

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRED H. EDENFIELD, ET AL., Petitioners v. SCOTT
FANE
CASE NO: 91-1594
PLACE: Washington, D.C.
DATE: Monday, December 7, 1992
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IN THE SUPREME COURT OF THE UNITED STATES

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FRED H. EDENFIELD, ET AL., :
Petitioners :
v. : No. 91-1594
SCOTT FANE :
- - - - -X

Washington, D.C.
Monday, December 7, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:43 a.m.

APPEARANCES:

PARKER D. THOMSON, ESQ., Miami, Florida; on behalf of the
Petitioners.
DAVID C. VLADECK, ESQ., Washington, D.C.; on behalf of the
Respondent.

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

2 (10:43 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 91-1594, Fred Edenfield v. Scott Fane.

5 Mr. Thomson, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF PARKER D. THOMSON

8 ON BEHALF OF THE PETITIONERS

9 MR. THOMSON: Mr. Chief Justice, and may it
10 please the Court:

11 This case involves one specific narrow
12 prohibition by Florida of the conduct of Florida licensed
13 certified public accountants. It is a prohibition imposed
14 by the legislature by statute, and by the State Board of
15 Accountancy which licenses CPA's by rule.

16 The prohibition is of cold call solicitation of
17 new clients -- what the statute and the rule called
18 direct, in-person, uninvited solicitation.

19 The conduct is one defined as solicitation which
20 directly or implicitly requests an immediate oral response
21 from the recipient. We're not here involved, of course,
22 with political speech or artistic speech, we are involved
23 with the most blatant of commercial speech implemented
24 through conduct of the most confrontational.

25 QUESTION: Mr. Thomson, may I just interrupt on

1 this one question?

2 You -- in your brief you do the same thing, you
3 talk about it calls for an immediate response. Would it
4 also be prohibited -- your rule also apply to a
5 solicitation by an accountant who did not ask for an
6 immediate response, if he just said I -- went in and made
7 the presentation and said, think it over and whenever
8 you're interested, let me know?

9 MR. THOMSON: The definition in the statute -- I
10 mean, in the rule, is of one that requests an immediate
11 oral response. I believe, nevertheless, that what you
12 have proposed would be barred because the presentation
13 would be direct, in person, and uninvited.

14 QUESTION: Is there some empirical evidence that
15 shows this sort of a request was made frequently? The
16 reason I ask, it seems to me, judging from my practice as
17 a lawyer, not as an accountant, in trying to put it in
18 present-day terms, it seems to me if I were trying to get
19 a client and had a presentation to make I wouldn't demand
20 that the person make an immediate response. You're trying
21 to kind of ingratiate yourself with the person, not
22 imprison them verbally.

23 MR. THOMSON: The prohibition, Mr. Chief
24 Justice, is of a circumstance, that is an event, a method
25 of presentation. It is not in any way to deter the

1 message. The message may be communicated in writing, on
2 radio, on television, by direct mail, in print, in the
3 yellow pages -- in a whole variety of ways, but it may not
4 be communicated in a way that --

5 QUESTION: That's not -- that wasn't my
6 question.

7 MR. THOMSON: Excuse me.

8 QUESTION: My question was, did the State of
9 Florida or agency have some sort of empirical evidence
10 before it that this sort of request, with a request for an
11 immediate answer, was common or prevalent among
12 accountants?

13 MR. THOMSON: No, Your Honor. There is no
14 empirical evidence, any more than that there is empirical
15 evidence that was dealt with by this Court in the Ohralik
16 case with respect to lawyers which you mentioned and where
17 also there is a broad-scale prohibition of direct, in-
18 person, uninvited solicitation.

19 QUESTION: Does the agency advance any
20 particular reason why it selected this kind of conduct, if
21 there were no empirical evidence why it picked out this
22 demand for an immediate response?

23 MR. THOMSON: There are two basic reasons that
24 go to the two basic purposes of the governance of
25 certified public accountants in the State of Florida. The

1 statute with respect to certified public accountants says
2 that the first purpose is to assure the accuracy of audit
3 statements upon which the public relies, and the second is
4 to protect the public from dishonest practitioners.

5 Taking the latter one first, the communication
6 made in this fashion is inherently unregulatable. You
7 simply do not know what was said, the circumstances, the
8 tone, what-have-you, and therefore it is beyond the
9 subject of regulation with respect to the first, which is,
10 after all, the board's primary concern. It is with the
11 attest function, so-called, of CPA's. That is, those
12 activities that are associated with financial statements.

13 In performing that function, the CPA represents
14 the public. He has a public function, because the
15 financial statements that he opines on will be used by the
16 public, and the public assumes the accuracy of the
17 financial statements because of the opinion and then
18 relies on them. That public could be clients themselves,
19 it could be lenders, it could be the securities markets,
20 it can be the persons who purchase and sell securities on
21 the security markets, it can be Government regulatory
22 agencies.

23 It is in effect to sanitize that particular
24 relationship which demands the independence -- the
25 nonadvocacy, but the independence of the certified public

1 accountant that this prohibition is placed, and it is not
2 merely the actual independence of the certified public
3 accountant, it is the apparent independence. It is that
4 the public has faith and trust in that independence,
5 whether in fact there has been any actual impairment of
6 it.

7 QUESTION: Mr. Thomson, does Florida have the
8 same prohibition on the books with regard to attorneys?

9 MR. THOMSON: Yes. It is done through the
10 Florida Bar, which is an integrated bar, and a
11 representative of --

12 QUESTION: How about any other profession in
13 Florida? Is it just these two, CPA's and lawyers?

14 MR. THOMSON: No -- Your Honor, I cannot answer
15 your question specifically, but I believe that there are
16 other -- there are other of the so-called learned
17 professions in which there are such prohibitions. I think
18 there are ones in respect to engineers. I cannot give it
19 to you --

20 QUESTION: And no evidence was offered that the
21 in-person solicitation gave rise to overreaching or
22 deception or anything of that kind.

