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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ANTHONY M. FRANK, POSTMASTER GENERAL OF THE
UNITED STATES, ET AL., Appellants V. MINNESOTA
NEWSPAPER ASSOCIATION, INC.

CASE NO: 87-1956

PLACE: WASHINGTON, D.C.

DATE: March 22, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ANTHONY M. FRANK, POSTMASTER :
4 GENERAL OF THE UNITED STATES, :
5 ET AL., :
6 Appellants :
7 v. : No. 87-1956
8 MINNESOTA NEWSPAPER ASSOCIATION, :
9 INC. :

10 -----x
11 Washington, D.C.

12 Wednesday, March 22, 1989

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:07 o'clock a.m.

16 APPEARANCES:

17 PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Appellant.

20 P. CAMERON DeVORE, ESQ., Seattle, Washington; on behalf
21 of the Appellee.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1956, Anthony M. Frank, Postmaster General v. The Minnesota Newspaper Association.

Mr. Larkin?

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE APPELLANTS

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

At issue in this case is the facial constitutionality under the First Amendment of a provision of the Anti-Lottery Act of 1890, an act of Congress that has been on the books for 99 years, and it has already been upheld by this Court over a First Amendment challenge.

The Anti-Lottery Act of 1890 contains two clauses that are relevant here: an advertisement clause and a prize list clause. The advertisement clause prohibits sending advertisements through the mail. The prize list clause prohibits sending through the mail lists of prizes drawn or awarded by the lotteries.

Now, this case, however, is now smaller in scope than it was when the Court noted probable

1 jurisdiction in October and when we filed our brief in
2 November. The district court upheld the
3 constitutionality of the advertisement clause, but that
4 ruling is no longer before the Court.

5 What is before the Court is the district
6 court's ruling on the constitutionality of the prize
7 list clause. The district court held that clause
8 unconstitutional on its face on the ground that it was
9 designed to and would prevent a distribution through the
10 mails of news stories that contained lists of prizes
11 awarded by a lottery.

12 What remains in this case in our view still
13 presents a live controversy between the parties. That
14 controversy can be decided on the record as it now
15 stands, and that controversy can be resolved in our
16 favor essentially by relying on this Court's
17 precedents. The judgment below should be reversed for
18 two reasons which I will summarize.

19 First, the district court misread the scope of
20 the prize list clause. This Court in the Horner case
21 held that a prize list used in the commercial promotion
22 of a lottery fit within the term "prize list" in the
23 statute. In our view that is also as far as the statute
24 reaches. In other words, the prize list clause does not
25 apply to news stories, editorials or similar types of

1 commentary. It applies only to what today would be
2 called commercial speech.

3 Second, when the prize list clause is
4 construed in that manner, it is facially constitutional
5 under this Court's decisions in *Ex parte Jackson*, *In re*
6 *Rapier* and *Posadas*.

7 QUESTION: Well, if you exclude news stories
8 and editorials, what kind of a -- what have you got left?

9 MR. LARKIN: What you have left, Your Honor,
10 is the type of prize list that this Court addressed in
11 the *Horner* case, and that shows up in some of the
12 examples we've reprinted in the appendix to our brief.
13 In the appendix to our opening brief, we've reprinted
14 several examples of what were prize lists that were
15 distributed during the period before this Act became
16 law. If you look to page 11a to 12a, you'll see an
17 advertisement that was distributed in behalf of the
18 Louisiana Lottery, which was the most famous or infamous
19 lottery in the 19th century. If you look to the top of
20 page 12a, you will see a section entitled "List of
21 Prizes". At page 14a in the appendix is another prize
22 list, this one distributed on behalf of the Kentucky
23 lottery.

24 Now, those examples we think are important
25 because that is what this Court construed the Act to

1 cover in the Horner case.

2 QUESTION: This was -- these were just
3 separate lists mailed -- sent through the mails to
4 addressees.

5 MR. LARKIN: Correct. They could be put --
6 put out by lotteries by purchasing advertising space or
7 space for the promotion of a prize list in a newspaper.
8 And then the newspaper was sent out across the country.

9 QUESTION: Well, but -- but I thought the ads
10 were already out of the case.

11 MR. LARKIN: The -- the -- the
12 constitutionality of the advertisement clause is out of
13 the case. You're correct. But what is in --

14 QUESTION: But if you buy space in the
15 newspaper to publish your prize list, isn't that an ad?

16 MR. LARKIN: Not necessarily, no, because
17 Congress adopted two different clauses in the statute
18 because I think it saw that there were two different
19 types of promotional materials being used.

20 The types of promotional materials you see
21 here that would constitute a prize list is the same type
22 of promotional material the Court addressed in the
23 Horner case. We have reprinted in our brief at page 30,
24 footnote 27, what this Court addressed in the Horner
25 case. The prize list that is reprinted at that part of

1 our brief is the same as the ones here.

2 What was happening in the 19th century was
3 that you had two different types basically of
4 promotional materials being used. You had an
5 advertisement that didn't include the lists of what
6 could be awarded. That, for example, is at page 13a of
7 our appendix. And then you had other types of
8 promotional materials that basically just consisted of a
9 list of what the lottery would award. Congress drafted
10 the statute to include both types of materials.

11 QUESTION: But, Mr. Larkin, I'm still a little
12 puzzled. Those lists were not sent out in newspapers,
13 were they?

14 MR. LARKIN: They could be, yes.

15 QUESTION: Well, yes, but -- but now they have
16 to pay to do it.

17 MR. LARKIN: Yes. And if they pay to do it --

18 QUESTION: Then it's an ad.

19 MR. LARKIN: No, it would not necessarily be
20 an ad.

21 QUESTION: Well, have you got an example
22 anywhere in the world of such a list being published by
23 a newspaper without -- when it was paid for and it was
24 not an ad?

