advertising liquor?

8 MR. RUSHFORTH: Well, if the advertising were
9 intrastate, Your Honor, no decision of this Court has
10 included within the power of the Twenty-First amendment
11 to ban that kind of advertising, but it would be a very
12 different case from the one we are involved with here.

13 Here, we are dealing, as this Court stated in
14 Metromedia, with the law of cable television, and there
15 are very special considerations that apply because of
16 the effect this ban has not only on the commercial
17 speech but on the non-commercial programming carried by
18 cable TV operators.

19 QUESTION: Well, and does the state always
20 just have to take the whole thing just as the cable
21 operators put it together because the cable operators
22 argue that they can't screen out the commercials?

23 MR. RUSHFORTH: Well, Your Honor, I don't
24 think, in the situation where the advertising ban were
25 addressed to something that were illegal under Oklahoma

1 law, then that advertising would not be entitled to
2 protection under the Central Hudson test. There are
3 also situations that would, of course, be illegal under
4 federal law, and under those circumstances there could
5 be a federal ban upon the advertising that may be able
6 to pass the Central Hudson test and may not in fact
7 restrain non-commercial speech.

8 This is a situation, however, in which not
9 only does the advertising ban restrain non-commercial
10 speech because of the economics and technology of cable
11 television, but it also is an advertising ban that does
12 not pass the tests established by this Court in Central
13 Hudson. It goes too far. It is not directly related to
14 the state's interest, as the trial court found, and this
15 Court has never held --

16 QUESTION: Why do you say it is not directly
17 related to the state's interest? The state presumably
18 wants to discourage consumption of hard liquor, and the
19 theory on which advertisers spend money is presumably
20 that the money they spend is going to increase their
21 sales. I don't see how you can fault the state of
22 Oklahoma for that approach.

23 MR. RUSHFORTH: Your Honor, I would like to
24 say two things about that. First, cable TV operators
25 derive no revenue whatever from wine advertising. They

1 have no direct relationship with wine advertising.

2 QUESTION: No, but you say they are carrying
3 it just because they can't sever out the --

4 MR. RUSHFORTH: That's correct. Secondly,
5 Your Honor, and more importantly, the District Court's
6 finding states very clearly that the incremental
7 advertising on cable TV in the face of advertising on
8 other media, in newspapers, in magazines, cannot do
9 anything but inform Oklahomans of what they already know
10 and will not advance the state's interest.

11 QUESTION: What evidence did he make that
12 finding on? Is that just his hunchback? Or, his hunch?

13 MR. RUSHFORTH: He made that finding on the
14 evidence that Oklahoma does not ban advertising for wine
15 from the New York Times as it comes into the state of
16 Oklahoma. No one is suggesting here, Your Honor, that
17 someone be sitting at the border of the state of
18 Oklahoma clipping wine advertising from the New York
19 Times. No one is suggesting --

20 QUESTION: We have said in a number of cases,
21 including that Texas election case two terms ago, that
22 the state can address one part of an evil at a time. It
23 doesn't have to go across the board, and its actions are
24 simply not subject to that sort of a comparison, that if
25 you really meant this you would have taken Step B as

1 well a Step A. The state dcesn't have to do that.

2 MR. RUSHFORTH: Well, the trial court found,
3 Your Honor, after an examination of the record,
4 including the fact that beer advertising is pervasive
5 throughout the state, that as a matter of fact the
6 application of this rule to cable television would not
7 directly advance the state's interest, and it is --

8 QUESTION: What did the trial court conceive
9 the state's interest to be?

10 MR. RUSHFORTH: The trial court conceived the
11 state's interest to be the promotion of temperance, the
12 prevention of drunk driving --

13 QUESTION: Why isn't the state's interest
14 exactly what the Oklahoma legislature said it was, or
15 the Oklahoma people when they ratified the constitution,
16 that we are interested in not having liquor advertised
17 on television?

18 MR. RUSHFORTH: Your Honor, this Court's line
19 of cases ending last term with Bolger sets out clearly
20 who has the burden to sustain a showing, and the state
21 simply has not complied with those requirements here.

22 Thank you.

23 QUESTION: Counsel, before you sit down --
24 maybe you answered this when I was out of the room --
25 what brought the Attorney General in 1980 to issue his

1 advisory opinion? Why then? Why not before?

2 MR. RUSHFORTH: Your Honor, we frankly don't
3 know the answer to that question. There is a
4 requirement that when a state senator, as I understand
5 it, when a state senator makes a request to the Attorney
6 General, the Attorney General has some obligation to
7 respond, and as I understand it, that's what happened
8 here.

