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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION:

FORT WAYNE BOOKS, INC., Petitioner v. INDIAN
ET AL.; and RONALD W. SAPPENFIELD, ET AL.,
Petitioners v. INDIANA

CASE NO:

87-470 and 87-614

PLACE:

WASHINGTON, D.C.

DATE:

October 3, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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FORT WAYNE BOOKS, INC., :

Petitioner :

v. : No. 87-470

INDIANA, ET AL.; :

and :

RONALD W. SAPPENFIELD, ET AL., :

Petitioners :

v. : No. 87-614

INDIANA :

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Washington, D.C.

Monday, October 3, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 o'clock p.m.

1 APPEARANCES:

2 JOHN M. WESTON, Beverly Hills, California, on behalf of
3 the Petitioners.

4 STEPHEN GOLDSMITH, Prosecuting Attorney for Marion
5 County, Indiana, Indianapolis, Indiana, on
6 behalf of the Respondents.

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JOHN H. WESTON, ESQ.	
On Behalf of the Petitioners	4
STEPHEN GOLDSMITH, ESQ.	
On Behalf of the Respondents	30

1 (12:59 p.m.)

2 P R O C E E D I N G S

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on Number 87-470 Fort Wayne Books, Inc. versus
5 Indiana, and Number 87-614, Sappenfield versus Indiana.
6 Mr. Weston, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF JOHN H. WESTON

8 ON BEHALF OF PETITIONERS

9 MR. WESTON: Mr. Chief Justice, and may it
10 please the court, recently in Hustler Magazine versus
11 Falwell, this Court reaffirmed the need to give adequate
12 breathing space to First Amendment freedoms in order to
13 protect them. These cases before the Court this
14 afternoon raise an essential element of that protection,
15 the right to be wrong.

16 Today's cases involve book stores, but this
17 Court's decision will unquestionably touch and affect
18 newspapers, publishers, the motion picture industry,
19 television and radio broadcasters and religious and
20 political organizations. In short, anyone or anything
21 who or which engages in conduct presumptively protected
22 by the First Amendment.

23 Ultimately, its greatest impact will be on the
24 American public's right to receive vast quantities of
25 protected expression. If these statutes are sustained,

1 the protective bulwarks surrounding First Amendment
2 freedom so painstakingly crafted by this Court will
3 crumble.

4 Affirming the judgments below would eviscerate
5 the longstanding prior restraint and chilling effect
6 doctrines --

7 QUESTION: Mr. Weston, in Sappenfield there
8 wasn't any seizure, was there?

9 MR. WESTON: That's correct, your Honor.

10 QUESTION: So, what is going to chill people
11 about simply upholding the possibility of prosecuting
12 under the statute?

13 MR. WESTON: But in Sappenfield, your Honor,
14 although it was brought pursuant to the Indiana criminal
15 RICO statute, the civil RICO statute is a direct adjunct
16 of that and given the collateral estoppel provisions of
17 civil procedure, forfeiture and subsequent restraint and
18 so forth are automatic upon conviction. The chilling
19 effect regarding the Sappenfield statute which has been
20 discussed and which we will discuss, involves the facial
21 presence of the potential enormously high jail sentence
22 in connection with engaging in conduct, a presumptively
23 protected by the First Amendment --

24 QUESTION: But, peddling obscenity is not
25 presumptively protected by the First Amendment.

1 MR. WESTON: No. Of course, your Honor.
2 Obscenity is not protected by the First Amendment. But
3 speech, up until the moment it is determined to be
4 obscene, is surely protected by --

5 QUESTION: Nothing happens to these people in
6 Sappenfield until there is a determination.

7 MR. WESTON: That's correct, your Honor, except
8 to the extent that someone like Sappenfield, a book
9 seller, or someone in another endeavor subject to the
10 possible application of obscenity law faced with the
11 draconian potential sanction of eight years in a
12 criminal jail sentence for violation of the statute,
13 which at best is inelastic with a limited scienter
14 standard, will certainly think more than twice before
15 electing to deal with sexually oriented material.

16 QUESTION: Well, what if an ordinary obscenity
17 statute simply provided for an eight-year term?

18 MR. WESTON: That question, of course, your
19 Honor, is not specifically before the Court, but
20 certainly raises in --

21 QUESTION: Well, you would be making the same
22 argument.

23 MR. WESTON: A similar one. Although, quite
24 frankly, under the Indiana RICO statute, particularly in
25 light of the semantical complication of the traditional

1 RICO language and some greater elastic language under
2 the scope provisions of the statute, there is probably a
3 broader reach and a greater vagueness problem that might
4 attend the usual Miller standard.

5 But, to deal with the Court's question, Justice
6 White, you're quite correct. That the argument that we
7 make with respect to the potential chilling effect of
8 high penalties is one which would be equally applicable
9 to a general obscenity statute.

10 QUESTION: Do we have a final judgment here?

11 MR. WESTON: We have final judgments, your
12 Honor, with respect -- Justice Blackmun, to the issues
13 raised in the courts below. That is to say, that the
14 Indiana Supreme Court considered and approved in a final
15 judgment all of the pretrial sanctions which were
16 utilized and available, all of the post-trial sanctions
17 which were the basis anticipatorily for the pretrial
18 sanctions, and also the principle that conduct at one
19 bookstore in a chain may be visited in terms of effect
20 on other bookstores in the chain.

21 With respect to Sappenfield in the court of
22 appeals, the challenges to the facial constitutionality
23 of the criminal RICO statute had been made in the trial
24 court and in the appellate courts and they were rejected
25 by the court of appeals in a rather brief opinion based

1 on the Fort Wayne decision in the Indiana Supreme Court.

2 So, under this court's decisions, the matters
3 were certainly rendered to the highest courts in the
4 state to consider them, were decided by those courts,
5 and in terms of the overriding federal interest at stake
6 here, would not be aided by remanding the causes to
7 trial where further proceedings might occur which would
8 prevent those issues from --

9 QUESTION: Mr. Weston, did any of the
10 respondents or the defendants in the Sappenfield case
11 even indicate with us an interest in pursuing the case
12 here?

13 MR. WESTON: I beg your pardon, Justice
14 O'Connor. I'm sorry, I'm missing your point.

15 QUESTION: Well, none of the parties in the
16 Sappenfield case, 4447 is it? Corporation?

17 MR. WESTON: Oh, I beg your pardon --

18 QUESTION: Had indicated any interest in
19 pursuing their matter?

20 MR. WESTON: Not in Sappenfield, Justice
21 O'Connor. There are theoretically three cases before
22 the court.

23 QUESTION: In the 4447 case --

24 MR. WESTON: That is correct, your Honor.

25 QUESTION: -- is anyone here at all on that

1 case?

2 MR. WESTON: That is correct, your Honor. No
3 defendant below in the 4447 has filed a direct
4 appearance in this court. An individual who was named
5 as a defendant, Burk Mendenhall did file an amicus brief
6 in this Court in this cause e but is not a direct party.

7 QUESTION: Okay.

8 QUESTION: Mr. Weston, I understand you can
9 make facial challenges, but don't your facial challenges
10 have to pertain to a portion of the statute that's been
11 applied against you? As I understand it, some elements
12 of the scheme here have not yet been applied against
13 anybody, in particular the prohibition against an
14 individual's engaging in the same business again.