23 MR. THOMSON: No empirical evidence, Your Honor.
24 This prohibition, as the prohibition with respect to
25 attorneys, antedates this Court's decisions, starting with

1 the Virginia Pharmacy decision and Bates, and so forth, by
2 many, many years, and that is the case of -- that is the
3 case of attorneys, it's the case of accountants, and it
4 would be the case of all other professionals with which
5 there were similar prohibitions.

6 QUESTION: Did the legislature command this sort
7 of a regulation?

8 MR. THOMSON: Yes, Your Honor. It is a specific
9 provision of the Florida statute governing certified
10 public accountants, chapter 473 of the Florida statute.

11 QUESTION: And the board --

12 MR. THOMSON: I might say, Your Honor, that the
13 prohibition in the statute is of direct, in-person,
14 uninvited solicitation. The spin put on it of demanding
15 an immediate response is by rule of the Board of Public
16 Accountants.

17 QUESTION: What was declared unconstitutional?

18 MR. THOMSON: The statute and --

19 QUESTION: The regulation.

20 MR. THOMSON: The rules -- everything. They
21 were both declared unconstitutional and the State board
22 was enjoined from enforcing them.

23 We submit --

24 QUESTION: Do you want us to consider the
25 statute as containing that additional qualification, or do

1 you think that was sort of just added by the regulation?

2 MR. THOMSON: I'm clear that it was added. It
3 was a construct of the State board as to how it
4 interpreted direct, uninvited, in-person solicitation.

5 QUESTION: Is that an authoritative
6 interpretation?

7 MR. THOMSON: Oh, yes, it is an authoritative
8 interpretation in that the State board is authorized to
9 adopt rules to carry forward the legislative mandate.

10 QUESTION: So we should regard the statute,
11 then, as meaning that, as requiring an immediate response.

12 MR. THOMSON: That is correct, Your Honor.

13 QUESTION: That's how you want us to interpret
14 that statute for purposes of this case.

15 MR. THOMSON: Well, I believe, as I said, Your
16 Honor, that the statute stands on its own, but it has been
17 interpreted by an administrative agency that has the power
18 to interpret it.

19 QUESTION: Well, the court of appeals didn't
20 make much of the immediate response business, did they?

21 MR. THOMSON: That is correct, Your Honor. A
22 majority of the court of appeals simply struck it all. It
23 elided the two.

24 QUESTION: Do you raise any question that --
25 they held the entire statute unconstitutional, the entire

1 rule unconstitutional, is that right?

2 MR. THOMSON: Correct, Your Honor.

3 QUESTION: Do you make any argument that they
4 should have tried to save possible applications of the
5 statute to extreme cases of overreaching or anything like
6 that, or do you say the whole ball of wax is at issue?

7 MR. THOMSON: I believe the whole ball of wax
8 clearly is at issue.

9 QUESTION: Even though it's conceivable that
10 some applications of the rule might be entirely legitimate
11 even under the court of appeals reasoning, if the
12 accountant went and engaged in the very extreme kind of
13 behavior that was in Ohralik, for example.

14 MR. THOMSON: That is correct, Your Honor. The
15 statute has been stricken as to all of its applications
16 with one -- with one caveat, and that is that the end line
17 of the decision of the Federal district court was that
18 what should be in the business context.

19 QUESTION: But other than that let me -- well,
20 it's the district court.

21 MR. THOMSON: That is the district court, and
22 its determination was affirmed.

23 QUESTION: Well, are you asking us to save as
24 much of the statute as can be saved under the
25 Constitution?

1 MR. THOMSON: Mr. Chief Justice, we are asking
2 you to save the entire statute under the Constitution.

3 QUESTION: Well, supposing we were to conclude
4 that the entire statute couldn't be saved under the
5 Constitution.

6 MR. THOMSON: Then we would be asking you to
7 save whatever could be saved. In fact, the statute itself
8 has a what you might call an unzipper clause. It says
9 that the -- essentially it says that it's to be
10 interpreted in accordance with the First Amendment, and it
11 is to be limited to the extent that there is a need for
12 it.

13 QUESTION: Well, what about --

14 MR. THOMSON: It gives the board, in fact, the
15 authority to do that.

16 QUESTION: I suppose there are a lot of CPA's in
17 your State that don't attest.

18 MR. THOMSON: The -- factually, any CPA may
19 attest.

20 QUESTION: Yes.

21 MR. THOMSON: Clearly, there are some CPA's that
22 do not attest. How many --

23 QUESTION: But do you think -- but the statute
24 covers them as well, doesn't it?

25 MR. THOMSON: Of course, Your Honor. The

1 statute covers any person who performs accounting
2 functions as a CPA, and I submit to Your Honor that to the
3 layman the difference between attest and performing
4 accounting functions as a CPA is a distinction without a
5 difference.

6 Now, in terms of the ultimate -- in terms of the
7 ultimate use of financial statements, to be sure, attest
8 has a very significant difference, and it is the ultimate
9 protection of the attest function that is one of, or the
10 most principal requirements and concerns of the statute.

11 But in fact a CPA is a person who performs
12 accounting functions as a CPA -- compilations, and so
13 forth -- and when you go to the small business that
14 Mr. Fane says that he wishes to secure, corporate and
15 commercial clients that have sufficiently complex
16 accounting and taxation needs to justify the retention of
17 a highly skilled accountant, the difference between an
18 attest function and a compilation function or something
19 else that is accounting services, I suggest is a
20 distinction that the average layman is not likely to
21 understand.

22 QUESTION: Mr. Thomson, can I come back to what
23 you call the -- what the unzipper feature of the stat --
24 we do have an overbreadth doctrine in First Amendment
25 cases which says that if the statute is valid in some

1 applications but not invalid in others, it's invalid in
2 toto.

