OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. X-CITEMENT VIDEO, INC., ET AL. :

CASE NO: 93-723

PLACE: Washington, D.C.

DATE: Wednesday, October 5, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 93-723

X-CITEMENT VIDEO, INC., ET AL. :

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Washington, D.C.

Wednesday, October 5, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

STANLEY FLEISHMAN, ESQ., Los Angeles, California; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-723, the United States v. X-Citement Video, Inc.

General Days.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE PETITIONER

GENERAL DAYS: Mr. Chief Justice and may it please the Court:

At issue in this case is the constitutionality of section 2252 of the Child Protection Act of 1984 as amended. That section prohibits knowingly transporting, shipping, receiving, or distributing in interstate or foreign commerce or mails any visual depiction if the producing of that depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct. The text of section 2252 is set out at section 3a of the appendix to our opening brief.

The Ninth Circuit held the statute unconstitutional on its face under the First Amendment because it held that the statute did not require an element of the offense be that the defendant knew the minority status of at least one of the performers engaging

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in sexually explicit conduct, but rather, according to the court, imposed strict liability. As a consequence, respondent's convictions under section 2252 were reversed.

We submit that the court of appeals committed error in this respect, because 2252 does require that the defendant know that at least one performer in the visual depiction is a minor. Consequently, we urge this Court to reverse and remand the case for further proceedings consistent with that proper reading of the statute.

QUESTION: General Days, the Government I would think could also have argued that the Ninth Circuit was wrong because no such scienter requirement was required by the Constitution.

GENERAL DAYS: Your Honor, we're not here to argue whether there was in fact an unconstitutionality presented in this case, but merely that there was a constitutional problem. Perhaps at another time one could discuss whether the statute would be constitutional without a scienter requirement -- that is, as a strict liability statute -- but that's not presented by this case.

QUESTION: Why not?

GENERAL DAYS: Well, because Federal courts are required, according to principles of interpretation, to try to avoid constitutional problems unless it would be

clearly contrary to the intent of Congress.

QUESTION: But what if a majority of the Court were to conclude that fairly reading the statute there was no such scienter requirement?

GENERAL DAYS: Well, if this Court was to so decide, that would conclude the matter.

QUESTION: Why? We don't take our law by stipulation of the parties. We would be perfectly free to say that there is no constitutional requirement.

GENERAL DAYS: That's what I'm suggesting.

QUESTION: Oh.

GENERAL DAYS: If the Court were to decide that, that certainly would resolve the matter, but our concern with the Ninth Circuit opinion is that it made no effort, according to the dictates of this Court's decisions, to try to avoid the constitutional problem.

It's certainly, as we understand it, not the duty of Federal courts to try to seek out a constitutional problem and resolve it if it's not presented, and we think that particular problem in the way the Ninth Circuit handled this case and its failure to recognize that normally scienter is presumed to be part of a statute even when there's no scienter requirement on the face of the statute, the Ninth Circuit's failure to use those two principles of construction, namely avoiding constitutional

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interpretation, and 2) reading this background assumption of the criminal law, namely, scienter, into the statute, caused it to commit error.

QUESTION: Well, General Days, the most natural reading of the statute may be that which the Ninth Circuit adopted. The language is set off by commas, and it might be the most natural reading, isn't that correct?

GENERAL DAYS: Perhaps so, Justice O'Connor. There are many readings that have been offered in connection with the statute, indeed, in this litigation. The Ninth Circuit held that knowingly went just to transporting and distributing and so forth, and didn't reach visual depictions.

QUESTION: Because that's how it is set out.

GENERAL DAYS: Well, visual depiction actually is before the if clause, the dependent clause, and yet the Ninth Circuit held that that wasn't encompassed, and then we have the amicus, the linguists who say that it goes down to include visual depiction, and apparently the respondents take that view.

It seems to me that it is also possible, because it's not clear from the statute how far knowingly travels down the paragraph, that it could include the entire provision, and besides, even if this --

QUESTION: Well, what do we normally do if we

think the language is clear?

GENERAL DAYS: Well, you go with the language as it's set out in the statute, but I think courts do that only when doing so would not present constitutional problems, and although a natural reading of the statute is one way that the courts can approach this issue, I think this Court has held that in some cases, particularly in criminal cases, the most plausible reading of the statute is not the one that the Court should adopt because of constitutional problems.

QUESTION: Judge Kozinski in the opinion below thought that you couldn't read knowingly into it, but what the court should do is to import a recklessness requirement for the age.

GENERAL DAYS: Yes, he did say that. I don't --

QUESTION: What is your position on the Kozinski view?

GENERAL DAYS: Our position is that it is not necessary for the Court to do that for several reasons. 1) Knowingly is in the statute, so it suggests something about Congress' regard for that level of scienter, and the Model Penal Code suggests that where a level of scienter is stated in a statute, it's appropriate to read that level of scienter throughout the entire statute unless there's something clearly to the contrary that would

suggest otherwise.

We also think that knowingly is consistent with what Congress had in mind. Looking at the legislative history, if there's any lesson that one can draw from the legislative history, it is that Congress wanted scienter in the statute, that it was not thinking in terms of strict liability.

QUESTION: As I understand it, General Days, when the statute was enacted in 1978, it had the word obscene before visual depiction.

GENERAL DAYS: That's correct. That particular statute is set out at 3-1 of our brief.

QUESTION: At that point, do you think that the knowledge requirement applied to subsections (a) and (b)?

GENERAL DAYS: Given the history of the statute, the legislative history, there are two possible readings, at least. One is that knowingly continued to apply to the minority statutes of a performer, but there is another reading. Since obscenity was added to the statute, Congress might have had in mind that the scienter attached to obscenity violations would suffice to comply with any constitutional requirements.

QUESTION: When we're talking about this earlier version, was this an earlier version that was approved by the whole Congress?

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GENERAL DAYS: The earlier version?

QUESTION: Yes, that had obscene visual depiction?

