

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1370

TITLE ARKANSAS WRITERS' PROJECT, INC., Appellant v.
CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS

PLACE Washington, D. C.

DATE January 20, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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ARKANSAS WRITERS' PROJECT, INC., :
Appellant :
v. : No. 85-1370
CHARLES D. RAGLAND, COMMISSIONER :
OF REVENUE OF ARKANSAS :
- - - - -x

Washington, D.C.
Tuesday, January 20, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:51 o'clock p.m.

APPEARANCES:
ANNE OWINGS WILSON, ESQ., Little Rock, Ark.;
on behalf of Appellant
JOHN STEVEN CLARK, ESQ., Little Rock, Ark.;
on behalf of Appellee

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1 that the Arkansas sales tax exempts from taxation.

2 There are two exemptions. First of all, the
3 Arkansas sales tax is imposed generally on sales of
4 tangible personal property. There are two exemptions
5 which are particularly apropos.

6 One is exemption (f), which exempts all gross
7 receipts or gross proceeds from the sale of newspapers.
8 The other one is exemption (j), which exempts religious,
9 professional, trade, and sports journals, and/or
10 publications printed and published within the state when
11 sold through regular subscriptions.

12 Now, just from reading exemption (j) one would
13 think that that might extent to cover all publications
14 printed and published within the state of Arkansas, and
15 in fact that's what the chancellor who first heard the
16 case found.

17 But the Department of Revenue appealed the
18 case to the Arkansas Supreme Court, and the Arkansas
19 Supreme Court construed exemption (j) extremely
20 narrowly, finding that it only exempted sales of
21 religious, sports, professional, and trade journals.

22 QUESTION: While we're on the subject of the
23 lower court's holding, I think that I understand the
24 lower courts here to have held that under Arkansas law
25 even the non-subscription sales of these so-called

1 exempt magazines are exempt?

2 MS. WILSON: That is correct, Your Honor.

3 QUESTION: It doesn't turn on whether the sale
4 is by way of subscription or not?

5 MS. WILSON: That's right. He found that the
6 words "when sold through regular subscriptions" were
7 words of description rather than limitation, and that
8 since Arkansas Times was a publication that was
9 regularly sold through subscriptions that all sales of
10 Arkansas Times Magazine were exempt from taxation.

11 It is our contention that, because newspapers
12 are exempt from taxation and because these other very
13 specific types of publications are exempt from
14 publication, that sales of Arkansas Times should also be
15 exempt from publications or that the other publications
16 should be taxed, that there should not be
17 discrimination.

18 QUESTION: Well, Ms. Wilson, I guess we don't
19 even have to look at the newspaper question if we focus
20 on just the particular types of magazines that are
21 exempt. Presumably we could answer this case by
22 answering that question alone, quite apart from the
23 newspaper exemption question.

24 MS. WILSON: That is correct if the remedy
25 were necessarily to be to extend the exemption to sales

1 of Arkansas Times Magazine. But if the case went back
2 to Arkansas courts and the court found that, rather than
3 extending that exemption, that it would simply delete it
4 and tax all sales of magazines regardless of content,
5 there would still be discrimination between magazines
6 and newspapers.

7 And it is our contention that any distinctions
8 that exist between newspapers and magazines are
9 constitutionally invalid and --

10 QUESTION: Ms. Wilson, excuse me. That same
11 thing could happen even if we rested our decision on
12 discrimination between magazines and newspapers. The
13 same thing could happen. So it seems to me we don't
14 prevent against that deprivation of relief by resting
15 our decision on the newspaper discrimination, rather
16 than on the magazine discrimination, do we?

17 MS. WILSON: I'm not sure I understand your
18 question.

19 QUESTION: Well, I'm not sure I understood
20 your answer to Justice O'Connor. Justice O'Connor asked
21 why couldn't -- why do we have to reach the newspaper
22 issue so long as you're discriminating between this
23 magazine and other magazines, isn't that enough?

24 And you said yes, it would be, so long as when
25 it goes back what happens is that the exemption is

1 extended to your magazine, rather than the exemption for
2 other magazines being eliminated, right?

3 MS. WILSON: That's right. So long as --

4 QUESTION: But that same thing could happen
5 even if we rested our decision on the discrimination
6 between your magazine and newspapers. Likewise, when it
7 goes back, likewise when it goes back, unless we say
8 something about it, the court could say, instead of
9 extending the newspaper exemption to your magazine,
10 we'll eliminate the newspaper exemption.

11 MS. WILSON: That is correct.

12 QUESTION: Okay. So that issue has nothing to
13 do with whether we base this decision on the magazine
14 exemption or on the newspaper exemption.

15 MS. WILSON: Well, again, if this Court were
16 to find that the discrimination between newspapers and
17 magazines was unconstitutional and the Arkansas court
18 then found that the remedy was to delete the exemption,
19 the result would be that all publications would be
20 treated the same, whether they be newspapers or
21 magazines or sports journals or whatever, and that would
22 end the discrimination and we'd have a constitutional
23 result at that time.

24 QUESTION: But that wouldn't defeat your right
25 to a refund, would it?

1 MS. WILSON: I don't know whether it would or
2 not.

3 QUESTION: You couldn't go back and collect
4 the tax retroactively from all the others?

5 MS. WILSON: That -- yes, I think to bring us
6 even we would have to get a refund of past taxes.

7 QUESTION: So the case isn't a moot case just
8 because the -- just because the exemption could be
9 eliminated.

10 MS. WILSON: No, not as to the taxes collected
11 up through the time of the decision, that's correct.

12 QUESTION: Yes, all right.

13 MS. WILSON: The discrimination obviously in
14 the magazine exemption and also in the newspaper
15 exemption is based almost entirely on content. It's
16 based entirely on content when the state favors sports
17 journals, religious journals, and so forth. It's based
18 primarily on content --

19 QUESTION: Ms. Wilson, you know, when we think
20 of a discrimination based on content in the freedom of
21 speech area, we think of the state as trying to suppress
22 or disfavor certain kinds of content. You know, maybe
23 communist propaganda or something like that.

