

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: 44 LIQUORMART, INC. AND PEOPLES SUPER  
LIQUOR STORES, INC., Petitioners v.  
RHODE ISLAND AND RHODE ISLAND LIQUOR  
STORES ASSOCIATION

CASE NO: No. 94-1140  
PLACE: Washington, D.C.  
DATE: Wednesday, November 1, 1995  
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 44 LIQUORMART, INC. AND :  
4 PEOPLES SUPER LIQUOR STORES, :  
5 INC., :  
6 Petitioners :  
7 v. : No. 94-1140  
8 RHODE ISLAND AND RHODE ISLAND :  
9 LIQUOR STORES ASSOCIATION :

10 - - - - -X

11 Washington, D.C.  
12 Wednesday, November 1, 1995

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 10:02 a.m.

16 APPEARANCES:

17 EVAN T. LAWSON, ESQ., Boston, Massachusetts; on behalf of  
18 the Petitioners.

19 REBECCA T. PARTINGTON, ESQ., Special Assistant Attorney  
20 General of Rhode Island, Providence, Rhode Island; on  
21 behalf of the Respondents.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 94-1140, 44 Liquormart, Inc.,  
5 v. Rhode Island and Rhode Island Liquor Stores  
6 Association.

7 Mr. Lawson.

8 ORAL ARGUMENT OF EVAN T. LAWSON

9 ON BEHALF OF THE PETITIONERS

10 MR. LAWSON: Mr. Chief Justice and may it please  
11 the Court:

12 Price advertizing has always been at the heart  
13 of the commercial speech doctrine. Indeed, it was the  
14 Court's concern for the free flow of price information  
15 that prompted the Court about 20 years ago to overturn the  
16 concept that commercial speech had no First Amendment  
17 protection and to accord particularly price advertizing  
18 protection under the First Amendment.

19 Since that time, the jurisprudence of the Court  
20 has developed, and the Central Hudson test has become  
21 established and refined. Application of the Central  
22 Hudson test to this case would yield the result that Rhode  
23 Island's ban on truthful price advertizing should be found  
24 unconstitutional.

25 Ordinarily, the Central Hudson test seems to be

1 discussed in a sequential fashion, but I would like to  
2 turn to the last part of the Central Hudson test, because  
3 I think that it is under that part that the defect of this  
4 ban is the most clearly apparent.

5 The last part of the Central Hudson test  
6 requires that the State's restriction on speech be no more  
7 expansive than is necessary. As this Court has posited  
8 it, that means that the restriction not burden speech any  
9 more than is necessary.

10 In this particular case, it is clear on the  
11 record both from the testimony of the State's own expert,  
12 and from the obvious facts of the case that are not  
13 disputed, that Rhode Island could accomplish the purpose  
14 that it says it wants to accomplish, that is, keeping an  
15 artificial price floor for alcoholic beverages simply by  
16 setting tax rates or by setting minimum consumer prices.

17 QUESTION: Well, now, there's no -- we don't  
18 apply a least-restrictive means test in that fourth prong  
19 of Central Hudson, so to show that something else might  
20 have been done isn't enough, I don't think.

21 MR. LAWSON: I'm not arguing for a least-  
22 restrictive means test. What I'm suggesting to the Court  
23 is that, where the State has a choice between regulating  
24 speech and not regulating speech at all, that it has an  
25 obvious alternative that doesn't burden speech.

1 QUESTION: Why isn't that a least-restrictive  
2 means approach?

3 MR. LAWSON: I don't think it is because I think  
4 the least-restrictive means approach would deal with an  
5 array of choices of various degrees of regulation of  
6 speech.

7 The precedent that I would cite for this is the  
8 recent Coors decision. In the recent Coors decision, you  
9 will recall, the Government was concerned with preventing  
10 strength wars and this Court --

11 QUESTION: Wasn't that a Federal regulation we  
12 dealt with --

13 MR. LAWSON: Yes, it was.

14 QUESTION: -- in Coors? And here we're dealing  
15 with a State regulation.

16 MR. LAWSON: That is correct.

17 QUESTION: And presumably the States have a  
18 little more leeway because of the Twenty-first Amendment  
19 in the area of control of alcoholic beverages sales.

20 MR. LAWSON: I would submit to you that the  
21 State's power to control alcoholic beverages sales is not  
22 dependent upon the Twenty-First amendment, but is inherent  
23 in their police power --

24 QUESTION: Well, surely the Twenty-First  
25 Amendment extends some power to the States that they

1 wouldn't otherwise have in this area --

2 MR. LAWSON: Yes, it does.

3 QUESTION: -- with respect to the Commerce  
4 Clause --

5 MR. LAWSON: Yes, it --

6 QUESTION: -- barriers.

7 MR. LAWSON: Yes, it does, but what I'm  
8 suggesting to you, and what I've argued, is that the  
9 Twenty-first Amendment does not in any way cut back on the  
10 force of the First Amendment as it is applied to the  
11 States.

12 QUESTION: How do you explain this Court's  
13 action in Queensgate Investment Company in 1982, where the  
14 Court dismissed for want of a substantial Federal question  
15 a case where a State regulation of price advertizing of  
16 liquor was upheld?

17 MR. LAWSON: Well, quite frankly, I can't  
18 explain it because the Court did not issue an opinion, and  
19 the Court has said in other --

20 QUESTION: At least it said there wasn't a  
21 substantial Federal question.

22 MR. LAWSON: That's correct, but the Court has  
23 said on other occasions that a summary dismissal of this  
24 sort does not imply even agreement with the opinion of the  
25 court that is below.

1 QUESTION: It's nonetheless a holding that the  
2 appeal raises no substantial Federal question.

3 MR. LAWSON: That is true.

4 Now, I can distinguish I think rather easily the  
5 Queensgate facts from the facts of this case. For  
6 example, in the Queensgate situation, there was no blanket  
7 ban on price advertizing. There was a ban on advertizing  
8 a price advantage.

9 It would seem to me that the State could, in  
10 fact, have a higher level of justification. I'm not  
11 arguing that that would be proper, but I think it clearly  
12 distinguishes that from a total blackout of price  
13 information, which is what's present in this case.

14 QUESTION: Do you think that Posadas is some  
15 authority for saying that the State could ban any  
16 advertizing at all of alcoholic beverages?

17 MR. LAWSON: I don't think that Posadas is quite  
18 that strong an authority. I think that what Posadas says,  
19 as I read it, it suggests that if the State wants to  
20 stifle demand for a product, at least under the  
21 circumstances of Posadas it could do so by stifling  
22 advertizing.

23 QUESTION: Do you think Rhode Island could ban  
24 all advertizing of alcoholic beverages?

25 MR. LAWSON: As I read the Court's jurisprudence



1 with the question put in that fashion, I think the answer  
2 is no, because what this Court has said is that States may  
3 not ban truthful, nonmisleading advertizing. They may,  
4 however, restrict it if they do so in accordance with the  
5 Central Hudson test, so if you put the question in terms  
6 of a general ban, my answer to that would be no.

7 QUESTION: Even though they could ban any sale  
8 or consumption of liquor.

9 MR. LAWSON: Yes, and the reason for that, Your  
10 Honor, is that it seems to me that the States must always  
11 act in accordance with the Constitution.