GENERAL DAYS: Oh, yes. That became the statute in 1978. It was a statute that did not have minority status as an element, as such, of the offense. What it had was minority status as a penalty-enhancing provision, and it was not until 1984, after this Court's decision in Ferber, that obscenity was dropped, and what happened then was that minority status became the element that distinguished between legal and illegal conduct.

It became the boundary between legal conduct, namely the possession of nonobscene material on the one hand, which is protected by this Court's decisions and by the First Amendment, and illegal material following Ferber, which would be nonobscene, pornographic material involving minors as performers.

QUESTION: But it is odd that the deletion of one word would imply the inclusion of two other unstated words.

GENERAL DAYS: What are the two other unstated words?

QUESTION: Well, it would be knowingly as to A, and knowingly as to B.

GENERAL DAYS: Well, knowingly was in the

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statute all along. Knowingly never dropped out, and the question is --

QUESTION: Well, I mean, if you assume that with obscene you did not need knowingly for A and B --

GENERAL DAYS: Well, that's certainly one assumption.

QUESTION: -- it would be rather odd to say that this is an implied extension by the deletion of the word obscene.

GENERAL DAYS: Your Honor, certainly that is a difficulty with that particular reading, but not inconsistent with the legislative history, and the fact that knowingly was retained throughout this process I think is instructive, because if one looks at a companion provision to 2252, namely 2251, which has to do with the production of child pornography, the history shows that Congress in 1978 dropped the term knowingly, intending, based upon advice that it received from the Department of Justice, that that was not necessary because it would be a situation where appropriately a producer should be given the burden of determining whether the performer was in fact a minor, and would suffer the consequences if he or she failed in that regard.

QUESTION: General Days, you said -- you explained that the statute which once had minority as a

penalty-enhancer --

GENERAL DAYS: Yes.

QUESTION: Was changed to make penalty an element of an offense. Why, then, wasn't this indictment insufficient for failure to allege an essential element of the offense, because minority status was not alleged in the indictment?

GENERAL DAYS: Well, that's a very good question, Justice Ginsburg. Let me say first that the lower courts have -- the court of appeals did not address the sufficiency of the indictment issue, but on that very point, Russell v. United States seems to suggest, although we are not reading it in this way, that where a court imposes an element that was not on the face of the statute, then the indictment is insufficient if it does not have that element set out in terms.

But one can read Russell v. United States and subsequent cases to hold that the issue is where an element of fact is supplied, in fact, by a decision of the court, that the indictment that lacks that particular information is deficient.

In Russell, it had to do with contempt of Congress, and the question was, did the indictment adequately notify the defendant that pertinent questions had to be answered, questions pertinent to the subject of

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the inquiry, and what this Court said was, it is not sufficient in the indictment to simply follow the statute, the terms of the statute, track the statute, because the subject of the inquiry is not clear, and therefore the indictment has to provide the defendant with more notice.

But we think here, we have the term knowingly, and if this Court determines that knowingly in fact reaches the minority status of the performer, I don't believe that there would be a problem with the indictment, but as I said initially, this is something that the court of appeals perhaps is in the best position to sort out, and it was not presented to this Court for determination.

QUESTION: So your first answer is that knowingly travels down the indictment just as you urge it travels down the statute.

GENERAL DAYS: That's correct.

QUESTION: May I ask you, General Days, on the basic argument that you're making that we should avoid the constitutional issue by construing the statute to include this knowing requirement, would you not make precisely the same argument if the word knowingly were not in the statute, given our decision last year in the Staples case holding that even though the word knowingly wasn't in the gun statute, the Court thought there was a presumption that the criminal must be proven to have known the facts

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that made his conduct illegal?

GENERAL DAYS: That's correct, Justice Stevens, not only in Staples, but this Court in Posters 'N' Things, in Liparota, in Bailey --

QUESTION: Well, Liparota, the word knowingly was in the statute.

GENERAL DAYS: It was, that's correct.

QUESTION: Yes.

GENERAL DAYS: But the process that we are describing that you identified is one that this Court has utilized in a number of cases, most recently in Staples, so that --

QUESTION: But wouldn't we import a recklessness requirement according to the Osborne case, rather than a knowingly requirement --

GENERAL DAYS: Certain --

QUESTION: -- if the word weren't in the statute at all.

GENERAL DAYS: Yes. If the word weren't in the statute, it would be easier to embrace a recklessness standard. Osborne certainly recognized --

QUESTION: Was Staples a recklessness standard?

GENERAL DAYS: I beg your --

QUESTION: Was Staples a recklessness standard?

GENERAL DAYS: No, it was not a recklessness

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standard.

QUESTION: Well, why should this one be a recklessness standard?

GENERAL DAYS: Well, our position is that knowingly is the appropriate standard, although we cannot ignore the fact that this Court in Osborne was confronted with a case where there was no scienter on the face of the statute, and this Court accepted the Ohio supreme court's decision to invoke a provision, a statutory provision that made recklessness the default standard, so that's on the books, and we have indicated in our brief that we think knowingly is more consistent with the legislative history, and I would assume --

QUESTION: General Days, that's a reasonable thing to do, to import knowingly, or recklessly, or whatever, where the legislator has not explicitly addressed the subject.

But you're dealing here with a statute in which the legislator has explicitly addressed it and I, frankly, I don't know how it could have been made any clearer that the portion of the statute coming after the word if is not subject to the knowingly -- I've asked myself several times, you know, how would I have put it if I had wanted to make clear that the knowingly only goes to shipping in interstate commerce any visual depiction. I would have

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written it precisely like this. It just couldn't be clearer.

GENERAL DAYS: Well, Justice Scalia, certainly one can read it that way, and perhaps it is clear to you that way, but as I said earlier, the clearest reading of a statute when constitutional issues are presented has not been the reading that this Court has embraced.

QUESTION: Well, we've also said that we will not distort a statute from its meaning in order to uphold it's constitutionality. We're not in the business of writing new statutes. If a statute means plainly one thing, and that thing is unconstitutional, our job is to say so, not to write a new statute.

