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Supreme Court of Texas.
Carl R. Pruett and National American Insurance Company, Petitioners,
v.
Harris County Bail Bond Board et al., Respondents.
No. 05-0283.

December 6, 2006

Appearances:
David A. Furlow, Thompson & Knight, L.L.P., Houston, TX, for petitioners.
Sandra D. Hachem, Harris County Sr. Assistant Attorney, Houston, TX, for respondents. Douglas M. Becker, Gray & Becker, P.C., Austin, TX, for intervenors.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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PROCEEDINGS

JUSTICE: Mr. Furlow, the [inaudible] petitioner. The petitioner is in five minutes rebuttal.

ORAL ARGUMENT OF DAVID A. FURLOW ON BEHALF OF THE PETITIONER

MR. FURLOW: May it please the Court. My name is David Furlow and I am here today on behalf of Carl Pruett and National American Insurance Company. Before I get into my two-prong analysis of how the first Court of Appeals went wrong in this case. I would like to-- the Court's indulgence for a moment so that I can place this bail bond issues in their real world context. The bail bonds that are subject of this appeal are these-- are instruments that have been determined to be available to defendants by magistrate and a peace officer. It is important to understand that these bail bonds are not available to people who are considered to be no bond defendants in the city in Harris County, that is, they are not available to habitual defendants, to capital offense defendants, to persons indicted before the grand

jury, but not arrested. To any defendant, out already on a felony bond, according to Cathy Brydofus, court's record three at pages 570 and at pages 138 to 139, not available to anyone who's a defendant with a pending motion to revoke probation motion, to revoke the federal adjudication motion to revoke parole; not available to anybody in the case involving family violence, thus, parental violence, extorts of child, passel of violence or ...

JUSTICE: You seem to take a big bite out of your argument. But do you have a left?

MR. FURLOW: Yes, your Honor. In fact, I began to more examples just to show you how limited it is, the issue that we examine today. Don't we fall at cases involving any situation where the victim has requested emergency release under the Texas Code of Criminal Procedure to protect that person from immanent violence, and that's in Tex. record 3, page 139. They don't include cases in which the police officer has determined that there was a danger, that there was danger or risk of flight and have therefore, obtained the 2b which known as the pocket warning. Those things are not before you today. What's also not before you today are matters with sealed indictment. Those are not matters of public record. So we take this entire category of all of these dangerous and likely flight-risk defendant and move them out of the moral argument today, because what we're actually talking about for the most part are misdemeanor offenses and citizens determined to be entitled to post a bail bond by a magistrate and peace officer.

JUSTICE: But some of them have, some of them have.

MR. FURLOW: Some of them have, your Honor, but it's significant in Harris County because, Justice Brister, we note that there are tens and thousands of letters issued every year by Sheriff's Department to our fellow citizens who've been determined to be as such little danger to Sheriff himself says, "You've got a pending warrant and it would be behold you to get a bail bond before an attorney, and go on face the bond yourself." Now, it suggests to you, Justice Brister, that the bail bondsmen by assisted Sergeant Paul and the other people in the Warrant Division actually help them and give them an opportunity of raising the response level above the minimal ten percent response that they get from those letters to a much higher level, and when those citizens, our fellow citizens, go out there and actually post their response, they're actually making life safer, they are police officers, because that means that those police officers don't have to go and serve the warrant dangerously before. We're coming into a situation to serve a warrant exposes them to a threat of attack or shewe.

JUSTICE: But there was testimony presented that some defendant had been tipped off and that occasionally-- this is a problem. There's a subsidence here that can be problem or danger to the arresting officer. How would you curb out this subsidence?

MR. FURLOW: We don't know. We submit the Charles Baculous , the district court [inaudible] because the tip off that you're referring to is the one that here preclude, the one they discussed and that occurred in 2000 and in July, on July 7th of 2000. That's when our district court bagged a reason, imposed the 48-hour rule. And let me emphasize also with respect to that, every time that the insurance officers or policemen determined that it's time to go back and give a warrant and they put this into the JIMS system, they got the 48-hour window rule which that information is not a public record. And that's in response to the tip off so that the tip off situation where someone received a notice shortly after the issue of with severless and that specifically officer shared in the hard lab story. First of all, that what occurred

