

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JAMES C. PLEDGER, COMMISSIONER OF REVENUES
OF ARKANSAS, Petitioner v. DANIEL L. MEDLOCK,
et al.

and

DANIEL L. MEDLOCK et al., Petitioners v. JAMES C.
PLEDGER, COMMISSIONER OF REVENUES OF
ARKANSAS

CASE NO: 90-29 & 90-38

PLACE: Washington, D.C.

DATE: January 9, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES C. PLEDGER, COMMISSIONER :
4 OF REVENUES OF ARKANSAS, :
5 Petitioner :
6 v. : No. 90-29
7 DANIEL L. MEDLOCK, et al.; :
8 and :
9 DANIEL L. MEDLOCK, et al., :
10 Petitioners :

11 v. : No. 90-38
12 JAMES C. PLEDGER, COMMISSIONER :
13 OF REVENUES OF ARKANSAS :

14 - - - - - X

15 Washington, D.C.

16 Wednesday, January 9, 1991

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 10:00 a.m.

20 APPEARANCES:

21 WILLIAM E. KEADLE, ESQ., Revenue Legal Counsel, Arkansas
22 Department of Finance, Little Rock, Arkansas; on
23 behalf of the Petitioner/Respondent Pledger.

24 EUGENE G. SAYRE, ESQ., Little Rock, Arkansas; on behalf of
25 the Respondents/Petitioners Medlock, et al.

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1 petitioners in 90-39, have challenged the Arkansas tax
2 because an exemption, as is extended to newspapers, is not
3 also extended to the sale of cable television service,
4 citing that there is a similarity between the two
5 services.

6 The law does not in fact violate the First
7 Amendment for the reason that cable television service is
8 a distinguishable medium from the newspapers. The State
9 is not arguing that cable television is not entitled to
10 some First Amendment protection. It's just, that the
11 ability to tax one of the medium, one of the media is not
12 necessarily binding the State to tax the other medium in
13 the same way. The tax involved does not single out the
14 press, nor is it content based. The taxpayer would have
15 you believe that it should be compared to newspapers to be
16 actually a group within the press that is being singled
17 out for special treatment.

18 QUESTION: The Supreme Court of Arkansas, Mr.
19 Keadle, said that the tax was invalid insofar as it
20 applied to cable TV operators but did not extend to
21 satellite dish operators?

22 MR. KEADLE: Yes, Mr. Chief Justice, that's
23 correct.

24 QUESTION: And you're appealing --

25 MR. KEADLE: That is the issue that the State is

1 appealing.

2 QUESTION: You're appealing that ruling? And
3 then you're defending the ruling of the Supreme Court of
4 Arkansas when it held that it was not invalid to
5 distinguish between cable operators and newspapers?

6 MR. KEADLE: Yes, Your Honor.

7 QUESTION: Is the satellite issue still in the
8 case?

9 MR. KEADLE: Well, Your Honor, the --

10 QUESTION: The law has been amended?

11 MR. KEADLE: Yes, it has. After the --
12 approximately 11 days after the trial court made its
13 ruling --

14 QUESTION: I see.

15 MR. KEADLE: -- upholding the tax, the law was
16 changed. Now, this was before --

17 QUESTION: But you would still like to argue
18 that it was not invalid prior to amendment?

19 MR. KEADLE: Yes, Your Honor. It seems --

20 QUESTION: Okay.

21 MR. KEADLE: -- somehow inconsistent, but the
22 basis of our argument is --

23 QUESTION: The legislature might go back, if you
24 want.

25 MR. KEADLE: Well, that could well happen, but,

1 Your Honor, we are arguing that the tax as it stood in
2 1987 was constitutional due to the fact that, although
3 evidence was presented that these two media provided
4 similar types of services, that there was a difference in
5 the two media that would justify the different, different
6 tax treatment.

7 QUESTION: How much is involved in that interim
8 period, between 1987 and 1989?

9 MR. KEADLE: Between 1987 and 1989, at the time
10 the taxes were escrowed in the case it was approximately
11 \$6.2 million. At present, after the Arkansas Supreme
12 Court ruled in the case, the respondents went back into
13 court and asked that the escrow account be reestablished.
14 Instead an agreement was reached between the parties
15 whereby the State would reserve an amount in one of its
16 refund accounts to compensate for the \$6.2 million plus
17 accumulated interest. I believe now it stands at
18 somewhere around \$8.1 to \$8.5 million.

19 QUESTION: And if this Court were to reverse the
20 Supreme Court of Arkansas and say that the statute in
21 effect before the legislative amendment went into effect
22 was constitutional, the State would recover some money,
23 then?

24 MR. KEADLE: Well, Your Honor, it is not a true
25 escrow in that sense. There is not -- it's more rather

1 that the State would not have to make that refund out of
2 its existing refund accounts.

3 QUESTION: Oh, I see. So that, that is the
4 tangible dispute, whether the State has to refund taxes
5 that it collected?

6 MR. KEADLE: Yes, Your Honor. On one hand there
7 will be a refund of taxes collected prior to the 1989
8 change, and in the other instance the tax is ongoing.
9 There will be a request for refund of that money, too.

10 As I had stated before, there is really no First
11 Amendment violation in terms of treating two like entities
12 differently for tax purposes --

13 QUESTION: Well, is that because they don't
14 compete?

15 MR. KEADLE: Well, Your Honor, in some sense
16 they do compete for viewer dollars, consumer dollars.
17 It's more of a fact that physically they are different
18 services. In the cable situation you have a process --

19 QUESTION: Well, I suppose we can tell when --
20 you can read a newspaper, and you watch a television
21 screen. They're dissimilar in that -- in that respect.
22 But for purposes of our determining the scope of the First
23 Amendment, can't we say that these media are in
24 competition? I take it cable offers a wide variety of
25 news broadcasts in Arkansas, including 24-hour news, I

1 suppose, on some channels?

2 MR. KEADLE: Your Honor, I think it's clear that
3 in fact evidence presented at the trial showed that many
4 of the types of programs that cable offered were indeed
5 similar to those provided by newspaper. But the
6 difference here is in the physical make up of the two
7 services and how does this burden on the Government to --

8 QUESTION: Well, but didn't the Arkansas Supreme
9 Court say that there was no competition between the two,
10 or am I wrong about that? I thought the Arkansas Supreme
11 Court said well, we -- they're not really competing in the
12 same way.