25 MR. LARKIN: Well, the one we've reprinted at

1 pages 11a to 12a, the one from the Louisiana Lottery,
2 was called an ad by the Postal Service at the time, but
3 it contained a list of prizes. You could --

4 QUESTION: But it wasn't in a newspaper. But
5 it wasn't in a newspaper.

6 MR. LARKIN: Yes, it was.

7 QUESTION: Oh, I'm sorry. I misunderstood. I
8 misunderstood.

9 MR. LARKIN: See, both of these types of
10 promotional materials -- the one we have, for example,
11 at page 13a, which is just basically a little flyer
12 about the Louisiana Lottery would be seen as an
13 advertisement in the period, like letting people know
14 the lottery existed. And then you had other types of
15 promotional materials that told them the prizes you
16 could actually win if you entered. And Congress drafted
17 the statute to include both.

18 QUESTION: But just how were the prize lists
19 -- they were -- were they a flyer in the newspaper or
20 reprinted on some page of the newspaper?

21 MR. LARKIN: They -- they could occur in both
22 ways. For example, at the time some lotteries in the
23 19th century actually tried to take advantage of the
24 loophole in the 1876 Act by publishing their own lottery
25 newspapers. For example, the postal -- the Postmaster

1 General pointed that out to Congress when they were
2 considering this statute. So, in that case what you
3 could have is the, say, Kentucky Lottery newspaper that
4 was being printed, and you could have reprinted as the
5 same way you have advertisements at grocery stores
6 nowadays an advertisement about the lottery or list of
7 the prizes that the lottery was going to award.

8 You also could have the situation in which
9 even if it wasn't a newspaper that was sponsored by the
10 lottery itself, the -- the lottery could purchase space
11 in the newspaper to reprint the advertisement or the
12 prize list.

13 Let me explain some of the background to this,
14 and it may help answer your question.

15 In the 19th century, gambling, particularly
16 lotteries, were treated with the same contempt that
17 narcotics trafficking is today. That's clear not only
18 from the materials that were before Congress, the
19 statements by Presidents of the United States, but from
20 the decisions of this Court.

21 QUESTION: And yet, the -- your illustration
22 of the Louisiana State Lottery under the personal
23 supervision and management of General G. I. Beauregard
24 and General Jubal A. Early of Virginia, rather prominent
25 figures in the 19th century.

1 MR. LARKIN: Absolutely. And, in fact, it was
2 that reason that they were used by the Louisiana Lottery
3 because they were -- they were asked by the Louisiana
4 Lottery to -- to lend their name to this enterprise in
5 order to add an air of respectability to it.

6 QUESTION: And they lent their names.

7 MR. LARKIN: Correct.

8 But, nonetheless, it was the Louisiana Lottery
9 that ultimately was the target of this statute. By
10 1890, after a nationwide effort extending over several
11 decades, most states -- in fact, every state except
12 Louisiana -- had prohibited this type of activity.
13 Louisiana allowed the Louisiana Lottery to engage in
14 business, however, and it engaged in business on a
15 nationwide scale and made an enormous amount of money as
16 a result.

17 It engaged in business on a nationwide scale
18 by putting advertisements and other types of promotional
19 materials in newspapers, and the reason it put those
20 materials in newspapers is that the existing 1876 law
21 that this Court upheld in the Jackson case did not apply
22 to newspapers. The result was there was no existing way
23 at that time for any of the other states in the Nation
24 or Congress -- excuse me -- or the executive to do
25 anything about the existence of the Louisiana Lottery.

1 However, Congress decided it was time to shut
2 it down. It decided that the only way effectively to do
3 so was to deny the Louisiana Lottery access to its
4 primary source of income which was money from
5 out-of-state bettors since the Louisiana Lottery
6 received more than 90 percent of its income from
7 out-of-state bettors. The result of that was the
8 Anti-Lottery Act of 1890. Congress passed that law in
9 order to deny the Louisiana Lottery the opportunity to
10 use newspapers for -- for promoting their own financial
11 success.

12 It was that type of prize list or that type of
13 advertisement that Congress was concerned about.
14 Congress was not intending to prevent a newspaper from
15 writing a news story about a lottery, about a lottery
16 winner or about a lottery prize list.

17 QUESTION: How do we know that? I mean, you
18 know, it -- very often Congress is concerned about one
19 particular aspect of a problem, and it drafts a statute
20 that covers that, but to be prophylactic covers a few
21 things beyond that as well. I have no confidence at all
22 that if you asked one of those original legislators,
23 well, what if -- what if a newspaper just wrote a news
24 story, not an advertisement, just a news story, said,
25 look it, these are the great money prizes that you can

1 get in the Louisiana Lottery, I think it's quite
2 plausible that that Senator would have said, yes, I
3 think -- don't like that any better.

4 MR. LARKIN: I have several --

5 QUESTION: I mean, it seems to me that you are
6 -- you are dealing in an anachronism here. You're
7 --you're casting back upon the 1890 Congress our modern
8 notion of commercial speech. They didn't know about the
9 distinction between commercial speech and other speech.
10 We've invented that in recent years. And why should I
11 ever think that they had it in mind in 1890?

12 MR. LARKIN: I don't suggest that the Congress
13 that passed this statute was thinking in terms of the
14 --you know, the four-part Central Hudson test or any of
15 the other cases that this Court has decided.

16 But what I do say is this. Congress passed
17 this statute to prevent lotteries from being
18 commercially promoted. That purpose dovetails nicely we
19 think with the commercial speech doctrine the Court has
20 today, and we think that is what they were concerned
21 about. You didn't have news stories about lotteries
22 then because --

23 QUESTION: Concerned about their being
24 promoted commercially or otherwise. Why -- why should I
25 think they were just concerned about their being

1 commercially promoted? To be sure, that was the main
2 way they were promoted, but I have no basis for thinking
3 that they wouldn't have been concerned about their being
4 promoted in any fashion, commercially or otherwise.