3 Can that doctrine be overruled by simply saying
4 in the statute, by the way, to the extent that this
5 statute is unconstitutional it's no good?

6 MR. THOMSON: No --

7 QUESTION: Can a stroke of the pen do away with
8 our overbreadth doctrine?

9 MR. THOMSON: Well, it's unlikely that any
10 Florida statute can get rid of United States Supreme
11 Court's overbreadth doctrine, but historically the statute
12 came about -- it was actually part of the rewriting of the
13 law in 1979, at a time when Bates had been decided,
14 Ohralik had been decided, Primus had been decided.

15 My suspicion, although there is no clear
16 legislative history, of the words, except to the extent
17 that such solicitation constitutes the exercise of
18 constitutionally protected speech as determined by the
19 rules of the board, was designed to pick up issues like
20 Primus in case there were some kind of semipolitical
21 speech rather than the uncontrovertible commercial speech
22 that is involved in this case.

23 QUESTION: Mr. Thomson, do you think that the
24 overbreadth doctrine applies to commercial speech
25 regulations?

1 MR. THOMSON: Well, going back to Bates, it was
2 said that it did not.

3 QUESTION: And there are other cases that say
4 the same thing.

5 MR. THOMSON: There are a series of cases --

6 QUESTION: So you take it that the overbreadth
7 doctrine is not applicable here.

8 MR. THOMSON: That is my assumption, Your Honor,
9 although this Court has in recent years utilized the term.
10 In some circumstances that might apply. However, I do
11 believe that the cases have said it does not.

12 We submit that solicitation is a form of
13 advertising with two aspects, the message that is
14 conveyed, and the medium in which that message is
15 conveyed. The message of the solicitation is the
16 commercial speech. It is a message that proposes a
17 commercial transaction.

18 The medium in which the message is conveyed is
19 not the message. There are many media through which the
20 commercial message here can be conveyed -- as I said,
21 print press, newspapers or magazines, electronic press,
22 radio or TV, direct mailings, laser letters -- but it
23 cannot be done in one specific form, and that is,
24 uninvited, in-person solicitation.

25 Each medium has its own unique features.

1 However, all print media permit review of the message
2 except one -- the cold call. By the very nature of the
3 cold call, the message that is delivered by this form is
4 not subject to regulation simply because it is not
5 recorded for review.

6 We submit that States have a substantial
7 interest in regulating their learned professions and in
8 maintaining the highest professional standards. We submit
9 that State regulation of professionals and the advice
10 professionals give is qualitatively different than the
11 regulation of claims involving standardized products and
12 services.

13 QUESTION: Would you say that Florida could have
14 the same kind of regulation for real estate brokers -- no
15 cold calls?

16 MR. THOMSON: Your Honor, it would pose a whole
17 set of different circumstances. You'd have to -- there
18 are various ways that you could define learned
19 professions.

20 QUESTION: Well, what's your answer?

21 MR. THOMSON: Well, Florida recently has defined
22 learned profession -- or professions, I should say, in
23 one -- in one way that relates to professional malpractice
24 that I think leads us in part towards that determination.
25 I think that there are other thoughts that are involved

1 that also impact -- what the Florida court referred to as
2 licensing, specialized knowledge, and academic preparation
3 of at least a 4-year degree.

4 You could incorporate into that academic
5 preparation training, and impart continuing education
6 training that is required of such professions as
7 accounting. You may also desire to include a code of
8 ethics with a disciplinary system with respect to members
9 who breach that code.

10 One criteria that has been offered at times is
11 that a primary emphasis of the profession involved is on
12 social responsibility over individual gains with respect
13 to the accountants, their public function, and one
14 definition, or one restriction that could clearly be
15 looked at, is where the legislature has chosen to apply a
16 privilege to the communications between the users of that
17 service and the service itself, which would be true of
18 accountants and attorneys.

19 We are not suggesting, however, that it would
20 apply beyond the learned professions, and specifically, of
21 course, we are suggesting that it should apply
22 specifically to certified public accountants.

23 I would --

24 QUESTION: May I ask you one other question
25 before you sit down, Mr. Thomson? Am I correct in

1 understanding that the statute says it's -- to the extent
2 that such solicitation constitutes the exercise of
3 constitutionally protected speech as determined by the
4 rules of the board, and then the rules of the board define
5 direct, in-person, uninvited solicitation as those that
6 directly or implicitly request an immediate, oral response
7 from the recipient.

8 Does that mean that, under your understanding of
9 the rules construing the statute, that if the oral
10 solicitation did not request an immediate response, it
11 would not be prohibited by the statute because the rules
12 have construed the statute to limit them in this fashion?

13 MR. THOMSON: At this point of time, Your Honor,
14 yes -- that is, that the board has authoritatively
15 determined the meaning of the prohibition. Whether they
16 did it for the reasons that they were attempting to
17 constitute, or determine what constituted the exercise of
18 constitutionally protected speech, is certainly not
19 evident in anything that is clear from the adoption of the
20 rule.

21 QUESTION: Is there any evidence in this case
22 that your adversary ever engaged in the kind of
23 solicitation as defined in the rule, where he demanded an
24 immediate response?

25 MR. THOMSON: It is my understanding that

1 Mr. Fane challenged the rule, and whether he violated the
2 rule in the meantime is unknown to the board.

3 QUESTION: But he asserts an interest in
4 engaging in solicitations that do demand an immediate
5 response, that's your --

6 MR. THOMSON: He doesn't say one way or the
7 other.

8 QUESTION: I wonder if he has standing to bring
9 this lawsuit, is what I'm asking.

10 MR. THOMSON: Your Honor, this Court -- this
11 case is posed, and it went on a summary judgment, as I
12 believe Your Honor knows, and we know from that what
13 Mr. Fane wants to do.

14 Mr. Fane wants to offer his services at rates
15 below the prevailing market rate for CPA's in the
16 community, and he wants to develop a clientele of small to
17 midsized businesses. He wants to explain why he can offer
18 superior service to clients as compared with other CPA's
19 or accountants, and gives some reasons.

