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The above-entitled case is set for oral

argument before the Honorable Justice of the United States

COURT on October 22, 1999 at 11:17 A.M.

APPEARANCE:

THOMAS C. GILBERTSON, Esq., Washington, D.C., on behalf of

the petitioner.

EDWARD C. MUMFORD, Esq., Washington, D.C., on behalf of

the respondent.

Deputy Clerk of the United States Supreme Court

Supporting the respondent.

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U.S. Supreme Court

Washington, D.C. 20543

202-462-2400

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 LOS ANGELES POLICE DEPARTMENT, :

4 Petitioner :

5 v. : No. 98-678 (2)

6 UNITED REPORTING PUBLISHING :

7 CORP. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, October 13, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:02 a.m.

14 APPEARANCES:

15 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 BRUCE J. ENNIS, ESQ., Washington, D.C.; on behalf of the
22 Respondent.

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25 Supreme Court U.S.

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1 PROCEEDINGS

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-678, the Los Angeles Police Department
5 v. United Reporting Publishing Corporation.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

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

11 California Government Code section 6254(f)(3)
12 requires Government agencies to provide access to the
13 addresses of arrestees and crime victims in only a few
14 instances, none of which include commercial solicitation.
15 The statute in this respect is similar to at least 80 laws
16 from around the country that limit access to a wide
17 variety of Government records, including campaign finance
18 reports, welfare records, accident reports, and even the
19 personal financial disclosure forms of the members of this
20 Court.

21 Respondent contends that subsection (f)(3) is a
22 speech restriction, but the text of the statute, which I
23 want to spend just a couple of minutes focusing on, shows
24 that plainly is not true, and it is reprinted in the
25 appendix to the blue brief at page 3.

1 One point to make at the outset is that
2 subsection (f)(3) limits access to only addresses, not any
3 of the other information that the State has about crimes
4 and about crime victims and about arrestees, but
5 subsection (f)(3), regarding the addresses of both the
6 victims and the arrestees --

7 QUESTION: Where is this in your brief, Mr.
8 Goldstein?

9 MR. GOLDSTEIN: The appendix to the blue brief,
10 Mr. Chief Justice, at page 3.

11 QUESTION: 3a? Okay, thanks.

12 MR. GOLDSTEIN: And subsection (f)(3) teaches
13 that with respect to addresses of both crime victims and
14 arrestees, the State grants access only, quote, where the
15 requester declares, under penalty of perjury, that the
16 request is made for one of five specified purposes. Those
17 are, a scholarly, journalistic, political, governmental
18 purpose, or investigation purposes by a licensed private
19 investigator.

20 QUESTION: Well, could the respondent just
21 publish this in a little newspaper format and claim a
22 journalistic exception?

23 MR. GOLDSTEIN: That has never been tested. In
24 fact, the respondent requested a declaration under State
25 law that they did have the right to publish this under the

1 journalistic provision. It's always been an open
2 question. The lower courts never reached it.

3 QUESTION: So the statute permits the automatic
4 release of the name of an individual. It's just his
5 current address that can't be given?

6 MR. GOLDSTEIN: That is exactly right, Mr. Chief
7 Justice, with respect both to the victim and to the
8 arrestee.

9 QUESTION: Well, the Jail Mail Register that's
10 in the record, isn't that an illustration of what looks
11 like a newspaper but really has a mailing list, or --

12 MR. GOLDSTEIN: Well, I think the difficulty is,
13 and again the lower courts never reached this question and
14 it would remain open on remand, is what precisely
15 respondent wants to do with the addresses, with respect to
16 the Jail Mail Register.

17 If you look at the end, the last page of the
18 different instances of the Jail Mail Register that are
19 published, respondent isn't using the addresses for a
20 journalistic purpose. It is there simply creating an
21 advertisement, just in the same way that in 44 Liquormart
22 the advertisement of the prices in that case and other
23 commercial speech cases were themselves not journalistic.

24 QUESTION: So if the purpose controls, then
25 assume this hypothetical. An attorney goes to lunch with

1 the publisher of the Los Angeles Times or the San
2 Francisco Chronicle. He says, you know, it's really very
3 helpful that you're printing the names and addresses of
4 the people who have been arrested for drunk driving,
5 because I use that to solicit, or to give alcohol
6 counseling or something.

7 I take it henceforward under the statute the
8 newspaper could not publish those names because it's being
9 used indirectly for that purpose.

10 MR. GOLDSTEIN: No, and let me -- that is
11 exactly the distinction that I wanted to get to with the
12 remainder of subsection (f)(3) in the text. There is a
13 misunderstanding by respondent in this facial challenge
14 about what the statute does and what about -- what use,
15 indirectly or directly, to sell a product or service is.

16 The statute and the language that respondent
17 focuses on, where it says that address information
18 obtained pursuant to this paragraph, i.e., if you are
19 trying to get it for one of the five permitted purposes,
20 it shall not be used directly or indirectly to sell a
21 product or service, is simply an enforcement provision.

22 It says that you cannot have access if you
23 intend to get it for a legitimate purpose, such as
24 journalism, but --

25 QUESTION: Are you referring to a specific

1 section of the statute now?

2 MR. GOLDSTEIN: We're still within -- Mr. Chief
3 Justice, still within (f)(3), the last sentence. It's
4 over on page 4a now.

5 QUESTION: Okay.

6 MR. GOLDSTEIN: It rolls over and it says, if
7 you get it, or are trying to get access for one of the
8 five permitted purposes, say, journalism in your
9 hypothetical, Mr. Justice Kennedy, you get it for
10 journalism, you can't then use it to sell a product or
11 service. It does not apply to third party end users, the
12 attorney in your hypothetical. It is only enforceable
13 against the person who makes the representation under
14 perjury that they are not going to -- that it is not going
15 to be used for the purposes of selling a product or
16 service.

17 QUESTION: You say it's not going to be used by
18 that person.

19 MR. GOLDSTEIN: No --

20 QUESTION: But that statute doesn't say that.

21 MR. GOLDSTEIN: No, that -- with respect, the
22 Los Angeles Times -- and let me just take one quick
23 detour. No paper that we're aware of in Los Angeles
24 actually prints this information on the question of
25 irrationality, but the Los Angeles Times is publishing it

1 for a journalistic purpose. The principal reason is to
2 educate the public. That's why some papers do have police
3 blotters.

4 We do not interpret the statute, at the point
5 that the Los Angeles Times knows that some lawyer is using
6 the information, to prohibit them from having access. The
7 statute is directed at bulk requesters such as
8 respondents, or individual law firms, or chiropractors, or
9 driving schools who come in and just have a commercial
10 purpose for requesting access. It is only enforceable
11 against the individual requesting access, who has to make
12 a declaration, under penalty of perjury, of what their
13 purpose in asking for the information is.

14 QUESTION: Among political -- permitted purposes
15 is political, and I think I have some idea of what these
16 others encompass, journalism, scholarly, but what is
17 political?

18 MR. GOLDSTEIN: Political was added at the same
19 time as the amendment for adding governmental purposes,
20 and it was, as we understand it, simply to make clear that
21 it wasn't simply the Government then existing. It could
22 include partisan politics, electoral campaigns and the
23 like. It was just to draw out a further distinction
24 between current governments and the possibility of --

25 QUESTION: Is this a State statute,

1 Mr. Goldstein, or an ordinance?

2 MR. GOLDSTEIN: It is a State statute, Your
3 Honor.

4 QUESTION: I'm still not totally clear on your
5 explanation. Are you saying that when someone gets the
6 information and, say, lists 30 people, as I see on page --
7 whatever this is, page 4 of the record, there's a big list
8 of names and addresses, that what he has to promise is
9 that his purpose in listing all these names and addresses
10 and sending a piece of paper with that list to various
11 people who pay, he has to promise that his purpose is not
12 to get paid for the list?