15 MR. WESTON: That is correct.

16 QUESTION: Nobody has been subjected to that.
17 Isn't that right?

18 MR. WESTON: No one has been subjected to it
19 except the complaint which remains in the Fort Wayne
20 case retains that prayer. The Indiana Supreme Court
21 specifically held that all of the available sanctions
22 under the statute were constitutional, raising no First
23 Amendment questions in specific rejection of the opinion
24 which invalidated the entire statute on its face with
25 specific focus on those remedies rendered by the court

1 of appeals.

2 As well, In the original 4447 case, which as
3 Justice O'Connor points out, is not really before the
4 court, the original complaint sought the general
5 injunctive remedies. Although there was an amended
6 complaint filed four or five weeks later which abandoned
7 that request.

8 But the Indiana Supreme Court, your honor,
9 Justice Scalia, has clearly upheld the full panoply of
10 remedies as against specific lower court judges.

11 QUESTION: I understand that. I just want to
12 know whether that was before the Indiana court.

13 MR. WESTON: Absolutely. Without question.

14 QUESTION: In both of these cases that are up
15 here there was a prayer to enjoin the parties from
16 engaging in the business in the future?

17 MR. WESTON: Not in Sappenfield, which was
18 exclusively a criminal prosecution with none of the
19 injunctive or civil type remedial provisions available.

20 However, in Fort Wayne, unquestionably the
21 complaint sought such a remedy. It is live. It is part
22 of the complaint. The original 4447 complaint,
23 subsequently amended to omit it, did include that,
24 and the Indiana Supreme Court specifically approved all
25 of the panoply of remedies available under the statute.

1 Again, if I just may finish the point, in
2 Sappenfield it is automatic that following conviction,
3 should one occur, there will be a civil forfeiture and
4 the entire -- and under collateral estoppel principles,
5 nothing can be raised by the defendant and there will
6 automatically be full forfeiture with the full panoply
7 of the remedies, at least if nothing is disturbed in
8 light of the --

9 QUESTION: But we wouldn't know what remedies
10 in fact would be selected or used by the court. Is that
11 right?

12 MR. WESTON: I suppose that's true, except to
13 the extent that under the Indiana court -- under the
14 Indiana statute forfeiture is mandatory subject to in
15 essence a conviction or --

16 QUESTION: If the items forfeited were the
17 product of illegal activity.

18 MR. WESTON: Oh, no, Justice O'Connor. Quite
19 much more broadly so. One would have hoped that that
20 would have been the ruling. But it's very, very clear.
21 And I might add that of course the court of appeals in
22 Arizona, in Arizona versus Feld, so construed and
23 limited its RICO obscenity predicated statute to limit
24 only specific proceeds attributable to materials found
25 to be obscene in appropriate litigation. It's very

1 clear, both in --

2 QUESTION: No. What if -- What if under the
3 state RICO law, let's say, the predicate offenses are
4 dealing in narcotics and the products are funnelled into
5 a bookstore?

6 MR. WESTON: Oh, well, there's certainly no
7 question about that.

8 QUESTION: The contents of the bookstore --

9 MR. WESTON: Of course, Justice O'Connor.

10 QUESTION: -- can be forfeited.

11 MR. WESTON: And really that's like -- that's
12 the Arcara type situation in a way because there there
13 would have been no speech conduct, no expressive conduct
14 at all as the predicate offense. Whatever proceeds
15 flowed from that would certainly be subject to scrutiny
16 under legislation which already exists.

17 QUESTION: And what difference does it make if
18 the predicate offenses are obscenity convictions instead
19 of drug, narcotics convictions?

20 MR. WESTON: Well, as I thought your concurring
21 opinion made clear in Arcara, Justice O'Connor, that
22 where the predicate conduct was expressive, then, of
23 course, a full First Amendment standard of review would
24 be required in order, aside from all the obvious
25 reasons, to make sure that there was no interference

1 with speech based on a desire to thwart the speech.

2 QUESTION: Well, required for what? For the
3 initial pretrial seizure?

4 MR. WESTON: No. One would think not only for
5 the initial pretrial seizure, but for an examination of
6 what the available post-trial remedies might be. For
7 example, by the time Arcara reached this court, it was
8 certainly in the position of a post-trial situation
9 after the full order had been issued with the court
10 examining the question.

11 So, if the First Amendment concepts have any
12 meaning whatsoever, if the principle of Near versus
13 Minnesota and Citizens for a Better Austin versus Keefe
14 have any meaning what those unbroken -- what that
15 unbroken line of cases tells us -- and, of course, there
16 are almost no examples challenging it.

17 QUESTION: I'm sorry to interrupt you.

18 MR. WESTON: No, not at all, Justice.

19 QUESTION: But, what is the status of 1447
20 Corporation, ISSI Theater Corporation, Plaza
21 Entertainment Center and Burton Gorlick? Are they
22 before us at all?

23 MR. WESTON: They are not, your Honor. As a
24 matter of formal notice, when Fort Wayne Books filed its
25 petition for certiorari, it was required to give notice

1 to those individuals, which we did. There has been no
2 response -- in individuals and corporations -- there has
3 been no response with respect to those individuals
4 asking to be litigants before this honorable court.

5 QUESTION: So all that we have, in your view,
6 in any event, is Fort Wayne Books and Sappenfield?

7 MR. WESTON: That is the position that --
8 certainly with respect to my representation, your Honor.

9 QUESTION: Thank you.

10 MR. WESTON: If the principles of prior
11 restraint, if the principles of Near and Austin have any
12 significance, they represent a basic governing concept
13 which has ennobled this country's history almost from
14 the beginning. And that is that one may not lose one's
15 right to speak by virtue of speaking. That if books or
16 magazines or films, or any other -- or newspapers, or
17 any other expressive entity or matter is going to be
18 suppressed, it must be so only by virtue of its own
19 validity or invalidity.

20 QUESTION: You can't use that -- you can't lose
21 that right even by virtue of something other than
22 speaking. I mean, I supposed you can't make it a
23 penalty for a narcotics trafficking that you can't make
24 speeches anymore.

25 MR. WESTON: I would agree, Justice Scalia.

1 QUESTION: Right? So what the problem is is
2 the remedy and not the crime that invokes the remedy.

3 MR. WESTON: Certainly at a major level,
4 absolutely. The remedy, of course, in these situations,
5 as was first articulated in Near is absolutely
6 inappropriate regardless of whatever the determination
7 may be with respect to the predicate offense.

8 The question with respect to whether obscenity
9 may still be criminalized or rendered illegal is not
10 necessarily before this court in terms of the questions
11 we raised. The court is quite correct. Certainly with
12 respect to the civil RICO statute, the biggest concern
13 expressed is indeed with the remedy.

14 But, nonetheless -- or, to follow along with
15 the same concept, these cases present what must be the
16 most egregious violations of prior restraint. And when
17 I say these cases, particularly with respect to Fort
18 Wayne Books and the facts which I guess are not formally
19 before the court in the --

20 QUESTION: Including Sappenfield within the
21 term of "these cases" presenting egregious violations?

22 MR. WESTON: No, your Honor, that was the point
23 I was trying to cut back from to make --

24 QUESTION: Well, perhaps you shouldn't use the
25 term "these cases." Maybe you should say "this case."

1 MR. WESTON: That would be a better approach,
2 Mr. Chief Justice. Yes. Thank you.

3 With respect to the forfeiture provisions, the
4 cases which raised the forfeiture provisions, they
5 appear to present the most egregious violations of the
6 Near principles and the prior restraint principles based
7 on expressive conduct challenged by the state, vis-a-vis
8 virtually unlimited examples of unlitigated,
9 unchallenged other books, magazines, films, and the
10 opportunity to express other sorts of --

11 QUESTION: Well, Counsel, of course, if you
12 sentence someone to jail for ten years, his or her
13 speech is chilled during that time. It's more difficult
14 to speak when you're in jail.