12 QUESTION: Well, how does that square with  
13 Posadas, your position?

14 MR. LAWSON: Well, the way it squares with  
15 Posadas is that, first of all, in Posadas the Court was  
16 not confronted with a total ban on advertizing. It was  
17 confronted with a partial restriction on certain types of  
18 advertizing, so that in terms of a precedential effect, it  
19 seems to me you cannot simply take the Posadas result and  
20 graft it onto this case.

21 QUESTION: Well, it's the same here. It's not  
22 all advertizing. It's advertizing a price.

23 MR. LAWSON: That's right.

24 QUESTION: You can advertize liquor all you  
25 like, just not the price.

1 MR. LAWSON: I agree with you, and I think  
2 that's why --

3 QUESTION: So how is Posadas distinguished?

4 MR. LAWSON: Posadas is distinguished only in  
5 that each case must apply the Central Hudson test to the  
6 facts that are before it.

7 The Court applied the Central Hudson test in  
8 Posadas and found the particular ban in Posadas to be  
9 justified.

10 QUESTION: Isn't this case, counsel, more like  
11 gambling ads than it is like the price of drugs approved  
12 by the FDA?

13 MR. LAWSON: I don't think that it is. I think  
14 it's very distinguishable from that because of what the  
15 State has asserted as --

16 QUESTION: Well, if we could --

17 MR. LAWSON: -- its interest.

18 QUESTION: The State, as you said, could ban any  
19 sale of liquor.

20 MR. LAWSON: That seems clear.

21 QUESTION: And it could ban gambling in its  
22 borders.

23 MR. LAWSON: That seems clear, too.

24 QUESTION: But it couldn't ban FDA-approved  
25 drugs.

1 MR. LAWSON: That's probably true as well.

2 QUESTION: It couldn't ban professional  
3 services.

4 MR. LAWSON: I think -- well, I'm not sure  
5 whether it could or it couldn't.

6 QUESTION: Are we resurrecting Lochner here?  
7 Why couldn't the State say no opticians -- is there  
8 some -- is Lochner back with us?

9 MR. LAWSON: I think -- no, I think the State  
10 has a great deal of power to ban many things, and that's  
11 why I think that the logic of saying, simply because you  
12 may have the power to ban something, that you then have  
13 the power to ban speech about something that you're not  
14 banning, is quite a different proposition.

15 QUESTION: The State could ban toothpaste if it  
16 wanted to?

17 MR. LAWSON: Well, I think at some point you get  
18 to a --

19 QUESTION: To what?

20 MR. LAWSON: You get to a point of  
21 irrationality.

22 QUESTION: To a constitutional provision on  
23 toothpaste?

24 MR. LAWSON: Well, I would be -- I'd be hard --

25 QUESTION: At some point you get to Lochner, is

1 that it?

2 MR. LAWSON: I don't think so. I think that the  
3 State -- I think that before you get to the kinds of  
4 questions of whether the State could ban toothpaste, you  
5 have to get through practical political considerations.

6 I think that there are certain things that the  
7 State can't --

8 QUESTION: I'm not saying whether it would, I'm  
9 saying whether it could. I don't think any State would.

10 MR. LAWSON: I think that --

11 QUESTION: I wouldn't want to run on that  
12 ticket.

13 (Laughter.)

14 MR. LAWSON: I don't think in Rhode Island you  
15 would want to run on the raising-the-price-of-alcoholic-  
16 beverages ticket, either.

17 QUESTION: No, but the point is, you would say  
18 that if the State could ban toothpaste, and let's assume  
19 it could unless you believe in Lochner, it still  
20 nonetheless could not ban toothpaste advertizing so long  
21 as it did not ban toothpaste.

22 MR. LAWSON: That's exactly my -- yes.

23 QUESTION: And you'd say liquor is no different  
24 from toothpaste.

25 MR. LAWSON: That's right.

1 QUESTION: That's a hard position to maintain, I  
2 suppose --

3 MR. LAWSON: Well, I think --

4 QUESTION: -- that liquor is no different from  
5 toothpaste.

6 MR. LAWSON: Well, I think that the Court has  
7 certainly suggested in the Coors case that when analyzing  
8 bans on commercial speech, it is not appropriate to  
9 recognize some hierarchy of products some of which are  
10 entitled to more protection than others.

11 QUESTION: Well, may I take us away from  
12 toothpaste and back to gambling?

13 MR. LAWSON: Yes.

14 QUESTION: If I just look at this Court's  
15 precedent and I say, well, there's Virginia Board and that  
16 concern, advertizing the price of drugs, and then there's  
17 the restriction on advertizing to locals gambling casinos,  
18 so it seems to me liquor is closer to gambling casinos  
19 than it is to drugs, so why doesn't Posadas control?

20 MR. LAWSON: It doesn't control in the sense  
21 that -- it controls in the sense that you apply the  
22 Central Hudson test to the facts of the case. It doesn't  
23 control in the sense that the application of the Central  
24 Hudson test to this case yields a contrary result than it  
25 would yield, or than it yielded in Posadas.

1           QUESTION: What I wonder is, if -- just going  
2 back for a second to where you started, suppose that a  
3 State thinks the following, people think this in the  
4 legislature: we don't mind if people buy liquor, but  
5 we're worried about them drinking too much, and we don't  
6 mind if the price is high or if small retailers make a lot  
7 of money, because they're in neighborhoods, and we're  
8 afraid that if there are a lot of advertizing for price,  
9 all the high school students will run up where they say  
10 beer at half-price this week, or whiskey reduced  
11 30 percent.

12           And we're just afraid that people will start  
13 running and drink more when they see those advertized  
14 specials and so we think it's a sort of middle position,  
15 let them drink, let the price be fairly -- a little higher  
16 than it otherwise would, but let's stop these advertizings  
17 of specials, et cetera, because then we don't get as many  
18 drunken drivers, and we don't get as much abuse of the  
19 product.

20           Now, suppose that's what they thought. What's  
21 the State supposed to do, in your view, under the  
22 Constitution?

23           MR. LAWSON: Well --

24           QUESTION: Is it that it can't do anything about  
25 this problem that it sees, or it can't implement the

1 position that it's reached?

2 MR. LAWSON: I think that under the Central  
3 Hudson test, the State would have to show that --

4 QUESTION: The facts are just exactly what I  
5 said, and let's also say they go into court and they make  
6 out a plausible case. I mean, I imagine you could make  
7 out a plausible case on the facts for that.

8 Maybe they couldn't, and then that would be  
9 easy, but let's assume they make out a plausible case of  
10 just the facts I said.

11 MR. LAWSON: Well, if --

12 QUESTION: Then what's the law supposed to allow  
13 them to --

14 MR. LAWSON: If the State were able to show that  
15 in fact --

16 QUESTION: What they do is, they go and do what  
17 I said. They get some people in who say, look, there are  
18 a lot of ads and it's common sense to think when the price  
19 is a big special kids will run up, and others, and buy the  
20 whiskey, and then somebody says, you haven't actually  
21 proved it. They say, yeah, well, we've presented enough.

22 I mean, that's the normal state of those things,  
23 okay, so I want to know what the law is under those  
24 circumstances.

25 MR. LAWSON: I think the law is that under the

1 Central Hudson test, they have not satisfied the Central  
2 Hudson test.

3 QUESTION: Right, so you're saying the State's  
4 powerless in that situation.

5 MR. LAWSON: No, I'm saying that the State --

6 QUESTION: I want to know what they're supposed  
7 to do in order to implement all the hearings before the  
8 legislature that bore out those facts.