today because those officers have 48 hours from the time that they actually go out and put this in system and go out and get that person arrested. But second, your Honor, I would say that, with respect to that particular instance, I'm not complaining to bail bond because the testimony is that Sherry Ballad called up the father accused of raping his own daughter and confronted him about that in order to build his case, and that's when the man told her on the phone. According to her own deposi-- her testimony at the temporary injunction hearing, that in response to what the police officer said, he said, forgive me for this is a [inaudible] language, but he said, "I'll take the line bitch, you go to Mexico. You will never catch me," that in response, in leading was in response to what the police officer told him. And there's no proof anywhere in this record that actually having been caused [inaudible] actually what fleeing and then they call that revenge with that actually resulted from a bail bond, from tip off. So I reject the states attempt to mis-calculize the evidence so just the bail bond to be responsible for that [inaudible] against the tact police officer. Now, the 48-hour does in fact addressed to the situation. But there's a plenty of other ways in this record. Our Code of Criminal Procedure talks about ways in which emergency orders can be imposed in order to protect the victims of crime and witnesses of crime. In fact, the no bond laws includes anybody who has requested an emergency relief. Again, according to Cathy Bratt, Court's record volume 3, pages 138 and specifically at 139, find that and it's talking about that. But there is other opportunities too. These police officers can go then get that to the warrant as long as that's-- that pocket warrant remains in the pocket, it doesn't bring us to the JIMS system. They have no opportunity to serve that at least. They told of the sealed indictment. So for the tiny minority of potential danger, there are plenty of alternatives available and that require us to muscle Carl through his mouth or to steal the pen when he and another independent bondsmen were [inaudible]. And I would submit to you that those letters and those phone call actually do us good because every citizen who's counted to be entitled by this officer by night [inaudible], and to post the bond. It actually does something. Say, it's our tax paying doubt because we don't have to pay for it if Carl has started in Harris County jails. So it's our benefit that Carl Pruett and other independent bondsmen do send out those notice letters based-- there are truthful and accurate and based on public record information. And it is against a public policy and against there in the record exactly, for the Harris County Bail Bond Board to shut down those avenues, those unique avenues, truthful communicated information that is the equivalent of media information for people like Carl Pruett, in fact, are transmitting that. And even if ...

JUSTICE: Even if some-- 3702 doesn't apply. Even if it doesn't, why is it that a reasonable distinction don't call between 9 to 8-- 9 a.m.? How can you uplift and call in 2 o'clock in the morning?

MR. FURLOW: Very simple, your Honor, because I'm a father of a teenage son and a teenage daughter. And my son would get up and call on, that to check our failure to turn off video tape charged by someone, by some police officer [inaudible] warrant. I don't want in fact to blame them. For 24 hours-- supposed it's nine to, you know, nine [inaudible] for up 36 hours, twenty-four plus twelve. I don't want to have to wait that long to get my son or daughter at the Harris County jail. In this Ms. Cathy Bratt, the assistant district attorney, I used to work with in Harris County District Attorney's Office, testified that they had for a temporary injunction hearing. Jails in

there placed, and I don't want my son or daughters teenager to be exposed to situation ...

JUSTICE: But you no longer get a phone call when you get rested. You got to count on the bail bond industry to contact the their parents.

MR. FURLOW: Usually, your Honor, we do get a phone call. Now if you got call back or a caller ID for those others in instance, they definitely sure of Shopper testify who block people from getting phone calls. If you got caller blocker, you got to pin it. You may not fear from them unless they're on a bail bond, who's never a moment hear on call blocking because it's not coming from a public plan. And that's a serious concern addressed in its development the testimony below. But I would submit, Justice Hecht, for the reason is so important because if you do spend call in Harris County jail, that is badly admitted. There isn't real possibility first that you might be-- second that you might be late and that you might be exposed at aids or on the lesser bank. If you went to this result, you're in jail with a number of people who were drug addicts and sometimes prostitutes and you may be exposed to work with strangers, which is then occur whenever you have a [inaudible] of people close to the defined court. So I would submit to you that people have very good reasons from wanting to avoid going to jail and most importantly from wanting to have little John and you have little Jenny out of jail as quickly as possible, actively have been placed in there.

JUSTICE: Are Johnny and Jenny going to get one phone call?

MR. FURLOW: Johnny and Jenny won't get one phone call.

JUSTICE: Correct. [inaudible]

MR. FURLOW: Phone call if I get caller ID. Yes, your Honor, I'm sorry.

JUSTICE: Won't they call back?