24 Here one would have to assume that the
25 legislature had it in for your kind of magazine and

1 wanted to somehow discourage its circulation. And yet,
2 that just doesn't seem to be a very rational
3 assumption. I mean, do you think the legislature was
4 out to kind of censor or suppress your magazine?

5 MS. WILSON: No. On the contrary, just the
6 timing of it shows that it's not, because the Arkansas
7 Times didn't even begin publication until seven years
8 after these exemptions were in effect.

9 Nevertheless, it is discriminated against,
10 regardless of the purpose of the legislature and
11 regardless of whether it was trying, deliberately
12 trying, to suppress this kind of speech. It does burden
13 the Arkansas Times Magazine where other types of
14 publications are not burdened.

15 QUESTION: Yes, I can understand that
16 argument. But when you go on and say it's a
17 content-based discrimination, usually the reason we talk
18 about a content-based discrimination is you infer from
19 that that there was a desire of the legislature to
20 suppress the content that it's discriminating against.

21 And I just don't see that that is a
22 permissible inference here, and I gather you agree with
23 me.

24 MS. WILSON: Well, the recent cases that the
25 Court has decided where there was content-based

1 discrimination were really not cases where the
2 government was trying to suppress a particular point of
3 view or anything of that sort. On the contrary, the
4 government in each case was really trying to favor one
5 particular type of speech.

6 As in Carey versus Brown, the government was
7 trying to favor any type of picketing related to labor
8 issues. The same thing in Moseley versus City of
9 Chicago, and that was found to be content-based
10 discrimination, even though the purpose of the
11 government in each case was to favor the labor picketing
12 and not to, particularly to suppress the -- well, of
13 course, the intent was to suppress everything but the
14 labor picketing.

15 QUESTION: Here you think the intention of the
16 legislature is to consciously favor religious,
17 professional trade and sports journals, at the expense
18 of other kinds of journals?

19 MS. WILSON: That's what the Arkansas Supreme
20 Court found when it decided the case, that's correct.

21 We don't have -- I don't know why the
22 legislature wanted to favor those, and the state has not
23 given any reason why those particular types of
24 publications would be favored.

25 QUESTION: Well, when you look into some of

1 these sales tax laws, I think you have a question in
2 your mind in almost every one of them as to how certain
3 exemptions came to be on the books. You know, maybe
4 there are amendments on the floor of the legislature.

5 You know, if you subject them to any sort of a
6 strict scrutiny or even a fairly rough rational basis
7 approach, a lot of them probably wouldn't survive. Now,
8 maybe they shouldn't. But we have said in some of our
9 tax opinions that the scrutiny on equal protection in
10 tax cases is the least demanding in any area of the law;
11 that if there's anything to uphold the thing it'll be
12 upheld.

13 MS. WILSON: Well, that's certainly true with
14 things which don't -- with taxing statutes which don't
15 involve First Amendment rights. But when First
16 Amendment rights have been implicated, the strict
17 scrutiny standard has been applied, as in the case, the
18 Minneapolis Star case, being the most apropos recent
19 case.

20 But the Court has not applied the rational
21 basis standard to taxes which implicate fundamental
22 freedoms, such as the right to speech and the press.

23 QUESTION: Well, Ms. Wilson, you argue that
24 the legislature in its sales tax cannot distinguish
25 between magazines and newspapers. Now, if that

1 proposition is correct, then would it mean, for example,
2 that books have to be exempt because magazines are, or
3 that videotapes have to be because magazines are?
4 Theater tickets?

5 How far do we go?

6 MS. WILSON: It's possible that the state
7 could assert some interest that would justify a
8 discrimination between videotapes, for example, and
9 newspapers. I don't know whether it could or not.

10 QUESTION: A state interest, a compelling
11 state interest? I mean, you'd require a compelling
12 state interest?

13 MS. WILSON: I don't know what kind of
14 interest the state could show in that type of
15 discrimination. I have some doubts as to whether --

16 QUESTION: Well, we're asking about the legal
17 standard. Does it have to be a compelling state
18 interest or just a rational basis for the distinction?

19 MS. WILSON: I think it depends on the nature
20 of the tax, how general the tax is, you know, the nature
21 of the exemptions, and many other factors. I don't -- I
22 think generally it's the compelling interest. Where the
23 First Amendment rights are implicated, it has to be the
24 compelling interest.

25 And I would think it would be unlikely that a

1 state could show that there was a compelling interest in
2 that type of --

3 QUESTION: Well, the Court has traditionally
4 given a great deal of leeway, has it not, to state
5 taxing schemes and to let the state distinguish among
6 objects of tax?

7 MS. WILSON: Yes, Your Honor, that is correct,
8 except in the area where it has burdened First Amendment
9 rights.

10 QUESTION: Well, did Minneapolis Star indicate
11 that a general sales tax would be different, and that we
12 wouldn't have the same concerns?

13 MS. WILSON: Minneapolis Star did indicate
14 that a general sales tax could be generally applied to
15 publications, as to all other items of commerce. That's
16 not the case here. The tax is not applied generally to
17 items of commerce anyway, and it's certainly not applied
18 generally to publications.

19 The state picks and chooses between
20 publications in applying this tax.

21 QUESTION: Well, do you think that the price
22 and frequency and the volume of newspaper sales in
23 general is different from that of magazines, and that
24 that difference might justify the difference in the tax
25 application?

1 MS. WILSON: The state has not shown any
2 information whatsoever concerning the volume and so
3 forth of newspapers. It has asserted an interest in
4 raising taxes. And to me it seems that the most
5 effective way for it to increase its tax revenues would
6 be to tax everything generally, including newspapers and
7 other publications.