9 MR. LAWSON: Well, if there were hearings that  
10 bore out those facts --

11 QUESTION: Let's assume there are.

12 MR. LAWSON: And if there were proof that was  
13 satisfactory that the State's hypothesis were, in fact,  
14 correct --

15 QUESTION: I'm trying to get at what the State  
16 really should do. I'm trying to make the world real, and  
17 I want to know --

18 QUESTION: I thought what you said they should  
19 do is that they should set a minimum price.

20 MR. LAWSON: Well, I think --

21 QUESTION: And that wouldn't restrict speech.

22 MR. LAWSON: I think --

23 QUESTION: It would have the same effect and not  
24 restrict speech. I thought that's --

25 MR. LAWSON: That is what I said, but the



1 proposition added a new -- the hypothetical added a new  
2 factor, which was that the State didn't want to keep the  
3 prices high, they just wanted to deter price advertizing  
4 because they thought that the presence of price  
5 advertizing itself was a stimulant.

6 QUESTION: Yes, specials and all these  
7 different --

8 QUESTION: Mr. Lawson, can't you concede --

9 QUESTION: What's the answer?

10 QUESTION: In Justice Breyer's example, can't  
11 you concede that the State might very well, under those  
12 circumstances, prevail without conceding that the State  
13 prevails in this case, because you've got at least one  
14 added overlay, it seems to me, in this case, and that is  
15 you've got a lot of -- or, you've got some empirical  
16 studies done by parties who are not interested in this  
17 litigation which tend to show that what is, in fact, I  
18 think intuitively, a very common sense view -- I mean,  
19 Judge Aldrich was depending on that view to a degree in  
20 the court of appeals -- doesn't in fact seem to be borne  
21 out.

22 So don't you have a different case from the one  
23 that rests upon the intuitive good sense and intuitive  
24 good sense alone?

25 MR. LAWSON: I think that I do and I also, in

1 reviewing the cases that deal with this type of issue,  
2 note that very often these cases simply turn upon logical  
3 discourses.

4 QUESTION: Yes, but what's worrying me is that  
5 so often these turn on, like, lawyer's arguments as, there  
6 was 14 inches of proof on this side and 12 files of  
7 evidence on the other side, but in the reality, what you  
8 do is, you get witnesses who come in and say, sure, kids  
9 will buy more liquor if you advertize half-price, and  
10 others say, we're not certain of that, or how often.

11 Now, that's -- what I want to know is, given the  
12 State's decision that that's a problem, what, in your  
13 opinion, is the State supposed to do?

14 MR. LAWSON: Well, I think that going into the  
15 hypothetical, and recognizing that it's not the facts of  
16 this case, that the question then would turn upon how much  
17 the State has to show.

18 This Court has never made explicit how much the  
19 State has to show as a factual matter. That's why --

20 QUESTION: Everything just comes down to an  
21 evidentiary question, then.

22 I thought there was a point of principle at  
23 issue in this case, and I thought that the response to  
24 Justice Breyer's question was, the State may require low  
25 prices -- may require high prices, but if it permits low

1 prices, it may not prevent people from telling about low  
2 prices because that's a restriction of speech.

3 You may do the one, but you may not do the  
4 other. I thought that was the point of principle.

5 MR. LAWSON: I -- that is the point that I was  
6 trying to make.

7 QUESTION: That the State may not have the  
8 motive that Justice Breyer --

9 QUESTION: Thank you.

10 QUESTION: -- attributes to it.

11 (Laughter.)

12 QUESTION: But you've also -- Mr. Lawson, you've  
13 also got a requirement, I suppose, at least in the light  
14 of Rubin and Coors, of proof that there in fact will be a  
15 material degree of advancement of the State's interest.

16 MR. LAWSON: Yes.

17 QUESTION: So your answer is ultimately going to  
18 have to take into account the evidence on that point,  
19 isn't it?

20 MR. LAWSON: Yes, it is, and I would suggest to  
21 you that despite the characterization of the First Circuit  
22 that the evidence went both ways, when you really look at  
23 it, the evidence only went one way.

24 QUESTION: But we're not here to evaluate  
25 evidence. I mean, we generally leave that to lower

1 courts.

2 MR. LAWSON: Well, the trial court evaluated the  
3 evidence and found as a fact that there was no material --

4 QUESTION: And the First Circuit reversed it,  
5 and we generally take our facts from the court of appeals.

6 MR. LAWSON: Well, I think that the First  
7 Circuit ordinarily would only be able to reverse a finding  
8 of fact of the trial court under the clearly erroneous  
9 standard.

10 QUESTION: But in --

11 QUESTION: How much of this is a matter of  
12 evidentiary proof, the way the stop light was green, or  
13 the stop light was red? Isn't there a certain latitude  
14 allowed to the State to indulge perhaps a common sense  
15 presumption that if you don't advertize the price of  
16 liquor, the prices will remain higher and therefore not as  
17 much will be sold? How many witnesses do you have to have  
18 to prove that?

19 MR. LAWSON: Well, I think that first of all  
20 there may be -- if the State -- if the State stated a  
21 logical proposition, and that was unopposed, perhaps that  
22 would be a different case, but in this case there was  
23 evidence, and the State's own expert I think agreed that  
24 simply changing the price of liquor does not necessarily  
25 affect consumption.

1 QUESTION: Mr. Lawson, why are you going away  
2 from your first point, which was, if they want to keep the  
3 price high, there are ways that they can keep the price  
4 high that don't involve speech? That's -- the State said  
5 something else besides keeping the price high.

6 They say, we can deter liquor sales 1) by having  
7 a price, also making it harder to find what you want. You  
8 can't just run in and say, give me the special that you  
9 advertized in the paper, the search time, and there I  
10 don't see your nonspeech alternative working.

11 MR. LAWSON: Well, the problem with the State's  
12 position on the search time argument, which is the generic  
13 problem with the State's position, is that in order for  
14 its theory to work, there has to be enough of a shift in  
15 prices that there will actually be an effect on  
16 consumption.

17 This is what the State's expert talked about as  
18 the optimum price, and the State's expert conceded that  
19 1) he didn't know what the optimum price would be, and he  
20 essentially conceded that he had no way of knowing, and in  
21 view of the fact that Rhode Island, with its price ban in  
22 effect for almost 40 years, was in the top third in  
23 consumption, there was no evidence to show that the  
24 State's theory worked.

25 And the three studies that were introduced,

1 including the Ornstein and Hanssens study that the State  
2 relied on, indicated that the price advertizing ban had no  
3 effect on consumption in what are called licensed States,  
4 that is, States that use the free enterprise system.

5 Therefore, there simply is a failure of proof of  
6 the connection between an effect on price and an adequate  
7 effect on price.

8 QUESTION: Mr. Lawson, why isn't it just common  
9 sense that if I can go into the liquor store and it says,  
10 Chardonnay 50 percent off, I can go in and get it in  
11 1 minute, but if it's -- there's just all that wine out  
12 there, and I don't know what one has the low price tag,  
13 I'm going to have to spend more time in the liquor shop?