15 MR. WESTON: Yes, Justice Kennedy. No question.

16 QUESTION: And in this case, focusing just on
17 the pre -- on the post-adjudication seizure for the
18 moment, suppose that a bookstore is engaged in selling
19 other items too and just those other items are seized.
20 Or a grocery store is selling a few books and all the
21 grocery assets are seized. Is that a prior restraint
22 after an adjudication of obscenity?

23 MR. WESTON: It would depend, it seems to me,
24 on what funds were utilized in order to justify the
25 seizure.

1 QUESTION: Well, suppose they're within the
2 statute. Their proceeds did derive from the operation,
3 and you seized all of the operation other than the books.

4 MR. WESTON: Would the funds, however, that
5 were utilized --

6 QUESTION: Yes.

7 MR. WESTON: Is this in terms of a proceeds
8 tracing statute or some sort of contagion?

9 QUESTION: This is under this statute after an
10 adjudication of sales of obscenity.

11 MR. WESTON: It would appear --

12 QUESTION: And you show that the proceeds are
13 derived from the operation.

14 MR. WESTON: If there were six books, six books
15 alleged to be obscene, found to be obscene, generated a
16 certain sum of money, that money, under procedural
17 safeguards, could be traced and utilized to forfeit
18 either that sum or that which they had acquired.

19 QUESTION: And is that consistent with the
20 First Amendment?

21 MR. WESTON: It would appear to be, under
22 appropriate procedural safeguards such that only
23 proceeds from materials specifically found, specifically
24 delineated, challenged, and judicially determined to be
25 obscene --

1 QUESTION: All right. Now, suppose, to take it
2 the next step, the purchase is for more books. Could
3 the books be seized?

4 MR. WESTON: Again, under appropriate
5 procedural safeguards there is no necessary First
6 Amendment barrier to tracing funds from specifically
7 delineated materials found to be obscene which generated
8 those proceeds.

9 The problem with the hypothetical which your
10 Honor proposed is that if there were a hundred books in
11 the store, six were alleged to be obscene, six were
12 found to be obscene, and the proceeds from those six
13 books resulted in \$15.00, it would be a First Amendment
14 violation to attempt to interdict or forfeit, or do to
15 anything with the proceeds from materials not found to
16 be obscene. And that was why I asked --

17 QUESTION: It's a First Amendment violation
18 only? So that if it's a drug case, I assume you can
19 seize all the assets?

20 MR. WESTON: Your former brother on the Ninth
21 Circuit, Judge Kozinski, of course, in Busher has raised
22 a proportionality question in terms of other
23 circumstances. But I would like to direct our own focus
24 this afternoon to the First Amendment consideration.

25 QUESTION: But you have to explain why the

1 First Amendment is the limiting principle. If this
2 statute is permissible as to contraband other than
3 speech or alleged speech, why can't it be applied to
4 obscenity after an adjudication? Because obscenity, as
5 we know, is not protected speech.

6 MR. WESTON: That is correct, your Honor. And
7 with respect to obscenity we are -- and perhaps I did
8 not make myself clear, but we're not questioning under
9 appropriate procedural safeguards the ability to track
10 proceeds from material specifically determined to be
11 obscene.

12 What we object to and what it appears that the
13 court's decisions have prohibited, is the use of funds
14 from materials not determined to be obscene to be
15 forfeited because other materials have been determined
16 to be obscene and their proceeds may be subject to
17 forfeit.

18 QUESTION: Why is that? I don't understand.
19 Let's assume that all of these proceeds from the sale of
20 non-obscene materials add up to a million dollars.
21 You're saying you can't do that because that million
22 dollars didn't come from the obscene sales. But you
23 acknowledge that you can impose a fine of a million
24 dollars.

25 MR. WESTON: Well, we acknowledge --

1 QUESTION: What's the difference whether you
2 call it one or call it the other?

3 MR. WESTON: We acknowledge that a fine may
4 statutorily be authorized. We certainly do not
5 acquiesce in the notion and light of the potential First
6 Amendment challenge to such high fines on the same basis
7 that the chilling effect would arguably invalidate the
8 potential for a high jail sentence under the present
9 state of the Miller test and the limited scienter
10 standard.

11 With respect, also, Justice Scalia, to the
12 possibility of a high fine, at least it's subject to
13 analysis. In other words, that the high fine will not
14 necessarily be applied, it may be examined. And to the
15 extent, even under traditional sentencing criteria, that
16 it may have the impact of closing down a business, it in
17 itself is subject to reduction or First Amendment
18 scrutiny. Not terribly different from the notion that
19 some courts have begun to apply in terms of punitive
20 damages in defamation cases, for example, or invasion of
21 privacy cases where to do so would tend to close the
22 business.

23 But there is another limited --

24 QUESTION: Well, let me ask one other question
25 before you go on.

1 MR. WESTON: Sure.

2 QUESTION: This line between proceeds and
3 non-proceeds. That isn't a line that's adopted in the
4 Federal RICO statute either, is it?

5 MR. WESTON: Not at all.

6 QUESTION: The Federal RICO statute does not
7 require that it be derived from proceeds of the unlawful
8 --

9 MR. WESTON: It's unclear. In the one case --
10 the one Federal case which discussed this issue, United
11 States versus Priva, the prejudgment opinion of the
12 court appears to limit the reach of the forfeiture to
13 proceeds from materials determined to be obscene.

14 Subsequently, at the time of forfeiture,
15 however, it became very clear that the court's
16 interpretation had changed and the statute was applied
17 to reach the entire panoply -- or, the entirety of the
18 assets. But, really, not so much on a proceed tracking
19 theory as much as an equally impermissible contagion
20 theory. Somehow that a book on a shelf presumptively
21 protected, never alleged to be obscene, somehow acquires
22 an obscene character by virtue of the fact that it's
23 neighbor was alleged to be obscene and determined to be
24 obscene.

25 QUESTION: It doesn't have to have an obscene

1 character. We're punishing you by taking away from
2 you. Just as we're punishing you by making you pay a
3 million dollars. It's not that the million dollars is
4 obscene or that there is anything evil about the million
5 dollars. But that's just the punishment we've selected.

6 MR. WESTON: Well, let me suggest, with respect
7 to that possibility. Certainly in Times versus Sullivan
8 this Court considered a relatively similar potential
9 application of the same doctrine. A very large series
10 of state judgments for expression deemed to be
11 unprotected.

12 The Court viewed the potential possibility and
13 concluded clearly that in terms of the potential for
14 chilling effect and the harm to publication and to First
15 Amendment interest, the unrestricted potential for
16 imposing that kind of damage award required a higher
17 scienter standard. And such was imposed, and that was
18 the way the chill was dissipated.

19 The circumstance that we face here, obviously
20 with an equally low scienter standard, or perhaps even a
21 lower one and a more difficult to apply definition for
22 the alleged wrongdoing may also require a heightened
23 standard. My point being not that that necessarily
24 answers the question of why a fine is okay and something
25 else is not, but simply that the court will not cast a

1 blind eye to what the realities are of the circumstance.