8 Again, this is not a general tax in Arkansas.
9 It's -- as to publications, it's a very special tax.

10 QUESTION: Ms. Wilson, what if a state exempts
11 from the general sales tax subscriptions to publications
12 by charitable organizations -- boy scouts, churches,
13 museums, and so forth? Could it do that?

14 MS. WILSON: That type of publication, it
15 might be able to show that the state had an interest
16 which was strong enough to justify the discrimination.

17 QUESTION: Oh, it needs a compelling state
18 interest to do that?

19 MS. WILSON: Well, yes, I think it does need
20 -- either a compelling state interest or to have some
21 other rights implicated, such as possibly religious, the
22 right to religious freedom or something of that sort?
23 It might be able to present a strong argument.

24 But the general standard --

25 QUESTION: You're comfortable with that, that

1 the state can't except the boy scout publications or
2 museums publications from its sales taxes unless there's
3 a compelling state interest?

4 MS. WILSON: That would be the general
5 principle, Your Honor, unless they could assert an
6 interest which was sufficient to justify the
7 discrimination.

8 QUESTION: Well, how do you -- how does the
9 state justify exempting charities from taxation at all,
10 then?

11 MS. WILSON: Okay, you mean just generally,
12 like exempting charities from property tax?

13 QUESTION: Yes, yes. They don't -- a charity
14 doesn't pay income taxes, its property isn't subject to
15 real estate taxes. How does the state justify that?

16 MS. WILSON: Well, I'm not saying that the
17 Court has to -- that if it exempts anything, it has to
18 also exempt the press. I think that, you know, in most
19 states churches and so forth are exempt from property
20 tax and publications are not exempt from property tax.

21 But it would be improper for --

22 QUESTION: Well, if the state can exempt a
23 charity from taxation, why can't it exempt the sale of
24 its magazines from sales tax?

25 MS. WILSON: Exempt the sale of a church or

1 something?

2 QUESTION: No, exempt the sale of its
3 magazines from sales tax.

4 MS. WILSON: Well, it might be able to do
5 that.

6 QUESTION: Well, it might? Would it or would
7 it not? And how would you test it? By just, would you
8 say a strict scrutiny?

9 MS. WILSON: I would say that it should be
10 scrutinized closely, yes. But the normal rationale for
11 charities is that they provide services that the state
12 would otherwise have to provide and things of that
13 sort. So you know, the state can frequently justify an
14 exemption for a charity which it possibly couldn't
15 justify otherwise.

16 QUESTION: Let's assume -- you ended it
17 earlier than I thought you would. I had assumed you
18 would say that the state could do that so long as --
19 without a compelling state interest, so long as it was
20 not demanding that the magazine sold by the boy scouts
21 have a particular content.

22 See, that was going to be my second question.
23 Assuming that you can say sales of museum magazines or
24 boy scout magazines are okay, could the state then say,
25 however, you can't qualify if you start selling Time

1 magazine, you know, published by the Arkansas Museum of
2 Art, that that won't be allowed if you're trying to
3 become a general purpose publication.

4 But since you think that you can't even exempt
5 boy scout magazines and museum magazines at all, much
6 less dependent on their content, I guess the second
7 question has no relevance.

8 MS. WILSON: No, I really wouldn't say that.
9 I would say that if you had a truly generally applicable
10 sales tax which exempted a very narrow classification of
11 publications that the state had identified as being
12 particularly in the public interest or of the type that
13 particularly should not be taxed, then I don't think the
14 same constitutional arguments would apply.

15 But here we have a situation where nearly all
16 periodical publications in Arkansas are exempt from
17 publications, with at the time that this went to trial
18 possibly the single exemption of Arkansas Times
19 Magazine.

20 It seemed to at that time be the only
21 publication subject to sales tax on any topic.

22 If the Court has no further questions, I'd
23 like to reserve the rest of my time for rebuttal.

24 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
25 Wilson.

1 We'll hear now from you, General Clark.

2 ORAL ARGUMENT OF

3 JOHN STEVEN CLARK, ESQ.

4 ON BEHALF OF APPELLEE

5 MR. CLARK: Mr. Chief Justice and may it
6 please the Court:

7 Realizing that the Appellant relies heavily on
8 this Court's decision in the Minneapolis Star case, I
9 submit to this Court that this case, Arkansas Writers
10 versus Ragland, is clearly distinguishable. The facts
11 in this case does not give rise to a First Amendment
12 violation.

13 The Arkansas tax is not a tax on a publisher,
14 but rather the ultimate purchaser, the consumer. The
15 Minnesota tax was applied to the publisher.

16 The Arkansas legislature in granting a tax
17 exemption, a benefit, as a part of its general taxing
18 scheme -- and that scheme in development was not to
19 single out and did not single out or target the press.
20 That's not true with the Minnesota statute.

21 The Arkansas tax does not affect specifically
22 identifiable individual taxpayers. It could not have.
23 As Ms. Wilson has pointed out to you, it was adopted in
24 1948, long before the Arkansas Times as a publication
25 ever came into existence. It does not single out any

1 individual members of the media or of the press. That
2 was not true of the Minnesota statute.

3 It's been well established by this Court that
4 the press is not immune from any of the ordinary forms
5 of taxation that support ordinary governmental
6 functions. The Arkansas general sales tax scheme was
7 adopted in 1935 and has been amended many times since
8 then to promote the general welfare of our state through
9 free public education, free text libraries, and
10 protection of wards of the state.

11 QUESTION: General Clark, the statute, though,
12 does seem to prefer certain journals -- sports,
13 religious, professional, and trade journals -- on the
14 basis of their content, does it not?

