In the

Supreme Court of the United States

HARRY J. LEHMAN,

Petitioner,

v.

CITY OF SHAKER HEIGHTS, OHIO, et al.,

Respondents.

No. 73-328

Washington, D.C.
February 26, 1974
February 27, 1974

Pages 1 thru 42

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HARRY J. LEHMAN, Petitioner,	:	
v.	:	No. 73-328
CITY OF SHAKER HEIGHTS, OHIO, ET AL., Respondents	:	

Washington, D. C.

Tuesday, February 26, 1974

The above-entitled matter came on for argument at 2:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LEONARD J. SCHWARTZ, ESQ., American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio, 43215, for the Petitioner.

PAUL R. DONALDSON, ESQ., Law Director, City of Shaker Heights, 3400 Lee Road, Shaker Heights, Ohio, 44120, for the Respondents.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-328, Lehman against City of Shaker Heights, Ohio.

I think we can have you proceed whenever you are ready now, Mr. Schwartz.

ORAL ARGUMENT OF LEONARD J. SCHWARTZ, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is factually very simple. The case involves the question of whether a municipality can, on its own transit system, have an advertising program that accepts any and all takers, with one exception. And that is, it precludes political advertising.

The case arose in 1970 when petitioner Harry J. Lehman attempted to purchase space to promote his candidacy for the State representative seat in Cuyahoga County.

He approached Metromedia, respondent and the exclusive advertising agent for the City of Shaker Heights transit system.

Now, it is significant that an employee of Metromedia approved the proposed copy, thereby finding that the copy was not vulgar, it was not greedy, it was not immoral.

By saying that, then you imply that if it were they could exclude it even though it were not political

advertising?

MR. SCHWARTZ: I believe that no matter what it is, whether it was free speech or not, that this Court has established some criteria in other types of free speech cases which they could use to preclude advertising.

Now, whether or not this particular regulation meets those standards isn't really a question, because whatever the standard is, and one I might suggest might be the Tinker Standard of foreseeable disruption. But, in any event, this innocuous advertisement meets any standard.

Q What if there had been a declared policy of the City of Shaker Heights -- they thought it would be better for the general well-being and health of the community not to have people exposed to the ravages of political debate, political exposure, political ads, while they are riding to and from work?

MR. SCHWARTZ: The policy is written policy. It is expressed in the contract between the City of Shaker Heights and Metromedia.

Metromedia, in its policy, which is reproduced in the Appendix to the Petition for Certiorari, has at the bottom of its total policies, a statement that they cannot accept in certain communities, political advertising, and Shaker Heights is one of those communities mentioned.

Q They didn't articulate the kinds of reasons I just

suggested, did they?

MR. SCHWARTZ: No, sir. They did not articulate --

Q What if they did articulate the reasons I just suggested and others like them? Do you think that would help any?

MR. SCHWARTZ: I think there are times where they could have articulated reasons that would be valid.

Now, I think what we have to do before we examine their reasons is look to what tests we would apply to those reasons.

And, I submit that this Court has, in many previous cases, particularly in Police Department, City of Chicago v. Mosely, said that in order for them to prevent free speech, they would have to have a compelling State interest.

Now, the reasons that they have used for their policy, one is that there would be administrative problems. They don't state what the administrative problems are. It was a conclusion by the Mayor of the City of Shaker Heights.

Other than the conclusion, there is nothing in the record to show any administrative problem.

Furthermore, respondent Metromedia has political advertising and allows political advertising in many of the transit systems that it deals with.

No place do they have an administrative problem

other than in Shaker Heights.

The second ground that the City has attempted to base its policy on is that the advertisement might be taken as an endorsement.

I think there are two answers to this argument. One, the policy of Metromedia states that an endorsement shall be placed on the advertisement which disclaims that the city is endorsing.

Q How many parties are there in Ohio, political parties? Are there eight or ten?

MR. SCHWARTZ: I would doubt that there are eight or ten, but there are certainly more than the two major parties.

Q Communist Party, American Party?

MR. SCHWARTZ: The American Party, the Communist Party, yes, sir.

Q Maybe that's what they meant by administrative problems.

MR. SCHWARTZ: I don't know what they meant by administrative problems. We can certainly speculate, but even if they meant that certain parties they did not agree with would attempt advertising, I think that's the purpose of the First Amendment, and certainly that should not be a valid argument.

Q You just pointed out, Mr. Schwartz, that

the Metromedia and the City would require the printing of a disclaimer on any kind of -- on this advertising.

MR. SCHWARTZ: Yes, sir.

Q And do you concede the constitutional validity of that requirement? After the California case that Justice Brennan wrote, what was it, that held such a requirement on political literature to be constitutionally invalid? Talley v. California.

