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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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CAPTION: FERRIS J. ALEXANDER, SR., Petitioner v.

UNITED STATES

CASE NO: 91-1526

PLACE: Washington, D.C.

DATE: Tuesday, January 12, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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FERRIS J. ALEXANDER, SR., :
Petitioner :
v. : No. 91-1526
UNITED STATES :
- - - - - X

Washington, D.C.
Tuesday, January 12, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:09 a.m.

APPEARANCES:

JOHN H. WESTON, ESQ., Beverly Hills, California; on behalf
of the Petitioner.
GEN. KENNETH W. STARR, ESQ., Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the
Respondent.

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1 PROCEEDINGS

2 (11:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-1526, Ferris J. Alexander v. the United
5 States.

6 Mr. Weston, you may proceed.

7 ORAL ARGUMENT OF JOHN H. WESTON

8 ON BEHALF OF THE PETITIONER

9 MR. WESTON: Thank you, Your Honor. Mr. Chief
10 Justice, and may it please the Court:

11 Congress designed RICO to eliminate any business
12 which has committed two or more predicate RICO offenses.
13 Such a business then becomes illegal and therefore
14 forfeitable.

15 Under the First Amendment, the presumption is
16 that no matter how many speech violations a business may
17 commit, it retains its protected status because all
18 unlitigated materials are presumed to be constitutionally
19 protected.

20 This case then presents the collision between
21 RICO and the First Amendment made inevitable by the 1984
22 congressional amendment adding obscenity to the predicate
23 list of RICO offenses.

24 QUESTION: Well, is -- what -- which of our
25 cases do you rely on, Mr. Weston, for the proposition that

1 when obscenity is charged, it is presumed that it is not
2 obscene? I take it that's what you're saying.

3 MR. WESTON: The mere fact of an accusation, Mr.
4 Chief -- if I understand the Court's question, the mere
5 fact of an accusation does not serve to deprive the
6 material that is being challenged of its protected status
7 until such time as a court ultimately and finally
8 determines that it is not obscene. That is certainly the
9 --

10 QUESTION: Well, is that just a burden of proof
11 proposition? You're saying that anyone is -- if it's a
12 criminal prosecution, you're presumed innocent until
13 you're found guilty.

14 MR. WESTON: Not at all, Your Honor. With the
15 -- with respect to the materials alleged to be obscene, a
16 host of cases, including all of the so-called search and
17 seizure cases, Marcus and Quantity of Books, Fort Wayne
18 Books, and a host of others, have all stood for the
19 proposition that even where material is being accused by
20 government of being obscene until such time as it is
21 finally determined to be obscene, it may not be removed
22 from the public totally because to do so would constitute
23 a total prior restraint.

24 And, in fact, in Heller, this Court went so far
25 in 1973 as to note that where a single motion picture film

1 was available to an exhibitor seized by government as part
2 of an obscenity prosecution, it was the duty of government
3 to make at least a copy of that film available or to
4 permit the defendant to have a copy of the film so that
5 the film might continue to be exhibited until such time as
6 it was ultimately determined to be obscene.

7 QUESTION: Yes. That established that you can't
8 seize it under those conditions. I don't think it
9 established the proposition that you're talking about.

10 MR. WESTON: Well, with all respect, I see no
11 difference with respect to that, Your Honor, that if the
12 material is presumed to be protected until it is
13 ultimately deprived judicially of its protected status,
14 under that circumstance, it retains the presumption of
15 protectedness and simply may not be removed.

16 Our point, however, is with respect to this
17 case, that other than the seven items determined to be
18 obscene by the jury in this case, all of the other
19 material that was seized and destroyed by the Government
20 pursuant to the forfeiture order was neither alleged nor
21 proven to be obscene. And the Government is quite candid
22 in that the nature of the material is totally irrelevant.
23 It might have been sexually oriented. It might have been
24 erotic, but it just might as well have been a book on how
25 to improve one's bridge game or build a garden or a

1 videotape dealing with Bambi or Aladdin. The point is --

2

3 QUESTION: Do I understand that all this
4 material was burned?

5 MR. WESTON: Yes, Your Honor. It is our
6 understanding that all of the hundreds of thousands of
7 books, magazines, videotapes, and films seized from the -
8 -representing the entirety of petitioner's inventory,
9 without any consideration or allegation or determination
10 of the protected or unprotected status of this material,
11 was seized by the Government, carted away, and burned in
12 an incinerator by the Federal marshal.

13 QUESTION: These were also called sexually
14 oriented materials or not? I mean --

15 MR. WESTON: Not -- the record --

16 QUESTION: The Last of the Mohicans? What are
17 we talking about here?

18 MR. WESTON: The record does not reflect that,
19 Your Honor. There were certainly some items --

20 QUESTION: What was the business in question?

21 MR. WESTON: The businesses represented a number
22 of different businesses. They were video stores, adult
23 bookstores, adult theaters.

24 QUESTION: What -- adult bookstores. What kind
25 of video? Were they adult video stores, so-called?

1 MR. WESTON: Much was probably adult video,
2 Justice Scalia. The entirety of it was not, but from the
3 First Amendment perspective, none of this material -- none
4 of the status -- none of the nature or determination or
5 character of the seized material was alleged. And clearly
6 under this Court's consistent decisions, the first
7 Amendment requires judicial blindness to the nature of the
8 material that was seized without any judicial focus
9 whatsoever.

10 QUESTION: As far as the seizure is concerned,
11 but --

12 MR. WESTON: And the destruction.

13 QUESTION: -- there was an objection here --

14 MR. WESTON: The destruction --

15 QUESTION: Once it's the Government's property
16 -- I suppose if the Government appropriately took control
17 of it and possession of it and ownership of it, I suppose
18 the Government can do with it what it wants, and the
19 objection to whether the Government ought to have burned
20 it or not probably should depend on what its character is.
21 Maybe the Government didn't want to be in the pornography
22 business.