13 MR. GOLDSTEIN: It is not to sell a product or
14 service, that is exactly --

15 QUESTION: So does the product or service mean,
16 in other words, I who print this paper know that people
17 want to get lists of names and addresses of victims --

18 MR. GOLDSTEIN: No.

19 QUESTION: -- and therefore I will sell them
20 this list, and I put a few articles in as a kind of cover-
21 up. Is that the idea?

22 MR. GOLDSTEIN: What happens here, to focus on
23 this exact example --

24 QUESTION: Yes.

25 MR. GOLDSTEIN: -- is that if respondent wants

1 the names to advertise in the Jail Mail Register that it
2 has a product or service -- and it does. It has a dial-
3 up service where you can get access to 3, on average, 350
4 names and addresses of arrestees every single day from Los
5 Angeles alone, not to mention the 180 other law
6 enforcement agencies.

7 If you are a newspaper, or you are the local
8 television station, and you have a journalistic purpose,
9 then you have a right to get access, but if your purpose
10 in doing so is simply to sell a product or service, it
11 doesn't qualify.

12 And if I could just make one qualification, and
13 that is that there -- the only reason there is some
14 ambiguity here is that the statute was enjoined
15 immediately. The statute, under subsection 6253.4
16 contemplates that law enforcement agencies, local
17 governments, will issue further guidance specifying
18 exactly what the terms -- and you asked the question, what
19 exactly is political. There will be further guidance.

20 QUESTION: Well, had the statute never been
21 construed by the State courts?

22 MR. GOLDSTEIN: It has not. There is a specific
23 provision under which respondent or anybody else has the
24 right to sue us, and that is subsection 6258, in State
25 court saying, listen, I have journalistic purpose. The

1 Los Angeles Police Department won't give me the
2 information. They should, I have a right to attorney's
3 fees, and please order them to do so.

4 QUESTION: How did the Ninth Circuit go about
5 interpreting it, if there had been no State
6 interpretation?

7 MR. GOLDSTEIN: Improvidently, I think is the
8 first answer, but the --

9 (Laughter.)

10 QUESTION: So what's new?

11 (Laughter.)

12 MR. GOLDSTEIN: What -- I don't -- section 6254,
13 I don't think there's any question as between the parties
14 that in the first place the Ninth Circuit got the statute
15 wrong. Both the district court and the Ninth Circuit
16 said, under section 6254, anyone other than commercial
17 users can have access to this information. It was just
18 wrong.

19 You can't get information for employment, to
20 discriminate against arrestees on the -- in employment, or
21 for plain old nosiness, or if you're a chiropractor, or if
22 you want to offer a nonprofit service. They interpreted
23 the statute just plainly in conflict with its plain
24 meaning.

25 QUESTION: There's a different in being nosy and

1 being political?

2 (Laughter.)

3 MR. GOLDSTEIN: There is. There truthfully is.
4 If you just want to know what's going on in your
5 neighborhood and you don't have any other purpose behind
6 it, it's simply --

7 QUESTION: Well, I read through this list of all
8 the people who had been arrested in Sacramento. I didn't
9 know any of them.

10 (Laughter.)

11 QUESTION: What if a newspaper had a different
12 policy from the one that you tell us prevails, and simply
13 did publish this information as a matter of course, and
14 every day a reporter went down and requested it and got an
15 accurate list and so on, and the paper published it.
16 Would the paper be in violation of the statute?

17 MR. GOLDSTEIN: It would depend on the specific
18 facts, and to take them just as you say, if all that they
19 were doing -- say that the Los Angeles Times publishes
20 out -- publishes a special version for lawyers, and it
21 says, look, we've got everybody who's arrested for DUI, it
22 would be a much closer case, and I think what you would
23 see, honestly, is the California legislature addressing
24 that problem. There's nothing in the record to suggest --

25 QUESTION: Okay, but we've got to work with

1 what we've got here.

2 MR. GOLDSTEIN: Right.

3 QUESTION: Let's assume that the paper simply
4 publishes this in one section of its regular edition,
5 every day, a complete listing. Would it be in violation
6 of the statute?

7 MR. GOLDSTEIN: It would not, but the --

8 QUESTION: Why would it not, because when it
9 made out its affidavit, it would know perfectly well,
10 assuming the statute remained in its present form, that
11 individuals such as the respondent here would use the
12 information and in any event would know that the purveyors
13 of services would use the information, so how could it
14 make out the affidavit?

15 MR. GOLDSTEIN: Because on the text of the
16 statute the sentence about selling a product or service
17 does not limit the scope of the first sentence. If you
18 have a journalistic purpose, you are not then limited by
19 the fact -- in interpreting what we mean by journalistic,
20 by the fact that you know there will be an end user.

21 QUESTION: Well, why isn't it journalistic to
22 provide information to people who are interested in
23 communicating with arrestees and victims? Why isn't that
24 at the core of journalism?

25 MR. GOLDSTEIN: Because that is not -- the press

1 and the core of journalism, under the constitutional
2 tradition that we have, and what we think of as police
3 blotters, is to simply educate the public about what is
4 going on in the community. That's what the record in this
5 case --

6 QUESTION: So then you have to identify your
7 journalism by the generality of the publication. If
8 somebody puts it in a -- if the Los Angeles Times puts a
9 separate section of this in its paper, surrounded by world
10 news and State news and so on, it's okay, but a -- an
11 individual who claims to be a journalist only with the
12 more limited audience that your alternative hypo of the
13 lawyer's paper and so on published, that, in fact, would
14 run afoul of this?

15 MR. GOLDSTEIN: In the main, if you are
16 publishing a police blotter, in the traditional,
17 journalistic sense that is a journalistic purpose.

18 Let me again --

19 QUESTION: Why do you say that only a police
20 blotter is journalistic? I think those who have trade
21 publications are journalists. For a narrower audience,
22 but I don't know how you can somehow -- journalism does
23 not include all of the press?

24 MR. GOLDSTEIN: Journalism includes the press.

25 QUESTION: Well, the press is broken down into

1 little subsets. I mean, if a trade journal is using these
2 names to sell the trade journal, just as a general
3 circulation newspaper is putting the names on the police
4 blotter down in order to sell the newspaper, I don't see
5 any difference between the two situations.

6 MR. GOLDSTEIN: The State and the legislative
7 history explains this. It was trying to preserve an
8 instance where you are simply attempting to educate the
9 public about what is going on with arrests. But let me
10 just specify again that we are now dealing with a problem
11 of statutory construction, and not constitutional mandate,
12 and this is a facial challenge to the statute. It's never
13 been applied to respondent.

14 QUESTION: May I ask --

15 QUESTION: Newspapers aren't trying to educate
16 the public. They're trying to sell newspapers.

17 MR. GOLDSTEIN: Newspapers would not exist if
18 they couldn't sell newspapers, but they are trying to
19 educate the public, with respect.

20 QUESTION: May I ask you a question about the
21 proceedings in the lower court? I notice there's been a
22 change in counsel up here and so forth.

23 Did the -- your client take the position in the
24 district court and the court of appeals that the Central
25 Hudson test did not apply at all?