GENERAL DAYS: Yes, I would agree with you if it were so plain, but I don't agree that it's so plain, based upon the legislative history and based upon the various readings that people who have looked at the statute have given it.

QUESTION: What the legislative history proves to me is that Congress made a mistake. Congress cannot make a mistake?

GENERAL DAYS: I think Congress can make a mistake, but this Court should do its best, unless it's clearly obvious that Congress made a mistake, to help Congress avoid moving into an unconstitutional realm, and

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I think that there is clear on the face of the legislative history of this statute that what Congress wanted to do was live within the Constitution as it understood it, not to test the boundaries of the Constitution.

Senator Roth, when he was talking about his earlier proposals --

QUESTION: I'm sure that's what they wanted to do.

GENERAL DAYS: Well, I think --

QUESTION: The question is whether they succeeded.

GENERAL DAYS: It is the question that this Court's --

QUESTION: Because we have a statute in front of us that says to me plainly one thing, that you need to know only what precedes the word, if.

GENERAL DAYS: Justice Scalia, I think that if one looks at the 1984 legislative history, what Congress was trying to do in 1984, it's clear that it wanted to adhere to this Court's decision in Ferber. It removed the obscenity requirement, and the idea was to go as far as the Constitution would allow.

I find it very difficult to conclude that Congress, having converted a statute from a penalty enhancement provision to one where the minority statutes

of the performer is the pivotal issue, it is the element that makes the difference, that we presume that Congress did not intend that the defendant have knowledge of that fact.

QUESTION: I'm going further than that, Mr. Days. As I read this statute, all the person has to know is that he is shipping a visual depiction. He does not even have to know that the visual depiction is pornographic.

GENERAL DAYS: Yes, and I think that the --

QUESTION: That's the way it's written, however.

GENERAL DAYS: The legislative history suggests that Congress did not want to impose that type of liability. It was not in the business of criminalizing a broad range of otherwise innocent behavior, so that this statute I think should not be read, given that background, to criminalize, for example, the innocent handling of material that turns out to be sexually explicit conduct involving minor performers, and this Court has stated innumerable times that it's not going to invite that type of constitutional problem --

QUESTION: Don't you think it would be useful to --

GENERAL DAYS: -- where statutes of this kind are presented.

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QUESTION: -- to read it the way it's written? Don't you think it might be useful in causing Congress to be more careful, especially in criminal statutes, about what it says in the future?

GENERAL DAYS: Justice Scalia, I suppose that one of this Court's jobs could be to teach Congress a lesson, but I don't think that that's really --

QUESTION: Not to teach Congress a lesson, but to read the law the way it's written, and if they want us to apply the law, to say we're going to apply it the way you write it.

GENERAL DAYS: Yes. I think that is an appropriate beginning point in an analysis of the statute, but as I've indicated, the problem here is that we have principles of interpretation that lead us in a different direction, and unless this Court is going to reject principles of interpretation that it's utilized very effectively, and I think very judiciously, if I may use that term, in many other circumstances, unless it's going to abandon those principles, those principles apply to this statute pointing in the direction of constitutionality, not unconstitutionality.

QUESTION: General Days, this is a peculiar statute. Even if we did as you suggest and read it as importing knowingly --

GENERAL DAYS: Yes.

QUESTION: -- even to the minority status, I suppose the Clerk of this Court, in receiving the video in question, has violated the statute. I suppose we have, if we've looked at it and had it in our hands.

GENERAL DAYS: Well, you're the ultimate arbiter of that, Justice O'Connor --

(Laughter.)

GENERAL DAYS: -- but certainly that suggests it.

QUESTION: Certainly the language of the statute, even read as you would have us read it, has no exceptions.

GENERAL DAYS: I beg your pardon? Even when someone knows that it's a minor performing in the material? Yes, I suppose you're right, and maybe this Court in another context should look at the question of what defenses would be available, but again, that's not presented by this case.

QUESTION: Is the other context anything for the further proceedings? I wasn't clear. You repeated today what was in your reply brief, we should reverse and remand for further proceedings.

GENERAL DAYS: Yes.

QUESTION: Your opening brief seemed to say that

we should -- that there was no need for a remand, that we would affirm the convictions.

GENERAL DAYS: Yes. Well, we're standing by the position we took in our reply brief, because there are two issues that remain for determination by the court of appeals. One is that the indictment was fatally defective, and the other is that the tapes did not constitute child pornography, and I must admit, I don't understand fully the nature of that argument. Perhaps my learned colleague can elucidate that for you.

But those are the two issues that are presented for the court of appeals on remand if this Court determines that the statute is, in fact, constitutional, which we hope it will.

QUESTION: The deficiency of the indictment, because it didn't allege minority.

GENERAL DAYS: That's correct. It is the issue that you, Justice Ginsburg, raised in your question to me.

QUESTION: General Days, you haven't made a kind of absurd result argument here this morning. I want to know whether you're waiving it. I suppose the absurd result argument would be that it would be ridiculous for Congress to waste it's time putting or retaining at the time of the amendment the knowingly requirement if all it was concerned with was that the defendant know that he is

shipping, or know that he is shipping a visual depiction.

That would be a waste of ink. Surely Congress wouldn't have bothered even to put a state of mind in there unless Congress must have had, or to retain a state-of-mind requirement, unless Congress had in mind the far more difficult issues of the minority character and the depiction of the minority character in that. Do you want -- do you shy away from that argument? Do you reject it?

GENERAL DAYS: No, I do not. I think that normally scienter is not required when one is dealing with certain jurisdictional requirements of a criminal statute, and the fact that knowingly is sitting there and, according to the Ninth Circuit, just applies to transporting, receiving, and mailing, is something of an odd placement when there is this very significant issue, namely the knowledge of minority status of the performer, in that new statute. It becomes, as I indicated, the pivotal consideration, really at the heart of criminality under the statute.