20 QUESTION: All of which he's permitted to do
21 under the rule, as long as he doesn't demand an immediate
22 response.

23 MR. THOMSON: Your Honor, that is -- that is how
24 the rule is interpreted by the board, without question.

25 QUESTION: But Mr. Thomson, in any event, this

1 suit was brought as a facial attack against the entire
2 Florida statute in question.

3 MR. THOMSON: Unquestionably, Your Honor, and it
4 was submitted on the basis of three affidavits, two by
5 Mr. Fane and one by Louis Dooner, who dealt with --

6 QUESTION: If the regulatory interpretation was
7 authoritative, the courts should not have declared the
8 statute unconstitutional on its face, and furthermore, I
9 can't imagine why the -- I would -- I can't imagine why
10 the board would purport to limit the statute to
11 solicitations that demanded an immediate answer, unless
12 they never wanted to enforce the statute at all, because I
13 can't imagine anybody trying to get a client would ever
14 say -- you'd never catch anybody doing that.

15 You wouldn't even can't imagine that anybody
16 would do that. So the statute as construed by the board
17 is -- they're just -- they just said, but we just don't
18 want to enforce it.

19 MR. THOMSON: I don't believe I could respond to
20 the latter part of your --

21 (Laughter.)

22 MR. THOMSON: I can respond to the former part,
23 that if Mr. Fane had wanted to know whether any specific
24 conduct that he wished to engage in would or would not be
25 permitted by the board, he could simply have asked the

1 board.

2 QUESTION: Yes, but normally we don't require
3 people to say, can I have permission to make this speech,
4 before they make a speech.

5 MR. THOMSON: Normally you may not. Certainly
6 you do not in the area of political or artistic speech,
7 but it may be that this board has endorsed many times with
8 respect to advertising regulatory requirements, or
9 suggested that they might, whereby the advertising is
10 required to be submitted, and of course most bar
11 associations have exactly that, in which there is a prior
12 submission for clearance, and the State Board of
13 Accountancy permits that.

14 They have counsel. Counsel can give informal
15 opinions, and if counsel decides that it has not been
16 determined under the rules of the board, it can submit it
17 to the board for final determination.

18 QUESTION: Did any of the affiants who joined
19 Mr. Fane, or did Mr. Fane himself, say that they wanted to
20 make solicitations and demand immediate responses from the
21 solicitees?

22 MR. THOMSON: No, Your Honor, they didn't say
23 that. Mr. Fane was the one, and he didn't say what he
24 wished to do with respect to that.

25 He said he wanted to make -- he wanted to make

1 direct, in-person solicitations, and he thought that that
2 was the most effective way to sell his message.

3 QUESTION: But one would think the board's
4 answer would be, go ahead, so long as you don't demand an
5 immediate response.

6 MR. THOMSON: The board wasn't ever asked. The
7 board was sued.

8 QUESTION: Mr. Thomson, is it possible to have a
9 facial attack on a statute which interprets the statute
10 according to a regulation? I mean, once you say you're
11 going to interpret it according to the regulation, it's no
12 longer a facial attack, is it?

13 MR. THOMSON: Well, it seems to me that it's a
14 facial attack on the statute as it's been definitively
15 interpreted.

16 QUESTION: Well, I guess I --

17 MR. THOMSON: You --

18 QUESTION: Sure, I guess you can have a facial
19 attack on the statute as it's been applied as well, but I
20 wouldn't consider that a facial attack.

21 MR. THOMSON: No, no. It seems to me that those
22 are two very different things. As to whether it has been
23 applied is a factual determination. As to whether it has
24 been construed, and therefore to that extent and to the
25 extent permitted, amended, you would be looking still at

1 the statute as it was on the books.

2 QUESTION: I thought the whole notion of a
3 facial attack was that you have not given the State an
4 opportunity to elaborate upon the statute through its
5 judicial decisions or through its regulations, but maybe
6 I'm wrong about that.

7 QUESTION: Thank you, Mr. Thomson.

8 Mr. Vladeck. Am I pronouncing your name
9 correctly?

10 MR. VLADECK: Yes, Your Honor.

11 QUESTION: You may proceed.

12 ORAL ARGUMENT OF DAVID C. VLADECK

13 ON BEHALF OF THE RESPONDENT

14 MR. VLADECK: Mr. Chief Justice, and may it
15 please the Court:

16 Let me start out by describing what this case
17 really was about, and what the injunction that was added
18 in this case provides.

19 No Federal court has declared this statute
20 unconstitutional. Rather, the district court entered a
21 narrow injunction which appears on page 88 of the Joint
22 Appendix, which enjoins the Board of Accountancy in the
23 State of Florida from enforcing the regulation barring in-
24 person solicitation, quote, as it is applied to CPA's who
25 seek clients through in-person, direct, uninvited

1 solicitation in the business context.

2 The district court tried to enter a narrow
3 injunction directed towards the regulation.

4 QUESTION: It banned something besides direct
5 solicitations, something besides those that demanded an
6 immediate response.

7 MR. VLADECK: Right, that's correct, Your Honor,
8 though --

9 QUESTION: Well --

10 MR. VLADECK: If you look at the affidavit
11 Mr. Fane submitted to the district court in which he
12 explained precisely what he wanted to do, it is quite
13 clear that he had no intention of demanding an immediate
14 response. Rather, if you look at the Joint Appendix --

15 QUESTION: So the district court -- neither Mr.
16 Fane nor the district court accepted the regulation as a
17 definitive construction of the statute, is that it?

18 MR. VLADECK: The word impliedly in the
19 regulations, Your Honor, as we understand it, has always
20 been read by the board to apply to the situation in which
21 Mr. Fane wanted to engage in solicitation, just as the
22 Chief Justice described earlier.