9 QUESTION: It wasn't just an election year?

10 MR. RUSHFORTH: Your Honor, I can't answer
11 that.

12 CHIEF JUSTICE BURGER: Counsel, your friend is
13 coming first. He has ten minutes.

14 Mr. McConell.

15 ORAL ARGUMENT OF MICHAEL W. MC CONNELL, ESQ.,
16 ON BEHALF OF THE FCC AS AMICUS CURIAE, PRO HAC VICE

17 MR. MC CONNELL: Mr. Chief Justice, and may it
18 please the Court, the Federal Communications Commission
19 has regulated the cable television industry since the
20 mid-1960's. The consistent themes of that regulation
21 have been to encourage the widest availability and
22 diversity of programming to persons all across the
23 nation while ensuring that the position of broadcasters,
24 who are, after all, the originators of most programming,
25 are not undercut by the availability of the new medium.

1 The Commission's regulatory approach in this
2 area has been dictated in large part by factors inherent
3 to the cable industry, the economic role of cable
4 operators in relation to broadcasters, and the
5 technological structure of the cable systems, a matter
6 which Mr. Rushforth discussed in his argument.

7 Oklahoma's law at issue here is preempted by
8 federal regulation because it requires cable operators
9 to do something that the Commission has determined as an
10 economic matter they should not be permitted to do, and
11 that as a technological matter they cannot feasibly do,
12 namely, to delete certain advertisements from the
13 programming to which those advertisements were attached
14 by the program originators.

15 QUESTION: What about cigarette advertising?
16 That is banned on television by the Commission, is it?

17 MR. MC CONNELL: By Congress.

18 QUESTION: Well, by Congress, and the
19 Commission oversees that, monitors that.

20 MR. MC CONNELL: Because those advertisements
21 do not appear on any broadcast stations, cable operators
22 have no problem deleting them, because they are not
23 there in the first instance.

24 QUESTION: Oh. That was a preface to the
25 question I put to you now. Could a state, if Congress

1 lifted that limitation on cigarette advertising on
2 broadcasting, could a state say, no, we like it the way
3 it is, and we will tolerate no advertising of cigarettes
4 on television or radio? Or would you say that is
5 preempted, too?

6 MR. MC CONNELL: Mr. Chief Justice, so long as
7 the broadcasters and cablecasters then move to
8 institute cigarette advertising, I believe that that
9 would be preempted for precisely the same reasons that
10 this ban is preempted. Let me discuss --

11 QUESTION: Mr. McConnell, what are the reasons
12 for the non-deletion requirements of the FCC rules?

13 MR. MC CONNELL: The reasons are two. One has
14 to do with the economics of the cable industry. The
15 other has to do with the technological structure. The
16 economics drive from the fact that cable operators
17 receive their revenues from subscriber fees, from the
18 homes that bring in the cable networks to their
19 television sets. They receive no income from the
20 advertising that they carry. This is in marked contrast
21 to the broadcasters, who receive no fees from the
22 persons who own the television sets, but who receive
23 their revenues from the advertisers.

24 In addition, the cable operators have no
25 contractual relationship with the broadcast stations

1 from which they obtain their programming. That is to
2 say, they have no contract with the station, they pay
3 money to the stations, and they have no control over
4 the content of the programming that the stations
5 broadcast.

6 Cable operators and broadcasters are able to
7 proceed in this fashion because there is a certain
8 conjunction of interests that the cable operators obtain
9 free programming, which makes their services more
10 valuable to the subscribers, but at the same time
11 nationwide broadcasters and cable networks expand their
12 audience, thus enabling them to command a higher price
13 for their advertising, but this conjunction of interests
14 exists only so long as the cable operators are required
15 to carry the advertising along with the programming.

16 If cable operators such as those in Oklahoma
17 are enabled to delete the advertising, they become free
18 riders. They divert the listenership from the
19 broadcasters while contributing nothing to the
20 advertising pool which provides the financing to support
21 the programming.

22 This economic structure is one that Congress
23 studied and expressly adopted when it amended the
24 Copyright Act of 1976.

25 QUESTION: Well, Mr. McConnell, the FCC

1 doesn't protect broadcasters in the Oklahoma situation,
2 does it? They can be required so far as the FCC is
3 concerned not to carry liquor advertising in Oklahoma?

4 MR. MC CONNELL: That is correct, Your Honor.
5 The reasons for that are that the local broadcaster is
6 the very person who would receive the revenues from the
7 advertising. There is no third party whose copyright
8 interests would be infringed by the broadcaster not
9 being permitted to carry the advertising. Moreover, the
10 broadcaster as a technological matter simply broadcasts
11 one signal over which he has complete control, whereas
12 the cable operators are broadcasting a number of
13 signals, usually somewhere between 12 and 30 signals
14 simultaneously, and their operations are simply not
15 equipped even to know what the content of the
16 advertising is, much less to be able to delete it if
17 they did know.

18 QUESTION: Mr. McConnell, in making the
19 preemption analysis, do you think that the Court has to
20 do the Midcal type of balancing because of the
21 Twenty-First Amendment?

22 MR. MC CONNELL: No, Justice O'Connor. I
23 don't believe that the Court needs to engage in
24 balancing, because the Twenty-First Amendment gives
25 states enhanced authority over the sale and importation

1 of alcoholic beverages. The regulation here does not
2 apply to persons engaged in the sale or importation of
3 alcoholic beverages.

