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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: UNITED STATES, Petitioners V.

MARSHA B. KOKINDA, ET AL.

CASE NO: 88-2031

PLACE: Washington, D.C.

DATE: February 26, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioners : No. 88-2031
v. :
MARSHA B. KOKINDA, ET AL. :
-----x

Washington, D.C.
Monday, February 26, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:54 a.m.

APPEARANCES:

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Petitioners.

JAY ALAN SEKULOW, ESQ., Washington, D.C.; on
behalf of the Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

JOHN G. ROBERTS, JR., ESQ.

On behalf of the Petitioners

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JAY ALAN SEKULOW, ESQ.

On behalf of the Respondents

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REBUTTAL ARGUMENT OF

JOHN G. ROBERTS, JR., ESQ.

On behalf of the Petitioners

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1 feet from the city sidewalk and the public highway that
2 form the front boundary of the postal property.

3 There is a canopy over the walkway in the front
4 entrance area. The walkway is entirely on postal
5 property. It serves only the post office building and is
6 not connected to the city sidewalk some 75 feet away.

7 QUESTION: Now, Mr. Roberts, will you tell us'
8 exactly what this regulation covers? I take it the Post
9 Office regulation does permit leafletting, for example.

10 MR. ROBERTS: Yes, Your Honor. It --

11 QUESTION: Would it permit handing out a leaflet
12 that said we hope you'll contribute to our cause?

13 MR. ROBERTS: The Postal Service has construed
14 the regulation to allow that. What is prohibited is --

15 QUESTION: Is what?

16 MR. ROBERTS: -- speech or conduct that solicits
17 an immediate donation of charity on the premises.

18 QUESTION: A collection on the spot.

19 MR. ROBERTS: On the spot.

20 The reason that that type of activity is
21 prohibited while the other examples that you mentioned are
22 not is that in the Post -- Postal Service's experience it
23 was that direct solicitation, seeking an immediate act of
24 charity on the spot, that led to the problems it
25 experienced.

1 QUESTION: Do you think it's more bothersome
2 than the leafletting? I mean, is that demonstrable?

3 MR. ROBERTS: I -- I think it is, Your Honor,
4 and I think it follows from common sense, as Justice
5 Blackmun noted in his separate opinion in the Heffron
6 case. If you're walking down the street and you look
7 ahead and see someone passing out leaflets, you know that
8 you can take the leaflet and stick it in your pocket or
9 read it later or toss in the nearest trash can.

10 By the same token, picketing, which is permitted
11 on postal property, if you look ahead and you see someone
12 carrying a picket sign, you know that when you get there
13 you can read the sign if you wish, react to it if you wish
14 or just keep walking.

15 A solicitor, however, seeks to engage the
16 passerby in an immediate face-to-face confrontation that
17 has as its objective an immediate act of financial
18 charity. That type of conduct is, as the Postal Service
19 found, inherently more aggressive than leafletting or
20 picketing or discussion, and it was that type of conduct
21 that the Postal Service found created congestion, impeding
22 patrons in their transaction of postal business, and
23 distracted postmasters and clerks from their duties.

24 QUESTION: Mr. Roberts, what about asking a
25 passerby to sign a petition?

1 MR. ROBERTS: That is not prohibited. The
2 regulations prohibit campaigning for public office; but,
3 assuming that's not the sort of petition we're talking
4 about, that's not prohibited.

5 Now, I will agree that that type of conduct has
6 many of the same burdens associated with soliciting
7 charity, but, in fact, the Postal Service had not found'
8 any problem with that sort of activity on postal premises.
9 There are people who want to leaflet on postal premises,
10 who want to picket and who want to seek signatures for
11 petitions. It's when you let them ask for money that the
12 crowds come out and that the problems are experienced.

13 So in 1978 the Postal Service narrowly targeted
14 that type of expressive activity that was causing the
15 problem and prohibited only that.

16 QUESTION: What were these problems?

17 MR. ROBERTS: The problems were congestion at
18 postal entryways, the distraction of the postmasters and
19 their clerks from their duties.

20 This case is a very good example. On the day in
21 question, the postmaster and his clerks were compelled to
22 field 40 to 50 complaints from customers concerning
23 respondents' activities.

24 QUESTION: Are these problems that could be
25 addressed by time, place and manner requirements, by

1 making the location of such a booth or a table more out of
2 the way and prohibiting it on peak -- at peak hours or
3 peak days or something of that sort?

4 MR. ROBERTS: The Service expressly considered
5 that alternative in 1978. It determined, given the fact
6 that we're talking about more than 35,000 separate
7 facilities around the country with various different
8 architectural configurations and surrounding environments,
9 that it would be an administrative and logistic nightmare
10 to attempt to draw time, place and manner restrictions for
11 each of those 35,000 facilities.

12 It further determined that it would be very
13 difficult, if not impossible, to enforce those sorts of
14 restrictions. Most postal facilities do not have security
15 forces, and it would be impossible to monitor compliance
16 with the time, place and manner restrictions.

17 Finally, it concluded that such a system, which
18 would leave considerable discretion with local postmasters
19 either in -- in implementation or enforcement, was
20 undesirable given the far-flung nature of the commercial
21 enterprise because they were concerned that the
22 postmasters would discriminate on the basis of viewpoint
23 or content.

24 QUESTION: Well, Mr. Roberts, I would assume
25 that if the post offices are permitting petition

1 gathering, signature gathering, that some of those could
2 be conducted in a very aggressive manner, and very likely
3 the Post Office is willing to have some kind of
4 restrictions or regulations that it's willing to enforce
5 to make sure that patrons aren't subjected to abusive
6 tactics.

7 MR. ROBERTS: Well, it is true that, as I
8 indicated in response to Justice Stevens' question, that
9 petition gathering can have many of the same problems as -
10 - as solicitation; but given the Postal Service's
11 experience, it wasn't creating serious problems. There
12 was --

13 QUESTION: Does it have no reasonable time,
14 place and manner restrictions on the picketing and the
15 leafletting and the petition gathering?

16 MR. ROBERTS: There is a prohibition on creating
17 -- I think it's creating a disturbance, hindering,
18 blocking the entryway. There is, in fact, that sort of
19 restriction.

20 QUESTION: Could that sort of restriction not be
21 applied to this type of activity?

22 MR. ROBERTS: It could be applied to the
23 activity if it fell within the restriction. The reason
24 the Postal Service did not want to rely on such ad hoc
25 prohibitions is because solicitation was causing a broader

1 problem that couldn't be addressed on a case-by-case
2 basis. The problems we've talked about inhibiting postal
3 patrons, giving rise to complaints by the postal patrons,
4 taking up the postmaster's time accompanies solicitation
5 that is not disruptive. It does not necessarily block the
6 entrance.

7 The Postal Service concluded after an experience
8 with limited solicitation that there wasn't enough room
9 for everybody who wanted to solicit on postal property and
10 further concluded that allowing limited solicitation
11 carried with it more problems than it was worth.