And I think that this Court has assumed that Congress, since its Members take an oath to uphold the Constitution and swear to abide by it, that that's what Congress was doing, and had read Ferber, understood that Ferber required some level of scienter, and was acting in

accordance with that.

QUESTION: But even without the Ferber consideration, why waste time putting the word knowingly in there if all you're concerned with in a statute of this scope is the fact of shipment, or the fact of depiction?

GENERAL DAYS: I would agree.

QUESTION: I mean, presumably Congress has a serious purpose, and they must have been serious about the subject of the depiction, and the knowledge of minority status.

GENERAL DAYS: I would agree. I think that --

QUESTION: General Days, is it common ground that this material would be constitutionally protected if it were not, did not contain a minority performer?

GENERAL DAYS: Yes, Justice Stevens. There was no claim throughout this proceeding that the materials were obscene, and therefore they would be protected by the First Amendment.

QUESTION: Could I --

GENERAL DAYS: Yes, Justice Breyer.

QUESTION: As I understand it, I -- the difficulty I'm having is this. As I understand it, you have a statute, and let's say it has three parts.

Somebody receives some photos, and the photos turn out to be pornographic, and the pornography involves

a child. Those are the three parts.

Now, one possibility is that Congress meant all you need to know is that you've received some photos, in which case the postman is likely guilty of the crime.

GENERAL DAYS: Yes.

QUESTION: All right. That doesn't seem to me likely that that's what they wanted, but that's a possibility.

The second thing is, well, you had to know they were photos, and you also had to know that they're pornographic, and the third possibility is, you had to know they were photos, you know they're pornographic, and you know they are children.

GENERAL DAYS: Yes.

QUESTION: Now, that third part is where I have the question. Imagine that the statute was totally silent. What is the normal scienter requirement that courts import where the statute is totally silent?

That is to say, there's a whole book here called the Criminal Code of the United States, which has hundreds, 800-and-something, approximately, different crimes, and only a few of those actually use words like knowingly, or say what the scienter is, and what's the normal thing, if you counted them up?

I mean, my guess is it's knowingly, and it's

unusual to import the word recklessly, but I'm not certain of that, and that's why I'm asking the question.

GENERAL DAYS: Justice Breyer, I don't know the answer to that. Certainly this Court in importing a scienter requirement in the cases that I'm aware of has looked at knowingly at the standard, and not something less than that, but it is the case that at least under the Model Penal Code, recklessly is viewed as the default standard if there's not a mention of a scienter requirement in the statute.

QUESTION: Why wouldn't --

GENERAL DAYS: That's why Judge Kozinski did what he did, I believe.

QUESTION: What about the second possibility that Justice Breyer mentioned, that the knowingly requirement extends only to knowledge that the material is pornographic? Why isn't that a possibility that you propose to us?

GENERAL DAYS: That is an approach that was taken by the lower courts, and I think it was drawn from this Court's decision in obscenity cases, where, as in Hamling or Smith, if you knew the nature and character of the materials, the fact that you didn't know that they were obscene and you were told after you were indicted that they were obscene would not be a defense.

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But it seems to me that that standard cannot be appropriate in the context of child pornography. One cannot know the nature and character of the materials unless one knows that they contain minor performers.

QUESTION: One can know that it's pornography. Can't we assume that pornography is entitled to a lesser degree of First Amendment protection, just as some other kinds of speech are, such as commercial speech, and say that Congress in effect adopted an absolute rule. When you know you're dealing with pornography, you take your chances as to whether the actors in this pornographic material are minors. Isn't that a reasonable explanation of Congress' intent?

GENERAL DAYS: It is a way of reading it, and we've set out in our brief, when we discuss the recklessness standard --

QUESTION: General Days, would it not encounter precisely the same textural difficulty that the statute, the other reading --

GENERAL DAYS: Well, it does, Justice Stevens. I was just going to point out, when we talk about recklessly, we included the fact that there had to be some knowledge of the nature and character of the material, and then reckless disregard for that particular awareness, so it's a combination.

QUESTION: I don't see why that's any more easy to reconcile with the text than the other.

GENERAL DAYS: We're not denying that that's a possibility, but continue to view knowingly as the appropriate way to work within the statute because of legislative history, because of the approach that this Court has taken in other circumstances, where knowingly was not even on the face of the statute.

QUESTION: Well, General Days, I thought we had already agreed that it doesn't require obscenity or pornography, but just a visual depiction of sexually explicit conduct.

GENERAL DAYS: That's correct.

QUESTION: All right.

QUESTION: But isn't that a synonym for pornography in the way you've been arguing the case?

GENERAL DAYS: Yes. If there are no further questions, I'd like to reserve the balance for rebuttal.

QUESTION: Very well, General Days.

Mr. Fleishman.

ORAL ARGUMENT OF STANLEY FLEISHMAN

ON BEHALF OF THE RESPONDENT

MR. FLEISHMAN: Mr. Chief Justice, and may it please the Court:

When Congress enacted the Child Pornography Act

of 1977, it deliberately treated the statute as the kind of -- a kind of sexual offense statute where knowledge of the minority was not an element of the offense, as, for example, in the Mann Act, and the Mann Act was specifically referred to by the Department of Justice when it made its recommendations with regard to this statute.

QUESTION: Is the word knowingly in the Mann Act? I don't recall.

MR. FLEISHMAN: I believe not, Justice Ginsburg, but the --

QUESTION: So in using that model, they should have just said transport in interstate commerce.

MR. FLEISHMAN: Whatever that may be, Your Honor, I'm saying that if you look at the text of the statute and its legislative history, that is the model, I believe, that Congress used, and that therefore Congress deliberately and unambiguously omitted knowledge of minority because that's the way these statutes traditionally have been dealt with.

QUESTION: Did they omit knowledge of pornographic character?

MR. FLEISHMAN: That's an arguable point, Your Honor, because the --

QUESTION: Why is it -- I don't see why it's any more arguable --

MR. FLEISHMAN: Well --

QUESTION: -- than the other. You seem to take the position that the statute does require knowledge that the photographs depict sexual conduct --

MR. FLEISHMAN: My --

QUESTION: -- but does not require knowledge of minority. It seems to me if requires the one, it requires the other.

