In The
SUPREME COURT OF THE UNITED STATES

October Term, 1951

Washington, D. C.

April 24, 1952

JOSEPH BURSTYN, INC.,

Appellant

vs.

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.,

Appellees

No. 522

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WARD & PAUL

1760 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

JOSEPH BURSTYN, INC., Appellant v. LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, et al., Appellees	No. 522

Washington, D. C.,

Thursday, April 24, 1952.

The above-entitled cause came on for oral argument at 12:10 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas Jackson, Burton, Clark, and Minton.

APPEARANCES:

On behalf of Joseph Burstyn, Inc.:

EPHRAIM S. LONDON, Esq.

On behalf of Lewis A. Wilson, Commissioner of Education, et al:

WENDELL P. BROWN, Esq.,
Solicitor General, State of New York.

CHARLES A. BRIND, JR., Esq.,
Counsel to the Board of Regents of the
University of the State of New York and
State Education Department,
Education Building,
Albany, New York.

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P R O C E E D I N G S

The Chief Justice: Oral argument in Case No. 522, Joseph Burstyn, Incorporated, against Lewis A. Wilson, Commissioner of Education, et al.

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF THE APPELLANT, JOSEPH BURSTYN, I NC

By Mr. London

Mr. London: May it please the Court, this appeal involves the motion picture, "The Miracle."

The appellant is a distributor of motion pictures, and h owns the rights to the film, that is, the exhibition rights.

The appellees are the heads of the Department of Educati of the State of New York.

In New York no motion picture can be shown in a public theater unless it is first examined by a censorship board of the Education Department and then approved and licensed.

The appellees, as I state, are the heads of the Educatio Department and they revoked a license that was issued for the showing of "The Miracle."

This is a proceeding to review the determination of the appellees, or the regents revoking the license for the film, in effect banning the film in New York State. And it is, als a proceeding to enjoin the enforcement of the statute.

The questions raised are these:

One, is the whole statue void as an unconstitutional

abridgment of the right of free communication?

Second, is the standard that was applied in this particular case unconstitutional, namely, that the film is a sacrilegious one and for that reason may not be shown?

On the question of whether or not the standard of sacrilege violates the Constitution we have three points:

One, that the term is so vague that it is void because it permits arbitrary interpretation.

Second, that the use of a standard such as sacrilege violates the constitutional guarantee that church and state shall be separate.

And, third, that if the law means what the regents say it does, then the interpretation or application is actually a violation of the distributor's freedom of religion.

The court of appeals of the State of New York held against the distributor with respect to each of the questions raised. There was a dissent made by Judges Fuld and Dye, and they agreed with the questions raised on the points of the distributor, each of them.

Now Your Honors have seen the film. And in view of the nature of the controversy about it I should like to tell you something of its background.

As you know, the film was made in Italy, and all of the actors, all of the professional actors in the film, are devout Catholics.

When the film was completed it received an approval or a certification from the Italian Ministry. Now that certification is significant, because in Italy there is a Lateran agreement between the state and the Vatican to the effect that the state may not approve of anything which offends against the Catholic Church. And as the record indicates, had this picture been thought to offend against the church it would never have received the certificate in Italy.

The film was seen by several representatives of the Vatican and none of them objected to the film on religious grounds. As a matter of fact, it was reviewed by the L'Osservatore Romano which is the Vatican paper and it made no religious objection.

The Chief Justice: Did they object to it on any other grounds?

Mr. London: No, Your Honor. There was some discussion of the directing, and the review, as I recall, suggested that Rossellini, the director, could do better and the church expected better things from him.

This picture, when it was brought to the United States through the Customs, and, of course, it was examined there and passed, then it was in 1949 submitted as an Italian language film for license and it was licensed by the State Censorship Board without question.

The Chief Justice: Then you say it passed the Customs. What does that mean, so far as this case is concerned?

Mr. London: I think it means this, Your Honor, that had the film been found objectionable it never would have been admitted to the United States. There had been other films that had been held up at the Customs.

The Chief Justice: Under what authority?

Mr. London: Under the Customs law. I believe it is referred to in our brief.

The Chief Justice: Anything other than obscenity? I do not just recall.

Mr. London: I do not think that the exact language includes sacrilege, Your Honor, but as I remember,in the Ulysses case there was an indication.

The Chief Justice: That was on obscenity, was it not?

Mr. London: Yes, it was, but the question of sacrilege was also raised. I believe they thought it was an anti-Catholic book, as well as obscene.

Justice Frankfurter: The word "sacrilege" is not in the Customs law.

Mr. London: No, Your Honor, it is not. At any rate, the film received the license in New York State where the word "sacrilegious" is in the statutes.

It received the license, first, as an Italian language film. Thereafter, English subtitles were added. The film was combined with two other pictures, and it was then resubmitted for license under the title "Ways of Love." And it again was

licensed by the motion picture division. And under the laws as interpreted in New York such a license is a State certificate that this film is not indecent, immoral, obscene, sacrilegious et cetera.

This picture was also shown in a church in Boston. It was shown in the Union Theological Seminary. It was shown in the Princeton Theological Seminary.

Many theologians, ministers, professors of theology and students saw the picture. Not one of them believed it to be sacrilegious. Many of them have submitted statements which are made part of the record.

Justice Reed: Why was it shown to the theological students?

Mr. London: It was shown because the Legion of Decency, a Roman Catholic censorship board --

Justice Reed: Some question came up?

Mr. London: They raised the question.

Justice Reed: It was shown to get the public reaction of the theological schools?

Mr. London: Yes, Your Honor, it was for that.

Justice Frankfurter: What is the direction of your argument, what is the purpose of all of this?

Mr. London: The purpose of this argument, Your Honor, is to show --

Justice Frankfurter: I mean, the whole of your argument?

Mr. London: Of this particular argument?

Justice Frankfurter: Yes.

Mr. London: It is to show that there was actually a religious controversy in this case in which the regents intervened. The regents have said in their brief that this is not a religious matter, it has nothing to do with religion. I am unable to understand that argument. And I wish Your Honors to understand the facts, so that you will realize this was a religious controversy.

Justice Frankfurter: Whenever there is in public somebody who says this thing is religious and offends and somebody says that it does not offend, that is regardless of the fact that, actually with regard to it, it actually deals with religion.

Mr. London: Not necessarily so, but where the controversy is as to whether a picture or a book offends against a particular doctrine, namely, the Divine birth, I should think that was a religious controversy.

Justice Frankfurter: But I wonder if it is established because some fellow says, "Yes," and some fellow says "No." It does involve that. I understand what you say. It may be that it called into question a religious doctrine, but I do not understand that it is established by the fact that some people say that it does involve a religious doctrine and that others say that it does not. I just want to know the direction of your authority.

Justice Reed: Will you please tell me the precise order. Does the Board of Regents have an order of some kind?

Mr. London: Yes, they do have an order which bans this film, revokes its license on the grounds of sacrilege.

Justice Reed: Where is that order?

Mr. London: I think you will find that, Your Honor, at page 55, or, rather, page 55 is the introduction to the resolution which is on page 56. You will find the actual resolution of the Board of Regents on page 56. It reads:

"Resolved, that the motion picture, 'The Miracle' is a sacrilegious motion picture."

No other questions were raised. It was not said to be indecent or immoral.

Justice Reed: How did it get before the Board of Regents?

Mr. London: The Board of Regents assumed that it had the power to revoke a license. That power, by the way, had never been exercised. It was not written into the statute.

Justice Reed: That has been upheld?

Mr. London: It has been. The highest court of the State has said they have the power. We are not raising that question.

Justice Reed: Did they raise it by sui juris?

Mr. London: The Board of Regents themselves raised it.

Justice Reed: Nobody filed a motion?