12 QUESTION: Mr. Roberts, this is based on a
13 regulation, isn't it?

14 MR. ROBERTS: Yes, sir.

15 QUESTION: Is there any significance in not --
16 that it is a regulation rather than a statute?

17 MR. ROBERTS: I think not, Your Honor. It is a
18 regulation duly issued pursuant to authority given by
19 Congress to the Postal Service, and deference is owed to
20 the Service in its interpretation of the regulation, but I
21 don't think it carries any less weight than would a
22 statute regulating these activities.

23 QUESTION: You don't cite the -- the authority
24 under which the regulations are issued, do you?

25 MR. ROBERTS: I believe we do. It's the act

1 that transformed the old Post Office Department into the
2 Postal Service in 1970, and when the Postal Service
3 enacted these regulations the objective was to reduce
4 and -- and to the extent possible eliminate what they
5 called nonmission-related burdens.

6 The direction from Congress when it passed the
7 Postal Service statute was to run the Post Office as to
8 the extent possible like a business, and so it began
9 looking at what was permitted and started to eliminate the
10 nonmission-related duties that were distracting it from
11 its really quite awesome commercial endeavor.

12 The -- the respondents rely before this Court on
13 what is essentially a syllogism. They say that this
14 access walkway immediately adjacent to the post office
15 building, set well back from the sidewalk, is just like a
16 city sidewalk. City sidewalks are traditional public
17 forums, and, therefore, this access walkway must be a
18 traditional public forum.

19 But this walkway, this concrete apron
20 surrounding the building, is not just like a city
21 sidewalk. It's entirely on postal property, set well back
22 from the sidewalk and the street, serves only one building
23 and is not connected to the sidewalk or any other
24 pedestrian or vehicle thoroughfare.

25 QUESTION: Are many postal facilities like this

1 one? If we decide this case, does it apply to Bowie,
2 period?

3 MR. ROBERTS: Well, the Bowie Post Office
4 facility is the pattern that's used by the Service in
5 suburban settings. As I mentioned, there are 35,000
6 facilities nationwide, so it's difficult to generalize.
7 This is a very common pattern. It's the same type, for'
8 example, that was at issue in the Third Circuit case, in
9 the Seventh Circuit case, the Ninth and the Eleventh.

10 It's a suburban post office, which is why you
11 have to put the building well back from the street. It's
12 a busy highway. It's not a city street. That's why
13 people get there in their cars rather than on foot, which
14 is why you need parking.

15 The majority below mentioned that First
16 Amendment values could not be subject to architectural
17 chicanery, but that's not what's involved here. These
18 buildings are designed this way to fulfill the Postal
19 Service's needs, and one of the consequences of that is
20 that you're set well back from the traditional forum city
21 sidewalk.

22 Now --

23 QUESTION: Well, Mr. Roberts, is it clear that
24 public forum analysis even applies here? Have we ever
25 applied it in situations where the public clearly has

1 access, or have we only applied that where what is sought
2 is some sort of access to the facility?

3 MR. ROBERTS: Your Honor, the Court has applied
4 forum access to areas in which the public was given
5 general access. Greer, I suppose, is the clearest case.
6 It involved Fort Dix in New Jersey, but the streets and
7 the sidewalks were open to the public. And the Court in
8 several of its cases, I believe Cornelius most -- perhaps
9 most recently mentioned that the fact that the public is
10 given a right of general access does not transform the
11 property into a public forum.

12 QUESTION: Do you think it's a satisfactory sort
13 of analysis? Is it working out satisfactorily from a
14 legal standpoint, in your view?

15 MR. ROBERTS: Yes, Your Honor.

16 QUESTION: There's been a lot of criticism of
17 it, and there certainly is -- are suggestions in some of
18 the briefs in this case that we should get off that tack
19 and onto something else in these cases.

20 MR. ROBERTS: Yes, Your Honor. The -- the
21 amici, all of whom have an interest in using the
22 government's property for their own purposes, don't like
23 the idea that is at the base of forum analysis that the
24 government, like a private owner of property, has the
25 right to reserve its property for the purposes to which it

1 is lawfully dedicated. That's the core of forum analysis,
2 and I think that has been working out quite well.

3 The suggestion that the analysis should be -- be
4 junked and replaced with sort of a general "why not"
5 approach, why can't we do this, shifts the burden
6 completely. It -- it takes away the notion underlying the
7 landmark Adderley decision that the government has rights
8 with respect to its property and shifts the burden to the
9 government to justify why it's imposing a restriction.

10 The government restricts the access to the
11 extent in the activities involved once you have access
12 here because this property is dedicated to the Postal
13 Service's use, not as a forum for expressive activity.

14 Now if, in fact, this --

15 QUESTION: Do you -- do you think the
16 government's position would be the same or would have been
17 the same had this been a Red Cross solicitation?

18 MR. ROBERTS: Absolutely, Your Honor. This is
19 not in any way a viewpoint-based restriction. It applies
20 equally to the Red Cross as to the respondents.

21 QUESTION: Well, it may -- maybe it would apply,
22 but you started off by mentioning Mr. LaRouche, and --

23 MR. ROBERTS: Well, I don't --

24 QUESTION: -- I wondered.

25 MR. ROBERTS: I don't -- I did not, actually, I

1 don't think, mention who the respondents were.

2 QUESTION: You mentioned there were 50
3 complaints. Do you think there would have been 50
4 complaints if it were the Red Cross?

5 MR. ROBERTS: I -- I can't say that there would
6 be. Probably -- probably not. I readily admit that some
7 of the complaints were probably based on exactly what it
8 was the respondents were saying, but there's no indication
9 that any of them in fact were based on that.

10 In fact, the one complaint we know about, the
11 woman said she thought it wasn't fair because they don't
12 let them sell Girl Scout cookies there, which indicates at
13 least in Bowie that the solicitation ban is being enforced
14 without regard -- without regard to content.

15 It is, in fact, Your Honor, the problem that you
16 allude to that perhaps they would bend the rules for the
17 sort of organizations that are more popular, that was one
18 of the reasons the Service didn't want to allow limited
19 solicitation, because they thought they couldn't police
20 that effectively throughout the nation. That's one reason
21 they adopted the general ban.

22 QUESTION: Well, let's -- let's assume
23 that -- that the Service, the Postal Service would have
24 authority to forbid all of this kind of communications
25 that you now permit.

1 MR. ROBERTS: Yes, sir.

2 QUESTION: Does that -- can't you still hold
3 this particular regulation invalid under the First
4 Amendment even if you have that broader authority? What
5 kind of a burden have you got to -- to sustain this
6 targeting of a particular kind of communication?

7 MR. ROBERTS: The burden under the nonpublic
8 forum is to show that the regulation is a reasonable one.

9 QUESTION: How do you show that?

10 MR. ROBERTS: The Postal Service when it adopted
11 this ban on solicitation, it noted in the Federal Register
12 announcement it was expressly allowing these other
13 activities, leafletting and picketing, and it explained
14 what the difference was between solicitation and those
15 other forms of activities.

16 Solicitation first and foremost was the activity
17 that was causing problems. The other types of activities
18 were not causing problems, so they didn't see a reason to
19 prohibit them. Solicitation is a more intrusive, more
20 aggressive form of speech. As I've mentioned, the
21 solicitor tries to stop you and get an answer from you
22 right there on the spot.

