LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-437

TITLE RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY, Petitioner V. CLOUD BOOKS, INC., ETC., ET AL.

PLACE Washington, D. C.

DATE April 29, 1986

PAGES 1 thru 40

ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -x

RICHARD ARCARA, DISTRICT :
ATTORNEY OF ERIE COUNTY, :
Petitioner, :
V. : No. 85-437
CLOUD BOCKS, INC., ETC., ET AL. :

- - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, April 29, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

JOHN J. DE FRANKS, ESQ., Assistant District Attorney of Erie County, Buffalo, New York; on behalf of the petitioner.

PAUL J. CAMBRIA, JR., ESQ., Buffalo, New York; on behalf of the respondents.

C O N T E N T S

P R C C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Arcara against Cloud Books.

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

ORAL ARGUMENT OF JOHN J. DE FRANKS, ESQ.,

ON BEHALF OF THE PETTITIONER

MR. DE FRANKS: Mr. Chief Justice, and may it please the Court, the present case on a writ of certiorari to the New York Court of Appeals stems from an action under New York's public health law to abate a nuisance allegedly occurring at respondent's book store premises.

In the trial court, respondents moved for summary judgment, arguing that the closure provision of the public health laws constituted an impermissible prior restraint. The motion was denied. The denial was affirmed by the intermediate appellate court. The New York Court of Appeals, however, found the law, the closure provision, that is, to constitute an unlawful prior restraint upon respondents' First Amendment right.

The issue as we see it before this Court is twofold: firstly, whether the closure provision amounts to any regulation of speech; and secondly, if it does, is it not a valid time, place, or manner restriction?

We argue initially that closure does not restrict speech in any form, oral or written, pure or symbolic. Closure would be the result of criminal conduct which my opponent concedes has no expressive element. Neither the complaint nor the law generically is concerned with control of any content, and the Court of Appeals specifically so found.

The exercise of First Amendment rights could never bring this law to bear against the respondents, and that is exactly what distinguishes this case from every other case cited by both sides in this controversy. In all of those other cases, it was the exercise or intended exercise of First Amendment rights that put the individual on a collision course with the law.

In this case, no matter what he says, no matter what he sells, legal or illegal, it could never result in a proceeding for closure.

QUESTION: Mr. DeFranks, would you mind explaining how New York interprets this law? Would a single occurrence of an illegal act on the premises of a business without the knowledge or consent of the owner amount to a violation so that it could be declared a public nuisance?

MR. DE FRANKS: No, it would not. The New

York courts have interpreted this law to require proof of a continuing course of conduct. Both courts, the Appellate Division and the Court of Appeals, have agreed in that.

QUESTION: And does the prosecutor have an option to seek closure or an injunction?

MR. DE FRANKS: No, under the law the closure is mandatory at the conclusion of a successful prosecution.

The present case is really like that.

QUESTION: Well, did the prosecutor in this case try to get an injunction?

MR. DE FRANKS: The prosecutor in this case commenced the action, and the case was dismissed prior to the trial, but in our complaint we sought injunction and closure, but the two come together as part of the law.

QUESTION: But your injunction was to close.

MR. DE FRANKS: Yes, that's correct. Correct.

QUESTION: It wasn't just to stop the --

MR. DE FRANKS: Correct.

QUESTION: -- the illegal conduct.

MR. DE FRANKS: Correct. That's correct, Your Honor.

The present case is like that of a publisher,

say, who is incarcerated for conduct unrelated to his publishing activity. Surely his incarceration incidentally affects his freedom to publish, but would anyone suggest that he be entitled to an O'Brien analysis on the date of sentencing? I would think not, because the penalty is unrelated to his First Amendment activity. There is no causal connection.

QUESTION: May I ask a question there? Supposing the publisher had this sort of activity going on in the men's room or the locker room or something, and didn't know it, it went on over and over again for the period of a month, and the investigators found it out. Could you close down the publisher?

MR. DE FRANKS: Could we close down the premises?

QUESTION: Yes.

MR. DE FRANKS: Yes, Your Honor.

QUESTION: Even if they are publishing a newspaper or magazine?

MR. DE FRANKS: Yes, Your Honor. This law would apply whether it be a newspaper or a church or a car dealership.

QUESTION: And whether or not the owner knew of the activity?

MR. DE FRANKS: Yes, the law does not indicate

that there has to be knowledge by the owner, but only that the premises is being used for the conduct. It requires the owner -- it puts a burden on the owner to know what is going on at his premises.