13 MR. KEADLE: That is between cable and
14 newspaper?

15 QUESTION: Yes.

16 MR. KEADLE: Yes. That statement was made, and
17 that is what is at issue here.

18 QUESTION: Was that based on some factual
19 findings?

20 MR. KEADLE: Well, I think it was more a review
21 of past cases of this Court that had not necessarily made
22 the distinction between cable and newspapers as being
23 competing interests, even though, even though the evidence
24 presented was they are similar types of programs. They
25 are still different -- different entities.

1 The tax involved in this case --

2 QUESTION: Mr. Keadle, what, what is your theory
3 of the law? Do you acknowledge that it is contrary to the
4 First Amendment to tax differentially two media that are
5 in competition with one another? That the test is whether
6 they are competing, and if they are competing, you cannot
7 tax one differently from the other?

8 Is that a --

9 MR. KEADLE: Your Honor, I don't think the basis
10 --

11 QUESTION: -- proposition you accept?

12 MR. KEADLE: No, I don't believe it's whether
13 the two are competing necessarily. That may be a factor
14 in the determination, but --

15 QUESTION: Well, what is it?

16 MR. KEADLE: -- other aspects have to be looked
17 at.

18 QUESTION: Oh, I see. Well, what is the
19 criterion, if it's not that? I mean, that one I
20 understand. What is it if it's not that?

21 MR. KEADLE: Well, the criterion that the State
22 is arguing and that we're looking at is the type of burden
23 that is placed on the Government by the two types of
24 services. In your newspaper situation you don't have
25 certain aspects that you have in cable, like the stringing

1 of the cable along the public rights-of-way on wires,
2 underground, the basic interference with the Government
3 function, and also --

4 QUESTION: Well, that's a difference between the
5 two, and there are a lot of other differences between the
6 two. So I -- is what you're saying is that, as with any
7 other tax, a rational basis distinction between the two is
8 enough to support a differential tax?

9 MR. KEADLE: Yes, Your Honor. When we are
10 dealing with a tax that is not content based or does not
11 -- and where the similarity between the two comes into
12 play is when you're not dealing with two similar enough
13 entities to make that distinction, then you do use the
14 rational basis test.

15 QUESTION: So it's just the same test that
16 applies to all taxation? There has to be a rational basis
17 between the two, you say, so long as you're not
18 discriminating on a subject matter basis?

19 MR. KEADLE: That's correct, and I believe this
20 Court's decision in another Arkansas case, the Writer's
21 Project case --

22 QUESTION: Yes, but what about a tax on ink and
23 typesetting?

24 MR. KEADLE: Your Honor, I believe this Court
25 has also stated that an effect on a newspaper, that

1 particular -- that particular example in the Minneapolis
2 Star case, that when you examine it and see that the
3 effect is had only on a few members of the press, in that
4 case a small group, a use tax on publishers, rather that
5 it was shown --

6 QUESTION: Yeah, but surely there was a rational
7 basis to distinguish publishers from other people. I
8 mean, they're different from other people in a lot of
9 ways. They put different burdens on the State's economy,
10 and so forth. Wasn't there a rational basis there to
11 distinguish between? I mean, I want to tax ink, and I
12 don't want to tax non-ink. Ink is different from non-
13 ink.

14 MR. KEADLE: Your Honor, I believe there was a
15 rational basis there --

16 QUESTION: But we struck it down anyway.

17 MR. KEADLE: The Court struck it down because
18 the tax in effect targeted a small group within one
19 entity.

20 QUESTION: In other words a group within an
21 entity that was competing with each other. So we're right
22 back where you say we aren't.

23 MR. KEADLE: Well, in effect it was the same
24 entity.

25 QUESTION: Pardon?

1 MR. KEADLE: It was the same entity, as opposed
2 to competing entities.

3 QUESTION: The same as opposed to competing?
4 The same in what sense?

5 MR. KEADLE: The same in the sense that --

6 QUESTION: They're different newspapers.

7 MR. KEADLE: -- the tax was on publishers. Yes,
8 they're different newspapers, but they are newspapers.
9 They are a member of the print media, and the distinction
10 we're making here is they're two different types of media.
11 They are competing, but the differences are physical.

12 QUESTION: So in one-half of the case it depends
13 on whether scrambled television systems are really the
14 same media as unscrambled television systems, is that's
15 your criterion, right? That's the question before us,
16 whether they are like two different newspapers or not?

17 MR. KEADLE: Well, Your Honor, I believe in that
18 situation you can actually distinguish between the
19 satellite service and the cable TV. service in that -- in
20 that basically the way the program is received in the
21 home, in one instance, satellite service, can be
22 distinguished from cable. Cable, again, uses public ways
23 and performs a type of intrusion on the Government, while
24 the -- in the satellite dish situation the signal is
25 beamed directly into the home and there is not, there is

1 not a basis to distinguish on in that instance. The --

2 QUESTION: May I ask, don't the newspapers use
3 public property to sell their newspapers?

4 MR. KEADLE: Yes, Your Honor, to some extent
5 that is true.

6 QUESTION: Then how -- what happens to your
7 distinction?

8 MR. KEADLE: Well, I believe the distinction is
9 still there. A look at other types of Government
10 protection afforded to cable, cable service, such as
11 franchises, rate regulation --

12 QUESTION: Of course they pay for the
13 franchises, don't they?

14 MR. KEADLE: Well, Your Honor, it's true there
15 is some payment for the franchise, but I don't think it's
16 clear also that that is necessarily full compensation for
17 that service.

18 QUESTION: But isn't it true the newspapers
19 don't pay anything for the newsstands on public property?

20 MR. KEADLE: That's true, Your Honor, and that
21 may -- and the distinction there may well be more of a
22 basis upon how administratively easy it is to collect the
23 tax from newspapers as opposed to cable. I believe the
24 evidence in the case shows that the collection of tax
25 from, or the collection of revenues for the satellite

1 service was actually to some extent being conducted by the
2 cable operators themselves. It does not appear at any
3 fee. I think this becomes important when you look at the
4 fact that the Arkansas legislature changed the law before
5 the Arkansas Supreme Court ruled that these were similar.

