

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE**

**THE SUPREME COURT
OF THE
UNITED STATES**

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WASHINGTON, D.C. 20543

CAPTION: BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF
NEW YORK, ET AL., Petitioners V. TODD FOX, ET AL.

CASE NO: 87-2013

PLACE: WASHINGTON, D.C.

DATE: February 22, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF TRUSTEES OF THE STATE :

UNIVERSITY OF NEW YORK, ET AL., :

Petitioners :

V. : No. 87-2013

TODD FOX, ET AL. :

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Washington, D.C.

Wednesday, February 22, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:58 p.m.

APPEARANCES:

O. PETER SHERWOOD, Solicitor General of New York,

Albany, New York; on behalf of the Petitioners.

HENRY T. REATH, Philadelphia, Pennsylvania; on behalf of
the Respondents.

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1 important error.

2 Today, I want to spend a minute, laying out
3 our position, and then, I plan to discuss why the Second
4 Circuit decision must be reversed.

5 We maintain that the challenge regulations,
6 designated SUNY Resolution 66-156, does nothing more
7 than prohibit the operation of -- for-profit commercial
8 enterprise on SUNY campuses and that it is
9 constitutional.

10 We believe, that if the Second Circuit had
11 simply, properly applied the standards of review for
12 restrictions on commercial speech, it would have
13 sustained the regulations. And, even if it was
14 disinclined to sustain the regulation, on that basis, it
15 should have sustained it as a permissible time, place,
16 and manner restriction.

17 We, of course, adhere to the other reasons set
18 forth in our brief, for sustaining the regulations.

19 QUESTION: Would your position proscribe an
20 attorney visiting a student in his dormitory room?

21 MR. SHERWOOD: If an attorney wished to visit,
22 where he's not yet been retained --

23 QUESTION: No, he's been retained, and it
24 would be -- his time would be charged.

25 MR. SHERWOOD: There is testimony in the

1 record from, I believe Norman Hofstaeder, in which he
2 says no, that that would not be permitted, believing
3 that there would be more appropriate places for those
4 kinds of communications.

5 QUESTION: What about a physician attending a
6 sick student in his dormitory room, for pay?

7 MR. SHERWOOD: I think under those -- there's
8 no testimony in the record, with respect to that example.

9 QUESTION: Well, what does your regulation say?

10 MR. SHERWOOD: The regulation doesn't speak to
11 it directly. The regulations -- the terms of the
12 regulations simply are that, for-profit commercial -- no
13 authorization shall be given for the operation of for
14 profit commercial enterprises.

15 It would seem to me, that given the example
16 that you just gave me, Justice Blackmun, that that would
17 not be conducting -- that would not be operating a
18 business on the campus.

19 QUESTION: Well, what about the lawyer?

20 MR. SHERWOOD: I'm simply referring to the
21 testimony that was given. I would say that that
22 testimony is rather ambiguous.

23 QUESTION: What about a tutor?

24 MR. SHERWOOD: What about -- that question was
25 asked, too. A tutor, according to the testimony, as I

1 recalled it -- Dr. Pogue, I believe, suggested that in
2 his interpretation, or maybe it was Murabito, that that
3 would not be permitted.

4 I should say though, that with respect to
5 these examples, the case here involved and focused on,
6 simply, efforts by American Future Systems to put on
7 product demonstrations in dormitory rooms.

8 None of the students, in their complaint, or
9 otherwise, indicated that they, in fact, wanted to put
10 on -- wanted to have doctors in their rooms, or to --

11 QUESTION: Well, we may have an overbreadth
12 problem.

13 MR. SHERWOOD: Excuse me?

14 QUESTION: We may have an overbreadth problem,
15 of course, and it depends on the meaning of the
16 regulation, and how are we to know what it means?

17 The testimony below, certainly gave it a very
18 broad interpretation. And, the district court appeared
19 to give it a rather broad interpretation. What are we
20 to make of that regulation?

21 MR. SHERWOOD: Well, I believe overbroad --
22 overbreadth is not here, Justice O'Connor. And there
23 are at least four reasons why overbreadth is not here.

24 First of all, it wasn't raised below in any --
25 in any sense.

1 QUESTION: well, it can certainly be offered
2 in defense of the judgment below, can't it?

3 MR. SHERWOOD: I believe that you have to have
4 preserved that claim, beyond that.

5 QUESTION: I didn't understand that. Do you
6 want to cite something to us?

7 MR. SHERWOOD: The cases that we've cited in
8 our applied brief, I, I admit, are Circuit Court cases.
9 We have not cited any Supreme Court cases that address
10 that beyond that.

11 QUESTION: This is commercial speech -- this
12 is commercial speech. The doctrine of overbreadth
13 doesn't apply at all, does it?

14 MR. SHERWOOD: I agree. As I said, there are
15 at least four reasons why overbreadth wouldn't apply
16 here.

17 QUESTION: And one of them is that?

18 MR. SHERWOOD: The first had to do with
19 non-preservation. The second has to do with the fact
20 that it doesn't apply -- overbreadth doesn't apply to
21 commercial speech. The third has to do with the fact
22 that this -- the challenge regulation here involves
23 conduct, not simply speech.

24 And, in Oklahoma and Broderick, that was a --
25 where you got that kind of circumstance, overbreadth

1 does not apply. And beyond that, the regulation here
2 could be invalidated as overbreadth only on a -- upon a
3 showing that it was substantially overbroad.

4 And then, this Court said, just last term, in
5 the New York State Club Association's case, you would
6 have to have a showing from the text of the regulations
7 an actual fact of a substantial number of instances
8 existing, in which the regulation cannot be applied
9 constitutionally.

10 I don't think that we have that here.
11 Otherwise, what this Court would do, and what courts are
12 obliged to do, is to solve those potential, extended
13 applications of a regulation on a case-by-case basis.

14 The students in this case -- that challenged
15 this regulation, never once, asserted any other interest
16 here, other than the fact that they wanted to host, or
17 listen to, demonstrations by American Future Systems.

18 And so, we believe that this is not a case in
19 which the overbreadth doctrine would apply.

20 The focus of this case has been on AFS'
21 demonstration. The case that was tried in the district
22 court focused on that.

23 Yes, there were a number of hypothetical
24 questions made of witnesses for the University, in which
25 they were asked, "what about doctors," "what about

1 tutors?" In one instance, there was a question asked,
2 "what about the sale of a bicycle, from one student to
3 another student?" And, you got conflicting testimony
4 there.

5 QUESTION: But the case or controversy -- the
6 issue here is product demonstrations?

7 MR. SHERWOOD: That's absolutely correct.

8 QUESTION: That's the application we're
9 talking about?

10 MR. SHERWOOD: Absolutely. And, that's all
11 that's before this Court, quite frankly.

12 QUESTION: Mr. Sherwood, can I ask you a
13 question about the procedure in the case?

14 After the Second Circuit decision, the case
15 went back and was tried, and then you lost it. Was the
16 district court's decision on remand ever reviewed by the
17 Court of Appeals for the Second Circuit?

18 MR. SHERWOOD: No. It was not. You're
19 talking about the October 8th, 1988 decision?

20 QUESTION: Yes.

21 MR. SHERWOOD: That -- no. We did not take an
22 appeal there. We moved in the district court for a
23 stay, because this Court had, on the very day that the
24 district court decided the case and granted cert, and to
25 my knowledge, the district court hasn't acted on that

1 motion yet. So, that's the posture that we're in here.