QUESTION: Must this be open and notorious use, or --

MR. DE FRANKS: Well, in this case --

QUESTION: -- standard there?

MR. DE FRANKS: In this case it was a premises open to the public, so in this case it was open and notorious, because the undercover officer was able to observe it from the position he was in which was in the area of the movie projectors, the booths.

As I was suggesting earlier, there is no causal connection, and in this case the exercise of their right to disseminate sexually explicit materials could never bring the law, the closure provision down against them, and this closure provision does not prohibit relocation. In and of itself, it is not concerned with where the respondents move to to continue in their operation. Respondents deny this. They say we are left with no option. We must remain there. They cite an ordinance that they never raised in the Court of Appeals below, the Kenmore adult use ordinance.

However, that ordinance on its face indicates

that he may move to an alternative location, and as the maps we have provided indicate, the alternative locations are ample and reasonable in light of the fact that the village of Kenmore is a ten-by-eighteen-block village, wholly consumed within the town of Tonawanda, which is 15 times its size, and which also allows alternative sites for adult uses.

That the sites might cost respondents more than they are willing to spend is of no moment. As this Court stated in Renton, economic impact, which is the only real impact here, economic impact is simply irrelevant to a First Amendment inquiry, but if we would have assumed that economic impact somehow translates into a restriction on speech, we would argue that this is a legitimate time, place, or manner restriction, a legimitate place restriction.

The law is content neutral. It is unconcerned with content. It is interesting that when the law went to the Court of Appeals, it was neutral in all respects. When it returned from the Court of Appeals, the bookstore had been accorded a privilege that we assume might not be accorded to a car dealership or a pharmacy.

QUESTION: Mr. DeFranks, let me go back to a point that was raised a couple moments ago. This case

has not yet been to trial, has it?

MR. DE FRANKS: Yes. That is true, Your Honor.

QUESTION: And what happened was that the appellate courts in New York upheld kind of a demur to the complaint or whatever you want to call it?

MR. DE FRANKS: A motion for summary judgment.

QUESTION: A motion for -- and the district attorney's allegations in this case were that the defendant was aware of what was going on in the store?

MR. DE FRANKS: Correct.

QUESTION: So for purposes of the case before us, we assume that those were the facts.

MR. DE FRANKS: Right, in this particular case, and it was very clear that the managers and higher ranking officials with the company were well aware of what was going on. They allowed it because they indicated that it gave them the opportunity to make money off the machines --

QUESTION: Those are the allegations.

MR. DE FRANKS: Those are the allegations in the complaint. As I mentioned, the closure provision does not block alternative channels. The government's interest is strong here, and the Court of Appeals so

found. The government sought to control criminal activity and the spread of transmissible sexual diseases. The law is found under the public health law.

The closure provision is narrowly tailored. It controls the premises in this case. However, it does not bring under its ambit the prostitution-free premises of others, nor does it infringe upon the constitutional rights of the respondents nor any other individual. In reality --

QUESTION: You take the position that it isn't a First Amendment case at all, so we wouldn't be concerned with narrowly tailored or substantial interests?

MR. DE FRANKS: Exactly. Under our first analysis, we would contend this is not a First Amendment case at all, and this would only be our secondary position. In fact, the closure here would have no more effect on respondents than the termination of their lease, the taking of the property though eminent domain, or a tax foreclosure.

The place restriction has a rational basis. It works to controvert the prior use pattern of the premises and rehabilitate the situs. It doesn't take the property for all time, and it allows for a

discretionary release of the property for good cause.

Now, if that release is denied in New York, that denial would be reviewed by an appellate court, if the respondents so desired. As this Court has stated in Albertini, if a time, place, and manner restriction meets the prerequisites I spoke of, it will be determined to be legitimate if the government's interest is accomplished in a better manner with it than without it.

I think in this case it is clear that the government's interest would be served better with closure than without it, because closure prevents the recurrence of the conduct, whereas injunction would admit the possibility of recurrence and punish after the fact. My opponent's suggestion that there exists a state constitutional basis for this decision is simply not proven by the opinion. The Court of Appeals decided this case on the basis of your decision in O'Brien. They did not cite the New York State constitution at all as authority.

They mentioned it once in reference, but that related to a restatement of respondent's arguments in the court of first instance. This is contracts that by the 19 references to the First Amendment to the United States Constitution and Footnote 3 where the Court of

Appeals specifically stated, we are adjudicating the First Amendment question, and as this Court is aware, there is no First Amendment in the state of New York, speech is accorded protection under Article I, Section 8.