Mr. London: What made them initiate the proceeding was that they had received a number of letters which were unquestionably inspired by the criticism of the Legion of Decency.

Justice Reed: Did they give due notice that they were going

to have a hearing?

Mr. London: Yes, they gave notice that there would be a hearing. I should like to speak of that in just a moment.

Justice Reed: All right.

Mr. London: I would like to add just two more facts with reference to the nature of the film, and, that is, the history of the film.

It was approved and especially recommended by the National Board of Review. That is an organization, a non-profit organization that reviews pictures for parent-teachers associations, libraries, small communities, villages, and so forth. And it passed upon the picture and recommended it as adult entertainment.

And, finally, the film won an award as part of "Ways of Love" as the best foreign film for the year 1950. That was the New York film critics award. I believe the highest award that any foreign film can obtain in the United States.

Of course, there is contrary opinion about this film.

As I said before, the Legion of Decency initiated a protest against the film. They believed that it was blasphemous. They believed it sacrilegious. And following the condemnation of the film by the Legion of Decency a number of letters were received by the regents, and these letters protested against the showing of the film.

Now counsel for the regents conceded in the argument below

that these letters were sent by people, many of whom had probably not seen the film because the letters came from parts of the State where the film had not been shown. In addition, they came from Roman Catholics who had been pledged not to see a film condemned by the Legion of Decency. So that in all probability they had never seen this film that they were protesting against.

The regents decided to look at this picture, and they sent three of their members, a subcommittee, to see the film. This subcommittee saw the film, reported back that all of them thought it sacrilegious, the three members of the subcommittee and immediately they were reappointed to hold hearings to determine whether or not it was sacrilegious or, to hold hearings to receive testimony and report back as to whether or not it was sacrilegious. And, also, to determine whether or not they had the power, the legal power to revoke the license.

The distributor refused to participate in these proceedings on the ground that the issue had been pre-judged by the judges or the referees.

The subcommittee reported back that they believed that the power existed, the power to revoke films existed.

All of the regents saw the film, and then all of them decided it was sacrilegious. And they issued the order that Your Honors just read at page 56 of the record.

Our first point is that the entire statute is void as an

unconstitutional restraint on freedom of expression. And I should like to make it very clear at the outset, because I believe that my argument has been slightly misinterpreted or misunderstood by the regents --I should like to make it clear that we do not say that there shall be no censorship or that the Constitution does not permit censorship of motion pictures altogether. We believe that censorship of motion pictures is proper, but we believe that the only proper remedy where a picture is obscene or indecent is by criminal prosecution, not prior restraint, not licensing.

Justice Frankfurter: Let me see if I understand. Your position is, however, that although licensed they could be prosecuted after the showing?

Mr. London: Yes, Your Honor, just as newspapers.

Justice Frankfurter: But the system of prior licensing you think as a system, no matter what its safeguards are, is at fault?

Mr. London: I think in this particular case it must fall. I think that with respect to movies it must fall.

Justice Frankfurter: That is what I am talking about.

Mr. London: Yes, Your Honor, I think any licensing system such as we have here which provides that no picture may be shown in the State unless it is first approved by a censorship board, which, in effect, is answerable to no one is an abridgment of the right of freedom of communication.

Justice Frankfurter: Under your view then no license is required, that is, if no license is required, the exhibitor may be prosecuted?

Mr. London: Yes, Your Honor.

Justice Frankfurter: That would not touch the continued showing of the picture, except that he could be re-arrested and re-arrested?

Mr. London: You have the same situation as you have in books. Once you have a prosecution instituted no sane man is going to keep showing the picture, because each showing is an additional offense.

Justice Frankfurter: As a matter of law?

Mr. London: Yes. We say that the same standards apply to motion pictures as apply to magazines. I think there is no question but that magazines cannot be licensed; that periodicals and books cannot be licensed in advance; cannot be submitted for the approval of a censor. And I say that the same rule applies to motion pictures.

Justice Reed: How about theatricals and plays?

Mr. London: I would say the same thing applied to theatrical plays, too, Your Honor. As a matter of fact, there has never been any attempt in New York, to my knowledge, to license plays. There was an attempt in England, as a matter of fact, they were licensed as Your Honor knows for many, many years, and are no more.

Justice Burton: Does the same thing apply to television?

Mr. London: Television is not subject to prior censorship. We have this curious anomaly in the law and absurdity in the law, that a picture which is refused a license in the State may still be shown in the State over television, so that while the small audience in the theater cannot see this film, you have a huge audience seeing the same film that is banned, over television.

I should also like to make another point clear now and that is that the basis of censorship provided in this statute is not the preservation of the public peace. If it were, we might have another question. But that is not the basis for censorship.

The language of the statute reads that no film shall be licensed if found indecent, immoral, sacrilegious, but there is not a word there about the public peace. And as a matter of fact, I do not believe there has been a case in which an attempt was made to ban a film because it would create a public disturbance.

Justice Frankfurter: Do you think that it would make a difference if the statute had then gone on and said no picture shall be shown for the reasons now stated, and the legislature of New York had added, because all of these tend towards the breach of the public peace? Do you think that would have made a difference to you?

Mr. London: It would have made a difference, but I would still say it was unconstitutional.

Justice Frankfurter: In other words, it would not make a difference?

Mr. London: I think there that you are injecting another question. I think that the question of the preservation --

Justice Frankfurter: The only question we have here is the constitutionality.

Mr. London: Yes, Your Honor.

Justice Frankfurter: From the point of view of constitutionality, would it make a difference if the legislature expressed its view, with these bunch of words, whatever they may be, that it is conducive towards a breach of peace?

Mr. London: I would still say it was unconstitutional, but I say further that in the absence of that language the unconstitutionality cannot really be questioned seriously.

Now with respect to the question of public peace this picture was not banned because it tended to interfere with public peace, because it might create a riot or a disturbance.

It played in New York for three months. There was never any disturbance. There were some pickets walking outside very peaceably, because they were from the Catholic War Veterans, but there was never any breach of the peace, never any question.

It played here in Washington for three weeks, and there was no comment. All of the criticisms that I have seen in the

Washington papers were favorable and none raised the question of sacrilege. I am sorry, one did, and said that he found the film not sacrilegious. But I think that my friends will have to concede that the preservation of the public peace was not the motive in banning this film.

Justice Reed: Would you say that it was the preservation of public morals?

Mr. London: No, Your Honor. I say that the reason given was that it was offensive to the religious sensibilities of Roman Catholics.

Justice Reed: That would be morals, would it not?

Mr. London: I do not know the processes of the regents' thinking, but I do not think that is what they intended. The regents relied chiefly on the Mutual Film case, the case that was decided, I believe, in 1915. And although that case can be distinguished, I think that the reasoning is such that unless it is overruled our position on this point must fall. I think the case is erroneous. I think it should be overruled.

Justice Burton: But it is not necessary to your position on the other branch of the case to overrule that.

Mr. London: Not so, Your Honor. As a matter of fact, not even, as I said, to sustain our position on this point, because the case turned on two other points, namely, an interstate commerce question and also a question of the Ohio Constitution. That was decided before the Supreme Court had held that the

provisions of the First Amendment as to civil rights provision were virtually incorporated.

Justice Frankfurter: Has Ohio a provision regarding religion?

Mr. London: Sacrilege, I believe they have.

Justice Frankfurter: Has Ohio a provision like the First Amendment, that is, as to free speech -- does it have it as to religion?

Mr. London: I cannot say.

Justice Frankfurter: As to free speech, it does have the provision.

Mr. London: Yes, Your Honor, very clearly.

Justice Frankfurter: And the Mutual case does raise all of the questions of free speech.

Mr. London: Yes, Your Honor. And as I said, the basic reasoning of that case is directly opposed to our position here. There is no question about it. I think that reasoning is erroneous.