2 I would also point out with respect to what the
3 social interests are involved that it is not only the
4 interests of the book seller that is being protected,
5 but what is protected in this circumstance is the
6 reciprocal right of the public to be able to receive
7 presumptively protected material. And the notion of
8 simply forfeiting unlitigated material removes such
9 material from the public.

10 On the one hand, it might be an acceptable slap
11 at the -- when I say acceptable, from the point of, say,
12 law enforcement -- an acceptable slap at the individual
13 who is the seller, but it would be inevitably the public
14 that would be the loser.

15 QUESTION: Well, Mr. supposing a drug kingpin
16 were laundering his money in a chain of bookstores,
17 would that mean that those bookstores and the proceeds
18 were not subject to forfeiture the same as if he were
19 laundering his money in a bunch of grocery stores?

20 MR. WESTON: No. Absolutely not, your Honor,
21 as I thought I had explained to Justice O'Connor. The
22 predicate conduct is what makes the significant
23 difference. If the predicate conduct is not expressive,
24 is not speech, then what is generated from that conduct
25 may be, under appropriate procedural safeguards, tracked

1 and dealt with as appropriate.

2 QUESTION: And what if predicate conduct is
3 obscenity?

4 MR. WESTON: And we have indicated that to the
5 extent that the predicate conduct is obscenity, that
6 with, again, appropriate protections, the material may
7 be prosecuted, the material may be subject to scrutiny,
8 and proceeds from the specific materials are subject to
9 tracing and ultimate forfeiture.

10 What has been done in these cases is simply to
11 deal with it as if it were contagious. And to forfeit
12 unlitigated materials and assets from presumptively
13 protected unchallenged materials and simply forfeit them
14 by virtue of their being on the same premises.

15 QUESTION: But, Mr. Weston, is it clear that
16 that remedy would be entered at the end of a
17 proceeding? I didn't read the Indiana Supreme Court
18 necessarily going that far. It speaks in terms of
19 disgorging assets acquired through racketeering
20 activity. And if you have, say, ten percent of the
21 bookstore's inventory is obscene and 90 percent is
22 non-obscene, and, say, they could prove that 90 percent
23 of the assets were perfectly lawful and not the proceeds
24 of the sale of the ten percent, are you sure they could
25 forfeit the whole bookstore?

1 MR. WESTON: Under the Indiana Supreme Court
2 opinion, it appears, your Honor, very clear that they
3 could do so. And one of the judges --

4 QUESTION: Well, it appears they could ask for
5 a remedy. I'm not so sure. This, perhaps, goes to the
6 question of finality too. You think it's perfectly
7 clear that under the statute if they prevail and prove
8 that anything in the store is obscene that the remedy
9 automatically will follow and that they can seize the
10 entire inventory?

11 MR. WESTON: Yes, Justice Stevens.
12 Unquestionably because that issue was before the Indiana
13 Supreme Court and when I argued the cause before the
14 Indiana Supreme Court I made that point. That in the
15 Indiana situation there were eight items alleged to be
16 obscene with a possible value of something like \$200.
17 I'm just guessing.

18 The material that was sequestered and held in
19 the closed bookstore in Indianapolis exceeded that sum
20 by exponential figures. It was very clear what the
21 theory of the state was in an oral argument and in every
22 position in the course of the argument, that it didn't
23 matter what was in the bookstore, it didn't matter what
24 was present or what proportion, if there was any proof
25 exclusively of this racketeering concept being defined

1 specifically as two examples of inappropriate conduct,
2 that would answer the question. That everything was
3 then subject to forfeiture.

4 QUESTION: But the court says, "It cannot be
5 presumed that prosecutorial discretion will be abused to
6 the extent of threatening the continued existence of
7 bookstores and theaters." I thought they weren't
8 necessarily meaning that one misstep in a bookstore and
9 the whole store is automatically closed. Do you read it
10 that way?

11 MR. WESTON: Two missteps.

12 QUESTION: Two missteps. Right.

13 MR. WESTON: And that is exactly what happened
14 both in Indianapolis and Fort Wayne. In Indianapolis
15 there had been no prior convictions. There were
16 allegations at each of two stores that there had been
17 four materials offered for sale which were alleged to be
18 obscene. On the basis of that, a third store about to
19 be opened -- never opened, never sold an item -- was
20 closed by virtue of its alleged involvement with the
21 other two.

22 In Fort Wayne, on the basis of 39 alleged
23 examples of obscenity, three stores were closed. And I
24 simply suggest that this is not speculative. Those
25 stores were closed for 13 months.

1 QUESTION: Well, don't we reach those issues in
2 connection with the pretrial seizure question?

3 MR. WESTON: Well, the pretrial seizure,
4 Justice --

5 QUESTION: It would just seem to me that what
6 we ought to address is what happened on the pretrial
7 seizure and possibly the question of the predicate
8 offenses. But perhaps the full range of penalties after
9 a conviction just isn't a final judgment and properly
10 before us. Now, is that a possibility to you?

11 MR. WESTON: I don't think so, Justice
12 O'Connor, although I understand in terms of certain
13 principles of jurisprudence of course why the question
14 would be asked.

15 But the issue was clearly before the Indiana
16 Supreme Court. The court of appeals went through the
17 potential parade of horrors and struck down the statute
18 on its face, in its entirety, for just those reasons.
19 And the Indiana Supreme Court rejected it and in essence
20 rejected your concurring opinion in Arcara saying that
21 there was absolutely no necessity of applying any First
22 Amendment analysis here and end of the question. And
23 simply said that the full range of RICO penalties is
24 perfectly appropriate here, no different whether these
25 materials are books or groceries or widgets.

1 So, I would suggest that at this juncture,
2 given the final judgment of the Indiana Supreme Court,
3 there is no appropriate basis for maintaining the -- for
4 staying this Court's scrutiny and hopefully its hand.

5 I would suggest, in concluding, with respect to
6 the parallel to the Near versus Minnesota situation and
7 the inapplicability of RICO because it's very clear that
8 this court has maintained that in prior restraint cases
9 the operation and effect of the legislation and of the
10 procedures would be looked at. And the Indiana Supreme
11 Court was very clear, as was Mr. Goldsmith in his brief,
12 that the basic purpose of RICO was remedial in order to
13 deal with a perceived evil, in order to stop a
14 particular kind of conduct.

15 And the remedy sought under the RICO statute is
16 clearly not simply punishment for subsequent activities,
17 but, instead, broadly remedial to eliminate a particular
18 kind of undefined conduct prospectively. And I think --

19 QUESTION: I thought one of your basic
20 positions here and in the state courts was that if books
21 are involved, you just can't close down a bookstore.

22 MR. WESTON: That is correct, your honor. And,
23 certainly, our constitutional position, although the
24 Indiana Supreme Court rejected its --

25 QUESTION: But aren't you claiming that even if

1 you could -- if the obscenity convictions are the
2 predicate crimes, aren't you claiming that even if you
3 trace the proceeds of the sales from obscenity -- if you
4 can trace those to buying more books, you can't seize
5 them?

6 MR. WESTON: No. No, your Honor. Under --

7 QUESTION: Do you concede that they can?

8 MR. WESTON: Yes, your Honor. Under
9 appropriate procedural --

10 MR. WESTON: Well, that isn't what you -- I
11 don't -- I thought you were arguing -- or, some people
12 in this case are arguing that you cannot seize a
13 bookstore even if you can trace it.