MR. SCHWARTZ: I am embarrassed that I am not real familiar with Talley, but, as I understood, it wasn't that, that you had to state who was putting out the literature rather -- disclaiming that the city is supporting it.

Q And, now, while I am on that subject, you indicate that Metromedia will not accept anywhere else -- not in Shaker Heights -- but you talked about the other communities where it does accept it

MR. SCHWARTZ: It does accept, yes, sir.

Q Will not accept any political copy that pictorially, graphically or otherwise states and suggests that proponents or opponents of the persons are measured, advertised, are vulgar, greedy, immoral, monopolistic, illegal or unfair. Do you concede the constitutional validity of that kind of censorship?

MR. SCHWARTZ: No, sir, I do not.

Q Yet, you use it to make your argument here.

MR. SCHWARTZ: Again, I really don't think that it's presented in the context of the case. I am only trying to demonstrate the narrowest that the Court has to reach, that is, the advertisement in this case was neither vulgar, greedy, immoral, monopolistic, illegal or unfair.

Q Well, what if they had said -- what if Metromedia or the City of Shaker Heights had said in its opinion -- or their respective opinions -- it was?

MR. SCHWARTZ: Well, clearly, they did not. They approved it, so that the record is void of that --

Q From reading your brief, it seems to me, that you implicitly conceded the validity of those criteria and those standards on the part of Metromedia. And, if you do, I suggest you are conceding, really, a good deal in this case, because the City of Shaker Heights could say, as far as we are concerned, all political advertising is vulgar. It might be monopolistic. It might be illegal -- and it is illegal, because it might be unfair.

MR. SCHWARTZ: Well, I certainly didn't mean to concede it in my brief, nor do I concede it now. I just thought that, having on the record an agreement or testimony, that they had approved it as meaningless criteria meant that I didn't really mean to get into the test, which I think is probably the Terminiello test or, as I suggested, maybe the Tinker substantial disruption test.

Obscenity would also be one I would agree that, under the test this Court has articulated for obscenity, they certainly could preclude that.

But, beyond that measure, I would not go any further. And, certainly, I do not think the fact if an advertisement says someone is acting illegally or unfairly would preclude it.

A good example is right now certain advertisements by the cigarette man -- excuse me, by the oil companies -- are claiming that the Government is acting unfairly toward them. And I would think that those advertisements that they have been publishing are legitimate and could be put on the transit system.

The other reason that, and I guess it comes close to the question presented, that they justify their policy on is that there is a captive audience.

And, I submit again that that -- his argument has been met by this Court in Pollack and also in Cohen v. California.

In Cohen, the Court said that anyone who wished could effectively avoid further bombardment of their sensibilities simply by averting their eyes, and I can't see that any of us would object to that. We many times have ridden on buses and we don't want to read an ad we simply do not read it.

MR. CHIEF JUSTICE BURGER: We will take up at that point in the morning, counsel.

(Whereupon, at 3:00 o'clock p.m., the oral argument

in the above-entitled matter was suspended until 10:05 o'clock a.m., Wednesday, February 27, 1974.)

IN THE SUPREME COURT OF THE UNITED STATES

HARRY J. LEHMAN, Petitioner,	:	
v.	:	No. 73-328
CITY OF SHAKER HEIGHTS, OHIO, ET AL., Respondents	:	

Washington, D. C.

Wednesday, February 27, 1974

The above-entitled matter came on for continuation of oral argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
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APPEARANCES:

LEONARD J. SCHWARTZ, ESQ., American Civil Liberties Union of Ohio Foundation, Inc., 203 East Broad Street, Columbus, Ohio, 43215, for the Petitioner.

PAUL R. DONALDSON, ESQ., Law Director, City of Shaker Heights, 3400 Lee Read, Shaker Heights, Ohio, 44120, for the Respondents.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 73-328, Lehman against Shaker Heights.

Mr. Schwartz, you will have about twenty minutes remaining in all.

Q Mr. Schwartz, may I ask you a question before you begin?

MR. SCHWARTZ: Yes, sir.

Q Your client, I take it, isn't running this year, is he?

MR. SCHWARTZ: In 1974?

Q Yes.

MR. SCHWARTZ: Yes, sir, he is running.

Q Is he in the same district?

MR. SCHWARTZ: Yes, sir.

Q So, he would probably have occasion again to ask the Shaker Heights bus people to get -- put his posters on the bus?

MR. SCHWARTZ: Yes. In fact, he has told the Shaker Heights Transit people that he wants space, should he prevail.

Q Prevail what, in the primary?

MR. SCHWARTZ: Should he prevail in this case here, for the primary.