4 It applies to persons who are engaged in the
5 cable industry, and the regulation concerns what types
6 of programming signals they are able to import into the
7 state. Merely because that may have an impact upon the
8 level of drinking or drunk driving in a state does not
9 mean that the state is able to have enhanced power
10 vis-a-vis the Congress over an unrelated industry.

11 This is a structure which was explicitly
12 adopted by Congress as well as the Commission when it
13 determined that it would -- when Congress set up the
14 compulsory licensing scheme. Congress considered
15 various ways in which the cable operations might be able
16 to solve the copyright problem, and concluded that a
17 system of individual contracts with various broadcasters
18 was simply infeasible. Thus the broadcasters pay a set
19 fee into a royalty pool which is then divided among
20 broadcasters, and in exchange for that, they are able to
21 pick up programming from broadcasters all over the
22 country.

23 The most important quid pro quo for being able
24 to pick up this broadcasting, however, is that they
25 carry the commercials along with the programming. This

1 is the main way in which broadcasters are remunerated
2 for the broadcasting that they carry.

3 The principal focus of this case has been on
4 broadcasters, but I would just like to add very quickly
5 that there is the matter of cablecasters as well, as to
6 which the non-deletion requirements of the statute and
7 regulations not directly apply. However, the Commission
8 has expressly preempted the all state and local control
9 over the content of signal carriage, and the effect of
10 that has been to protect the contractual arrangements
11 for non-deletion which are the uniform policy within the
12 industry from being violated by state and local
13 requirements of this sort.

14 Precisely the same economic and technological
15 factors that make the non-deletion requirements in the
16 broadcast area so compelling also apply in the area of
17 cablecast. The Commission has recognized this quite
18 explicitly all the way since before cablecast was
19 actually a practical reality --

20 QUESTION: Do you think the federal law then
21 preempts a TV station just outside the borders of
22 Oklahoma from broadcasting liquor advertisements into
23 Oklahoma, advertising the sale of liquor and urging
24 Oklahomans to come across the border and buy liquor, or
25 not?

1 MR. MC CONNELL: Is your question, does the
2 Oklahoma law forbid, say, a Kansas station from
3 broadcasting? I think not.

4 QUESTION: No, I thought I asked whether the
5 federal law preempted --

6 MR. MC CONNELL: The federal law does not
7 preempt any restrictions upon advertising by
8 broadcasters.

9 QUESTION: But you think it would preempt any
10 Oklahoma rule forbidding cablecasters to carry such an
11 advertisement?

12 MR. MC CONNELL: That's right, Your Honor,
13 because they are not originating the programming. They
14 are retransmitting programming signals that they are
15 receiving from broadcasters or cablecasters.

16 QUESTION: How does that go to the fundamental
17 question that Justice White put to you? How does that
18 technical problem go to the fundamental question?

19 MR. MC CONNELL: The technical problem is
20 merely one of two important considerations that the
21 Commission and Congress considered in adopting a scheme
22 which depends upon a non-deletion requirement. The
23 expense and change and structure of the cable
24 broadcasting system that would be entailed by obedience
25 to the sort of rule that we have here would be quite

1 significant, and would seriously retard the ability of
2 cable systems to --

3 QUESTION: Do you think the Twenty-First
4 Amendment has any place in this argument at all?

5 MR. MC CONNELL: Your Honor, we believe that
6 the state's authority is not enhanced with respect to
7 industries other than those involved in the sale and
8 importation of alcoholic beverages, but even were that
9 not true, and even if this Court were to apply a
10 balancing test, we are quite confident that the concerns
11 of the Congress and the Commission would far outweigh
12 the marginal gains to the state's interests from
13 enforcement of this law.

14 QUESTION: Well, I would suppose the state's
15 interest in keeping the liquor advertisements out of
16 Oklahoma is just as great with respect to a broadcaster
17 as with respect to a cablecaster. They just don't want
18 the liquor advertised in Oklahoma. They don't want
19 Oklahomans being inveigled to come across the border and
20 load up with some booze. The state's interest is the
21 same.

22 MR. MC CONNELL: Your Honor, the difference --

23 QUESTION: Isn't it?

24 MR. MC CONNELL: Yes, it is. The difference
25 between --

1 QUESTION: Well, don't tell me the state
2 doesn't have an interest.

3 MR. MC CONNELL: Your Honor, it is not that
4 the state does not have an interest. The important
5 point here is that the --

6 QUESTION: Well, they have got enough interest
7 to be able to keep a broadcaster from sending signals
8 into Oklahoma.

9 MR. MC CONNELL: And the difference is that
10 neither Congress nor the Commission have promulgated
11 rules and statutes that preempt --

12 QUESTION: Now you are saying that the
13 broadcaster can be kept out, but some people who carry
14 his very signals can't be kept out.