MR. FURLOW: Presumably, they will call back. And if that-- he is speaking of a similar of the New York City where they remain in jail. If dad-- he's got caller ID on the system, or call whatever to block out phone calls from public phone, then I don't get any work at all. And they remained in such a date he mentioned he calls somebody else or until a bail bondsman notifies him. [inaudible] again. This on the bail bond, and that bail bondsman also gives me pertinent information about confidential instances, and most importantly, in that system where the US Supreme Court's decision in Virginia Pharmacy Board versus, versus Virginia Citizens Consumer Council. That binds me with triple accurate information about [inaudible] corresponds, because as you see these restrictions, the reason and there's no act enacted statement of purposes. The reason there is no legislative history here or in a federal bail bond case where judge court decided is because these bonds reflect not a real call for people concerned, for the police, or the public but from International Fidelity Insurance Corporation's desire to create little violence of non-competition, attempt its people by curbing out exceptions that undermine stated purpose for the rule, that is, the exceptions for existing business relationships prior to existing business relationships. In any call, any [inaudible] such a great danger to the police and the public, why then are there exceptions curbed out for the existing business relationship bondsmen? Is this customer not post the same sort of threat? Are there any reference, observance, studies, statistics, analysis by this Bail Bond Board in which a competitor with existing business relationship bondsmen and probably against the theft criminal or crime versus the ordinary business bonds, the independent business bondsmen? He's trying

to serve the needs of [inaudible] public where off, having their very first sentence [inaudible] jail. I would submit to you that there is absence of record.

JUSTICE: Now, the Courts have above coverage particular respond attorney, solicitation of clients for appeal in our rules 24 and 25 ...

MR. FURLOW: Very simple, your Honor, because Mr. Pruett and his direct employees such as business offer I think could provide people with truthful informational non-misleading information. They are not as [inaudible] as it clearly was employing no others. [inaudible] some of them apparently may address that as [inaudible] moral agreement. There you have a record of the real concerns about misleading the public, fraud, and the meaning of illegal profession. Here, you have none of those, none of those matters taking forward. You have certainly truthful, non-misleading information about the constitution ...

JUSTICE: So restrictions on lawyers, okay, counsel, lawyers in fad, have restrictions on bail bondsmen. Okay, because everybody knows bail bondsmen are right practices.

MR. FURLOW: No, they are first to argue.

JUSTICE: Any proper argument.

MR. FURLOW: But what I'm just saying is there, there was a record of abuses and misleading information and of problems where there were in fact runners who were outside the lawyers' control, where you get in combat running cases for a cup of fate. Did you know you have friends in disguise? I would also submit, however, and since the order of this side pointed out if I could-- the Supreme Court started out special area of bar regulation because liquidation of attorneys as officers of the board on the counts of civil bail bond cases would offer litigated category from the lawyer, disciplinary rules cases that this Court deserved for. They are different matters. The important things I would like to address here is-- let me address Justice Hecht's concern with respect to 3702. Specifically, bail bonds are unique three-way contract between the state, the defendant and the bondsman in an amount precept by the state. And so what you actually have there is something that falls outside the 3702, which deals with two-way transaction between the seller, say, who contributes, purchaser who contributes. Here, this three-way matters are matters in which the state through a magistrate and an assistant district attorney had turned him the amount of the bond. And that takes us over to Section 3702(b)2, which says that the consumer telephone call is not subject to sub section (a) if the call is made. Number two is primarily in connection with the existing debt or contract in which payment or performance has not been made above the obligation that contract. The potential debt is the bond that someone has to take when they are prepared to pay, if they don't show up. Well, the Court [inaudible]. That's the pre-existing matter that you have unique three-way contractual relationship between the state, the defendant and the bondsmen. And this is not some sort of bail bond that I got to take home my [inaudible] again. This is a Court order that remains with the Court, that reflects in my allegation to appear at the date they called me to appear. And that's where you get into, for example, Jefferson County versus Sturk.

JUSTICE: Mr. Furlow, your time has expired. Are there any further questions? You can continue on rebuttal and the Court is now ready to hear arguments from the respondents.

JUSTICE: May it please the Court. Ms. Hachem and Mr. Becker, official argument for the respondent. Ms. Hachem would open for first defendant.

ORAL ARGUMENT OF SANDRA D. HACHEM ON BEHALF OF THE RESPONDENT

MS. HACHEM: May it please the Court. My name is Sandra Hachem. I represent the Harris County Bail Bond Board. This case concerns challenges to two rules passed by the Board which provide two clearer restrictions on solicitation by bondsmen. The rules have been challenged on the basis of the Court's authority as well as the constitutionality. In my ten minutes before the Court, I'd like to focus on two issues that were brought in the briefing. The terms and of course the evidence probably before the Court to establish the substantial cover of the interest that the Board stopped to address to satisfy the First Amendment. And the second, for the Board's interest sufficiently addressed in rule 25 to satisfy person and concerns maturity rules as found by the court below.