1 MR. GOLDSTEIN: No. The Los Angeles --

2 QUESTION: They didn't make the basic argument
3 you're making now, in other words.

4 MR. GOLDSTEIN: They did. The Los Angeles
5 Police Department's briefs below invoke all of this
6 Court's decisions about right to access, and about how the
7 standard is much lower. We do say in the lower court
8 briefs that this can be analyzed under Central Hudson, but
9 we specify that the court has to give substantial more
10 leniency --

11 QUESTION: What does Central Hudson have to do
12 with our access cases? I think if you assume that Central
13 Hudson applies, you're assuming it's an abridgement of
14 speech case rather than a denial of access case.

15 MR. GOLDSTEIN: Well, the Los Angeles Police
16 Department said below, and believes strongly here, of
17 course, that this is an access case, that all that we
18 do --

19 QUESTION: And what of our cases ever said
20 Central Hudson applies to an access case?

21 MR. GOLDSTEIN: I agree that it -- none.

22 QUESTION: But they did agree below that Central
23 Hudson was the test. It seems to me they therefore were
24 not even claiming it was not an access case, or that it
25 was an access case.

1 MR. GOLDSTEIN: With respect, on a full reading
2 of the Los Angeles Police Department's briefs below, this
3 case -- this Court's cases like Houchin, Zemel and the
4 like are cited and fully relied on.

5 QUESTION: I now see how they got into this, and
6 I -- I read the last sentence on 4a, where, to think that
7 at its heart was case 1, not case 2. Now, this is case 1.
8 I am not a journalist. I am a businessman, and my
9 business is to sell addresses of victims to people who
10 will pay me for such a list. I've never published a
11 newspaper or anything that looks like a newspaper in my
12 life.

13 I thought that was at the heart of this
14 provision, and I thought secondarily was in the provision
15 somebody who advertises for my product. Now, you're
16 saying that it's the second case that this is about, and
17 you don't care about the first case.

18 MR. GOLDSTEIN: Under the hypothetical, if you
19 simply want to sell addresses of arrestees and victims,
20 without regard to what somebody else is going to do with
21 them, you just want to sell them, you don't know what
22 they're going to do, you are prohibited from receiving
23 access under the first sentence of subsection (f)(3)
24 because you don't have one of the five --

25 QUESTION: Well then, I must also execute an

1 affidavit, must I not --

2 MR. GOLDSTEIN: You must.

3 QUESTION: -- that I am not going to, as an
4 enforcement device, I, or -- the language covers it only
5 awkwardly, but I who want to sell to other people
6 addresses of victims and have never published a newspaper
7 must execute that declaration that I am not -- want the
8 information to sell a product or service, namely my
9 product or service that I've just described.

10 MR. GOLDSTEIN: And it is enforceable only as
11 against you.

12 QUESTION: Yes, but I've now pushed you into
13 this, because it seems to me that maybe that wasn't what
14 this case was about. I mean, is this case, or is the
15 statute about my heartland case of a person who's not a
16 journalist but wants to sell addresses of victims to other
17 people? Or is the statute about something that looks like
18 a newspaper and advertises -- you know, you can also get
19 more addresses?

20 MR. GOLDSTEIN: No, absolutely not. The
21 heartland of the statute is about the person who wants to
22 get the 350 addresses and names every single day which
23 aren't published anywhere else. The hypothetical has come
24 up about a potential ambiguity in the statute about who is
25 a journalist, which has never been tested in this case,

1 and we don't understand to be presented here.

2 What we are concerned about is that there are
3 massive wholesale invasions of privacy that occur in the
4 status quo. In a sense, our Freedom of Information Act
5 has been hijacked into something that it was never
6 intended to do, which was to educate people about what the
7 Government was doing. And if I could --

8 QUESTION: Do you accept the distinction that
9 the Government's brief makes between what I think it
10 called an intrinsic speech content on the one hand and
11 information which is useful only for some purpose, e.g. in
12 this case finding targets for solicitation? Do you accept
13 that distinction, and does your case rest upon it?

14 MR. GOLDSTEIN: We do accept the distinction
15 insofar as it means that respondent's sales of addresses
16 aren't subject to the highest level of First Amendment
17 scrutiny. They aren't the press. They may not be --

18 QUESTION: No, but that -- your argument for
19 that is that it's part of a commercial enterprise, right?
20 Isn't that why?

21 MR. GOLDSTEIN: No.

22 QUESTION: No.

23 MR. GOLDSTEIN: Just simply on the perspective
24 of them transmitting data. Information is a commodity to
25 respondent. It has no intrinsic value.

1 QUESTION: Well, information is a commodity to
2 the New York Times.

3 MR. GOLDSTEIN: Information is a means of
4 communicating an idea for the New York Times.

5 But to get to the second half, possibly the more
6 important part of your question --

7 QUESTION: But I mean, I don't -- I don't know
8 that that is so. One of the things the New York Times
9 publishes are the names of public officials who are doing
10 things. That is not, that I can see, analytically
11 different from publishing the name of somebody who has
12 just run a red light and gotten pinched for it. What is
13 the distinction?

14 MR. GOLDSTEIN: It is in a larger context,
15 even -- and the same is true of a police blotter. They
16 are trying to communicate what is going on in the
17 community, but again, I really need to get to the second
18 part of your question.

19 QUESTION: Well, has the respondent ever claimed
20 to be a journalist?

21 MR. GOLDSTEIN: Respondent did request a
22 declaration in the district court, and the district court
23 never got to that part of the case, yes.

24 To get to the second part of your question,
25 Mr. Justice, this case does not turn at all on that

1 distinction because it is an access restriction. It is
2 enforceable only as an access restriction. The only thing
3 that we do is --

4 QUESTION: Well, but one of the reasons why -- I
5 mean, we've got to make a -- basically a category
6 judgment, whether it's an access restriction or whether
7 it's a speech restriction, and one of the reasons upon
8 which we may make that categorization, it seems, is the
9 reason behind my question. So simply to say, well, this
10 is an access case, I think begs the question.

11 MR. GOLDSTEIN: Taking -- take your question to
12 the furthest. Assume that respondent was the Los Angeles
13 Times. It is fairly clear, and the lower courts agreed,
14 that we could limit access to everyone, including the Los
15 Angeles Times. This is a question of differentiation
16 only.

17 QUESTION: Thank you, Mr. Goldstein.

18 Mr. DuMont, we'll hear from you.

19 ORAL ARGUMENT OF EDWARD C. DuMONT

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

21 SUPPORTING THE PETITIONER

22 QUESTION: Mr. DuMont, could I follow on the
23 question just asked, because it just -- for me, it is
24 difficult to view this as an access case rather than a
25 speech restriction case once you have a provision in the

1 law that says that journalists can obtain the information.

2 I mean, that in effect is saying this
3 information can go out to the public at large. There is
4 no attempt to limit the -- you know, as there would be in
5 a need-to-know situation, where certain information is
6 only given to -- State secrets and so forth. That seems
7 to me an access restriction.

8 But once you give it to a newspaper you're
9 saying the whole world can know this. How can you
10 possibly think this is an access restriction?

11 MR. DuMONT: Well, I think your question
12 certainly gets to the heart of the case, which is that
13 this case is about, in the first instance, access, who can
14 have access.

15 In the second instance, it does impose a use
16 restriction on people who are allowed to have access under
17 the statute. So fine, let's start with the restriction,
18 the condition on access, and the cases that your question
19 brings to mind are, for instance, the rape shield cases if
20 you want to call them that, BJJ, Cox Broadcasting, cases
21 where information was released to the general public, is
22 the way the Court characterized it, and in fact what the
23 Court said was that it was released without qualification.