2 QUESTION: What did you lose in the district
3 court?

4 MR. SHERWOOD: After the Second Circuit
5 decided the case, the district court then applied the
6 commercial speech standard, as it was defined by the
7 Second Circuit, the Second Circuit having said that,
8 with respect to the fourth prong of the Central Hudson
9 test, that that involved a, a least restrictive means
10 test.

11 The district court said given our
12 justifications for having this regulation that we could
13 not meet that standard, and therefore, struck down the
14 regulation.

15 QUESTION: May I ask you, if in your view, the
16 record that we're permitted to look at in deciding this
17 case, includes what happened on remand, as well as what
18 was before the Second Circuit?

19 MR. SHERWOOD: I believe you could.

20 QUESTION: When we're reviewing the Second
21 Circuit decision, we can rely on matter that that court
22 had never even seen at the time of its decision?

23 MR. SHERWOOD: Well, the only thing that
24 exists beyond, in the district court, at this point,
25 beyond what the Second Circuit concerned was the

1 decision.

2 QUESTION: Wasn't there another evidentiary
3 hearing?

4 MR. SHERWOOD: There was not a hearing.

5 QUESTION: Oh.

6 MR. SHERWOOD: No. The district court here
7 simply decided that it would -- undertook to -- it got
8 back the mandate, and undertook to enter a decision
9 resolving the case.

10 QUESTION: But was there oral argument and
11 briefing at that time or --

12 MR. SHERWOOD: None of those.

13 QUESTION: You mean, you just got the remand?

14 MR. SHERWOOD: Got the remand and made a
15 decision.

16 QUESTION: What happens if you win here? If
17 your case is over in the --

18 MR. SHERWOOD: If we win here, we believe that
19 the case is over. We believe that we're entitled to, or
20 should receive, a reversal.

21 QUESTION: Well, no, but, what happens to the
22 judgment against you in the district court? It never
23 was appealed.

24 MR. SHERWOOD: I would imagine that we would
25 go back to the district court in that circumstance, and

1 seek to have the judgment vacated, in view of the
2 decision in this Court.

3 QUESTION: And if you lost?

4 MR. SHERWOOD: We would then seek to appeal
5 from the denial of our --

6 QUESTION: But what if you lost on the ground
7 that it had become final a long time ago, and it's too
8 late to redo it?

9 MR. SHERWOOD: Well, the district court does
10 have before it, a motion in our Part 4 stay, and we
11 assume that you would --

12 QUESTION: Which, it just hasn't acted on? Is
13 the injunction in effect now?

14 MR. SHERWOOD: I assume that it is in effect,
15 given that the Court has yet to act on our application
16 for the stay.

17 QUESTION: I see.

18 QUESTION: Could the district court overrule
19 us?

20 MR. SHERWOOD: I doubt it.

21 (Laughter)

22 MR. SHERWOOD: Well, it could overrule you,
23 instead by a vote --

24 QUESTION: They had the same case. Don't they
25 have the same case?

1 MR. SHERWOOD: Excuse me?

2 QUESTION: Don't they have the same case we
3 have?

4 MR. SHERWOOD: It is certainly the same case.

5 QUESTION: Well, you might have kept your --
6 you might have appealed this adverse judgment and kept
7 your case alive.

8 MR. SHERWOOD: We thought that we certainly
9 might have done that, but we thought the appropriate way
10 to approach the matter was to request to the District
11 Board, a stay, pending a determination by this Court.
12 After all, the court had -- this Court had granted cert,
13 and we're here now arguing the case upon that grant of
14 cert. So, we thought that it was appropriate, simply at
15 the district court to hold everything in abeyance.

16 QUESTION: But he hasn't?

17 MR. SHERWOOD: Rather than -- pardon?

18 QUESTION: But it -- the district court hasn't
19 done that?

20 MR. SHERWOOD: He doesn't anything one way or
21 the other.

22 QUESTION: Well, there's an Injunction
23 outstanding, isn't there?

24 MR. SHERWOOD: There is an injunction
25 outstanding, yes. But our motion has not been acted on.

1 We do have -- and that motion is -- we do have
2 motions also pending pursuant to Rule 59, I've been
3 reminded, and I believe that we don't have a need to
4 take an appeal while our motion is pending.

5 As applied to the underlying controversy in
6 this case, Resolution No. 66-156 of the Trustee, does
7 prohibit the holding of Tupperware parties in students'
8 dormitory rooms, and it is not, in any sense, a
9 reflection of any animus on the part of the University
10 against American Future Systems, or Mary Kay, or the
11 Fuller Brush Company, or any of the other hundreds, or
12 even thousands of direct marketing companies that
13 operate in the United States. Rather, the regulation is
14 intended to preserve the educational character of SUNY
15 campuses, and to respond to the safety and security
16 concerns on campus.

17 The Second Circuit recognized that these were
18 substantial interests. Now, even though the Second
19 Circuit correctly saw this case as involving commercial
20 speech, and not pure speech, it held that the regulation
21 would not be sustained, as I said before, because --
22 largely because the standard that it viewed to be
23 appropriate is the least restrictive means test.

24 It also sent back the case, by the way, for
25 the district court to make determinations with respect

1 to whether or not the regulation directly advanced the
2 state's interests.

3 The Respondents here, interestingly, do not
4 seek to make virtually no effort to defend that holding
5 -- that untenable holding of the district -- of the
6 Second Circuit. They assert, instead, that SUNY hasn't
7 proved that the regulation isn't more extensive than
8 necessary. For this reason, I want to focus largely on
9 the fourth aspect of the Central Hudson test.

10 As I've already mentioned, the regulation is
11 intended to promote the educational character of the
12 University's facilities, and to preserve the safety and
13 security on campus. To an extent, the regulation is a
14 prophylactic measure, which is designed to forestall a
15 perceived harm.

16 And these predictive judgments, we contend,
17 made by University officials who have both the authority
18 and responsibility for maintaining the campuses is
19 entitled to some deference unless there is a showing
20 that their actions here are unreasonable.

21 The only way that the University is going to
22 preserve, we submit, the educational character of its
23 campuses and avoid turning campuses into commercial
24 bazaars is to prohibit the operation of commercial
25 enterprises on campus.

1 AFS is just one of the many companies that
2 seeks to market directly to college students. Its
3 demonstrations last two to three hours. Each one of
4 them lasts two to three hours.

5 The Federal Court in Philadelphia found that
6 at Penn State, AFS managed to put on 51 product
7 demonstrations in just a two-week period.

8 One can see, pretty readily, that the prospect
9 of students seeking to earn incentives -- putting the
10 arm on their fellow students to -- to attend
11 presentations and purchase products, has a potential for
12 creating tensions among students and can alter the
13 character of the University.

14 In addition, the regulation is a way of
15 dealing with security risks on campus. A prohibition on
16 the operation of commercial enterprises has the effect
17 of limiting the number of strangers who come on to the
18 campus.

19 QUESTION: That would justify almost any rule,
20 wouldn't it?

21 MR. SHERWOOD: Security concerns?

22 QUESTION: Right. I mean, limiting the number
23 of people who come onto campus would justify almost any
24 rule.

25 MR. SHERWOOD: Well, this regulation now is --

1 where it seems to me that it is -- it is an appropriate
2 -- I guess it goes to the question as to whether or not
3 that's a substantial governmental interest. It seems to
4 me there is.

5 QUESTION: You're telling me you let people
6 come on campus for no reason, but you will not let them
7 come on for this reason? That helps your security?