15 MR. MC CONNELL: That's right, Your Honor.
16 Let me add that cable, cable systems insofar as they are
17 originators of programming within Oklahoma might be
18 subject to the identical rules. That also is not
19 preempted by federal law. The difference is not so much
20 cable versus broadcast as it is the economic and
21 technical structure here wherein the cable operators are
22 carrying other people's programming and are obligated to
23 carry with it the commercials that pay for it.

24 QUESTION: The difference, as I understand it,
25 is, in one case there is a conflict with a federal rule,

1 and in the other case there isn't.

2 MR. MC CONNELL: That's right, Your Honor.

3 CHIEF JUSTICE BURGER: Very well.

4 MR. MC CONNELL: Thank you.

5 CHIEF JUSTICE BURGER: Mr. McDonald?

6 ORAL ARGUMENT OF ROBERT L. MC DONALD, ESQ.,

7 ON BEHALF OF THE RESPONDENT

8 MR. MC DONALD: Mr. Chief Justice, may it
9 please the Court, the issue before the Court today is
10 whether the state of Oklahoma may prohibit the
11 advertising of liquor in Oklahoma by the television
12 medium coming into the homes of the citizens of the
13 state of Oklahoma.

14 The petitioners contend that there are two
15 impediments to that, and they rely upon the First
16 Amendment, a First Amendment ground and a preemption
17 ground. First, let's talk about the regulatory scheme
18 and the historical basis for the rule itself in the
19 state of Oklahoma.

20 Oklahoma's prohibition of liquor advertisement
21 is part of a state constitutional amendment which
22 repealed Prohibition in 1959. One of the conditions of
23 that repealing was that they retain the prohibition
24 against liquor advertisement. Of course, now, the
25 state's interest is the purpose of the prohibition

1 against liquor advertising, and that is to prevent the
2 artificial stimulation of the consumption of alcohol, or
3 increasing the consumption of alcohol, or to consume
4 alcohol if you do not consume it.

5 I think we must keep in mind here that this is
6 the electronic medium. In the FCC case and some of the
7 other cases, this Court has recognized that the
8 electronic medium is treated specially because of the
9 uninvited -- as an uninvited guest, especially in
10 commercial speech, into the home, and the impression
11 that it has upon people who can't read, or we are
12 talking about children.

13 What is the relationship of this state
14 regulation to commerce? First of all, I think that it
15 must be pointed out to the Court that -- I don't think
16 there's any argument about it -- that the rule was
17 pursued -- was pursuant to the Twenty-First Amendment.
18 I don't know if counsel makes light of the Twenty-First
19 Amendment, but we don't make light of it in Oklahoma.
20 Oklahoma historically has had a regulatory scheme, a
21 very strict regulation of alcohol in the state of
22 Oklahoma.

23 We value our right under the Twenty-First
24 Amendment. It is one of the -- it is the only express
25 grant of power to the states, and we pursue and claim

1 our right in this particular case that we have the right
2 to prohibit the artificial stimulation of alcohol, and
3 we think that in preventing the artificial stimulation
4 of alcohol, that is, liquor advertising, that we are
5 pursuing the right to the Twenty-First Amendment. That
6 is an incident of regulating alcoholic beverages in the
7 state of Oklahoma.

8 We are not trying to regulate speech. We feel
9 like that the incidence of the evils of alcohol has been
10 recognized by this Court.

11 QUESTION: Why isn't there a law against
12 liquor advertisements in newspapers?

13 MR. MC DONALD: In newspapers? There is -- It
14 is against the law to advertise in newspapers.

15 QUESTION: Do you ever enforce it?

16 MR. MC DONALD: We could -- it was interpreted
17 in a national publication -- we do for the local
18 publications. That's true. Now, for national
19 publications is the only time that the courts and the
20 Attorney General's office interpreting the courts'
21 rulings on it is that it is impractical or it is
22 impossible to regulate out of state newspapers.

23 QUESTION: You mean, you just don't think you
24 want to go to the trouble of taking liquor
25 advertisements out of Time Magazine?

1 MR. MC DONALD: That's right. Intercept them
2 either at the mailbox or at the --

3 QUESTION: Why is that? That is just because
4 it is too much trouble, just impractical, or what?

5 MR. MC DONALD: Yes.

6 (General laughter.)

7 QUESTION: Like the argument on the other
8 side, it is just impractical for cable operators to do
9 it?

10 MR. MC DONALD: It is like that argument, but
11 we would distinguish the facts and the degree of
12 impracticability. In trying to enforce that law -- and
13 we do, of course, in the publications intrastate. It is
14 just the national publications. And we would have to
15 intercept them at the border or at the mailboxes when
16 they were mailed, and there are several million people
17 in the state of Oklahoma, so we think that certainly
18 that -- and of course, now, we have been looking at the
19 national publications, because we are noticing in the
20 national publications that it may be now technologically
21 feasible to do that, because they have regional
22 advertising. We are noticing in national publications
23 that there's advertisements directed -- in the national
24 publications directly for Oklahoma.

25 QUESTION: How about national outdoor

1 advertising on signboards? National outfits.