5 MR. LARKIN: Well, it's possible that if you
6 had a different set of facts before Congress, they would
7 have been concerned about that. But you didn't have
8 news stories about lotteries because there was only one
9 state, Louisiana, where they were lawful. And
10 newspapers themselves supported this Act. Congress
11 certainly believed that the majority of newspapers
12 supported the legislation that it was putting forward,
13 and I doubt the newspapers themselves would have
14 supported this Act if they thought it was going to
15 censure their ability to report about stories.

16 Congress dealt with a particular problem, and
17 it's the goal that Congress had in mind, the purpose of
18 that statute, that should influence the construction
19 here, and that is so even apart from the concerns
20 expressed in cases like Catholic Bishop about construing
21 statutes in order for them to be constitutional. We
22 don't think Congress, which debated the
23 constitutionality of this type of statute under the law
24 that the Court had set forth in the Jackson case,
25 intended this type of statute here to reach more

1 broadly. Congress certainly hasn't shown any indication
2 of intending in more recent times that the statute be
3 read that broadly. The statute was revisited in 1974.
4 The statute was revisited last year, and there's no
5 reason to believe that Congress is not aware of what the
6 historic construction is.

7 In fact, Justice Scalia, there is no hint in
8 this Court's opinion in the Rapler case, which was
9 decided two years after the statute was passed, or in
10 the Horner case, which was decided three years after the
11 statute was passed, that this Act applied to news
12 stories. And the people on this Court at that time were
13 certainly aware of what the statute was designed to deal
14 with.

15 As I said, lotteries in the 19th century were
16 as well-known and as despised as narcotics trafficking
17 is today. The fact that this Court twice at that early
18 stage didn't hesitate to even ask the question whether
19 it applied to news stories I think is significant
20 evidence that the statute doesn't reach that --

21 QUESTION: Mr. Larkin, suppose I disagree with
22 you. Suppose I think it means what it says and -- and
23 why -- why couldn't I say that it's valid as applied to
24 all -- all commercial speech and not valid as applied to
25 other speech? Why couldn't I handle the problem that

1 way?

2 MR. LARKIN: Well, if the statute is limited
3 so that it applies only to commercial speech --

4 QUESTION: No, I'm saying it's written to
5 apply to everything, but it's -- it's unconstitutional
6 insofar as it extends beyond commercial speech. Why
7 can't I say that?

8 MR. LARKIN: Well, the statute still cannot be
9 held facially unconstitutional, which is the ruling
10 below, the one we are challenging, unless it is
11 substantially overbroad, and we don't think it meets
12 that test.

13 QUESTION: Or why couldn't we adopt a new rule
14 that in addition to being substantially overbroad -- if
15 it's overbroad in a fashion that can be limited very
16 clearly, as most -- most overbroad statutes can, where
17 the only overbreadth consists of extending beyond
18 commercial speech. It's a very clear line that you can
19 make by judicial decision. Why couldn't I hold that a
20 facial challenge can be rejected if the only overbreadth
21 consists of going beyond commercial?

22 MR. LARKIN: We think you can, and we ask in
23 this case for the district court's judgment which dealt
24 only with the facial constitutionality of the statute to
25 be reversed. If there are problems of the type that are

1 concerning you, those problems can be worked out when
2 the statute is applied in particular cases. That's what
3 an as-applied type of challenge is for.

4 But the district court held the statute
5 facially invalid. We have argued that the statute
6 should be construed to be limited to lotteries -- excuse
7 me --to prize lists used commercially to promote
8 lotteries.

9 QUESTION: Tell -- tell us again what the
10 prize list clause covers that the advertising clause
11 doesn't cover.

12 MR. LARKIN: The prize list clause covers
13 circumstances in which you offer a prize in -- for entry
14 in the lottery, and the advertising clause covers other
15 types of commercial promotion.

16 QUESTION: Well, now -- now, wait a minute.
17 Why does -- why is the first example you mention that
18 you say is covered by the prize list clause but not by
19 the advertising clause -- why isn't that covered by the
20 advertising clause?

21 MR. LARKIN: It -- there is some overlap
22 between the two.

23 QUESTION: Well, exactly. What I'm trying to
24 find out is what the prize list clause reaches that the
25 advertising clause doesn't reach.

1 MR. LARKIN: The prize list clause would reach
2 the case where you just basically have the list of
3 prizes that the lottery is being -- that the lottery is
4 offering, perhaps with the title of the lottery, like
5 the --

6 QUESTION: Where? Where?

7 QUESTION: Where?

8 QUESTION: Where do you have it?

9 QUESTION: How did it come into existence
10 --this thing you're talking about?

11 MR. LARKIN: Well, prize lists were -- were
12 used in circulars and other types of promotional
13 materials.

14 QUESTION: So, it would be mailings of prize
15 lists that don't appear in the newspapers, for example,
16 but there could be prize lists, I take it, that would be
17 in the newspaper that you think the prize list clause
18 would cover.

19 MR. LARKIN: Yes, I agree with Your Honor.
20 The prize list clause could apply to newspapers and to
21 other types of circulars.

22 QUESTION: But why wouldn't the advertising
23 clause cover a prize list that appears in a newspaper
24 and is paid for by some sponsor?

25 MR. LARKIN: Because we don't think Congress

1 intended the prize -- excuse me -- the advertisement
2 clause just to be limited -- to reach in that manner.

3 QUESTION: Why not?

4 MR. LARKIN: In adopting a -- well, by
5 adopting a separate prize list clause, it seems that
6 Congress thought it was dealing with two somewhat
7 overlapping but, nonetheless, somewhat distinct types of
8 promotional materials.

9 QUESTION: Well, I would think -- that's
10 pretty fine. That's a pretty fine -- I can understand
11 that the prize list clause would surely cover mailings
12 of prize lists and circulars to a bunch of addressees.
13 There's no doubt -- not much question about that, but I
14 suppose the prize list clause, since it has been
15 declared invalid on its face, couldn't even reach those
16 circulars.