23 QUESTION: Well, you -- you had a -- you had a
24 chance to convince the lower courts of this, I suppose?

25 MR. ROBERTS: And we've been successful in the,

1 as I've indicated, Third, Seventh, Ninth, Eleventh
2 Circuits, and we persuaded Judge Widener below.

3 QUESTION: But not the majority?

4 MR. ROBERTS: But not -- not the two judges in
5 the majority.

6 QUESTION: Who thought that -- that -- that this
7 was just really just a minor bother for you.

8 MR. ROBERTS: Well, their analysis, first of
9 all, was that this -- the concrete apron, the access
10 walkway, was a public forum, and once they reached that
11 conclusion, of course, that's a much heavier burden for
12 the Postal Service to carry.

13 I would note that the Seventh Circuit concluded
14 that the Service could carry the burden even if this
15 walkway were -- this type of walkway were a public forum.

16 The conclusion, though, that it is a public
17 forum is inconsistent with this Court's decisions. If
18 this type of property were a traditional public forum,
19 one, in Justice Roberts' words, that was immemorially or
20 time out of mind set aside for expressive activities, we
21 would expect at least a few decisions from this Court so
22 holding. But in fact, all of the decisions of this Court
23 with one arguable exception concerning activities on
24 sidewalks, streets, involved sidewalks or streets on the
25 perimeter of the government property forming the boundary.

1 QUESTION: Yes, but let's -- let's just assume
2 that the -- that the court below was wrong in saying that
3 this was a -- that this sidewalk was a public forum, a
4 general public forum like all other sidewalks. Does
5 that -- does that really win the case for you?

6 MR. ROBERTS: Well, if it is a nonpublic forum,
7 the Service need only show that its regulation is
8 viewpoint neutral --

9 QUESTION: Yes.

10 MR. ROBERTS: -- which it clearly is, and a
11 reasonable one.

12 QUESTION: Yes. Now, what is your -- I've asked
13 you what was your burden? How do you satisfy that burden?

14 MR. ROBERTS: To show that it's reasonable, the
15 first thing they have to do, I suppose, is show why
16 solicitation is different from these other activities.
17 They allow leafletting and picketing. Why not allow
18 solicitation?

19 And the reason is based on experience. This
20 isn't speculation. They allowed solicitation prior to
21 1978, very limited and subject to discretion; but they
22 allowed it. And the experience was, as they said, highly
23 unsatisfactory. Too many people wanted to use postal
24 facilities. Postmasters were distracted from their duties
25 in administering a system of selective access.

1 QUESTION: Mr. Roberts, didn't they allow
2 solicitation inside the Post Office at that time?

3 MR. ROBERTS: Both -- both inside and outside.

4 QUESTION: And wasn't that the problem of
5 deciding whether to let the Red Cross -- you know, you had
6 your content discrimination then. Isn't that -- wasn't
7 that part of the problem of deciding who could solicit?'

8 MR. ROBERTS: It's certainly true that the most
9 serious problem was within the postal lobbies, but the
10 regulation is not limited in that respect. It applies by
11 its terms to all real property under the charge and
12 control of the Post Office.

13 QUESTION: Which one might argue that perhaps
14 it's overbroad for that reason, that it responds more
15 broadly than the problem that it's addressed to.

16 MR. ROBERTS: I don't think there's any
17 functional significance -- difference.

18 QUESTION: Well, is there a history of a problem
19 outside the Post Office?

20 MR. ROBERTS: It's not referred to in the
21 Federal Register notice. The Federal Register notice does
22 concern the postal lobbies. It also mentions, though --
23 I'm not sure if it's in the proposal or in the final
24 enactment -- entranceways. And this is the sort -- this
25 access walkway as far as the danger for disruption and

1 congestion is not different from the postal lobby, and, in
2 fact, there may be more room in the lobby once you get
3 past the entryway through which all the patrons must pass.

4 This is a covered walkway right at the front
5 through which all patrons going in the building have to
6 pass. Solicitation --

7 QUESTION: My memory is that lines are usually a
8 little more -- they fill up the lobby pretty often. The
9 inside is often fairly crowded in these post offices, a
10 busy post office.

11 MR. ROBERTS: It depends on the configuration of
12 the lobby; and, of course, I suppose that solicitation
13 would be off to a side away from the lines.

14 But the solicitors in this case picked this spot
15 because it's where they could get everybody going in and
16 get them going out.

17 QUESTION: Well, yes, but you -- but the
18 regulation cover -- would cover solicitation anywhere on
19 that sidewalk.

20 MR. ROBERTS: Yes, Your Honor.

21 QUESTION: And/or anywhere else --

22 MR. ROBERTS: In the parking lot.

23 QUESTION: -- outside the building.

24 MR. ROBERTS: Yes, and it's not overbroad for
25 that reason because we're dealing --

1 QUESTION: Well, why isn't it overbroad for that
2 reason?

3 MR. ROBERTS: Because for the reason the Postal
4 Service stated when it adopted these, is that it would be
5 impossible to craft time, place and manner restrictions
6 for every single one of the 35,000 post offices around the
7 country; and, therefore --

8 QUESTION: Well, I suppose they could give the
9 postmaster for each facility some authority to tailor the
10 requirements to the configuration of that particular
11 premises.

12 MR. ROBERTS: A possibility, Your Honor, and one
13 that they considered and expressly rejected because they
14 did not want to have the postmasters having that
15 discretion for, I think, largely the reason Justice
16 Blackmun referred to. The pressure on the postmaster to
17 allow the Red Cross and the Girl Scouts to solicit --

18 QUESTION: Why couldn't you just say within 30
19 yards or 20 yards or 30 feet of any entrance?

20 MR. ROBERTS: Well, some entrances may not
21 stretch that far, and there is no requirement on the
22 Postal Service that it adopt narrowly tailored time, place
23 and manner restrictions.

24 QUESTION: Well, if this -- if you apply forum
25 analysis, can it be said this is a limited public forum?

1 You keep talking about nonpublic forums. Certainly some
2 public access and usage have been allowed, as we explored
3 earlier and are allowed.

4 So perhaps it's a limited public forum. How
5 would that affect the analysis, do you suppose?

6 MR. ROBERTS: Well, it's a limited public forum
7 in the sense that the Postal Service doesn't prohibit
8 leafletting, picketing, other activities, but it has not
9 expressly opened up the sidewalk to those activities.
10 There may be a difference there.

11 QUESTION: Well, suppose we think in effect it's
12 been opened up to these other uses. That's the proper
13 interpretation, and it's a limited public forum. Now
14 what's the analysis?

15 MR. ROBERTS: The analysis is no different, Your
16 Honor, as --

17 QUESTION: Still just reason?

18 MR. ROBERTS: Still just reasonable because
19 solicitation is not one of the activities as to which the
20 Postal Service has opened up the forum.

21 QUESTION: Mr. Roberts, I guess I don't
22 understand this. You mean even -- is the government
23 conceding that even when it's a nonpublic forum, the
24 government cannot say we just don't want any expressive
25 activity, this is our property, we don't want any?