In conclusion, I point out to this Court that the law does not seek to control or censor the content of any of the materials the respondents are disseminating. It does not deny him access. There are alternative channels. It is simply not a prior restraint. The Court of Appeals was wrong, and we urge that their judgment be reversed.

CHIEF JUSTICE BURGER: Very well.

Mr. Cambria.

ORAL ARGUMENT OF PAUL J. CAMBRIA, JR., ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. CAMBRIA: Mr. Chief Justice, and may it please the Court, initially I think that it is important to again emphasize the record that we come up here on. We have a complaint only, and for purposes of a motion for summary judgment, of course, the allegations are admitted to be true. That is the law in New York State and most other jurisdictions.

We do not have in that complaint, however, an allegation by the people that closure of the store is

necessary to abate the nuisance. They allege in the complaint that the activities themselves of which they complain, the prostitution activities, et cetera, should be restrained. They do, of course, ask in their wherefore clause that the closure provisions and so on be applied, but they never allege that closure is necessary in order to abate this nuisance.

In addition to that, they do not allege and there is no proof on this record that there are indeed ample other locations available. In each case by this Court where ample locations has come up as an issue, most recently Renton, through Justice Rehnquist --

QUESTION: May I ask this question?

MR. CAMBRIA: Yes, Your Honor.

QUESTION: Am I mistaken? I was under the impression that under the statute, if the nuisance was found to exist, the Court had no alternative. It must order closure.

MR. CAMBRIA: That is the way the statute is written.

QUESTION: Yes.

MR. CAMBRIA: And the way it has been applied by the Court of Appeals is to make this a permissive rather than a mandatory closure, and the reason that that was done was to say that based on this record, this

would not be justified. It would not be the least drastic means or the narrowest means, and the way the Court of Appeals arrived at that, and I think that it makes sense, because historically if you look at nuisance cases, we always see a broad area of discretion given to the trial court to fashion a remedy, whether it be First Amendment or just a factory, to fashion a remedy that supposedly fits the nuisance as it is found and as it is defined by the record.

QUESTION: But your opponent here says that the New York statutory scheme does not give trial courts that sort of discretion here, that upon a showing of this kind, closure is mandatory. Is he wrong, in your view?

MR. CAMBRIA: That is what the statute says literally, and the way that the Court of Appeals interpreted that to be permissive versus mandatory was to analyze the record, analyze the law from this Court and from the state court and make the determination that --

QUESTION: The court below, as I understand it, said the First Amendment in effect forced it to make that decision, because it thought there were First Amendment values at stake here. Isn't that right?

MR. CAMBRIA: I think that is partly right.

There's two things the court did. The first thing the court did was say that it wasn't necessary in order to effectuate, if you will, the legislation here, to close the store based on this record, and I think that what happens by that statement is that the court interprets, first of all, what the intent of its legislation is, which I submit is legitimate for the highest court of the state to do, and I might add, this is the first time this has ever arisen in the state of New York with regard to application of this statute.

This statute by all history is a house of prostitution statute. Now it is being applied in this case for the first time in an area where there is undeniably and admittedly on the part of the prosecution lawful speech conduct occurring on the premises, so what the Court of Appeals did was say first of all in viewing our piece of legislation we say that it is not necessary in order to carry out the force of the legislation on this record, and they emphasize under these circumstances, on this record it is not necessary to have closure, that to do so would, because of the First Amendment implications here, constitute a restraint, and I --

QUESTION: Do you think the same analysis would be required if a bookstore were closed because of

violation of some safety --

MR. CAMBRIA: No, and I think there is an obvious distinction there, and that is this. If I failed to pay taxes, and I had a publishing concern, a newspaper, if I failed to pay taxes, or if I had some zoning problem, the narrowest remedy available would be for me to pay the taxes or to correct the zoning problem. That is the narrowest remedy, and the moment that I do that, there is no cessation beyond my satisfying that narrowest remedy to my publishing, but in this case --

QUESTION: Well, but now wait a minute. Suppose it was fire safety regulations, and the city said, you will have to close because you don't have the required fire safety code equipment?

MR. CAMBRIA: I think the point there is what the city would say is that the least you can do to comply with our noncontent legislation here is to correct X, Y, and Z fire code. That is what you have to do. That is the least drastic remedy. There is no other. And so therefore once you do that you are able to open.