8 MR. SHERWOOD: We're not attempting, Justice
9 Scalia, to turn a campus into a high-security facility,
10 by any means.

11 QUESTION: Well, I just don't see how this
12 furthers security at all. If you had rules only, only
13 the following categories of people are able to come on
14 to campus, then I could see, excluding this category is
15 for security reasons. But, as far as I understand the
16 state system, anybody can go on campus, so long as he
17 goes there for no reason. But, if he happens to come
18 for this particular reason, he can't go. It doesn't
19 seem to me that furthers security at all.

20 MR. SHERWOOD: Because -- well, in our
21 experience, at one of our campuses, there was a time,
22 when, under a permit system, people were permitted to
23 operate businesses in the campus quad. The number of
24 people coming on to campus, and actually functioning on
25 campus increased dramatically, because of the ability of

1 students to -- of those individuals who are not
2 students, to run businesses on campus.

3 When you have many, many more people on
4 campus, it is more difficult for the University to
5 monitor the campuses -- to monitor the campuses. And
6 that's particularly true where you're talking about
7 dormitories, where you have perfect strangers sort of
8 coming and going in and out of the dormitories all the
9 time. It is very difficult for the University to
10 provide security for on campus.

11 QUESTION: Aren't you being too general when
12 you talk about campuses? You know, it's a little
13 different between NYU and Columbia and Syracuse.

14 MR. SHERWOOD: That's -- certainly their
15 location makes a difference, Justice Marshall.

16 QUESTION: I mean, the public just walks right
17 through.

18 MR. SHERWOOD: Well, if, if, if you view the
19 quad at NYU to be Washington Square Park, I suppose
20 that's correct. But, we're talking here about -- this
21 is a University-wide regulation, and we're talking
22 about, for the most part, campuses that are in, in
23 locations where there are -- where there is a discrete
24 area set aside as a campus. While we don't want to
25 prevent students from having people come on to campus --

1 QUESTION: NYU has a campus, and Columbia has
2 a campus.

3 MR. SHERWOOD: NYU --

4 QUESTION: But it's in the middle of the city.

5 MR. SHERWOOD: Well, it's sort of around
6 Washington Square. Washington Square Park is a big park.

7 QUESTION: Well, Columbia is right on the
8 outskirts of Harlem, and I think that is not a, you
9 know, way off country place.

10 MR. SHERWOOD: That's true. But, even there --

11 MR. SHERWOOD: That's your law school, isn't
12 it?

13 MR. SHERWOOD: Excuse me?

14 QUESTION: I say that's your law school?

15 MR. SHERWOOD: Actually, NYU is, Justice
16 Blackmun.

17 QUESTION: That's right.

18 MR. SHERWOOD: But even if -- at a place like
19 Columbia, having people operate businesses there
20 increases pretty dramatically the number of people who
21 are strangers, unknown to the University or University
22 officials, coming on to campus. (Inaudible).

23 QUESTION: You gave us the first reason. I'd
24 like to go back. You gave us your first reason for this
25 regulation that it reduces the problem of one student

1 contacting another student for a commercial transaction?

2 MR. SHERWOOD: Yes.

3 QUESTION: Could you prohibit that directly?

4 MR. SHERWOOD: Could we prohibit directly --

5 QUESTION: Could you say it shall be unlawful

6 for one student to contact another student, with

7 reference to a commercial transaction?

8 MR. SHERWOOD: With respect to --

9 QUESTION: A commercial transaction.

10 MR. SHERWOOD: In other words, to simply talk
11 to another student about having a commercial transaction?

12 QUESTION: Yes.

13 MR. SHERWOOD: I don't think that's covered by
14 this regulation. It says that you can't operate a
15 business.

16 QUESTION: I'm asking you whether you could
17 prohibit that directly?

18 MR. SHERWOOD: Could we prohibit directly --

19 QUESTION: One student from contacting a
20 second student about a commercial transaction?

21 MR. SHERWOOD: I believe we could not and do
22 not wish to.

23 QUESTION: Well then, if you can't do it
24 directly, how can you argue that it's legitimate for
25 this ordinance to do it indirectly?

1 MR. SHERWOOD: Because the justification --
2 because the justification for this regulation really
3 isn't aimed at the speech itself.

4 I took your question to be can you prohibit
5 speech where your purpose is to, is to prevent the
6 speech in order, because of the content or some related
7 purpose -- something related to the context of the
8 speech?

9 QUESTION: You began by defending the rule as
10 saying that it prevents or diminishes the instances in
11 which one student contacts another student for a
12 commercial transaction. And then, I asked you, could
13 you do that directly, and you indicated that you can't
14 do that directly. Well, if you can't do it directly,
15 then how can you justify this ordinance for that
16 objective?

17 MR. SHERWOOD: Because if you have, as I
18 understand, this -- I took your question to be the
19 Linmark situation, in which, could one, for example,
20 prohibit "for sale" signs on the lawn? And, I believe,
21 you can't do that. You certainly cannot do that
22 directly, where the purpose is to affect what is
23 contained on the sign here.

24 What we are seeking to do in this circumstance
25 is -- our purposes, our justification for this program,

1 for this regulation, has to do with the secondary
2 effects that it associated with that kind of conduct.
3 We're not aimed at -- we're not aiming this regulation
4 at the speech itself.

5 We are really quite unconcerned with whether a
6 student wants to sell something to another student or
7 not. What we are concerned with is speech, plus in
8 person, and in person present on the campus, operating a
9 business. That's what we --

10 QUESTION: So, then you're not concerned with
11 one student soliciting another?

12 MR. SHERWOOD: We're not concerned with a
13 direct solicitation between one student or another.

14 QUESTION: (Inaudible) you make sure there's
15 enough time that students have to study?

16 MR. SHERWOOD: Well, we would certainly that
17 -- that's so as well, and that is a concern of ours, and
18 there is some testimony in the record with respect to
19 that.

20 However, where we are not, in any sense,
21 seeking to regiment the students -- how the students
22 conduct their out-of-class time.

23 QUESTION: Well, if they don't have a
24 Tupperware party, they could go to the movie. It isn't
25 as if they were going to study for sure, if they didn't

1 have a Tupperware party?

2 MR. SHERWOOD: That's true. They could go to
3 the movie if they want, or they could watch television,
4 or they could do many other things.

5 But, again, the purpose of this regulation
6 really isn't aimed at suppressing speech, as such.
7 We're aiming at some of its secondary effects, which
8 have to do with security concerns that we have, and also
9 the concern for preserving the educational character of
10 the -- of the campus.

11 QUESTION: Which includes eliminating
12 commercialism, in and of itself? You want to retain the
13 ivy-hall character of the place, right?

14 MR. SHERWOOD: We would like to retain --

15 QUESTION: You want to have the campus a place
16 not where business is done, but where academic pursuits
17 are pursued.

18 MR. SHERWOOD: That's correct. Which goes to
19 our, I suppose, to the second issue that I wanted to
20 discuss this afternoon, and that is, the justification
21 of this regulation as a time, place and manner
22 restriction. Because here, I think it's important to
23 remember that we're not seeking to ban commercial
24 activity.

25 Students and AFS can contact students in their

1 dorm rooms -- by telephone if they wish. They can use
2 campus newspapers; they can use radio; they can use mass
3 media. But, if they insist on "in-person" sales and
4 presentations, that is banned, and if they want to have
5 that kind of marketing, then they can do that at
6 locations right off the campus.