14 MR. LAWSON: Well, I don't think -- let me  
15 illustrate the common sense approach in this fashion.  
16 Hypothetically, let's assume that I drink one glass of win  
17 a week. If wine suddenly became twice as expensive, I'm  
18 not going to pass up on my one glass of wine a week.

19 The State's swing in prices is much less  
20 dramatic than that.

21 QUESTION: So supposing I budget \$10 a week for  
22 liquor. Rather than saying, I'm going to drink one glass,  
23 I'm going to drink however much I can buy for \$10.

24 (Laughter.)

25 MR. LAWSON: I don't think that's -- I don't

1 think that that's really accurate. I think that --

2 QUESTION: How can you be sure that everyone  
3 works just the way your mind does -- obviously a very  
4 disciplined fashion, I'm going to drink so much. Maybe  
5 somebody else says I've got \$10 in my weekly budget for  
6 liquor --

7 MR. LAWSON: Well --

8 QUESTION: -- and I'll buy however much I can.

9 MR. LAWSON: If that hypothesis were correct,  
10 which seems to make common sense, it would show up in some  
11 data, and it doesn't. We have a dramatic situation, the  
12 Michigan situation, where you had a price advertizing ban  
13 in effect, you had it lifted for 16 months, and you had it  
14 put back into effect, it was studied, and there was found  
15 to be no difference.

16 Now, if the theory is correct that people will  
17 suddenly buy more because the price advertizing --

18 QUESTION: I guess these bars that have happy  
19 hours don't know what they're doing.

20 MR. LAWSON: Well, I --

21 QUESTION: They're just throwing money away.

22 MR. LAWSON: I think the happy hour situation is  
23 different.

24 QUESTION: If low prices do not increase the  
25 volume of sales --

1 MR. LAWSON: The happy --

2 QUESTION: -- that's a novel economic theory.

3 (Laughter.)

4 MR. LAWSON: The happy hour situation is  
5 different, and I think you also have to remember that what  
6 the State has said it's directing its regulation at is not  
7 volume of sales, it's directing its regulation at  
8 temperance, which seems to mean abuse of consumption,  
9 although the State has shifted its ground a little bit.

10 There's no indication that abuse of consumption  
11 is affected by the kind of price fix that the State is  
12 trying to put into effect.

13 And once again, getting back to Part 4, it can  
14 accomplish that objective without burdening speech at all,  
15 and I --

16 QUESTION: Just a quick point. Apropos of  
17 evaluating what indications there are in the record,  
18 evaluating the evidence, do you concede that this Court  
19 has no independent role in doing that?

20 MR. LAWSON: Well, I --

21 QUESTION: You seemed to --

22 MR. LAWSON: I have in mind --

23 QUESTION: -- by your silence a little while  
24 ago. Is that your position?

25 MR. LAWSON: No. I have in mind the Bose case,



1 which would indicate that the Court does have an  
2 independent role at least when the lower court's decision  
3 runs contrary to protecting --

4 QUESTION: Protecting what?

5 MR. LAWSON: -- freedom of speech.

6 QUESTION: Speech.

7 MR. LAWSON: Speech, particularly.

8 QUESTION: It's the First Amendment --

9 MR. LAWSON: It's the First Amendment --

10 QUESTION: Okay.

11 MR. LAWSON: Yes. The First Amendment --

12 QUESTION: Have we ever applied Bose in the  
13 commercial speech area?

14 MR. LAWSON: Not that I'm aware of. Not that  
15 I'm aware of.

16 QUESTION: I'm not, either.

17 MR. LAWSON: I don't know -- one of the things  
18 that's interested me about reviewing the commercial speech  
19 cases is how rarely they seem to actually be tried with  
20 evidence. Mostly they seem to be -- they seem to play out  
21 in some theoretical realm, and in the circumstances where  
22 there is evidence, by and large the Court seems to be  
23 upholding the side that has the weight of the evidence --  
24 for example, in the Florida Bar case.

25 QUESTION: May I ask, in this State is it legal

1 to sell liquor to high school kids?

2 MR. LAWSON: No, it's not.

3 I would like to reserve 2 minutes.

4 QUESTION: Very well, Mr. Lawson.

5 Ms. Partington.

6 ORAL ARGUMENT OF REBECCA T. PARTINGTON

7 ON BEHALF OF THE RESPONDENTS

8 MRS. PARTINGTON: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 The State of Rhode Island has adopted an  
11 advertizing ban on the price of alcoholic beverages that  
12 meets this Court's test for restrictions on free speech,  
13 and commercial speech in particular, and that is what we  
14 have here, is commercial speech, which is entitled to a  
15 lesser degree of protection than other forms of  
16 noncommercial speak.

17 QUESTION: Suppose that students in Rhode Island  
18 over 18, or over 21, had a computer Internet and one  
19 student was very interested in advising all of the people  
20 that would plug into the Internet what the prices were in  
21 various liquor stores for, say, beer and wine, could the  
22 State prohibit that?

23 MRS. PARTINGTON: Under the Twenty-First  
24 Amendment separately, it probably could, but that's not a  
25 commercial speech question, because that's not proposing a

1 commercial transaction from seller to buyer, so I think  
2 you have other concerns, other than a First Amendment  
3 concern in that case.

4 QUESTION: Just addressing the First Amendment  
5 concerns, are there First Amendment problems with the  
6 hypothetical?

7 MRS. PARTINGTON: That would probably -- the way  
8 I interpret that would be a free speech question, not a  
9 commercial speech question, and I think the standard would  
10 be different.

11 However, this Court has taught, as discussed  
12 earlier, and it's the State's position that if you can  
13 totally ban the sale of a product you can ban  
14 advertizements, but I have trouble seeing that as  
15 commercial speech. I think that's more of an opinion, and  
16 that the State would be hard-pressed to restrict that sort  
17 of speech.

18 QUESTION: And suppose that there were some sort  
19 of a charge to access this particular information.

20 MRS. PARTINGTON: I still don't think the fact  
21 that -- again, this Court has said in the case of where  
22 there is a book or a pamphlet that discusses sales of this  
23 and that, that doesn't make it commercial speech just  
24 because you sell a book about something. There has to be  
25 proposing a commercial transaction, and that's the very

1 limited area we're in here today, so I think that those  
2 two situations are different.

3 QUESTION: Suppose there were testimony -- and  
4 there isn't. This is wholly hypothetical, but suppose the  
5 availability of the Internet type of -- or computer  
6 information type of publication was widely available and  
7 widely used, would that change the calculus here, so far  
8 as judging the constitutionality of banning it in  
9 newspapers?

10 MRS. PARTINGTON: Of banning it in newspapers?

11 QUESTION: Yes.

12 MRS. PARTINGTON: Not unless it became  
13 commercial speech. I don't think the size of the audience  
14 is a factor in the Central Hudson test.

15 QUESTION: Could a newspaper just on its own  
16 print all this information, just as advice to the  
17 consumer?

18 MRS. PARTINGTON: As a matter of fact, that  
19 happened immediately before this case came up to this  
20 Court.

21 One of the newspapers in this State did a story  
22 and most of it was focused on the difference in prices  
23 among liquor stores and they did, as part of that story,  
24 as part of that news piece, run prices, and our liquor  
25 control administrator would not find that that was a

1 violation, because that is not proposing a commercial  
2 transaction.