ORAL ARGUMENT OF LEONARD J. SCHWARTZ, ESQ.,

ON BEHALF OF THE PETITIONER (CONT'D)

MR. SCHWARTZ: At the conclusion yesterday, we had covered two points, one, that the test which must be applied was the compelling State interest test. And, two, we had examined the justifications for the policy presented by the City and found that they would not stand up to scrutiny.

Today, I would like to address myself to the final point in this case, and that is the grounds upon which the Ohio Supreme Court ruled and which we feel are not only unsustainable, but are quite ridiculous.

The Ohio Supreme Court ruled against petitioner principally on the ground that the establishment of a commercial advertising program could not be considered to have opened a forum, because this Court had previously ruled that commercial advertising was not free speech.

Hence, it followed, according to the Supreme Court, that no forum was opened for free speech.

Well, the argument is obviously unique. It is just as obviously without merit.

To begin with, Valentine involved the validity of a local sanitary ordinance that prohibited the distribution in the streets of commercial and business advertising matter.

The Court held that the ordinance was constitutional both on its face and as applied.

Yet, whatever validity Valentine may still have, it certainly cannot be read to permit a State to allow commercial advertising on a New York street, while preventing free speech pamphleting.

To accept the argument that one can allow commercial speech while disallowing political speech, is to implicitly overrule Hague v. C.I.O., and to readopt the Davis v. Massachusetts rationale.

Would the result have been any different in Hague if the City's ordinance in that case had read, "We will allow all commercial advertising, but no free speech advertising"?

The statement of the question, seems to me, answer enough.

Yet, if the opinion of the Ohio Supreme Court stands, if the commercial over free speech argument works in the transit cars, I cannot, for the life of me, see why it does not work in the public parks, the city streets, on open military bases, in municipally owned auditoriums, near school houses, or anywhere else that the open forum doctrine has been used to prevent selective exclusions from a public facility.

Q I suppose, Mr. Schwartz, it would follow, from your position, that a newspaper would be required to accept all political ads. Would it? Or, does that not necessarily follow from your posture?

MR. SCHWARTZ: I believe it only follows if the

paper is run by the Government, such as we have in some school cases.

Q In other words, you must have the State action factor here?

MR. SCHWARTZ: Yes, sir. Without the State action factor, of course, there is no open forum that comes into play.

In the university, where there have been several cases where the State action is involved, courts have universall held that there is an open forum.

What we have tried to point out, in our brief, is that the real question is not whether there is an open forum for free speech, but whether the forum has been dedicated for speech.

Once the City has made the initial determination that advertising does not interfere with its primary function of moving people from one point to another, they have opened a forum. They have determined that advertising does not interfere with its primary function.

At that point, they cannot exclude,based on refence to content.

It is at that point that the Mosely case comes into play.

Now --

Q How much of this advertising -- how much was it going

to cost? If it had been available? How much does it cost in other cities of Metromedia advertising?

MR. SCHWARTZ: I don't recall. It is in the Appendix and I can find it. But the rate for political advertising is higher --

Q That's what I thought.

MR. SCHWARTZ: -- than the rate for regular commercial. And none of the cases that you've cited, involving certainly Mosley and the others, as I remember it -- none of them involved a fee charge by Government, d id they?

MR. SCHWARTZ: Well --

Q -- A fee that some might be able to pay and others might not.

MR. SCHWARTZ: Mosely did not involve that. The cases cited from the California Supreme Court, and from the Washington Supreme Court --

Q Cases similar to this one.

MR. SCHWARTZ: Were similar to this one and involved the same problem.

Q You don't know how much this was going to cost your client, had it been available?

MR. SCHWARTZ: No, I do not know what it was going to cost Mr. Lehman had he been able to rent the space.

Q But it is higher than the commercial rate?

MR. SCHWARTZ: It is higher than the commercial rate.

Q And, generally, cash is required in advance, isn't it?

MR. SCHWARTZ: I couldn't answer that; I simply don't know.

Q If the city could put commercial advertising on its garbage trucks, would you think that the same principle that you are urging here with respect to public transport should apply, or do you think there the city might have a stronger argument, that it just doesn't look right to see a publicly owned truck going around with political advertising on it.

MR. SCHWARTZ: Well, I think I would make the same argument, Your Honor. I think once they've determined that advertising would be appropriate on that particular place, then it is up to the individual involved to determine whether or not he would want his political advertising to be on the garbage truck.

I can't see that the State has the right to make that determination unless they can show a compelling state interest.

Q Well, what about the interest of not wanting to become identified as a city with the campaign of one particular partisan candidate.

Q As long as they make it available equally, that would not happen. Certainly it never happened in those areas in which Metromedia does allow political advertising.

I just simply don't believe that the American public is naive enough to believe that the city is supporting someone.

And, secondly, I believe that they can always have an exclaimer -- a disclaimer -- placed on the ad.