2 MR. MC DONALD: Well, of course, now, it
3 wouldn't be national -- what I'm talking about, national
4 publications, those --

5 QUESTION: What do you do about signboards?

6 MR. MC DONALD: It would apply to signboards
7 also, and it did until the stay, of course, was -- Until
8 the stay ordered by the court was imposed staying the
9 order of the Tenth Circuit, before the case at the
10 District Court level, there was a prohibition against
11 signboards or billboards advertising liquor within the
12 state of Oklahoma.

13 QUESTION: Doesn't Oklahoma localities issue
14 cable licenses?

15 MR. MC DONALD: Municipalities, yes.

16 QUESTION: And is that pursuant to the
17 permission of the state?

18 MR. MC DONALD: No, that is pursuant to the
19 permission of the Federal Communications.

20 QUESTION: I suppose that any -- could any
21 municipality just have a rule that any cablecaster who
22 carries a liquor advertisement will get his license
23 revoked?

24 MR. MC DONALD: I think that is very --

25 QUESTION: Is that essentially what the --

1 MR. MC DONALD: I think that's a possibility
2 in Oklahoma. I don't think the FCC would think too much
3 about it, though. They might have a different
4 viewpoint.

5 It is this regulatory scheme which petitioners
6 argue are preempted by federal communications and
7 copyright regulations. We think these laws, however, do
8 not preempt the state legislation challenge. Now, what
9 they are talking about is the traditional supremacy
10 clause. Now, we are calling for a balancing test. We
11 don't think the traditional supremacy clause comes into
12 play here.

13 The petitioners maintain, especially the FCC,
14 maintain that the Communications Act and Copyright Acts
15 preempts state law. They are invoking the traditional
16 supremacy clause. What we maintain, of course, is that
17 the Twenty-First Amendment authorizes the state of
18 Oklahoma, which we enacted our regulation pursuant
19 thereto, is on the same level as the Federal
20 Communications Act.

21 QUESTION: So, to win, don't you have to have
22 the Federal Communications Commission rule invalidated?

23 MR. MC DONALD: I think -- well, we are
24 calling for a balancing test.

25 QUESTION: Well, I know, but isn't your rule

1 just in square conflict with the FCC rule?

2 MR. MC DONALD: Yes, I think it is, Your
3 Honor.

4 QUESTION: Well, and so you say -- aren't you
5 in effect saying that the FCC rule is invalid under the
6 Twenty-First Amendment?

7 MR. MC DONALD: I am saying under the
8 competing interests that we have more compelling
9 interests, because we are trying to protect the effect
10 of alcohol in the state of Oklahoma. What I am saying
11 is there is a balancing test. Under the traditional
12 supremacy clause I concede we would probably fail
13 because there is an express conflict and preemption
14 would probably prevail.

15 QUESTION: General McDonald, you also contend,
16 as I understand you, that the Copyright Act is
17 unconstitutional in order to avoid that conflict. The
18 federal statute.

19 MR. MC DONALD: Yes, Your Honor.

20 QUESTION: Yes, so for you to prevail, we have
21 to hold both the federal statute and the FCC rule
22 invalid?

23 MR. MC DONALD: As applied.

24 QUESTION: As applied to this --

25 MR. MC DONALD: To this fact situation. What

1 we are saying is that we are exercising our
2 constitutional rights, too, in Oklahoma. The
3 Twenty-First Amendment and the other clauses that the
4 Federal Act, the Copyright Act are pursuant to are
5 clauses of the same Constitution, so we are just
6 claiming our right to be on the same level, and that you
7 should have a balancing test, and not to go by the
8 traditional supremacy clause test.

9 QUESTION: But with the same effect, namely,
10 the other way, that you apply the supremacy clause the
11 other way, that Oklahoma has got the right to do this,
12 and the feds don't.

13 MR. MC DONALD: Yes, Your Honor.

14 QUESTION: Yes.

15 QUESTION: Because of the Twenty-First
16 Amendment.

17 MR. MC DONALD: Yes, sir.

18 QUESTION: Do you prohibit advertisements on
19 the sides of your trucks out there?

20 MR. MC DONALD: Yes, Your Honor.

21 QUESTION: You mean, you don't have any
22 Budweiser trucks?

23 (General laughter.)

24 MR. MC DONALD: Well, on Budweiser, on beer
25 advertising, by statute, and of course, they are

1 reevaluating that because some of the findings of some
2 of the effects of beer, especially -- by statute, by
3 definition, a non-intoxicating beverage is anything less
4 than 3.2. Budweiser maintains that they are advertising
5 3.2 beer or less, and so they are exempt from the
6 advertising, so normally you will see Budweiser on the
7 sides of trucks, Your Honor.

8 QUESTION: How about the truck that sells Haag
9 and Haag Scotch Whiskey? They can't put their name on
10 the side of the truck?