3 I realize there's a line there, but I think that  
4 was easy to distinguish. They were discussing the  
5 difference between prices in Rhode Island and  
6 Massachusetts.

7 QUESTION: If there were widespread exchange of  
8 price information in some of the media that I propose, and  
9 some of the methods that I propose, it would seem to me  
10 the State's interest would be the same. I mean, this  
11 undercuts your interest. You don't want people to know  
12 about price changes because that might increase  
13 consumption.

14 MRS. PARTINGTON: I suppose that if it rose to  
15 the level of an advertizement, or if it appeared that some  
16 of the liquor retailers were attempting to subvert the  
17 advertizement requirement, or the advertizing ban, then  
18 the State could take some action, but this -- the example  
19 that you've given me, the facts that happened in the State  
20 of Rhode Island were so very clearly part of a newsworthy  
21 event that was taking place that the ban did not apply.

22 QUESTION: Suppose the liquor salesman says,  
23 please tell your neighbor about our low prices. Could the  
24 State prohibit him from doing that?

25 MRS. PARTINGTON: Not under the ban as it exists

1 today, I don't --

2 QUESTION: Constitutionally could the State  
3 prohibit that?

4 MRS. PARTINGTON: Yes, I believe they could.  
5 Under the Twenty-First Amendment, I think the State has a  
6 separate basis for dealing with all manner of discussion  
7 involving alcoholic beverages.

8 QUESTION: If we had no Twenty-First  
9 Amendment --

10 MRS. PARTINGTON: If we had no Twenty-First  
11 Amendment a State still has considerable police powers and  
12 has always had considerable police powers in dealing with  
13 alcoholic beverages. Since the mid-1800's this Nation's  
14 history has always given the State considerable police  
15 power to regulate the sales of alcoholic beverages.

16 QUESTION: More than toothpaste?

17 MRS. PARTINGTON: More than toothpaste, yes.

18 QUESTION: Is that right? That's in the  
19 Constitution?

20 MRS. PARTINGTON: Oh, I'm sorry --

21 QUESTION: I mean apart from the Twenty-First  
22 Amendment.

23 MRS. PARTINGTON: The Twenty-First Amendment  
24 gives the State, this Court has said, something more than  
25 the ordinary police power, and --

1 QUESTION: With respect to commerce.

2 MRS. PARTINGTON: With --

3 QUESTION: With respect to the demands of the  
4 Commerce Clause of the Constitution it does, but where in  
5 it does it say that it somehow increases the State's  
6 authority under the First Amendment, or in the face of the  
7 First Amendment.

8 MRS. PARTINGTON: The Court has repeatedly, in  
9 cases not dealing with commercial speech, and this is  
10 the -- from what I can tell the Court's first commercial  
11 speech State Twenty-First Amendment case in recent years.  
12 The Twenty-First Amendment, acting together with -- and  
13 the State would make an argument that the Twenty-First  
14 Amendment together with the fact that alcoholic beverages  
15 are involved here, and they are not one argument but two,  
16 gives the State considerable regulatory power here and  
17 assists the State in meeting the Central Hudson test.

18 QUESTION: So there are -- if we take Craig v.  
19 Boren as our model, then I would think there's not too  
20 much to your Twenty-First Amendment, but I thought you  
21 were relying most heavily on the Posadas case saying,  
22 well, Twenty-First Amendment, we could put in as a weight,  
23 or make-weight.

24 MRS. PARTINGTON: Absolutely, and that takes me  
25 back to applying the Central Hudson test, and I think in

1 answer to a couple of the questions I heard earlier, it is  
2 not a question of who presents the most evidence, it's a  
3 question of could the State and can the State reasonably  
4 believe that by banning price advertizing the substantial  
5 and legitimate State interests will be advanced?

6 QUESTION: Well, how do you get over the  
7 requirement which I thought was expressed in Rubin and  
8 Coors and in fact the indication has got to be that the  
9 State's interest is -- I think the word was materially  
10 advanced?

11 It seems to me that that, if that means anything  
12 it requires something more than a reasonable basis for  
13 the State's belief that it would be advanced.

14 MRS. PARTINGTON: Well, I read that requirement  
15 in Rubin, which, by the way, suggested a marketing ban on  
16 the -- regarding the strength of beer as a feasible  
17 alternative to the labeling ban -- I read Rubin and I read  
18 that together with the Florida Bar case, which cautioned  
19 that in every case we do not have to have a mountain of  
20 scientific evidence.

21 QUESTION: Well, we're not talking, I think,  
22 about quantity of evidence. We're just talking about the  
23 quality of evidence, and the evidence has got to indicate,  
24 Rubin says, that there is a material advancement of the  
25 State's interest.



1 MRS. PARTINGTON: Correct.

2 QUESTION: And how do you get around that, and I  
3 guess more specifically, how is that indicated on this  
4 record?

5 MRS. PARTINGTON: First of all, the Florida Bar  
6 case said that you can rest a reasonable belief on data,  
7 studies, history, and common sense. We have all of that  
8 present in this case. We have many things --

9 QUESTION: By the way, do we make that  
10 determination, that in fact the advancement, if it is  
11 advancement, is to a material and substantial degree? Is  
12 that a judgment for this Court to make?

13 MRS. PARTINGTON: I think that -- not under a  
14 clearly erroneous standard, Your Honor.

15 QUESTION: Well, no, but we're dealing with a  
16 First Amendment issue. Do you think we have an  
17 independent evidentiary weighing function because there is  
18 a First Amendment speech issue here?

19 MRS. PARTINGTON: I think that it goes back to,  
20 and the State would argue that it has to be a reasonable  
21 believe on the State's part --

22 QUESTION: No, no --

23 MRS. PARTINGTON: -- that it would be advanced.

24 QUESTION: Could I just call you back, though,  
25 to my last question? In making that determination, does

1 this Court have an independent function in weighing the  
2 evidence because there is a First Amendment issue  
3 involved?

4 MRS. PARTINGTON: Not to weigh the evidence, but  
5 to see if the State put forth some evidence that could  
6 support the reasonable belief, but in --

7 QUESTION: Well, that -- we have said in  
8 noncommercial speech cases that in fact the Court, and any  
9 court dealing with a First Amendment speech issue, has an  
10 obligation to evaluate the evidence independently.

11 Now, do we have that obligation here? That's  
12 something quite different from saying there is a  
13 sufficient basis in the evidence from which a lower court  
14 could have concluded whatever it concluded. It's an  
15 independent role in evidentiary evaluation. Do we have  
16 that in this case?

17 MRS. PARTINGTON: Correct, and I think the  
18 Fifth --

19 QUESTION: We do?

20 MRS. PARTINGTON: The Fifth Circuit in the  
21 Dunagin case --

22 QUESTION: No, but is your answer that we do  
23 have that?

24 MRS. PARTINGTON: The appellate courts in a  
25 First -- yes, sir, that the appellate courts in a First

1 Amendment case have a special role not to review under a  
2 clearly erroneous standard, but to see whether a  
3 reasonable basis exists, and they made the distinction --  
4 the Fifth Circuit and the Fourth Circuit recently in the  
5 Anheuser-Busch case made the determination between the  
6 adjudicative and the legislative facts, and that is the  
7 State's argument here today that as long as there is a  
8 reasonable belief, and we are not limited to our record  
9 below --

10 QUESTION: No, but hasn't this Court got to have  
11 the reasonable belief, if we are going to -- or be  
12 justified in having the reasonable belief, if we are going  
13 to engage in that independent evidentiary evaluation?