17 MR. LARKIN: That's right. The district
18 court's judgment wouldn't allow the prize list clause to
19 be applied in any manner to circulars, to newspaper
20 stories, to even illegal uses of a lottery, such as a
21 numbers racket.

22 QUESTION: Now, if the -- if there's a news
23 story on the front page of the paper saying here is
24 --here are the prizes that this new lottery will offer.
25 It tells about the lottery starting up and who is

1 sponsoring it. It's a news story. Then they have a --
2 they have the very list that you find in the back of the
3 paper that has been paid for in this news story. You
4 say that --that is not covered by the prize list.

5 MR. LARKIN: No, a bona fide news story is not.

6 QUESTION: Well --

7 MR. LARKIN: We don't think that the statute
8 should be read to prevent the press from reporting about
9 factual events and --

10 QUESTION: Well, not -- not events. This is
11 -- they're reporting what you can win in the lottery.

12 MR. LARKIN: That's right.

13 QUESTION: Here's the list.

14 MR. LARKIN: It's an event to occur in the
15 future and we don't think that the prize list clause
16 properly construed should apply to simple,
17 straightforward news stories in the manner --

18 QUESTION: Or a news story that says -- a news
19 story that sums up and makes a great list of the prizes
20 that have been won in the last year in the lottery.

21 MR. LARKIN: Correct. If the lottery
22 purchases the space in the newspaper to list all the
23 prizes they have awarded in the past 10 years, to list
24 all the prizes that they are going to award --

25 QUESTION: That's covered. That's covered.

1 MR. LARKIN: That would be covered. If the
2 newspaper sells the advertising space, that would be
3 covered. But if the newspaper on its own prints a story
4 either because it thinks its newsworthy or because it
5 wants to just let the public play in the lottery by
6 telling them about it, that wouldn't be covered.

7 QUESTION: But the example you just gave is
8 not an ad.

9 MR. LARKIN: Correct. If it's just a list of
10 prizes and, say, the name of the lottery, I don't think
11 Congress thought that that was an advertisement.

12 QUESTION: And if it says this is an
13 advertisement paid for by the XYZ Lottery Company, it's
14 still not an ad.

15 QUESTION: Why do -- why do you care whether
16 it is or not?

17 MR. LARKIN: Well, we're trying to be faithful
18 to this fact that there are two separate clauses in the
19 statute, and --

20 QUESTION: Well, you've already got some
21 --some coverage for the prize -- for the prize clause:
22 circulars.

23 MR. LARKIN: That's right, but we think if you
24 use the same material that goes in the circular in a
25 newspaper, it would be covered there too.

1 QUESTION: Mr. Larkin, I'm not sure you have
2 circulars. I -- I don't -- I don't agree with your
3 --your answer to Justice White on that.

4 The first clause of 1302 covers any letter,
5 package, postal card or circular concerning any lottery.
6 That first clause would cover a list of prizes put into
7 an envelope with a stamp on it and sent. That would be
8 a circular concerning any lottery whether it's an
9 advertisement or a list of prizes or anything else. The
10 clause we're talking about here only, I believe, deals
11 with material that is not inserted into an envelope, but
12 that goes as a general publication to the general
13 public, newspaper, circular, pamphlet or publication of
14 any kind. I think they mean to distinguish between a
15 publication and the kind of circulars that are -- that
16 are mailed to -- to individuals.

17 MR. LARKIN: Well --

18 QUESTION: I don't see the meaning of the
19 first clause if -- if you're reading this one the way
20 you do to cover something put into an envelope to a
21 private individual.

22 MR. LARKIN: Well, let -- let me explain then
23 if -- the difference here between the two.

24 The circular part of the statute to which you
25 were referring was part of the original 1876 law. The

1 part of the statute that includes the prize list phrase
2 was the part that was added by the 1890 law that was
3 designed to deal with newspapers.

4 QUESTION: (Inaudible).

5 MR. LARKIN: That's right.

6 So, when I was answering Justice White's
7 question, what I was trying to say was you could have
8 prize lists that show up in circulars because that's
9 what happened in the Horner case. But the part of the
10 statute that you have at issue under the district
11 court's judgment is the part of the statute that's
12 designed to deal with newspapers. So, as a factual
13 historical matter, you could have a prize list show up
14 in a circular. And the circular clause that you
15 mentioned would cover it.

16 QUESTION: (Inaudible).

17 MR. LARKIN: But when the prize list shows up
18 in the newspaper, then it is covered by the clause that
19 we're dealing with here because that was part of the
20 1890 --

21 QUESTION: But doesn't that leave Justice
22 White's question still on the table then? What does it
23 cover besides -- besides advertisements? Isn't that
24 kind of a prize list an advertisement?

25 MR. LARKIN: I don't think so if it's just

1 simply the list of the prizes they are going to award,
2 Congress must have thought that that was specifically
3 addressed by the prize list clause rather than the
4 advertisement clause.

5 QUESTION: Well, I -- it seems to me that -- I
6 don't know why you care whether it's an ad or not. The
7 ad -- the ad provision has been sustained, and if all
8 --if all non-editorial prize lists in a paper are ads,
9 there's no problem. But I take it you concede that if
10 the prize list is read to cover editorial prize lists,
11 it's unconstitutional. Is that it?

12 MR. LARKIN: If the prize list clause is read
13 to apply to a general news story?

14 QUESTION: Uh-hum.

15 MR. LARKIN: We would -- we would say that it
16 would be unconstitutional in that respect.

17 QUESTION: Well, all right. And so, what's
18 the big problem in the case? If it covers -- if it
19 covers editorials -- editorial prize lists, it's bad.

20 MR. LARKIN: Well, if --

21 QUESTION: And if it covers paid-for prize
22 lists, and -- and if the ads -- the ad provision covers
23 paid-for prize lists, it's all right.

24 MR. LARKIN: But if the newspaper is operating
25 the lottery as -- or is owned by the lottery, as

1 happened in the 19th century, then you don't have a bona
2 fide news story, and if they just list the prizes, then
3 it would be within the prize list clause.