1 MR. ROBERTS: Oh, no.

2 QUESTION: It has to have a good reason?

3 I mean, there's an apron around this Court in
4 addition to the sidewalk. It goes right under the
5 Justices' windows. Now, could the -- can the Court not
6 say we just don't want people there? We don't care if
7 they're quiet. We don't care if they're passing out
8 things or soliciting or whatever. We just don't want
9 people there, period. Do we need a good reason?

10 MR. ROBERTS: Well, you've given a good reason,
11 because it passes right under the Justices' window.

12 QUESTION: No, but that -- I mean, I don't see
13 them, they don't make any noise.

14 MR. ROBERTS: It's a nonpublic forum.

15 QUESTION: If that is a good reason or not a
16 good reason, we just say we don't want it.

17 MR. ROBERTS: I -- I think not. I think --

18 QUESTION: We can't do that. Every piece of
19 property the government opened -- that the government has
20 must be open to speech unless there's a good reason to
21 exclude it. Is that the principle the government accepts?

22 MR. ROBERTS: The test for a nonpublic forum is,
23 first of all, that it must be viewpoint neutral, and,
24 second of all, that the regulation must be reasonable,
25 yes, and the government does accept that test. Now it

1 doesn't, as was pointed out in the Cornelius opinion, it
2 just has to be a reasonable regulation. It doesn't have
3 to be the most reasonable one. It doesn't have to be, for
4 example, specifically tailored time, place and manner
5 restrictions.

6 QUESTION: Mr. Roberts, what is your view,
7 supposing this regulation did prohibit leafletting and
8 picketing? Would it be valid, in your view?

9 MR. ROBERTS: Yes, Your Honor, because it's a
10 nonpublic forum assuming the Service came up with a reason
11 for limiting leafletting and picketing. In its
12 experience, those --

13 QUESTION: Well, they give the same reason it
14 gives here. You just don't want a lot of people crowding
15 the front door. That's basically --

16 MR. ROBERTS: Well, if that has been the
17 experience. That has not been the experience. They have
18 indicated in 1978 that that's not a problem, so we're not
19 going to prohibit it.

20 QUESTION: Yeah, but how do you know it won't be
21 a problem tomorrow?

22 MR. ROBERTS: If it does become a problem --

23 QUESTION: You could stop.

24 MR. ROBERTS: -- we're free to eliminate it,
25 and --

1 QUESTION: And how serious does the problem have
2 to be? I'm a little puzzled. We have 3,500 post offices.
3 Maybe three or four of them get very crowded. Can you ban
4 picketing all over the country?

5 MR. ROBERTS: Well, no. I wouldn't say three or
6 four, but I think, as the courts mentioned, the Service is
7 entitled to -- to enact its regulations with the
8 generality of the cases in mind. If it becomes a serious
9 problem, I think they have the authority on this nonpublic
10 forum to respond.

11 QUESTION: Mr. Roberts, supposing that the
12 Justice Department wants to promulgate a regulation saying
13 we don't want anybody coming in here and giving speeches
14 in -- in the Department during -- in the halls and so --

15 Now you're saying there has -- that -- that's a
16 regulation that has to be reasonable?

17 MR. ROBERTS: Well, I think that's -- that sort
18 of regulation clearly is reasonable.

19 QUESTION: But at any rate, it would be subject
20 to review in any court, challenge in any court, and if you
21 satisfy the court it wasn't reasonable, then the court
22 would say, well, go ahead and give speeches in the Justice
23 Department?

24 MR. ROBERTS: That's right, Your Honor, because
25 the -- even in a nonpublic forum --

1 QUESTION: What case supports that proposition?

2 MR. ROBERTS: Well, the cases that establish the
3 standard for a nonpublic forum. Perry states that in a
4 nonpublic forum the restriction must be viewpoint neutral
5 and reasonable. And again, it's not the most reasonable
6 regulation you can imagine. There's no least restrictive
7 alternative approach, but you have to come up with a
8 reason for restricting the expressive --

9 QUESTION: Is it a kind of a rational basis type
10 of thing?

11 MR. ROBERTS: I think it's very close to that,
12 yes, Your Honor.

13 QUESTION: Maybe you have to have a reason for
14 discriminating between different types of -- of -- of
15 speech. I mean, I can understand perhaps the government
16 having to justify why you can pass out flyers but you
17 can't solicit, but if the government just decides we don't
18 want anybody on the property but those who are here to do
19 business, it has to give a reason for that. Whatever the
20 government owns is subject to people coming in and saying
21 I want to talk, it's your burden to show that it is
22 unreasonable for me to talk. That's really the position
23 the government accepts?

24 MR. ROBERTS: The government is -- is satisfied
25 with the public forum doctrine as it's been established,

1 which requires that the regulation --

2 QUESTION: Well, I didn't understand it that
3 way.

4 MR. ROBERTS: We'd be happy with -- with one
5 that didn't have -- that we didn't have to give a reason
6 at all, but certainly in this case the reasons that have
7 been given by the Postal Service --

8 QUESTION: Well, but even in Justice Scalia's
9 example, I suppose the reason is we own the property, and
10 as a property owner we have control and so forth.

11 MR. ROBERTS: That's right, and you can restrict
12 as -- as any business can access to the premises --

13 QUESTION: But that changes the doctrine
14 entirely. If it's a sufficient reason to say we own the
15 property, then you're not saying any regulation has to be
16 reasonable if it's on a property that you own, if it's
17 enough to say we own the property.

18 MR. ROBERTS: Well, I think there has to be some
19 connection between the restriction and what's going on.
20 if it's a place of government business, I think that's
21 enough of a reason to restrict access to those who don't
22 have business there.

23 If I could reserve the remainder of my time.

24 QUESTION: Very well, Mr. Roberts.

25 Mr. Sekulow.

1 ORAL ARGUMENT OF JAY ALAN SEKULOW

2 ON BEHALF OF THE RESPONDENTS

3 MR. SEKULOW: Mr. Chief Justice, and may it
4 please the Court:

5 Time, place and manner restrictions are the
6 means whereby the balance is struck between expressive
7 activity and public convenience. Yet, rather than
8 enacting reasonable time, place and manner restrictions,
9 the Postal Service determined that it would be more
10 efficient, if you will, to eliminate a protected form of
11 free speech rather than to regulate it.

12 There are existing regulations that the Postal
13 Service currently has which prohibits obstruction,
14 interference with postal patrons, interference with postal
15 employees in the performance of their duties.

16 What has happened in this particular case is
17 that a classic form of political speech, as Judge
18 Wilkinson referred to it, was eliminated strictly because
19 the government in its discretion said it would be too
20 complicated to regulate it; and it is the elimination of
21 free speech that these people were convicted for, if you
22 will.

23 QUESTION: So do you disagree with -- with the
24 test that this regulation is valid if it's reasonable?

25 MR. SEKULOW: I think that --

1 QUESTION: And is it your -- you just agree with
2 the Fourth Circuit that it's unreasonable; is that it?

3 MR. SEKULOW: Well, we agree with the Fourth
4 Circuit in this context, Justice White, and that is, that
5 this activity took place on a traditional public forum,
6 and the reason set forth by the Postal Service for
7 enforcing this prohibition did not reach the level of, in
8 this particular case, compelling interest.