23 MR. WESTON: Well, that may be, and I understand
24 that perspective, although with --

25 QUESTION: Your objection is to the seizure of

1 it and the -- placing the ownership in the Government, not
2 to what the Government does with what it owns I assume.

3 MR. WESTON: Absolutely, Your Honor, except to
4 the extent that the Government's destruction of the
5 material, certainly at a time of enormous national debt,
6 when all proceeds from sale of seized material would
7 certainly go to reduce that debt, bespeaks a governmental
8 purpose to remove protected or presumptively protected
9 materials from public circulation in a way that certainly
10 ought to arise the interest in anti -- in constitutional
11 protection of both this Court, as well as all of --

12 QUESTION: Mr. Weston, would you be making any
13 objection if what had been done was simply to require the
14 sale or disposition of all the presumptively protected
15 materials and to turn the proceeds over to the Government?

16 MR. WESTON: That's a very tricky and
17 interesting question, Justice O'Connor, and the answer to
18 that is yes. And frankly, the Government --

19 QUESTION: Yes, you would be making --

20 MR. WESTON: Yes, we would make the --

21 QUESTION: -- the same First Amendment claim?

22 MR. WESTON: Yes, Your Honor, and the reason for
23 it is well demonstrated by what happened in this case
24 because the moment the Government acquires title to the
25 materials, it then has the absolute determination as to

1 whether it's going to leave the materials in public
2 circulation or whether it isn't.

3 QUESTION: Well, suppose it doesn't take title
4 to the materials. It instructs the -- your client to
5 dispose of it and turn the money over to the Government.

6 MR. WESTON: In that case, an aspect of the
7 prior restraint doctrine would be satisfied or would be
8 finessed, in a sense, in that the public would not
9 necessarily be deprived of the materials. But it
10 certainly doesn't deal with the right of the disseminator
11 to be able, in an untrammelled way, to continue to
12 disseminate presumptively protected materials --

13 QUESTION: Well, for goodness sake. Suppose the
14 Government decided because of the RICO violations to seek
15 a prison sentence of this person.

16 MR. WESTON: But in that --

17 QUESTION: I guess he could be imprisoned for a
18 criminal violation of RICO.

19 MR. WESTON: No question, Your Honor, but the -

20 - QUESTION: And that might discourage his
21 business activities for a while.

22 MR. WESTON: Discourage, but not necessarily or
23 inevitably or immediately in every case eliminate them.
24 And that really becomes the critical difference.

25 QUESTION: Oh, you assume that the business

1 could continue to be operated while the person is in
2 prison?

3 MR. WESTON: Yes, absolutely, and particularly
4 in the context of today's modern business world.
5 Corporations conduct most businesses. If the president of
6 a corporation is placed in jail, the corporation continues
7 to function, and the business continues to disseminate
8 presumptively protected materials. Sadly, we have seen
9 all too often in recent years the presidents of major
10 corporations incarcerated and business goes on in the same
11 way, although hopefully in a more law-abiding fashion.

12 QUESTION: In fact, that happened here, didn't
13 it? I mean, your client was in prison.

14 MR. WESTON: Oh, no, absolutely not, Justice
15 Scalia.

16 QUESTION: He was not in prison?

17 MR. WESTON: He was in prison.

18 QUESTION: But the business did not continue to
19 operate while he was?

20 MR. WESTON: The business was totally -- in
21 fact, that's exactly the point. What the Government did
22 here was to completely eliminate the business and
23 completely impose the total prior restraint because the
24 forfeiture order --

25 QUESTION: I'm not talking about this

1 conviction. I'm talking about prior convictions. My
2 understanding was that there had been prior convictions on
3 obscenity charges.

4 MR. WESTON: The predicate RICO acts did not
5 include or allege any prior conviction. The record does
6 not reflect that there was a prior conviction.

7 As an officer of the Court, I advise, Your
8 Honor, that in 1969 or 1970 there was an obscenity
9 conviction of Ferris Alexander, followed some years later
10 by an acquittal, followed by almost 20 years of
11 nonprosecution at either the State or the Federal level,
12 the point being that under this statute, which is what is
13 obviously before the Court, what was done here was on the
14 basis solely of jury determination that seven items were
15 unprotected. Literally hundreds of thousands of books,
16 films, magazines --

17 QUESTION: Mr. Weston.

18 MR. WESTON: Yes, Mr. Chief Justice.

19 QUESTION: Is that the actual correct
20 comparison? You say seven items were unprotected, and
21 then hundreds of thousands were not determined. But
22 wasn't there more than one copy of each of those seven
23 items?

24 MR. WESTON: The indictment alleges, Your Honor,
25 that with respect to some of the materials, there were

1 multiple copies received in interstate commerce by my
2 client in Minnesota. The substantive provisions, the 1466
3 counts which reference possession with intent to sale or
4 sale, do not indicate whether there were more than one
5 copy. They are silent with respect to that.

6 QUESTION: Did the record of the trial -- I
7 mean, because your -- when you say hundreds of thousands,
8 you're talking about --

9 MR. WESTON: Different titles, Your Honor.
10 Different titles.

11 QUESTION: Hundreds of thousands of different
12 titles.

13 MR. WESTON: Hundreds of thousands of different
14 titles is what we believe to be the case with respect to
15 videotapes, films, magazines, individual media items. And
16 I'm trying to --

17 QUESTION: Yes.

18 MR. WESTON: Because I think I understand the
19 Court's question. I am not saying a million copies of
20 three titles. We are saying scores of thousands, perhaps
21 hundreds of thousands. Perhaps I engaged in some
22 hyperbole for which I apologize, but scores of thousands,
23 many thousands of different titles were seized and
24 destroyed, all of which had neither been alleged to be
25 obscene or determined to be obscene, coupled with --

1 QUESTION: Is there some transcript or record
2 that you can refer to that establishes this?

3 MR. WESTON: The -- yes, there are -- there is a
4 transcript. Offhand, I confess, Mr. --

5 QUESTION: But someone got up and testified that
6 this -- there were scores of thousands or something like
7 that?

8 MR. WESTON: Let me suggest this and perhaps
9 this will assist the Court.

10 QUESTION: Well, did -- I'm asking did someone
11 --

12 MR. WESTON: Yes. There was -- the trial court
13 in its sentencing order noted it, and more importantly --
14 and I'm sure the Government would not contest this, but
15 at the forfeiture hearing, the Government put into
16 evidence in an attempt and, we respectfully submit, a
17 constitutionally irrelevant attempt -- but to somehow
18 characterize what the nature of the business was -- at
19 least 400 different, separate videotapes, none of which
20 had been alleged to be obscene, and perhaps 20 or 30
21 magazines and books and so forth. So, whether it be
22 100,000 different titles or 50,000 or 10,000 different
23 titles, the number of different, unlitigated titles was
24 extraordinary.