In this case the Court of Appeals, and I believe rightfully so, and I think it is reasonable, said, the least drastic remedy on this record is to at

least in the first instance have an injunction or attempted injunction.

QUESTION: But you are assuming it is a First Amendment case.

MR. CAMBRIA: And I think for good reason, and I might say this is the reason. If we look at the history of the decisions of this Court, whether it be Healy v. James or Procunier or Schaumberg or Schad or American Mini, and a lot of other cases that have come down from this Court, the Court has said that even in a situation where motivation is not considered, or where content is not considered, the Court must consider the effect of legislation on expressive conduct -- on expressive conduct by an individual, the effect of the legislation.

Otherwise, I submit, Justice O'Connor, we would be in a situation where if a community could simply pass a law and it could tremendously affect a newspaper, motion picture studio, what have you, but if they simply said, it is content neutral, completely, they would have total immunity from any scrutiny by this Court or any other court on the position that we are not saying anything at all about your theater or about your newspaper, whatever. We have a fire code, for example.

I think that since it would affect, and any

time it does affect, and I believe this Court's decisions say that, that when legislation affects speech, it is subject to some kind of scrutiny by the court, whether it be O'Brien or whether it be the time, place, and manner, and I might say that in some cases it looks as if, for example, in the Creative Nonviolence situation, we start off with an O'Brien observation, and it goes into a time, place, and manner, and sometimes these seem to overlap one another.

QUESTION: This would be true in your view even if it were the application of a city fire ordinance to all buildings of a certain kind, and one building turned out to be a bookstore?

MR. CAMBRIA: I think that if we had a situation where --

QUESTION: Answer my question.

MR. CAMBRIA: I am attempting to answer your question. I think that if we take any piece of legislation that can affect speech directly -- now, example here.

QUESTION: Is my example a kind of speech, legislation that could affect speech directly, in your words?

MR. CAMBRIA: It could affect speech directly, yes. I think it could. For example, if we had an

American Mini type statute that said --

QUESTION: But the hypothetical I gave you was an ordinance which applied fire regulations to all buildings of a certain kind --

MR. CAMBRIA: Yes.

QUESTION: -- including a book store.

MR. CAMBRIA: Yes, I think fire would be analogous to zoning, and we could make the same argument. There would be some scrutiny if we started to affect that particular area of speech, if we had to --

QUESTION: And does the application of a fire ordinance to a building in which there is a book store affect that area of speech, as you put it?

MR. CAMBRIA: I think it would depend on what the ordinance said.

QUESTION: The ordinance says you have to have a certain fire resistant break on the outside, you have to have smoke detectors on the inside, that sort of thing?

MR. CAMBRIA: No, I don't think that would be true. I think that if it said, however, that even if you corrected the fire, the brick, the smoke detectors, you would be closed for a period of time, no matter what. Then I think that would affect First Amendment rights, and that is the facts we have here. We are not

dealing simply with something like fire, where we are saying, once you cure the problem, you can open.

We are dealing with something that goes beyond what is necessary to cure the problem, so in your fire analogy, if we had one that said nevertheless, even after you correct the fire problem, you still have to be closed for a period of one year, I submit that that kind of legislation then would be subjected to scrutiny by the Court, and we would say, is that a legitimate time, place, or manner, or is that a legitimate, whatever the --

QUESTION: Suppose there is no bookstore involved, and you just have a house of prostitution. What is the purpose of shutting down a place like that for a year?

MR. CAMBRIA: I don't know basically what the purpose would be unless we had the facts before us to see. In other words --

QUESTION: Well, here is a nuisance, here is a public nuisance ordinance that allows the city to close down the use of that property for a year for anything.

MR. CAMBRIA: Yes.

QUESTION: Isn't that right?

MR. CAMBRIA: That's exactly what the legislation said.

QUESTION: I would suppose it is some sort of deterrence --

MR. CAMBRIA: But isn't --

QUESTION: -- to prevent -- to convince people that they shouldn't run houses of prostitution.

MR. CAMBRIA: But, Justice White, isn't the point here in this case --

QUESTION: I am just talking -- just answer -- how about my question? Wouldn't you suppose that's right, that they want to --

MR. CAMBRIA: I think depending upon the record, I would agree.

QUESTION: -- they want to make it expensive to run houses of prostition?

MR. CAMBRIA: Depending upon the facts in the record, yes.

QUESTION: And you say that the operator of a house of prostition can avoid that deterrent effect by selling books, too.