JUSTICE: Do you agree that this case is well involved misleading [inaudible]?

MS. HACHEM: No, there is no. We're not thinking there's such a thing. Our point is [inaudible] of the absence of enactment statements or record of evidence that can't be poured a promulgation of these rules. It means there was no evidence and all the substantial interests were adoptions of these rules. Of course now, we disagree that there wasn't evidence, but second of all we disagree with the statement of law. In this connection, we need to mention to the Court that there was a brief filed last Thursday, a letter brief by our opponent. It cites an Eleventh Circuit's case suggesting this is recent controlling authority on this issue to suggest that we can't consider anything after trial on issue concerning the intent of the rule-making body. In making citation, this though I need to mention that it tells to cite very recent case filed in Fifth Circuit. That is decided this last August, Tennessee Ranch versus the City of Arlington. I'd like to stress in that case first. In that case, the Arlington-- there was an Arlington rule that was adopted to SOP's, that prohibited certain actions in proximity to nude dancers, to better prevent touching between nude dancers and patrons. Tennessee had filed suit, challenging the arguments under the First Amendment. And in evaluating the substantial interest element under First Amendment, the Court discussed right evidence it could consider. And relying on the United States Supreme Court, Omida and Lentin, the Court held that a municipality may remand on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial independent interest. In this connection, the Court noted, "There was evidence according to city's rationale court's ordinance from expert report, several studies, as well as data cited in Court of Appeals." Tennessee argued, however, that there was no empirical evidence according to city's ordinance pre enacted, and according to expert's statements that he was unaware of any empirical studies correlating distance issue for enactment. The Fifth, Fifth Circuit responded this for saying that he, he focused on pre-enactment rationale. It's misplaced since our corporate focus is not empirical inquiry to the actual intent of the enacting legislature, but remedy to the existence of a current governmental interest. In this record, there was sufficient evidence of current interest ...

JUSTICE: I was talking about that because opposing counsel said it

was subset that really is at issue here that, that is subject to the interest that, that point of concern. It's so small as to really [inaudible]. Now, how do you respond to that?

MS. HACHEM: Well, I don't think it's so small. We have testimony in the record. Primarily, the-- what are the testimony competitive letter that start saying the Court [inaudible] up page 5636, 620 or something. She talks about a lot of the promise that we-- that the more they became aware of concerning perceptual order commonly altered before the issue of tipping off officers. And in fact, it became such a problem, the problem that he was in a newspaper and also JIMS responded that our district court isn't an independent authority, responded by having the 48-hour rule with respect to JIMS.

JUSTICE: What about the argument that there are a whole lot of categories of, of people who have really-- this shouldn't address in the misdemeanors that, that all the people who do have other means of getting this information?

MS. HACHEM: You know, the officers provide the testimony at the-- in, in connection with this as well. And I don't think it matters what type it-- if the constant committed the misdemeanor or whatever, there is always a safety concern. And I recall recently in Houston we had, you know, there is situation when someone just, you know, stopping someone for a, a violation traffic and, and put some danger. This is a, this is a ...

JUSTICE: That's certainly contrary [inaudible] that peanut butter presidential letter paid analogy. They're just to be something-- has the potential to be dangerous. It doesn't mean you can ban it.

MS. HACHEM: Why?

JUSTICE: It sounds like what you're saying is, there may be some potential and some are [inaudible]. But it's not a providing clause.

MS. HACHEM: Well, it was, it was discussed with the Board as being if ever a real danger or a real danger to the officers on the tipping off issue, and because of that, this, you know, the Bail Bond Board has a unique relationship with the bondsmen and that it does kind of, kind of a Sheriff thing responsibility. This profession, like Sheriff, we have a responsibility, our rules that we adopt the judges in court for lawyers. And in doing that, they need to be responsible to public in ensuring that the way they conduct their activity is not a risk to the public. So they may find that something that they are doing is at risk to the public. It was their responsibility by virtue of their responsibility in doing this, this particular activities to, to respond.

JUSTICE: So if one out of fifty thousand people who were stopped for traffic violation turned violent on arrest, that's enough to justify the permission?