6 QUESTION: Yeah, but administration of a sales
7 tax on newspapers probably isn't any harder than sales tax
8 on candy bars, is it?

9 MR. KEADLE: Your Honor, that may well be true.
10 I know that that is a distinction the Court has brought
11 out at times, specifically, I believe, your concurring
12 opinion in the Minneapolis Star case, that based a
13 distinction that there is at least some administrative
14 inconvenience in collecting the tax of newspapers.
15 Admittedly, maybe it's similar to others, but that
16 distinction has been made.

17 QUESTION: In Arkansas, what do -- what public
18 property does the -- do the cable companies use?

19 MR. KEADLE: Well, in effect they use both, both
20 the wires, the wires and underground conduits. They make
21 use of the public streets to lay these -- lay these wires.
22 And that not only -- not only causes problems necessarily
23 in traffic and other means, but there is actually a
24 physical use of phone wires --

25 QUESTION: Do they use telephone poles?

1 MR. KEADLE: Yes. Yes, they do. I think in
2 Arkansas both methods of using the above ground poles and
3 underground conduits are used.

4 QUESTION: Did the Arkansas Supreme Court find
5 that cable television pays a franchise fee for the use of
6 the public right-of-way?

7 MR. KEADLE: Your Honor, I believe that --

8 QUESTION: I thought that was included in their
9 findings?

10 MR. KEADLE: Your Honor, that was, indeed
11 mentioned in the findings, but I would submit that that
12 finding is not completely correct, given the fact that
13 this Court in the Preferred Communications case has at
14 least sent that case back down for more evidence on how
15 that fee is collected and how it is used.

16 QUESTION: So you don't support the opinion of
17 the court below on that point, is that it?

18 MR. KEADLE: Your Honor, I believe that the
19 evidence that we have can allow us to make a decision
20 without necessarily addressing that portion. I would have
21 to say that I do recognize that there is a franchise fee
22 paid and what it goes to. But that it's not necessarily a
23 full compensation for the intrusion of the public rights-
24 of-way. I believe the Arkansas Supreme Court said that
25 the fact that there was a franchise fee fully satisfied

1 the problem. Therefore they rejected the public rights-
2 of-way argument.

3 QUESTION: Mr. Keadle, I suppose the State of
4 Arkansas can impose a tax on candy and not impose a tax on
5 ice cream if it wanted to, couldn't it?

6 MR. KEADLE: Your Honor, I would think so.

7 QUESTION: And you wouldn't have to show that
8 candy used public facilities or the public streets more
9 than ice cream or anything of that sort?

10 MR. KEADLE: No, Your Honor, I think --

11 QUESTION: You'd just come up here and you'd say
12 candy is different from ice cream, right?

13 MR. KEADLE: Well, Your Honor, the --

14 QUESTION: So why -- what you're saying today is
15 that cable is different from scrambled -- un -- you know
16 --

17 MR. KEADLE: Well, the difference in the two
18 examples, one being the candy and the other being the
19 difference between cable and newspaper and cable and
20 scrambled satellite services is to what extent the
21 respondents' First Amendment rights are being violated.

22 QUESTION: Well, I understand, but what I don't
23 get from you, what I don't understand is what your theory
24 is. Do you acknowledge that in order to make a
25 distinction between two media, a State must show a

1 compelling State interest? Do you acknowledge that?

2 MR. KEADLE: No, Your Honor, I do not.

3 QUESTION: Well, if it's not a compelling State
4 interest that has to be shown, what must be shown beyond
5 what has to be shown in the candy and ice cream
6 illustration? Anything other than the two things are
7 different and we chose to tax -- choose to tax the one and
8 not the other?

9 MR. KEADLE: Your Honor, I believe on one hand
10 this Court has recognized that the need for the State to
11 raise revenue is a rational basis for making any decision
12 to tax a certain subject.

13 QUESTION: Well, on that instance I suppose you
14 could have taxed the press and exempted cable?

15 MR. KEADLE: Yes, Your Honor. I submit that we
16 would very well probably be up here trying to make another
17 distinction, but I believe that the cases indicate that we
18 could, we could make that distinction and reverse around.

19 QUESTION: I thought there was language in some
20 of our opinions that when a tax is placed on the media in
21 what appears to be some discriminatory fashion, that the
22 State has to come up with a strong State interest for
23 making that differential tax.

24 MR. KEADLE: Well, Your Honor, that --

25 QUESTION: Is that right, that there's some

1 heightened scrutiny when the First Amendment is involved?

2 MR. KEADLE: Well, Your Honor, that does bring
3 to mind the O'Brien case that in effect stated that the
4 interest should be -- should be important or substantial.
5 That may well indicate that a higher level of scrutiny
6 should be used. I believe it goes to --

7 QUESTION: How about Arkansas Writers and
8 Minneapolis Star? You don't think that those cases
9 indicated that some form of heightened scrutiny was being
10 employed?

11 MR. KEADLE: Yes, Your Honor, I feel that that
12 was suggested in a case where, as in Arkansas, that, that
13 interest was needed to justify a content based
14 discrimination. In this instance the tax is levied on all
15 cable operators, regardless of the content of what they
16 provide.

17 QUESTION: But it's also a State sales tax,
18 isn't it?

19 MR. KEADLE: Yes, Your Honor, it's applied to --

20 QUESTION: That applies not just to the press, I
21 mean not just to the media --

22 MR. KEADLE: Oh, it applies to all similarly
23 situated businesses.

24 QUESTION: Yes.

25 MR. KEADLE: The newspaper, in effect, is part

1 of a limited number of exemptions.

2 QUESTION: Exactly.

3 MR. KEADLE: And the fact that --

4 QUESTION: So the real issue is whether you can
5 distinguish between one form of communication and another?

6 MR. KEADLE: Yes, Your Honor, I feel it's very
7 clear here that not only is that content based --

8 QUESTION: Now, sales of newspapers and
9 magazines sold by subscription are exempt?

10 MR. KEADLE: Yes, Your Honor.

11 QUESTION: And cable services are generally sold
12 by subscription, I take it?

13 MR. KEADLE: Yes, Your Honor, that is correct,
14 too.

15 QUESTION: Could the State tax magazine
16 subscriptions and not newspapers?

17 MR. KEADLE: Your Honor, I believe that that
18 would be within the State's province to do, again subject
19 to a challenge on why it was done.