14 MRS. PARTINGTON: Yes, and I would like to  
15 tell --

16 QUESTION: Okay, now, why should we have that  
17 reasonable belief?

18 MRS. PARTINGTON: All right. I would like to  
19 point you to several factors in this case that support  
20 that reasonable belief.

21 In addition to the testimony and the data, the  
22 studies the State put forward which were based on  
23 generally accepted and well-established economic  
24 principles --

25 QUESTION: On that point, could I just interrupt

1 you with one problem that's running through my mind.  
2 Let's assume that when you raise prices, there will be  
3 less consumption. That seems fairly common sense. But I  
4 gather that -- assume that the consumers in the State, 85  
5 percent of them are perfectly temperate, and maybe 10 or  
6 15 percent are abusive drinkers, and you're concerned  
7 about the price to those who are not temperate.

8 Do you think that raising the price to the  
9 85 percent who may be perfectly temperate, who may not  
10 consume any more, keeping the price up, furthers the State  
11 interest?

12 MRS. PARTINGTON: I think that the testimony we  
13 have is that consumption generally --

14 QUESTION: Right, generally it would be  
15 affected. Let's assume that's true, but how do you  
16 know -- how do you balance, in your figuring out what is  
17 the appropriate thing to do, the impact on those who will  
18 remain temperate, who presumably are most of the  
19 consumers, and the minority who might be affected by it,  
20 and how do you know you're being successful with the  
21 minority?

22 MRS. PARTINGTON: I think that that's a point  
23 the experts made here. You cannot study this subject in  
24 that detail. You cannot know exactly which part of your  
25 society that you're affecting. All of the experts said

1 this was a very difficult area to study, and that the  
2 generally accepted economic principles apply to alcohol.  
3 We have to look at it in a much larger picture if  
4 consumption is --

5 QUESTION: What if the evidence showed there  
6 were only 5 percent were intemperate drinkers, would that  
7 make any difference, that you make the 95 percent pay more  
8 anyway because you're so concerned about the 5 percent?

9 MRS. PARTINGTON: I think that that sort of  
10 figure would go to the reasonableness of the legislature's  
11 belief.

12 QUESTION: And what do we know about the figure  
13 in this case?

14 MRS. PARTINGTON: We do not know, because all of  
15 our experts said that those figures would be impossible to  
16 compile, so it comes down to whose decision should it be  
17 to make this social policy? Should it be the legislators  
18 of the State of Rhode Island or the liquor retailers in  
19 the State of Rhode Island?

20 QUESTION: Well, making the 95 percent pay more  
21 is no problem. The State can do that without any  
22 difficulty, can't it? I mean, it could set minimum  
23 prices.

24 MRS. PARTINGTON: I don't think that minimum  
25 prices --

1 QUESTION: And that would make the 95 percent  
2 pay more, and there would be no problem at all. You can  
3 always make people pay more. The only thing you can't do  
4 is withhold information from them in some circumstances.

5 MRS. PARTINGTON: And in addressing  
6 Mr. Lawson's -- the narrowness issue and the minimum price  
7 problems, I don't think, and I disagree that the minimum  
8 price would be as effective as this.

9 Number 1, there is a constitutional problem in  
10 minimum retail prices, and this Court has previously held  
11 that.

12 QUESTION: A constitutional problem?

13 MRS. PARTINGTON: This Court, I believe Mid --

14 QUESTION: You think the State could not set  
15 some kind of minimum prices for alcohol?

16 MRS. PARTINGTON: I think that the schemes that  
17 have been propounded by States in the past have had  
18 constitutional problems, and also they don't --

19 QUESTION: What happened to the vigor of the  
20 Twenty-First Amendment? A moment ago you were saying it  
21 was pretty good against the First Amendment, but suddenly  
22 it's weakened.

23 MRS. PARTINGTON: I don't think so. I think  
24 that the minimum retail prices, and to answer a couple of  
25 questions that came during the petitioner's argument,

1 minimum retail prices simply would not work as well in  
2 this case. They --

3 QUESTION: Okay, but I thought -- it was the  
4 constitutional problems that you alluded to that I was  
5 alluding to. If the Twenty-First Amendment is good  
6 against speech, why isn't it good against these  
7 constitutional problems?

8 MRS. PARTINGTON: If I understand your question  
9 correctly, why wouldn't a --

10 QUESTION: Why do you have constitutional  
11 problems in setting a liquor price when you've got the  
12 Twenty-First Amendment?

13 MRS. PARTINGTON: Historically, in the minimum  
14 retail price area the States have been affecting prices in  
15 other States and other areas of the country, and that has  
16 been held to be improper and unacceptable even with the  
17 Twenty-First Amendment. I am not arguing that the Twenty-  
18 First Amendment is absolute or that it trumps the First  
19 Amendment in this case.

20 QUESTION: If our concern is, how do we keep the  
21 price high, let's substitute for a tax. I don't think  
22 there's any problem with the constitutional problem with a  
23 State putting a higher tax on liquor. That would up the  
24 price and it wouldn't restrict speech.

25 MRS. PARTINGTON: And it wouldn't work as well,

1 because it wouldn't remove the artificial inducement to  
2 consume that an advertizement constitutes. The artificial  
3 inducement --

4 QUESTION: But I thought the artificial  
5 inducement was in the price, in the capacity to advertize  
6 low prices, not the capacity to advertize as such.

7 MRS. PARTINGTON: It is the State's position,  
8 and it is a reasonable belief that would support this ban,  
9 that those citizens who are already so inclined to consume  
10 will purchase no matter what.

11 QUESTION: Then it seems to me your argument is  
12 showing that the State can perfectly well ban all  
13 advertizing of liquor. You'd take it all the way.

14 MRS. PARTINGTON: Oh, I absolutely think --

15 QUESTION: Okay.

16 MRS. PARTINGTON: -- that a State can -- a total  
17 advertizing ban would be constitutional.

18 QUESTION: Mrs. Partington, can I -- I'm not  
19 sure what the scope of the concession that you made to  
20 Justice Souter earlier was.

21 Do I take it that you acknowledge that with  
22 respect to the First Amendment, as opposed to other  
23 constitutional -- claimed constitutional violations, we  
24 have some special authority to make factual determinations  
25 on our own and disregard factual determinations reasonably



1 made -- reasonably, but we disagree with it, made by State  
2 legislatures, for example?

3 MRS. PARTINGTON: I think that --

4 QUESTION: Is the First Amendment different from  
5 other amendments in --

6 MRS. PARTINGTON: The rule as I understand it  
7 is, and the First Amendment has been afforded a lot of  
8 special consideration by this Court, and again, set out in  
9 the Dunagin footnote better than I'm saying it today,  
10 obviously, is that appellate courts in a First Amendment  
11 case bear a special role in reviewing the lower courts.  
12 You're not bound by their evidence.

13 QUESTION: Why is that? I mean, more than other  
14 constitutional -- let's say a violation of equal  
15 protection, or discrimination against someone because of  
16 race.

17 MRS. PARTINGTON: And I think in Craig --

18 QUESTION: First Amendment's different. We  
19 would not accept judgments of legislatures in that area  
20 that we would with respect to the other matters.