25 But let us not stop there simply with the media

1 items because the media items, large as they were,
2 whatever the number was, are an extraordinary minimal
3 portion of the terrible prior restraint that was imposed
4 here because 10 media businesses, the equipment necessary
5 to support the dissemination, plus the businesses
6 themselves, were taken over by the Government and closed
7 in a geometric fashion, totally therefore eliminating not
8 only the dissemination of all materials that presently
9 existed in the universe, but all those which might have
10 been created in the future which could have been
11 disseminated --

12 QUESTION: Mr. Weston, as I understand it, you
13 would have had -- you say you would not have any objection
14 to that under the First Amendment if the predicate
15 offenses had not been speech offenses.

16 MR. WESTON: That is correct, Your Honor. This
17 Court in Arcara made very, very clear that where the
18 predicate conduct has no communicative quality, whether it
19 be conduct with some -- as Justice O'Connor --

20 QUESTION: You can take away all the media
21 businesses.

22 MR. WESTON: In Arcara, that was the holding of
23 this Court.

24 QUESTION: Right, okay.

25 And similarly, as I understand it, you would

1 have no objection if it was a speech offense for the
2 predicate RICO offense, and the punishment, no matter how
3 severe, life imprisonment, was not the taking away of
4 media businesses or of media documents, books, and so
5 forth.

6 MR. WESTON: I understand.

7 QUESTION: Right?

8 MR. WESTON: No, Your Honor.

9 QUESTION: No?

10 MR. WESTON: There would be no per se
11 description of that penalty as being a per se prior
12 restraint. As in the potential of a high fine, the
13 potential of a jail sentence may or may not in any case
14 constitute a First Amendment problem.

15 QUESTION: Well, you see, I don't see how --
16 what you're doing is combining two positions, neither one
17 of which alone would be -- would violate the First
18 Amendment on your admission. And you say that somehow
19 when you combine the two, although they don't reinforce
20 each other as far as I can see, it is a First Amendment
21 objection.

22 There are two problems involved. One is the
23 chill of the speech. Right? And the chill could be
24 affected just as much by imprisonment as by taking away
25 the person's business. Right?

15

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1 MR. WESTON: But we're not -- in this argument,
2 Your Honor, although this Court has frequently noted that
3 one of the vices of a prior restraint is the chill -- I
4 mean, in the Pittsburgh Glass Company case cited by the
5 Government, that's exactly what the concept is.

6 But the point that we're making primarily here
7 is that it is the prior restraint which invalidates in
8 every case the RICO sanction as -- the RICO forfeiture
9 sanction as applied to speech predicates because in every
10 case, speech will inevitably and immediately be
11 suppressed, the taking of the books, the closing of the
12 store, and so forth, whereas --

13 QUESTION: Speech will inevitably be suppressed
14 whenever you go after anybody in the media business under
15 RICO, whether it's for a speech offense or for any other
16 offense. Right?

17 MR. WESTON: I see the Court's point.

18 QUESTION: Yes.

19 MR. WESTON: But the classical difference is, as
20 pointed out by Near and in a host of subsequent cases,
21 there are special rules, special concerns, that we have
22 for the First Amendment, and the nature of the injunction
23 that was issued in Near would have caused no problem if,
24 as in Arcara, the predicate or triggering conduct had had
25 nothing to do with speech.

1 Why was it that this Court -- forgive the
2 rhetorical question, but this Court struggled and wrestled
3 with the problem in Arcara because, in fact, a bookstore
4 was enjoined. The ultimate conclusion was that where the
5 triggering conduct either had no speech at all or had no
6 communicative content or no expressive conduct which was
7 involved in the sanction, that it simply was not a prior
8 restraint.

9 But the obvious implication, if not explication,
10 in both Chief Justice Burger's opinion and in Justice
11 O'Connor's concurring opinion is that where the triggering
12 activity was either speech or had communicative conduct
13 or, as Justice O'Connor noted, where a nonspeech
14 triggering statute had been used as a pretext to impose
15 censorship in the interest of decency, then there would
16 have to be a First Amendment analysis.

17 And in this case, the only underlying conduct,
18 the only triggering or predicate conduct is unquestionably
19 speech. We are out of Arcara. We are back in Near. We
20 are back in Kingsley. We are back in Marcus and Quantity,
21 and the First Amendment analysis unquestionably applies.

22 And what is also clear in this case is that
23 there was no pretext for the use of RICO to close down
24 this business. That was what the statute was designed to
25 do, to eliminate a speech business because an -- in this

1 case -- an isolated number of its titles had been
2 determined to be obscene. And I ask the Court to consider
3 --

4 QUESTION: What about fraud convictions? Are
5 they speech convictions?

6 MR. WESTON: Inherently --

7 QUESTION: Inherently you said, but --

8 MR. WESTON: No. Forgive me. I was trying to
9 analyze it.

10 One must look at the nature of the conduct.
11 Fraud will not necessarily involve a speech situation.

12 QUESTION: You have to make a representation,
13 don't you?

14 MR. WESTON: Well, we'll have to see what the
15 underlying conduct is and then to try to examine it. The
16 --

17 QUESTION: It's always performed by speech, by
18 communication. Now, that speech is unprotected to the
19 extent that it commits a fraud, and the speech in this
20 case is unprotected to the extent that it becomes
21 obscenity.