MR. CAMBRIA: Oh, no, I never --

QUESTION: Well, that is your argument.

MR. CAMBRIA: Not at any time, because, you see --

QUESTION: Well, here is a house of prostitution, and he also runs a bookstore. According

to your analysis, you could not close down that house of prostitution --

MR. CAMBRIA: No.

QUESTION: -- you couldn't -- you would have to let the bookstore run.

MR. CAMBRIA: What I am saying is that you could definitely close the house of prostitution or the prostitution -- and the Court of Appeals has said the same thing.

QUESTION: Yes, but housing the -- closing the -- without the bookstore you could close down the property and it couldn't be used for anything for a year.

MR. CAMBRIA: What I am saying --

QUESTION: With the bookstore you say the property cannot be closed down for a year.

MR. CAMBRIA: What I am saying is, again, depending upon the facts, the remedy has to fit the problem. If under the facts of this case, which is what the Court of Appeals has been dealing with, they felt that the lesser means or the narrowest means was to first attempt the injunction. They never said abatement wasn't a proper remedy, that it could never be a proper remedy. If they would have said that, then I think the district attorney would be here with that sort of issue

before this Court.

QUESTION: Then are you arguing this is a violation of the Eighth Amendment? It is to excessive a penalty? Because it is clearly a penalty, isn't it?

MR. CAMBRIA: I think that it clearly is too excessive under the First Amendment, because what it amounts to is, it is an overkill. One time this Court --

QUESTION: What in the First Amendment talks about penalties?

MR. CAMBRIA: Nothing.

QUESTION: Then --

MR. CAMBRIA: As far as penalty, Your Honor, it simply --

QUESTION: This is a penalty, isn't it?

MR. CAMBRIA: -- indicates that it can't be abridged, that it can't be suppressed, and that is what this is. This is a situation where -- this is a situation where there is a total closure here of a lawful, legitimate aspect of a business before the reasonable step under this record is being taken, which is to attempt an injunction or to have an injunction, and I submit that all the Court of Appeals said was this. It never said that closure wasn't a valid remedy. It said that on this record it was overly broad.

This Court has said on a number of occasions and talked about overly broad remedies in First Amendment areas, in areas where you found that narrower means could be used in order to vindicate the purpose of a piece of legislation, and I submit that it is only reasonable for the Court of Appeals to say in this case, why is it unfair, why is it unreasonable when we have a legitimate aspect of a business, not simply sex books, but all kinds of books and magazines, why is it unfair to say to the court below that the narrowest means, which are already in the statute, they don't have to be made up by anybody, they are in the statute, that the narrowest means here is an injunction.

QUESTION: You say there is a provision for an injunction in the statute?

MR. CAMBRIA: Yes, there is in the statute a provision. However, the problem with the statute is that when it was amended, and it was amended over the years, an additional provision was added saying that there shall be an abatement. Now, what the Court of Appeals has done here is basically what the state of California has done through its Supreme Court, and it is to make it a permissive closure versus a mandatory one, and they simply took the position that where we have this effect, you should follow the narrowest means, and

not the most drastic means, but the narrowest means.

QUESTION: And they did that because they thought the First Amendment to the United States Constitution required it, didn't they?

MR. CAMBRIA: I think that that -- and the way they interpreted their legislation that it did not require closure regardless of the facts.

QUESTION: Let me read this statement to you from the New York Court of Appeals opinion on Page A-19 of the petition, where just before they reached the end and Judge Jason starts dissenting, the Court of Appeals says, "Under these circumstances, we conclude that closure of defendant's bookstore is not essential to the furtherance of the purposes underlying Title 2, and is thus an unconstitutional restraint on defendant's First Amendment rights."

MR. CAMBRIA: Yes, and I think the key phrase begins off with "Under these circumstances."

QUESTION: Yes, and under these circumstances they felt the legislation could not be constitutionally applied.

MR. CAMBRIA: Under these circumstances, because it wasn't the narrowest means available. If we look at all the other cases coming out of this Court, for example, the recent one, Creative Nonviolence,

Albertini, and the other cases, if we look at these cases, we find that there are and there is on the record, a finding on the record of ample other outlets for the distribution of the material or the speech that is involved. Creative Nonviolence on the mall, all types of things were able to be done there to make the speech.