7 It is the -- it's the combination of both
8 speech with the physical presence that is our concern.
9 Speech alone is not the concern that we have.

10 QUESTION: I'm not clear that a time, place
11 and manner regulation is -- can be sustained if it's not
12 content neutral. I may be incorrect.

13 Do we have any cases where we sustained a
14 regulation on a time, base -- time, place and manner in
15 a regulation and it's not content neutral?

16 MR. SHERWOOD: I believe one of the
17 requirements that this Court has imposed, with respect
18 to time, place and manner restrictions, is precisely
19 that. That it be content neutral, and I would submit --

20 QUESTION: But, this isn't content neutral.

21 MR. SHERWOOD: Oh, it certainly is content
22 neutral, because defining what -- whether a particular
23 regulation is content neutral or not really goes to the
24 justification that's given for the regulation. Our
25 justification here is not aimed at the speech itself,

1 but rather at secondary effects that may be associated
2 with that speech, and so we are not here -- we don't
3 have the Linmark situation, as I mentioned before.

4 QUESTION: Well, you are just aiming at
5 commercial speech --

6 MR. SHERWOOD: Excuse me?

7 QUESTION: You are just aiming at commercial
8 speech? That's content oriented, isn't it?

9 MR. SHERWOOD: well, the fact --

10 QUESTION: And, not even all commercial
11 speech? You make exceptions for cultural events, for
12 dry cleaning, for laundry, for banking, barber,
13 beautician? I think you have to say there's some
14 content discrimination here?

15 MR. SHERWOOD: Well, again, as I understand
16 this Court's decisions, having to do with content
17 neutrality, you really look to whether or not the
18 justification given for the restriction is aimed at the
19 speech itself or whether it's aimed at some other
20 concern, having nothing to do with speech.

21 QUESTION: I thought you looked at what it
22 did. You have to look at what it says to determine if
23 it's content neutral. What does it prohibit, and what
24 does it not? How else could you interpret it?

25 MR. SHERWOOD: Well, one can, for example,

1 prohibit, prohibit camping, I suppose, in Lafayette
2 Park, where, and what was prohibited there is people
3 seeking to make -- to symbolically protest the plight of
4 the homeless. There is some reference to the content of
5 that kind of conduct. But, certainly, the Court, this
6 Court did not thereby say that one could not -- that
7 that kind of regulation is one that's not content
8 neutral, as I understand the Court's cases. I would
9 like to --

10 QUESTION: How about the Encyclopedia
11 Britannica salesman?

12 MR. SHERWOOD: Could a Encyclopedia Britannica
13 salesman come on campus and sell?

14 QUESTION: Uh-hum.

15 MR. SHERWOOD: I believe the answer to that is
16 no. And there, you're, you are talking about the
17 conduct of --

18 QUESTION: His job -- he's advancing
19 education. (Inaudible) allow him to do this.

20 MR. SHERWOOD: One can argue that he is
21 advancing education. That's true. But what he is
22 doing, in that circumstance, is selling his wares on
23 campus, and this rule applies to solicitations. I
24 should say, with respect to that, again, that none of
25 the Plaintiffs in this case have standing to raise that

1 kind of claim, because it is not addressed to.

2 The only thing -- the only harm that these
3 students have complained about, is the refusal of the
4 University to permit them to either host or to listen to
5 AFS presentations.

6 I'd like to reserve the rest of my time.

7 QUESTION: Thank you, Mr. Sherwood.

8 Mr. Reath, we'll hear now from you.

9 ORAL ARGUMENT OF HENRY T. REATH

10 ON BEHALF OF THE RESPONDENTS

11 MR. REATH: Mr. Chief Justice, members of the
12 Court:

13 I don't -- I have the benefit, I guess,
14 because I was trial counsel and I've been with this case
15 ever since it started -- that, in that sense, I know a
16 good bit more about the case than Mr. Sherwood.

17 Unfortunately, Mr. Sherwood has made several
18 statements to this Court, as to the underlying facts,
19 that just are not correct. And, I will correct them in
20 due order.

21 The one that I want to address immediately,
22 however, is his contention, that the students in this
23 case -- none of the students, at any time, he said,
24 raised the other issues such as the questions asked by
25 Justice Blackmun and others, about the right to have an

1 attorney, the right to have a tutor, and such things as
2 that.

3 Your Honors, at page 10 in my brief, I quote
4 from the testimony of Edward R. Detweiler, a student
5 government representative at SUNY-Cortland. "I became
6 interested," -- top of page 10 -- "I became interested
7 in this case, because of the infringement upon my
8 rights, my constitutional rights of assembly and
9 speech. It bothered me to know I couldn't invite
10 somebody such as an attorney or some commercial person
11 to my dorm."

12 And, then the same thing was said (Inaudible)

13 QUESTION: But, Mr. Reath, did he ever -- is
14 there any testimony that he ever did invite an attorney
15 to his dorm?

16 MR. REATH: No, sir, there was not, but again
17 Your Honor --

18 QUESTION: It was just a hypothetical concern.

19 MR. REATH: Your Honor, understanding issues,
20 Justice Stevens, there are a bulk of cases this Court
21 has said you do not have to run the risk of being
22 arrested or being held in contempt, or your rights at
23 the University being in jeopardy.

24 QUESTION: Are any of those commercial speech
25 cases?

1 MR. REATH: Excuse me, sir?

2 QUESTION: Are any of those cases commercial
3 speech cases?

4 MR. REATH: I can't -- I can't answer that.

5 QUESTION: So, I mean, there really isn't --
6 there is not an issue as to somebody trying to get a
7 lawyer, who was frustrated, is there?

8 MR. REATH: Well, Your Honor, there is an
9 issue. Because what we have, and I'll come to that in
10 just a moment. What we have here, is the way in which
11 the University took a regulation, which on its face said
12 you can't have commercial enterprises on campus, and
13 then totally distorted and turned it around against the
14 students, because if there's one thing that must be made
15 clear, and I think it makes this case so different in
16 terms of the legal impact of this case in Court's
17 earlier case, and otherwise, is this case, Your Honors,
18 is a right to listen case. It involves the students'
19 rights to listen and to invite whoever they want to come
20 into their room. Whether it's a lawyer, whether it's a
21 Tupperware party, whether it's Christmas cards --

22 QUESTION: Mr. Reath.

23 MR. REATH: Yes, Your Honor.

24 QUESTION: Does that take it out of the
25 commercial speech category?

1 MR. REATH: Well, I think you could say it
2 does. Because I think that when we have argued -- we
3 have argued that in our brief, sir, that --

4 QUESTION: And, that is your position here,
5 that this is not a commercial?

6 MR. REATH: No. I say that the Court doesn't
7 have to come to that. Because, either under the
8 commercial speech standard, or under core speech
9 standard, and following the four part test of Commercial
10 Hudson, which is what the Second Circuit did; which is
11 what the lower court did. We prevail entirely under
12 Commercial Hudson.

13 But, to answer your question, specifically,
14 Your Honor, we suggest in the brief an alternate
15 argument, which is -- that if you are looking at the
16 right to listen, and that is the right that is involved,
17 as the counterpoint to the right to speak, then the
18 motivation of the listener makes no difference, because
19 --

20 QUESTION: Well, that would -- that would
21 totally obliterate the difference between commercial
22 speech and what you refer to as core speech --

23 MR. REATH: I don't think so, Your Honor.

24 QUESTION: I haven't finished.

25 MR. REATH: Excuse me. Excuse me, sir, I

1 apologize.