15 MR. CLARK: No, Your Honor, I submit to this
16 Court it does not. The general taxing scheme provided
17 for some exemptions, some benefits. Among those which
18 were three: one to newspapers, which were exempt from
19 sales tax on the sale of that product. The reason
20 behind that --

21 QUESTION: Well, could we talk about the
22 exemption of certain types of journals, please?

23 MR. CLARK: Yes, ma'am, Your Honor. The
24 provision that dealt with the four generic types of
25 publications -- sport, trade, professional, and

1 religion. The Arkansas General Assembly, I submit to
2 this Court, in its effort in adopting that standard was
3 to promote those publications, realizing that they did
4 not have the same revenue base in terms of advertising
5 that an publication like the Arkansas Times might have,
6 which also enjoys an exemption from sales tax on
7 advertising space sold which contributes from 60 to 90
8 percent of the income of those type publications.

9 With these four generic types, Your Honor, the
10 Arkansas General Assembly in its wisdom I believe
11 determined that there was not an advertising base
12 because of a low subscription interest.

13 QUESTION: Well, is it a type of content-based
14 treatment? It's only journals dealing with sports and
15 religious matters and trade and professional journals
16 that qualify for the exemption?

17 MR. CLARK: Your Honor, it's only those four
18 generic types of publications. It does not deal with
19 content; it deals with a classification as to a generic
20 description, a type of description the Arkansas General
21 Assembly tried to apply to a host of publications.

22 It is a matter of fact that in Arkansas there
23 is no publication -- there are no publications of which
24 we are aware that has ever benefited from this
25 classification as a religious, a trade, a sport, or a

1 professional publication. There are none that we are
2 aware of who have made requests for that benefit and
3 have received it.

4 QUESTION: So the exemption has never been
5 applied?

6 MR. CLARK: That is correct, Your Honor.

7 QUESTION: Is it true that the Arkansas Times
8 is the only one that's ever been taxed?

9 MR. CLARK: No, Your Honor. There are two
10 other publications. That information was part of the
11 lower court record and the protective order, the two
12 others who do qualify for general taxation as does the
13 Arkansas Times.

14 QUESTION: Does the record show -- just to be
15 sure, the record shows that the exemption has never been
16 applied?

17 MR. CLARK: Your Honor, the exemption -- we
18 have gone back to our tax administrator and reviewed all
19 of our records. We can find no evidence.

20 QUESTION: But was that evidence -- but does
21 the record show that? I'm not questioning the accuracy
22 of what you tell me, but --

23 MR. CLARK: No, Your Honor, the record does
24 not. As you recall, in the lower court the Arkansas
25 Times stipulated that it was neither a newspaper nor one

1 of these four generic types of publications.

2 QUESTION: Right.

3 MR. CLARK: The only affidavit from the state
4 tax administrator was to the effect that there were
5 other publications subject to this general sales tax
6 other than the Arkansas Times. He was not asked and did
7 not produce information as to whether the exemption had
8 ever been applied.

9 QUESTION: Are there any magazines sold in
10 Arkansas that would qualify for the exemption?

11 MR. CLARK: Your Honor, I think the answer to
12 that is yes. They just --

13 QUESTION: Well, do they just out of the
14 kindness of their heart collect the sales tax?

15 MR. CLARK: Your Honor, I do not know the
16 reason why they do not seek this benefit. But the
17 record --

18 QUESTION: Well, your answer is that they do
19 collect the sales tax when they sell?

20 MR. CLARK: There are three publications, Your
21 Honor, for which the sales tax is to be collected and
22 remitted back to the state, the Arkansas Times being one
23 and there are two others.

24 There may be publications in the state that
25 would fall under these generic classifications --

1 QUESTION: That do not what?

2 MR. CLARK: That in fact would be exempt from
3 the tax.

4 QUESTION: And they don't collect it?

5 MR. CLARK: But they have not applied for the
6 exemption, and so it's not applied to them. The only
7 way we know whether they're collecting tax and remitting
8 is if they have asked for a sales tax permit. If they
9 have we audit them, and that's the process; we know
10 whether they're collecting and remitting tax.

11 So there may be publications that fall within
12 the exemption, Your Honor. There may be some that need
13 to be taxed and are not collecting and remitting taxes.
14 It's just a failure of enforcement on the part of the
15 state.

16 QUESTION: Well, not a failure of
17 enforcement. You mean it's just a failure to insist
18 that they apply for an exemption.

19 MR. CLARK: Under our sales tax scheme, Your
20 Honor, all sale of tangible personal property is subject
21 to tax unless a benefit is granted through an
22 exemption. All persons who are to make such sales must
23 apply for --

24 QUESTION: Well, I find it difficult to
25 believe that people collect the tax when they don't have

1 to.

2 MR. CLARK: Well, Your Honor, as I said, the
3 record reflects no one has asked for that benefit of
4 that exemption.

5 QUESTION: Well, are you saying that under
6 Arkansas law one cannot simply read the statute, if
7 you're in the business of selling tangible personal
8 property, and say, look, I'm exempt, so I won't collect
9 the tax? You have to apply for the exemption?

10 MR. CLARK: Yes, Your Honor. If you're to
11 sell tangible personal property, you are to apply for a
12 sales tax permit. In the procedure at that point
13 indicating what you are selling, a decision would be
14 made as to giving you a tax permit number for collecting
15 and remitting your tax or, in the event you were
16 determined to be exempt through the tax administrator's
17 decision, you'd get a letter stating such.

18 QUESTION: May I ask, what would happen to a
19 publisher who was perfectly -- talked to a lawyer and
20 the lawyer said, oh, you're clearly exempt because this
21 is a religious publication, and he said thank you and
22 started to publish, and didn't -- he published a purely
23 religious thing they sent out every Sunday or something
24 like that.

25 And he just never paid the tax and never

1 applied for an exemption. What -- could he be put in
2 jail or penalized in any way?