4 As I tried to explain earlier, there were
5 instances in the 19th century in which a lottery
6 published what they called a lottery newspaper, and in
7 that circumstance, just listing the prizes would not be
8 a bona fide news story because it would be used
9 commercially to promote the lottery. In fact, if you
10 didn't include within the type of commercial speech that
11 we're talking about here situations in which a lottery
12 newspaper is covered, then you're creating an exemption
13 that allows the lottery just to print something that
14 they call a lottery newspaper and advertise their prize
15 lists freely in that manner.

16 QUESTION: So, but the newspapers here don't
17 plan to do that. There's no indication that they are
18 going to do that, is there?

19 MR. LARKIN: No, I don't -- do not believe so.
20 But the statute was held facially invalid, and for that
21 reason we think the district court was wrong. If the
22 newspapers in this case became shareholders in a
23 lottery, then you have a different story, and the
24 question of the constitutionality or construction of the
25 statute should be construed in that context. But here

1 the district court held it facially invalid, and we
2 don't think it's facially invalid. We think it can
3 properly be applied.

4 When it's read in the manner that we have
5 suggested or when it's limited to the types of material
6 that we have said the statute should be limited to, we
7 think the statute is a lawful regulation of commercial
8 speech under the Jackson, Rapier and Posadas cases.
9 Rapier, for example, upheld this very statute, and
10 Posadas upheld a very similar ban on casino gambling.
11 As a matter of precedent, therefore, we think this
12 statute passes muster, and we also think that precedent
13 makes good policy sense.

14 What you have here is a situation in which
15 Congress has attempted to deal with a narrow category of
16 materials such as firearms, alcohol, cigarettes,
17 narcotics or legalized prostitution. These are areas
18 that government has historically regulated under the
19 morals head of its police power. One of the ways of
20 regulating it is to limit advertising. This Court
21 upheld the constitutionality of that judgment by
22 Congress a century ago. We ask the Court to do so again
23 today.

24 QUESTION: Counsel, if the newspapers were
25 willing to forego all claims for equitable relief and to

1 have this judgment vacated in -- in its entirety, would
2 the case then be moot?

3 MR. LARKIN: If the Court allowed them to
4 dismiss their complaint, then there would be no -- there
5 would no longer be a case. But they -- they don't have
6 a right to dismiss their complaint because we filed our
7 answer. And we would urge the Court not to grant the
8 motion because this part of the statute was not changed
9 by the most recent amendments. The constitutional
10 question presented here, therefore, is one that is of
11 practical importance to the Postal Service, and that the
12 Postal Service would ask this Court to decide based on
13 the record in our favor.

14 Thank you.

15 QUESTION: Thank you, Mr. Larkin.

16 Mr. DeVore?

17 ORAL ARGUMENT OF P. CAMERON DeVORE

18 ON BEHALF OF THE APPELLEE

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

21 The government has served up in its briefs and
22 in oral argument today a number of historical examples
23 of historical prize lists which may or may not be real
24 today, but certainly are not things which are before the
25 Court in this case. We submit that this case if over,

1 that each side agrees that the other is entitled to the
2 outcome that it seeks, and we ask the Court to close the
3 case on the statutory construction point.

4 QUESTION: But you're not willing to have the
5 entire judgment vacated.

6 MR. DeVORE: We are willing to have the entire
7 judgment vacated, Justice Kennedy, but I think the Court
8 in doing so should explain the logic used by the Court
9 in reaching that point. And I think you must face the
10 statutory construction point. The government and we
11 basically agree that it is proper to construe the
12 statute not to apply to fully protected speech, but I
13 think in order to -- to -- to reach that point, you've
14 got to go through some of the logic in the -- in, for
15 example, Catholic Bishop and DeBartolo from last term to
16 understand where you -- how you get there. It's not the
17 sort of mootness situation that you find in a -- oh,
18 say, the DeFunis case or others where an intervening
19 event has disposed of the case.

20 Congress acted here and passed the Charitable
21 Games Act and the Indian Gaming Statute after the Court
22 noted jurisdiction on both appeals here. We dismissed
23 our appeal on the advertising clause based on that
24 intervening event. The prize list clause is all that's
25 still before the Court.

1 So, we agree with the government that the
2 --the court went too far below. We didn't ask for a
3 holding of facial unconstitutionality. The district
4 court provided that because it was apparently concerned
5 about the reach that the government argued for into news
6 and editorial fully protected speech.

7 QUESTION: Well, don't you -- why don't you
8 defend that?

9 MR. DeVORE: Well, I have -- would have no
10 doubt, Justice White, that if --

11 QUESTION: The government concedes that --

12 MR. DeVORE: -- this applied --

13 QUESTION: The government concedes that if you
14 construe it to cover that, it's unconstitutional.

15 MR. DeVORE: They did construe that -- they
16 did concede that here today to the Court in oral
17 argument.

18 QUESTION: Why do you want that vacated?

19 MR. DeVORE: Well, I would be pleased to have
20 a -- an eloquent holding of the Court that an -- another
21 holding of the Court, because there are many that the
22 Court has done in the past, that a statute which would
23 purport to apply to news and editorial copy would meet
24 -- would not meet the strict scrutiny test which I think
25 was held by the district court. The district court just

1 went a little too far in -- in holding that it was
2 facially unconstitutional and enjoining all
3 applications, including applications not before the
4 court.

5 QUESTION: (Inaudible) left of the prize
6 clause that if you eliminate news stories and editorials?

7 MR. DeVORE: I'm not sure I know the answer to
8 that. The government has given some examples, possibly
9 -- and the example in the Horner case of circulars sent
10 by a lottery sponsor to people who were already in the
11 game may well be something that might be covered by it.
12 But that --

13 QUESTION: What about a --

14 MR. DeVORE: -- is certainly not an
15 advertisement in a newspaper.

16 QUESTION: What about -- what about a
17 so-called lottery newspaper, a lottery publishes a
18 newspaper or a newspaper runs a lottery, whichever one
19 you want to say?