2 QUESTION: There's always going to be a
3 listener for any commercial speech.

4 MR. REATH: And, Your Honor, what we're saying
5 is, that the right to listen, as a right, is a one on
6 one.

7 If I, as a student, want to have somebody come
8 to my room to tell me about law, about medicine, or
9 whatever subject I want, I, as a student, have that
10 right, which is the counterpart of the right to free
11 speech.

12 QUESTION: But, why should it be limited to
13 one on one? Why can't it be a right to listen to a
14 sound truck along with thousands of other people?

15 MR. REATH: Well, because that, Your Honor,
16 immediately conflicts with the right of everybody else
17 on the street.

18 And, you can't argue -- I mean, I agree with
19 Your Honor, that if you carried that right to listen
20 that far. But, what we're saying is, the right to
21 listen is in a one-on-one setting.

22 QUESTION: Well, who brought this suit?

23 MR. REATH: Your Honor, this suit was brought,
24 initially, by one student, Kathleen Rapp, who was the
25 person who was involved in the proceeding.

1 QUESTION: And, who wanted to do what?

2 MR. REATH: He wanted the right to invite and
3 have a Tupperware party in his room.

4 QUESTION: So, is that the issue? That's the
5 application of this regulation that we're talking about
6 here?

7 MR. REATH: Yes, sir. Now, what happened,
8 Your Honor, is that after we had extensive discovery,
9 and it came out, and in answer to one of the questions
10 about -- Mr. Sherwood said that there's nothing that
11 prohibits people from selling books and bicycles.
12 Absolutely wrong. The senior person for SUNY --

13 QUESTION: Yes, but was there -- were there
14 some intervening Plaintiffs?

15 MR. REATH: Yes, sir.

16 QUESTION: Who?

17 MR. REATH: A whole number of intervening
18 plaintiffs. The president of the Student Council,
19 Steven Gawley. Another member of the Student Council.
20 Several people who are very active in campus life, and
21 they all intervened, and SUNY objected to their
22 intervention.

23 QUESTION: So, what did they -- and these
24 other people had other interests, besides having
25 Tupperware parties?

1 MR. REATH: Absolutely. Absolutely. And,
2 that's the whole point. And, Your Honor, that's all
3 spelled out in our brief at pages 9 through 11.

4 QUESTION: Well, wasn't the AFS a party?

5 MR. REATH: Excuse me, Justice O'Connor?

6 QUESTION: Wasn't the company a party at one
7 time? AFS?

8 MR. REATH: They were, originally, Your
9 Honor. And then, what happened --

10 QUESTION: And, you represented the company
11 originally?

12 MR. REATH: I did represent the company.

13 QUESTION: And they dropped out?

14 MR. REATH: And they've dropped out. That's
15 correct. And then, what happened was, that when the
16 students saw the breadth and the scope of the
17 application of this regulation and saw how it applied to
18 an attorney coming into the room, to a medical doctor,
19 to a tutor --

20 QUESTION: Once they saw how it applied, did
21 any of these intervening Plaintiffs -- was any of them
22 turned down in their attempt to get a lawyer?

23 MR. REATH: Yes.

24 QUESTION: In their attempt to get a doctor,
25 or anything like that?

1 MR. REATH: Yes. Mr. Fox was turned down.

2 QUESTION: What do you mean was turned down?

3 MR. REATH: He was the original Plaintiff.

4 The others?

5 QUESTION: Yeah, Yeah, I'm talking about the
6 other ones.

7 MR. REATH: No, sir.

8 QUESTION: So, the only actual -- the only
9 actual application of this regulation that we have
10 before us, is preventing the Tupperware part?

11 MR. REATH: That is correct. But, on the
12 other hand, Your Honor -- may I just briefly refer to
13 the Court how this incident started, because, I think,
14 that when Your Honor sees how the incident started, you
15 will understand why the students would be very reluctant
16 to test and challenge the University in the way it
17 interpreted its regulation.

18 QUESTION: Could I just inquire, first of all
19 though, whether the student host was going to earn
20 something by virtue of hosting it?

21 MR. REATH: No, Your Honor. The student host
22 --

23 QUESTION: No credits, or no Florida trip or
24 something?

25 MR. REATH: There was an offer, Your Honor, of

1 a free Florida vacation. That was involved in the case
2 -- the testimony also shows that that --

3 QUESTION: And, some kind of \$50 discount?

4 MR. REATH: No, sir. No, Your Honor. Excuse
5 me.

6 QUESTION: No? The record doesn't support
7 that?

8 MR. REATH: There were no discounts, no
9 credits. The only -- only for someone who had already
10 been a purchaser. If someone had already been a
11 purchaser, and then they hosted a party, they would get
12 a credit.

13 QUESTION: And, the student host earns nothing?

14 MR. REATH: Nothing, Your Honor.

15 QUESTION: Nothing?

16 MR. REATH: Except the free Florida vacation.

17 QUESTION: Well, that's something, isn't it?

18 MR. REATH: Well, well --

19 QUESTION: I thought that was something.

20 Now, do you think, do you think the University
21 can prohibit students from conducting commercial
22 enterprises in their rooms?

23 MR. REATH: I think they can, but that's not
24 what is involved here.

25 QUESTION: Well, why isn't that a commercial

1 enterprise?

2 MR. REATH: This is not a commercial
3 enterprise, because the student is a host -- the student
4 is a bonafide host --

5 QUESTION: Well, the student's earning
6 something for it.

7 MR. REATH: Well, Your Honor, you can say that.

8 QUESTION: Yes.

9 MR. REATH: But, that is only one of many
10 instances that is involved in the issues before this
11 Court.

12 QUESTION: Well, what other instances are
13 involved? I thought your answer to Justice Scalia was
14 that the only area in which this regulation was actually
15 applied was to prevent this Tupperware party?

16 MR. REATH: Well, Your Honor, what happened --

17 QUESTION: Is that correct?

18 MR. REATH: Yes, Your Honor, but if I can
19 explain that what happened here was, that after the case
20 got started, we tried to find out what was the
21 regulation, how it was interpreted, how it was applied,
22 and who it would apply to. And, the senior person for
23 SUNY, who was presented by SUNY to explain and justify
24 and show what the amendment was and how it worked, was a
25 Mr. Hofstaeder. And, he was questioned. And, I asked

1 him these questions:

2 "Have you ever issued any clarifying
3 bulletins, explaining the interpretations of the words
4 in this regulation?" "No, I have not."

5 "Well, what would be your definition of a
6 private commercial enterprise?" Answer. "It would be
7 an organization that deals in a product, which the end
8 result would be the making of a profit for that group."

9 QUESTION: Who is this -- you're seeking to
10 give legal content to this regulation by the trial
11 testimony of whom?

12 MR. REATH: This is the pretrial testimony,
13 Justice Scalia, of the senior representative of SUNY,
14 who was produced by SUNY as that person who was
15 authorized to speak for and explain the application, and
16 how that regulation was filed.

17 QUESTION: What was his title? What was his
18 title?

19 MR. REATH: Excuse me, sir?

20 QUESTION: What was his title?

21 MR. REATH: His title was Assistant Vice
22 Chancellor for Educational Services, and also -- he also
23 had charge of security. And he was tendered under Rule
24 30(b) as the officer who was authorized to speak for
25 SUNY as to how this regulation applied. Now, here's

1 what went on:

2 "What about a service -- would a service be
3 included within that definition." Answer: "If it is a
4 service, outside services we already provide for, yes."