23 That is, what Mr. Fane wanted to do -- and this
24 is laid out in the Joint Appendix between pages 13 and
25 14 -- is call the chief financial officers of small to

1 midsize businesses and say in essence, I'm new in town, do
2 you have any interest in meeting me so we can discuss the
3 services that I offer?

4 If the phone conversation ended with a no,
5 Mr. Fane would have not pursued it. If he was invited to
6 make a presentation, Mr. Fane would go to the office, the
7 business, and explain the services he can rendered his
8 qualifications, his experience, discuss the business needs
9 of the client and his ability to meet those needs.

10 At that point, he says on page 13 and 14 of his
11 affidavit, the CPA also understands that most businesses
12 will not hire a new CPA without checking his or her
13 references extensively. After all, the decision to hire a
14 new CPA is not made lightly. CPA's are privy to all of
15 the business' financial records, and as a result, know a
16 great deal about the business' strengths and weaknesses.

17 Truly, what Mr. Fane is saying is that he cannot
18 conceivably demand an immediate response.

19 QUESTION: Well then, what's this lawsuit about?
20 The board says it wants to impose this requirement only on
21 people who demand an immediate response. You say that's
22 the last thing your client would have done.

23 MR. VLADECK: Because until this morning, Your
24 Honor, the board has consistently taken the position that
25 the word implicitly in its regulations applies to the

1 situation that Mr. Fane has described. That is, Mr. Fane
2 describes the service he can offer and somehow, under the
3 board's reading of the regulation, that is an implicit
4 request for an immediate response.

5 QUESTION: What's your authority for that view
6 of the board?

7 MR. VLADECK: Well, Your Honor, we laid this
8 affidavit out and we've made our concerns known throughout
9 the course of this litigation, and the board has always
10 said that that conduct would be proscribed. That's the
11 theory under which this case has been litigated
12 throughout. We even --

13 QUESTION: How has the board manifested to you
14 its view that this conduct would be proscribed?

15 MR. VLADECK: The board has said that any
16 contact between a CPA and someone who is not yet a client
17 poses the fear that there will be an abuse in the
18 solicitation process, or that it will impair the public's
19 perception as to the integrity of financial statements,
20 and therefore the board has taken the position throughout
21 this litigation that any direct face-to-face or telephone
22 encounter between a CPA and someone who is not already a
23 client is proscribed by its regulation.

24 QUESTION: Can you document your statement that
25 the board has taken this position that you describe

1 throughout this litigation?

2 MR. VLADECK: Well, I can document it only in
3 the sense that when we put in Mr. Fane's affidavit, which
4 describes in detail what conduct he intends to engage in,
5 the board offered no response. The board didn't say, we
6 agree with you that that conduct would be permissible. To
7 the contrary, they said that conduct and any conduct like
8 it would be impermissible.

9 QUESTION: They said that in a pleading
10 somewhere.

11 MR. VLADECK: In all of their pleadings
12 throughout this case, Your Honor.

13 The first mention of Mr. Thomson's theory came
14 10 minutes ago. We've not heard a word about it prior
15 to --

16 QUESTION: Then --

17 MR. VLADECK: This point.

18 QUESTION: Then you don't think the board ever
19 qualified the statute the way Mr. Thomson says it did.

20 MR. VLADECK: That's correct, Your Honor, and
21 Your Honor, I think as one of the other justices points
22 out, if that were the board's reading of its regulations
23 in the statute, then it would apply to virtually no CPA
24 solicitation. CPA's are not like lawyers in the sense
25 that they're seeking one --

1 QUESTION: One shot.

2 MR. VLADECK: A one time, one shot arrangement
3 with the client. What Mr. Fane wants, and what he said in
4 his complaint, what he said in both of his affidavits, he
5 wants to establish a long-term professional relationship
6 with a client that has some need for reasonably
7 sophisticated CPA services.

8 And as I think Justice O'Connor asked Mr.
9 Thomson before, abusive solicitation practices are not
10 likely to be favorably received, and for that reason the
11 State has been unable to point to any evidence from
12 Florida or from any of the jurisdictions that have long
13 permitted solicitation by CPA's that there's a problem
14 with abusive solicitation.

15 QUESTION: In any event, the court of appeals
16 declared the statute unconstitutional, broadly.

17 MR. VLADECK: Well, I don't read the court of
18 appeals opinion --

19 QUESTION: Well, what did it do?

20 MR. VLADECK: The court of appeals, Your Honor,
21 opinion ends on page 103 of the Joint Appendix --

22 QUESTION: But at least it didn't -- it didn't
23 stop to fool around with notions about demanding an
24 immediate response.

25 MR. VLADECK: Your Honor, until this morning

1 that issue --

2 QUESTION: All right.

3 MR. VLADECK: -- has not been raised in this
4 case.

5 QUESTION: Now, Mr. Vladeck, in the petitioner's
6 brief they refer to the affidavit of Louis W. Dooner, CPA,
7 in his response to Fane's motion for summary judgment on
8 page 7 of the petitioner's brief --

9 MR. VLADECK: That's correct, Your Honor.

10 QUESTION: And they quote from Dooner's
11 affidavit. It says, the only type of solicitation that a
12 CPA may not engage in is that that places the potential
13 client in the position of having to make an immediate oral
14 response.

15 If that's a fair statement, I don't think your
16 earlier statement is fair that it had never been suggested
17 before that this was the interpretation.

18 MR. VLADECK: Your Honor, this case has been
19 litigated now for 4 years. We made quite clear at the
20 outset of this litigation, before Mr. Dooner's affidavit
21 was submitted, precisely the conduct Mr. Fane sought to
22 engage in. There has been never any suggestion that that
23 conduct would be permissible under the regulations that
24 the board in fact --

25 QUESTION: According to them, the Dooner

1 affidavit was filed in opposition --

2 MR. VLADECK: Yes.

3 QUESTION: To your motion for summary -- at
4 least you knew then that this was a position that the
5 board was taking, and I'm not sure that is consistent with
6 what you said moment ago.