11 MR. MC DONALD: There is a prohibition
12 against --

13 QUESTION: They can't sell Haag and Haag
14 Scotch in Oklahoma?

15 MR. MC DONALD: Yes, they can sell --

16 QUESTION: Why, of course they can.

17 MR. MC DONALD: They repealed Prohibition in
18 1959. They may sell it at a licensed liquor store. But
19 the prohibition is a total ban on liquor advertising in
20 the state of Oklahoma, so it would be applied to trucks
21 as well as any other type of medium.

22 QUESTION: You sell it, but you don't
23 advertise it?

24 MR. MC DONALD: That's correct, Your Honor.
25 In other words, the attitude of the state of Oklahoma is

1 now, since 1959 --

2 QUESTION: That if people don't see it, they
3 won't buy it?

4 (General laughter.)

5 MR. MC DONALD: Well, Your Honor, we don't
6 think --

7 QUESTION: I am trying to figure out the
8 theory behind this.

9 MR. MC DONALD: We don't think the companies
10 would spend \$1 billion a year in the United States
11 advertising liquor if they didn't think it would
12 increase the consumption of liquor. We think that
13 advertising -- it is just common sense -- causes an
14 artificial stimulation to consume liquor, and especially
15 in this particular case, the electronic media --

16 QUESTION: In all 49 of the other states?

17 MR. MC DONALD: Not all the other states allow
18 advertising. Mississippi doesn't.

19 QUESTION: How many do?

20 MR. MC DONALD: I think there's 30 something
21 regulate advertising. I don't know how many have a
22 total ban. I know of two.

23 The reasoning in the second particular case,
24 and that is in commercial speech, that the District
25 Court really has as its holding was that it did not meet

1 the Central Hudson test. We maintain that it does meet
2 that, and the Tenth Circuit was correct in applying the
3 Central Hudson test and declaring as a matter of law
4 that there was a rational basis between the prohibition
5 of liquor advertising and the state's interest.

6 We might point out that they applied the
7 four-part test of the Central Hudson test and -- first
8 of all recognized commercial speech as being a lawful
9 activity and being not misleading, and that there was a
10 substantial state interest, that is, a temperance
11 interest. The Tenth Circuit said that the state's
12 regulation directly advanced that interest, and that it
13 was not more extensive than necessary.

14 In fact, they said that one of the other
15 alternatives, of course, could be that they could
16 completely prohibit the sale of liquor in the state of
17 Oklahoma if they wanted to, and this would seem like it
18 would be more of a lesser means of trying to regulate
19 alcohol.

20 I think what we must keep in mind, we are
21 trying to regulate alcohol. We are not trying to
22 regulate speech.

23 QUESTION: Do you think your Twenty-First
24 Amendment would permit Oklahoma to forbid any motion
25 picture to be shown in the state of Oklahoma that

1 involved drinking intoxicating beverages as part of the
2 plot or by the star or -- because that might easily
3 stimulate drinking?

4 MR. MC DONALD: We don't think so, because
5 that would not involve commercial speech. That is a
6 matter of protected speech other than non-commercial, so
7 we don't think it would come into play, and Oklahoma
8 would not try to prevent anything like that.

9 QUESTION: Well, I know, but it might very
10 well increase the consumption of alcohol.

11 MR. MC DONALD: Well, it's not --

12 QUESTION: If people watch their favorite
13 movie actress imbibe.

14 MR. MC DONALD: Yes, but under the definitions
15 of the ABC Act, the Alcoholic Beverage Control Act in
16 the state of Oklahoma that is not a commercial, Your
17 Honor, so it wouldn't be anything to be able to enforce
18 there.

19 QUESTION: That isn't my question. My
20 question was whether the Twenty-First Amendment would
21 prevent Oklahoma from having --

22 MR. MC DONALD: Oh, okay. I understand your
23 question now, Your Honor. I think if Oklahoma did try
24 to enforce any type of regulation that might try to
25 comprehend that, I think there would have to be a

1 balancing test to the Twenty-First Amendment, and of
2 course I think probably if you went into the balancing
3 test you would have commercial speech or some type of --
4 well, commercial speech and have a balancing test. I
5 don't think we would win in a case like that, Your
6 Honor.

7 QUESTION: Because -- In spite of the
8 Twenty-First Amendment?

9 MR. MC DONALD: I think that's correct. I
10 think what you've got it, you've got competing interests
11 under the Twenty-First Amendment. The competing
12 interest, I think, would be attenuated in trying to
13 enforce the regulation in a situation like that. I
14 don't think we could prevail.

15 QUESTION: Does your regulation apply to a
16 Kansas newspaper, say, a borderline town that is right
17 on the border between Oklahoma and Kansas and wants to
18 advertise, urging people to come across the state line
19 and buy some liquor in Kansas?

20 MR. MC DONALD: No, we would not be able to
21 enforce that Act outside of the state of Oklahoma.

22 QUESTION: I am just talking about the
23 distribution in Oklahoma of such ads directed at
24 Oklahoma people, soliciting their patronage to come
25 across the state line and get some of the good Kansas

1 beer.