9 But we would also say it would not reach a
10 reasonable --

11 QUESTION: I take it -- I take it that you
12 would -- you would say the lobby of the Post Office is a
13 traditional public forum?

14 MR. SEKULOW: No, I would not say it was a
15 traditional public forum. And in fact --

16 QUESTION: Well, didn't the Fourth Circuit say
17 it was?

18 MR. SEKULOW: No, they did not, Your Honor.

19 QUESTION: What did they say?

20 MR. SEKULOW: The Fourth Circuit determined that
21 the regulation, as applied to the sidewalk, now called an
22 apron, is in fact a traditional public forum, and that the
23 prohibition was not narrowly tailored, not that it was not
24 justified by compelling interest.

25 QUESTION: Would you say the regulation is valid

1 inside the -- inside the lobby?
2 MR. SEKULOW: A complete prohibition?
3 QUESTION: No, no. No, no. This regulation the
4 way it is.
5 MR. SEKULOW: I think that a line could be
6 drawn; however, I don't think that it would be --
7 QUESTION: Well, answer the question.
8 MR. SEKULOW: I think, yes, a complete ban on --
9 QUESTION: No, no. No. No.
10 MR. SEKULOW: On the solicitation --
11 QUESTION: Yes.
12 MR. SEKULOW: -- inside the lobby can be
13 justified --
14 QUESTION: Even though the other things are
15 permitted?
16 MR. SEKULOW: Well, that's --
17 QUESTION: That's what I want to know.
18 MR. SEKULOW: Yes. Not with the recent
19 announcement that automatic teller machines can now be
20 placed inside all these postal lobbies.
21 QUESTION: Well, that isn't -- that isn't our
22 case. It isn't our case. Now --
23 MR. SEKULOW: I think that -- I think a blind
24 can be drawn at that point --
25 QUESTION: Suppose -- suppose the people

1 involved here who were arrested had been soliciting inside
2 the post office, inside the building, and this case then
3 came up to the Fourth Circuit, and it was decided the same
4 way. Should we reverse -- would we reverse that?

5 MR. SEKULOW: No. I think this Court can still
6 affirm the opinion of the court below both on the forum
7 ground and, as well, on vagueness grounds as we asserted
8 in our brief; that is, that what is solicitation, as
9 Justice O'Connor alluded to earlier in the argument, is a
10 question. What is it? Is it the immediate solicitation
11 and donation of funds that is on postal premises? Is it
12 requesting it? Is it exhorting the benefits of one's
13 organization?

14 And in comparing that test and the government
15 now stating that, well, what we're really talking about in
16 solicitation is a request for an immediate exchange of
17 money to take place on the postal premises may not be what
18 happened in the district court and may not have been the
19 type of solicitation that was taking place.

20 But we find and we feel that the sidewalk
21 surrounding this particular postal facility is
22 functionally indistinguishable from any other sidewalk.
23 That is --

24 QUESTION: Well, just before you -- you get on
25 to that, let's assume that we rejected your argument on

1 vagueness. Could you and would you argument -- argue that
2 this is a content-based regulation that's insupportable?

3 MR. SEKULOW: Yes, I would -- I would -- we
4 would argue that even inside the lobby it would be of
5 course content based, that is, the words being uttered by
6 the particular individuals, the defendants in the lower
7 court, and, of course, the respondents here.

8 The determination of whether there's been a
9 violation of this particular regulation is based entirely
10 upon the content of what they state.

11 QUESTION: Well, but on the other hand, it
12 applies equally to the Girl Scouts and the Salvation Army
13 and your client.

14 MR. SEKULOW: It's -- it's -- in effect, it is
15 a --

16 QUESTION: It -- it is direct toward the asking
17 for money on the premises.

18 MR. SEKULOW: That's the way --

19 QUESTION: So it's hard to say that's content
20 based.

21 MR. SEKULOW: We would take it one step further,
22 Your Honor, and that is the compelling interest test would
23 still have to apply here because a particular type of
24 expression, as Justice White said in the Grace case, has
25 been eliminated from this particular forum, and that is,

1 there does have to be a line drawn if you will where the
2 activities should not take place.

3 And what we're dealing with here, again, as I
4 stated, was the sidewalk.

5 QUESTION: Well, are you saying that the
6 regulation is not content neutral?

7 MR. SEKULOW: I think it's -- it's content
8 neutral in -- to the extent that it is being applied
9 across the board. However, they're prohibit -- it's the
10 statement on the speech is not -- the way the government
11 is interpreting solicitation under the regulation is not
12 content neutral because they are making a determination
13 based on the words uttered whether, in fact, an illegal
14 solicitation has taken place or a legal solicitation has
15 taken place.

16 And that is, if there's an immediate request for
17 funds right now, in the government's view, a illegal
18 solicitation has taken -- but if I say I would like you to
19 donate to my organization and you can see my friend on the
20 sidewalk around the corner or the municipal sidewalk or
21 mail it in, that now under the government's
22 interpretation --

23 QUESTION: But your -- but your vaguest point,
24 that's your vagueness point. That's -- that's -- that's
25 not your content base point. Your content base point

1 requires you to say that you cannot distinguish at all
2 between asking for money, whether you're asking for it
3 right now or whether you're asking to mail it in three
4 weeks from now. You cannot select out asking for money.
5 That's -- that's a type of content, you're saying.

6 MR. SEKULOW: Yes, that is, and that is our
7 position, and that is what one would have to look at.
8 It's to the type of speech taking place, the content of
9 those words as to whether in fact a solicitation has taken
10 place.

11 And in this context of this case, I wanted to
12 briefly mention the -- what was alluded to by Mr. Roberts,
13 the 40 or 50 complaints. As the court below stated, those
14 complaints might well have been related to the viewpoint
15 of these particular respondents. There's nothing in the
16 record other than the statement from postal patron Wyatt
17 about the Girl Scouts as to what the nature of these
18 particular complaints were.

19 And in fact, implementing a reasonable time,
20 place and manner restriction rather than eliminating the
21 speech for a forum would prove to be a workable and
22 constitutionally required method to control this public
23 convenience and government ownership situation.

24 QUESTION: Well, now Mr. Sekulow, do you -- do
25 you take the position that the government could not simply

1 say that on postal premises we will have no activity of
2 any kind by anybody unless it's addressed to post office
3 business?

4 MR. SEKULOW: I think the --

5 QUESTION: There won't be leafletting; there
6 won't be picketing; there won't be soliciting; there won't
7 be anything. You can come and go for postal business, and
8 that's it.

9 MR. SEKULOW: Yes. I think the government --
10 the Postal Service could create a quasi-military enclave,
11 if you will. However, they have not chosen to do so --

12 QUESTION: Well, if they can do that, why can't
13 they do something less than that?

14 MR. SEKULOW: Because the Postal Service as now
15 operating in the Bowie, Maryland Post Office, Justice
16 O'Connor, is allowing a vast array of activities. The
17 invitation to conduct postal business is not -- the
18 invitation to come onto the premises is not for just
19 postal business. It has not created this enclave --

20 QUESTION: Yes, but if -- if once you accept the
21 fact that the Post Office could exclude every use other
22 than the postal use, it seems to me that you have to
23 accept the fact that they could permit some lesser
24 restriction.