22 MR. WESTON: That --

23 QUESTION: I'm hesitant to say that no media
24 business can be --

25 MR. WESTON: Where the underlying --

1 QUESTION: -- taken for fraud.

2 MR. WESTON: And we are not asserting that.

3 And, for example, there may well be a situation in a
4 copyright infringement situation where a print shop prints
5 copyright violational materials, where the underlying
6 concern is not the expression, as in the fraud case, but
7 what the concern is is the content of the material.

8 This statute is content based. It is designed
9 to prohibit and punish content, communicative content, of
10 the expression in a way that either the fraud or some
11 other print type thefts or property -- interferences with
12 -- are not.

13 In this situation, this is speech, and this is
14 exactly what the situation was in Near where the contents
15 of the Near publication were, although denominated a
16 public nuisance, analyzed and determined that it was the
17 expressive content of the speech which is what gave it --
18 although in and of itself, each item of speech, each of
19 the nine issues of The Saturday Press over the 3 month
20 period were themselves deemed to be outside constitutional
21 protection, nonetheless, that did not permit Government
22 under any circumstances to be prospectively able to
23 interfere with any other kind of speech.

24 QUESTION: But you don't claim that this case is
25 governed by Near, do you?

1 MR. WESTON: Yes, Justice Souter, we find that
2 Near is --

3 QUESTION: Well, in the Near case, any further
4 publication by the publisher of The Saturday Press was
5 enjoined, and in fact, no one else was publishing The
6 Saturday Press; whereas, in this case, we have no reason
7 to believe that there aren't -- that the publishers of the
8 material seized aren't going to go right on publishing it
9 and other distributors are going to go right on
10 distributing it. And we have no reason to believe that
11 when this individual gets out of prison, he can't go right
12 on doing those things too. So, I don't see how Near
13 covers this situation.

14 MR. WESTON: But there was no suggestion in Near
15 that Mr. Near's brother or his neighbor or someone who
16 shared his virulent anti-semitic passion couldn't pick up
17 the publication and continue to publish it in exactly the
18 same way.

19 QUESTION: Well, Near didn't decide that one way
20 or the other, did it?

21 MR. WESTON: Near was silent with respect to it.

22 QUESTION: That's right.

23 MR. WESTON: But the -- but with all --

24 QUESTION: Your -- maybe I understood your
25 argument. I thought you were analogizing your client to

1 the publisher in Near, and all I'm saying is that he does
2 not bear a very close analogy because, A, he is not
3 enjoined from further distribution and, B, no one else is
4 enjoined from distribution.

5 MR. WESTON: The aspect of the injunction --
6 merely because an injunction was issued in the case is
7 certainly, with respect, not dispositive of the nature of
8 what the fundamental Near holding is. By analyzing the
9 operation and effect of the sanction in the case, as we
10 are directed by Near to do, Near was prevented from
11 dealing with future unlitigated publication. There was a
12 speech sanction that was imposed on Near from going
13 forward and disseminating presumptively protected material
14 in the future, and the Court said no, you -- that is an
15 impermissible restraint.

16 In Keith -- in Citizens for a Better Austin v.
17 Keith, the injunction, although it was an injunction, was
18 even broader. The enjoined party could disseminate
19 nothing prospectively.

20 The point is in this case unlitigated,
21 undetermined speech -- presumptively protected speech was
22 seized and destroyed. An analogy to Near's incapacity to
23 be able to go forward and continue to publish what it was
24 that he determined that he wanted to publish, so too
25 Ferris Alexander was deprived the opportunity at the 10

1 locations to be able to disseminate the material which he,
2 in his editorial judgment, chose to disseminate.

3 QUESTION: Well, what if the offense were the
4 failure to pay taxes, as was also alleged here I guess?
5 Can the Government seize all the inventory and dispose of
6 it for the failure to pay the taxes without invoking the
7 concerns of a prior restraint?

8 MR. WESTON: In this case, Your Honor, of course
9 -- and I say this for the record, that none of the RICO
10 predicate conduct or any of the forfeiture was
11 attributable to the tax case.

12 But in response to the Court's specific
13 question, a civil judgment or a tax judgment may certainly
14 be satisfied from whatever assets there are to be
15 satisfied. But then, once again, what triggers the
16 sanction is not speech, and the Constitution, just as in
17 *Arcara*, does not say that no speech business may be
18 subject to regulation in the same way that zoning or fire
19 or safety and so forth would be. And just as in any
20 situation where a civil judgment might be satisfied from a
21 completely unrelated situation -- the owner of a bookstore
22 hit a -- in an automobile killed somebody, and certainly a
23 civil judgment could be used to satisfy that.

24 But the point is that from the jurisprudence
25 with this Court dealing with First Amendment matters,

1 unlitigated, presumptively protected speech may not be
2 interdicted, destroyed, taken out of circulation simply
3 because other media materials have been determined to be
4 obscene. And if --

5 QUESTION: Mr. Weston, can I ask you a question
6 about your theory? I understand what you're saying about
7 speech both causing it and being what's forfeited.

8 What if what was forfeited was -- say American
9 Airlines showed a couple of obscene movies on a flight.
10 Would you say that that would justify forfeiture of the
11 whole airline?

12 MR. WESTON: No, Justice Stevens.

13 QUESTION: But under the statute would it? I'm
14 curious about how the statute operates. Here his entire
15 business was forfeited because a half a dozen or so
16 obscene items were seized. Would the statute operate in
17 the same way in my hypothetical?