24 That was crucial to the Court's -- the
25 majority's holding in Florida Star v. BJJ. I think I'd

1 like to focus on that, because what the Court did not say
2 is that when the Government has information that it is
3 under no strong form of constitutional compulsion to make
4 public, generally public, the Court did not say that it
5 may not condition its release of that information in
6 certain ways.

7 And what California has done here is to say,
8 look, we have some information in our files. We would
9 like to make it available for certain purposes but not
10 others.

11 That is not a general release even when you give
12 it to the press, because what they've said to the press
13 is, you, too, may use it for journalistic purposes but not
14 to sell a product or service, and let me give content to
15 that by saying in our view what that would mean is, the
16 L.A. Times can print the addresses, but it can't use them,
17 for instance, for a subscription drive.

18 QUESTION: But somebody who reads the L.A. Times
19 can use them for all of those commercial purposes.

20 MR. DuMONT: That's right, and that gets to your
21 question of what level of scrutiny we're under, because
22 normally what we would say is, the legislature can address
23 a problem that it perceives one step at a time, and it may
24 address the problem that it perceives, and I -- it's fair
25 to say on this record and from the legislative history

1 that the problem that was perceived was not that
2 journalists were printing those addresses, and that that
3 was invading people's privacy, but that commercial
4 services were gathering them and selling them to
5 commercial solicitors.

6 Now, if we were in a world of heightened -- of
7 the most heightened First Amendment scrutiny, presumably
8 that would not be enough, because we don't say the
9 Government can proceed one step at a time normally in a
10 true heightened scrutiny case, but this is not a true
11 heightened scrutiny case, because this is not a case where
12 what the Government has said is, you have information and
13 you may not publish it.

14 What the Government has said is, we have
15 information, and you may have it, but only for certain
16 purposes, and only if you tell us you won't use it in this
17 way, and that is an entirely different thing.

18 QUESTION: Could the Government, or could the
19 State pass a statute which said, we have -- anyone can get
20 access to this information, but it's a felony if you use
21 it for any purpose other than scholarly, journalistic,
22 political, governmental?

23 MR. DuMONT: What BJB and Cox Broadcasting
24 suggests is that certainly in the -- when you are dealing
25 with the institutional press, it may very well not be

1 enough to have a restriction set off somewhere else in a
2 statute which puts the onus on the reporter, having gotten
3 something which is facially perfectly available and says
4 press release on the top, for that reporter to know that
5 there's another restriction on access.

6 What we have here is something that before he
7 gets the, or she gets the information, the reporter signs
8 a paper --

9 QUESTION: So what do you do with my statute?
10 I'm not quite clear where you come out on my -- you say
11 it's probably unconstitutional?

12 MR. DuMONT: I say if it's -- applies to the
13 press, it is probably unconstitutional under BJF, or at
14 least it's constitutionally problematic.

15 QUESTION: Excuse me, only if it applies to the
16 press? I don't -- is there some special status of the
17 press under the First Amendment? I --

18 MR. DuMONT: The Court has been reluctant to
19 recognize a special status.

20 QUESTION: Yes, so I don't know -- I don't know
21 of any, and it seems to me Joe Six Pack can do anything
22 with the information that the press ought to be able to do
23 with it.

24 MR. DuMONT: Well, the fundamental distinction
25 that we draw out of BJF and Cox Broadcasting on this point

1 is this one, that it may be unfair, the Court has said, to
2 give somebody something that is facially perfectly
3 available but then say, gotcha, there's another piece of a
4 statute somewhere that you may not have known about that
5 criminalizes --

6 QUESTION: Well, I don't think that was the
7 point of Justice Kennedy's -- he wasn't talking about
8 tricking. He was talking about saying, everybody can have
9 the information, but you can only use it for particular
10 purposes. Is that really any different from this law,
11 because when you say the press can have it you say anybody
12 can have it --

13 MR. DuMONT: We -- well --

14 QUESTION: -- but they can only use it for
15 certain purposes.

16 MR. DuMONT: And we think that is perfectly
17 permissible. The question is, can the Government in one
18 form or another, with sufficient safeguards to make sure
19 that it is not tricking or hoodwinking anybody, put
20 conditions on the release of information in its files?
21 The answer is yes. It's done in a variety of Federal
22 statutes. It's done in a variety of State statutes, and
23 we think --

24 QUESTION: It's a condition subsequent on the
25 use of information that's in, within a wide domain. I've

1 just never seen a case --

2 MR. DuMONT: No.

3 QUESTION: -- like this, either for you or
4 against you, I must admit.

5 MR. DuMONT: With respect, it is a condition
6 precedent to getting the information.

7 Now, let me just suggest a way in which this
8 case could be entirely different. Suppose the statue
9 said, we don't think that soliciting people is a good idea
10 when they've just been arrested, so no matter where you
11 got the address, you may not send a solicitation. That is
12 a case this Court has seen before, and it's one that's
13 been very problematic.

14 This doesn't say that. It says, if you have the
15 address because you did the spadework yourself, you hung
16 around the courthouse, you knew who was arrested, however
17 you got it, if you had that address, you may sell it, you
18 may use it to send information, you may do whatever you
19 want with it, but you may not get that address from public
20 records, compiled under compulsion for public purposes,
21 and use it for a purpose that the State legislature of
22 California has determined is not -- is out of balance with
23 the privacy invasion that it causes. That's a standard
24 sort of legislative determination about what use may be
25 made of Government information and Government files, and

1 it doesn't --

2 QUESTION: Mr. DuMont, could a State in a KQED
3 type situation say, we're going to give investigative
4 journalists access to our prisoners to interview them, but
5 nobody else? I mean, the notion that you can't give
6 something to the press -- if you give it to them, you have
7 to give it to everybody, how would it work in that
8 context, if the State is not obliged to do this, but
9 decided it wanted to let investigative journalists have
10 interviews with prisoners, but nobody else?

11 MR. DuMONT: Well, I think particularly in
12 contexts where there are what amount to constraints on
13 quantity -- I mean, you can't have everybody traipsing
14 through the prisons, so when you have a constraint on
15 quantity, or there's a limited number of seats in a
16 courtroom, you may make certain kinds of what would
17 normally be neutral but I think can probably favor the
18 press in some circumstances.

19 The members of the Court have suggested you
20 could favor the press in that circumstance, and I think
21 that would be a perfectly sensible thing to do.

22 The important thing here is, I think, to
23 emphasize that no one is restricting United Reporting's
24 ability to speak in any way that has to do with its own
25 speech that it can -- an unconstitutional condition case,

1 for instance, is about someone who is at liberty to speak
2 an idea that he has from some other source and is
3 prohibited from doing that because the Government says,
4 well, I won't give you a tax exemption, or I won't give
5 you employment if you exercise your otherwise freely
6 exercisable right to speak.

7 Here, United Reporting is not in a position to
8 exercise that right unless it gets this information from
9 the Government. Now, either it has a right to get that
10 information --

11 QUESTION: As a practical thing, as a practical
12 matter, is there a difference? I mean --

13 MR. DuMONT: Yes.

14 QUESTION: -- I've sat in courts -- I mean,
15 trial courts a lot of the time and I -- people come before
16 the courts for arraignment, and I don't know that their
17 addresses are mentioned, so that I don't know that there's
18 a practical way that, en masse, this kind of information
19 really could be obtained unless it's obtained from the
20 police.

21 Maybe there is, but I -- so that's why it seems
22 to me the practical effect of this may be the same thing
23 as an absolute denial.