2 MR. MC DONALD: No, not if they -- we have no
3 way of regulating that.

4 QUESTION: You don't -- you wouldn't
5 contend --

6 QUESTION: Well, you can regulate the paper
7 there that sits on the newsstand. You certainly don't
8 -- It wouldn't be hard to keep that paper out of
9 Oklahoma, would it?

10 MR. MC DONALD: Well, I think that could be
11 another fact situation than your fact situation. That
12 is, if it was in Oklahoma there, and --

13 QUESTION: You don't let your own papers
14 publish liquor ads, do you?

15 MR. MC DONALD: No, Your Honor.

16 QUESTION: But you do let the New York Times
17 publish them when --

18 MR. MC DONALD: Yes.

19 QUESTION: Would you allow your papers to
20 publish an ad on behalf of a Kansas liquor store?

21 MR. MC DONALD: No, Your Honor.

22 QUESTION: You would not?

23 MR. MC DONALD: We think the analyses that you
24 would use in the balancing test would be similar to the
25 analysis that was used in the commercial speech or a

1 First Amendment type balancing test. One thing that we
2 think that might be some problems, and had some problems
3 below, we believe -- we realize the record was meager
4 below. There was quite some confusion, I think, in
5 trying to read the record, just what type of burdens or
6 what type of criteria. Was this a First Amendment case?
7 Was it a preemption case? Who had the burden of going
8 forward and challenging?

9 The court -- from reading the record, my
10 impression of reading the record was that the court was
11 not -- was going along with a regular type of First
12 Amendment or supremacy type as far as getting to a
13 preemption type of test. It was confusing to me what
14 type of test or criteria was being used.

15 So I think --

16 QUESTION: Mr. McDonald, did you think there
17 was enough evidence for a balancing type approach?

18 MR. MC DONALD: Your Honor, I did not think
19 there was enough evidence on either side to really
20 decide --

21 QUESTION: But you agreed not to introduce any
22 more. Is that right?

23 MR. MC DONALD: That's correct, because it was
24 going along the First Amendment grounds. We believe
25 that the Tenth Circuit applied the proper test, and that

1 was the Central Hudson. Of course, now, they tipped
2 their hat to preemption and said that was a problem, and
3 they said it would be impractical. Now, we think that
4 -- Of course, now, the FCC in their brief, in their
5 argument before this Court, they don't seem to recognize
6 the Twenty-First Amendment, or they -- when they do
7 recognize it, they don't give it the import that we do
8 in Oklahoma.

9 QUESTION: Why do you suppose the Tenth
10 Circuit didn't really adjudicate the preemption
11 argument?

12 MR. MC DONALD: Because it wasn't raised very
13 vigorously down at the District Court.

14 QUESTION: But it was raised. It was raised.
15 Was it presented in the briefs to the Tenth Circuit?

16 MR. MC DONALD: I don't think so, no.

17 QUESTION: It wasn't an issue at all?

18 MR. MC DONALD: Not --

19 QUESTION: Before the Tenth Circuit? Why did
20 they even mention it?

21 MR. MC DONALD: They just -- because of the --
22 the way that it was raised was because -- was along the
23 regular standard preemption. That was that it was
24 impractical. It was brought up at the District Court
25 level and at the Tenth Circuit level about the

1 impracticality of deleting the --

2 QUESTION: Yes, but if the holding was, which
3 it was, I gather, that you weren't violating the First
4 Amendment, why didn't they have to reach the preemption
5 argument and say it isn't preempted either?

6 Wasn't the issue squarely presented to them?
7 Or wasn't it?

8 MR. MC DONALD: I don't think it was squarely
9 presented to them, Your Honor.

10 QUESTION: Maybe they thought that the
11 Twenty-First Amendment couldn't be preempted.

12 MR. MC DONALD: I think what they did was,
13 they recognized that the record was meager at the
14 District Court level, that the court was talking about
15 the impracticality of it and the burden that it would
16 have on cablecasters.

17 QUESTION: Well, do you object to the
18 petitioners here relying on the preemption argument if
19 they didn't present it to the Court of Appeals?

20 MR. MC DONALD: Well, they presented it to the
21 Court of Appeals, but I am talking about --

22 QUESTION: But the Court of Appeals just
23 didn't adjudicate it.

24 MR. MC DONALD: That's correct, Your Honor.

25 QUESTION: There are a number of old cases

1 that have held here that we will not let a case turn on
2 an issue not decided by the Court of Appeals.

3 MR. MC DONALD: I understand, Your Honor, but
4 it was very difficult to decide whether they were
5 looking at really a preemption --

6 QUESTION: And I would think you would want to
7 embrace them.

8 MR. MC DONALD: One of the other things that
9 we think that should be addressed by this Court is that
10 what type of setting is there when a Twenty-First
11 Amendment case is presented to the Court, that it go
12 with a presumption in favor of the state in a competing
13 interest between the federal interest and the state's
14 interest, or what type of record. Does there have to be
15 any evidence?