20 QUESTION: On the grounds that we say they're
21 different?

22 MR. KEADLE: Well, that would be the first
23 argument. Yes, they are different. I think a further
24 look would have to be made at, again, if there is any
25 legislative history as to why --

1 QUESTION: Suppose we show -- suppose it is
2 shown that they compete for the same consumer dollar? I'm
3 not sure you can make that showing, but suppose that
4 showing were made in a particular case?

5 MR. KEADLE: Your Honor, I don't --

6 QUESTION: Would that have a bearing on whether
7 or not they are different, or is that just something we
8 don't look to?

9 MR. KEADLE: Your Honor --

10 QUESTION: We look to some metaphysical
11 difference between newspapers and magazines, and
12 metaphysical difference is fairly easy to establish, I
13 suppose.

14 MR. KEADLE: Your Honor, I think that would have
15 a bearing on the matter, again. I think on a case-by-
16 case basis we'd have to look at, look at other
17 considerations. I do not think that the fact that they
18 compete for the same dollar alone would be, would be
19 enough.

20 QUESTION: What's the -- in the cases, what is
21 the standard that has been applied that, sustaining the
22 right of localities to license cable operators but to
23 exempt newspapers from license? Just a rational basis?

24 MR. KEADLE: Your Honor, I believe that in
25 effect is a higher point. too, when you're looking at a

1 regulatory -- well, in fact taxation, too, is a regulatory
2 form of restriction. But that type of restriction more
3 goes to the absolute restriction of a media to speak at
4 all, as opposed to a tax exemption which might have some
5 burden, but the message is going to be conveyed as long as
6 the tax is not content based.

7 Mr. Chief Justice, I'd like to reserve the rest
8 of my time for rebuttal.

9 QUESTION: Very well, Mr. Keadle.

10 Mr. Sayre, we'll hear from you. .

11 ORAL ARGUMENT OF EUGENE G. SAYRE

12 ON BEHALF OF THE RESPONDENTS/

13 PETITIONERS MEDLOCK, ET AL.

14 MR. SAYRE: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 I would like to first state the theory of the
17 case on behalf of the operators and subscribers to
18 summarize the relief that we seek and then to discuss the
19 merits of the case. First, the theory is, as enunciated
20 in this Court's Minneapolis Star case, that if we have a
21 differential of taxation between different forms of the
22 media, then, even though the Court said that it does not
23 in essence make such a compelling force on the speaker
24 that it totally keeps them from speaking at the time, that
25 that presence and the threat of future differential

1 taxation is such that it puts a burden on the State to
2 show a higher or the compelling interest.

3 And in this particular case we believe that the
4 taxpayers and the cable operators have sufficiently
5 established that the method of delivering news information
6 and entertainment by the cable electronic message is
7 exactly the same as that that is delivered in the print,
8 either newspapers or magazines, and in fact the trial
9 court stated that our witnesses referred to this as an
10 electronic magazine.

11 Now the method, or the relief that we're seeking
12 is a reversal of the latter part of the decision and an
13 affirmance of the first part. As Mr. Keadle said, the
14 Arkansas Supreme -- legislature amended the law because we
15 had established at the trial in this case that the direct
16 broadcast satellite, or the scrambled services, were not
17 being taxed and were delivering exactly the same type of
18 information, news and entertainment, virtually identical,
19 to the cable that was taxed, that for that 2-year period
20 the tax was unconstitutional under this Court's
21 Minneapolis Star and Arkansas Writer's Project rationale.

22 However, we have never had an opportunity in the
23 second stage of the case to present any evidence to attack
24 that, because it was after the trial court's decision. We
25 believe if this Court will accept the broader approach

1 that we have suggested, and that is that print and the
2 cable are similar, sufficiently similar, that the same tax
3 should be applied to the same or they are unconstitutional
4 without a compelling interest being shown by the State,
5 then you should reverse the Arkansas Supreme Court on the
6 approval of the second or amended law.

7 However, even if you find that only the
8 electronic media is similar and that we should narrow the
9 approach or the look to those particular entities, we have
10 submitted the affidavits in the petition for rehearing
11 simply to establish that there is a factual difference.
12 The Supreme Court of Arkansas noted twice in the opinion
13 that the Act 769 was not before the trial court, and did
14 not pass upon it. And therefore we submit that even if
15 the Court should narrow the limitation of the view in this
16 case, that we should be entitled on remand -- the Court
17 should vacate and we should be entitled on remand to
18 present evidence on the amended statute either in this
19 case on remand or in another case without the threat of
20 collateral estoppel or res judicata being raised.

21 QUESTION: Well, I see that in your brief you
22 refer to cases since Minneapolis Star, and you say, these
23 courts have held that unless there is some logical reason
24 for distinguishing between different segments of the mass
25 communications media, cable television services should

1 enjoy the same First Amendment rights. Is that your
2 standard -- logical?

3 MR. SAYRE: Well, the -- it's a compelling. The
4 standard, if we're applying --

5 QUESTION: You mean logical is at least
6 compelling?

7 MR. SAYRE: Well, what I'm -- Mr. White, if I
8 have stated -- there is no logical distinction between the
9 two inasmuch as they are transmitting and conveying to the
10 public the same type of information. I think that there
11 has to be a compelling interest shown on the State to show
12 a differential between them, and that the reasons the
13 State has offered here, the use of the public right-of-
14 ways or the pervasiveness of television in the home, with
15 regard to a -- not a regulation of the entry or the access
16 but with regard to the application of the tax is not
17 logical.

18 QUESTION: Mr. Sayre, if you say that a
19 compelling State interest is required in order to have a
20 tax that distinguishes between types of media, you're
21 going from what was the standard before Minneapolis Star,
22 which was that any rational basis would support a tax
23 distinction, you know, Lenhouse v. -- and those cases,
24 that that was where the latitude awarded to the Government
25 was the greatest, to a situation where the Government can

1 virtually never prevail. You say that's the import of
2 Minneapolis Star?