14 MR. WESTON: Not seize a bookstore, your Honor,
15 but seize the particular books. If -- I thought -- when
16 Justice Rehnquist inquired -- Chief Justice Rehnquist
17 inquired if, say, there were drug sales --

18 QUESTION: Yes.

19 MR. WESTON: -- proceeds from drugs, that sales
20 from the drugs had bought the New York Times, could the
21 New York Times be forfeited with appropriate procedural
22 safeguards?

23 QUESTION: Yes.

24 MR. WESTON: Of course. And I think we're not
25 disputing that possibility, if there are specifically

1 identified obscene books. If those books are properly,
2 under appropriate standards, tried, found to be obscene,
3 the \$97.00 that flow from those books may be traced. If
4 they bought \$97.00 worth of books, it may be suppressed
5 or forfeited. If they bought some drapes or a videotape
6 on how to play golf, that may be suppressed.

7 But what may not be done is that because \$97.00
8 worth of books were sold, the entire bookstore closed.

9 CHIEF JUSTICE REHNQUIST: I think you have
10 answered the question, Mr. Weston. Your time has
11 expired.

12 We will hear now from Mr. Goldsmith.

13 MR. WESTON: Thank you, Mr. Chief Justice.

14 ORAL ARGUMENT OF STEPHEN GOLDSMITH

15 ON BEHALF OF RESPONDENTS

16 MR. GOLDSMITH: Mr. Chief Justice, may it
17 please the Court, let me just -- Yes, sir.

18 QUESTION: (inaudible) 47, whatever that
19 number is, out of this case?

20 MR. GOLDSMITH: We think we're here, your
21 Honor. The Indiana Supreme Court consolidated Fort
22 Wayne and Indianapolis, which is called 4447, and then
23 this Court consolidated, when it accepted the petition
24 for certiorari, the Indianapolis and Fort Wayne cases
25 with the Kokomo case, which is called Sappenfield --

1 QUESTION: Well, now, you were the prosecuting
2 attorney --

3 MR. GOLDSMITH: Yes, sir.

4 QUESTION: -- in 4447?

5 MR. GOLDSMITH: Right.

6 QUESTION: Well, how is that case here? All
7 we've got is Fort Wayne and Sappenfield.

8 MR. GOLDSMITH: Well, it's a procedural
9 question, your Honor. The Indiana Supreme Court
10 consolidated under the 4447 court cause number, 4444 and
11 Fort Wayne. This Court then accepted certiorari on that
12 cause number in both of those cases. We are listed as
13 --

14 QUESTION: We accepted the --

15 MR. GOLDSMITH: Yes, sir.

16 QUESTION: In 4447?

17 MR. GOLDSMITH: Yes. Except none of the --

18 QUESTION: Well, why doesn't --

19 MR. GOLDSMITH: Well, because -- I'm sorry.

20 QUESTION: Go ahead.

21 MR. GOLDSMITH: The confusion, your Honor, is
22 that the defendants in that case did not become
23 petitioners in this case. The 4447 defendants didn't
24 elect to participate in the argument today.

25 QUESTION: The case just got here on its own?

1 No --

2 (Laughter.)

3 MR. GOLDSMITH: Well, your Honor, this Court
4 accepted certiorari for -- under a petition that came
5 from a cause number that included 4447 and included Fort
6 Wayne. The defendants in 4447 elected not to
7 participate, but the Court granted certiorari. The
8 petitioners listed the state as a respondent and myself
9 -- I'm listed as a respondent.

10 QUESTION: Maybe we granted it improvidently
11 then.

12 MR. GOLDSMITH: Very well --

13 QUESTION: I don't recall that we've ever let
14 one side beat up on another who is not even here.

15 MR. GOLDSMITH: Justice Scalia, I think if I
16 could address my remarks to the overall issue of the
17 RICO laws and the only reason that the Indianapolis --

18 QUESTION: Don't you sign with the clerk's
19 office who represents who?

20 MR. GOLDSMITH: Yes, sir. I represent --

21 QUESTION: Well, did you sign that? Is that
22 filed in our clerk's office?

23 MR. GOLDSMITH: Yes, sir.

24 QUESTION: You're sure?

25 MR. GOLDSMITH: Yes, sir.

1 QUESTION: ISSI and Plaza Entertainment and
2 Burton Gorlick.

3 MR. GOLDSMITH: Those were all of the
4 defendants who were rearranged --

5 QUESTION: Well, what you're submitting, does
6 that go also for them? Are you telling us they are here
7 too?

8 MR. GOLDSMITH: Well, they are here as not --
9 pursuant to this Court's rules, they are here as nominal
10 respondents because they did not elect to come forward
11 as petitioners. But, nevertheless, may it please the
12 Court --

13 QUESTION: Well, how come you're representing
14 them?

15 MR. GOLDSMITH: I represent Sappenfield, Fort
16 Wayne and if 4447 is here, I represent them as well. I
17 represent the State of Indiana in the consolidated RICO
18 cases that are before this court. The only significance
19 to 4447 other than a fact that it continues as a case
20 when this Court is finished with it, is that it is a
21 civil RICO case without pretrial seizures, Sappenfield
22 is a criminal case that's been stopped midstream without
23 any pretrial seizures, and Fort Wayne is a case with 39
24 prior convictions and pretrial seizures. They represent
25 a range of what can happen underneath the RICO laws.

1 In terms of directing attention to the issues,
2 though, I would suggest to the Court that the most
3 important issue in terms of law enforcement in the long
4 run is whether in enforcing a RICO law after judgment,
5 and after conviction, the state may impose sanctions
6 that affect First Amendment materials. It's the
7 post-trial, post-judgment, post-conviction remedies that
8 can be applied to assets, regardless of whether those
9 assets expressive materials, as alluded to in the Arcara
10 case, that are of critical importance in this case and
11 in the future RICO enforcement.

12 QUESTION: Mr. Goldsmith, will you help me with
13 the issues a little bit. Your opponent agrees they can
14 be applied -- the sanctions can be applied to First
15 Amendment materials if they are traced to show they are
16 proceeds of the violations. So, we don't -- everybody
17 agrees they can be applied to First Amendment issues.
18 That much is clear, is it not? I just heard him say
19 that a few minutes ago.

20 MR. GOLDSMITH: Yes, your Honor. But he tried
21 to limit that at tracing. Our position is that it would
22 not stop there.

23 QUESTION: Well, that's right. Your position
24 is -- and is he correct? Do you agree with his
25 statement of your position, that you're saying that if

1 In a bookstore two obscene books are sold, automatically
2 you can seize the entire inventory? Yes or no?

3 MR. GOLDSMITH: I don't agree that that could
4 necessarily happen.

5 QUESTION: Can it happen under your statute?

6 QUESTION: Well, it did.

7 MR. GOLDSMITH: Justice White, I think in terms
8 of post-trial sanctions, it has not happened in any one
9 of these cases.

10 QUESTION: I know. But you could answer
11 Justice Stevens what your position is.

12 MR. GOLDSMITH: My position, Justice Stevens,
13 is post-trial that becomes an Eighth Amendment question,
14 which could or could not occur, depending on the
15 proportionality of the response.

16 QUESTION: Oh, I'm not asking you about its
17 constitutionality. I'm asking you about the meaning of
18 the statute. If the statute is applied as it's been
19 construed by the Indiana Supreme Court, could you, as
20 the prosecutor, say to the judge, "We have proved that
21 three books were obscene in this store. Kindly enter an
22 order closing the entire store and forfeiting the entire
23 inventory"?