5 Question: "Supposing there was person who had
6 a private job counseling service, who, for a fee, would
7 counsel students regarding appropriate jobs and job
8 opportunities on graduation, would they be permitted to
9 come on campus, at the invitation of the student to meet
10 with one or more students in the privacy of the
11 student's room to learn about that service?" "No, they
12 would not." "Why is that?" The Answer: "This is
13 already provided."

14 Similarly, I asked this question: "If there
15 was a student, who had been given a small inheritance by
16 an aunt or some family representative, and that student
17 wanted to consult with a lawyer, as to his or her legal
18 rights, and wanted to use his or her dorm room as the
19 place for the meeting --"

20 QUESTION: What has this got to do with the
21 issue before us?

22 MR. REATH: Excuse me, sir?

23 QUESTION: What has this got to do with the
24 issue before us? We're trying to find out if this
25 regulation may validly be applied to preventing a

1 Tupperware party?

2 MR. REATH: Because, Your Honor, the way the
3 interpret -- the way the regulation is applied and
4 interpreted, and they went on to say that it includes
5 any person who seeks to provide information for a profit.

6 QUESTION: Well, it sounds to me like you're
7 disagreeing with the court of appeals. I thought the
8 Court of Appeals said this was a commercial speech case.

9 MR. REATH: The court of appeals did, Your
10 Honor, and we --

11 QUESTION: And you're saying, you're trying to
12 say that it isn't at all.

13 MR. REATH: No, I'm saying it is more than a
14 commercial speech case.

15 QUESTION: Well, yeah, but that isn't --

16 MR. REATH: It is a --

17 QUESTION: The court of appeals that said it
18 was only a commercial speech case.

19 MR. REATH: Well, we will accept that, Your
20 Honor.

21 QUESTION: Well then, there's no overbreadth
22 doctrine in commercial speech. So, no matter what this
23 regulation might have barred, that never actually
24 happened. If it can properly bar a Tupperware party,
25 that's the end of the case.

1 MR. REATH: Well, Your Honors, I believe that
2 this Court has the power to look at and take a practical
3 view of what is the regulation, and how the regulation
4 works.

5 QUESTION: But, you're going to -- if you want
6 to, if you want to have the case decided on a ground
7 that the Court of Appeals didn't use, and if that's
8 going to -- you can't do that if it's going to expand
9 your relief, and I would think saying this isn't a
10 commercial speech case but some other kind of a speech
11 case would give you a lot more than you won in the court
12 of appeals.

13 MR. REATH: Well, Your Honors, as I've said
14 before --

15 QUESTION: I have even a greater problem than
16 that. I'm not even sure that if you call it a
17 non-commercial speech case, by seeking to interpret the
18 regulation that way, it makes it such.

19 I'm not sure that our commercial speech cases
20 are doctrine -- that you cannot raise overbreadth in
21 commercial speech cases.

22 I think it looks to who the plaintiff is. If
23 the plaintiff is complaining about the restriction of
24 his commercial speech, that kind of a plaintiff cannot
25 use other hypothetical situations in justification of

1 his claim. And, you have here, a plaintiff who is
2 clearly complaining about commercial speech. Isn't that
3 right?

4 MR. REATH: That is right.

5 QUESTION: So, if that interpretation of our
6 overbreadth doctrine is correct, you just don't have any
7 claim for all these other cases you're worried about.

8 MR. REATH: Well, Your Honor, there are others
9 who have joined in the suit, who say that we want to
10 exercise these rights.

11 And, what I was trying to say to the Court
12 was, that what happened to the young lady who had
13 appeared on this initial demonstration, and I was about
14 to read that, and if I may take just a second to read
15 what happened. Because, what happened to her that day
16 and the very next day, shows a hostile attitude by the
17 University that is incredible, I think, when you think
18 of what the rights of students are to use their own dorm
19 rooms, within the privacy of their rooms, for whatever
20 purposes they wish, as long it is lawful, peaceful
21 conduct.

22 And here's what happened. She described how
23 she'd come in. She'd been invited by the girls to come
24 to present the party. She called up the night before,
25 said, "Do you still want the party?" "Yes," and she

1 came. And then, a dorm representative came, and said,
2 "You're not allowed to do this; you have to leave." And
3 she said, "well, I think that I do have a right, if the
4 girls want me to stay."

5 And here's what's said. "So, I said to the
6 girls," and I'm reading now from Joint Appendix 98,
7 "would you like me to leave? I would go gladly, but
8 otherwise, I feel what you are doing is both wrong and
9 illegal."

10 And then, what happened was, that she had
11 brought the campus policeman down -- the campus
12 policeman had come and he said, "You are under arrest.
13 Hands against the wall." And then what happened? What
14 did he do? "The girls were aghast, and my hands against
15 the wall, and then he handcuffed me, and by this time, a
16 crowd of students was gathering, and he marched me out
17 of the dorm, leaving all my things behind, went down to
18 the Public Safety Building and, still handcuffed, they
19 put me in a chair, in the middle of a room, and he said
20 to the one, another policeman, 'watch her.'"

21 Now, the next day, Your Honor, the next day,
22 Your Honors, she went back. She was very disturbed by
23 this incident. She had been there. The girls had asked
24 her to come. They wanted her to come. They were
25 interested in what she had to tell them about the

1 information and the product that she was offering.

2 And, she said -- so, she described what
3 happened. And, she met with one group, and then she
4 said as she was going down the hallway, she said, "They
5 were very indignant about what had happened, and about
6 being in a place where they were denied their
7 constitutional rights. And we were talking about it,
8 and they were writing up a petition, when, all of a
9 sudden, down the hall, came two SUNY policemen, marching
10 down the hall, and came up to the door where I had been,
11 knocked on the door, and said, "We understand Katy Rapp
12 is here." Then, the girls, not knowing what to do, said
13 she wasn't"

14 And at that point, Kathy Rapp said, "That's
15 not the way to handle this matter." She said, "And I
16 said, "well, this is not the way to conduct this to the
17 other girls in the room." So, I opened the door, and I
18 said, "You know, here I am," to the guards, to the
19 policemen. Are you looking for me? And, he said "You
20 are persona non grata on this campus." And, I was told
21 if you were back here, you would be subject to arrest
22 for criminal trespass.

23 QUESTION: Which is what had happened the
24 previous times?

25 MR. REATH: Yes. Now, the point that I think

1 you have to agree, that that is an incredible way to
2 treat a situation --

3 QUESTION: Well, she may have a tort action
4 for that here. Are you complaining about the excessive
5 use of force? About the handcuffs and all that? That
6 does seem excessive to me.

7 MR. REATH: No, I am not, Your Honor. I'm
8 explaining that under those circumstances --

9 QUESTION: But the issue is whether she should
10 have left when she was asked to leave. Isn't that the
11 only issue before us? Not the handcuffs, or all of that?

12 MR. REATH: No, I think the issue, Your Honor,
13 is --

14 QUESTION: Should she have left, when she was
15 asked to leave, because there was a valid regulation?
16 That's the only issue.

17 MR. REATH: And, or did that infringe the
18 student's rights to invite people to come to their room,
19 to use their room as their private space in which to
20 receive information?

21 QUESTION: Mr. Reath, why isn't the regulation
22 somewhat akin to a zoning regulation that's typical in a
23 lot of communities that says you can't conduct a
24 commercial enterprise in your home?