3 MR. CLARK: Your Honor, he could be penalized
4 through civil penalties for failure to pay those taxes.

5 QUESTION: No, but he doesn't have any tax.
6 He clearly would qualify for an exemption if he went
7 through the procedure. He does nothing but publish a
8 religious publication, and he's been doing this for five
9 years and somebody in the tax department finds out and
10 says: Hey, you should have filed for an exemption. And
11 he says: I'm sorry; I'll do it now.

12 What would happen to him for the past five
13 years?

14 MR. CLARK: He would not be penalized for that
15 conduct for the publication that was exempt from the
16 sales tax on the sale. Now, that publisher would be
17 paying sales tax on the materials in the process of
18 publication, but not from the sales tax of the sale.

19 QUESTION: Well, I was just going to say, it
20 seems to me the fact that no exemptions have been
21 granted in this category, as you've explained to us,
22 does not mean that it is not entirely possible that
23 there are a lot of religious publications that simply
24 didn't bother to apply for the exemption because they
25 realized they wouldn't get into any trouble.

1 MR. CLARK: Your Honor, I think the answer to
2 that is yes, there are a number of religious
3 publications that are not printed and published in
4 Arkansas, but circulated there, and they wouldn't
5 qualify for the exemption. We're aware of at least a
6 couple.

7 QUESTION: No, I'm talking about those that
8 would qualify for the exemption. It seems to me that
9 you haven't really satisfied me that there may not be
10 publications in Arkansas that would qualify for the
11 exemption that this publisher would not qualify for.

12 MR. CLARK: Your Honor, I believe that there
13 may well be publications in Arkansas who would qualify
14 for the exemption, but just never have made
15 application.

16 QUESTION: Right.

17 MR. CLARK: And the penalty -- there would be
18 no penalty assessed in the sense of confinement or
19 jailing. And since they were exempt from tax --

20 QUESTION: Or any other sense.

21 MR. CLARK: Or any civil penalty that would be
22 assessed.

23 QUESTION: Well, usually somebody who is
24 supposed to collect the tax and doesn't is going to have
25 to pay the tax.

1 MR. CLARK: When they have the responsibility
2 to collect the tax.

3 QUESTION: Yes.

4 MR. CLARK: In this instance, Your Honor --

5 QUESTION: Yes. Well, I take it these
6 magazines had a responsibility to collect it unless they
7 got an exemption. If they don't apply for the exemption
8 and they don't collect the tax, why shouldn't they have
9 to pay the tax themselves?

10 MR. CLARK: Your Honor, there are none that
11 have applied for the exemption. I just don't know the
12 answer to that, other than -- why they didn't. I just
13 know they didn't.

14 QUESTION: How many people -- how many firms
15 are in the same position as petitioner?

16 MR. CLARK: Pardon me, Your Honor?

17 QUESTION: How many are in the same position
18 as the petitioner?

19 NS. CMASL: Uhere are two others. There are
20 three totally, the Arkansas Times and two others.

21 QUESTION: It's a total of three. And about
22 how much money is involved?

23 MR. CLARK: For the Arkansas Times, \$15,800.
24 With the other one, about \$500 or \$600 on an annual
25 event; and the other one, also \$500 or \$600.

1 QUESTION: I just wanted to know.

2 MR. CLARK: All the state of Arkansas, I
3 submit to this Court, needs to demonstrate is that there
4 is some rational basis for these four generic
5 classifications found in the exemptions granted. A
6 frustration which I feel and I know this Court must also
7 face is the frustration that the record is devoid of any
8 legislative explanation for the granting of these
9 exemptions in 1948.

10 I would speculate that in granting these
11 exemptions for any publications -- and exemptions were
12 granted, as I said, for newspapers, for general interest
13 publications much like the Arkansas Times, as well as
14 for these four generic types of publications -- that the
15 purpose behind these exemptions was to foster
16 communication in what is basically a rural state.

17 And within our general scheme of taxation,
18 that sales tax is applied, as I said, to the sale of all
19 tangible personal property. A comprehensive section of
20 exemptions, however, was adopted that dealt with First
21 Amendment outlets.

22 As I mentioned to the Court, for newspapers
23 Arkansas, like 37 other states, created an exemption
24 from sales tax on the sale of that paper, the reason
25 being, I submit, because of the unique means of

1 distribution, young boys and young girls, independent
2 contractors, and the difficulty in administering and
3 collecting that tax.

4 The Arkansas legislature created for
5 publications like newspapers and like the Arkansas Times
6 an exemption from sales tax on advertising space sold,
7 which comprises, as I have said to this Court, 60 to 90
8 percent of the base revenues for such publications. The
9 Arkansas Times, having a circulation of 25,000 to 30,000
10 in terms of subscription and sales at \$1.75 per volume,
11 simply can't support itself on subscriptions and over
12 the counter sales.

13 That exemption from that sales tax on
14 advertising space sold, which comprises the bulk of
15 their operating bases, gives those type publications the
16 opportunity to publish for profit and foster the
17 communication and the information and ideas that they
18 would carry.

19 The four generic types of publications
20 enumerated I submit that the Arkansas legislature
21 created for the reason that these types of publications
22 did in fact -- or would not in fact have anything other
23 than a limited advertising base because of their
24 specialty of interest.

25 QUESTION: General Clark, is the exemption for

1 religious, professional, trade, and sports journals --
2 is that conditioned by the fact that they're published
3 in Arkansas?

4 MR. CLARK: Yes, Your Honor, they must be
5 published and printed within Arkansas and sold by
6 subscription.

7 QUESTION: And your argument is that a sports
8 magazine would have a less general advertising base than
9 a general interest magazine?