24 MR. GOLDSMITH: I could --

25 QUESTION: If that's all you've proved?

1 MR. GOLDSMITH: I could ask for that remedy and
2 --

3 QUESTION: And would you be entitled to it
4 under the statute?

5 MR. GOLDSMITH: It would be a proportionality
6 question. I would be -- officially I would be entitled
7 to it under the statute. Yes, sir.

8 QUESTION: So, the only objections to that
9 relief would be constitutional objections?

10 MR. GOLDSMITH: If I convince the judge and the
11 jury and then the outside --

12 QUESTION: That the three books were obscene
13 and they were sold in a particular store and the rest of
14 the store was filled with nothing but Charles Dickens
15 and William Shakespeare?

16 MR. GOLDSMITH: Yes, sir.

17 QUESTION: Well, didn't -- wasn't there a
18 seizure of the entire store before trial?

19 MR. GOLDSMITH: There was a --

20 QUESTION: Based on just probable cause to
21 believe that obscenity was being sold there?

22 MR. GOLDSMITH: In the Fort Wayne case, that's
23 true.

24 QUESTION: A few items of obscenity being sold
25 there?

1 MR. GOLDSMITH: Well, it was based on the
2 allegation that there had been 39 prior convictions at
3 those three stores.

4 QUESTION: Yes. But that doesn't necessarily
5 indicate that even a major share of the merchandise in
6 the store were obscene.

7 MR. GOLDSMITH: Nor, Justice White, no one of
8 these cases takes the position that whether or not the
9 materials seized are obscene is significant. It's as to
10 whether they are the proceeds of a prior existing crime
11 to wit an obscenity.

12 QUESTION: Yes.

13 MR. GOLDSMITH: And in this particular case,
14 the state maintains that once there is an adjudication
15 of obscenity, then it becomes a proportionality question
16 because of 39 prior convictions, each conviction carries
17 a year sentence. So, the prosecutor had his choice
18 between putting the owner in prison for 39 years or
19 confiscating \$25,000, \$50,000 or \$100,000 worth of
20 books. That's a relationship --

21 QUESTION: Yes, but I thought -- I thought the
22 remedy was seizure of the proceeds of the violation.

23 MR. GOLDSMITH: The Indiana and Federal
24 Racketeering laws, it's the position of the respondents,
25 allow seizure of proceeds and also seizure of other

1 assets if they are derived from a criminal activity to
2 wit --

3 QUESTION: Yes, if they are derived from a
4 criminal activity. Now, suppose there is only one book
5 that's been proved obscene and sold. Now, it's awfully
6 hard to conclude that the whole store full of books and
7 the real estate itself is derived from the sale of one
8 book.

9 MR. GOLDSMITH: Yes, Justice White. We agree
10 with that.

11 QUESTION: So, that's a state statutory
12 construction problem in the first instance, I suppose.

13 MR. GOLDSMITH: In the trial court, just
14 because there is a sanction allowed statutorily for a
15 crime doesn't mean that the maximum is automatically
16 going to be imposed.

17 QUESTION: I agree with that.

18 QUESTION: I thought you had answered Justice
19 Stevens earlier -- that it is a matter of statutory
20 construction. If there were a conviction on the
21 predicate offense, this sort of forfeiture would
22 automatically follow. Are you now saying -- or, at
23 least, are you saying, whether you said something
24 different before or not, that the trial court has
25 discretion to determine what sort of a penalty along

1 those lines will be imposed?

2 MR. GOLDSMITH: Mr. Chief Justice, that's
3 correct. I meant to answer Justice Stevens, his direct
4 question. We would be allowed to ask that under the
5 statute. It wouldn't in any way be mandatory. The
6 trial judge would have discretion to fashion the penalty
7 in the same way he would fashion the penalty in years,
8 fashion the penalty in terms of fine, and fashion the
9 penalty in terms of confiscation and forfeiture of
10 assets. They all are ways to enforce a law. RICO, as
11 this Court has ruled is --

12 QUESTION: You're getting me confused now. I
13 thought you said before that it doesn't have to be -- I
14 thought you said earlier it doesn't have to be proceeds
15 derived from the obscenity.

16 MR. GOLDSMITH: That's the state's position.

17 QUESTION: You said that. But just now you've
18 said it has to be derived from. What are we talking
19 about? How does the Indiana statute work? Is it
20 necessary that there be a derivation from -- derived
21 from the proceeds of the unlawful activity or not?

22 MR. GOLDSMITH: There has to be a nexus between
23 what you're trying to forfeit --

24 QUESTION: Oh, of course.

25 MR. GOLDSMITH: -- and what you have previously

1 convicted for or judged. What we disagree with the
2 petitioners on is the need to trace the assets from book
3 up to organized crime back to another bookstore. We
4 don't believe that that --

5 QUESTION: What is the nexus? It's enough that
6 you sold it in the same business? Is that enough?

7 MR. GOLDSMITH: The people would need to be
8 same. You would have to show that they invested money
9 from the first criminal proceeds into the second
10 criminal proceeds. You'd have to show relationship in
11 terms of enterprise between those two.

12 QUESTION: Yes. But, Mr. Goldsmith, if I'm not
13 mistaken, you have two ways of describing the term
14 criminal activity. The two obscene sales are one form
15 of criminal activity. But they also, if I understand
16 you correctly, make the entire enterprise in which those
17 books were sold a criminal enterprise and an unlawful
18 activity, under your RICO statute.

19 So, if the bookstore has sold two or three
20 obscene books, it becomes, in its entirety, a criminal
21 activity. Isn't that the way it works?

22 MR. GOLDSMITH: Yes.

23 QUESTION: And, therefore, everything in the
24 store is automatically subject to forfeiture because the
25 whole store is a criminal activity by reason of the fact

1 that the two obscene books were sold there. Isn't that
2 the way it works?

3 MR. GOLDSMITH: It does. But just so I -- It's
4 automatically is subject to forfeiture. That doesn't
5 automatically mean that a court would exercise its
6 discretion if there were a proportionality problem.

7 The same is true -- this case is no different
8 than the --

9 QUESTION: But how can there be a
10 proportionality problem if under the RICO statute the
11 pattern of activity is satisfied by the sales of two or
12 three items which are part of the ongoing business?
13 Then the whole business is a criminal enterprise. Isn't
14 that -- that's the way RICO works I thought.

15 MR. GOLDSMITH: It does.

16 QUESTION: Yes.

17 MR. GOLDSMITH: The court, it's the state's
18 position, would fashion the remedy at the extent and
19 scope that it wished. The same as the 39 prior
20 convictions, it could put the person who owned it in
21 jail for 39 years or one year.

22 Similarly, we view this case as an Arcara case
23 and that simply says that this is no different than if
24 there was narcotics sold at store one and the person
25 sold the cocaine three times and two times, took the

1 money and went into business in a toy store or bookstore
2 or any other sort of store. That would be subject to
3 the confiscation of the state.

4 And to rule that this case is anything else,
5 would reduce the sanctions of racketeering laws. It
6 would provide a safe haven behind expressive materials
7 for organized crime. That's why we believe this case is
8 an Arcara case.

9 And if it's not an Arcara case, it's an Eighth
10 Amendment case. But it's surely not a First Amendment
11 issue.

12 QUESTION: Mr. Goldsmith, do you also defend
13 the right of the state to get a pretrial seizure without
14 any hearing pre or post-seizure and based on a
15 conclusory affidavit of the police officer?