25 MR. SEKULOW: What I was referring to, Justice

1 O'Connor, was the function as to how the Post Office
2 operates. The way they operate now, the Postal System
3 operates now, it is not an enclave immune from the First
4 Amendment. There is, in addition to the utilization
5 of -- of distributing literature and the peaceful
6 picketing, there are other activities that take place at
7 the Postal Service, and it is a public thoroughfare. This
8 sidewalk, it can be referred to as a concrete apron or a
9 walkway, but it is a public thoroughfare to get someone
10 from one point to another point.

11 QUESTION: It's a public thoroughfare only from
12 the parking lot to the post office, isn't it?

13 MR. SEKULOW: Yes --

14 QUESTION: Access to the post office. So I
15 don't see -- unless you mean no more than that, I don't
16 know why you call it a public thoroughfare.

17 MR. SEKULOW: Well, it's a public thoroughfare,
18 Chief Justice, no different than any other municipal
19 sidewalk; and that is that it's to a public thoroughfare
20 for people to move to get to a location.

21 The fact that one --

22 QUESTION: Other sidewalks get people between
23 locations.

24 QUESTION: Yes.

25 QUESTION: I mean, I go from one building to

1 another. That's what the public sidewalk is. This
2 is -- I mean, in this sense my doorway is a public
3 thoroughfare. The public comes in to my house when they
4 come in. Do we call that a public thoroughfare? No,
5 because it leads only to my house.

6 MR. SEKULOW: Yes --

7 QUESTION: And it's the same thing with this
8 sidewalk. It leads only to the post office, right?

9 MR. SEKULOW: Oh, yes, but the post office --

10 QUESTION: It becomes a public thoroughfare
11 because the public walks on it. Is that your principle?

12 MR. SEKULOW: Oh, I think that's absolutely part
13 of the -- the analysis.

14 QUESTION: Then my house is a public
15 thoroughfare because members of the public come up to my
16 door all the time.

17 MR. SEKULOW: Your house, Justice Scalia, I
18 assume is privately owned, and you have that right to
19 exclude.

20 QUESTION: Well, this is privately owned, too.
21 I mean, the government has a property right --

22 QUESTION: The government has a right to
23 exclude, too.

24 MR. SEKULOW: The government has a right to
25 exclude. However, general public access is not even

1 really at issue in this case, Chief Justice. What is at
2 issue is the general public has the right to be there.
3 There's no question that they can be there for postal
4 business or for nonpostal business.

5 The invitation to come to the postal -- post
6 office in Bowie, Maryland is no more limited to those on
7 postal business really than was the invitation to come to
8 the Los Angeles International Airport limited to those on
9 airport-related business. It is a general public asset
10 situation, and since that access exists the government
11 would have to put forth a compelling interest, is our
12 position, justifying the exclusion.

13 QUESTION: You mean so long as the government
14 allows the public access to a government building, it has
15 to show a compelling reason why there shouldn't be speech
16 in the building?

17 MR. SEKULOW: Not in the building, Your Honor.
18 Outside on a public sidewalk open to the general public.
19 There is --

20 QUESTION: Well, the post office is open to the
21 general public, too. Why should there be a different rule
22 for the sidewalk outside than the post office inside?

23 MR. SEKULOW: The Postal Service themselves, in
24 adopting the regulation prohibiting the solicitation of
25 funds, specifically addressed itself to the problems that

1 are associated inside the lobbies, the cramped areas, and
2 that is a compatibility factor. That the activity taking
3 place inside the public forum, inside the post office,
4 would not be compatible with its -- the efficient
5 operation of that particular facility.

6 QUESTION: So you -- you say the compelling
7 interest standards governs inside the post office, but
8 it's been met here?

9 MR. SEKULOW: I think that argument could be
10 made that in fact the public -- that a compelling interest
11 keeping solicitation outside of the busy areas of the
12 postal office inside, yes, could be met, but that would
13 not apply to the outside areas open to the general public
14 for any purpose or for no purpose at all, for
15 postal-related business or nonpostal related. Yes, a
16 different set of -- a different situation exists inside
17 versus outside.

18 QUESTION: But it would just be a question of
19 what the -- what the walk was used for, then. I suppose
20 if the walk became terribly congested and it was shown
21 people couldn't really get into the post office because of
22 the solicitation, then you could ban it outside.

23 MR. SEKULOW: Oh, even then, Chief Justice, I
24 don't think it could be banned. But implementing a
25 reasonable time, place and manner restriction prohibiting

1 maybe that activity from taking place at the peak hours or
2 during congestion --

3 QUESTION: Why -- why wouldn't you say the same
4 thing about the inside of the post office, then, that all
5 you could have would be a time, place and manner
6 regulation?

7 MR. SEKULOW: Perhaps a booth rule would suffice
8 inside the post office on a first come, first served
9 basis. The experience that the Postal Service had,
10 obviously I'm not trying to argue their point, is that
11 inside the postal facility they were having sufficient
12 congestion problems where the operation of the forum was
13 being affected. That does not exist outside --

14 QUESTION: Well, the operation of the post
15 office, not the forum.

16 MR. SEKULOW: Yes, excuse me, the post office.
17 But in this particular situation there is no evidence that
18 the solicitation of funds outside the -- on the postal
19 sidewalk is prohibiting the operation of the facility for
20 postal purposes. The test cannot be met, either a
21 compelling interest or even a significant interest.

22 In fact, we would go one step further, as the
23 Court had alluded to, that even a reasonable --
24 requirement of a reasonable regulation here would not be
25 met because there is no evidence that outside the

1 particular sidewalk in these particular post office that
2 there is this problem of such huge proportion justifying
3 the elimination of this protected activity taking place
4 here.

5 Again, the complaints that were made might well,
6 as the court below stated, be dealing specifically with
7 viewpoint of the particular -- respondents' particular
8 political views. But yet it was classic political speech
9 that was being exercised outside.

10 The aspect I think that's important to draw the
11 distinction -- and I think the Postal Service really did
12 this -- is that they were concerned with solicitation
13 taking place really inside the lobbies. That was where
14 the experience was a problem. The prohibition outside
15 the -- outside the interior of the Postal Service onto the
16 public access sidewalk here was more of a ad hoc decision,
17 in our opinion, than --

18 QUESTION: Is the post office not allowed to
19 make that sort of an ad hoc decision if things are very
20 bad inside that post office, they might not be quite as
21 bad outside but were bad enough to regulate?

22 MR. SEKULOW: I think they could, and if they
23 could justify the prohibition outside and meet the
24 compelling interest test, then --

25 QUESTION: Why -- why do you need to meet the

1 compelling interest test?

2 MR. SEKULOW: Because a particular type of
3 speech, Chief Justice, has been eliminated from a public
4 forum, and that --

5 QUESTION: Well, what -- are you -- I don't
6 understand why you say this is a public forum. Under our
7 cases, government property, Adderley, Greer against Spock,
8 the government can reserve the use of its property for the
9 conduct of its business, and it's not a public forum.