25 MR. REATH: I understand. Yes, Your Honor.

1 QUESTION: Now, why isn't that similar?

2 MR. REATH: Well, does that say, Your Honor,
3 that if you, or anyone else decided they wanted to have
4 Tupperware party in their one time, on one occasion,
5 that constitutes the conduct of a commercial enterprise
6 that violates the zoning?

7 QUESTION: Well, conceivably, it might.

8 MR. REATH: Excuse me?

9 QUESTION: Conceivably, it might. How many
10 times does it take to make it a commercial (inaudible) --

11 MR. REATH: Well, I think it certainly takes
12 more than one. I think it takes more than one. And,
13 here, you have the situation, and as a matter of fact,
14 the record shows that this was a one-time invitation.

15 We asked, in interpreting this regulation,
16 said that, "Supposing a student had a friend who, one of
17 the girls and her daughter -- her friend made sweaters.
18 And, she wanted to come, on one occasion, and sell those
19 sweaters in the dorm room to other friends. Would it be
20 permitted? Absolutely not, they said, because this
21 constitutes the operation of a commercial operation, and
22 I say that's absurd.

23 QUESTION: Mr. Reath, I thought one of the
24 issues -- the major issue in this case was whether or
25 not the least restrictive means test --

1 MR. REATH: It is, Your Honor.

2 QUESTION: -- is a proper and I can't -- I've
3 hardly heard a word about it from either side.

4 MR. REATH: All right. May I address that
5 right now, Your Honor?

6 Your Honor will recall that in Zauderer, you
7 wrote the opinion, in which you tracked the four-part
8 test of Commercial Hudson. Commercial Hudson says that
9 the truth -- the speech must be truthful, it must be --
10 it must advance the substantial interest, and we don't
11 dispute.

12 Number one, the truthfulness is not involved.
13 They've taken it out of the case. As far as it
14 advancing a legitimate, substantial interest, we concede
15 that. That's not an issue.

16 The third question is --

17 QUESTION: What is the interest that you
18 concede?

19 MR. REATH: Excuse me, sir?

20 QUESTION: What is the interest -- that you
21 concede?

22 MR. REATH: We concede that preserving the
23 academic atmosphere, or --

24 QUESTION: All right. So, you accept that as
25 a substantial interest?

1 MR. REATH: Of course. No question about it.
2 Of course it is.

3 QUESTION: All right. And, now what?

4 MR. REATH: Now, the question, the question
5 then comes as to prong 3 and prong 4.

6 QUESTION: All right, now, prong 3 --

7 MR. REATH: Prong -- yes, Your Honor.

8 QUESTION: You don't contest that one, do you?

9 MR. REATH: We do. And, as a matter of fact --

10 QUESTION: Here? You mean this regulation
11 doesn't further that substantial interest?

12 MR. REATH: And, as a matter of fact, Your
13 Honor, the court below found that from the evidence.
14 The court below, the judge, Judge McCurn, found it, and
15 also the Second Circuit averted to it.

16 I can direct Your Honors attention to that
17 finding. Because the one on preserving education
18 atmosphere -- Your Honor asked the question about
19 studying. And the testimony was that at SUNY, that
20 there is little or no studying done in the dorm rooms.
21 Not surprisingly.

22 And, here, Your Honor, and this is why the
23 University has backed off from that argument of academic
24 atmosphere. Here's what the handbook says. Here's what
25 the handbook that the University distributes to all the

1 new students -- It says, and it's undisputed. "Blaring
2 televisions and bickering statements do not a happier
3 student make. Distraction is the most common problem
4 when you study in your room. And it is a safe bet that
5 you will accomplish absolutely nothing in your dorm."

6 Now, the point is -- of course, there are ways
7 to preserve educational atmosphere, but, Your Honors,
8 the dorm room, the residential dorm room, is nothing
9 more than a boarding room in a boarding house --

10 QUESTION: Mr. Reath, do you think the
11 University could prohibit the students from having
12 televisions sets in their dorm rooms?

13 MR. REATH: That's a very interesting
14 question, Your Honor, that I don't think the Court has
15 to meet.

16 QUESTION: But, I should think that if they
17 could prohibit --

18 MR. REATH: I can't -- I don't believe the
19 University --

20 QUESTION: At least we found a question you
21 don't want us to reach, huh?

22 MR. REATH: No, I think, Your Honor, would
23 agree with me that there wouldn't be many universities
24 existing if they had such a rule. I suppose that if
25 they wanted to, to turn their dorm room into a monastic

1 cell, that they probably might have the power to do that.

2 QUESTION: Maybe they could even keep out
3 Tupperware.

4 MR. REATH: If they did everybody. But the
5 point is, that they cannot discriminate, Your Honor.
6 They cannot make a distinction here between social
7 guests and business guests.

8 And, that's what they do without any
9 justification, and Justice White, if I may, that brings
10 us to the fourth prong of the Commercial Hudson, which
11 is what you wanted to hear about.

12 QUESTION: And, finally, we're there.

13 MR. REATH: And, we're there.

14 QUESTION: Before you get there --

15 (Laughter)

16 MR. REATH: Yes, Your Honor.

17 QUESTION: Do they cook in these dormitory
18 rooms?

19 MR. REATH: I don't believe they can, sir.

20 QUESTION: Well, what in the world are they
21 using Tupperware for?

22 MR. REATH: Your Honor, this is products that
23 are sold on a hope chest concept, whereby the young
24 people -- the argument is made to them. "Look, instead
25 of wasting your money on pizzas and movies and junk

1 food, save your money. Now's the time to buy -- it's
2 not only cookware, it's --

3 QUESTION: Any connection with education?

4 MR. REATH: Excuse me, sir?

5 QUESTION: Any connection with education? Any?

6 MR. REATH: Well, it's very remote, Your Honor.

7 QUESTION: Miniscule.

8 QUESTION: Sir?

9 MR. REATH: The evidence shows -- the evidence
10 shows, Your Honor, that in these sessions, there is a
11 lot of informational -- a lot of information given about
12 nutrition, about cooking --

13 QUESTION: About education?

14 MR. REATH: Excuse me, sir?

15 QUESTION: Well, do they teach cooking in this
16 university?

17 MR. REATH: I'm sorry?

18 QUESTION: Do they teach cooking in this
19 university?

20 MR. REATH: I do not know. I would suspect
21 that at some universities they do.

22 QUESTION: Well, you said -- well, is
23 Tupperware anything else but cooking?

24 MR. REATH: Well, Your Honor, it's --

25 QUESTION: Do you use Tupperware for anything

1 other than cooking?

2 MR. REATH: Well, Your Honor, we are -- we're
3 talking throughout here about what's called a Tupperware
4 type --

5 QUESTION: Well, you're going into everything
6 under the sun. Let me get in there, too.

7 MR. REATH: Yes, sir.

8 Your honor, it's referred to as a Tupperware
9 type party. In fact, the product that was sold here was
10 cookware and china and tableware, the idea being to
11 build up, whether it's a trousseau, or a hope chest
12 concept.

13 QUESTION: You're talking big money. We're
14 not just talking a pot or a pan. What were the amounts
15 that they were getting students committed to -- \$6,000,
16 I forget the number?