MR. FLEISHMAN: My position, Your Honor, is that the text, the statute read literally does not require knowledge with regard to either minority or the -- and I prefer not to use the word pornographic, if Your Honors don't mind, because the term is sexually explicit conduct, and the term sexually explicit conduct is extraordinarily broad, and it includes -- all nudity, frontal nudity has been interpreted as being sexually explicit conduct, so we're not talking about pornographic material alone. We're talking about adult material, and we're talking about mainline material.

QUESTION: Adult material?

MR. FLEISHMAN: Adult material, Your Honor, as we talk about it in this context.

QUESTION: And this is different from pornographic --

MR. FLEISHMAN: Yes, Your Honor, in many

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respects. In any event --

QUESTION: Call it what you --

QUESTION: Mr. Fleishman, may I just interrupt you at this point? If that's all Congress had in mind as an object of knowingly, what was the policy behind it? If, for example, a very high proportion of visual depictions -- is that it? Yes -- visual depictions which are shipped or transported did, in fact, depict the kind of material that Congress wants to penalize here.

I could understand why Congress would say, we will make the knowing element only go to the shipment of the visual depiction, because that's going to pick up the risky stuff, but that's not the case. Most visual depictions shipped in interstate commerce, I presume, are not of this kind of material, so why did Congress bother to put in a knowing requirement, the object of which is basically innocent conduct?

MR. FLEISHMAN: Well, if -- to answer you, Justice Scalia's question a little further, because one answer that I've given is that the text itself does not require knowingly with regard to either minority or the nature and character of material, but if we go beyond the text of the statute, and we go to the legislative history, we have the answer to your question, Justice --

QUESTION: Well, but without getting to

legislative history, if I understand your position to be that the statute, properly read, is read as having only shipment of visual material as the object of knowingly, as the portion of the sentence modified by knowingly, by the adverb --

MR. FLEISHMAN: Yes, sir.

QUESTION: -- then my question arises, and that is, what could the object of Congress have been in wanting to make sure that the defendant knew that he was engaging in a form of conduct which is by and large innocent? Most shipment of visual material is not --

MR. FLEISHMAN: Correct.

QUESTION: -- shipment of pornography.

MR. FLEISHMAN: I agree with what has been said by Justice Scalia. It was a badly drawn statute. I think that Congress drew a bad law, and that's the simple answer to the textual argument.

QUESTION: Well, it's a grammatical answer, but it doesn't answer the problem of meaning. I mean --

MR. FLEISHMAN: Well, I --

QUESTION: -- you've got to give some meaning to this thing, and wouldn't anyone read that and say, well, surely they weren't wasting their time putting knowingly in there just to make sure that the shipper knew that he was shipping and knew that he was shipping visual

material?

MR. FLEISHMAN: And that's why I say, Your Honor, if we go to the next step, we go to what the legislative intent is, and that legislative intent is clear.

QUESTION: Well, do you agree with me that if you don't go to legislative intent, we have, on your reading, what may be a grammatical reading, but a very foolish statute?

MR. FLEISHMAN: Oh, I agree 100 percent it's a poor statute, Your Honor. I think it's an unconstitutional statute. That's why we're here.

QUESTION: Well, apart from unconstitutionality, we have a statute in which we just couldn't imagine why Congress was even bothering to put in the adverb, isn't that fair to say?

MR. FLEISHMAN: That is -- the textual reading does lead to that result, Your Honor, and when you get to an absurd result, as that would do, then you go to, as I understand the rules, to the legislative history, and you go to the legislative history, it says that what we mean by the word knowingly is, the nature and character of the material.

That was explicitly said, stated by Judge Wald, then Assistant Attorney General. That was explicitly what

the Government believed the statute read for 15 years. This is not a new statute, Your Honor. For 15 --

QUESTION: It does present you with another serious grammatical problem, doesn't it, because grammatically, how do you separate in the text of this the nature and the character of the material from the minority status of the act?

MR. FLEISHMAN: One could do that, Your Honor. I prefer -- well, one could do it in this way, because the statute reads, if you knowingly transport a visual depiction, so if you know that you're transporting a visual depiction, one could say you know the contents of that visual depiction. If you know the contents, then you reach the nature --

QUESTION: Knowing -- you could have an illustrated Bible, visual depiction.

MR. FLEISHMAN: I -- Your Honor, the question that I'm trying to answer is --

QUESTION: If you pick up a bunch of photographs at the drug store in an envelope, you don't necessarily know what's on the photographs.

QUESTION: Mr. Fleishman, your answer to Justice Souter, it seems to me, should be that yes, it does make a hash of the text to import only one of the two, only B rather than A as well, but we've agreed to make a hash of

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the text once we apply the knowingly to anything that comes after the if, so if we're making a hash of the text, let's make a reasonable hash of it and come up with a statute that we like better.

(Laughter.)

QUESTION: Well, I'm not sure that a reasonable hash is the one that Mr. Fleishman wants to argue for, because a reasonable hash surely is not going to leave the statute as being construed to mean that Congress was only concerned with knowing the fact of shipment and knowing the fact of visual depiction. I mean, I think you have agreed to that.

MR. FLEISHMAN: My position is very clear, Your Honor. The text of it is an absolutely unconstitutional statute without more. I understand that when you have a statute where the text is unconstitutional, that sometimes the Court looks to legislative history. Sometimes it does not. I'm saying, once you agree that the text is bad, and you want to go to the legislative history, the legislative history will permit you to come to the conclusion that there is knowledge with regard to the nature and character of the material and --

QUESTION: Why would you do that in a criminal statute? If it's unconstitutional on its face, why would you look to save it by running to the legislative history

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when that wouldn't --

MR. FLEISHMAN: Your Honor, I have no wish to save the statute. I'm here saying it's unconstitutional. All I'm saying is that if you want to go to make the best case for the statute -- I'm trying to make the best case for a statute that is unconstitutional, and I think the best case is not good enough.