3 MR. SAYRE: If there is a differential in
4 taxation, Mr. Chief Justice, I would say that is probably
5 the case. But we have attempted here to target or to
6 limit our scope of review to those entities that are First
7 Amendment speakers, that are members of what we refer to
8 as the mass communications media, those that are
9 transmitting as part of the press, either electronic or
10 print.

11 QUESTION: Well why would it be so limited? We
12 had a case involving nude dancing here yesterday, as to
13 whether that was communicative. Now, would a State have
14 to tax the bookstore that was presenting the nude dancing
15 the same way it taxed other forms of communicative
16 activity?

17 MR. SAYRE: We don't -- I was going to say have
18 that situation in this case, but I would say that that
19 argument certainly could be made by the bookstore operator
20 with regard to what he was selling to the public. We are
21 not in anyway asking for the Court to make that broad a
22 distinction in this case because what we have before you
23 is what we consider virtually identical methods of
24 transmission. The only difference is one is paper and one
25 is electronic. Now in that particular --

1 QUESTION: What about telephone services? I
2 take it now that if you dial, I don't know if it's 800 or
3 900, there are all sorts of information services, sports,
4 news, and so forth, that you get on the telephone. Is
5 that -- does the State have to have a compelling interest
6 before it can tax the telephone service company if it
7 exempts your industry?

8 MR. SAYRE: Justice Kennedy, I would say that,
9 again, as the Chief Justice, that is an argument that the
10 telephone companies could raise, whether it, is --

11 QUESTION: Well, we have to write the opinion,
12 and we want to know the consequences of the theory that
13 you're advancing. Can you, can you answer this question?

14 MR. SAYRE: The consequences would be --

15 QUESTION: It seems to me the consequences are
16 they're engaged in dissemination of information and that
17 they qualify for the exemption.

18 MR. SAYRE: And they are -- in the case of when
19 they're acting other than a common carrier, and they are
20 originating the information, they probably have that same
21 constitutional right.

22 QUESTION: Because I can think of no case in
23 which we -- in which a State has been able to show a
24 compelling interest, of course we have never asked them to
25 do so, but I can't think of how a State could show a

1 compelling interest to justify any tax exemption or any
2 tax discrimination.

3 MR. SAYRE: The situation that I think, Mr.
4 Kennedy, that this case presents is exactly the one that
5 was left open in the Arkansas Writer's Project case, and
6 that is that in the instance, in the first part, the 1987
7 to 1989 part of this case, that being when the direct
8 broadcast satellite services were not taxed. We have
9 exactly the same type of programming being delivered, and
10 there is a differential between cable and between the
11 satellite broadcast. This is the same type of situation
12 that existed in Arkansas Writer's Project, where some
13 magazines were taxed and other magazines were not taxed.
14 After the amendment in 1989 --

15 QUESTION: That was on the basis of the subject
16 matter of the magazines. You can certainly distinguish
17 that case on that ground. This is not a subject matter
18 distinction.

19 MR. SAYRE: Then, Mr. Scalia, with regard to the
20 part that was reserved in Justice Marshall's decision in
21 that case, of whether or not the difference between --
22 taxation between periodicals would be an additional basis
23 -- was reserved, and I think that is exactly what is
24 presented in this case. We have a different type of
25 periodical, be it electronic or be it print. We have a

1 differential in taxation.

2 And again we go back to the Minneapolis Star
3 decision of this Court and the policy matter, the decision
4 matter that there is a distinction being drawn between
5 similar media, and as such that once we have established
6 that we are providing the same type of information, and
7 once we have established that we are being discriminated
8 in the imposition of the tax, in this case a general tax
9 and exactly the same tax that was in Arkansas Writer's,
10 then the burden or proof on the strict scrutiny or
11 heightened scrutiny switches to the State to show that it
12 has some strong or compelling interest to be served by
13 this differential in taxation. And we do not believe that
14 the, the use of the right-of-ways or the pervasiveness of
15 television are sufficient for tax purposes to sustain
16 that.

17 QUESTION: Does it constitute an
18 unconstitutional discrimination that has to have a
19 compelling justification if the type of tax at issue,
20 although it's applied uniformly to anyone, is simply a tax
21 that does not happen to fall on one of the media? Let's
22 assume -- well, a sales tax.

23 Let's assume that most of the broadcasters in
24 Arkansas don't sell their advertising locally, that the
25 sales are made by the networks to nationwide advertisers

1 and what not, so that the over-the-air broadcasters in
2 Arkansas really don't make any sales to people. Now,
3 would a uniform sales tax that applies to newspapers,
4 cable owners, and everybody else, but that happens not to
5 bite the over-the-air broadcaster because he is not
6 selling anything in Arkansas, is that kind of a tax
7 unconstitutional, too, because it has this --

8 MR. SAYRE: In the particular instance here, the
9 sale, I mean, the sales tax is imposed as an excise tax on
10 the sale.

11 QUESTION: No, I understand that --

12 MR. SAYRE: So I think that would be a
13 distinction that would be drawn.

14 QUESTION: No, but I'm trying to test the
15 breadth of the principle you're urging us to adopt. Is
16 the principle that you have to treat all media equally, or
17 is it just that you can't make an exemption from a
18 particular tax for some media and not for others? But so
19 long as you design your tax correctly so that it happens
20 to hit some of them and not others, that's okay?

21 MR. SAYRE: I would think, in response, Mr.
22 Scalia, that it would have to apply generally, and that is
23 what this Court's admonitions in Minneapolis Star and
24 Arkansas Writer's meant to say.

25 QUESTION: Mr. Sayre, the members of the Court

1 should be addressed as Justice.

2 MR. SAYRE: Excuse me, Chief Justice. Justice
3 Scalia.

4 In that particular instance I think that the
5 cable industry in Arkansas pays sales tax upon any
6 purchases that it makes, in the same manner that the
7 broadcast media or the print media pays a sales tax or a
8 use tax upon tangible personal property. It is only in
9 the instance -- or all tangible personal property is
10 subject to tax in our State. The -- only certain
11 enumerated services are subjected to tax, and you don't
12 have the presumption that all services are taxed, as you
13 would all property. And in this particular instance they
14 have chosen only -- the legislature has -- to extend the
15 tax to certain entities within the media and to exclude
16 others. And we believe that there is no compelling
17 interest, or any logical reason for that.