10 MR. SEKULOW: We believe this case is
11 distinguishable from Greer and from Adderley. In Greer it
12 was the special constitutional function of the military
13 that was the primary concern when this Court said the free
14 speech activities could not take place inside the military
15 enclave.

16 In Adderley, in that particular situation the
17 charge that the individuals were charged with here was a
18 trespass charge, and they were deemed to have blocked an
19 area not open to the public for general use. That is not
20 what exists at the Bowie Post Office --

21 QUESTION: Well, that certainly wasn't the
22 reasoning of the Court in Adderley. The Court in Adderley
23 said when the government runs a jail it can set a jail
24 aside, and you don't have to have speech around a jail.

25 MR. SEKULOW: And that was because of the

1 security concerns of the jail, and it was speech taking
2 place, Chief Justice, in areas that were not open to the
3 general public. And here, there has not been this
4 reservation of use. Rather, the Postal Service has
5 invited the public in for postal services and nonpostal
6 services, for the distribution of literature, for peaceful
7 picketing, for petitioning for signatures. Yet they've
8 singled out solicitation outside.

9 QUESTION: You said a moment ago in response to
10 Justice O'Connor's question the post office could ban all
11 of these things and say we're just running post office
12 business here and all of you get out.

13 MR. SEKULOW: Oh, they could ban it if in fact
14 they operated as this quasi-military enclave, but they do
15 not, Chief Justice.

16 QUESTION: Well, but I take it it would be
17 permissible for them to do so, in your view?

18 MR. SEKULOW: They would have to show the
19 constitutional requirement being met, that the Postal
20 Service was so important to national interest, as the
21 military was, to justify it. The argument might well be
22 made, but the Postal Service is not at that point of being
23 a quasi-military enclave. They have not reached that
24 point. In fact, they're increasing their invitation
25 rather than limiting their invitation. They're not

1 limiting it to Postal Service business --

2 QUESTION: How about us? Are we a
3 quasi-military enclave? Do we have to allow
4 pamphleteering and -- and people quite silently carrying
5 posters right outside in the anteroom here?

6 MR. SEKULOW: I think the compatibility factor
7 that would justify a prohibition of that. We're not
8 saying that one who is rightfully in a place can
9 distribute his literature anywhere just because he has
10 that invitation. There is that compatibility factor that
11 this Court looked at in Grayned.

12 Is that particular speech compatible with what's
13 taking place, in this particular case, inside the forum?
14 But certainly, those distributing --

15 QUESTION: Eminently so. Posters protesting
16 that what -- you know, court decisions. Why is that
17 incompatible?

18 MR. SEKULOW: Well, I think if it was -- I think
19 it would be incompatible in the sense of the judicial
20 decorum and the courtroom decorum that takes place in the
21 chambers and inside of this courtroom, but that is not the
22 case where you've got general public access unlimited for
23 any business at all. One is not invited to the Supreme
24 Court building other than of course tours and whatnot for
25 just any business. It's a courtroom dedicated to a

1 specific function and is operating more distinct, if you
2 will.

3 However, free speech activities outside on the
4 sidewalks around this Court were protected and were deemed
5 to be areas within First Amendment protection.

6 QUESTION: The sidewalk right under the window,
7 too? You think we would have to let people -- you know,
8 there's a sidewalk that goes --

9 MR. SEKULOW: That's correct.

10 QUESTION: -- quite close to the building in
11 addition to the sidewalk next to the street that you use
12 to get from this building to other buildings. We would
13 have to let people right next to the window, too, right?

14 MR. SEKULOW: I think, yes, you would, but for
15 this condition. I want to draw a distinction --

16 QUESTION: Don't you think we have a case
17 dealing with the plaza area? Wasn't that issue decided --

18 MR. SEKULOW: In Grace --

19 QUESTION: -- and decided against you?

20 MR. SEKULOW: In Grace, the -- the Court did
21 indicate that the plaza -- it was not -- I don't think it
22 was a complete decision on that point -- was maybe not
23 open to the forum like the sidewalks, but I think --

24 QUESTION: Precisely. The sidewalk, the public
25 sidewalk was open.

1 And isn't the public invited, in effect, to come
2 to this building for any purpose to see it, to stand
3 around, whatever?

4 MR. SEKULOW: And in Grace --

5 QUESTION: Aren't they welcome to come and do
6 that?

7 MR. SEKULOW: Yes, they are. Absolutely.

8 QUESTION: Yes. And do you think that we have
9 to then permit the sort of activity that was involved
10 here?

11 MR. SEKULOW: On the plaza level, I think the
12 argument can be made that you draw the line there and
13 don't have to, but there's a distinction between this
14 Court's physical setup, if you will, and that of the post
15 office, and here's the point. That is, one who is
16 entering into this building must use the municipal
17 sidewalk to enter into the building. That is, to come
18 into this building as a public visitor, one must use the
19 sidewalk surrounding it.

20 At the Bowie Post Office, most people drive in,
21 and it is that access sidewalk is the only means whereby
22 people are going to get out of their car for the most part
23 and walk on into the facility.

24 QUESTION: Right. Now that's a very different
25 argument. Now you're saying this is just not an apron;

1 this is a public sidewalk in the sense that -- in the
2 sense that because of a change in circumstances the old
3 public sidewalk is no longer used for getting from one
4 building to another, and this -- this has become the
5 public sidewalk. But that's quite a different argument
6 from what you've been talking about up until now.

7 MR. SEKULOW: I -- I wouldn't think so, Justice
8 Scalia, in this context, again. That is, the design
9 was -- it was an intentional design by the Post Office to
10 set the area back from the main street mostly because of
11 the concerns with traffic on these main streets, so
12 setting it back allowing parking, a parking lot to be a
13 place between the municipal sidewalk, which the Fourth
14 Circuit said is not a reasonable alternative means of
15 communication, and the public access sidewalk.

16 And that -- our position is that sidewalk -- the
17 intervening parking lot does not create -- create a First
18 Amendment moat, if you will, which all of a sudden
19 announces to someone that they're on a special enclave and
20 free speech activities stop as if to have one's
21 constitutional rights shed as they walked out of their car
22 and onto the only sidewalk to get in and out of that
23 building.

24 QUESTION: (Inaudible) would you make the same
25 argument that the -- the apron -- I agree, that's a loaded

1 word -- the sidewalk, the private sidewalk around the bank
2 -- the bank has a parking lot, and it's set back. Would
3 you say that the bank now has to allow protests on that
4 section?

5 MR. SEKULOW: Absolutely not. It's a completely
6 different situation. The United States is subject to the
7 mandates and the protections of the First Amendment. A
8 bank, in private capacity, would not be, and I think
9 that's the distinction.

10 QUESTION: Oh, but -- but we're talking about
11 whether a sidewalk is a sidewalk. You wouldn't be arguing
12 that that is the functional equivalent of the public
13 sidewalk, would you?