MS. HACHEM: We know-- you are talking about a, a [inaudible] safety risk to the officers that could be alleviated by this rule. So then the question is, is that an-- a substantial asterisk for the public and for this Court to consider? And I think it is. I think anytime there is danger to an officer, the intention might not consider that there is not just that kind of danger as-- there is also the danger in their ...

JUSTICE: Their job is inherent in nature.

MS. HACHEM: I'm sorry.

JUSTICE: Their job is inherent in nature. It's not a, it's not a free zone after we can do a bigger job without the risk of being harmed, to the analysis of what the-- Mr. Furlow to say that it's a danger for them to go-- do as your thing to do is in danger.

MS. HACHEM: Well, in the tipping off situation, there is the danger to the officer. It's that what we discover from talking to different officers, but in addition, it also ...

JUSTICE: Do we have, do we have a concrete example that they were actually happened? How many [inaudible]

MS. HACHEM: I don't have any evid-- exact number. We just have the discussions from the different officers ...

JUSTICE: How [inaudible].

MS. HACHEM: You know, I don't, I don't believe that it was under-- qualified a number. But I do not think that it was an issue.

JUSTICE: Well, I show you.

MS. HACHEM: I think common sense would also tell us that there is, there is going to be more of risk if someone is aware that they are about to be arrested especially in a domestic concept issue ...

JUSTICE: Well, but the question [inaudible]. We've got to evaluate competing [inaudible]. The First Amendment [inaudible] step a considerable way to forget and forgive. And so I was just wondering what we're talking about in the abstract officers could be [inaudible] has ever or whatever occurred.

MS. HACHEM: Well, I think that the danger has been-- what has been discussed about that knowing that they were about to beneath point -

JUSTICE: Sure, it is.

MS. HACHEM: - at the arrest.

JUSTICE: So the answer is evident. You're not familiar with the case in the record [inaudible].

MR. HACHEM: NO, I'm not. But I am also aware that, you know, early on in this case, there was a [inaudible] filed by David Prong. And, and he's talking about the discussion with people that are in domestic violence situation, do not force them in tipping off, and that situation also brings a fear or danger to those who might be doing, recording that is perspective to the arrest, also the destruction of evidence which is a real risk. Any of these are common sense things that would be involved in the possibility of an arrest occurring. So ...

JUSTICE: Did the, did the 48-hour check them whether with this old JIMS to that help.

MS. HACHEM: I don't know that that was never qualified. In the second issue that we ...

JUSTICE: Well, let me, let me just get back. It seems to me one of the problems here is the exception or does with a prior existing business relationship.

MS HACHEM: Uh hmm.

JUSTICE: And I just prove 24-word existing business relationship.

MS. HACHEM: Uh hmm.

JUSTICE: And it seems to me in the Court of Appeals held that that exception can really swallow the rule. If the danger is tipping off, you're currently in the whole great of people. They were afraid to tip off. Perhaps the best bond of defenders is there would be ...

MS HACHEM: Well, under 24 when it deals with existing relationships and that would be people that already have a bond with that person. They're not going to be likely to tip them off because they know that if they run and there is a potential. On [inaudible] discussion about this [inaudible] that there is a potential that they would, you know, take off when they lose their interest in their bond. So the, the risk could that in an existing situation is very high, turning to it, the 24 and 25 that prior end of this thing relationship. That is not a tip ...

JUSTICE: Does any event qualify as the testimony of any event?

MS. HACHEM: You know, this, this is exhaustion area of law. Just like it would be with the solicitation with attorneys, you're not going to be able to qualify everything exactly. This is a social science, such a dealing with issues that are, are not one that you can easily quantify with numbers. You just know that risk that you should comment since. I'm sorry I feel that I just found out of time and I did ask to allow the intervenor to respond in this case as well.

JUSTICE: The Court will hear from Mr. Becker.

MS. HACHEM: I'm sorry.

JUSTICE: The Court then will hear from Mr. Becker.

MR. BECKER: May it please the Court. I am Douglas Becker with the Gray and Becker here in Austin. Your Honors, this commercial speech cases to me than very heavily on the record and I commend this record to you as a full statement. To-- that explains, citing all of the questions that have been answered.

JUSTICE: Well, we've been hearing a lot of speculation about the record and all concrete examples. So maybe you can help us with that.

MR. BECKER: Yes, I will. With respect to matters of safety, there's, there's two things at least that you need to know. One is, this ordinance was not likely passed. There start to be complaints about this calls from bail bondsmen, from citizens, and from police officers who feel at risk.