The two fundamental principles of the Mutual Film case are these: These are the bases, these are the supports for the case.

One is that motion pictures are merely a form of entertainment and not a form on communication. And second is that motion pictures is a business and therefore not a means of communication.

Now the regents rely very heavily on that reasoning and devote a great portion of their brief to the argument that movies are primarily a form of entertainment, therefore not a medium of communcation.

I submit, Your Honors, that even this Court was unable to distinguish between communication and entertainment in the Winters case. I believe Mr. Justice Reed's language was very clear there. I do not think it has ever been possible to distinguish between what is entertainment and what is informing. As a matter of fact, the best illustration of that is an appendix to the brief submitted by the regents.

The appendix is a list of advertisements showing films that are being played in New York that were taken at random. It was a casual list. And this list they said demonstrated that films were primarily entertainment and that the emphasis was on entertainment.

Now I have gone through that list, Your Honors, and they include these pictures. They include Victor Hugo's "Les Miserables," George Bernard Shaw's "Caesar and Cleopatra," T. S. Eliot's "Murder in the Cathedral," three documentaries which are purely reporting.

There is a film there on Americanism. There is another film on the problems of the immigrant coming to the United States; another one about domestic problems, domestic problems that lead to the domestic relations court, a story on Viva

Zapata, on the life of the Mexican revolutionary; a philosophic film. Really the greater number provoke thought and deal with problems and have as their basic purpose the dissemination of ideas.

Of course, it is not necessary that they have that as their basic purpose.

If any ideas are communicated they are, I believe, a form of communication within the protection of the Constitution.

I do not think one can name a great novel that does not both entertain and communicate ideas simultaneously and I think that same is true of every great play, certainly, of every great essay. I cannot think of any to which that does not apply.

In point of fact, the communication of ideas by way of entertaining media probably is the most effective. I think counsel has practically conceded that in his argument. Certainly no tract was ever quite as effective as Uncle Tom's Cabin, so far as the dissemination of an idea was concerned.

Now with respect to the question raised that movies are a big business and therefore not a medium of communication, I think that has been decided by this Court in Thomas versus Collins. I think it was made quite clear there are two aspects to a business of communication. One is the function of communicating and the other is the business part of it.

Certainly, the fact that a newspaper has many millions

of subscribers does not mean that it does not disseminate ideas. And that is the fact that it spends a great deal of money and receives a great deal of money has very little to do with the fact that it is also a medium for the communication of ideas.

Counsel have pointed out that there are 60 million paid attendances for movies per week and concludes from that that movies are therefore not a means of communication but big business. And I think that we can point out in answer that there are about 54 million paid daily circulation for newspapers in the country, and no one would question but that they are a medium of communication.

Much has been made of the fact that movies are a very effective medium and it is therefore concluded that movies are therefore very dangerous and that the only possible method of dealing with movies, of properly regulating them, is by a licensing law.

First, with respect to the danger. The mere fact that a communication is effectivedoes not mean that it should be denied the freedom of the Constitution, otherwise the freedom means absolutely nothing.

The more effective the communication I think the greater should be the protection. It may make a difference so far as the standards of regulation are concerned. In short, you may allow a certain latitude in a written description of nudity, but

you would not allow the same latitude in a pictorial representation of nudity. But that does not mean that the basic principles are different. That does not mean that you may place movies under a different kind of rule, namely, the prior censorship rule.

Justice Minton: Do you take the position that even though the film were admitted to be sacrilegious that it could not be censored?

Mr. London: That is my next argument, yes. And I certainly say it could not be censored in advance for any reason.

Justice Minton: Not even for obscenity?

Mr. London: Not ever for obscenity, not censored in advance, not licensed, not subject to a licensing arrangement, Your Honor, even as to obscenity.

I would say if there is obscenity the same rule would apply as applies to a magazine, but the obscenity would be punished by prosecution.

With respect to this great danger that movies present, I think we need only point out two facts: One is that there are only six States which actually have censorship laws. There are only a handful of cities of the some 4,000 cities in the United States, about 200 my friend says, and the figures that I have are 50, but let us take his figure, 200, that have censorship laws. The remainder do not.

Obviously, the people in the 42 States that do not have

censorship laws are not more corrupt than the people in the States that do have censorship laws.

There has been no real need for this kind of regulation, and without that need no real basis for it.

The second fact is that the movies can, as I stated before, be shown over television, so that this regulation, so far as the licensing of movies is concerned, actually does not serve the purpose that my friends attribute to it.

There is also some indication in the appellee's brief that really the purpose of this law is to protect motion pictures. They are taken into a kind of protective embrace and that really the industry loves this kind of censorship because it avoids a multiplicity of suits. Nothing could be less accurate.

I think I need only quote this statement made in February, 1952, by Eric Johnston, the spokesman for the industry speaking of self-regulation of the movies. He says, "This is the democratic answer to the censors or vigilante groups that would substitute the coercive power of the State for the free decisions of the citizenry."

Now with respect to the provision denying a license to films that are sacrilegious, we believe that the term "sacrilegious" is so vague, so general, that it virtually delegates legislative authority to the censors who are to enforce it.

I should like to read the definition given by the Court

and the standard for enforcement. This is the Court of Appeals' definition, the Court of Appeals' standard, and I believe it is the one on which we must rest which is binding on this Court.

On page 151 of the record we have this definition given by the court, beginning with the words:

> "Only the word 'sacrilegious' is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e.g., 'the act of violating or profaning anything sacred.'"

Then on page 154, this is the standard or the means of applying the standard for application of this word "sacrilegious." This appears on page 154 of the majority opinion in the Court of Appeals.

> "As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: That no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures."

Sacrilegious means that no religion shall be subjected to scorn and ridicule, I believe that is the word, that is, those are the words that the court used. Those are the very words that

this Court in the Kunz case held to be so general.

Justice Reed: What case?

Mr. London. The Kunz case. I will read from the Court's opinion, Kunz versus New York, 340 United States, 290, cited at page 32 of my brief, in which the Court was discussing an ordinance, a city ordinance, which made it unlawful to ridicule or denounce any form of religious belief, and Mr. Chief Justice Vinson then characterizing that said that the ordinance was one "restraining control over the right to speak on religious subjects in an administrative official, where there are no appropriate standards to guide his action."

I think that the language clearly indicates that the words "ridicule or denounce," and I think the same would apply to "scorn or ridicule," are too vague standards as a guide for the enforcing official.

The Court has laid down certain tests of vagueness. I believe the test is laid down in the Winters case, and the Court has made it quite clear that you cannot have scientific precision in language. Of course you cannot. But there are certain limits beyond which you cannot go in definiteness. The test of vagueness as it has been laid down by the Court --

Justice Reed: In other words, the words normally used?

Mr. London: I am sorry, I did not understand.

Justice Reed: You say as normally used?

Mr. London: Yes, Your Honor.

I was speaking of the test not as to a particular word, but the general test in the Winters case, namely, that the language of a statute is unconsciously vague that men of common intelligence must necessarily differ as to its meaning.

It is true that in that particular case the language referred to, breach of the peace, a criminal or penal statute, but there are other cases which apply the same language to civil penalties.

Justice Minton: Is there a difference between the context of vagueness where it applies in civil law as against criminal law?

Mr. London: I would think it was particularly offensive in criminal law, but nevertheless vagueness is not permissible in law dealing with civil penalties such as you have here. And I might point out that the violation of this censorship law is a criminal act. It is punishable as a penal offense.

Now I think this case is almost a classic illustration of the test that was given in the Winters case, namely, it is a word about which men of common intelligence must necessarily differ. I think that the record indicates so very clearly and incontestably that men will differ as to the application of the term like "sacrilegious," particularly to a motion picture.