16 One of the problems that was presented, of
17 course, to the Metromedia case was that, and it was
18 raised, is that there was no evidence presented at the
19 District Court level which showed that banning of
20 billboards would improve the safety or the aesthetic
21 aspect of San Diego. This Court held that as a matter
22 of law the Court could make that and no evidence would
23 need to be presented on that, that you would apply a
24 rational basis.

25 And we think that in this particular situation

1 there is a rational basis.

2 What are some of the dangers of petitioners'
3 arguments? You are going to have possibly, and it was
4 raised by one of the questions when petitioners were
5 presenting their argument, and that is, what about an
6 unlawful activity being advertised by the cablecaster?
7 That would not have commercial speech protection,
8 because it would be concerning unlawful activity, and it
9 would not meet the Central Hudson test.

10 Well, they are saying that the state of
11 Oklahoma has no authority to or any control because it
12 is preempted. It would be up to the federal -- or the
13 FCC to enforce the type of violations of state law where
14 it would be an unlawful activity and they would be
15 advertising it within the state of Oklahoma.

16 We must also address the problem of the
17 electronic media, and that is the children in the state
18 of Oklahoma, because cable television is getting very
19 pervasive in the state of Oklahoma. It is getting very
20 popular. It is getting into the homes, and that is one
21 of the reasons that there were many complaints that came
22 in that resulted in the request of an AG's opinion to
23 determine whether cablecasting or cable television fell
24 under the prohibition of liquor advertising, and the
25 opinion was rendered, because of the coming into homes,

1 and it had not been coming into the homes before, and
2 people were getting rather excited about the uninvited
3 solicitation to -- for the artificial stimulation to
4 consume alcohol.

5 In conclusion, the petitioners' challenges to
6 Oklahoma's restriction on liquor advertising is not
7 supported by sound constitutional arguments, nor is
8 petitioners' position supported by sound public policy.
9 If this Court were to adopt petitioners' position, it
10 would leave states powerless to protect a citizen
11 against liquor advertising, no matter how fraudulent, no
12 matter how deceptive.

13 Under the petitioners' arguments, the federal
14 government, despite the Twenty-First Amendment, has
15 absolute power to dictate that the children of Oklahoma
16 be subjected to television advertising of alcohol that
17 is aimed specifically at encouraging the consumption and
18 indeed increased consumption of alcohol.

19 In proposing the Twenty-First Amendment to the
20 people of this country, Congress itself refused to
21 include provisions which would have vested Congress with
22 concurrent power to regulate or prohibit the sale of
23 intoxicating beverages. The record as far as the debate
24 when the Twenty-First Amendment was presented to
25 Congress, Senator Wagner, one of his statements in that

1 third section that gave the federal government
2 concurrent power, he said, what we are doing here, we
3 are expelling the federal government out of the liquor
4 business as far as regulating it, and we are supposed to
5 be giving the states express power, and then we're
6 letting them in the back door.

7 That is one of the things that we think is the
8 spirit of the Twenty-First Amendment, and that was to
9 give the states the power to regulate the alcohol and
10 the effects of alcohol and the incidence of alcohol in
11 the state of Oklahoma, and that is exactly what we feel
12 like the Twenty-First Amendment was all about, and to
13 prevent a situation such as we have here, and that is
14 the federal government coming in and telling the people
15 of Oklahoma that they don't have the right to regulate
16 alcohol or the incidence of alcohol.

17 QUESTION: What do you do about television
18 stations just across the border, or radio stations just
19 across the border broadcasting into Oklahoma?

20 MR. MC DONALD: We can't do anything about it,
21 Your Honor. In fact --

22 QUESTION: It is against your law, I take it.

23 MR. MC DONALD: Yes, but they don't broadcast
24 in Oklahoma, so we have no control. We have always
25 wondered -- we'd like to try to probably invoke the

1 political process, and of course the FCC recognized the
2 analogous type of problem with cigarette advertising,
3 and we'd like for the political process, you know, some
4 type of situation where they could help out or have some
5 type of regulation, or Congress, or seeking some type of
6 political solution to it, because of the problems that
7 we are just now recognizing that alcohol causes.

8 We would ask this Court to affirm the Court of
9 Appeals' decision which recognized Oklahoma's right to
10 regulate themselves and chart the course of their own
11 destiny.

12 Thank you very much.

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

15 (Whereupon, at 2:52 o'clock p.m., the case in
16 the above-entitled matter was submitted.)
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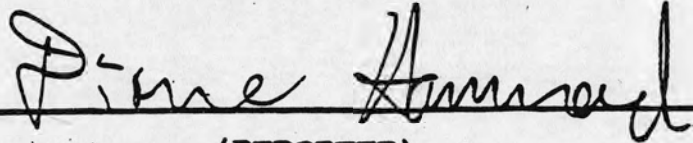
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1795-CAPITAL CITIES CABLE, INC., ET AL., Petitioners v. RICHARD A. CRISP,
~~DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD~~

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

BY

A handwritten signature in cursive script, appearing to read "F. H. Anderson", written over a horizontal line.

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