16 MR. GOLDSMITH: Justice O'Connor, this is the
17 most difficult position for the state to maintain in
18 this case.

19 QUESTION: No. I just asked if that's the
20 position you take.

21 MR. GOLDSMITH: It is the position of the state
22 --

23 QUESTION: That's perfectly okay?

24 MR. GOLDSMITH: -- that if in the Fort Wayne
25 case with 39 prior convictions beyond a reasonable

1 doubt, an allegation of identity of parties that that
2 was permissible conduct, but we admit, your Honor, that
3 that is the most difficult position for the state to
4 maintain in this case.

5 QUESTION: Well, you concede that the seizure
6 of Fort Wayne Books and the stores was not to preserve
7 evidence for trial?

8 MR. GOLDSMITH: Yes, we concede that.

9 QUESTION: Okay.

10 MR. GOLDSMITH: And that's one reason that it's
11 come back --

12 QUESTION: Then how do you avoid the Marcus
13 rule, do you think? Why doesn't that apply?

14 MR. GOLDSMITH: Well, I think that if it
15 doesn't apply -- we may --

16 QUESTION: Why doesn't it apply?

17 MR. GOLDSMITH: It would not apply, your Honor,
18 because of the 39 prior convictions. But I would
19 suggest to the court -- because this is really just a
20 continuation of the first action. Federal RICO is all
21 in one action and Indiana RICO collateral estoppel from
22 the criminal cases.

23 I would also acknowledge, your Honor, this is a
24 very difficult position for the state and it may be that
25 the RICO laws pretrial ex parte we have a Brockett

1 severance issue that ought to occur here as it relates
2 to the pretrial ex parte seizures. I'm going to be very
3 careful, though, to separate that in terms of my
4 argument from the sanctions post-trial which we believe
5 present an Arcara issue.

6 But I do acknowledge that the pretrial
7 seizures, without a hearing, present a very difficult
8 position for the case, for the state and it's based on,
9 however, the prior 39 convictions. That's the way we
10 distinguish the case.

11 QUESTION: Does this statute provide for fines?

12 MR. GOLDSMITH: Yes, sir.

13 QUESTION: What's the maximum fine?

14 MR. GOLDSMITH: The maximum criminal fine, I
15 believe is \$10,000, Mr. Chief Justice.

16 QUESTION: Well, now, is it your position that
17 the non-obscene portion of the books sold could be
18 forfeited even though, say, they were of a value of
19 \$40,000 or \$50,000 as a result of a successful criminal
20 prosecution?

21 MR. GOLDSMITH: The legislative procedure in
22 Indiana is that the state could bring a civil action
23 based on the criminal conviction and ask for remedy in
24 excess of the \$10,000. That, your Honor, we think is
25 reasonable given the fact that the court had an option

1 between \$10,000 and eight years, and what this court
2 would be doing if it were to suggest that the forfeiture
3 is unconstitutional under the Eighth Amendment is to say
4 that a seizure of \$50,000 or \$100,000 is a more severe
5 penalty than the eight years.

6 And we think it would not restrict expressive
7 material to take a million dollar operation -- we
8 haven't even had a chance to go to trial to show the
9 factual worth of the defendant -- and take a \$50,000 or
10 \$100,000 penalty, we may have a much less restrictive
11 effect on expressive rights than putting the owner in
12 jail for eight years.

13 QUESTION: Yes, but then this is something
14 quite different, really, from saying that you're fined
15 \$10,000 and these books are attached to make sure that
16 you pay the fine.

17 MR. GOLDSMITH: It's different in that under a
18 fine the defendant has the option from where he should
19 get the money. Yes, sir.

20 QUESTION: And it's also different in that
21 there is no particular monetary limit on it.

22 MR. GOLDSMITH: There is no limit in terms of
23 obscenity or narcotics or anything else to RICO
24 enforcement nationally or at the state level. That's
25 correct.

1 That's why, Mr. Chief Justice, we believe this
2 is an Eighth Amendment proportionality issue and not a
3 First Amendment expressive material question. If this
4 does -- the state's position is that we need to begin
5 first with Arcara post-trial. After look at Arcara and
6 satisfy ourselves that this does not relate -- this is
7 content-neutral, does not relate to expressive materials
8 -- the obscenity is a predicate. Once it's found to be
9 obscene, it's the same as drugs. Then you move --
10 that's the issue one. There's an expressive issue on
11 the front side.

12 On the back side are the sanctions. The
13 sanctions, it is our position, make no difference
14 whether they are books that are involved, or any other
15 material where enforcing is sanctioned. And in that
16 regard, it's either Arcara, or it is an O'Brien test, as
17 modified by Albertini.

18 Albertini clearly said that an incidental
19 burden on speech is no greater than is essential and,
20 therefore, it's permissible under O'Brien so long as
21 neutral regulation promotes a substantial government
22 interest. This promotes a substantial government
23 interest.

24 Finally, the discussion of Near we believe also
25 is misdirected. In that case, the Court exactly said

1 they were not looking at the permissible scope of
2 subsequent punishment.

3 This is a subsequent punishment case and not a
4 prior restraint case. Once there is a conviction for
5 obscenity, it is a subsequent punishment and not a prior
6 restraint. And if it has incidental effect, it has
7 incidental effect under the O'Brien test as modified by
8 Albertini.

9 QUESTION: Are you just going to leave it up in
10 the air on the pretrial seizures or are you just going
11 to say that that's a difficult question? Are you
12 conceding error?

13 In the Fort Wayne case you say there are 39
14 priors that had already been adjudicated and you save
15 the pretrial procedures on that basis. But how about
16 this other case that you say is here?

17 MR. GOLDSMITH: There are --

18 QUESTION: Which I'm not sure it is, but if it
19 is, there weren't 39 priors in those cases.

20 MR. GOLDSMITH: That's right. And in that
21 case, your Honor, there were three bookstores. Two
22 which were open --

23 QUESTION: Right.

24 MR. GOLDSMITH: -- and the court explicitly
25 allowed them to stay open and sell their books and

1 didn't interfere at all because they were ongoing
2 businesses.

3 The third store was not open yet and the
4 72-hour order was that they come into court before they
5 opened up. The object of the Indianapolis pretrial
6 orders was to maintain the status quo until a full
7 adversarial hearing 72-hours later.

8 I would submit and I would concede that RICO
9 cannot and should not allow ex parte closure of
10 bookstores absent prior convictions. That clearly would
11 be unconstitutional.

12 QUESTION: Absent prior convictions?

13 MR. GOLDSMITH: Yes, sir. And with prior
14 convictions, we would acknowledge that there is no
15 authority from this Court directly on point either way.

16 QUESTION: Well, you know, in a RICO case like
17 this were you allege but haven't yet proved three
18 obscenity violations, you would say that until the
19 actual case is tried out you cannot seize or close down
20 the business?

21 MR. GOLDSMITH: Absolutely not. It would
22 clearly be a violation of their First Amendment rights.

23 QUESTION: But you would allow an order
24 preventing the wasting of assets?

25 MR. GOLDSMITH: Clearly, Justice Scalia, the

1 same as a narcotics case, an order not to dissipate
2 assets would be appropriate. And I would suggest, in
3 modification to my prior answer, if there were some
4 allegation that the assets were being moved to Europe,
5 that it might be proper to seize them.

6 But absent a suggestion that the assets are to
7 flee, an order not to dissipate, which was the
8 Indianapolis order not to dissipate -- the reason that
9 I'm so intent on that, Justice Scalia, is because the
10 important tool here is the post-trial sanction which
11 looks just like any other penalty after trial because
12 obscenity does not have any First Amendment expression.