Here you have virtually 100 ministers of many sects, from the Episcopal to the Unitarian, all agreeing that this is not sacrilegious. The term sacrilege can not be applied to this kind of picture. And you have certainly men of integrity saying that this is a sacrilege picture, that there can not be any question about it, but this difference is almost inherent in the nature of the term. It must be, because you have to apply a religious standard or belief in order to determine whether or not it is sacrilegious. And the religious belief is of course a subjective one.

In order to say that something is sacrilegious, according to the definition given by the regents, you have to say it profanes something sacred.

What is sacred depends on the individual's beliefs. And if a particular censor, let us say, is of one religion, and the picture that he is viewing does not offend him, he has to try to apply the subjective beliefs of people of another religion which is virtually impossible to do.

Justice Reed: Does not the statute forbid the sacrilege, no matter what the religion is?

Mr. London: That is right, your Honor. That is the way it is interpreted by the regents, and I think it would virtually ban everything.

I mentioned in my brief there are 256 religious sects, quoting the McCollum case, recognized religious sects.

If you take every sect the number is about 600, and each one has its own religion.

Father Divine insists that a particular person is a divine person. He is God. I think that that statement is offensive to most people of other religions. I think it unquestionably is.

Do we have to honor the beliefs of his followers in applying the statute? I am sure no one would. The regents have ignored the beliefs of almost all of the other sects in applying this statute.

Now I should like to discuss briefly the two final questions that we raised, the two final constitutional questions, whether this standard of sacrilege violates the constitutional guarantee of separate church and state, whether it violates the right of free expression of religion.

I just do not follow the argument of my friends when they say that this was not a religious controversy, that this was not a matter relating to religion, that this had no interference in religious matters.

Here we have two groups lining up: one a group of Roman Catholics saying that this is a sacrilegious film and ought to be banned, and on the other hand, you have a large group of Protestants, Jews and some Catholics saying that this is not only not sacrilegious, but some of them saying that this is deeply religious.

You have one minister writing and saying that this is the picture that he wants to take his children to, a Presbyterian minister. "I think it is a fine picture. I think it shows devotion."

It was into this controversy that the regents stepped taking the viewpoint of the Roman Catholic group, banning the film and saying this has nothing whatever to do with religion.

I think whenever you attempt to apply a standard such as this you are bound to apply a religious belief. It is the standard you are using, and once you do you violate the constitutional warranty that the church and state shall be separate.

Finally, we have the question of whether or not it violates the right of religious expression.

According to the regents' interpretation of this picture it profanes the doctrine of the divine birth of Christ and indicates that he was actually illegitimate and not a divinely conceived being. If that be true, and we say it is not, but if that be true that statement is entitled to the protection of the Constitution because the Constitution protects not only statements of religious belief but statements of religious disbelief.

Again stating that this is not the kind of statement that could be said to incite a breach of the peace, that question does not enter into it.

In the answering briefs submitted by the appellees the contention is raised that the distributor is precluded now because it received a license from challenging the validity or the constitutionality of the statute. I believe he is raising that argument only with respect to the first point that we raised, namely, the total invalidity of the statute.

I think that it is fully answered in our brief, and I shall not take up the time of the Court in discussing it further.

The Court may very well decide this case on the narrower grounds than the particular standard of sacrilege is unconstitutional for any of the reasons given.

I would like in conclusion to plead with the Court that the reversal which I hope will be the result of this case be on the broader constitutional grounds. There have been many, many cases brought before this Court for the purpose of testi[illegible] that question, and I think to avoid a multiplicity of suits i[illegible] ought to be finally laid to rest.

Justice Reed: Would you say that sacrilegious is more vague than obscene?

Mr. London: I think that the word "obscene", for example, is a vague and general word. However, it has been defined so thousands of times.

Justice Reed: I suppose "sacrilegious" has, too?

Mr. London: No, your Honor, it has never been judicially

defined in the United States, curiously enough.

Justice Reed: I mean, by common use?

Mr. London: In common use the word is that it shall be sacrilegious to something that profanes a sacred thing. It has been applied in a different way in this particular case. There was no sacred thing that was violated here, but allegedly a sacred doctrine, so that actually it is not even the ordinary use of the term that was made here.

Justice Reed: Where does the quotation come from that you have in your case?

Mr. London: That comes from Judge Froessel's opinion.

Justice Reed: That comes from the opinion?

Mr. London: Yes, your Honor.

Thank you.

ARGUMENT ON BEHALF OF THE APPELLEES,

LEWIS A WILSON, ET AL

By Mr. Brind

Mr. Brind: May it please the Court. My name is Brind. As the brief indicates, I am the counsel for the Board of Regents.

As has already been noted by our opponents, there are two fundamental issues here, the issue of constitutionality of the statute in toto, and then the other question as to whether if the statute is constitutional is there anything unconstitutional about the content of the sacrilegious.

Due to the difficulty of attempting to split an argument my colleague, Mr. Brown, the Solicitor General of the State, whom this Court knows very well, will take both of those points and discuss them. And my function here is merely to briefly funnel through to his argument some of the preliminary matters which we think should be cleared up to the Court before his argument. So that when he comes to his argument, he will not need to devote his attention to them.

I wish first to call the Court's attention to the provisions of our statute, because after all I presume the problem has to be directed to the statute that affects the State of New York.

That statute is a very narrow statute. The statute is not a negative statute. It is a positive statute. It says that every film in the State must be licensed unless, and then it contains the language which has already been noted here, obscenity, indecency, immorality, inhumanity, sacrilegious, that it tends to corrupt morals or incite crime. Therefore, the statute to that extent is definitely narrow and it is limited solely to that language.

Now the Court will note that there is nothing in that language that gives the regents any power to pass upon matters of opinion, to pass upon any issue that may appear in the picture that would have anything to do with the person's thoughts or the person's opinion of what is being presented by the picture.

The only thing that the regents are dealing with are directly with that language, most of which is already contained in the penal statute of the State.

In addition to that, the statute is narrower than that, and it is narrower as a matter of fact than the Ohio statute.

Justice Frankfurter: I do not quite follow that, you say that the statute does not deal with opinion?

Mr. Brind: That is correct.

Justice Frankfurter: Do you mean that the determination of whether it is obscene or sacrilegious is mechanically or demonstrably determined?

Mr. Brind: I do not think you quite got what I did mean.

Justice Frankfurter: That is why I asked my question.

Mr. Brind: I mean a question as to whether something is presented in the statute, in the motion picture, that will have to do with a person's opinion or something of that sort, the regents have nothing to do with that. The regents must pass on obscenity. The question as to whether a picture is obscene or not is a job for the regents. The question as to whether a picture is indecent must be passed on by them, but if you leave out of that whether it is indecent or obscene or anything else and you forget a question whether there is any propaganda in the picture or things of that sort or issues of teaching of something or other, teaching some particular principle, that is not a matter for the regents to pass upon.

Justice Frankfurter: Do you think whether a thing conveys a religious theme or feeling or whether it does not convey a religious feeling is not a matter before them?

Mr. Brind: I think that is correct. We do not have that jurisdiction and that problem is not here, as we understand it.

Justice Frankfurter: The question of what this picture means, whether it is calculated to offend something that is profoundly dear to a particular faith is certainly involved, is it not; whether it means to decry a particular doctrine, such as the Divinity of Christ or not, it, certainly, is prohibited?

Mr. Brind: If it profanes a particular doctrine that the regents, as we understand it, are required to pass upon.

Justice Frankfurter: How do you find that out, whether it profanes it or not? What authoritative sources do you go to in order to make that determination?

Mr. Brind: The consensus of opinion that is involved in that particular field.

Justice Frankfurter: How do you get that consensus of opinion?

Mr. Brind: The regents must make that determination.

Justice Frankfurter: Out of their heads?

Mr. Brind: No, not necessarily out of their heads.