18 QUESTION: But Mr. Sayre, I think -- I'm really
19 not sure you're answering Justice Scalia. Suppose you
20 reversed the situation and said the tax applied to sales
21 of all tangible property, and therefore newspapers are
22 subject to tax, but cable would not be because they don't
23 sell anything tangible. Would that be constitutional in
24 your view?

25 MR. SAYRE: I do not believe it would, because I

1 believe that the newspapers stand in the same strike that
2 cable would.

3 QUESTION: Thank you.

4 MR. SAYRE: The -- this Court in the application
5 of the First Amendment rights of the press and speech to
6 cable TV treated it as a passive receiver in the 1960's
7 and 1970's. But in 1979 this Court's decision in the
8 Midwest Video case, the second Midwest Video case, you
9 found that the FCC had gone beyond its jurisdiction. The
10 result is that Congress acted in 1984 to establish a
11 comprehensive policy for cable.

12 In that, the hearings on that, or the report,
13 there is a substantial amount of detail given or
14 consideration given to the First Amendment rights of
15 cable, and how both the cable operator and the cable
16 subscribers' First Amendment rights should be protected
17 and were trying to be protected by Congress in that act.
18 In particular in Section 542(g), Congress states that
19 there should be the ability to subject cable to general
20 taxes, such as sales and income, and this type, but it
21 said not in a discriminatory manner. And that is what we
22 are objecting to here, is that the tax in Arkansas has
23 been subjected in a discriminatory manner against cable
24 and not against the similarly situated entities within
25 this mass communications media.

1 QUESTION: But the discrimination is not --
2 there's no discrimination between cable and other retail
3 businesses?

4 MR. SAYRE: No, there is not. It is part of the
5 general tax that is imposed upon retail sales. The only
6 difference is that it has not been extended to the sale of
7 magazines by subscription, the sale of the newspapers --

8 QUESTION: So I suppose the State, in your view,
9 could solve the problem either way, by extending the tax
10 or exempting cable?

11 MR. SAYRE: That is correct. They could -- they
12 have either decision, either tax all media or tax no
13 media.

14 QUESTION: Would they need some kind of a
15 compelling interest to include all of the media in the
16 sales tax?

17 MR. SAYRE: No. Because this Court has ruled
18 that -- and we accept as a standard, that a tax of general
19 application that is applied to all media would have to be
20 borne. We're not trying to say that we're not subject to
21 tax. We're simply saying we're not subject to tax in this
22 discriminatory way in which the State has attempted to
23 impose it here.

24 QUESTION: And why should the exemption of the
25 press be subject to -- the exemption of newspapers be

1 subject to a compelling interest if taxing all of the
2 press would not require a compelling interest?

3 MR. SAYRE: Because of, as this Court stated in
4 the Minneapolis Star case, it offers the incentive for the
5 legislature to act as a carrot and a stick, to play one
6 media off against the other, to offer if you change your
7 viewpoint we'll take the tax off or we'll exempt you.
8 That potential exists. And, as Justice O'Connor stated
9 there, it's not just what the tax is being imposed here,
10 but it's the -- perhaps the promise or the potential for
11 other differential taxes --

12 QUESTION: Do you think the congressional
13 decision to subject cable to licensing is constitutional?

14 MR. SAYRE: With regard to the First Amendment,
15 as when newspapers are not subjected to --

16 QUESTION: No, no. Just generally.

17 MR. SAYRE: Acting under the Commerce Clause,
18 the Congress can generally exercise any power over --

19 QUESTION: Oh, yeah, yeah.

20 MR. SAYRE: So --

21 QUESTION: How about is it constitutional --
22 does the First Amendment interfere with that decision by
23 Congress?

24 MR. SAYRE: A number of courts have indicated
25 that exclusive franchising, it does, because that there

1 ought to be more than one speaker, that there's no reason
2 -- no logical or compelling reason to limit it. And I
3 think that that is a valid distinction that should be
4 made.

5 QUESTION: Well, do you think Congress really
6 needed to demonstrate a compelling interest to subject
7 cable to licensing but not newspapers?

8 MR. SAYRE: But -- well, Your Honor, I think
9 they perhaps have shown the compelling interest, and that
10 being the licensing of the franchises --

11 QUESTION: What are they?

12 MR. SAYRE: The licensing and franchising of the
13 use of the public property.

14 QUESTION: What is the compelling interest?

15 MR. SAYRE: The -- again, the predominant use or
16 continued use of the public right-of-ways in that instance
17 is one that --

18 QUESTION: But you don't think applying the
19 sales tax can be justified as a -- on that basis?

20 MR. SAYRE: Not on that basis.

21 QUESTION: Why not?

22 MR. SAYRE: Because there is -- it has no
23 logical connection with it. The franchise fee, the
24 payment for the use of that right-of-way, does. And
25 that's what cable pays, is a -- that plus the pole rental

1 is for the rental or the use of that public right-of-way.
2 The sales tax is not directed. It does not compensate the
3 State for that particular use, and that is exactly what
4 the franchise fee does.

5 QUESTION: Mr. Sayre, suppose a State says,
6 suppose we come out the way you want and the State says
7 gee, we can't tax these media differentially. What we'll
8 do instead is we'll subsidize some of them and not
9 subsidize others. Is that okay? Can you, can a State
10 subsidize media differentially?

11 MR. SAYRE: The subsidation would probably bring
12 into consideration this Court's decision in Reagan v.
13 Taxpayers with Representation. It perhaps would lower the
14 standard, but it is an instance in which it is not a
15 direct effect upon the speaker's --

16 QUESTION: It isn't? I mean, to give public
17 money, let's say public broadcasting is, is an example
18 where the Federal Government and maybe some States
19 subsidize television and radio, but don't subsidize public
20 newspapers. Is that unconstitutional? And if not, why
21 not? I can't understand what's the difference between
22 giving them a subsidy and declining to impose a tax. Is
23 there any real difference?