13 And this remedy is content neutral. In this
14 particular case it's applied to a bookstore. But if it
15 were applied to any other set of assets, it would be the
16 exact same discussion.

17 QUESTION: Don't you think that your state
18 supreme court held that you could have a pretrial
19 seizure of the bookstore just based on probable cause?

20 MR. GOLDSMITH: I think that the Indiana
21 Supreme Court held -- three justices held that in the
22 Fort Wayne case with prior convictions there could be a
23 pretrial seizure. Yes, sir. One of the chief justices
24 dissented on the Fort Wayne case.

25 QUESTION: But there is no holding that --

1 there is no holding that just on probable cause you
2 could have a pretrial seizure?

3 MR. GOLDSMITH: That's correct. There is no
4 holding. And I think that what we're facing here is if
5 the Court is troubled by the facial ex parte ability of
6 the Indiana law, that we have a Brockett analysis that
7 ought to be made, and that part ought to be severed out.
8 But it should not affect the remedial opportunities of
9 federal or state RICO.

10 And the best way to look at that is the
11 Sappenfield case. It's a traditional criminal case that
12 wants to go to trial based on obscenities as the
13 predicate and enforce a sanction at the other end. That
14 is a typical RICO case and the issue of ex parte seizure
15 at the front end shouldn't affect the court's sanctions
16 on the back end of the case.

17 It's particularly important that we consider
18 this case -- this Court has accepted any number of
19 remedies that affect expressive materials so long as
20 they are not aimed at the content of those materials.

21 QUESTION: If we sustain the statute, it has a
22 strong deterrent effect on your state, does it not?

23 MR. GOLDSMITH: Absolutely. Yes, sir.

24 QUESTION: Don't you think in candor that some
25 businesses which sell books as just part of their

1 Inventory might give up that line of inventory just to
2 keep well clear of the statute?

3 MR. GOLDSMITH: Justice Kennedy, I acknowledge
4 that this has a powerful deterrent effect. I'm not
5 particularly embarrassed about that. I don't think it
6 would cause people to stop selling books. I think that
7 it might cause persons to conform their sale of obscene
8 books more on the side of indecent books.

9 But, of course, that's the purpose of criminal
10 obscenity laws. It is to deter conduct. And I think
11 that what we have before the Court today is an
12 acknowledgement that obscenity is a powerful source of
13 funds for criminal activities and that we have a
14 sanction that is equally powerful. And if the state --

15 QUESTION: But are you completely confident
16 that the deterrent is not so strong that indecent but
17 non-obscene expression is not going to be affected?

18 MR. GOLDSMITH: Your Honor, it's the state's
19 position that obscenity law in the United States today
20 has developed to such a hard-core standard and is so
21 clearly understood to have such a hard-core standard
22 that I would anticipate that it would have a deterrent
23 effect on legitimate sale and expression of ideas.

24 And that would not be the case because, even
25 here, there has to be a conviction for the obscenity

1 predicate. And we don't believe that it would have a
2 chilling effect, but rather a deterrent effect, on
3 people who are involved in the expression of ideas.

4 QUESTION: -- Smith in California was decided,
5 wasn't it?

6 MR. GOLDSMITH: Well, this case relates not to
7 the content of the materials. But this case does not
8 come into being until there is a finding of obscenity.
9 And then the sanctions are in place. And we believe
10 that that differentiates it from the prior rulings of
11 this court. That's why we think it's an
12 O'Brien/Albertini case if it's a First Amendment case at
13 all.

14 QUESTION: Incidentally, Mr. Goldsmith, you must
15 be tired of my pressing 1447, or whatever it is. Is
16 there a separate judgment in that case?

17 MR. GOLDSMITH: There is no judgment in any
18 case before this Court today. There is a ratification
19 by the Indiana Supreme Court of the facial
20 constitutionality of the RICO laws which would allow the
21 enforcement of sanctions by the court.

22 QUESTION: Well, did the Indiana Supreme Court
23 enter a judgment in 4447?

24 MR. GOLDSMITH: The Indiana Supreme Court's
25 opinion applies to 4447. The court case hasn't yet been

1 tried because it's --

2 QUESTION: Well, I know. But the Indiana
3 Supreme Court entered some kind of judgment, did it not?

4 MR. GOLDSMITH: The judgment of the Court was
5 to reverse the court of appeals and remand the case back
6 for trial. One of the three -- just to give you an idea
7 of the import of the sanctions here, one of the three
8 stores was burned down. There was an arson conviction
9 in federal court. And under federal racketeering law,
10 the interests of that person in these other stores were
11 forfeited.

12 So, we have a closure from an arson as a
13 predicate that really parallels what we would see from
14 obscenity as a predicate.

15 QUESTION: It's a small point.

16 QUESTION: There's been a final judgment that
17 pending trial in the Fort Wayne case that the stores may
18 be closed.

19 MR. GOLDSMITH: Yes, sir, that's correct.

20 QUESTION: And you say that's permissible
21 because there were 39 prior convictions?

22 MR. GOLDSMITH: That's correct.

23 QUESTION: I just want to get one small point
24 on the meaning of the statute. The predicate of -- you
25 have to have -- what is it, two or three?

1 MR. GOLDSMITH: Two.

2 QUESTION: And is it two sales of the same book
3 or does it have to be two different books?

4 MR. GOLDSMITH: This is a basic racketeering
5 law. It requires two predicate offenses. The predicate
6 offenses have to be obscenity. It could be one book. I
7 suppose it could be two books at two separate times that
8 were sold.

9 QUESTION: But it could be the same book on
10 Monday and then another copy of that book on Tuesday?

11 MR. GOLDSMITH: Or it could be two murders or
12 it could be two heroin --

13 QUESTION: Yes. But I'm just asking you a
14 question about this.

15 MR. GOLDSMITH: That's right. So, the
16 conviction or judgment for those offenses would throw
17 the case back into the RICO analysis if there was a
18 common enterprise. And what we really have here is not
19 a draconian response. I prefer to use the Russello
20 analysis that we have new weapons of unprecedented scope
21 and we're dealing with an organization with lots of
22 money and so they're financial remedies, instead of the
23 traditional criminal remedies, which put the store clerk
24 in jail for a number of years.

25 And we believe that these remedies post-trial,

1 at least, fall within traditional First Amendment and
2 Eighth Amendment literature. And if they have an
3 incidental effect under O'Brien and Albertini, that that
4 effect is constitutional. And deprive the right of the
5 state to use its sanctions in a racketeering law
6 essentially and when it involves bookstores, provides a
7 safe haven behind which narcotics dealers can buy a few
8 books and provide a facade of respectability.

9 We believe the state's sanctions should not be
10 limited. This is really what this is; it's an Arcara
11 case and it's not a First Amendment case. That the
12 sanctions which ultimately come before this Court, need
13 to be judged in terms of Eighth Amendment, a
14 proportionality law as applies to all the RICO laws.

15 Thank you very much.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Goldsmith. The case is submitted.

18 Your time had expired, Mr. Weston.

19 MR. WESTON: Thank you, Mr. Chief Justice.

20 (Whereupon, at 1:58 p.m., the case in the
21 above-entitled matter was submitted.)
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23
24
25

CERTIFICATION

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

87-470 Fort Wayne Books, Inc., -v- Indiana, et al.

87-614 Ronald W. Sappenfield, et al., -v- Indiana

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

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