20 MR. DeVORE: Well, the issue there would be
21 one which would still be open to the Court if you accept
22 the -- either holding, either that this is -- the
23 statute is unconstitutional as applied to the only
24 speech at issue in this case, news and editorial copy,
25 or you simply say that as construed under Catholic

1 Bishop and DeBartolo, you needn't reach those things.
2 It would still be open to the Postal Service to attempt
3 to apply it in a situation. Then the Court would be
4 confronted or a court would be confronted with the
5 question of whether you had commercial speech at all
6 under the tests of -- you know, adduced by the court,
7 and then if you had commercial speech, whether in fact
8 the regulation of that speech was permissible under
9 Central Hudson.

10 QUESTION: What if we were to conclude for one
11 reason or another, Mr. DeVore, that the statute should
12 be construed to cover only the sort of commercial speech
13 that you've adverted to and Mr. Larkin has adverted to?
14 What -- what does -- what does that do to the judgment
15 here? The judgment of the district court is -- is too
16 broad.

17 MR. DeVORE: It's too broad. Really, the only
18 thing before the Court is news and editorial copy. The
19 only point I'd make, Justice Rehnquist, on the
20 construction point is that I think that where the
21 government gets off track in application of the
22 construction cases, Catholic Bishop and DeBartolo, is
23 that instead of stopping at the stopping point that that
24 prudential rule is designed to achieve for the Court,
25 namely, avoiding the decision of constitutional issues

1 if you don't find a clear intent of Congress to cover
2 the thing that's before the Court in the case -- what
3 the government does is to say -- it goes a step further
4 and says what the statute still covers is commercial
5 speech. The Court simply need not decide under Catholic
6 Bishop or DeBartolo what's left under the statutory
7 section.

8 QUESTION: So, you say that all you're asking
9 for is the sort of relief that will exclude newspaper
10 stories about lotteries, which the government concedes
11 the statute doesn't cover.

12 MR. DeVORE: That is all the relief we've ever
13 sought in regard to the prize list clause --

14 QUESTION: And therefore, the -- the district
15 court went too far --

16 MR. DeVORE: That's right.

17 QUESTION: -- but that we should not go beyond
18 what you've asked for and construe the statute other
19 than it's saying it does not apply to what you're trying
20 to do.

21 MR. DeVORE: I believe that's correct. The
22 Court does not need to do that.

23 QUESTION: Did you try this case below, Mr.
24 DeVore?

25 MR. DeVORE: Pardon me, sir?

1 QUESTION: Did you try this case before Judge
2 Magnuson?

3 MR. DeVORE: No, I did not. I was not present
4 when the case was tried with Judge Magnuson, but I have
5 reviewed the -- all the documents that were filed with
6 the court.

7 QUESTION: Was there an attempt to keep him
8 within bounds along the lines that have been discussed
9 this morning?

10 MR. DeVORE: There really was not that kind of
11 discussion. The government's brief -- memorandum argued
12 in the alternative to the court that -- that if the
13 statute were to be applied to news and editorial copy,
14 that it would meet the strict scrutiny tests of fully
15 protected speech. But if it did not and if the court
16 held it only to apply to commercial speech, then it
17 applied the commercial speech analysis.

18 QUESTION: So, you feel the government would
19 change its position from the position it took below
20 before Judge Magnuson.

21 MR. DeVORE: From reading -- from reading the
22 -- the government's memorandum in the case, I would say
23 that the government has not changed its position.

24 QUESTION: Well, didn't the newspaper, though,
25 take the position that the -- that the prize clause was

1 unconstitutional on its face? Didn't they ask for a
2 judgment like that?

3 MR. DeVORE: No, they did not, Mr. Justice
4 white.

5 QUESTION: They did not.

6 MR. DeVORE: They asked solely for a judgment
7 that it was unconstitutional as applied to news and
8 editorial copy.

9 QUESTION: So, you don't think there was any
10 case or controversy before the court on non-editorial
11 prize lists.

12 MR. DeVORE: I think once you've gone through
13 the construction analysis, no controversy remains in
14 this case.

15 QUESTION: Well, I thought the newspapers had
16 also asked to invalidate the -- the requirement
17 concerning ads.

18 MR. DeVORE: Yes, indeed, they did, Justice
19 O'Connor.

20 QUESTION: I mean, more was asked below --

21 MR. DeVORE: Exactly.

22 QUESTION: -- than we have before us now. So
23 --

24 MR. DeVORE: And quite frankly, below the
25 advertising clause was the one that loomed most

1 important in the minds of the newspaper because they
2 were under that clause --

3 QUESTION: Well, yes, that's their revenue.

4 MR. DeVORE: That's right.

5 QUESTION: That was what they were in there to
6 litigate. Isn't that right?

7 MR. DeVORE: They were prevented from -- from
8 running -- by the Postal Service applying that from
9 running advertisements of locally legal lotteries in
10 Minnesota --

11 QUESTION: But that issue is now out of the
12 case.

13 MR. DeVORE: Yes, it's gone. It's gone.
14 Congress fixed that or at least they fixed it to the
15 satisfaction of the papers.

16 QUESTION: Well -- well --

17 QUESTION: Well, that's right. It's --

18 QUESTION: But I -- but why should that part
19 of the judgment -- if you don't want to defend that or
20 attack that judgment, why shouldn't that part of the
21 judgment -- why should that be vacated?

22 MR. DeVORE: I'm not suggesting that the
23 advertising judgment should be vacated.

24 QUESTION: Okay. So, the -- that -- the --
25 the advertising clause -- the judgment upholding that

1 stands.

2 MR. DeVORE: That stands. I mean, it was
3 prize lists and nothing but prize lists, Justice White.

4 QUESTION: Okay.

5 QUESTION: Well, but in -- in fact, you -- you
6 don't -- the only reason it's out of the case is not
7 because you agree with the government on it, but because
8 you are affected by that decision for one year until the
9 new statute comes into effect.