21 MRS. PARTINGTON: Well, I think in the past this  
22 Court has accepted --

23 QUESTION: Sort of a privileged amendment, is  
24 it -- I mean, the First Amendment? All the others are  
25 disfavored. I don't understand --

1 MRS. PARTINGTON: I think this Court has always  
2 held a special place for the First Amendment in the law --

3 QUESTION: In our hearts?

4 MRS. PARTINGTON: -- that I have read it,  
5 perhaps other amendments are entitled to a great deal of  
6 deference.

7 QUESTION: How about in commercial speech cases?  
8 Have we shown the same deference to the First Amendment as  
9 we have in noncommercial speech cases?

10 MRS. PARTINGTON: No, and I think that's just  
11 the point about the commercial speech doctrine, and that  
12 is, the State's position is that it is not as protected  
13 because it is proposing a commercial transaction, in this  
14 case a transaction, the sale of alcoholic beverages, a  
15 highly regulated commodity.

16 QUESTION: May I ask this general question in  
17 terms of factual basis for the statute?

18 What if the records show -- and I'm not going to  
19 suggest it does -- that the real motivation for the  
20 statute was to protect the competitive position of the  
21 small retailer, and to enable price-fixing to succeed  
22 without these discounters cutting prices all the time.  
23 That's really what motivated it, but it also has this  
24 additional support that you can say it tends to reduce  
25 consumption. Would that affect the constitutional

1 analysis at all?

2 MRS. PARTINGTON: I think as long as the State's  
3 asserted interest in this case is substantial, and is  
4 advanced, and the State could reasonably have believed it  
5 was advanced, the peripheral effect on the distribution  
6 scheme and on the small retailers and the large retailers  
7 and their relationship --

8 QUESTION: No, I'm not saying that's the  
9 peripheral effect, I'm assuming from my hypothetical, and  
10 I guess it's alleged in one count of the complaint, but  
11 that fell by the wayside somewhere, that the real  
12 background to the statute is, it's just old-fashioned  
13 price-fixing.

14 If that were proved and assumed to be the fact,  
15 would that affect the constitutional analysis?

16 MRS. PARTINGTON: I think it would under the  
17 substantial interest test, or the substantial interest  
18 prong of Central Hudson, could protection of the smaller  
19 retailers be a substantial interest. Fortunately, we  
20 don't have to determine that here. The substantial  
21 interest has been stipulated to.

22 QUESTION: That's just the question that's  
23 bothering me. Suppose that you were -- I understand your  
24 argument to be, look, banning the price advertizing is  
25 better than the tax, because when you advertize prices

1 people run out and buy the thing in a way they don't with  
2 the tax, and of course price controls require an elaborate  
3 administrative mechanism and bring a host of problems of  
4 their own.

5 So suppose I accept that, and say, okay, you  
6 have a plausible justification here. Suppose that's what  
7 the Constitution held. Then could the small broccoli  
8 producers, or the small -- I don't know, the small table  
9 producers, or the distributors, or virtually any product  
10 under the Sun that could create a plausible reason why the  
11 product has some negative aspects to it, do exactly the  
12 same thing and create price advertizing bans against  
13 dozens of products?

14 I mean, is your product special, or if we allow  
15 the ban to be constitutional here, is the Court also  
16 saying that price advertizing could be stopped across the  
17 board in any product where there is a plausible argument  
18 that too much use of the product by a group would be  
19 harmful?

20 That's what's worrying me. Is this a special  
21 product, or if this product you can restrict advertizing,  
22 can they do the same thing with plausible reasons -- and  
23 of course lots of producers like to stop advertizing, if  
24 they can agree to do it -- across the board, or is your  
25 product special, and if so, how?

1 MRS. PARTINGTON: I think our product is quite  
2 special because of this Nation's regulatory history of  
3 alcoholic beverages. If some other product were to have  
4 the history that alcoholic beverages has, including a  
5 total prohibition of sales of that product in the Nation  
6 for a period of years --

7 QUESTION: How about bullets and firearms?  
8 Could the State impose price advertizing restrictions on  
9 those?

10 MRS. PARTINGTON: I think if we met the Central  
11 Hudson test we would then have to create more of a  
12 legislative history in this case than we had to in the gun  
13 case. In the liquor case, you have a history prepared for  
14 us. It's out there. It's been established by --

15 QUESTION: Of course, part of the history in the  
16 liquor case is that the mom and pop stores want this  
17 legislation every badly.

18 MRS. PARTINGTON: They intervened on the side of  
19 the State, correct. The State's interest is in the  
20 constitutionality of this law, and we believe it is,  
21 because it is a reasonable belief, and beforehand I was  
22 setting out those factors that supported the State's  
23 reasonable belief.

24 QUESTION: And food products that, eaten in too  
25 great an amount, cause diseases, or could lead to

1 overweight, or --

2 MRS. PARTINGTON: For instance, like red meat.

3 QUESTION: Or -- I don't -- anything that's  
4 carcinogenic in large doses to small animals. I mean, I'm  
5 looking for the -- is there a stopping point, or is this  
6 to authorize lots of State rules that would in effect  
7 inhibit price competition?

8 MRS. PARTINGTON: I think at this point in  
9 history, alcoholic beverages stand in a unique position,  
10 because of the history and because it's the only grant of  
11 power to the States, the Twenty-First Amendment, to  
12 regulate --

13 QUESTION: But doesn't that just give States  
14 more power within the Interstate Commerce Clause area?  
15 Has this Court ever said that the Twenty-First Amendment  
16 gives the States more power to interfere with the First  
17 Amendment?

18 MRS. PARTINGTON: No, you have not. However, in  
19 the Larkin case, which was a First Amendment case, not a  
20 free speech case, you did state that in the area of --  
21 that Larkin was concerned with, the State's regulation of  
22 alcoholic beverages deserves great deference.

23 And I would say at this point the Twenty-First  
24 and First Amendments are both part of the same  
25 Constitution, as was said in the Craig v. Boren case, and

1 a reasonable accommodation was made here that is  
2 sufficiently narrow, I think --

3 QUESTION: I don't see what the Twenty -- the  
4 Twenty-First Amendment seems to me entirely irrelevant.  
5 The only operative provision here is, the transportation  
6 or importation into any State for delivery or use therein  
7 of intoxicating liquors in violation of the laws thereof  
8 is hereby prohibited.

9 MRS. PARTINGTON: Well, as I was saying --

10 QUESTION: I mean, I don't see what power that  
11 gives to the States. It just says that it's unlawful to  
12 bring into the State something that's against the State's  
13 alcohol laws, but they're not given any new powers over  
14 alcohol.

15 MRS. PARTINGTON: And I think it might be a  
16 mistake to limit my position to saying the Twenty-First  
17 Amendment gives us power. It gives a lot more. It -- the  
18 Twenty-First Amendment should weave in and out of the  
19 Central Hudson test, and the alcoholic beverages should  
20 weave in and out of the Central Hudson test, again, as  
21 providing a history --

22 QUESTION: I don't think this Court has ever  
23 said we weave the Twenty-First Amendment in and out of  
24 some First Amendment analysis. I think that would be a  
25 disaster.