10 MR. CLARK: Your Honor, I think a general
11 sports magazine, the example being Sports Illustrated,
12 might have a broader base than one which deals with duck
13 hunting or deals with fox hunting or deals with bass
14 fishing.

15 I think the legislature in 1948 contemplated
16 that certain types of sports journals would have a very
17 limited audience and a very limited --

18 QUESTION: So limited that no one might ever
19 try to publish them, it sounds like.

20 (Laughter.)

21 MR. CLARK: Yes, Your Honor, that could well
22 be true.

23 The legislative motive in dealing with these
24 exemptions was to deal with the type and the kind of
25 publication. It was not to deal with what was to be

1 contained in the articles in these publications.

2 If the state of Arkansas had applied this
3 exemption, for instance, in the four generic categories
4 to only accepted religious publications, it would have
5 been impermissible. That's not the standard. If the
6 state of Arkansas had applied the exemption for
7 advertising space only to those publications that
8 advertise the sales of cigarettes or liquor, it would
9 have bee impermissible, I submit to this Court.

10 If the state of Arkansas had said to
11 newspapers that it only applied the exemption to sales
12 tax on the sale if those newspapers published a liberal
13 philosophical agenda, that would not be permissible.

14 But the Arkansas taxing scheme is not that.
15 It is not a selective exclusion based on content alone.
16 And since 1948, as I've stated, we have no record of any
17 publication which has availed itself of this benefit.

18 QUESTION: But General Clark, I guess it does
19 involve content to this extent. I don't suppose you
20 could publish Time magazine and just label it "local
21 sports magazine" and just say everything else is
22 unimportant. You wouldn't qualify as a sports
23 publication just by calling it sports, would you?

24 MR. CLARK: No, Your Honor, I don't believe
25 that you would. These four generic definitions -- I

1 submit the Arkansas General Assembly were struggling and
2 somewhat inartfully, I would be willing to admit to this
3 Court, to come up with broad categories of types of
4 publications, generic types of publications.

5 And in reaching those, it tried to have a
6 broad-brush stroke in terms of application. And then
7 some determination is made by the tax administrator if
8 you were to file a tax permit and a determination is
9 made of exemption. Then you have ordinary courses of
10 appeal through the appellate process at the state level
11 and then on into the court system.

12 QUESTION: But you said the purpose basically
13 is to foster communication by magazines that would not
14 otherwise be able to make a profit, in effect.

15 MR. CLARK: Your Honor, I think that was the
16 original legislative purpose with all of these types of
17 publications, to foster this communication in our rural
18 state of the printed word, whether it be newspaper,
19 general interest publications, or these four generic
20 types of publications that might only have, say, a
21 limited audience, a limited advertising base, and have
22 difficulty in administering a tax of \$400 of \$500.

23 But it was to foster that communication.

24 QUESTION: But then it's to foster some
25 communication and not others, for a purpose that is not

1 evident on the face of the statute. At least that's
2 clear, because I suppose there could be other -- other
3 than these four categories, there could be economically
4 marginal publications that would not get the same
5 benefit.

6 MR. CLARK: Yes, Your Honor, I think there
7 could be. I'm at a loss to describe some, and we have
8 worked to try to describe some, but feel that there may
9 be some means to fit those -- virtually any type of
10 publication --

11 QUESTION: Say publications on how to play
12 poker, or publications on how to do lots of things that
13 aren't necessarily one of those categories.

14 MR. CLARK: As I said, the legislature
15 inartfully drafted this statute. But in response to
16 your question, Your Honor, for instance a how to do
17 publication might fit under trade, in terms of how to do
18 plumbing or how to do carpentry or how to do electrical
19 work.

20 The contention that --

21 QUESTION: What about the very publication
22 we've got before us in this case? Why doesn't it need
23 the same kind of help? I guess it doesn't make
24 millions.

25 MR. CLARK: Well, Your Honor, I think that one

1 thing that this Court should consider is the fact that
2 this case might be ripe for remand on the basis that we
3 have such an incomplete record, and that the Arkansas
4 Times by stipulation stipulated it was not a newspaper.
5 It also stipulated it was not one of these four generic
6 kinds of magazine, without a determination being made by
7 the state.

8 It might well fit in one of these categories.

9 QUESTION: Well, hadn't it been denied the --
10 or the state was assessing the -- you say it had never
11 applied for the exemption, is that what it amounts to?

12 MR. CLARK: Your Honor, the Arkansas Times did
13 not. It applied for a sales tax permit initially, it
14 began to collect and remit the tax, protested that tax,
15 and went through the administrative hearing, went to the
16 lower court in Arkansas, and then settled, with the
17 contingent that if in fact this Court or other courts
18 were to determine a different standard they could then
19 challenge the tax again.

20 At the lower court hearing -- they challenged
21 it with the tax administrator. He denied their
22 exemption. At the lower court hearing, the Arkansas
23 Times stipulated, we are not a newspaper, we are not one
24 of these four generic types of publications, which took
25 that out of the realm of having some determination of

1 whether or not our tax administrator had made a proper
2 determination. Then --

3 QUESTION: Yes, but they must have made that
4 stipulation at your request, at the tax authority's
5 request. It must have asked them to make that
6 acknowledgment.

7 MR. CLARK: Well, Your Honor, they made that
8 acknowledgment on their own.

9 QUESTION: They did? That's kind of a
10 surprise, for somebody who's trying to avoid taxation --
11 well, okay.

12 MR. CLARK: I would submit to this Court --

13 QUESTION: You did say that they have
14 substantial revenue from advertising?

15 MR. CLARK: Yes, Your Honor.

16 QUESTION: Which is exempted under another
17 provision of Arkansas law?

18 MR. CLARK: Yes, Your Honor.

19 QUESTION: To that extent, your response to
20 Justice Stevens' question could have been that would
21 seem to indicate that this is not one of those
22 publications that needs the kind of help that the narrow
23 categories do.