18 MR. WESTON: Absolutely. For two or more --

19 QUESTION: But you're saying that would not
20 violate any -- that would be perfectly constitutional to
21 take over the airline --

22 MR. WESTON: No, we're not --

23 QUESTION: -- because they're not engaged in the
24 speech business.

25 MR. WESTON: No, Your Honor, we're not saying

1 that, and for two reasons. One, because it may well be -
2 -and I would assume in the circumstance that you suggested
3 -- that taking over the entirety of the airline would
4 certainly affect a prior restraint on the airline's
5 ability to be able to exhibit other unlitigated motion
6 picture films. But in this context --

7 QUESTION: It's only for that reason, not
8 because of the magnitude of the seizure. You don't rely
9 at all on the magnitude of what --

10 MR. WESTON: Not the --

11 QUESTION: -- was seized in relation to the --

12 MR. WESTON: Not from the --

13 QUESTION: -- small amount of what was --

14 MR. WESTON: Excuse me.

15 QUESTION: -- the violation.

16 MR. WESTON: Not from the First Amendment
17 perspective. Of course, the Eighth Amendment might well
18 speak to that, as we have raised in our --

19 QUESTION: Mr. Weston, I take it you don't claim
20 that the RICO statute did not authorize these seizures.

21 MR. WESTON: Not only did it not -- not only do
22 we not claim that, Justice White, we affirmatively
23 represent and argue that this judgment fairly and
24 accurately did exactly what the RICO statute directed
25 trial judges to do under the circumstance.

1 QUESTION: So, you think the provisions of --
2 you don't think you can find any basis for objecting to
3 this forfeiture in the provisions of the statute
4 authorizing the forfeiture.

5 MR. WESTON: That is --

6 QUESTION: You don't think that this forfeiture
7 that the Government insisted on was outside the provisions
8 of the statute.

9 MR. WESTON: Given --

10 QUESTION: I mean, just as a statutory
11 construction problem.

12 MR. WESTON: Given the broad potential for
13 forfeiture under 19 -- section 1963, what the Court did
14 was commanded and directed by the statute. Trial counsel
15 ably argued that the forfeiture should be limited to the
16 obscene materials and the proceeds specifically
17 attributable, and under the grandiloquent phrase from
18 Congress and from judicial decisions that the purpose of
19 RICO is to extirpate the entire business root and branch
20 --

21 QUESTION: But it's the entire business -- any
22 contribution of the business, no matter how trivial, is
23 the proceeds of a predicate offense?

24 MR. WESTON: Under settled -- under existing law
25 that appears to be unquestioned as Judge Kozinski in the

1 Ninth Circuit in U.S. v. Busher railed against in that
2 case.

3 I would just like to conclude, if I may, Justice
4 Stevens, with the second portion of the question that you
5 had asked and that was this, that in the circumstance
6 where the entirety of American Airlines might be seized
7 because of the two or three films.

8 Under that circumstance, we would suggest that
9 one would look to the motive underlying the statute in
10 terms of its speech suppressive characteristics that the
11 statute had been, whether it be, in that circumstance, to
12 get at speech or more specifically in our own client's
13 situation where it had been devised to get to speech. We
14 would suggest that the motive ought to be examined even
15 though we well recognize --

16 QUESTION: Now, is that as a constitutional
17 matter or as a statutory matter?

18 MR. WESTON: As a constitutional matter --

19 QUESTION: No.

20 MR. WESTON: -- in terms of dealing with --

21 QUESTION: But under the statute, there -- the
22 prosecutor would have the same duty to seize the entire
23 airline that he has here and seize the entire business.

24 MR. WESTON: Absolutely, Justice Stevens. No
25 question.

1 QUESTION: I would have thought you might make
2 an Eighth Amendment argument somewhere along the line in
3 response to these inquiries.

4 MR. WESTON: Thank you, Justice O'Connor. As I
5 thought I had mentioned to Justice White -- or Justice
6 Stevens, that there certainly would be an Eighth Amendment
7 issue, whether it be under the excessive fines provision
8 or the cruel and unusual punishment provision, that the
9 confiscation of this business with the notion of
10 forfeiture being tantamount to fines, as you observed
11 recently, for Eighth Amendment purposes would constitute a
12 grossly disproportionate penalty in connection with the
13 underlying offense. And this would be whether the
14 underlying offense was analyzed under the Solem majority
15 test or under Justice Kennedy's test as articulated in
16 Harmelin.

17 I mean, this is the most passive kind of felony.
18 This is the sort of conduct which in Osborne this Court
19 noted, in terms of the obscenity laws, were motivated by
20 essentially a paternalistic interest in the subject
21 matter. It is the sort of offense which, again applying
22 Justice Kennedy's form of analysis, is not the sort of
23 thing which generates parallel or ancillary offenses and
24 where there's no national consensus and connection with
25 whether obscenity or erotic materials should be

1 prosecuted. Seven States have no obscenity laws, and
2 there is certainly minimal or relatively minimal Federal
3 enforcement in terms of numbers of places around the
4 country of this particular --

5 QUESTION: I take it you wouldn't be here making
6 this argument if your client sold a reasonable amount of
7 -- well, an unreasonable amount of cocaine in his
8 bookstores along with books.

9 MR. WESTON: Absolutely -- you're, of course,
10 right, absolutely right, Justice White, that if there had
11 been -- and our argument is --

12 QUESTION: Well --

13 MR. WESTON: -- as in this case, that the sole
14 predicate offense was speech, that if our client had been,
15 as part of the predicate acts, indicted for the sale of
16 cocaine, our argument is over because then --

17 QUESTION: Even though his entire business was
18 seized.

19 MR. WESTON: Absolutely. We're constrained to
20 --

21 QUESTION: Well, wouldn't you still have an
22 Eighth Amendment argument?

23 MR. WESTON: Yes. There may well be an Eighth
24 Amendment argument with respect to that, but in terms --
25 forgive me, Justice White. I thought you were addressing

1 --

2 QUESTION: No. That's all right.

3 MR. WESTON: -- the First Amendment question
4 exclusively.

5 QUESTION: I see your red light is on.

6 MR. WESTON: Thank you.

7 QUESTION: Thank you, Mr. Weston.

8 General Starr, we'll hear from you.

9 ORAL ARGUMENT OF KENNETH W. STARR

10 ON BEHALF OF THE RESPONDENT

11 MR. STARR: Mr. Chief Justice, and may it please
12 the Court:

13 Let me begin where we left off in this
14 discussion.

15 As I see it, until the very end of his argument,
16 Mr. Weston did not seem to be calling into question the
17 basic proposition that this Court established, after
18 hearing Mr. Weston's arguments to the contrary, in Fort
19 Wayne Books that obscenity is not speech within the
20 meaning of the First Amendment and that it can serve as a
21 predicate offense for a RICO statute.