With regard to this case, however, we do not have that. There is nothing in this record to demonstrate that. In fact, because the District Attorney had made a statement in the brief, they could simply move across the street, that is what compelled us to have to file an appendix in this case showing that they were there under a prior nonconforming use in this particular area, and it is extremely restrictive, but I think the point is that if we look at Renton, and we look at Schad, and we look at American Mini Theaters, in each case there was a specific finding there relied upon by this Court to say that there were ample other outlets.

The Court said, we find that. In Renton they found the District Court had ruled that way. In American Mini, in Footnote 35, the Court there said that we find myriad other locations, and so on, and as a matter of fact when we look at these other cases, we can

see that each one of those individuals could still have an outlet for speech. In American Mini, for example, they could have shown other types of movies, or in Schad, they could have had other kinds of books, magazines, or what have you.

QUESTION: May I interrupt to ask this question? In any of the cases you have cited, was conduct alone involved, conduct unrelated to speech? You rely on O'Brien, but I don't recall any decision of this Court that ever applied O'Brien where only conduct unrelated to speech was involved.

MR. CAMBRIA: If I might say, I think if we look at the Committee for Creative Nonviolence case, there the question was whether sleeping was prohibited.

QUESTION: That was conduct, wasn't it?

MR. CAMBRIA: And that was simply conduct, and in that case I think the Chief Justice indicated conduct is not talking or not speech.

QUESTION: Conduct in Lafayette Park.

MR. CAMBRIA: Yes, and in this particular case we have pure speech, admittedly pure speech being detrimentally affected when it doesn't have to be, and the purpose of the statute can still be furthered simply by the injunction, and if it is not, if it is not, then the cases cited by the Court of Appeals in their

decision, Croaton and Allouwill and so on, in those cases, the record there demonstrated there should be a closure.

QUESTION: May I ask this question? The statute on its face is completely neutral, isn't it?

MR. CAMBRIA: The statute on its face doesn't --

QUESTION: Had nothing whatever to do with --

MR. CAMBRIA: -- say anything one way or the other.

QUESTION: Yes.

MR. CAMBRIA: And there are a number of statutes that have been netural, but nevertheless this Court has applied the balancing test.

QUESTION: Never where there is conduct unrelated to speech. At least I can't recall a case.

MR. CAMBRIA: Never where conduct unrelated to speech.

QUESTION: Where the only issue was conducted unrelated to speech.

MR. CAMBRIA: If we had -- no, I agree. I think that what we have is, we see two kinds of cases. We have on where there is conduct, mixed conduct and speech, which would be like O'Brien, for example. In O'Brien, the position taken by the individual was that

burning the draft card was symbolic speech. The Court disagreed with that, and found, of course, that it could be regulated under this test.

In Healy v. James, we had a status thing, where they would recognize or not the SDS on a campus. And in that particular case they certainly argued that this was an infringement on their speech not to be recognized, and the Court took the position, we have to now go through this measuring test, and in a whole raft of cases the Court has always taken the position that where speech is involved and affected, and the words used by the Court repeatedly have been affected, that then this measuring test takes place

QUESTION: Well, Mr. Cambria, suppose we had a policeman who arrested a television anchorperson for speeding or drunk driving just before the evening broadcast. Now, does the policeman have to take into account the fact that by arresting the person speech will be suppressed?

MR. CAMBRIA: No, and if, however, there was a law that said that if you are convicted of speeding or arrested for speeding, then you cannot act as an anchorperson for a year after that time, then I would submit we are involved in an overly broad regulation, because in the case you pose, the thing that needs to be

addressed is the actual conduct that is against the law, and I think that is what the Court of Appeals has said here.

The conduct against the law is the activity of the patrons or some patrons over the short period of time on the premises. And that should be addressed.

QUESTION: Well, but the policeman would have an option to issue a citation at the moment and release the anchorperson to go make the broadcast, or to keep the person under arrest and prevent it.

MR. CAMBRIA: But, Your Honor, if I might, I don't see how that is analogous to this situation, where the problem is, it is the closure order that we are dealing with and not the restraint. The restraint everyone agrees, I believe, can and should be enclosed under the right record. It is the closure, the total closure where this Court of Appeals has said it is overly broad.

QUESTION: Does this penalty run against a person or a building?

MR. CAMBRIA: It runs against the premises, and the people punished are the people who have control and ownership of the premises, including corporate officers and so on. So it is there. As a matter of fact, in the trial court in this case --

QUESTION: He could go and rent another place and engage in these alleged First Amendment activities.

MR. CAMBRIA: I submit, Your Honor, that there has been no proof of that and no allegation of that in this case.

QUESTION: Is it a fact?