14 MR. SEKULOW: I would be arguing that in that
15 particular case it is not governmentally owned, although I
16 wouldn't be arguing that if I was up here on that case,
17 obviously, but if it's not governmentally owned. And that
18 is the difference. And that is the First Amendment
19 mandates are to the state action sufficient --

20 QUESTION: It is not a difference for this
21 argument. You -- you engaged in a discussion with -- with
22 Justice O'Connor, and Justice O'Connor said the mall
23 outside is government owned but you're not allowed to go
24 on it, and your argument was but the mall is not a
25 sidewalk. And this is a sidewalk. Yes, it's set back

1 from the street, but it's still a sidewalk.

2 And now I give you a case where it's also a
3 sidewalk from the bank, and you say but no, it's not a
4 sidewalk.

5 MR. SEKULOW: It's a -- it's a privately owned
6 piece of sidewalk, if you will. It is privately owned.
7 The mandates and the protections of the First Amendment,
8 this Court has not required those to exist onto private
9 property owners.

10 While a government can treat its property as a
11 private owner of that property, it has not chosen to do so
12 here, and that is, it's publicly owned, the general public
13 is invited, and their -- their invitation, as I stated
14 earlier, was not limited to postal business only. That is
15 not the situation --

16 QUESTION: Now -- now under your argument, I
17 suppose, the post office would also have to permit
18 panhandlers on the premises; is that right?

19 MR. SEKULOW: I think yes, that that activity,
20 the district court in New York recently addressed that and
21 said that that was a protected form of speech, again,
22 though, subject to time, place and manner restrictions.
23 And what the government has chosen to do in this
24 particular case is eliminate the speech for efficiency
25 reasons rather than narrowly tailoring time, place and

1 manner restrictions. And --

2 QUESTION: Do you think you can narrowly tailor
3 time, place and manner -- manner restrictions to all post
4 offices in the United States with one regulation, or are
5 you advocating that we have to have an office-by-office
6 regulation?

7 MR. SEKULOW: I think that there are, from what
8 we understand, two basic designs to post offices, and some
9 exist immediately adjacent to municipal sidewalks, which,
10 of course, the government concedes would be protected
11 speech, and others that are set back. And I think a
12 reasonable time, place and manner restriction could be
13 uniformly adopted, and that is what I think the
14 Constitution requires, and that's --

15 QUESTION: Can I ask you, you can you
16 could -- that your argument applies to panhandling. Does
17 it apply to all commercial solicitation, selling magazine
18 subscriptions and shoes and everything?

19 MR. SEKULOW: Well, I don't --

20 QUESTION: In other words, is commercial speech
21 covered by your theory?

22 MR. SEKULOW: I don't think necessarily
23 commercial speech would be, and the Court --

24 QUESTION: Do you think panhandling is
25 commercial speech, or is it like your speech?

1 MR. SEKULOW: The court in New York, the
2 district court, said it was in fact charity. It was an
3 individual solicitation for a very personal charity but a
4 charity nonetheless, and they held it to be a -- a
5 charitable solicitation no different than what our
6 respondents were -- entered into. I haven't digested how
7 far we take that argument, obviously, but that is what the
8 court in the district said, that that personal
9 solicitation for their personal interest was a form of
10 charity indistinguishable than any other charitable
11 contribution.

12 QUESTION: On that theory, every thief is Robin
13 Hood.

14 MR. SEKULOW: Well, I -- that's correct,
15 Chief -- Justice Scalia.

16 QUESTION: Let me ask one other question, if I
17 may.

18 MR. SEKULOW: Yes, Your Honor.

19 QUESTION: If we focus on access to the
20 building, I know -- I realize you're making a facial
21 attack on the regulation, but you really think you have a
22 right to put a table up in front of the door?

23 MR. SEKULOW: Well, we had -- we had the right
24 in this -- in this sense.

25 QUESTION: Because you think the regulation is

1 invalid.

2 MR. SEKULOW: Yes, but -- but clearly I think a
3 booth rule, as Justice O'Connor alluded to, would be
4 constitutionally sufficient, which could eliminate the
5 table and any potential blocking problems. But that's not
6 what the government has chosen to do here.

7 What they've chosen to do instead was to
8 eliminate entirely this speech from this sidewalk, the
9 sidewalk which is the only way into this building. It is
10 the access way. There is no mall separation in the
11 context of someone coming off the municipal sidewalk onto
12 the mall.

13 I think that's a distinction here, and that is
14 basically the way to get into the post office. The way
15 this particular facility was designed was that the
16 entranceway in is that public sidewalk. You exit your
17 car, come out to your car and get onto the sidewalk to get
18 into the building for postal reasons, as I said, or for
19 nonpostal reasons.

20 The situation that exists at Bowie, Maryland,
21 and these respondents were convicted and sentenced to jail
22 for doing something that they would be entitled to if it
23 was abutting a municipal sidewalk. And what we're saying
24 is that the First Amendment cannot -- a moat cannot be
25 created by this intervening parking lot to eliminate First

1 Amendment activities.

2 QUESTION: Well, you don't think they could put
3 up a table on the municipal sidewalk, do you?

4 MR. SEKULOW: There are regulations in some
5 municipalities that prohibit tables because of the
6 obstruction. And again, those regulations are in
7 existence which could prohibit obstructing the pedestrian
8 flow of traffic. But these defendant -- respondents were
9 not charged with that. They were charged with soliciting.

10 What our position is is that the right to
11 solicit, what's been referred to by the court below as
12 classic political speech, is not subject to the grace of
13 government, to an architectural design or to a fluke of
14 history.

15 Thank you.

16 QUESTION: Thank you, Mr. Sekulow.

17 Mr. Roberts, you have two minutes remaining.

18 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

19 ON BEHALF OF THE PETITIONER

20 MR. ROBERTS: Thank you, Your Honor.

21 First of all, Justice Blackmun, the cite for the
22 authority to issue these regulations is 39 U.S.C., Section
23 401, subsection 2 in the Postal Service Act.

24 The distinction between the interior and the
25 exterior is one that the Postal Service did not adopt in

1 issuing these regulations. Permitting solicitation on the
2 outside carries many of the same administrative problems
3 that would accompany permitting solicitation in the postal
4 lobbies. Certainly where you're talking about
5 solicitation as in this case where the people go, which is
6 the entranceway, it carries at least the same degree of
7 problems.

8 And as the Court articulated in the Cornelius
9 case, the government doesn't have to wait until havoc is
10 wreaked to act in restricting access with respect to a
11 nonpublic forum.

12 I understood my brother to concede that if the
13 Postal Service eliminated all extraneous activities and
14 barred all sorts of expression, there would be no
15 constitutional objection. I take that concession to be
16 somewhat inconsistent with an argument that this is a
17 traditional public forum, and I take it to mean that what
18 we're talking about is a limited public forum. But again,
19 as the Court has made clear, in a limited public forum
20 selective access does not mean that everyone has the right
21 to come and go and do whatever activities they wish. The
22 government can preserve the property under its control for
23 the purposes to which it is dedicated.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Roberts.

2 (Whereupon, at 11:50 a.m., the case in the
3 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. 88-2031 - UNITED STATES, Petitioner V. MARSHA B. KOKINDA, ET AL.

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BY Judy Freilicher

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