22 Secondly, he has now --

23 QUESTION: Do you think it's entirely invisible
24 to the First Amendment --

25 MR. STARR: It is --

1 QUESTION: -- after R.A.V.?

2 MR. STARR: To the extent that a final
3 determination has been made that it is obscene, the First
4 Amendment does not care and thus, in that sense, it is
5 invisible once it has been -- in terms of First Amendment
6 values, yes. It is invisible to the First Amendment.

7 QUESTION: Do you think that's consistent with
8 the holding in R.A.V.?

9 MR. STARR: I don't think it's inconsistent with
10 the holding in R.A.V. because R.A.V. did not seem to call
11 into question -- or R.A.V. was obviously concerned with
12 content basis. And I don't want to delay unduly in
13 rearguing what may be a very intriguing dialogue within
14 the Court about R.A.V., and I know the Court has now taken
15 the Wisconsin case.

16 The basic holding in R.A.V. -- and it was a
17 unanimous holding -- was that that ordinance had to fall
18 because it was content based. This Court has held that as
19 serious as content based kinds of distinctions are,
20 obscenity is a different matter, and obscenity is not
21 protected within the meaning of the First Amendment.

22 Now, the second aspect -- and I think this is an
23 important part of the argument -- that is not being
24 contested is Arcara, that if in fact there is a, as he
25 would say, nonspeech predicate, there can, in fact, be

1 forfeiture of what he considers First Amendment expressive
2 materials.

3 What I think we have seen today is, first of
4 all, an assault on Fort Wayne Books without his having
5 said in the petition that he wants to see Fort Wayne Books
6 overruled. Accepting the proposition that Fort Wayne
7 Books and the value of stare decisis is still good
8 constitutional law and taking that with Arcara, we get
9 exactly where Justice Scalia was suggesting that we get in
10 this case, that we somehow, combining those two holdings,
11 end up with a violation of the First Amendment. That ends
12 up being quite a remarkable proposition that is unfounded
13 in this Court's First Amendment jurisprudence.

14 What really seems to be at issue here is the
15 sense of disproportionality, that the defendant, the
16 petitioner, stands convicted of seven obscenity offenses,
17 and yet this entire business enterprise, including what he
18 considers presumptively expressive and protected
19 materials, has been forfeited to the Government.

20 QUESTION: Is there anything in the record to
21 show us the extent of the forfeiture or what was taken?

22 MR. STARR: Yes. I refer the Court to the
23 petition appendix and the thorough opinions by Judge
24 Rosenbaum where he goes through a very careful analysis of
25 1963(a)(1), (a)(2), (a)(3), and showing what parts of the

1 business proceeds, interests, corporations, and so forth
2 are being forfeited and why each is being forfeited
3 appropriately under the statute.

4 And that gets, by the way, to part of the
5 response I think to this sort of intuitive sense that can
6 be put most comfortably I think in Eighth Amendment terms
7 that there is wild disproportionality at work here. That
8 is not so for the following reasons, and if I may, let me
9 share with you a bit of the record in the case, not what
10 the film --

11 QUESTION: Why don't you just tell us about the
12 record, rather than share it with us.

13 MR. STARR: The record tells us, Mr. Chief
14 Justice, that there were essentially here 10 businesses
15 and adult theaters that were engaged in the sale of
16 literature and movies that all partook of the same nature.
17 They were adult entertainment materials. That's what this
18 was all about.

19 The Government offered to introduce into
20 evidence not only the obscene materials, and at the jury
21 trial the first film that was shown, She Male Encounters,
22 80 minutes was displayed to the jury. Additional films
23 were displayed to the jury. The Government, anticipating
24 the very kind of argument that was eventually made at the
25 court of appeals and in this Court, said there are others,

1 and we are prepared to introduce those. An objection was
2 interposed on relevancy grounds.

3 In addition, at the forfeiture phase of the
4 trial, there was, as my colleague on the other side has
5 indicated, introduced to the court 400 plus videos and
6 magazines that the district court at page 153 of the
7 petition appendix specifically found are of the -- without
8 making the same kind of elaborate review of every minute
9 of the movie or every aspect of the book, were of the same
10 nature.

11 But ultimately what the court also had before it
12 and what the jury had before it was an enterprise that was
13 rife with criminality: secreted assets, under-reporting
14 of income --

15 QUESTION: Mr. Starr, is that part of your case?

16 MR. STARR: Yes, it is. It's not --

17 QUESTION: That was necessary to prove that?

18 MR. STARR: It's not necessary, but it's part of
19 my case in the sense that if you read the indictment, the
20 indictment alleged various tax offenses and fraud --

21 QUESTION: Is it not correct that the obscenity
22 offenses were the only predicate offense?

23 MR. STARR: Absolutely, and I don't want to
24 mislead the Court --

25 QUESTION: Then why do we talk about the other

1 offense? Let's assume he's a real bad person for all
2 these other reasons.

3 MR. STARR: Because it tells us about the nature
4 of this enterprise and the criminality of the enterprise
5 in --

6 QUESTION: But is that -- tell me this because I
7 really am curious because the statute is a difficult
8 statute to understand. Do you agree with your opponent
9 with respect to his answer to my hypothetical about
10 American Airlines, that you would have the authority under
11 the statute to forfeit the entire airline if they showed
12 three or four obscene movies in a flight from here to
13 California?