QUESTION: But we've also not simply gone to legislative history, perhaps we've gone to that less than said there's an implied mens rea requirement, you know, recklessly, knowingly, even where it's not written in the statute. We did that last year.

MR. FLEISHMAN: Sure you did it last -- but the rule that came out of the Staples case is that's only done when Congress has not manifested a contrary intent. In this case, Congress has manifested a contrary intent both in the text of the statute and in the legislative history.

QUESTION: Well, we also did it in the Nevada cash-reporting case. We read knowingly to mean something that certainly wasn't necessarily present in the statute.

MR. FLEISHMAN: Well, that was read to include a specific intent requirement, Your Honor.

Of course, the Court does interpret statutes, but the one central rule is hat the Court will never interpret a statute contrary to the congressional will.

Once you have the congressional will, as we have it here, that Congress did not want to have knowledge of minority, then you cannot do what you did in Staples, because in Staples there was no congressional will that was to the contrary.

As a matter of fact, in Staples the Court pointed out that there was nothing one way or the other to indicate whether the --

QUESTION: What is your basis for the statement that Congress did not want to require knowledge of minority?

MR. FLEISHMAN: We -- with regard to the text, Your Honor, when the S. 101, the Roth amendment was before the Congress, it was completely restructured in terms of the indentations and the place where the if was put to make it very clear that they were accepting the recommendation of the Department of Justice.

There are two things, Your Honor. When this act was passed in 1978 -- the 1977 act -- there were two sections, 1550 -- 2251 and 2252, and with regard to 2251, the Government agrees that the word knowledge was taken out, that it was taken out deliberately, and that there is no way that this Court could then read it back in because of the clarity with which the word -- as to the meaning of the removal of the word knowingly.

Now, in that same legislative history, Judge Wald said, we'll leave the word knowingly in section 2252, but only -- only for the purpose of showing that it has application to the nature and character --

QUESTION: This was testimony of Judge Wald when she was in the Justice Department, before the committee.

MR. FLEISHMAN: Exactly.

QUESTION: I mean, that doesn't necessarily represent the final view of the committee.

MR. FLEISHMAN: No, it does not, but what does help us along that line was that that -- it was not just testimony, it was written testimony which was appended to the Senate bill and the equal statement made by Attorney Keeney was attached to the House bill, both making the same statement with regard to why the word knowingly remained in 2252 but was not in 2251.

And the reason given, and the only reason for that was, so that it would reach the knowing, the nature and character of the material, but at the same time the statement said, but it does not require the Government to prove that the defendant knew that the material applied to a minor engaging in sexually explicit conduct.

QUESTION: Mr. Fleishman, could you tell me why, assuming we accept your interpretation of it that it does require knowledge of a visual depiction, or one of your

interpretations, but does not require knowledge of minority, why that would be unconstitutional? Why would it be unconstitutional to say, look, if you want to transmit sexually explicit materials in the mail, to send or receive them, something short of obscenity but sexually explicit, or adult, if you like, you do it at your own risk. You're welcome to do it, but if they're minors, it's going to be a criminal offense.

MR. FLEISHMAN: Because --

QUESTION: Why is that unconstitutional?

MR. FLEISHMAN: Well, as the general stated, that the single fact that transfers constitutionally protected material from criminal activity is the age of the person depicted and, therefore, what you would have is a very substantial infringement upon constitutionally protected --

QUESTION: You mean --

QUESTION: The same is true of the Mann Act.

MR. FLEISHMAN: I'm sorry.

QUESTION: I say, the same is true of the Mann Act, and with all the statutory rape cases.

MR. FLEISHMAN: Of course, that's true, Your Honor, but that does not involve any First Amendment problems, because here what we're talking about are books, all forms of media, and most of the --

QUESTION: We've said the right to procreate is covered by the Constitution, haven't we?

MR. FLEISHMAN: I'm not sure the analogy is one that is as powerful as it might be, Your Honor --

(Laughter.)

MR. FLEISHMAN: -- but with all due respect, what we have here is a statute that impinges on all forms of media. We're not talking about -- I know in the minds of some people this is just sort of pornographic material, but that's not what we're talking about. It involves movies, it involves art books, it involves all forms of mainline material, and to say that all of this is put in jeopardy because the single fact that --

QUESTION: Not all of it. Only sexually explicit material, not all the whole world of literature and art and everything. Just when you're dealing with sexually explicit material, you take your chances.

MR. FLEISHMAN: Your Honor, sexually explicit material involves everything, if you don't -- if I may say so because, first of all, the definition of sexually explicit material includes the actual or simulated lascivious exhibition of the genitals or pubic area of any person. Any person, Your Honor, not any minor.

QUESTION: I understand, and I'm willing to rely upon prosecutorial discretion not to go after the fellow

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who publishes a medical book or something like that. Don't we --

MR. FLEISHMAN: I'm not talking about that, your Honor. I'm talking about the person who publishes books or makes movies, and if it says that you're a criminal if it's the actual or simulated -- and I want to repeat it, lascivious exhibition of the genitals or the pubic area of any person, not of any minor. That is to say, of a --

QUESTION: Lascivious exhibition, right, so --

MR. FLEISHMAN: Of any person.

QUESTION: Yes.

MR. FLEISHMAN: Yes, and when we get to --

QUESTION: So it wouldn't cover a medical book at all. It has to be a lascivious exhibition.

MR. FLEISHMAN: Oh, well, I'm not sure of that at all, Your Honor, because the cases that I have read show, have shown that virtually any depiction of a nude -- frontal nudity is considered lascivious by the juries and courts.

QUESTION: So we don't need the adjective, I guess.