MR. CAMBRIA: It is not a fact. It is in fact the contrary fact.

QUESTION: You say it is not a fact that they aren't free to rent another building?

MR. CAMBRIA: Not in this community, they are not. That is why we have had a lodging here with the Court, because there was a statement made by the state that they could simply move across the street or next door, and we demonstrated that we had litigation over that. They are in this location as a prior nonconforming use. There is a little strip that has been provided for in part of the city which they say is the area where adult uses can go, and that particular strip at this point is not applicable because of the grandfather rights.

There was litigation in this case, but there was no -- there is not even an allegation in the complaint, which is our record here, that other avenues are available, and the Court has always required that if

somebody is imposing a time, place, and manner restraint, that it is their burden to demonstrate that all the requirements are there, including ample other avenues, and in each one of these cases where the Court has upheld effect legislation on speech, they have found specifically proof of other ample avenues, and we just don't have that here.

I submit it is not unfair in a nuisance case and unreasonable for the Court to simply say, it is like if you have a rash on your hand, the most efficient remedy would be to put the person to death. That is certainly the most efficient remedy, but is it reasonable? The reasonable thing would be to at least in the first analysis -- and I submit, expression is entitled to this. This is a clearly, admittedly lawful expressive area. Isn't it entitled to first have the part of the statute that provides for the injunction to be applied first before the door is slammed shut?

It is not like being arrested for -- there was a statement made in the opening remarks, it is similar to being arrested. It is not similar to being arrested for a crime or even for the crime of obscenity if that were to be applied, because with the arrest you certainly could punish that individual.

If that person owned a newspaper, when you

arrested him and convicted him of that particular crime, you wouldn't simultaneously go to their newspaper and put a padlock around the front door, and that is exactly what happens here, and that is the difference, and that is why arrest, penal law provisions, tax abatement, and so on, are not the same, because in those cases, once you take care of that ill, that problem, it does not have a spillover effect on the First Amendment expression part, and that is the problem here.

QUESTION: Mr. Cambria, may I ask you a question? Supposing -- as I understand, the case comes up on the motion. We don't have a trial yet.

MR. CAMBRIA: Yes.

QUESTION: Supposing when you go back, the city, even though it hasn't alleged it yet, does put in proof that establishes beyond a reasonable doubt, A, that you could move across the street, and you deny you could, and B, that there is no other remedy that would effectively prevent the nuisance from reoccurring.

Could they then order a closure?

MR. CAMBRIA: I think if they allege that, if we had another lawsuit, yes.

QUESTION: Well, as part of this, I assume they are not old common law pleading. They could put in extra evidence, I suppose, in support of this complaint,

and if they convinced the trier of fact of both of those propositions --

MR. CAMBRIA: Yes.

QUESTION: So what I am really suggesting is, do we know on the record before us what the issue is going to be at the time the remedy is imposed?

MR. CAMBRIA: I think yes and no. When we come up before the Court of Appeals, they are dealing with a record that shows that in three years between the time this suit is filed until the time it gets to them, there hasn't been one arrest, there has been no injunction successfully gotten because when they were there the courts found there were adequate legal remedies which were using the penal law provision for nuisance and so on, and I might say that in reading the decisions of this Court, Village of Schaumberg and some others, this Court has taken the position that in evaluating whether the narrowest remedy is being used you can look to whether there are more direct penal remedies involved, which one of the trial courts did in this case.

So the Court of Appeals gets this case with nothing having occurred in three years, no arrest of a single patron at any time for any conduct, and no injunction gotten by the District Attorney, no trial

had, and there has been no stay in this case. Up until the time we had the decision by the Court of Appeals, nothing preventing them from having a trial in this case.

QUESTION: I thought the law that the District Attorney was faced with, though, wouldn't permit him just to get an injunction.

MR. CAMBRIA: They -- no, I don't believe that is true at all. The final relief provides for the abatement. Interim relief is unrestricted, and interim relief here, there was never a sufficient showing, and they made two --

QUESTION: Did they try to get an injunction?

MR. CAMBRIA: Yes, and what the trial court found was that they didn't demonstrate that there were not adequate legal remedies, that in addition they didn't --

QUESTION: Well, on that basis you would never get an injunction.

MR. CAMBRIA: No, I submit no, Your Honor. For example --

QUESTION: Well, why, if there are adequate legal remedies like indicting somebody. That is the end of the injunction --

MR. CAMBRIA: Your Honor, in the Village of

Schaumberg case, which you wrote the decision in --

QUESTION: That was a Court opinion.