JUSTICE: Well, I don't like tell a bark, but I didn't know I can complain [inaudible]. If I've been there, I might not complain a lot there. But it seems to me that just because people are complaining, it doesn't mean that you couldn't depend you from the first to [inaudible] for the, the risk.

MR. BECKER: That's correct, your Honor. You can't shut it down just from the basis of complaint, but the test is established in central Austin and explain that you can't shut it down if there is a substantial interest. You had a rule that directly advances it and that there is reasonable fit not least restricted means but reasonable fit between the regulation and what you're trying to do. I don't call to hear that there's any doubt in this record about these rules increasing the safety of police officers. At trial, Mr. Furlow definitely said and it's true, "There's not been a single police officer killed trying to execute an arrest warrant and for bail bondsmen who tipped somebody off." However, there are 6, 8 police officers who testified at trial. And in addition, because of summary judgment evidence, I think nine affidavits properly before you. I recall one of the top of my head complete S-officer that resulted in the shoot-out because of the tip off. And all of those affidavits from the police officers I don't think can do anything that lead and may look to build that inclusion that this is going to increase officers safety. They are all of that depending and ...

JUSTICE: What about the, the tip off from someone would pay an existing relationship?

MR. BECKER: There is a lot of evidence about that. First of all is to the extent of it. The industry representatives of Roger Moore [inaudible] counsel, my client, and Jerry Watson, the president, Mr. Moore testified that there would be less very few people with existing forms out there less than three or four percent. Mr. Watson had been in the business longer said because of the zero, then the three or four percent. It's a small number, but why is it okay if there are any? The reason is the bail bondsman has a substantial financial investment. His existing bond. And the testimony at trial is the bail bondsman knows he

is fine. He knows which ones, he knows the family, he knows how long they've been in the community, he knows the whole life story, that's his business to know that otherwise, he's not in making money, riding bus. So when we get a second charge on someone, the bail bondsman knows if I tell this person to come in, he will take care of the second charge, that will be okay. There is testimony that there are bail bondsmen who knew that the second charge is likely to make their-- the person aide bonded run. In those cases the bail bondsman will call the person into the office or to the police station on a pretence and have him arrested on the second charge thereby preventing liability on the existing bond. So there is a support in the record for the existing bond exception.

JUSTICE: What about the prior exception?

MR. BECKER: Okay. The prior exception was not in safety situation.

JUSTICE: I understand.

MR. BECKER: Yes. Just in the middle of the night harassment situation and the justification manner is simply, I think, a numerical one. In other words, there is the prior relationship. Well, also that bondsman will also know what the situation is, but that bondsman-- is there's going to be a small number of people with prior existing relationships. There's a very small number of people who have among all those people who are arrested. There is not many that have gone to more than abandoning that mere too. So we're talking about there is testimony in the middle of the night, 20 to 40 calls, phone calls at home that indicting proxies at home in a 24-hour period, and those phone calls for people that have a prior or existing relationship would go down to warrant too.

JUSTICE: Do you think the three-way nature of a bail bonding relationship precludes this thing subject to 3702?

MR. BECKER: The Court of Appeals I think said yes. I don't know whether, I don't know whether it is subject to it or not to take a trip through this argument to be made that is not. But whether it is or it isn't, if you soar out these regulations, you guess serious doubt handed this to [inaudible] code and also with the FTC regulations that have the identical exceptions for prior or existing relationships. And all of those bodies who have felt that, they were worthy of some degree of protection. You know, I really want to impress on you that Bail Bond Board studied all of these four years starting in late 1997. They didn't just pass this overnight. And they also tried other means to solve this problem. They tried-- well, it first [inaudible]. It was a leak in the district attorney's office because there was so many complaints from police officers. They found that wasn't true. They tried voluntary complaints through one that it didn't work. They tried other means blocking out information, blocking the, the JIMS system and there what they found was the 48-hour rule. The JIMS system wasn't working. It is inconsistent. It wasn't consistently applied to decide with the change at any time. And then I also ...

JUSTICE: Should, should they do-- what did they do?-

MR. BECKER: The JIMS system?

JUSTICE: No. The 48-hour applied.

MR. BECKER: Well, it's up to the district court. It's not applic ...

JUSTICE: Well, I understand that, but I-- would help prove ...