MR. FLEISHMAN: Well, I'm just saying that the term lascivious is so broad that we are talking about everything when we --

QUESTION: I don't think it's broad at all. I

think it separates that exhibition of a naked, or depiction of a naked person from a lascivious exhibition of a naked person. You think there's no difference, you're --

MR. FLEISHMAN: Whatever lascivious may be, Your Honor, and I think that the problems that the Court had with regard to obscenity bespeaks that this is a problem that is not easily disposed of, but the truth of the matter is, Your Honor --

QUESTION: -- an obscenity law, then, but that's a separate problem, but given that there is such a thing as lascivious --

MR. FLEISHMAN: But there isn't.

QUESTION: But there isn't?

MR. FLEISHMAN: There is not. There is not --

QUESTION: But our case law says that. We made a distinction between pornography and other First Amendment protected speech, and you're saying that distinction is invalid.

MR. FLEISHMAN: No. Your Honor, the distinction that has been made, and I don't want to get on too fine a point, but the Court has ruled from obscenity to lewdness, and then we are now over into lasciviousness, which is something different than lewdness.

Your Honor will recall that when the statute was

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passed originally in 1977, the statute applied to lewd exhibition, and then somebody thought, well, that didn't reach enough. Let's just make it lascivious, because then we're going to get some more material, too.

There is no case by this Court that I know of which gives a meaning to the word lascivious, and the Court has worked for some 20 years and more trying to give some meaning to the word obscenity, so it is not -- it is not fair to suggest that, just because the word lascivious is in there, that protects the art books, it protects the medical books, it protects the movies.

QUESTION: It's in where? This statute says sexually explicit conduct.

MR. FLEISHMAN: I'm sorry, Your Honor.

QUESTION: This particular statute says sexually explicit conduct, right?

MR. FLEISHMAN: That's what the statute says, yes, Your Honor, but if Your Honor looks at section 2256(2)(E), it tells you what sexually explicit conduct is, and one of the things that it tells you is that it is what I've just read to Justice Scalia.

It also says that sexually explicit conduct is actual or simulated masochistic or sadistic abuse, without any further elaboration, and it should be noted that prior --

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QUESTION: Imagine that.

MR. FLEISHMAN: Imagine that, yes.

(Laughter.)

MR. FLEISHMAN: I dare say that every one of the detective books and magazines that's on the newsstands would fit this masochistic or sadistic abuse. It does not say abuse for sexual purposes, even, as the statute originally did when it was enacted in 1977, and that was specifically taken out in the 1984 amendment.

So that what we have, then, is a statute -- if we take out the knowledge of minority, is a statute that endangers all of us.

I think what Justice O'Connor said is true. You're all child pornographers. I mean, I don't mean to say it quite that way, but you have received --

(Laughter.)

MR. FLEISHMAN: You have received this material, and if you didn't know, and actually if you do know, perhaps, you're caught in the web.

This is a very broad, a very dangerous statute.

QUESTION: There is a longstanding exception for law enforcement officers from all sorts of criminal statutes, criminal trespass and so forth. It doesn't make an explicit exception for a law enforcement officer with a warrant, but it's understood that that's an exception. I

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don't really think that Justice O'Connor and I have to worry a whole lot about this statute.

(Laughter.)

MR. FLEISHMAN: I'll be glad to defend Your Honor.

QUESTION: And I don't think we have to abandon all notion of pornography in order to save ourselves.

MR. FLEISHMAN: Well, in any event, to come back to the statutory construction, there is another line that I think the Court should consider in terms of why the appropriate resolution of this case is to declare the statute unconstitutional on its face, because there are remaining constitutional problems that would be in the statute and I have already touched on two of them.

And that is, you will have to face the fact that section 2256(2)(E) is plainly unconstitutional on its face because it use -- if for no other reason, but for the reason that it uses the word persons instead of minors, so you have it, if it's the actual or simulated lascivious exhibition of the genitals or the pubic area of any person.

I assume we can all agree that that statute, as written, is unconstitutional.

QUESTION: Yes, but that only goes to what's sexually explicit conduct, and another part of the statute

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makes it clear that sexually explicit -- visual depictions of sexual explicit conduct are not forbidden unless a minor is one of the persons depicted.

MR. FLEISHMAN: But the statute then should have said, of any depiction of a minor.

QUESTION: It does say that --

MR. FLEISHMAN: It doesn't.

QUESTION: -- in the visual --

MR. FLEISHMAN: Well, but if Your Honor looks at 2256(2)(E), it says --

QUESTION: Well, yes, I know, but that's only a definition of what the sexually explicit conduct is.

QUESTION: Surely it is.

MR. FLEISHMAN: But then the definition is too broad, I'm suggesting.

QUESTION: Well, but the statute doesn't prohibit all visual depictions of sexually explicit conduct.

QUESTION: And just before it defines minor. We don't erase the definition of minor when we get to the second definition.

MR. FLEISHMAN: Well, let's agree that Congress made a mistake there, that's all. They should have used the word minors.

QUESTION: But they didn't make a mistake, so --

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at least I think several of my colleagues and I feel that way, that because the definition refers -- what you're talking are the terms of defined sexually explicit conduct. In addition to that, there's a requirement the person be a minor.

MR. FLEISHMAN: May I just read the statute? It's actual or stimulated lascivious exhibition of the genitals or pubic area of any person. Now, Your Honor is saying they didn't mean -- I know what's behind it all, but the language used is bad.

Let me put that aside. There is another problem that will be hanging over for the Court and with deep constitutional -- a deep constitutional cloud, and that is section 2251. It, everybody agrees, deliberately, unambiguously omitted the word knowledge so that it does not apply to the minority of the person.

QUESTION: Well, it does in subsections (a) and (b), but it doesn't omit it from subsection (c). In other words, it omits the requirement of knowledge for the offense of employing the minor, and it omits the requirement of knowledge on the part of a parent or guardian allowing the minor to be used.

MR. FLEISHMAN: Right, Your Honor.

QUESTION: It doesn't omit the knowledge requirement in the advertising section.