10 MR. DeVORE: Actually 18 months, Justice
11 Scalia.

12 QUESTION: Eighteen months.

13 MR. DeVORE: Yes.

14 QUESTION: And you just -- you just say, well,
15 we don't care anymore. It isn't --

16 MR. DeVORE: Well --

17 QUESTION: It's not that you're in legal
18 agreement at all.

19 MR. DeVORE: No, that's correct.

20 QUESTION: And it's -- and it's not that
21 you're not affected by it. You are affected by it. You
22 just don't -- you just now no longer want to litigate
23 over --over that effect. Right?

24 MR. DeVORE: We will be affected by it -- the
25 newspapers in Minnesota and elsewhere -- until May of

1 1990.

2 QUESTION: But the judgment stands.

3 MR. DeVORE: The judgment stands.

4 QUESTION: Yes.

5 MR. DeVORE: That's right.

6 QUESTION: Well, when you say the judgment
7 stands, let me --

8 MR. DeVORE: The dismissal. The dismissal
9 stands and that is no longer at issue in the case.

10 QUESTION: You have dismissed your appeal.

11 MR. DeVORE: That's correct.

12 QUESTION: Okay. So, it's stands simply
13 because there was an adverse judgment entered in the
14 district court to you and you have not appealed from it.

15 MR. DeVORE: That is the -- that's the net
16 result of where we are.

17 I would like -- not that the Court needs
18 reminding in great detail about Catholic Bishop and
19 DeBartolo, but I think it's important to address a
20 question that Justice Scalia put to the government about
21 the legislative history of this -- of this statute.

22 And incidentally, on February 21, I contacted
23 the Deputy Solicitor General, after we had gotten deeply
24 into the briefing process, and suggested a joint motion
25 to this Court based on what was then the agreed

1 construction of this statute to ask the Court to dismiss
2 this case, vacate the judgment below. So, we -- we
3 felt, at least a month ago, that -- that this was the
4 result that was certainly acceptable to us.

5 The statutory construction analysis of the
6 --of NLRB v. Catholic Bishop really fits this case like
7 a glove. In that case, the Court will recall the
8 National Labor Relations Board had applied the
9 jurisdiction under the NLRA to some mixed religious and
10 secular schools in the -- in the Archdiocese of
11 Chicago. That was appealed by the -- by the Archbishop,
12 and it went to the Seventh Circuit which held that
13 application facially unconstitutional.

14 That was, in turn, appealed by the board to
15 this Court. And this Court determined that under the
16 --going back to Mr. Justice Marshall's opinion in Murray
17 v. The Charming Betsy in 1804, the prudential notion
18 that this Court shouldn't decide constitutional
19 questions and get into the actions of Congress on -- to
20 judge them constitutionally unless there really were a
21 reason to do so. If that could be avoided by
22 construction, the Court should do it.

23 In Catholic Bishop, the Court announced a
24 version of that rule which I think is a little more
25 precise and objective than earlier versions. What it

1 said was that a two-step test should be applied. Number
2 one -- this was a narrow question -- if the application
3 of the statute -- too in this case it was the religious
4 activity, another clause of the First Amendment -- was
5 such as to raise this kind of sensitive constitutional
6 issue, then you went to the words. You went to Congress
7 and you went to the act. You went to the legislative
8 history and you found out if, in fact, it was a clearly
9 expressed intention of Congress to apply the broad
10 language of the -- in this case the jurisdiction clause
11 of the act -- to this kind of sensitive activity. And
12 if you didn't find that, absent that, then it was to be
13 construed not to apply.

14 Now, the same -- the Court was divided in
15 Catholic Bishop. The Court really joined last year in
16 DeBartolo v. Florida Building Trades and applied what it
17 called the traditional rule of Catholic Bishop in a
18 similar situation dealing directly with speech in a
19 peaceful hand-billing situation in a Florida shopping
20 mall.

21 I think it's terribly important that what
22 those cases hold applies here in that a careful reading,
23 Justice Scalia, of the -- not just the -- the
24 Anti-Lottery Act of 1890, but the many pages of text of
25 the House report, and all of the reports in the history,

1 you simply find no expression on the part of the
2 sponsors of the bill to apply this to news and
3 editorial. It seemed fairly clear that at least as far
4 as newspapers were concerned -- and newspapers were
5 added to the Act, as the Government has said, for the
6 first time in 1890. What they were concerned about was
7 the advertising. They mentioned the prize lists, but it
8 appeared to be their assumption that that was something
9 which, as far as newspapers went, was included within
10 advertising. There was no expression of any intent to
11 cover news and editorial. And (inaudible) cases --

12 QUESTION: I assume that Marbury v. Madison
13 would have come out differently on that kind of a
14 theory. The difficult constitutional question of whether
15 a mandamus could have applied to a -- to a cabinet
16 officer being so difficult and Congress not having
17 explicitly said in the statute at issue whether mandamus
18 would apply to a high level cabinet officer, we wouldn't
19 have reached the issue, would we? We -- we would have
20 just said this statute does not apply to cabinet
21 officers.

22 MR. DeVORE: I believe that's correct, Justice

23 --

24 QUESTION: Boy, it's going to change a lot of
25 our law, isn't it?

1 (Laughter.)

2 MR. DeVORE: Well, in any event, it is -- it
3 is -- we agree with the government. The government, as
4 I said earlier, went a -- went a little different
5 direction after citing DeBartolo and Catholic Bishop at
6 page 28 of their brief to this Court, and went on not
7 just to stop with what the Act does not cover, avoiding
8 the constitutional problem here, but went on to say what
9 the Act does cover. And I think a great deal of
10 attention has been given by the government to deciding
11 what is commercial speech, what would it apply to other
12 kinds of lotteries that newspapers might or might not be
13 involved in or other parties, professional gamblers
14 might or might not be involved in.