14 MR. STARR: Absolutely not. Under -- and the
15 reason is the statute, 1962, talks about a pattern of
16 racketeering. This Court in HJ, Inc., this Court in
17 Sedima --

18 QUESTION: Well, but you had a pattern of
19 racketeering with six obscenity offenses. That's enough,
20 isn't it?

21 MR. STARR: But we were --

22 QUESTION: Under the statute I mean.

23 MR. STARR: But we were prepared to show much
24 more --

25 QUESTION: No. I know you could have proved a

1 lot more, but is it not true that under the statute, all
2 you had to prove was six obscenity offenses to get your
3 pattern of racketeering --

4 MR. STARR: To show that, in fact, there was a
5 pattern of racketeering, and then the other elements of
6 the enterprise, that the enterprise was used in the
7 offense. That is to say, to take your American Airlines
8 --

9 QUESTION: Right.

10 MR. STARR: If a division manager or if the
11 president himself of American Airlines, if Mr. Crandall
12 orders the showing of this, it doesn't mean American
13 Airlines is going to be forfeited. He may -- it is in
14 personam. This operates in personam. If it's corporate
15 policy, yes. I would have to say, Justice Stevens, that
16 there is the possibility that we would have to analyze the
17 corporation's liability. But recall --

18 QUESTION: Well, it helped sell a few tickets to
19 the -- from here to California. Isn't that enough? Isn't
20 that all you need under the statute?

21 MR. STARR: Not at all in terms of corporate --
22 I'm trying to draw a distinction between what I
23 understand you to be concerned about, which is forfeiture
24 by American --

25 QUESTION: I'm concerned about the

1 disproportionately problem --

2 MR. STARR: Exactly, forfeiture of an entire
3 airline on the basis of these few offenses. My response
4 --

5 QUESTION: Each of which contributed to the
6 running of the business because it induced some people to
7 take the flight that they might not otherwise have taken.

8 MR. STARR: I would have to know, first of all,
9 whether this was, in fact, corporate policy, board of
10 directors approved policy, and the like when we're talking
11 about a corporate forfeiture as opposed to the in personam
12 forfeiture of Mr. Crandall's own interest in American
13 Airlines because he has to, under the statute, use this
14 enterprise for criminal purposes. That's the evil that
15 the statute is getting at, and that's what was built up
16 here.

17 QUESTION: Well, let's assume the board of
18 directors approved the schedule of the flight, you know,
19 what -- the movies they're going to show on the flight to
20 California. It's rather unlikely, but assume they did.
21 And they decided that there were six very interesting
22 Swedish films that --

23 (Laughter.)

24 QUESTION: -- might be very attractive to a lot
25 of travelers, and they decided to show them. They turn

1 out to be obscene, and they had advertised them. They
2 could forfeit the whole airline.

3 MR. STARR: I don't think so under this Court's
4 interpretation in HJ, Inc. of the statute, which we don't
5 quarrel with. In fact, we think it's quite correct
6 because it is the statute's concern, Congress' concern,
7 about what the Court called the pattern, that is to say, a
8 threat of continuity. This is --

9 QUESTION: But you just told me six is enough
10 for a pattern.

11 MR. STARR: I have suggested that it could be
12 enough as long as there is the threat of continuity, and
13 that is why I will not concede that any, other than the
14 most irrational, corporation would knowingly, as a matter
15 of corporate policy, continue and threaten to continue
16 within the meaning of HJ, Inc.

17 What this statute was aiming at and why this
18 Court has seen since 1984 so little of these kinds of
19 predicate offenses is the kind of empire that we saw here,
20 one that is essentially given over to the display of
21 materials that are very similar, as the district court
22 saw, to those --

23 QUESTION: Well, it may be -- Mr. Starr, if I
24 may interrupt you. It may be very similar, but there is a
25 crucial constitutional difference depending on whether

1 there are six pieces which are obscene and 600,000 which
2 are merely erotic. And it seems to me that your argument
3 rests upon the identification of what is assumed and
4 probably correctly assumed to be simply erotic adult
5 material with the six which were shown to be obscene. And
6 that's your way of sort of getting out of the analogy that
7 Justice Stevens is suggesting, and I don't see how that's
8 a legitimate basis. I don't see how we can assume the
9 identity of eroticism with obscenity.

10 MR. STARR: I don't think you have to make that
11 assumption. The point that I am getting at is can
12 Congress constitutionally say once you prove the requisite
13 elements of RICO, effect a forfeiture. In our view, yes,
14 that it is not disproportionate when, in fact, the
15 enterprise is being used as the instrument for carrying
16 out the criminal activity. Here the pattern is the sale
17 of obscene materials.

18 QUESTION: And, General Starr, would you take
19 the same position if a substantial amount of the inventory
20 turned out to be Gideon's Bibles?

21 MR. STARR: We would take the same position,
22 that it is -- that what RICO is getting at -- and I think
23 this is what is critical in terms of a First Amendment
24 analysis, that RICO is neutral in terms of what it is
25 seeking to obtain. It is seeking to obtain proceeds and

1 assets. It does not care what those assets are, if
2 they're cash registers or if they're Gideon's Bibles.

3 QUESTION: There would be no First Amendment
4 concern that would trigger even so much as an O'Brien test
5 to the application --

6 MR. STARR: Not as long as there is an
7 appropriate predicate offense, and then I think there is
8 an appropriate -- as was noted in the concurring opinion
9 in Arcara, a concern that Congress -- that the Government
10 may be getting at a business because it disfavors that
11 particular speech.

12 QUESTION: Well, would the Government have
13 burned the assets if it had turned out they were Gideon's
14 Bibles instead of erotica?

15 MR. STARR: I would seriously doubt that it
16 would have, and one of the reasons that --

17 QUESTION: So, does that mean it's somehow
18 content based?

19 MR. STARR: Not at all. Because of the
20 Government's concern about the nature of these materials
21 and not wanting, frankly, to traffic in obscene materials,
22 the Government did not need to go into the business or
23 otherwise dispose of these in any other way than to
24 destroy.