7 MR. VLADECK: Your Honor, we've always
8 understood the board's position to be that any
9 unsupervised conduct, nonpublic conduct, or the contact
10 between a CPA and someone who is not yet a client of that
11 CPA, to implicitly call for an immediate response. That
12 is, we've always understood the position, and indeed, I
13 think that's the only --

14 QUESTION: Let me give you a little further
15 help. That's certainly the way the court of appeals
16 understood it.

17 MR. VLADECK: It's certainly the way --

18 QUESTION: They said that in Florida, in-person
19 solicitation by CPA's is forbidden, period. That's the
20 way they construed it.

21 MR. VLADECK: And that has always been the
22 position of the board until this morning.

23 I'd like to get to responding to the first
24 justification the board has offered in defense of this
25 all-out ban, which is that a ban on solicitation is needed

1 to preserve the sanctity of the attest function.

2 There are several points I'd like to make.

3 First is, there is no evidence to support the ban furthers
4 or substantially furthers the State interest in preserving
5 the attest function. While Florida has had a statutory
6 ban on in-person solicitation since 1969, many other
7 States have no ban on in-person solicitation by CPA's, and
8 there is no evidence from any of those jurisdictions that
9 it presents a problem.

10 Many Federal regulatory agencies, most notably
11 the Securities and Exchange Commission, depend very
12 heavily on audited financial statements from publicly held
13 corporations.

14 QUESTION: Well now, you brought what appears to
15 be a broad sort of facial attack on the statute.

16 MR. VLADECK: Justice O'Connor --

17 QUESTION: It had not been applied to Mr. Fane,
18 right?

19 MR. VLADECK: That's correct, Your Honor.

20 QUESTION: He had not engaged in conduct and
21 been disciplined for it. He brought this in advance, this
22 attack, against the whole statute.

23 MR. VLADECK: Well, Your Honor, he is -- we
24 didn't --

25 QUESTION: Right?

1 MR. VLADECK: Well, yes --

2 QUESTION: Okay.

3 MR. VLADECK: But not against the whole statute.

4 QUESTION: Do you think the overbreadth doctrine
5 applies to commercial speech?

6 MR. VLADECK: No, Your Honor, I do not believe
7 that's the case.

8 QUESTION: Do you think there are any possible,
9 legitimate applications of this statute?

10 MR. VLADECK: There may be, Your Honor, and --

11 QUESTION: Then how can the court just strike
12 the whole thing down?

13 MR. VLADECK: Well, in the first place, we don't
14 believe the court has. The injunction that has been
15 entered applies only in the business context.

16 Secondly, Your Honor, we don't believe we --

17 QUESTION: Only to what?

18 MR. VLADECK: Only to solicitation in the
19 business context. It doesn't apply to CPA's who want to
20 solicit individuals for their personal accounting needs.

21 In further response, Justice O'Connor --

22 QUESTION: Will you explain that again? I don't
23 understand. What is, in the business context?

24 MR. VLADECK: Well, we assume that what the
25 district court judge meant, and defendants have not sought

1 clarification of it, was that Mr. Fane would be allowed to
2 solicit the business entities that he wants to solicit --
3 corporations or other commercial entities -- in
4 distinction to what the board claimed was one of its
5 fears, which was that CPA's would solicit unsophisticated
6 individuals, and so the district court's injunction is
7 limited to the business context.

8 Which, if I may, Your Honor, gets me back to my
9 answer to Justice O'Connor's question. We didn't label
10 this as a facial, or as an as-applied challenge.

11 I think if you look at our complaint, it is more
12 clearly an as-applied challenge, because in our complaint,
13 we specify precisely the conduct in which Mr. Fane seeks
14 to engage, and we certainly pushed the district court
15 towards issuing an order that was limited towards
16 solicitation in the business context, or business clients.

17 And in that respect I think the complaint is
18 very much like the kind of challenge that was described by
19 this Court in Fox, which is a narrow tailoring challenge.
20 That is, the kind of challenge that doesn't apply --
21 doesn't seek to have the statute struck down as facially
22 overbroad, but challenges one particular application to
23 that statute, and here, it's for the kind of business
24 solicitation that Mr. Fane seeks to engage in.

25 We didn't label the complaint that way, Justice

1 O'Connor, but I think that's the only fair reading of the
2 complaint, and certainly that's the way it was treated by
3 the district court judge.

4 QUESTION: What is the present position of the
5 organization representing CPA's, the American Institute of
6 CPA's?

7 MR. VLADECK: That's correct, Your Honor.

8 QUESTION: Well, what is the present position of
9 that institute? Do they have a rule against in-person
10 solicitation now, or did they ever, or what?

11 MR. VLADECK: Let me trace the history of the
12 AICPA's regulations.

13 QUESTION: Well, you don't need to go through
14 the whole thing.

15 (Laughter.)

16 MR. VLADECK: Well, it's very brief, Your Honor.

17 At present, there is no prohibition enforced by
18 the AICPA with respect to in-person solicitation. This
19 rule has its genesis in the first code of ethics issued by
20 the AICPA in 1917. That code prohibited encroachment, not
21 solicitation.

22 Essentially, the prohibition was for one CPA
23 soliciting the clients of another CPA who happened to be a
24 member of the organization. It did not forbid general
25 solicitation.

1 QUESTION: That was called encroachment.

2 MR. VLADECK: Encroachment, or referred to
3 otherwise as poaching, Your Honor.

4 QUESTION: Also called unfriendly.

5 MR. VLADECK: Yes, also called unfriendly.

6 QUESTION: Unfair and destructive business
7 practices.

8 MR. VLADECK: That's correct, Your Honor. That
9 prohibition remained in force until 1948, when the AICPA
10 sweepingly amended its rules to prohibit all kinds of
11 promotional activity -- advertising, solicitation and
12 everything of the sort.