15 But because the only issue before this Court
16 is the application to the fully protected news and
17 editorial speech about lotteries, we submit that your --
18 your prudential construction rules get us to a common
19 stopping place. And we ask that the Court vacate the
20 judgment below based on that analysis and lift the
21 injunction in the case.

22 QUESTION: And not try to define or redefine
23 commercial speech?

24 MR. DeVORE: We don't think that those
25 sensitive issues are before the Court today.

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QUESTION: Vacate the entire judgment?

MR. DeVORE: Yes, Justice Kennedy.

QUESTION: Well, not the advertising.

MR. DeVORE: I'm sorry. That -- vacate the entire judgment as to the prize list clause. The advertising judgment of the court will stand.

QUESTION: Do we vacate or do we -- do we remand with instructions as -- as we did in the case -- what was it -- Deakins, the case you cite to support --

MR. DeVORE: Deakins v. Monaghan.

QUESTION: We -- we directed the -- the court to dismiss with prejudice. Is that -- Is that what --

MR. DeVORE: I puzzled over the --

QUESTION: -- you're willing to have entered here?

MR. DeVORE: I puzzled over the kind of metaphysical differences between reversal and vacation and dismissal with prejudice. I think that --

QUESTION: Dismissal with prejudice sounds worse to me, don't you think?

MR. DeVORE: It sounds -- it sounds awful.

QUESTION: It sounds a little worse.

(Laughter.)

QUESTION: But that's what we did in --

MR. DeVORE: We would have no -- no objection

1 assuming the Court analyzes this from a construction
2 point of view and does not apply it to the speech we
3 brought to the Court, as a matter of concern under the
4 prize list clause, then the vacation of the facial
5 holding below with prejudice is of no concern to us.
6 But we would ask, given the government's change of
7 position, given the -- the concession in the
8 government's brief at page 9 of their reply brief, that,
9 in fact, there is confusion in the Postal Service, we
10 would ask that the Court articulate the reason for this
11 so there is some guidance, as counsel for the government
12 has asked, for those Postal Service employees that this
13 does not reach into news and editorial copy.

14 QUESTION: Well, I don't think we're quite as
15 limited as you suggest in the extent to which we can
16 review the judgment of the district court. The district
17 court held the statute unconstitutional on its face.
18 The government has appealed from that ruling. And the
19 fact that you don't see -- that the sort of construction
20 which the government wants to put on it to save it from
21 being held unconstitutional on its face would not hurt
22 you doesn't at this stage of the litigation mean that we
23 couldn't write an opinion, it seems to me, upholding the
24 government's position and still not hurt you in any way.
25 That would mean that the judgment of the district court

1 would be reversed.

2 MR. DeVORE: Yes, if I understand, Justice
3 Rehnquist. You could certainly write -- if the
4 government's position is that it's not to be construed
5 to be applied to this kind of speech, I would have
6 certainly no -- we would have certainly no objection to
7 that kind of decision of the Court.

8 QUESTION: Well, and of course we write lots
9 of opinions to which counsel do have objection.

10 (Laughter.)

11 MR. DeVORE: Yes, right.

12 But I just want to make clear whatever
13 --however the Court writes it -- and I think there are,
14 as Justice Scalia suggests, there are several ways
15 around the barn to accomplish that result. And I don't
16 know what the exact word is to describe what the Court
17 does, but we certainly feel that as far as this case is
18 concerned -- and it's the application of this clause,
19 the news and editorial copy, the case is over because we
20 do accept that construction as -- as required by your
21 authorities.

22 QUESTION: Well, it sounds like you'd be
23 satisfied if we vacated, reversed or affirmed. Isn't
24 that right?

25 MR. DeVORE: Well, we -- we have certainly not

1 asked that it be affirmed, and I suspect it would not be
2 proper for the Court to do that.

3 QUESTION: That would reach the result you
4 would be happy with.

5 MR. DeVORE: But that would, in fact
6 --somewhat probably ironically, it would have the same
7 result in regard to the speech at issue in the case
8 today.

9 QUESTION: You're clear that you want this
10 case off our docket, though. Right?

11 (Laughter.)

12 MR. DeVORE: I think my feeling is sufficient
13 unto the day to resolve the other sensitive issues
14 raised by the government in the case.

15 Thank you.

16 QUESTION: Thank you, Mr. DeVore.

17 Mr. Larkin, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF PAUL J. LARKIN

19 MR. LARKIN: Just a few points, Your Honor.

20 I think it was Justice O'Connor asked about
21 the scope of the relief they asked for. The scope of
22 the relief they asked for in district court was not
23 limited to advertisements and news stories. Page 8 of
24 the joint appendix reprints their request, and they ask
25 the statute to be held void to the extent they prohibit

1 or interfere with the publication of information about
2 lawful gaming activities regardless of the form. So,
3 they asked for the statute to be held invalid insofar as
4 it prevented them from publishing any information about
5 lawful gaming activities, not just advertisements and
6 not just news stories.

7 Secondly, I don't think it is we that have
8 changed our position in this case. After all, the
9 Appellee filed a motion to affirm in which it asked this
10 Court summarily to affirm the judgment below. Appellee
11 has now said that it doesn't mind if the case is
12 affirmed, reversed, vacated or disposed of in some other
13 manner.

14 But our construction of the statute has been
15 consistent throughout. We asked the district court not
16 to read the statute to apply to news stories. We ask
17 the Court not to read the statute that way today. We
18 ask the Court to uphold the statute in the manner we
19 have suggested.

20 Thank you.

21 QUESTION: Thank you, Mr. Larkin.

22 The case is submitted.

23 (Whereupon, at 10:53 o'clock a.m., the case in
24 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:
No. 87-1956 - ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET

AL., Appellants V. MINNESOTA NEWSPAPER ASSOCIATION, INC.

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

BY alan friedman

(REPORTER)

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