MR. BECKER: There were conversations with the district court to try to get in to change the system in a way that would be more protected. It's an independent relative issue and that's what he was learning to do. And there's testimony in the record that it clerked

inconsistent and ineffective even, even to this day. So, there was a feeling that these rules have to be, have to be passed and that they would do real good. All the officers testified that they would. In fact, they have. They really know for a fact they're doing good because Cathy Braddy testified that after these rules were passed, complaints to citizen fell 80 percent to 90 percent, and complaints from police officers also fell respectfully. So we don't have to guess whether this effectively addressed the problem. The record reflects it didn't address the problem. And there are alternate means. The phone calls in the jail is testimony about the phone that are available in the jail to people who are there. And if there is a call blocking or something like that, they can call someone else. There's no testimony to get one phone call. There's testimony there are phones in the jail. Is it ...

JUSTICE: What about the 24-hour?

MR. BECKER: The ...

JUSTICE: It looks like that's what the motion [inaudible].

MR. BECKER: Yes, it-- that is and that's why there are those 24 phone calls together in there, but there is testimony in the record that produced numerous facts that population of the Harris County jail did not increase. If there was not a problem with people getting bondsmen, they simply got them by alternative means. There is also in the jail, the Harris County jail posted a crew bail bondsmen with upon notice as the date and call the record. There's a yellow pages, others' friends that they can call. And the fact of the matters is, bottom line, more people did not have to stay in jail for a longer period of time according to what we have in the record.

JUSTICE: Mr. Becker, what does the record reflect about how of us in competitive to the bail bond industry as in Harris County?

MR. BECKER: The 82 bail bondsmen, your Honor. And if there's a biggest rate yearning in the state which has been made by competitors who have to be [inaudible] of this. There is evidence in the record that about economy through last in course. Mr. Curd was inferred in his bail bond from an 82. It turns the bond rate on the seventh day in terms of code on liability. My clients, you remember, are not really bail bondsmen. Their insurance company did underwrite bail bondsmen. Then-- and they had six tenure, twenty-six that aren't member bail bondsmen in Harris County, but they underwrite. And if you look at the list on the big chart, it goes from the top to the bottom. Mr. Curd is much more a big guy than we are.

JUSTICE: How many bail bondsmen were there before 2001? Do you know?

MR. BECKER: Before the notes there at least no ...

JUSTICE #2: When the rules were promulgated.

MR. BECKER: In 2001, March of 2001.

JUSTICE: The evidence that you are reciting is all creative caused promulgation of these rules, right?

MR. BECKER: No, Ma'm. I do not agree with that. I certainly do not agree with that. I don't agree with the cases that he cites on page 33 of his brief where he says, "I stand to the proposition by the way that it has to be pre-promulgation." Those cases don't say that. And in fact, in the Edenfield case which he cites, they did consider post promulgation evidence and just rejected it on the merits. But I think and, and I think-- I mean this is an important question. These are-- they are. A lot of these evidence, for example, denied in affidavits the police officers had testified. They hadn't given this warrant testimony to the Bail Bond Board before promulgation. But they verified the, the information that the Bail Bond Board already had. That's all.

They have oral information, oral complaints, and some in writing, and after the fact we showed there was valid basis for that concern.

JUSTICE: And I think you heard my second question. How many-- do you know how many bondsmen or does the record work reflect how many bondsmen there were before 2001?

MR. BECKER: I thought I said I didn't know, at least I don't know. I know that there were 82 at about the time that these regulations were protest because that's the number on this list which shows who's the big ones and who are the small ones.

JUSTICE: Does the record reflect the-- what has happened at bail bond charges and rates since the rules into-- went into effect compared to before they went into effect?

MR. BECKER: No, Sir? There is none. All we know are [inaudible] regulation was effective into the complaints in Harris.

JUSTICE: Any further question? Thank you, Mr. Becker.

MR. BECKER: Thank you, your Honor.

JUSTICE: Mr. Furlow.

REBUTTAL ARGUMENT OF DAVID A. FURLOW ON BEHALF OF PETITIONER

MR. FURLOW: Your Honors, Mr. Becker says your pre-promulgation case were off [inaudible] and that they misled the Court deciding those. Well, that is disturbing because the US Supreme Court emphasized in central plus in another cases like Ebony and that case citations to those, where they said, "And it's got to be states, stated purposes and the-- as opposed to rationale of relationship analysis." This First Amendment analysis requires the state to stick with the stated purposes or its restrictions on how about to speak. And even ...

JUSTICE: What do they have to be stated in the damaged suit?