Justice Frankfurter: I want to know what the sources are which lead them to say, "Yes, this offends Jews, Catholics,

Mohammedans, Protestants, Hindus."

Mr. Brind: If you take this picture as an illustration, here is a picture that the regents, and followed through by th courts in the State, felt offends the concept, not of the Catholic Church, because I think that is a mistake, when our counsel says we were dealing with the Catholic Church -- there is nothing in the record to indicate that.

Justice Frankfurter: The regents didn't profess to say, "Here is a Catholic doctrine incontestably recognized as a Catholic doctrine by appropriate authoritative sources, and we find that this offends this Catholic doctrine?" The regents didn't do that?

Mr. Brind: That is correct, your Honor. The regents found that the concept that is held by the Christian Church of the Divinity of Christ was involved in this picture and was offended profanely.

Justice Frankfurter: What I want to know is how did they reach that conclusion other than exercising the judgment that those men and women, too, had?

Mr. Brind: There was only one woman.

Justice Frankfurter: How did they reach that conclusion, if not from their experience, learning and good sense that they have?

Mr. Brind: There are 13 regents, two Catholics.

Justice Frankfurter: This body of 13, presumably

representing all segments of society in New York -- a good cross section -- used their judgment, their criteria which the had in their minds, their experiences; is that what they used? Is that correct?

Mr. Brind: That is correct.

Justice Frankfurter: Are the words "profane" and "sacrilegious" synonymous?

Mr. Brind: I think so.

Justice Black: "Sacrilegious" is the word in the statute on which this case turns?

Mr. Brind: Sacrilegious is the term in the statute.

Justice Black: There is no other?

Mr. Brind: No other term.

Justice Black: On which reliance is placed?

Mr. Brind: On the term "sacrilegious."

In addition to that, I want to make it also clear --

Justice Frankfurter: The regents did not profess to go o some authoritative pronouncement, from any branch of the Christian faith, did they?

Mr. Brind: That is correct, your Honor.

Justice Frankfurter: Isn't it true that they went on their judgment of what is sacrilegious?

Mr. Brind: Their judgment.

Justice Frankfurter: Plus the dictionary.

Mr. Brind: That is right.

In addition to that the statute contains reference to permits. Any picture which is educational, which is religious, which is charitable, which is scientific, gets a permit from the regents without inspection and without fee. The only pictures that the regents deal with under this statute are those pictures which are presented in a theater where a fee is charged for admission. That indicates the narrowness of the statute that we have in New York State.

In addition to that, all news reels are completely excepted.

The Chief Justice: All what?

Mr. Brind: News reels. No news reels need to come to the regents for any permit or for any license.

Justice Reed: Is that by statute?

Mr. Brind: That is by statute. So the only pictures under the statute -- the narrow statute which we have, and I am saying this in particular because Mr. Brown will point out, when he comes to it, that the Ohio statute covered all the other things, but in New York news reels are out, educational films are out, charitable films are out, religious films are out. The only films included are those which are presented in a motion picture house for which an admission fee is charged. Those are the only pictures we are dealing with under the New York statute.

The Chief Justice: What do you call a religious picture?

Mr. Brind: If a church or any group wished to show a picture that they termed religious, all they have to do, in order to get a permit, is to present to the regents a statement in affidavit form setting out the content of the picture. On the basis of that, we issue the permit. Then they may use that picture, if they call it religious, in presenting it to their church people or wherever they want to present it. However, if they present it or wish to present it in a motion picture house at which admission fees are to be charged, then irrespective of the question of the contents of the picture, it needs to have a license.

Justice Frankfurter: Do I understand, then, if a Protestant faith or Dr. John Holmes' Community Church or Men's House, or whatever they are called, settlements, which various churches have in New York, if they treated this as a religion promoting motive, they wanted to show it in their community houses, as a part of their church property, you would, as a matter of automatic action, think you could be mandamused to license them?

Mr. Brind: You are absolutely correct.

Justice Burton: Could they then charge admission?

Mr. Brind: Not charge admission. If they show it at place for entertainment and they charge admission, they fall under the statute.

Justice Burton: They could not charge admission even on

their home premises?

Mr. Brind: As long as they are doing it for that purpose, it comes within the purview of the statute.

Justice Reed: They couldn't charge admission?

Mr. Brind: No. Then it is set up as a business.

Justice Reed: Then it is not a question of use, it is a question of business?

Mr. Brind: It is a question of business. I think that is a better term for it.

Justice Frankfurter: If the Ford Foundation deemed this an educational picture, or whatever it was, and subsidized picture houses for people to go to and see it without admission, would you have to give them the usual license?

Mr. Brind: That would be correct.

Justice Reed: The same thing would be true if a club showed it?

Mr. Brind: Yes. Your Honor, if a club showed it, that would be correct.

Justice Reed: Without charging admission?

Mr. Brind: Yes, your Honor.

Justice Reed: Would that be true if it had something to do with morals?

Mr. Brind: I think the statute has the content that if we knew a picture were immoral or indecent, then --

Justice Reed: But not if you knew it was sacrilegious?

You have more power over immoral pictures?

Mr. Brind: I think not. I am not making myself plain on that. If a club wants to show a picture and wants to show it to their own members and they claim it is an educational or charitable or scientific picture or even a religious picture, they have the right to do it under the statute.

Justice Reed: Suppose it is a sacrilegious picture?

Mr. Brind: If it were a sacrilegious picture, I think the regents would have to make up their minds whether they have the right to grant the permit.

Justice Reed: There is a difference between the words in the statute, as I understand it?

Mr. Brind: No. The obscenity -- it wouldn't make any difference as far as I understand whether it is obscene or indecent or inhuman or whatnot.

Justice Reed: Or sacrilegious?

Mr. Brind: Or sacrilegious, on this permit. If the evidence came to the regents that they were showing a picture which violated the terms of the statute, we would have the job I think, of revoking the permit. We issue the permit without examination of the picture. We issue it without fee. But if the evidence came that they were using that kind of a picture for improper usage, we would have to give consideration to the problem.

Justice Reed: There would be no difference between

sacrilegious pictures and indecent pictures so far as the power goes?

Mr. Brind: That is absolutely true so far as I understand it.

Justice Black: Do I understand you have the power to tell a church in New York that they can not do it?

Mr. Brind: Oh no, your Honor.

Justice Black: I understood you to say that if the church was showing the picture and you heard or came to the conclusion that it was immoral, indecent, or inhuman or any of these other terms, that you could order it stopped and cancel the license

Mr. Brind: Cancel the permit. They would not have a license. They would have a permit.

Justice Black: Does the church have a permit in New York for that purpose?

Mr. Brind: They don't have to do it, but they have the right to do it if they want to.

Justice Black: If they don't do it and the Board of Regents decides that it is sacrilegious or these other terms --

Mr. Brind: If they do not have a permit, we would have no problem, Your Honor.

Justice Black: If you found out they were showing the picture without a permit and reached the conclusion that it was sacrilegious, what would you do?

Mr. Brind: If they did not have a permit, did you say, Your Honor?

Justice Black: Yes.

Mr. Brind: Then I think we would merely call it to the attention of the policing authorities.

Justice Black: For what purpose?

Mr. Brind: For whatever disposition they wish to make of

Justice Black: What disposition would they be inclined to make of it if it was a church showing the picture?

Mr. Brind: If the district attorney came to the conclusio as I understand it, that they were showing an indecent picture, he would then have to make up his mind as to whether he wished

Justice Black: Could he prosecute them for showing it to their members of their church without a license if it is sacrilegious?

Mr. Brind: I do not know, Your Honor. I do not know what

the answer to that is. It would not affect our jurisdiction at all as to whether the district attorney in the State of New York would have the power under the penal law to hail into court the officials of the church because they were showing a sacrilegious picture for which we had not issued a permit. That would not come within the purview of our jurisdiction.