13 In 1973, the Justice Department Antitrust
14 Division first contacted the AICPA to explain that it
15 thought the rules were anticompetitive and violative of
16 the antitrust laws.

17 Finally, in 1979, threatened with imminent
18 litigation by the Justice Department, the AICPA withdrew
19 its solicitation ban and issued a report called the Report
20 on Solicitation, which is contained in the Joint Appendix,
21 which takes the position that there is no evidence
22 whatsoever that in-person solicitation by CPA's leads to
23 either of the concerns the State claims to fear.

24 That is, abuse of the attest function, or
25 overreaching by CPA's who engage in solicitation, and the

1 AICPA Report on Solicitation is really the only
2 comprehensive or authoritative study on this issue
3 uncovered by either party. In fact, it was submitted by
4 the defendants in the district court.

5 Let me just take one last attempt to respond to
6 the Chief Justice's concerns about the reading of the
7 regulation. We alleged in our complaint precisely the
8 conduct we wanted to engage in, and in paragraph 13 of our
9 complaint, which appears at Joint Appendix page number 4,
10 we say that Mr. Fane, quote -- I'm quoting now -- Mr. Fane
11 brings this action because Florida's prohibition on in-
12 person, direct, uninvited solicitation, including initial
13 telephone calls, denies him the opportunity to communicate
14 this and similar information, so on.

15 In the answer, the defendant denied that
16 allegation --

17 QUESTION: Well --

18 MR. VLADECK: And it seems to me the denial is
19 inconsistent with the narrower reading that --

20 QUESTION: But I would have -- but if you place
21 the way things develop in a trial in the time sequence, I
22 take it first you get the complaint, then the answer, then
23 you get motions for summary judgment, and I think the
24 affidavit I was quoting from in the petitioner's brief was
25 at the summary judgment stage --

1 MR. VLADECK: That's correct.

2 QUESTION: Where you accept the positions to be
3 refined over the complaint and answer.

4 MR. VLADECK: Yes, Your Honor, but the position
5 that Mr. Thomson has espoused was not put forward in any
6 of the other submissions, particularly the brief of the
7 defendant, which --

8 QUESTION: Well, but it certainly was put
9 forward in that affidavit --

10 MR. VLADECK: Yes, sir.

11 QUESTION: Don't you agree?

12 MR. VLADECK: Yes, sir, I would agree.

13 Let me return, though, to the State's
14 justifications here. The other point I'd make is, not
15 only is there no evidence, but there is experience before
16 other jurisdictions that shows that there have not been
17 problems with solicitation activities by CPA's, nor has
18 there been any evidence from Florida during the 2 years
19 that this injunction has been in effect that there have
20 been any problems with abusive solicitation.

21 The defendants never sought a stay of the
22 district court's order. Solicitation at least in the
23 business context has therefore been permissible in Florida
24 for the last 2 years. There has been no suggestion at all
25 that that has given rise to any problems or any

1 difficulties.

2 I'd like to say briefly a word about the time-
3 place-manner doctrine argument that the defendants have
4 made as well. We have explained in our brief why we do
5 not believe the time-place-manner argument applies, and
6 let me just highlight two of our most fundamental
7 concerns.

8 The first is, there's no question in our view
9 that this is a content-based ban. Like all restraints on
10 commercial speech, the solicitation ban picks out the
11 particular form of communication and regulates it, and
12 this Court's jurisprudence has made clear that content-
13 based regulations are not subject to review under the
14 time-place-manner doctrine.

15 In the commercial speech area, we submit they
16 are reviewable under the Central Hudson test which we
17 believes govern, and indeed, all of this Court's prior
18 cases involving lawyer advertising, professional
19 advertising regulation, had been decided under the Central
20 Hudson test, not under the time-place-manner doctrine.

21 The second point that we think is pertinent is
22 that the defendant's argument really seems to make a
23 fortress out of the dictionary by equating the word manner
24 with mode. Here, this regulation seeks to suppress an
25 entire mode of communication, and this Court's opinions by

1 and large have said that where the regulation completely
2 prohibits a particular mode of expressive activity, it
3 ought not to be judged under the time-place-manner
4 standard.

5 QUESTION: Mr. Vladeck, supposing that you were
6 in complete agreement with Mr. Thomson that the only way
7 the board sought to -- and the only kind of conversation
8 the board sought to prohibit was those demanding an
9 immediate answer, would you still say that that was not a
10 time, place, and manner regulation, if he could
11 communicate everything he wanted to but couldn't demand an
12 immediate answer?

13 MR. VLADECK: No, Your Honor, I would still say
14 that that was a content-based restraint in that he could
15 say, I'd like you to consider hiring me, I'm extremely
16 well qualified, here are the services I render and the
17 fees I charge, but he couldn't say, and please let me know
18 soon.

19 QUESTION: Well, he couldn't say, let me know
20 right now.

21 MR. VLADECK: He couldn't say, let me -- all
22 right, that's fine. I accept your amendment -- and that
23 seems to me to be a content-based restriction. That is,
24 you can say everything but those four magic words.

25 And it seems to me that that restriction would

1 have to be judged under the commercial speech test, and it
2 would either rise or fall on whether it passed muster
3 under Central Hudson. It seems to me that that restraint
4 would have far more appeal than the restraint that the
5 board throughout this litigation says it intends to
6 impose.

7 QUESTION: Why shouldn't we at least prefer to
8 wait until the board goes after somebody so we know
9 what -- know for sure what the Florida prohibition is?

10 MR. VLADECK: Well, Your Honor, there are two
11 reasons. One is --

12 QUESTION: Well --

13 MR. VLADECK: There is --

14 QUESTION: Is it all right for us to prefer
15 that?

16 MR. VLADECK: There's an interrum effect. The
17 uncertainty would chill Mr. Fane's speech. If Mr. Fane
18 couldn't go to the court to get a resolution of whether
19 his conduct was permissible or not, Mr. Fane and probably
20 many other CPA's would sit on the sidelines.