MR. CAMBRIA: -- you looked to the fact of using penal laws in an area for lesser or more direct means than using equitable remedies, or using other remedies that weren't as narrow, and I submit they legitimately did that here, and further, I submit this, that if they demonstrated below --

QUESTION: The District Attorney tried to get an injunction, and the court wouldn't give it to him.

MR. CAMBRIA: Because they didn't have a sufficient showing, not that it wouldn't be proper with a sufficient showing, but they didn't have a sufficient legal showing, and the decision is here from the lower court about the fact of the hearsay nature of it and the fact that they tried never to have an arrest -- I mean, in these other cases we look at Croaton and Allouwill and so on. They had arrests in those cases. They attempted to have a direct legal remedy be imposed, and it failed, and then they had a proper record to show they could get a closure, and I submit in this case that the area of expression is important enough that it is not unreasonable to say that under the right case, under the right circumstances pled and proved, they can get a closure order, but under this case the record does not

substantiate that. We have no attempt whatsoever to try legitimate, viable interim remedies here in a substantial or sufficient way, and if they had all of the pervasiveness and so on, I have to assume they would have moved under those grounds and said that, in fact, even had alleged in their complaint that they needed closure in order to stop the activity on the store, which they never even allege in their complaint.

So I submit --

QUESTION: But I guess it is their legal position that they don't have to show that it is necessary or that there is some other place you can move if the statute means what it says, and closure follows automatically from proof of this kind of activity.

MR. CAMBRIA: Well, but I don't think that's --

QUESTION: That's their legal position.

MR. CAMBRIA: I don't think that's -- they have not said that, because they would have to allege it so that we could at least deny it, so that then there would be an issue of fact for someone to try --

QUESTION: No, they can just say the statute means what it says.

MR. CAMBRIA: The statute simply says --

QUESTION: And the Court of Appeals said it did. They said, we have to construe the fact because of

the First Amendment.

MR. CAMBRIA: Right, the statute says there is one and only one remedy basically no matter what the facts are, and I submit that is the problem here. One and only one remedy without regard to what the facts are is the problem in this case, and it is not unreasonable, I submit again, to say in this case where we have a total cessation of this outlet without any demonstration of other adequate outlets available, to say that it is worth it and it is worth it to our system of free expression to say attempt the injunction or get the injunction, because they could certainly, from what they allege here, take the position they could get a permanent injunction at the end of a trial. If it doesn't work like it didn't in Croaton and it didn't in -- it did in the other case, but not in Croaton, then they would be entitled to closure, and I think that is why this statute isn't emasculated at all. It is just simply a reasonable response, saying let's just tailor it like we do any other nuisance.

If we had a factory that was emitting pollutants, it seems to me if we had a law that said any pollutants emitted would require bulldozing down the factory, that this Court would take a hard look at that and say, well, wait a minute. Isn't there a lesser

means, a filter on the stack system or what have you? Do we have to bulldoze it down?

And I submit that is what is happening here. We have an all or nothing blunderbust kind of remedy, a machette versus the scalpel that ought to be used in the First Amendment area, and I just submit that that response below is a reasonable one, and it is one that deserves to be employed, and it may be that when they have the trial in this case they can demonstrate that it is not effective to simply have an injunction, that there must be a closure, and if that is so, then I submit that would be proper. If not, I ask the decision below be affirmed.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. DeFranks?

ORAL ARGUMENT OF JOHN J. DE FRANKS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DE FRANKS: Just one thing, Your Honor. I just would like to refer the Court to our appendix in our reply brief where the maps demonstrate that there absolutely is an area set aside in both the village and the town for adult uses.

Thank you.

QUESTION: Wait. Mr. DeFranks, I really don't understand your making this argument, because am I not

correct that your position is, you don't have to prove anything like that, that you are simply entitled to closure?

MR. DE FRANKS: On a first analysis, correct.

QUESTION: So it seems to me that you should be saying to us, don't bother looking at alternatives. We have a right to closure. It is an effective remedy, and so forth. So I just don't understand your --

MR. DE FRANKS: Right. It is only on our secondary analysis, time, place, and manner. I agree that our first position, our initial position is a much stronger position.

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

(Whereupon, at 11:43 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#85-437 - RICHARD ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY, Petitioner

V. CLOUD BOOKS, INC., ETC., ET AL.

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

BY Paul A. Richardson

(REPORTER)