Justice Black: Is there any exemptions for them, for getting a permit from you for a church? Is that their duty?

Mr. Brind: If it is to be used as an educational picture

Justice Black: They are going to show it to their member. Do they have to get a permit?

Mr. Brind: I think the statute would anticipate that. I think that is so.

Justice Black: You think the statute applies to every church requiring them to get a permit for a motion picture?

Mr. Brind: I think that is true.

Justice Black: And if they get it and you come to the conclusion that it is sacrilegious or indecent, the church shows it to their members without charging admission, you can cancel the permit?

Mr. Brind: I think we should.

Just to make this plain, from my own thinking, we have never had this problem, so it is a new problem so far as I am concerned. But we would have to determine when we are dealing with the question of sacrilegious as to whether the presentation

of a particular picture in a particular church is sacrilegious under the same basis as it would be if it were being presented for amusement or hire in a place of business. There may be a difference there.

Justice Jackson: Suppose a church group, which does not accept the doctrine of the divine birth, takes this particular film and says, "We will now show a film which shows the doctrine of divine birth as those who believe in it say," would you say you consider sacrilegious? Do you say that that church group could not use this film under New York law?

Mr. Brind: I think they could because it doesn't become sacrilegious under this law.

Justice Jackson: I thought you said they could not. I think it is important that we know what the law is.

Mr. Brind: You have to get back, Your Honor, to the definition of the term whether you are lampooning or profaning for public display.

Justice Jackson: I take it, if you showed it to a group that didn't believe and said, "Now we are showing you how absur the belief is by a picture," and they used it for that purpose and with that announced intention, would that be prevented by New York law?

Mr. Brind: I think the answer to that is no.

Justice Jackson: Do you reconcile that with the answer you gave to Justice Black?

Mr. Brind: If it were a motion picture house in which a fee was being charged and it was being used to lampoon that particular religion, then it comes within the term of our statute, as I see it. If it were being used in a church for not the same kind of approach, then I do not think we would have jurisdiction.

Justice Jackson: The motion picture is not being used with any particular religious motive, the church group I am using as an illustration -- I don't know of any such, but there may be -- would be using it directly for the purposes of impeaching the doctrine or lampooning it, to use your phrase, and you say it cannot be barred from this group and would be permitted to use it for frank propaganda purposes, but it couldn't be exhibited for commercial purposes.

Mr. Brind: If it is used by the church for propaganda purposes of their own and not in a public theater for pay, my answer is that we do not have jurisdiction to bar it.

Justice Frankfurter: I would like to ask you this question: From the discussion we have had and the analysis you have given, you derive jurisdiction from Sections 2 and 3 of the Act; is that right?

Mr. Brind: Parts 2 and 3 of one of those sections; that is right.

Justice Frankfurter: As I read 2, it is reflected in what you have said. As I read 3, it merely gives discretion to the

Director of the Division, Director of the Motion Picture Division, without examination to issue a permit to any motion picture film. I should think that naturally, on this very picture, in view of the rumpus and the controversy that has been raised, even though it could be shown in a place not for amusement, say by Dr. Holmes' Community Church in New York, the Director of the Motion Picture Division would not be compelled automatically by Section 2 without examination to issue the permit. I think he could say, "In view of the determination of my superiors, the Board of Regents, that this is sacrilegious, I will not give the permit."

I think I am exceeding my right to interpret New York law but I wonder what you think about it.

Mr. Brind: I think I would agree, Your Honor. I think I would probably give that consideration, but I think it would depend a great deal on the exercising of the discretion. If he misused that discretion, then it could be reviewed in the courts.

The Chief Justice: I understood you to say that the film might be shown in a church or to such groups without a permit.

Mr. Brind: Right.

The Chief Justice: At one time you said, if you learned that it was sacrilegious in your opinion, you would call it to the attention of the prosecuting officers; is that right?

Mr. Brind: I said that in case we had not issued the

permit --

The Chief Justice: I said that you had not issued the permit and you had learned about it and you then convey that information to the prosecuting officer.

Mr. Brind: Yes, Your Honor.

The Chief Justice: Where is the statute that makes it an offense for a church to show without permit a sacrilegious film

Mr. Brind: I was thinking particularly of the terms obscenity and indecency.

The Chief Justice: I am thinking of the words that are involved in this case. Is there a statute in New York making it a violation of law for that church to show that picture that you think is sacrilegious?

Mr. Brind: I don't believe there is anything. I don't profess to be too familiar with the penal law. I don't think there is anything in the penal law that prohibits the showing of a sacrilegious picture in a church for that purpose.

The Chief Justice: Showing it for a fee is what gives you the power?

Mr. Brind: To act.

The Chief Justice: Under the statute?

Mr. Brind: Under the statute.

Justice Jackson: Then it comes down to this. Is this a correct statement of your view of New York law? That the New York law prohibits sacrilegious for pay, but permits

sacrilegious for its own sake. (Laughter) Really, that isn't laughable. That is really what it comes to, isn't it?

Mr. Brind: We get into other problems in trying to answer that categorically. I didn't want to get into the other part of the argument because Mr. Brown is going to do that. This Court has already held that it is perfectly proper to have a record which is attempting to say that a particular thing should not be adhered to by a particular church. The question of what they can or cannot do comes under that. The only thing we are dealing with here is the question whether the Regents have the power under this statute to censor pictures. The word "censor," incidentally, doesn't appear in the statute, but we use it here. The question is whether the Regents have the power to censor pictures which are sacrilegious to be utilized in motion picture houses for admission.

Justice Jackson: It depends entirely on whether a fee is charged for the exhibition?

Mr. Brind: And the exhibition for a fee at a place of amusement. I use the term "place of amusement," because that is what the statute says.

I have used more time than I planned, and I have more things, but I think I should give Mr. Brown the opportunity to go on with his argument.

The Chief Justice: Mr. Brown.

ORAL ARGUMENT ON BEHALF OF THE APPELLEES,
LEWIS A. WILSON, et al.
By Mr. Brown

Mr. Brown: May it please the Court, on the subject which has just been discussed, I think that I should point out in connection with the issuance of permits that the applicant for a film for educational or religious purposes is required to file an application which shall contain a description of the film. If a religious group should apply for a permit to show "The Miracle," the Regents very naturally would deny that permit.

The Chief Justice: If they didn't file the application, according to counsel, they should show it impunity.

Mr. Brown: I think counsel may be in error about that.

The Chief Justice: Tell us where he is in error, because to me that is a very important point.

Mr. Brown: It is. Our penal statute makes it a misdemeanor to exhibit a motion picture which is required to be licensed.

The Chief Justice: He says it is not required to be licensed.

Mr. Brown: It is required to have a permit.

The Chief Justice: He says you don't have to have a permit.

Mr. Brown: I think the statute is otherwise, with all due deference to Dr. Brind.

As I read the statute --

The Chief Justice: Where is the statute?

Justice Frankfurter: What you are saying is that Section

122 is the general statute requiring licenses and that Section 123 is the qualification as to exhibitions for which permits are required.

Mr. Brown: That is right.

Of course, Your Honor, we rely here --

Justice Douglas: This case comes under 122, not 123.

Mr. Brown: 122. I want to make sure about that.

Justice Reed: That is a licensing provision.

Mr. Brown: 122, yes.

Of course, we here rely upon this Court's decision in the Mutual Film cases. Contrary to the assertions of counsel, we maintain that not only have those cases not been overruled, but they have been followed in numerous cases, in the State courts, in the Federal courts and by more recent decisions of this Court. I refer particularly to this Court's decision in the Eureka Productions case and the RD-DR Corporation v. Smith case.

In the former, which was decided in 1938, this Court affirmed a judgment of a three-judge District Court which had sustained the constitutionality of the very statute now before the Court. That is our New York statute. And the Court, in that case, based its decision upon the decision in the Mutual Film cases.