1           Can you win your case if the Twenty-First  
2 Amendment has nothing to do with it?

3           MRS. PARTINGTON: I believe so, Your Honor. I  
4 believe the Central Hudson test has been met by the State  
5 in this case irrespective of --

6           QUESTION: What do you say today is the State's  
7 ultimate interest here, to reduce consumption of alcohol?

8           MRS. PARTINGTON: The State's asserted interest  
9 in the statute is the promotion of temperance and the  
10 reasonable control in the traffic of alcoholic beverages.

11          QUESTION: Do you think it likely that a  
12 legislature, that the Rhode Island legislature would enact  
13 direct price control or raise taxes to do that, or does it  
14 have to depend on this very indirect way of achieving that  
15 goal?

16          MRS. PARTINGTON: Well, I would have to disagree  
17 with the characterization of this as indirect, because I  
18 think as the Fourth Circuit recently said in the Anheuser-  
19 Busch case, and this Court said, marketing and advertizing  
20 are a direct link to consumption.

21          And in this case, and as taught in prior cases  
22 and decisions by this Court beginning -- I would refer to  
23 the Bates case, where this Court says that price  
24 advertizing often leads to dramatically lower prices for  
25 the consumer, and using the history of alcoholic



1 beverages, those opinions, our testimony --

2 QUESTION: But how far -- how many commodities  
3 has that spread to? You were asked about guns. What  
4 about butter? What is the line between what the State can  
5 discourage and what it can't?

6 MRS. PARTINGTON: I think the line would be  
7 those -- from my cases, alcoholic beverages is unique,  
8 because of, again, the regulatory history of this country  
9 and the social problems caused by alcoholic beverages, and  
10 the focus that the Constitution has had on alcoholic  
11 beverages -- two constitutional amendments.

12 This Court has mentioned other items and goods  
13 as, and we've discussed it in this case, as vices, and I  
14 think that --

15 QUESTION: Well, but surely that's up to the  
16 people of the State. I mean, the people of one State may  
17 really be dead against drinking too much, and people of  
18 another State may be vegetarians and they're really dead  
19 against people eating red meat.

20 Isn't that a matter of policy that the citizens  
21 of a State are able to adopt on their own, and what this  
22 State can do because it hates alcohol, surely another  
23 State should be able to do because it hates red meat.  
24 That's up to the citizens of the State, isn't it? I mean,  
25 is there something up in the sky that says alcohol has to

1 be hated and red meat doesn't?

2 MRS. PARTINGTON: I think the history of  
3 alcoholic beverage regulation and the general police  
4 powers, I think --

5 QUESTION: If that's so, if we accept the  
6 uniqueness argument -- and I think you can make a very  
7 good uniqueness argument here. Gambling is in a different  
8 category because the States are going on a binge of  
9 supporting gambling, they're running it. Red meat does  
10 not seem to have found very much disfavor, and so on and  
11 so on. I think you've got a good argument for uniqueness.

12 If we buy the uniqueness argument, are we in  
13 effect saying that Posadas was incorrectly decided, so  
14 that we would have to overrule -- in effect we would be  
15 implicitly overruling that?

16 MRS. PARTINGTON: No. I think Posadas  
17 explicitly found that since the State, or since Puerto  
18 Rico could ban gambling altogether, the restriction on  
19 speech was permissible as long as the Central Hudson  
20 test --

21 QUESTION: Then why don't you take that as your  
22 argument here because Rhode Island could, in fact,  
23 preclude the importation and sale of any liquor  
24 whatsoever, it therefore can regulate its advertizing?

25 I mean, if the Posadas argument is good, why

1 isn't it good for you?

2 MRS. PARTINGTON: That has been one of the  
3 arguments of the State up until this point. However,  
4 footnote 2 in Rubin convinced me that perhaps to set out  
5 to prove that the Central Hudson test had been met was  
6 perhaps the wisest and simplest way to go about this case,  
7 and the State believes that the Central Hudson test has  
8 been met.

9 We also believe that the greater power to ban  
10 does include the lesser, but that we need not reach that  
11 point in this case today.

12 QUESTION: As part of your brief you say that  
13 price advertizing is the least informative speech  
14 concerning a product. If I were writing the opinion for  
15 the Court sustaining your position, I think that would be  
16 a most unconvincing beginning.

17 MRS. PARTINGTON: Let me try to explain what I  
18 was --

19 QUESTION: I was curious to know where you got  
20 that.

21 MRS. PARTINGTON: What I was trying to say was  
22 that it doesn't tell you about the product itself. It  
23 doesn't tell you what's contained in that bottle, or in  
24 that can, as did the information in Rubin. Rubin involved  
25 information about the product itself, and price

1 advertizing --

2 QUESTION: So you were not talking about price  
3 information on a scale of priorities of interest of the  
4 consumers.

5 MRS. PARTINGTON: No. I think that would be a  
6 mistake.

7 QUESTION: But if you say a fifth of Gilbey's  
8 Gin, you know what's in there.

9 (Laughter.)

10 MRS. PARTINGTON: Some people might.

11 As far as the quality of the product, the amount  
12 of alcohol in the product, the smoothness, the taste, no.  
13 That is different from price. Price does not tell you how  
14 good a product it is, how long it was in the barrel, et  
15 cetera. I think that's what I was trying to convey by  
16 that to distinguish the information in this case from the  
17 Rubin case.

18 QUESTION: You were not trying to convey the  
19 fact that price is not of vital interest to consumers of  
20 most products.

21 MRS. PARTINGTON: Absolutely not, and that takes  
22 us back to the reason and the basis for this statute, and  
23 that is what the testimony is here. Although the  
24 advertizing is questionable, the effect of price is not.

25 Thank you.

1 QUESTION: Thank you, Ms. Partington.

2 Mr. Lawson, you have 4 minutes remaining.

3 MR. LAWSON: I will waive the rebuttal.

4 QUESTION: May I ask you one question, though?  
5 The Eleventh Amendment always interested me, and in this  
6 case I notice the State was now a party but was not  
7 originally. How did the State get to be a party in this  
8 case?

9 MR. LAWSON: The State voluntarily stepped in in  
10 place of its administrator.

11 QUESTION: I see.

12 MR. LAWSON: I think that the Eleventh Amendment  
13 would not be a problem where the State voluntarily --

14 QUESTION: And at what stage of the proceedings  
15 did they become a party?

16 MR. LAWSON: Sort of between the decision of the  
17 district court and the case reaching the First Circuit.

18 QUESTION: The appeal was taken in the name of  
19 the State, in other words.

20 MR. LAWSON: I think it was originally taken in  
21 the name of the liquor control administrator, but my  
22 memory of this is somewhat dim, but what happened is, I  
23 believe --

24 QUESTION: They voluntarily appeared rather than  
25 your bringing them in, is what you're saying.

1 MR. LAWSON: No, I definitely didn't bring them  
2 in. They came in and the State in fact -- what happened  
3 was, I think the question of the State coming in came  
4 about at the same time that a stay was being sought of the  
5 decision of the district court pending appeal.

6 QUESTION: Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lawson.

8 The case is submitted.

9 (Whereupon, at 10:59 a.m., the case in the  
10 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:*

44 LIQUORMART, INC. AND PEOPLES SUPER LIQUOR STORES, INC.,  
Petitioners v. RHODE ISLAND AND RHODE ISLAND LIQUOR STORES  
ASSOCIATION

CASE NO.: 94-1140

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

BY Ann Marie Federico

(REPORTER)