MR. FLEISHMAN: But I'm talking about section (a) for the moment, Your Honor, and if we agree for the moment that section 2252 would be unconstitutional if it did not have knowledge of minority in it, in section 2252, we agree to that --

QUESTION: I'm not sure of the proposition we're agreeing to. You said the Government conceded the unconstitutionality of 2251 without a knowledge requirement, but General Days just explained the difference between the one who makes the film and the one who is simply distributing it.

MR. FLEISHMAN: I understand that, Your Honor. What I'm saying is this. If, hypothetically, section 2252 is unconstitutional because it does not have a scienter as to minority requirement in it, if that's true, and if it's true that 2251 does not have a scienter requirement in it, then it would seem to follow logically that for the same reasons that 2252 would be unconstitutional, 2251 would be unconstitutional, so you would have --

QUESTION: But that ignores the distinction that Justice Ginsburg just mentioned, attributing it to the Solicitor General. The subsections of 5-1 which omit the minority requirement are kind of action subsections, employing minors, allowing minors to be used, as distinct from knowledge of the content of written material.

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There's the distinction.

So maybe 5-1 is unconstitutional. I'm not suggesting that it is, but if it is, it is not simply because it follows from the unconstitutionality of 5-2.

MR. FLEISHMAN: I'm not -- the purpose of this argument, Your Honor, is not to say that it is, in fact, unconstitutional. I'm just saying that it would have a heavy cloud upon it, and it would be helpful for Congress to clean up the whole --

QUESTION: Well, you then say no distinction can be made between, can reasonably made for this purpose between the kind of obvious First Amendment subjects of written material, and the kind of ostensibly non-First Amendment subject of employing and allowing them to be employed.

MR. FLEISHMAN: At this time, Your Honor, all I'm saying is that there would be a serious constitutional cloud on section 2251 without saying that it would necessarily be unconstitutional, and that would be a prudential reason for the Court to find this statute unconstitutional, because it does have a lot of vices in it, and the Court could then be helpful to Congress in terms of letting Congress pass a law that's --

QUESTION: You say that --

MR. FLEISHMAN: -- also correct.

QUESTION: You say that we should say that 2251 is unconstitutional?

MR. FLEISHMAN: No, Your Honor. No. What I'm saying is that the Court should say that there would be a serious problem with regard to the constitutionality of 2251, if it were necessary to save 2252 to read a knowledge --

QUESTION: What if we didn't agree that there was any serious constitutional problem with respect to 2251?

MR. FLEISHMAN: Well, then you wouldn't say that.

QUESTION: That's what I would think.

MR. FLEISHMAN: No, I would not --

(Laughter.)

MR. FLEISHMAN: I should hope not, but I am suggesting that, to the extent that 2252 is unconstitutional if it does not have this knowledge requirement, then there is a powerful argument to be made that 2251 might be unconstitutional for the same reason, and it would be poor policy to save 2252 and leave 2251 hanging out there for the next, as the next target.

In this way I think the Court could be very helpful, not only to Congress, but more importantly to the First Amendment, in terms of to people who actually have

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to deal with this type of materials.

QUESTION: Suppose that you did think that the strict liability as to the age of the person depicted --

MR. FLEISHMAN: Yes, Your Honor.

QUESTION: -- raised a constitutional problem.

MR. FLEISHMAN: Yes, Your Honor.

QUESTION: Suppose, for example, you thought a lot of people who were going to ship material that they had a constitutional right to ship, say of adults --

MR. FLEISHMAN: Yes, Your Honor.

QUESTION: -- or works of art, or whatever, some not works of art, but regardless, they had a constitutional right, would have to err on the safe side, and therefore they would have to refrain from shipping material that they had a constitutional right to ship.

MR. FLEISHMAN: Yes, Your Honor.

QUESTION: Suppose you believed that, but you thought the statute might be saved by importing a scienter either of recklessly or of knowingly. How would you decide which of those two would be the appropriate scienter requirement for this statute?

MR. FLEISHMAN: I would say neither, and I would say that the requirement should be specific intent, specific intent something like what you have in the Cheek case. After all, if there are difficulties in terms of

what's involved, in terms of what the meaning of the statute is, at the very least a person ought to know that he's committing a crime.

There's just -- the ambiguity with regard to the minority aside for the moment, there are a lot of other problems in here where a person can be a perfectly innocent, law-abiding citizen and be trapped into this broad law, so if you're going to try and save it at all, I would say that it has to have specific intent.

Your Honors did that, as the Chief pointed out earlier, in the case that you wrote, Justice Ginsburg, with regard to the Nevada case where there was specific intent with regard to the money-laundering. If you have specific intent there read in, it would seem to me it's more appropriate to read a specific intent into a statute, a criminal statute of this type of severity where the First Amendment's interests are so strongly at play.

QUESTION: I thought that case involved construction of the words of a statute.

MR. FLEISHMAN: It did, Your Honor, but there were a number of constructions possible, and the construction that Your Honor gave it in terms of the willfulness was to make it a --

QUESTION: Willfulness, the word willful was used in the statute --

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MR. FLEISHMAN: It was, Your Honor.

QUESTION: -- and the question was whether --

MR. FLEISHMAN: I think Your Honor did right. I think that was a good decision --

(Laughter.)

MR. FLEISHMAN: -- and I'm saying it's a good model, and I think we ought to use that model now in terms of interpreting this statute if the Court wants to interpret it, but I do believe that this is a case where the Court should not interpret it. I think this is a case where Congress has spoken, Congress has spoken clearly, unambiguously --

QUESTION: Thank you, Mr. Fleishman.

MR. FLEISHMAN: Thank you, Your Honor.

QUESTION: Your time has expired.

MR. FLEISHMAN: Thank you very much, Your Honors.

QUESTION: General Days, you have 1 minute remaining.

GENERAL DAYS: Mr. Chief Justice, I will waive my rebuttal time. Thank you very much.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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UNITED STATES, Petitioner v. X-CITEMENT VIDEO, INC., ET AL.

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CASE NO.:93-723

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BY Ann Marie Federico

(REPORTER)