In 1950, this Court denied certiorari in the RD-DR Corporation case in which was presented the constitutionality of an ordinance of the city of Atlanta which was much broader in scope

and far more indefinite in its language than the New York statute now before the Court.

In that case the Court of Appeals, Circuit Court of Appeals, referring to the Mutual Film cases, said this -- and this is a short quotation on page 17 of our brief:

> "The decision" -- the Mutual Film decision -- has been on the books for years, not only unchanged but uncriticized.... Since its writing, it has been quoted from and followed without varying in decisions without number."

In the recent Kovacs case, Mr. Justice Frankfurter said:

> "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated."

We submit that there is no basis at all for the contention that the Mutual Film cases have been overruled or that the principles which they enunciate have been departed from in the subsequent decisions of this Court.

The Chief Justice: You recognize that the Court has made certain statements in subsequent cases that run counter to the Mutual Film cases?

Mr. Brown: Your Honor, there are such statements.

The Chief Justice: The Mutual Film cases were decided in 1915. In the Paramount case, 334 U.S., the Court s aid:

> "We have no doubt that moving pictures, like

newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."

Mr. Brown: I think that was by Mr. Justice Douglas, his opinion.

The Chief Justice: Yes.

Mr. Brown: In that opinion he very candidly said that this statement was purely dictum.

The Chief Justice: There is no doubt about that, but I say that is an expression.

Mr. Brown: I would hardly say that that expression stated to be dictum was any indication that the Mutual cases had been overruled.

The Chief Justice: You think it wouldn't be any indication? I don't know how much of an indication, but I would think it would at least show -- it is not binding, it was not overruled -- but it certainly shows what it shows.

Mr. Brown: It certainly shows what it shows, as does Mr. Justice Frankfurter's statement in the Kovacs case. But certainly neither shows as much as the affirmance by this Court of the decision of the statutory three-judge court which had held this very statute constitutional.

That is why I say that I find no indication, reading all of the opinions of this Court, that the Mutual cases have been overruled.

But if the question were one of first impression --

Justice Frankfurter: You read the Mutual Film cases as saying that movies are outside of all constitutional protection?

Mr. Brown: No, indeed.

Justice Frankfurter: Justice McKenna would not have used so many pages for his opinion, for it would have been easy to dispose of it by throwing it out. They would not have had to discuss what the scope of that amendment was with reference to that. The Mutual Film cases didn't say that it could do what it pleases about it.

Mr. Brown: We make no such contention, Mr. Justice. Of course, we don't.

As I was saying, if the question were one of first impressions, I am sure that the Court in principle and under its decisions of cognate questions would hold the statutes to be unconstitutional. As the Court stated in the Mutual Film cases, while a motion picture may be a medium of thought, it is not the

same thing as speech and writing, to which the First Amendment guarantees apply, and therefore are not similarly protected. But the Court there went on to say that motion pictures are capable of evil, having the power which is greater because of their attractiveness, the manner of their exhibition, before mixed audiences of men and women, boys and girls and children, sitting together in the theater.

As Dr. Brind has pointed out, the Ohio statute is much more open to attack on constitutional grounds than the New York statute. I shall not read it now, but there were no exceptions as in the New York statute that film known as newsreels, with which the Court is familiar, were exempt from it. Those are things which really involve the expression of ideas and views, and thus those are wholly exempt from our statute, which was not the case in the Ohio case.

This Court has said: "The lewd, the obscene, the profane by their very utterance inflicts punishment." Mr. Justice Jackson said in one of the cases -- I forget the case -- "The moving picture generally, the radio, the newspaper, the handbill, the sound truck, and the street-corner orator have different natures, values, abuses, and dangers. Each, in my view, is a law unto itself."

We submit that there is a reasonable basis for legislation under the states' police power to prevent the exhibition of such pictures as these, to use the language of Mr. Justice Reed in

the Breard case, which "attack the social welfare of the community."

The Court knows from personal experience that the vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing platform or the cold type of the written page or the still picture in a magazine does not. Add to that the setting in which the movie is viewed, the darkened theater, the relaxed receptive audience, the complete concentration on the presentation, the company of a sizable or even vast audience, all simultaneously focusing on the screen, and also the vast number which the motion pictures reach, the wider and less selective audience made up of men and women together with teen-age boys and girls, children, and I think we have the difference in values in potential evil which this Court has said is the reasonable basis for legislative control and which requires differences in the application of constitutional guarantees.

I think the state's judgment in this respect, depending as it goes upon its knowledge of the local social and economic factors, bears a weighty title of respect. We must also give pause, I think, to the fact, to the realization, that invalidation of the statute here would deny the power to Congress to adopt similar legislation.

Something was said by Mr. London regarding television being wholly unrestricted. I think that is not correct. Under the Federal Communications Act a station license may be revoked if

the station does not retain the right to reject for unsuitabili[illegible]

Under that power it seems to me obvious that the obscene, profane, sacrilegious may be barred from the television circuit[illegible] I think that is the effect of this Court's decision in the National Broadcasting case.

Justice Burton: That can be exercised before the showing of the picture on television or after?

Mr. Brown: As I understand it, Your Honor, although I am not an expert on this, any exhibitor over radio or television i[illegible] required to submit the script to the broadcasting company and t[illegible] broadcasting company is under an obligation to see to it that objectionable, obscene, sacrilegious film is not permitted to b[illegible] broadcast. If they permit that, the Federal Communications Com[illegible] mission may revoke their license.

Counsel has also referred to the fact that pictures may be imported into this country. That does not mean that all of the pictures received here are pictures which are suitable for presentation to mixed audiences or to any audience. As a matter of fact, the picture involved in the Eureka case to which I have referred, which was the picture "Ecstasy", was passed by Custom[illegible] It was banned in New York and its banning was sustained as constitutional by the three-judge court, and the three-judge court's decision was affirmed by this Court.

Counsel has given the impression that the motion picture industry in this country is very much opposed to censorship. I

doubt very much that that is so. Certainly there is nothing before this Court to establish that fact. I am informed the industry was requested to participate in this case and refused to do so.

As to the brief of the amici curiae here, there appears thereon the name of the International Motion Picture organization. That organization is newly formed. I believe it was formed in 1950. Its members are exhibitors of motion pictures in this country which are received from abroad. The directors of that corporation are Mr. Joseph Burstyn, who is the appellant here, Mrs. Gerard, who is the manager of the Paris Theatre in New York where the picture "The Miracle" was shown, and the other directors appeared to be all people who are interested in the exhibition of foreign films, films that are produced abroad.

Justice Jackson: As a matter of fact, that is the only question, since the foreign films are the only ones of practical importance in this situation, isn't that so?

Mr. Brown: That is what I was about to observe at this point.

Justice Jackson: I didn't mean to anticipate you.

Mr. Brown: Very little difficulty is found with domestic produced film.

Justice Jackson: The domestic industry submits its films, as I understand, to censorship in advance, does it not?

Mr. Brown: I would say it has not objected to and is

not opposed to our censorship law.

Justice Frankfurter: Justice Jackson means something diffe ent.

Justice Jackson: They submit, as I understand it, the producing companies in this country, their films to a censorship, or call it an examination, by the church before they are put out. Isn't there an agreement to do that?

Mr. Brown: To the church?

Justice Jackson: Yes.

Mr. Brown: They have their own so-called censorship committee.

Justice Jackson: Well, yes, that is what I mean.

Mr. Brown: I don't know how much control it has, but it does have that committee.

Justice Jackson: So the only application of this would be with respect to imported film?

Mr. Brown: Largely that. However, there are independent producers in this country who do not submit their films to this censorship board of the industry. I would like briefly to refer to this industry code, so-called, the production code of the industry. We have quoted from the code in our brief. That recognizes what we are arguing here. I think it does so in all of its aspects.