17 MR. REATH: They were fairly substantial, Your
18 Honor, \$500 to a \$1,000.

19 QUESTION: Commercial enterprise -- there's no
20 doubt about that.

21 MR. REATH: Well, it -- again, I --

22 QUESTION: (Inaudible).

23 QUESTION: Justice White, he'll vote against
24 you if --

25 QUESTION: (Inaudible).

1 MR. REATH: Your Honor, the uncontradicted
2 evidence in this case, and this, I'm directing to
3 Justice Stevens, and the question of the least
4 restrictive test of Central Hudson.

5 Because, Your Honor, in Zauderer, and I might
6 point out --

7 QUESTION: Well, that isn't what -- that isn't
8 what Central Hudson said. It didn't say the "least
9 restrictive."

10 MR. REATH: Not Central Hudson didn't, Your
11 Honor, but the -- you said it --

12 QUESTION: Let's talk about Central Hudson.

13 MR. REATH: Well, I was talking about
14 Zauderer. Zauderer is -- Central Hudson says the least
15 restrictive.

16 QUESTION: But Central Hudson says "narrowly
17 tailored."

18 MR. REATH: Excuse me, "narrowly tailored," or
19 that is not --

20 QUESTION: That isn't the same thing.

21 MR. REATH: A less restrictive measure -- a
22 less restrictive measure will do. Now, Your Honor --

23 QUESTION: Is that what Central Hudson said?

24 MR. REATH: Yes, sir.

25 QUESTION: I thought it said "narrowly

1 tailored"?

2 MR. REATH: "Narrowly tailored," and it also
3 talks about a lesser restriction. Now, Your Honor, in
4 Zauderer --

5 QUESTION: Well, you don't think that
6 "narrowly tailored" means the same thing as "least
7 restrictive," do you?

8 MR. REATH: I think it does, Your Honor. And,
9 I would remind the Court that in the Central-Hudson
10 test, Your Honor, was "no more extensive than
11 necessary." And, if it's to be no more extensive than
12 necessary, the counterpoint to that, I submit is, the
13 least restrictive, and that's precisely what this Court
14 said in Zauderer.

15 And, may I read, Your Honor, from the Court's
16 opinion, which, which Justice White, you wrote. And
17 there, they were talking about the ban of the state bar
18 on commercial -- on commercial illustrations, and what
19 the Court said was, "The burden is on the state to
20 present a substantial government interest, justifying
21 the restriction as applied to appellant, and to
22 demonstrate that the restriction vindicates the interest
23 through the least restrictive available means.

24 Now, the evidence shows here, Your Honor, that
25 the overwhelming majority of colleges and universities

1 in the country solved this problem in a very simple
2 way. They say, "We will let the students decide," and
3 may I read to the Court from the rule that is followed
4 in the University of Illinois, which is representative
5 of the rules that are used in the mainstream of the
6 universities throughout the country, and here's what it
7 says, and it's so simple. It's easier to read than it
8 is to try to summarize.

9 And it says this, -- now, wait a minute, I'm
10 sorry, where is it -- where is the rule? The essence of
11 the rule is this: "One, we will not allow any itinerant
12 peddlers on to roam the halls," and we support that. No
13 peddling or uninvited solicitation, that is out.

14 Here it is. I'm reading from the record at
15 JA-93. "Sales representatives of commercial activities
16 are not allowed to go door to door." We support that.
17 That's the right, we believe, the right way to handle it.

18 "Call your resident advisor, or area office if
19 you see one in your area. However, you may invite a
20 sales representative to your room to see you, as your
21 personal guest, if your roommate agrees."

22 And then it goes on to say, "University
23 property cannot be used for commercial enterprises."

24 Now --

25 QUESTION: Mr. Reath, that may be fine for

1 some universities -- maybe most of them prefer that.
2 But, maybe SUNY wants to have a stricter rule, just as
3 some parents might want to send their children to
4 universities that have no parietal restrictions,
5 whatever -- that allow visitors in dorms of male or
6 female, at any hours. Other colleges don't. Now, you
7 made a statement, earlier, that the students were upset
8 that this deprives of their right to have a visitor in
9 their room. Whatever visitor they want.

10 Are -- doesn't the college have any -- have
11 any power to establish in dormitories, in which it's
12 acting, in loco parentis, for minor students, for many
13 of these colleges, certain reasonable rules?

14 MR. REATH: Absolutely.

15 QUESTION: And may that not vary from one
16 college to another?

17 MR. REATH: Absolutely, Your Honor. And, we
18 made that very clear in our brief, and I make it very
19 clear to this Court.

20 We do not challenge the University's right to
21 have reasonable restrictions on dormitories in use.

22 What the University cannot do is to prohibit
23 lawful speech. They cannot prohibit lawful speech in
24 the dormitory rooms.

25 If you think about it, a dormitory room is the

1 student's home. It is the only place where the student
2 can retire for the peace and privacy, and that is the
3 place where the student says, "I want to have the right
4 to invite people of my choice, to speak on topics of my
5 choice, without the University putting its ear to the
6 keyhole and without saying, "Oh, well, yes, you can
7 come. But, the moment that you start talking about
8 anything, other than social activities -- the moment you
9 talk about a commercial activity, out you go."

10 And, that's not right, Your Honor.

11 QUESTION: Could they set up a securities and
12 exchange office?

13 MR. REATH: Excuse me, sir?

14 QUESTION: Could they set up a securities
15 office?

16 MR. REATH: Absolutely.

17 QUESTION: To sell securities?

18 MR. REATH: Absolutely.

19 QUESTION: You think so?

20 MR. REATH: And in fact, Your Honor, the
21 record --

22 QUESTION: And that they couldn't stop that?

23 MR. REATH: They have every right to do that.
24 They should do that.

25 QUESTION: You think so?

1 MR. REATH: The record shows, Your Honor, that
2 in over half of the SUNY universities and colleges, they
3 have a checkpoint system, but they still --

4 QUESTION: No, Justice Marshall is asking
5 about stock, securities --

6 MR. REATH: Excuse me, sir?

7 QUESTION: Stock, securities. Not security --
8 securities.

9 QUESTION: Stocks and bonds?

10 MR. REATH: Oh, excuse me, sir, I'm sorry.

11 And, the question was, can -- could they sell them?

12 QUESTION: Yes.

13 MR. REATH: Not at the state campus.

14 QUESTION: Well, what do you say?

15 MR. REATH: I think that if the state --

16 QUESTION: Do they have a right to?

17 MR. REATH: I think they have a right to
18 receive somebody. To hear their proposition, whether
19 they are selling Christmas cards, or silk stockings, or
20 securities.

21 QUESTION: (Inaudible) get to the end. Horse
22 race betting.

23 MR. REATH: Well, I'm not sure how that would
24 fit into this?

25 QUESTION: Did you have any trouble with it?

1 MR. REATH: Well, Your Honor, If it's a lawful
2 activity, they have a right to have speech relating to
3 the lawful activity. And, I think that's the position
4 we take.

5 QUESTION: Thank you Mr. Reath.

6 Mr. Sherwood, you have one minute remaining.

7 REBUTTAL ARGUMENT OF O. PETER SHERWOOD

8 MR. SHERWOOD: I just wanted to say one thing.

9 This regulation has been around for over 20
10 years, and there's no evidence anywhere in this record,
11 that that regulation has ever been used, or applied to
12 pure speech on any SUNY campus.

13 Thank you.

14 QUESTION: Very well. The case is submitted.

15 (Whereupon, at 1:57 p.m., the case in the
16 above-entitled matter was submitted.)

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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. 87-2013 - BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, ET AL.

Petitioners V. TODD FOX, ET AL.

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

BY alan friedman

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