MR. FURLOW: Only one of the circuits is summarizing all the cases that has-- were passed to majority [inaudible]. Do we make exceptions perhaps for cases among the urgent pornography because this case conserved bail bond in speech? It didn't arrive, did not bear of the rest in expressive conduct. That's the subject of the [inaudible], SOP case of the Fifth Circuit. Those cases, they are on the virtue, pornography might be analyzed under the existing of government rationale. That still puts the Fifth Circuit [inaudible]. But I can easily [inaudible] the Supreme Court had said specifically location number that it got made stated rationale [inaudible]. Here, we don't have free enactment or have an act stated purposes. So I submit all of these post fact justification created for litigation years half-- a year and a half after they passed this enactment is ironically irrelevant to this case, and under the [inaudible] case from the Eleventh Circuit [inaudible] courts dealt with this issue. It is not proper to be considered that. And that is clear. The first Court of Appeals erred in its analysis despite that matter [inaudible] two.

JUSTICE: What is the status of this circuit appeal? All up in this case to federal.

MR. FURLOW: All briefing on the merits is complete. They were waiting here tomorrow on it. I'm sorry.

JUSTICE: Right here about it or -

MR FURLOW: - or waiting did thing.

JUSTICE: Yeah.

MR. FURLOW: We just employed to that for last attorney

[inaudible]. And so that Eleventh Circuit case reflects the best majority cases. The Second Circuit said you got a fair legislative record. Restriction falls. They cannot meet their Central Hudson second element of a substantial governmental purposes on the record created for litigation afterwards. If they were studying it for years as Mr. Becker tells you, why couldn't they do what are to be the simple rule here which is gabbling because to study it for years set forth your purposes and take you enact, and set forth the reasons? And that's what the Supreme Court required mentally upheld the restrictions of the State Bar in Florida in the Nextpery case because with a hundred set page summary of a study that did honor for two years. This bugs came out of that executive section with this chapter with exception rules crafted by ethics tried in Mr. Moore. And they did that without any statement of purposes or any explanation on how they get to revise the rules that there originally been on flat bond.

JUSTICE: Was there, was there more of the statements in connection with the legislature promulgation for public statutes?

MR. FURLOW: No. [inaudible]. That slipped in by ethics law and slipped in two days before our democratic legislators pled the legislature in response to the Tom Blake previous for complaint [inaudible]. No record, you know, that could easily get in the legislative history, look at [inaudible] self, no hearings, no studies, no observance, no testimony, no nothing except that if the people did in the best pay language to come in there at the last moment were known as looking [inaudible]. And that's how they continually offered. And here is County Bail Bond Board and the legislature on two legislature enactments. They go in under the radar as long as its an opportunity to oppose their restrictions on people's First Amendment letter to misspeak.

JUSTICE: Mr. Furlow, and I think it would be safe to say that everybody up here is concerned about the safety of police officers, and what I understand on the record is not-- they're not to number of examples can tell us how many police officer in danger because of the statute. How do we weigh that if we keep that in mind and we're concerned about the safety of police officer with your argument that your client has a-- this First Amendment rights have been framed just to come up with an answer [inaudible]?

MR. FURLOW: I actually [inaudible] danger. That was you and [inaudible] for me on the record that Chief Justice Roberts engaged in feasibility in [inaudible] case which former bail bondsmen representative Mark Coolbus catch this element of perfection [inaudible]. Here, let me fill in the details that Mr. Becker didn't give you. Zero officers, victims of crime, witnesses throughout the nation and they feel survive the needs. They're sorting hard Bail Bond Board. He got him to study two years not trying to point some real world example hard down zero and it's [inaudible] summary judgment.

JUSTICE: What about this specific [inaudible] reference in his argument?

MR. FURLOW: And he concludes ridiculous affidavit not to disclose deposition without any facts, any dates, any specific circumstances to which we rejected [inaudible] statements of the summary judgment and nature of objection. We object [inaudible]. So there's nothing there very conclusary. It's just like MD Repairer versus Fairer Back case. Further failure to convict the [inaudible] expert witnesses, what they got here was agent who talks about how the essential matters. These are absolute failures on the part of the Board which has the burden of proof to justify its actions. That's one of the reasons why the

attorney general refused to defend the constitutionality of these rules or of the corresponding state legislation. He would not defend what he knew the unconstitutional. And I asked this Court to preserve, to protect and defend the constitutional rights by defending us in this bail bond.

JUSTICE: Any further questions? Thank you, Counsel. The case is submitted and the Court will take a break for recess.

COURT ATTENDANT: All rise.