21 And let me point out, Your Honor, this isn't the
22 only case that was brought to challenge this restraint.
23 There is another case that is now pending in the Florida
24 State courts that preceded Mr. Fane's case, during which
25 the board has taken what we thought was the board's

1 unequivocal position in this case, which is that any
2 unsupervised contact either on the phone or face-to-face
3 between a CPA and someone who is not that person's client
4 is forbidden under the Florida rules, and so this is not a
5 case, at least in our minds, as to which there is any
6 uncertainty at all as to the board's position.

7 QUESTION: They didn't -- when -- this has
8 already been remarked upon. When you filed your complaint
9 and said what he wanted to do, the board didn't say go
10 ahead and do it.

11 MR. VLADECK: No. In fact, they have
12 vigorously, vigorously litigated this case at every turn,
13 even though we have -- we put it in our complaint, we put
14 it in our affidavits, we have always clearly explained
15 precisely the kind of conduct in which Mr. Fane seeks to
16 engage.

17 Unless there are further questions --

18 QUESTION: Does the record say anything at all
19 about the rates he proposed to charge as compared with the
20 prevailing rates?

21 MR. VLADECK: No. There is an allegation in the
22 complaint that he would charge rates below the prevailing
23 rate in the community, but that was never a central
24 feature in our --

25 QUESTION: And they never defended on the ground

1 that they have an interest in preventing that.

2 MR. VLADECK: Oh, no, Your Honor, they did not.

3 (Laughter.)

4 QUESTION: Thank you --

5 MR. VLADECK: Unless there are any further
6 questions --

7 QUESTION: Thank you, Mr. Vladeck.

8 Mr. Thomson, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF PARKER D. THOMSON

10 ON BEHALF OF THE PETITIONERS

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

13 I simply wanted to say that the rule says a
14 communication which directly or implicitly requests an
15 immediate oral response from the recipient --

16 QUESTION: Now, where are you reading from?

17 MR. THOMSON: I am reading -- it is -- it is an
18 appendix to our brief --

19 QUESTION: A-15 of the appendix.

20 MR. THOMSON: On A-15.

21 QUESTION: A-15 to the blue brief?

22 MR. THOMSON: A-15 -- A-15, Mr. Chief Justice.

23 QUESTION: And whereabouts on A-15?

24 MR. THOMSON: At the very top of the page: for
25 purposes of this rule, the term direct, in-person,

1 uninvented solicitation shall be deemed and construed to
2 mean any communication which directly or implicitly
3 requests an immediate oral response from the recipient.

4 The Dooner --

5 QUESTION: And you're telling us that this
6 regulation was duly enacted by the board.

7 MR. THOMSON: That is correct, Your Honor, and
8 what I started to say is, I do not want to suggest to this
9 Court that the board is going to look -- would look
10 favorably on a request because it is their assumption that
11 it would implicitly respond.

12 They did not intend, I believe, to rewrite the
13 statute as was -- to gut the statute, which is what was
14 the suggestion, perhaps, by some of the questions that
15 were previously asked.

16 QUESTION: In fact, the next sentence in the
17 regulation makes that rather clear.

18 MR. THOMSON: Correct.

19 QUESTION: Uninvited, in-person visits, and so
20 forth, are prohibited.

21 MR. THOMSON: Correct, Your Honor, and I did not
22 want in any way to be -- to suggest that the Court is
23 going to look favorably on a request with respect to this
24 matter.

25 It is the assumption that normally when that

1 type of solicitation is made that a response is at least
2 implicitly called for, and I do not want to suggest to the
3 contrary.

4 Mr. Dooner's affidavit was before the Court,
5 Mr. Dooner said what he did, and that is in fact the way
6 it went forward for determination by the Federal district
7 judge and by the court of appeals.

8 QUESTION: But the second sentence that Justice
9 Stevens just referred to does say uninvited, in-person
10 visits or conversations or telephone calls to a specific
11 potential client are prohibited.

12 Now, does that mean ones that demand immediate
13 oral response, or just across-the-board they're
14 prohibited?

15 MR. THOMSON: Your Honor, I believe, reading the
16 two sentences together, that there is an assumption that
17 when such a call is made that it implicitly -- at least
18 implicitly requests a response.

19 QUESTION: Even though no such response is
20 requested by the caller.

21 MR. THOMSON: Absolutely if no response -- the
22 question was asked to me before, what if I don't want your
23 response? That was the question to which I responded, in
24 which it was specifically negated, but I do say -- believe
25 if the person makes a cold call and says nothing, he

1 expects a response.

2 QUESTION: It seems to me, Mr. Thomson, that the
3 whole purpose of that which directly or implicitly
4 requests an immediate oral response is simply to
5 distinguish the situation described in the last sentence,
6 indirect forms of -- such as giving speeches.

7 When you give a speech, you don't expect
8 somebody in the audience to get up and say, oh, that
9 sounds pretty good to me, can you give me a little more --

10 (Laughter.)

11 QUESTION: Isn't that the only purpose of it,
12 really, and that they're really saying you cannot make
13 person-to-person oral contact?

14 MR. THOMSON: Well, certainly, as the words of
15 the statute -- as I said before, I do not believe that the
16 board attempted to gut the statute with this rule.

17 QUESTION: What do you say the State's interest
18 is in doing that?

19 MR. THOMSON: The State's interest is dual.

20 With respect to the attest function, it is to
21 assure the independence, and the apparent independence of
22 the certified public accountant which the board submits is
23 contrary to the advocacy function that would be involved
24 in this kind of -- this kind of solicitation.

25 The second is to prevent, because of the

1 unregulatability of this, to establish a prophylactic rule
2 that would protect against overreaching and other
3 misconduct.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Thomson. The case is submitted.

6 (Whereupon, at 11:36 a.m., the case in the
7 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:

91-1594 Edenfield ✓ Scott Fane

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