24 MR. SAYRE: Well, the -- I think the real
25 difference would be, in those particular instances of

1 public television and public radio that are being funded,
2 they, in the commercial sense that they could not attract
3 enough to provide that type of programming and the access
4 is one that the State is trying to get a broader and a
5 further discussion of public issues of -- and as the Court
6 said, of Government, being those that are the most
7 important.

8 QUESTION: You're saying the State has a good
9 reason. The State always has a good reason. It has a
10 good reason for giving tax exemptions, too.. It wants to
11 foster cable, which is a useful medium for the State for
12 emergencies and a lot of other things. Well -- but you
13 say there's a difference between subsidy and tax?

14 MR. SAYRE: Yes, I do.

15 QUESTION: So it's all right for the
16 municipalities in Arkansas to permit the use of sidewalks,
17 public sidewalks, for news boxes without charge? Isn't
18 that a subsidy?

19 MR. SAYRE: That would be a subsidy.

20 QUESTION: And a permissible one?

21 MR. SAYRE: A permissible one, but I think that
22 it's also one that they probably could charge a minimal
23 amount to State for whatever use of the public right-of-
24 way that's being made.

25 QUESTION: But they don't. But they charge

1 cable.

2 MR. SAYRE: They do.

3 QUESTION: Mr. Sayre, in your response to one of
4 Justice Scalia's inquiries, you spoke of Reagan against
5 TWA -- TWR.

6 MR. SAYRE: Yes.

7 QUESTION: That case is mentioned by one or two
8 of the amicus curiae. It isn't cited, as far as I can
9 tell, in either your briefs or your opponent's briefs. Do
10 you have any comment, further comment, about the Reagan
11 case? Doesn't it give you some trouble?

12 MR. SAYRE: It would, Justice Blackmun, with the
13 exception that again I think it deals with the entity --
14 or the instance of a subsidy as opposed to the direct
15 speaking. And here we have a tax being imposed upon the
16 delivery of the message, as opposed to one that is, again,
17 several levels down and a very minor amount of the subsidy
18 that's being put in. It is not one in which the
19 Government is subsidizing the entirety of the local
20 programming. And also, I believe that this Court's
21 longstanding determination that the veterans have specific
22 or perhaps greater rights because of their service to the
23 country is a distinguishing point in that case that is not
24 presented in these cases. And --

25 QUESTION: Well, the amici were certainly

1 sufficiently concerned to try to spar that -- the holding
2 in that case, but evidently neither you nor your --
3 opposing counsel was concerned about it.

4 MR. SAYRE: I would simply say that this -- what
5 I have stated to distinguish it I believe is sufficient,
6 that it is not in the same line as the Minneapolis Star or
7 Arkansas Writer's Project type of case that is attacked --
8 or, excuse me, review of the First Amendment application
9 to the delivery of the -- or direct delivery of the
10 message.

11 QUESTION: Mr. Sayre, could Arkansas exempt not-
12 for-profit organizations from its sales tax? Not-for-
13 profit newspapers, let's say, church newspapers and things
14 of that --

15 MR. SAYRE: Well, it does.

16 QUESTION: It does?

17 MR. SAYRE: It does exempt not-for-profit
18 organizations. Charitable organizations are exempt under
19 the statute.

20 QUESTION: Well, why is that all right?

21 MR. SAYRE: In the sense of -- most of those
22 aren't selling any type of newspaper. They're not -- or,
23 excuse me -- any message. They're simply performing --

24 QUESTION: Well, they're selling the newspaper,
25 but what they get from it just covers their costs of

1 production. But they are exacting a charge for it.

2 MR. SAYRE: The basic principle for the
3 exemption of any charitable organization is they're
4 supplying a service or some need that the State would
5 otherwise have to supply. And in this particular --

6 QUESTION: That's a compelling State interest?

7 MR. SAYRE: That would be a consideration of a
8 compelling State interest, but that is what I'm stating is
9 the reason that the courts in Arkansas at least have held
10 that the tax-exempt or charitable organizations may be
11 exempt from tax. Now, in the --

12 QUESTION: Why doesn't that offend the principle
13 of freedom of the press? I mean, the principle of freedom
14 of the press is not to -- is not meant to assure that
15 everybody makes the same amount of profit. That's not
16 what it's for.

17 MR. SAYRE: That's correct.

18 QUESTION: It's to ensure open discussion.
19 What's the difference whether the discussion is by a not-
20 for-profit organization or a profit organization?

21 MR. SAYRE: Well, in this particular instance I
22 would say it would simply be the delivery of -- if it's
23 the message of, again, not a general interest but simply
24 the charitable organization's organ of dissemination of
25 information to its members or its supporters that is a

1 confined and limited purpose, it perhaps is sufficient to
2 rise to a compelling need.

3 On the other hand, in Arkansas the
4 municipalities that operate a cable system are required to
5 impose the sales tax in the same manner that a private
6 organization is required to.

7 Now, the other courts that have considered this
8 question, the State courts that have considered this
9 question, have more broadly applied this Court's rationale
10 in Minneapolis Star and Arkansas Writer's Project than has
11 the Arkansas Supreme Court. The Arkansas Supreme Court
12 stated that its only reason for not more broadly applying
13 it with regard to the print and the cable entities was
14 because it found no case of this Court that had required
15 the same type of taxation. In the Oklahoma Broadcasters'
16 case and the McGraw-Hill case in New York, the courts did
17 apply broadly to both the print and the electronic media
18 the same standards, and they said that again the burden,
19 because of this policy decision of this Court, is upon the
20 State to show a compelling interest, which it did not.

21 And that is the test that we're urging this
22 Court to apply in both the first and second parts of this
23 case, to find that the print media and the cable media are
24 similarly situated, delivering the same message, and
25 therefore should be taxed in the same manner. And if

1 they're not, if the State fails to show a compelling or
2 substantial interest, then the tax must be stricken.

3 QUESTION: May I ask you a question just running
4 through my mind as a result of one the Chief Justice asked
5 you? Supposing a State imposed an amusement tax on motion
6 picture theaters, but did not impose a similar tax on your
7 clients. Would that be valid?