24 MR. DuMONT: There are a variety of kinds of
25 information that the Government may have a practical

1 monopoly or a near monopoly on, and what I would suggest
2 is, for instance, the names of people who have HIV or AIDS
3 may be --

4 QUESTION: But what about my question? What
5 about the names of these people? Is there a practical way
6 to get this information en masse, except by getting it the
7 prohibited way?

8 MR. DuMONT: En masse, probably not, the same
9 way there is not to get the list --

10 QUESTION: Yes, so that as a practical matter,
11 this is a prohibition on a form of commercial speech. I
12 mean --

13 MR. DuMONT: No. That's --

14 QUESTION: -- that's the practical effect of it,
15 it seems to me.

16 MR. DuMONT: It is a public restriction which
17 was undertaken with the consciousness that it would not
18 facilitate a certain kind of commercial speech, and that
19 is --

20 QUESTION: Right, but I think -- and I don't
21 want to put words in your mouth, but I think you are
22 conceding that the argument that they can use it if they
23 get it from any other source really does not meet the
24 objection, because the objection is that there is a
25 category of commercial speech which in fact is being

1 prohibited by the prohibition on this source of supply,
2 and I think you agreed that in practical terms that
3 argument is true, sound.

4 MR. DuMONT: What I do not agree with is that
5 simply because the Government may have a practical
6 monopoly on compelling the compilation of the
7 information -- and again I would go to the case of public
8 health. There may be things the Government compels you to
9 disclose for compelling public purposes, but it ought not
10 to be the rule that the First Amendment then requires that
11 the Government either disclose that, or, if it disclose it
12 at all, disclose it completely to the winds.

13 QUESTION: Well, that's -- I mean, are you
14 conceding that this -- I mean, I don't know, maybe it's
15 obvious -- skip it. The light's on.

16 MR. DuMONT: Thank you.

17 QUESTION: Thank you, Mr. DuMont.

18 Mr. Ennis, we'll hear from you.

19 ORAL ARGUMENT OF BRUCE J. ENNIS

20 ON BEHALF OF THE RESPONDENT

21 QUESTION: Mr. Ennis, as I read your brief, you
22 not only concede -- contend that the limitations here on
23 potential use are bad under the Constitution, but that the
24 Los Angeles Police Department could not, consistently with
25 the Constitution, have withheld this information from --

1 have refused this information to everybody.

2 MR. ENNIS: Chief Justice Rehnquist, it is not
3 essential to our argument whether the LAPD could withhold
4 this information from everyone. The key to our argument
5 is, this statutory scheme requires First Amendment review
6 because it discriminates between speakers in order to
7 reduce the amount of commercial speech.

8 QUESTION: Then I gather pages 35 through 49 of
9 your brief were not really essential.

10 MR. ENNIS: Not to win this case. They are
11 additional arguments why we could win this case if we
12 don't win on the narrower ground. Our narrower ground is
13 that, regardless of the form of the law, any law that
14 discriminates between speakers in order to reduce a
15 category of constitutionally protected speech requires
16 First Amendment review.

17 The Government does not claim that this
18 discrimination is necessary in order to preserve any
19 scarce resource --

20 QUESTION: But Mr. Ennis, may I stop you at that
21 first point, because if you regard this case as one where
22 there is no right of access at all, unless the Government
23 chooses to give it, then the Government's choice to give
24 it to some is increasing speech where there would have
25 been none before, so I think it's really important to

1 address the Chief's question. Are we to assume for
2 purposes of this case that the Government could say,
3 nobody gets this information?

4 MR. ENNIS: Justice Ginsburg, I think that's a
5 very difficult question, and it's not necessary to resolve
6 that question here.

7 As KQED itself makes clear, the Government there
8 could have excluded everyone from coming into the prison,
9 but as Justice Stewart's concurring opinion, which made
10 the plurality, stresses, although the press does not have
11 a superior right of access above and beyond what the
12 prison accords to the public, once the prison accords an
13 access right to the public, the press has an equal right
14 of access unless there is a strong justification for the
15 discrimination.

16 Equality of access, once the prison has opened
17 its doors to some, was the key concept in KQED. That's
18 our case.

19 QUESTION: But I don't understand why you don't
20 answer Justice Ginsburg's question directly. Could the
21 Government say, nobody is going to be given the addresses
22 of crime victims, period?

23 MR. ENNIS: Your Honor, for the --

24 QUESTION: And if not, why not?

25 MR. ENNIS: For the reasons --

1 QUESTION: Why isn't that a pure access issue?

2 MR. ENNIS: For the reasons we list in our
3 brief, it is our view that in this area, arrests, a total
4 denial of access would be highly constitutional suspect.
5 Here's why. The Government, you must remember, is the one
6 who has arrested these individuals, and if it's denying
7 access in order to prevent lawyers from gaining access to
8 assist and defend them against the Government itself,
9 that's an access question in which the Government has a
10 conflict of interest and I think might violate the
11 Constitution, but the Court doesn't have to go there.

12 QUESTION: Under what holding of this Court? I
13 mean, this is a far-out argument, and I want to know --

14 MR. ENNIS: Justice O'Connor, there is --

15 QUESTION: -- how you back that up.

16 MR. ENNIS: -- there is no specific holding of
17 this Court --

18 QUESTION: No.

19 MR. ENNIS: -- which you could apply to say, as
20 a rote matter, we would win that general access point.

21 QUESTION: Victimless --

22 MR. ENNIS: But there are holdings of this
23 Court which make clear that once the Government has opened
24 its doors to broad access, it cannot discriminate in
25 access without a governmental interest that is unrelated

1 to the suppression of expression.

2 If you look, for example --

3 QUESTION: In what case -- do you cite them?

4 MR. ENNIS: Well, two cases I think are quite
5 instructive, Justice Kennedy. In Discovery Network this
6 Court applied intermediate scrutiny where "the burden on
7 commercial speech was imposed by denying the speakers
8 access to public property." Here --

9 QUESTION: No, but that wasn't access to the
10 information.

11 MR. ENNIS: No. Here, the burden on commercial
12 speech is imposed by denying the speaker access to
13 information, and that brings me to the second case,
14 Justice Stevens.

15 QUESTION: Well, before you get to the second,
16 I'm stuck on the first. That is, is my case 1 -- you
17 remember my case 1? It was simply the person who sells
18 information.

19 MR. ENNIS: I do, Justice Breyer, and the answer
20 to your question is both.

21 QUESTION: No, no --

22 QUESTION: I don't remember his case 1.

23 (Laughter.)

24 QUESTION: I'm not repeating --

25 QUESTION: I don't remember his case 1. Would

1 you give me his case 1?

2 (Laughter.)

3 QUESTION: I'm not repeating my own question.

4 What I wanted to know is --

5 (Laughter.)

6 QUESTION: -- Is that commercial speech? I
7 mean, I'm thinking that probably three-quarters of the
8 gross national product consists of businesses selling, in
9 part at least, pieces of paper that have words on them,
10 and I want to know if, in your opinion, all of that counts
11 as commercial speech.

12 MR. ENNIS: Not at all.

13 QUESTION: All right. If that isn't, why is my
14 case 1?

15 MR. ENNIS: Let me first try to say that it is
16 our view, which we briefed, that all of United Reporting's
17 speech is fully protected speech. United Reporting's
18 speech is not an advertisement saying, buy my journal. It
19 is selling the information the same way the New York Times
20 or the Los Angeles Times sells the information.