I would like to read briefly from page 25 of the brief. This is the industry's own code.

"Theatrical motion pictures, that is, pictures intended for the theater as distinct from pictures intended for churches, schools, lecture halls, educational movements, social reform movements, et cetera, are primarily to be regarded as entertainment."

The code then points out the distinguishing features of a motion picture as compared with books, newspapers and stage shows.

The code states: "The latitude given to film material cannot, in consequence, be as wide as the latitude given to book material or to newspapers or to plays on the legitimate stage.

Comparing motion pictures to books and newspapers, the Court said -- this is on page 26 -- "By reason of the mobility of a film and the ease of picture distribution, and because of the possibility of duplicating positives in large quantities, this art reaches places unpenetrated by other forms of art ...

"The latitude given to film material cannot, in consequence be as wide as the latitude given to book materilal. In additi n

"A book describes; a film vividly presents. One presents a cold page; the other by apparently living people.

"A book reaches the mind through words merely; a film reac the eyes and ears through the reproduction of actual events.

"The reaction of a reader to a book depends largely on the keeness of the reader's imagination; the reaction to a film depends on the vividness of presentation. Hence, many things

which might be described or suggested in a book could not possibly be presented in a film."

Comparing films to newspapers, the code says:

"Newspaper present by description, films by actual presentation.

"Newspapers are after the fact and present things as havin taken place; the film gives the events in the process of enactment and with apparent reality of life."

We consider this to be of primary importance.

In the recent Breard case the commercial feature of door-to-door canvassing was held to remove the solicitation from First Amendment protection. That motion pictures are not the equivalent of speech or press, of tongue or pen, is settled beyond question, I think, within the principles of this Court's decision in the Kovacs case involving sound trucks and in the Hughes case involving picketing.

I think I can be very brief on the subject of sacrilegious Neither the Appellate Division nor our Court of Appeals had any trouble with the meaning of the word. The Court of Appeals concluded the word "sacrilegious" to mean: "The act of violating or profaning anything sacred." That is its meaning in ordinary speech. It is as definite and precise as any word or words tha the legislature could have used in expressing its intent. It i a word in common use and certainly is as clear in meaning as th words "obscene, lewd," or "indecent," which this Court has held

not to be vague or at least not so vague as to deny due process even in a criminal statute.

It is as definite as loud and raucous, which this Court said in the Kovacs case, conveyed to any interested person a sufficiently accurate concept of what is forbidden. It is certainly more definite than the expressions "so far as practicable" and "where feasible," which this Court at this term in the Boyce Motor Lines case held not open to attack on the ground of vagueness.

The appellant's contention that it could not have anticipated the statute would be applied to a mockery of religion because the meaning of the word "sacrilegious" is to steal sacred things, is not one which I think commends itself to reason.

In this statement I am paraphrasing the Court's language in the very recent United States v. Hood case.

A word in answer to the appellant's argument that the statute violates the constitutional guaranties of the separation of church and state and the free exercise of religion.

We submit that the constitutional guarantee of freedom of religion does not embrace the right to lampoon and vilify all religion or any religion. Gratuitous insults to recognized religions, religious beliefs, by means of commercial pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose.

The proscription of such motion pictures does not entail participation in religious affairs and is, we submit, well within the state's police power to promote the public welfare, morals, public peace and order.

The infirmity in the appellant's argument is that it assumes that a license could be denied under our statute for the exhibition of motion pictures which portray subjects which are contrary to the beliefs of certain religious sects. Of course, that is not so. As I said, purely religious films are exempt from licenses, and a license may not be given for the commercial entertainment of motion picture because it propagandizes the creed of a religious sect.

Propagation of religious views or anti-religious views by means of the motion picture is not, as our Court of Appeals said in this case, permitted by the statute. Many pictures have been licensed without question which exemplify the beliefs of one sect or another. Examples of this are: "Come to the Stable" --

Justice Reed: Who determines that?

Mr. Brown: The State Board of Regents.

Justice Reed: And then it is a matter of constitutional law in which this Court has authority to look at the matter to see whether it is sacrilegious?

Mr. Brown: We think we understand, Mr. Justice, that this Court will accept the decision of the State's highest court on that question of fact as to whether it is or is not sacrilegious. However --

Justice Reed: Even though assuming the exhibiting of a sacrilegious picture may be constitutionally prohibited, it does prohibit the showing of a film that is not sacrilegious.

Mr. Brown: No, I quite agree, Your Honor.

Justice Reed: The only charge is sacrilegious.

Mr. Brown: Waiving the obscenity.

Justice Reed: Looking only at the element of sacrilegious.

Mr. Brown: Confining it to sacrilegious, the Board of Regents could proscribe one.

Justice Reed: If it proscribes one that this Court thinks

is not sacrilegious, what then?

Mr. Brown: I had assumed, Mr. Justice, in accordance with its usual practice, in cognate matters, it would accept that finding by the State's highest court. However, this Court has viewed the picture and we certainly have no objection to this case being decided upon the Court's own independent judgment.

Justice Reed: We have no constitutional ground to do that.

Mr. Brown: I think I said personally I have no objection to the Court doing that.

I was citing some examples of pictures which have been licensed without any question whatever. The names are familiar to the Court, I think.

"Come to the Stable" is one.

"Song of Bernadette."

"Going My Way."

These are pictures portraying nuns and priests.

"Quo Vadis."

The Chief Justice: Your time has expired.

REBUTTAL ARGUMENT ON BEHALF OF THE APPELLANT, JOSEPH BURSTYN, INC.,

By Mr. London.

Mr. London: I would like to answer one statement made by counsel to the effect that the motion picture industry is not opposed to licensing statutes. Your Honors have just had submitted to you a case brought by the motion picture industry,

W. L. Gelling versus the State of Texas, Docket No. 707.

The first question raised in this case is as follows: Whether the Marshall censorship ordinance is invalid on its face as a prior restraint of freedom of speech and press in violation of the First Amendment.

I think there is no question they are unalterably opposed to any statute of this kind.

Justice Jackson: That does not involve the question of sacrilegious.

Mr. London: No, Your Honor. I am talking about the First Amendment question, whether or not there may be a statute licensing movies as a form of communication. They are unalterably opposed to any such statute. I think it is clearly indicated in this statement as to jurisdiction.

Justice Jackson: Don't they submit to voluntary censorship?

Mr. London: Yes. They say this is the democratic way of proceeding. "Let's look and see ourselves whether or not we can clean house."

They feel that is the proper way to do it, not leave it to a censor. They feel, if they do not do it properly, then there should be criminal prosecution. I think that is their position and I am stating it correctly.

Justice Jackson: But if they submit it to a censor of some kind --

Mr. London: They are not submitting it to a censor. They

are submitting it to themselves. They act as their own censors. This is their code which they administer.

Justice Jackson: But I understood there was an agreement in connection with the so-called Hayes Office.

Mr. London: Yes, sir.

Justice Jackson: Under that agreement they would submit everything to a committee of the church which examined it. Am I wrong about that?

Mr. London: I believe you are. They submit to the motion picture code administration, which is their own organization, which examines the pictures and decides for themselves.

Justice Jackson: Some considerable time before this case came on, I was told by a man in the industry that that was the uniform practice, to do that.

Mr. London: Whether they also submit it or seek the advice of the church is something that I don't know. But I do know that the code administration is their own organization, which they themselves administer, and it is a kind of self-censorship. It is a kind of cleaning house for themselves. Of course, I think that is unquestionably not the kind of censorship that we have in issue here.

I just wanted to make it clear that the industry is opposed to licensing statutes.

Thank you.

(Whereupon, at 1:55 o'clock p.m., the argument was concluded.)