24 MR. CLARK: Yes, Your Honor, that would be
25 correct.

1 QUESTION: How much advertising? Is that in
2 the record, how much?

3 MR. CLARK: No, Your Honor, it's not. General
4 interest magazines of the kind of the Washingtonian, the
5 Arkansas Times, rely in advertising, sale of advertising
6 space, for anywhere from 60 percent up to higher
7 percentages in terms of how they publish profitably.

8 As I indicated, the Arkansas Times has a
9 circulation of 25 to 30,000 in our state, principally
10 among all 75 counties. But that alone at \$1.75 per
11 issue would not sustain the publication as it is
12 presently published and distributed.

13 QUESTION: Would you just clarify one thing,
14 because I didn't quite follow it. If they were to take
15 the opposite position and say, well, we are one of these
16 exempt publications and therefore -- and you agreed --
17 and therefore we're entitled to be exempt from the sales
18 tax, would they lose the exemption from the advertising
19 tax?

20 MR. CLARK: No, Your Honor, they would not.

21 QUESTION: So really, it would be in their
22 interest just to get out of the four -- to get into that
23 category?

24 MR. CLARK: Yes, Your Honor. They would then
25 be exempt from sales tax on the sale, but they would not

1 lose their exemption from sales tax on the sale of
2 advertising.

3 QUESTION: So if we have a marginal sports
4 publication, it can get both the advertising exemption
5 and the sales tax exemption?

6 MR. CLARK: A marginal publication?

7 QUESTION: Yes, it fits one of the four
8 categories, sports or religion for example.

9 MR. CLARK: If it were sport, and determined
10 on these four generic categories, it would be exempt
11 from sales tax on the sale. To get an exemption from
12 sales tax on the advertising, Your Honor -- well, excuse
13 me. If they sold advertising space, it would get that,
14 too, yes. I'm sorry.

15 QUESTION: It would get both.

16 MR. CLARK: The answer is yes.

17 QUESTION: So the advertising space, if there
18 is discrimination here, the advertising exemption really
19 doesn't have any effect on the discrimination in the
20 sales tax area, if it does exist, because everybody gets
21 the advertising exemption?

22 MR. CLARK: Everyone would get that, yes, Your
23 Honor. I think the distinction that the Arkansas
24 General Assembly was attempting to make in 1948 was that
25 with these four generic types of classifications there

1 might not be advertising revenue that could be
2 generated.

3 QUESTION: So that what they should have done
4 is describe the category they tried to protect as those
5 publications who don't have substantial advertising
6 revenues. That would have accomplished their purpose in
7 a neutral way.

8 MR. CLARK: That certainly would have
9 clarified it some, Your Honor. I think the General
10 Assembly may have moved away from that for fear that
11 what is that standard and how do you apply it, what is
12 substantial advertising revenue.

13 QUESTION: It seems to me that's easier to
14 apply than this four-pronged standard they came up
15 with.

16 MR. CLARK: If this Court were to decide that
17 the Arkansas statutory scheme of general taxation fails,
18 then 45 states like Arkansas, I submit, are at a loss to
19 impose a constitutionally approved taxing scheme on the
20 sale of any commercial commodities that have any ties to
21 any First Amendment outlet.

22 Therefore, I would ask this Court to affirm
23 the decision of the Arkansas Supreme Court below or, in
24 the alternative, to remand this case back to the
25 Arkansas court, since by virtue of the Appellant's

1 stipulation that they are not a newspaper and they're
2 not one of the four generic types of publications
3 exempted, that they've precluded a state determination
4 or consideration as to whether they would fall into one
5 of these categories and they've actually precluded the
6 state courts from determining the parameters of those
7 exemptions.

8 This Court I believe should not be asked to
9 decide a major constitutional issue on an incomplete
10 record, and that the better position or decision would
11 be, if this decision cannot be affirmed, would be for
12 this Court to exercise restraint and remand this case
13 for development of the record fully.

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, General
16 Clark.

17 Ms. Wilson, do you have something more?

18 REBUTTAL ARGUMENT OF
19 ANNE OWINGS WILSON, ESQ.,
20 ON BEHALF OF APPELLANT

21 MS. WILSON: Yes, if it please the Court.

22 Attorney General Clark did make reference to a
23 number of facts which are not in the record, and I did
24 want to bring them to your attention. One is he stated
25 that there are two other publications in the state of

1 Arkansas that also have paid sales tax. There was
2 nothing in the record to indicate that and I don't know
3 where that came from. I don't know which publications
4 those could be.

5 QUESTION: He didn't volunteer that. That was
6 in response to a question.

7 MS. WILSON: Yes. I think, though, that -- I
8 mean, if there are two publications, I think the
9 situation was that one of them was taxable, admittedly
10 taxable, but it hadn't had any revenue, so it hadn't
11 actually paid tax.

12 The other I believe was a cockfighting
13 magazine, which would have fit under the sports
14 exemption. And I really think that the taxes that it
15 paid were on sales of cocks and cockfighting
16 paraphernalia and not on the publications. But I don't
17 know, because the record was never developed on that
18 point.

19 QUESTION: Cockfighting?

20 MR. CLARK: Cockfighting, yes. I think that's
21 correct.

22 Another fact that he mentioned that's not of
23 the record and I don't know whether it's a fact or not
24 is that 60 percent or more of a publication's revenue is
25 from advertising. There certainly is nothing in the

1 record to that effect, and I don't actually know what
2 the proportion of revenue from advertising versus
3 subscription sales is in this particular case or in the
4 industry generally.

5 QUESTION: Ms. Wilson, could I ask you about
6 your thesis that the state cannot in its management of
7 its fisc, in either the imposition of taxes or, I
8 suppose it would follow, in its disbursement of state
9 funds, favor one subject over another, like sports or
10 what-not.