21 QUESTION: That's why I'm talking about my
22 case 1. It is a facial challenge, as I said. I thought
23 it was aimed at case 1, and that's what I'm trying to --

24 MR. ENNIS: Here's why -- Here's why Justice
25 Breyer, because there are two parts to this statute, and

1 even -- as they say in their brief, petitioner says in its
2 brief expressly, even if United Reporting gets access to
3 address information for a legitimate journalistic purpose,
4 assuming that the Jail Mail Register is a legitimate
5 journal, it cannot then sell that information to its
6 subscribers because it knows that its subscribers will use
7 that information to try and sell a product or service,
8 namely their service as attorneys, bail bondsmen, and the
9 statute prohibits not only the direct use but the indirect
10 use.

11 The statute says, even once the information has
12 been lawfully disclosed, that information cannot be used,
13 quote, directly or indirectly to sell a product or
14 service.

15 QUESTION: Does that mean that this is a speech
16 case --

17 MR. ENNIS: Absolutely.

18 QUESTION: -- other than an access case?

19 MR. ENNIS: Absolutely.

20 QUESTION: Well --

21 QUESTION: It's --

22 QUESTION: Under your view the telephone book
23 would be commercial speech, I would think.

24 MR. ENNIS: No. No, I wouldn't think that,
25 because it's not an advertisement. It's containing

1 information, the same way in Dun & Bradstreet this Court
2 held that financial credit newsletters are fully protected
3 speech, the same way in SEC v. Lowe this Court held that
4 investment newsletters and stock quote letters are fully
5 protected speech.

6 QUESTION: What case --

7 MR. ENNIS: Ours is, too.

8 QUESTION: What case would you cite for the
9 proposition that once the information is within a wide
10 domain there can be no restrictions on its use? What case
11 would you cite?

12 MR. ENNIS: Well, I think there are many cases
13 that support that.

14 QUESTION: It sounds sensible enough, but I
15 can't think of a case.

16 MR. ENNIS: It's traceable to the discrimination
17 principle which applies across the board, and the second
18 case I wanted to mention in that regard that I think is
19 instructive is the Seattle Times v. Rhinehart case. That
20 case involved a court-ordered discovery order which
21 granted access to information to which the party otherwise
22 would not have access, but at the same time said, we are
23 going to grant you this access only if you use it for
24 purposes of this litigation, and not for general speech.

25 This Court applied intermediate scrutiny to

1 review that access use scheme. I can see no distinction
2 between that case and this on that point.

3 QUESTION: Except one was a judicial proceeding,
4 and this isn't.

5 MR. ENNIS: But it's Government action, Chief
6 Justice Rehnquist, making available information that is
7 not generally available. In fact, it follows a fortiori --

8 QUESTION: That case held that the restriction
9 was perfectly okay.

10 MR. ENNIS: Yes.

11 QUESTION: But have you got one that says the
12 restriction is not okay?

13 MR. ENNIS: The first question, Justice Stevens,
14 is whether this case gets any First Amendment review, and
15 those cases stand for the proposition, Discovery and
16 Seattle Times, yes, it gets First Amendment review.

17 The second question is on the merits, and there,
18 in Seattle Times the Court emphasized that it survived
19 intermediate scrutiny because the Government had a
20 legitimate Government purpose in limiting use that was
21 unrelated to the suppression of expression. It was for
22 use in facilitating litigation proceedings, and here --

23 QUESTION: Why isn't that so here, when the
24 purpose put forward is, we want to shelter these people
25 not simply from the bombardment, but from the real risk

1 that these records are going to be used to deny them
2 employment? The State is not just saying, we don't like
3 solicitors. It's saying that we want to protect this
4 class of people who are vulnerable.

5 Now, why isn't that a satisfactory reason?

6 MR. ENNIS: Justice Ginsburg, let me answer that
7 question by beginning to say first, the Government doesn't
8 claim here that address information is a scarce resource,
9 so this is not like the subsidy cases. It doesn't claim
10 that it needs to limit this information in order to --

11 QUESTION: Well, it is a scarce resource,
12 because the lawyers who are chasing clients can't get them
13 without the address information.

14 MR. ENNIS: Not in this sense, Justice Stevens.
15 In a subsidy context, the Government cannot give the same
16 dollar bill to every speaker who wants it, but it can give
17 the same address information to every speaker who wants
18 it. There's no scarcity problem here.

19 QUESTION: Is the Freedom of Information Act
20 also subject to First Amendment review if not
21 constitutionally required, in your opinion?

22 MR. ENNIS: I think any act is subject
23 to constitutional --

24 QUESTION: No, no, no, I mean it seriously.
25 That is to say, on your opinion -- in your view of what

1 the Government has to do whenever it gives out
2 information, and I'm not sure of the answer. But I --
3 would we now have to start --

4 MR. ENNIS: No.

5 QUESTION: -- applying First Amendment standards

6 MR. ENNIS: No.

7 QUESTION: -- to all the exceptions in the
8 Freedom of Information Act?

9 MR. ENNIS: No.

10 QUESTION: Why not?

11 MR. ENNIS: Justice Breyer, here's why. In
12 every single one of the Federal statutes cited in
13 petitioner's and the United States briefs, those statutes
14 were all justified by nonspeculative harm, and all of them
15 materially advanced a governmental interest that was
16 unrelated to suppression of expression, for example, a
17 subsidy type of interest. That's not this case.

18 QUESTION: I'm not sure -- are there exceptions
19 to the Freedom of Information Act insofar as who can get
20 the information is concerned? I think there may have
21 been --

22 MR. ENNIS: No. In fact -- in fact, under
23 the --

24 QUESTION: -- one recently enacted involving
25 foreign espionage services, or something.

1 MR. ENNIS: I'm not --

2 QUESTION: That's the only exception I know of.

3 MR. ENNIS: Justice Scalia, I'm not an expert on
4 the Freedom of Information Act, but it's my understanding
5 that under that act, everyone has access to --

6 QUESTION: It's mine, too.

7 MR. ENNIS: -- exactly the same information.

8 QUESTION: There are exceptions as to what
9 information must be given out.

10 MR. ENNIS: Right, but there's no discrimination
11 among --

12 QUESTION: It's filled with exceptions, in
13 fact --

14 MR. ENNIS: Yes. There --

15 QUESTION: -- so I suppose you might try to
16 distinguish among them, but do -- I don't know if you want
17 to pursue this further.

18 MR. ENNIS: I think it would take more time than
19 is warranted, Justice Breyer.

20 QUESTION: Justice Ginsburg raised a question
21 that's I think important, with her example of limited
22 access to prison. Suppose the police department said, the
23 only people that can get access to this information are
24 law professors, professors involved in the criminal
25 justice system, clinical psychologists, and sociologists

1 for scholarly purposes, and then your people wanted the
2 information, what result there?

3 MR. ENNIS: Well, the answer is, first, I think
4 that would require at least intermediate First Amendment
5 review. The second question is whether it would satisfy
6 intermediate review or not, and the answer is, it's far
7 more likely to satisfy intermediate review than this case,
8 because there's -- here the sole justification -- look at
9 page 11 of the petitioner's brief.

10 They justify this statute on the ground that it
11 will, quote, reduce commercial solicitation of arrestees.
12 The justification they advance for this scheme is, it will
13 reduce commercial speech. They don't --

14 QUESTION: Well, that was true in Went For It,
15 wasn't it?

16 MR. ENNIS: Vastly different --

17 QUESTION: What's the difference?

18 MR. ENNIS: -- Justice Souter, because in Went
19 For It this Court's opinion I think makes quite clear, as
20 it surely makes clear in Shapero and Edenfield, that a
21 naked desire to suppress commercial solicitation is not
22 even a substantial and legitimate governmental interest.
23 There has to be more. In Went For It, the more was, there
24 was a particularly vulnerable population, and it was a
25 time-limited ban on solicitation.