25 I should note the fact that a number of these

1 materials were, in fact, preserved and shipped to
2 California, and I don't think there will be dispute with
3 respect to that. Moreover, the adult theaters were not
4 forfeited. The Government did not try to achieve a
5 forfeiture of the adult theaters.

6 What it was, in fact, focusing on were these
7 bookstores -- and this was all before the jury in the case
8 -- photographs of the interiors of these -- or these adult
9 entertainment magazine and video kinds of centers. And
10 so, the jury had before it the nature of this enterprise
11 and that prompted then at the forfeiture hearing the judge
12 to conclude that what had been established here was a vast
13 supply network that permitted this pattern of racketeering
14 in terms of obscenity offenses in interstate trafficking
15 in obscene materials to take place.

16 That is to say, what is RICO getting at? It is
17 an enterprise -- an individual's use of that enterprise as
18 the vehicle for commission of criminal offenses. And when
19 Congress took the step that it did in 1984 to include
20 obscenity as a predicate offense -- again Fort Wayne Books
21 said that was all right to do. It was all right for
22 Indiana. It was all right for Congress -- it did so based
23 on Congress' concern and understanding that pornography
24 was, in fact, linked to organized crime and, in fact, was
25 a major supply of source, financial resources, for

1 organized crime. That's why Congress saw fit to include
2 it.

3 That is why the prosecutions that this Court has
4 seen -- there have been all of five. This Court has seen
5 two. The Pryba case, which the Court had before it on
6 certiorari, but did not take certiorari a few years ago.

7 All were the same type as what we have here, an
8 organized criminal enterprise given over to the
9 trafficking in obscene materials, and it also was
10 characterized by these other aspects of secreted assets,
11 hidden income, the use of nominees as owners of the
12 corporation, and the like.

13 QUESTION: Are you suggesting that if there
14 weren't the evidence of the hidden assets and the tax
15 offenses and so on, that the result under the -- under
16 RICO might be different?

17 MR. STARR: I am not. I'm not moving from my
18 comment to Justice Stevens. But in terms of why this case
19 was brought, if there is concern about this case was
20 brought because the Government disfavors certain kinds of
21 speech, these are the kinds of prosecutions that the
22 record shows that the United States has, in fact, brought.
23 There have been four or five obscenity predicate RICO
24 prosecutions. Two have made it to this Court.

25 QUESTION: I don't quite understand what you're

1 saying. You're saying you do or do not disfavor this kind
2 of speech if it's nonobscene?

3 MR. STARR: The -- we --

4 QUESTION: Which were you saying? I'm just
5 trying -- I didn't quite understand whether you said the
6 Government did --

7 MR. STARR: I may have misspoken, Justice
8 Stevens. I am not prepared to concede, as Mr. Weston
9 would have the Court accept, that obscenity is speech.

10 QUESTION: No, no. I understand. I'm assuming
11 that there's a lot of this stuff out there that's not
12 obscene. We have to presume that. And I'm asking you
13 whether you're telling us that the Government disfavors
14 the nonobscene, erotic material speech.

15 MR. STARR: No. That's not of interest to the
16 Government.

17 QUESTION: Then it's puzzling why you burned it
18 all.

19 MR. STARR: That is not of interest to the
20 Government. The Government's concern, Justice Stevens,
21 was that these materials were of -- as the district court
22 saw who had the materials before him, of a similar nature.
23 And the Government is not interested either in storing
24 these materials indefinitely, nor is it interested in
25 selling these materials --

1 QUESTION: So --

2 MR. STARR: -- which might be adjudicated to be
3 obscene.

4 QUESTION: So, you're saying if the Government
5 did, in fact, bring these RICO forfeiture proceedings only
6 against sellers of pornography, that you would, indeed,
7 have a problem of content based suppression.

8 MR. STARR: At least, I think it's more likely
9 -- no, I don't concede that. I do think that you might
10 have a charge of selective prosecution. Under this
11 Court's analysis in Waite, that kind of argument can
12 obviously be advanced. It was not advanced here. There's
13 no discussion or suggestion by Mr. Alexander that he alone
14 has been singled out for prosecution. No. As long as the
15 Government is proceeding with obscenity as the predicate,
16 it is abiding by Congress' intent and it is not making
17 content based distinctions.

18 QUESTION: Suppose it brought no other RICO --
19 that's what I understood Justice Souter's questions to be.
20 The only RICO prosecution that the Government ever brings
21 are obscenity prosecutions of this sort. You wouldn't --
22 you think that would be a basis to suspect that the
23 Government is -- has some antagonism towards the speech?
24 I would be prepared to consider that evidence of such
25 antagonism. If you brought no other --

1 MR. STARR: If, in fact -- but I think --

2 QUESTION: You have a few other RICO cases,
3 don't you?

4 (Laughter.)

5 MR. STARR: Oh, we have many other. In fact,
6 the United States -- if there is some impression, Justice
7 Scalia, that the Government is only bringing RICO
8 obscenity predicate cases, we bring about 100 cases a
9 year. One or two of those a year are typically obscenity
10 predicate type offenses. But if, to accept the
11 hypothetical, we were only using RICO which had seven or
12 eight predicate offenses and using it only, I think,
13 number one, one can obviously appropriately be concerned
14 with the exercise of prosecutorial discretion and the --
15 and whose power is that? It is the executive branch's
16 authority to determine what is, in fact, the most
17 important kinds of prosecutions to bring.

18 But because of the First Amendment overlay that
19 does, in fact, arise in this context, it does seem to me
20 that an argument could very well be mounted -- and it
21 might be accepted -- that the Government is engaged in
22 selective enforcement, selective prosecution of cases, and
23 we would take that through the Waite analysis.

24 I thank the Court.

25 CHIEF JUSTICE REHNQUIST: Thank you, General

1 Starr.

2 The case is submitted.

3 (Whereupon, at 11:58 a.m., the case in the
4 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:

Ferris J. Alexander, Sr., Petitioner v. United States

Case No.: 91-1526

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

BY *Lona M. May*

(REPORTER)