8 MR. SAYRE: That would certainly be subject to
9 question, and I think that the theater owners would have,
10 with regard to their particular type of communication, a
11 valid claim that there is a discrimination. This is what
12 the Illinois court held in the satellite link case where
13 cable was not taxed and the microwave services providing
14 the same movies were taxed. And I would say that that
15 would apply in the same manner.

16 QUESTION: So tax on the -- I'm talking about
17 theaters exhibiting motion pictures.

18 MR. SAYRE: Theaters, yes.

19 QUESTION: I see.

20 MR. SAYRE: But, Justice Stevens, in Arkansas
21 the theaters are taxed and cable is taxed. What we're
22 directing at is more the heart of the traditional press,
23 that being the newspapers and our communication -- C-Span
24 --

25 QUESTION: I understand, but I think your

1 distinction -- I mean your argument that the press and
2 cable TV are similarly protected would apply equally to
3 cable TV and motion picture theaters.

4 MR. SAYRE: Yes.

5 QUESTION: And you can think of no compelling
6 interest, can you, for that distinction?

7 MR. SAYRE: No, I cannot.

8 Again, the cross-ownership within the medias,
9 the fact that magazine publishers, newspaper publishers
10 also own broadcast stations and the cable entities, is
11 another sign that these are all part of the same method of
12 communication, the same manner of communication in the
13 press. If you go into a newsroom of any of these entities
14 you will find the same electronic computers, the same word
15 processors. The only difference is the method of delivery
16 of the final message, that being whether it is delivered
17 on print on your doorstep or whether it comes through your
18 television screen on cable or broadcast.

19 If there are no further questions, I would
20 release the rest of my time, Mr. Chief Justice.

21 QUESTION: Thank you, Mr. Sayre.

22 Mr. Keadle, do you have rebuttal? You have 5
23 minutes left.

24 REBUTTAL ARGUMENT OF WILLIAM E. KEADLE

25 ON BEHALF OF THE PETITIONER/

42

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1
2 MR. KEADLE: Thank you, Mr. Chief Justice, and
3 may it please the Court:

4 I would take exception to one of Mr. Sayre's
5 statements made early on that the Arkansas General
6 Assembly enacted this amendment to the tax because it was
7 found that satellite television services and cable
8 services were the same. There is nothing in the record,
9 no legislative history to indicate that that was indeed
10 the case, so I do not feel that we are left with that
11 result. The trial court did not make that determination,
12 and the Arkansas Supreme Court did not make that
13 determination until after the law was changed. So --

14 QUESTION: Well, arguably, I suppose the,
15 changing the law made the exemption of newspapers even
16 more difficult, because satellites don't use the -- a
17 satellite doesn't use -- don't use the streets and put any
18 burden on the public like the -- like the cable operators
19 do.

20 MR. KEADLE: Your Honor --

21 QUESTION: And yet, and yet newspapers are
22 exempt and satellite are not.

23 MR. KEADLE: Well, Justice White, I would
24 suggest that there might well be another reason for the
25 distinction at first between satellite and cable

1 television service and the later addition to the tax --

2 QUESTION: Well, what about between satellites
3 and the newspapers?

4 MR. KEADLE: Your Honor, I believe there's an
5 even greater distinction --

6 QUESTION: Well, they are different.

7 MR. KEADLE: They're quite different. In fact
8 even more so than satellite and cable, due to the fact
9 that satellite might be seen more as a retransmission, as
10 maybe cable was looked at earlier, of other programming.
11 There's not that original content --

12 QUESTION: What has that got to -- how is that
13 relevant to taxation?

14 MR. KEADLE: I think the distinction is relevant
15 due to the fact that there is some indication in the trial
16 record that -- or through testimony, that brought up the
17 fact that the fees collected for this service were
18 collected by the cable companies and then --

19 QUESTION: In the State of Arkansas.

20 MR. KEADLE: In the State of Arkansas.
21 Therefore it might have occurred to the General Assembly
22 that here is an administrative -- an administratively
23 convenient way to collect taxes on these services where
24 there may not have been any perception beforehand that it
25 -- that in fact maybe administration of a tax on this

1 service, even if it was known about, would be feasible --
2 would be economically feasible for the State.

3 I would also take exception to Mr. Sayre's
4 statement that perhaps this case should be send back on
5 remand due to the fact that he did not have a chance to,
6 to make an argument as to the distinction between cable
7 and the newspaper because the act was passed prior to the
8 trial court's decision. This in fact was the same
9 argument he was making with regard to the 1987 act. There
10 was some -- was some evidence presented that there were
11 similarities between satellite and cable television, but
12 the thrust of the case seemed to be that the First
13 Amendment violation occurred because they were treating
14 cable differently from newspapers. There was not an
15 appeal made to the Arkansas Supreme Court with regard to
16 that part of the decision. Now I understand that the
17 taxpayers in effect won the case, and they -- the result
18 is that there was an award of a refund. But I believe
19 that the respondents had a full -- full chance to argue
20 this case, and in fact there is sufficient evidence to at
21 least show that be made.

22 In conclusion I would state that the Arkansas
23 tax in both instances is not violative of the First
24 Amendment due to the fact that it does not single out the
25 press for special treatment, special tax treatment. It

1 does not target what can be proved to be a small group
2 within the press for that treatment. It is definitely not
3 content based. Therefore a rational basis should be the
4 only requirement of the State to justify this differing
5 tax treatment.

6 I might further address an argument that was
7 made with regard to whether this tax exemption could be
8 seen as a subsidy. I believe that if that were the test
9 to be made, on one hand we could win based on the Writer's
10 Project, Minneapolis Star line of cases. If we were to
11 look to the dissent in Arkansas Writer's Project, you
12 could very well see that this tax exemption to an
13 otherwise generally applicable tax could --

14 QUESTION: Thank you, Mr. Keadle.

15 MR. KEADLE: Thank you, Chief Justice.

16 CHIEF JUSTICE REHNQUIST: The case is submitted.

17 (Whereupon, at 10:59 a.m. the case in the above-
18 entitled matter was submitted.)
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25

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Supreme Court of The United States in the Matter of:

No. 90-29 - JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF
ARKANSAS, Petitioner V. DANIEL L. MEDLOCK, ET AL.;
and
No. 90-38 - DANIEL L. MEDLOCK, ET AL., Petitioners V. JAMES C.
PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS

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