1 QUESTION: But it was nonetheless a suppression
2 of speech.

3 MR. ENNIS: I didn't hear you, Chief Justice.

4 QUESTION: In *Went For It*, it was a suppression
5 of speech. You say it was limited, and of course that was
6 one of the justifications, but it was a suppression of
7 speech.

8 MR. ENNIS: Yes, it was, Chief Justice
9 Rehnquist, and for a limited period of time, and because
10 of an interest that was unrelated to the suppression of
11 speech.

12 QUESTION: Well, but --

13 QUESTION: Because --

14 QUESTION: It was protecting the interests --it
15 was protecting the persons who would otherwise receive the
16 speech. The same thing here. You've got the arrestees,
17 they don't want to have the lawyers soliciting them.

18 MR. ENNIS: First of all, Justice Stevens,
19 there's no basis to believe that's so. The record in this
20 case is clear. It was an undisputed fact that arrestees
21 find these solicitations from lawyers who are trying to
22 defend them against the State who has arrested them
23 helpful. There were declarations --

24 QUESTION: Well, I don't --

25 QUESTION: Since when do we have a trial of the

1 facts on the constitutionality of a State statute? I
2 mean, you say the State can't advance a reason if you
3 could show in court that there's -- something else is the
4 fact?

5 MR. ENNIS: But Chief Justice Rehnquist, it has
6 always been the law in all of this Court's commercial
7 speech cases even, that the State bears the burden of
8 proving that the harm is more than speculative, and that
9 the law will materially achieve the State's objectives.
10 Here, the State did not prove either. It did not -- for
11 the 13 years before this amendment to the statute was
12 passed, everyone could get this information and could
13 freely solicit arrestees. There was no evidence --

14 QUESTION: Because California chose to do that.
15 They didn't --

16 MR. ENNIS: Well, it's their burden to do that,
17 though, Justice Ginsburg, under all these court cases.

18 QUESTION: Only if you say access must be
19 available to everybody. If you took that part of your
20 case, the rest would be easy. If you don't take that part
21 of the case, that is, everybody is entitled to access,
22 then it becomes a much harder case.

23 MR. ENNIS: We're not saying, Justice Ginsburg,
24 that everybody is entitled to access. What we're saying
25 is, once the State opens up this information for broad

1 access, for many governmentally approved purposes, then
2 the State can only deny access for a reason that is
3 unrelated to the suppression of expression.

4 If the Government has some legitimate
5 Government-functioning interest to justify the
6 discrimination, that would survive.

7 QUESTION: Well, what about the protection of
8 crime victims? It also deals with addresses of victims of
9 crimes, as I understand.

10 MR. ENNIS: Justice O'Connor, we did not
11 challenge this law insofar as it deals with addresses of
12 victims of crimes. We don't publish that information,
13 never have, and it's undisputed we never would. That's
14 a --

15 QUESTION: Do you concede that the statute is
16 valid as to the limitation on addresses of crime victims?

17 MR. ENNIS: No, because I frankly haven't
18 thought about it enough. We didn't challenge the statute
19 with respect to victim addresses.

20 QUESTION: Can the newspapers get that, the
21 addresses of crime victims?

22 MR. ENNIS: Yes, the newspapers can get that,
23 but if --

24 QUESTION: What about --

25 QUESTION: Then I would think you would

1 challenge it.

2 MR. ENNIS: But your question, Justice O'Connor,
3 raises a very important point, because the statute, this
4 statutory section itself has an opt-out provision which
5 says that victims can preclude disclosure of their names,
6 which would otherwise be required, at their request.

7 Under the Central Hudson test, prong 4, that's
8 fatal here, because the same opt-out provision would fully
9 achieve the Government's interest --

10 QUESTION: Well, that's only --

11 MR. ENNIS: -- in protecting privacy of
12 arrestees who don't want to be solicited.

13 QUESTION: That's only if we were to conclude
14 that this is a regulation of speech, rather than a denial
15 of access.

16 MR. ENNIS: That's correct, Chief Justice
17 Rehnquist.

18 QUESTION: Well, if -- suppose I assume
19 everything in your favor so far, which I'm not saying I
20 am, but I mean, suppose I did. Let's get to the question
21 of the State's reasons. What's wrong with them saying,
22 you know, there's issue of privacy. Privacy. That's why
23 we don't want people to have this information?

24 Now, we see some important countervailing
25 interest, a First Amendment interest for the free press,

1 we see -- and we think those are very important interests,
2 studies, governmental interests, crime control. But
3 obviously, we want no one to have it for reasons of
4 privacy, and without those very important exceptions we're
5 going to keep it. Now, what's wrong with that?

6 MR. ENNIS: Justice Breyer, as I understand it,
7 you've asked two questions. Let me try to answer them in
8 order. First, on the privacy question, as Shapero held,
9 quote, the privacy invasion, if any, occurs when the
10 lawyer discovers the recipient's legal affairs, not when
11 he confronts the recipient with discovery through targeted
12 direct mail solicitation. That's not a privacy invasion,
13 to get a letter in the mail.

14 As Bolger and Con Ed and every case said, that's
15 so simple, just throw the letter in the waste basket,
16 that's not considered to be a privacy --

17 QUESTION: I would think if somebody was going
18 to send my name and address around to 40 million people,
19 my privacy was far more invaded than if three just
20 happened to find out about it.

21 MR. ENNIS: Your Honor, I think that that cuts
22 our way, because under this statute the crucial fact that
23 a named individual has been arrested and charged with a
24 specific crime is disclosed to everyone, and can be
25 publicly disclosed to everyone.

1 QUESTION: Yes, but in practical terms it's not.

2 QUESTION: The address --

3 MR. ENNIS: In practical terms it is, Justice
4 Souter. If you'll look at the record, supplemental
5 excerpts of record, pages 496 through 547 are examples
6 from the Sacramento Bee, which on a regular basis, I think
7 several times a week, prints what's called the Police/Fire
8 Log, which lists the names and addresses and charges of
9 everyone.

10 QUESTION: Okay, there's --

11 QUESTION: But the addresses, it's not just a
12 question of getting mail, it's a question of people
13 staking out your house, and finding out where you live.

14 MR. ENNIS: You can get that. Anybody can find
15 that information from the Sacramento Bee.

16 QUESTION: No, but they don't find that from
17 newspapers in the State generally. It may be that
18 every -- if every State went to the practice that obtains
19 in Sacramento, you would have a much stronger argument,
20 because nothing would be advanced by this prohibition.

21 But in the world that it exists now, at least
22 outside of Sacramento, it seems to me it's hard to argue
23 that it does not have a substantial advancement of the
24 stated interest.

25 MR. ENNIS: First, it's not just Sacramento.

1 That's the excerpts in the record, but there are also
2 declarations about Oceanside, California and other places.

3 But this cuts our way, because think about it,
4 if you're an arrestee, and some newspaper publishes, any
5 newspaper publishes this information to the world at
6 large, you've got to worry about that problem.

7 Contrast that with getting a private,
8 confidential letter in the mail from an attorney or bail
9 bondsman.

10 QUESTION: But the State's argument -- and I
11 mean, you're right if you accept the premise, but the -- I
12 think the State's assumption is that you don't get a
13 letter, you get a whole slew of letters. You get letters
14 from lawyers, you get them from social workers, from
15 alcohol and drug abuse counselors and so on, and it kind
16 of drives you crazy, and it seems to me that we speak of
17 privacy, but we're really sort of speaking of annoyance
18 and harassment --

19 MR. ENNIS: Your Honor --

20 QUESTION: -- and is that not in the Government
21 interest?

22 MR. ENNIS: We all get, every day, junk mail
23 that drives us crazy, and junk telephone calls. There are
24 opt-out remedies for that.