11 That's essentially your thesis. What do you
12 do about, let's say, the Kennedy Center, which receives
13 federal funds? Now, that is solely subsidizing one form
14 of speech, right, the dramatic arts? Presumably it's
15 also favoring only particular subjects, namely the
16 subjects of the particular plays and shows that are
17 presented at the Kennedy Center.

18 Now, is that as much a violation of the
19 Constitution as you say granting a tax exemption for
20 sports is?

21 MS. WILSON: Well, the Court has made a
22 distinction between subsidies of that sort versus
23 classifications which burden types of speech. And
24 probably the best example of each of those is Regan
25 versus Taxation with Representation on the one hand and

1 on the other hand Regan versus Time, Inc., where the
2 Court found that the government could not discriminate
3 on the basis of the type of content in allowing
4 publications to publish pictures of dollar bills in that
5 case.

6 And in Regan versus Taxation with
7 Representation, where organizations which engaged in
8 lobbying were denied 501(c)(3) exemptions, the Court in
9 that case found that that type of benefit was not
10 subject to a compelling state interest, but rather to a
11 rational basis, and that the government could provide
12 subsidies for the Kennedy Center, the Smithsonian
13 Institute, things of that sort.

14 QUESTION: Well, why is this different? Could
15 Arkansas provide a subsidy to have a sporting show in
16 Little Rock?

17 MS. WILSON: Yes, I think it could, yes.

18 QUESTION: At which there would be, you know,
19 speeches and all the communication that goes with that.
20 It's essentially a communicative activity.

21 MS. WILSON: Certainly.

22 QUESTION: Well, why can't it foster the sales
23 of sporting magazines then, if it wants, so long as it's
24 not trying to stamp out your magazine?

25 MS. WILSON: Well, it probably does subsidize

1 the Razorback magazine or something like that, in that
2 there is probably a sports publication at the University
3 of Arkansas which is subsidized by the state.

4 The state subsidizes student newspapers and
5 things of that sort. It's a very common thing to do
6 that, and that's certainly very different from something
7 which burdens people, you know, that are similarly
8 situated, people in the same marketplace.

9 QUESTION: But they're not burdening anybody.
10 They're just granting them an exemption. You mean it
11 would be okay if they taxed all of them and then gave
12 money only to sports publications? That would be all
13 right?

14 But the vice here is, instead of collecting
15 the tax from anybody and then handing over some of it to
16 sports publications and the other ones that they
17 mention, they simply short-circuited it and they said,
18 instead of, you know, having it come back in and out,
19 just don't pay the tax? That's what's wrong?

20 But they could have done the same thing had
21 they imposed the tax generally and then distributed a
22 subsidy?

23 MS. WILSON: Well, I think a systematic
24 program of the government where it systematically
25 favored publications that espoused a particular point of

1 view and then denied the same benefits --

2 QUESTION: Not a particular point of view, a
3 particular subject: sports, I don't know, politics.
4 The federal government requires special provisions to be
5 made for matters of public interest by radio and
6 television stations. Isn't that content
7 discrimination?

8 MS. WILSON: Well, again, it's an enhancement
9 rather than a burden on some elements of speech. It's
10 really just -- it's just a different classification of
11 -- you know, there's kind of two lines of cases, and one
12 is where the government is allowed to enhance, you know,
13 something like the Smithsonian or the veterans
14 organizations in Regan versus Taxation with
15 Representation; and on the other where it burdens one
16 element of the press versus another, as in Minneapolis,
17 as in the Minneapolis Star case.

18 This really falls clearly into the areas where
19 the government has sought to distinguish, to burden, one
20 speaker and allow another not to be burdened. I don't
21 think --

22 QUESTION: It's a general tax. It's not a tax
23 just on your company. It's a general tax. What they
24 have given is a benefit to some special magazines.

25 MS. WILSON: Well, of course, the benefits

1 that they've granted are such that I still assert one
2 publication is singled out for taxation, where every
3 other publication is exempt from taxation.

4 One thing I wanted to mention that's just an
5 example of how, well, really irrational these
6 classifications are is again, you know, who decides what
7 a trade publication is? I guess the state of Arkansas
8 does, some official with the department of finance and
9 administration.

10 Take a computer publication. Some people use
11 computers in connection with their hobbies and some
12 people use computers in connection with their trade or
13 business. Now, should a computer magazine get an
14 affidavit from a subscriber as to whether he is
15 purchasing it for his trade or purchasing it for his
16 hobby?

17 You know, and of course in the sports
18 category, Arkansas Times publishes plenty of articles
19 about sports; it publishes religious articles. Because
20 it doesn't publish enough religious articles, the state
21 wouldn't classify it as a religious publication.

22 QUESTION: But you don't really know that, do
23 you? You don't know whether, if you submitted those
24 arguments to the state, whether you might be able to get
25 an exemption? Or did you make that argument to the

1 commissioner?

2 MS. WILSON: We did not argue that it was a
3 religious publication or a sports publication, no, Your
4 Honor. We stipulated with the state that it was not any
5 one of those four classifications and that it was not a
6 newspaper.

7 And I might add in that regard, the state now
8 wishes the case remanded for development of further
9 facts. That was a joint stipulation that was agreed
10 to. Both sides felt that all the facts that were
11 necessary for the court to decide the case were in the
12 record.

13 And the facts as they are in the record do
14 clearly show that the state had no interest and no
15 justification in making the distinctions that it's made
16 in taxing publications.

17 If there are no further questions.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
19 Wilson.

20 The case is submitted.

21 (Whereupon, at 11:42 a.m., oral argument in
22 the above-entitled case was submitted.)
23
24
25

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:

#85-1370 - ARKANSAS WRITERS' PROJECT, INC., Appellant V. CHARLES D.

RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS

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BY Paul A. Richardson

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