25 QUESTION: You don't think there's a public

1 interest in reducing the volume of that stuff?

2 (Laughter.)

3 QUESTION: You don't think there's a public
4 interest in reducing the volume of that stuff?

5 MR. ENNIS: It depends on the way it's pursued.
6 The FE -- the Federal Government has adopted regulations
7 for telemarketing which have an opt-out provision. If you
8 don't like getting that stuff, you can opt out.

9 QUESTION: What about opt in? I mean, I was
10 struck in the brief that says, well, if the arrestee is
11 really worried about improper use of this, say in future
12 employment, at the moment of arrest he can check off the
13 box, but it seems to me if you're really interested in
14 recognizing that interest, you would say, opt in.

15 If you want to get this kind of stuff from the
16 lawyers and everything, opt in, but unless you
17 affirmatively opt in, we are going to spare you the
18 invasion of privacy, the potential for misuse of this
19 information to curtail your opportunities.

20 MR. ENNIS: Well, Justice Ginsburg, here, the
21 statute doesn't do either. It doesn't have an opt out, or
22 it doesn't have an opt in. Either one would be better
23 than --

24 QUESTION: Yes, but do you think an opt in would
25 be okay?

1 MR. ENNIS: Two terms ago when this Court
2 decided a cable indecency case it found that an opt-in
3 provision unduly burdened First Amendment rights, whereas
4 an opt-out provision would not, so an opt-in provision is
5 more constitutionally suspect, but even that would be far
6 better than what this scheme is.

7 QUESTION: How do we know we're talk -- I mean,
8 I'm a little worried about the fact that these are people
9 arrested for crimes. I don't know that we're talking
10 about junk mail at all, and I don't know that in a serious
11 case that's the concern, and it might well be that in
12 cases that are quite serious, and addresses are very
13 important for reasons other than junk mail, the newspapers
14 would act in a manner that the police department would
15 consider "responsible," but commercial enterprises might
16 continue. Now, that seems a possible analysis.

17 MR. ENNIS: Let me get back to --

18 QUESTION: Yes.

19 MR. ENNIS: -- answering your prior question, if
20 I could, first, Justice Breyer, the, basically what I
21 described as the compensating benefits view that, well,
22 there are benefits to letting the public learn about
23 addressee information.

24 I think this Court has already rejected that
25 compensating benefits analysis in both Greater New Orleans

1 Broadcasting, and in Discovery itself, where the same
2 argument was made. It's a greater benefit to have fully
3 protected speech than commercial speech.

4 In Greater New Orleans Broadcasting, the
5 Government allowed advertising by Government casinos and
6 Indian casinos on the ground that that would further the
7 compensating benefit of governmental autonomy and revenue
8 generation for those governmental units, but this Court
9 pointed out that that did not mean that the statute did
10 not undermine the justification for its purpose, which was
11 decreasing advertising about gambling.

12 QUESTION: But Mr. Ennis, that was --

13 MR. ENNIS: The same is true here. Every single
14 time there's an increase in public understanding about
15 addressee addresses, there's a corresponding decrease in
16 address privacy, which is the ostensible justification.

17 QUESTION: You cite cases where I have the
18 information and the Government's saying, you can't publish
19 it. This is quite different, where I say, I don't have
20 the information. First, the Government has to give it to
21 me, and then I will speak with it. So I don't see that
22 those cases are on four, or all four, where the Government
23 is prohibiting you from publishing what you have, where
24 you say, first, Government, give it to me, and then after
25 you give it to me, I'll publish it.

1 MR. ENNIS: Justice Ginsburg, that's exactly
2 what was at issue in Seattle Times v. Rhinehart, which is
3 why I raised that case.

4 In Seattle Times, the media did not have the
5 information. They tried to get it. The Government said,
6 we will compel the opposing party to give you the
7 information, but only if you use it only for purposes of
8 litigation and not for general publication. They --
9 without that condition, they wouldn't have gotten the
10 information, the same as our case, and this Court did
11 apply intermediate scrutiny there.

12 QUESTION: But the Court also said that there's
13 no right of access, and it cited Zemel.

14 MR. ENNIS: Chief Justice Rehnquist, we do not
15 have to establish a raw right of access in order to
16 prevail in this case. Our case hinges on the
17 discrimination among speakers when access is granted for
18 governmentally approved purposes, including speech
19 purposes, journalism, and is denied when access is
20 withheld for governmentally disapproved speech purposes.

21 QUESTION: Mr. Ennis, can I -- will you tell me
22 what you understand by journalism? In your response to
23 Justice Breyer's question, you accepted his assumption
24 that journalistic use would be presumably responsible, I
25 guess the notion that it would be the New York Times, or

1 some prominent newspaper.

2 MR. ENNIS: I don't think this Court has ever
3 held that it's only journalism that is responsible.

4 QUESTION: I assume journalistic purposes under
5 this statute could be somebody who has a Xerox machine in
6 his basement.

7 MR. ENNIS: Yes, I think that's right, or a Web
8 site. I -- there --

9 QUESTION: And just wants to inform the public,
10 and if he wants to spread this around the block --

11 MR. ENNIS: Correct.

12 QUESTION: -- around his neighborhood --

13 MR. ENNIS: That would be journalism.

14 QUESTION: That would be journalism.

15 MR. ENNIS: Or just tell the next-door neighbor
16 in a leaflet.

17 I have very little time. I'd like to make two
18 brief points. The first is, a late concern has been
19 raised about computerized data banks. The Ninth Circuit
20 found that was completely speculative, no evidence there
21 were such data banks in the 13 years when this law allowed
22 access.

23 But more important is, this statute allows
24 everybody to get the name, occupation, and date of birth,
25 and the date of birth is a far better identifier than the

1 current address for data bank purposes.

2 Second, Justice Souter asked about the intrinsic
3 value of this speech. I think that it has intrinsic
4 value, because it identifies the precise person named John
5 Jones who has been arrested and charged with a particular
6 crime. The fact that it's not just instrumental is made
7 clear by the fact that newspapers publish the address
8 information.

9 QUESTION: Sure, but isn't the
10 instrumental/intrinsic value distinction one which
11 ultimately dissolves?

12 MR. ENNIS: I think it does.

13 QUESTION: Yes.

14 MR. ENNIS: I mentioned that the scheme plainly
15 fails the fourth prong of the Central Hudson test because
16 there is an opt-out alternative. The petitioner and the
17 United States don't even discuss that. They don't say,
18 why would it not be sufficient to allow arrestees to opt
19 out, as the same statute allows victims to opt out. They
20 don't discuss it because there's no answer to it.

21 I finally want to say that they've also raised
22 at the last minute a discrimination argument. That
23 argument does not stop discrimination by employers if they
24 get the address information from newspapers or private
25 investigators. Furthermore, the name and date of birth

1 would be sufficient for most employers, who are going to
2 track potential employees by name, to discriminate against
3 them.

4 Third, it's an entirely speculative
5 justification, no evidence in the record to support it
6 and, finally, the Government could directly prohibit the
7 use of this information by anyone to discriminate in
8 employment, and that would not be a speech restriction.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ennis.
11 The case is submitted.

12 (Whereupon, at 12:02 p.m., the case in the
13 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:

LOS ANGELES POLICE DEPARTMENT, Petitioner v. UNITED REPORTING PUBLISHING CORP.

CASE NO: 98-678

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

BY Don Mari Federico

(REPORTER)