As far as the question about the garbage truck, I don't think, personally, that a politician would want his sign on the garbage truck, but, again, I really feel that that's a decision to be made by the person involved.

It brings us to a point of, should the city itself say that there is something inherently wrong with politics, that we have to hide political signs from view. I would really fear for --

Q Would you think a newspaper that refused to accept ads was, in effect, declaring that there was something inherently wrong with political campaigns?

MR. SCHWARTZ: No, I am not sure that I would, but, regardless, there would be nothing we could do about it, because of the State action.

But, for the State, itself, to say there is something inherently frightening about a commercial that advertises a man who is running for office -- it seems to me that this -- to fly in the face of the whole First Amendment.

I refer to something that Justice Brennan --

Mr. Justice Brennan wrote in dissent, that, "The suggestion that constitutionally protected political signs may be banned because some persons may find the ideas expressed offensive, is in itself offensive to the very meaning of the First

Amendment."

I think that Mosely is the last, or most recent, in a long line of unbroken decisions of this Court which have held that the public forum right is a guarantee of non-discriminatory access to publicly owned or controlled areas of communication, regardless of the primary purpose for which the area is dedicated.

So long as the transit system finds that transit advertising does not interfere with its primary role of moving people, it cannot selectively exclude from speaking on the basis of what is to be said.

The State cannot select which issues are worth discussing or debating in public facilities. Hence, the only real issue in this case is whether or not there is a compelling State interest for the selective exclusion.

An examination, as we did yesterday, of the rationale for this policy, finds that there is no compelling State interest.

Thank you.

Q Before you sit down, on page 13 of your brief, if you have it in front of you, Footnote 18. It is a minor point, but I want to be sure I understand your -- the right that you are talking about. See Footnote 18 there?

MR. SCHWARTZ: Yes, sir.

Q The protection against non-discriminatory access. You don't quite mean that, do you. You mean protection against

discriminatory access --

MR. SCHWARTZ: Discriminatory access, yes.

Q -- or the guarantee of non-discriminatory access.

MR. SCHWARTZ: Yes, sir. It should be the protection against non-discriminatory --

Q Or the guarantee of non-discriminatory access.

MR. SCHWARTZ: Right.

Q Right.

MR. SCHWARTZ: Actually, a reference to the Mosely decision where the Court determined a First Amendment-Fourteenth Amendment case, with reference to the Fourteenth Amendment, Equal Protection, rather than solely based on the First Amendment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schwartz.

Mr. Donaldson.

ORAL ARGUMENT OF PAUL R. DONALDSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case was originally tried by Mr. Walter C. Kelly, who was then the Law Director of the City of Shaker Heights and he has successfully defended the action throughout the courts of Ohio.

About a year ago, one of the defendants in the case,

Paul K. Jones, then Mayor of Shaker Heights, retired and Walter C. Kelly took his position. I then became the Law Director and inherited the defense of this case in this Court.

To my knowledge, the exact question in this case has never been answered by any court in this country, and that is whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

I would like to point out the burden here is on the petitioner to demonstrate the unconstitutionality of the city's policy.

I think we have, basically, four classes of the forum involved, one is newspapers, magazines, television and radio stations, in which the courts have held that these are open forums for political advertising and must accept all forms of advertising.

Public meeting rooms, streets and parks are a second category, which also come under the First Amendment.

There is the rapid transit, streetcars, and so forth, which we feel that there is no inherent right to begin with. If we permitted no advertising,whatsoever, there would be no right for the petitioner here to place his political ads on our rapid transit.

Q I think petitioner agrees with you about that.

MR. DONALDSON: Right.

Q That you could, perfectly validly, just say there is going to be no advertising on our cars.

MR. DONALDSON: That's right, sir.

Q But the point is, since you have said there is going to be advertising on our cars, that's what he says makes this an open forum, so to speak.

MR. DONALDSON: That's correct.

Q In other words, there is no dispute, as I understand it, between you and the petitioner, as to your right to say we are not going to have any advertising in our cars.

MR. DONALDSON: That's right, Your Honor.

Q Why do you prohibit political advertising?

MR. DONALDSON: We prohibit political advertising for a number of reasons --

Q Is this all political advertising?

MR. DONALDSON: All political advertising, including bond issues, including candidates running from our own school board or our own city.

They are all prohibited from advertising. It is a completely non-discriminatory policy. It has been in effect for twenty-seven years. It has been attacked only once before, and it was upheld by both the Common Pleas Court and the 8th District Court of Appeals of Cuyahoga County, Ohio.

We refuse all candidates, even our own issues.

Q Why?

MR. DONALDSON: Well, we feel that there are a number of reasons. First of all, probably one of the most important, is showing political favoritism towards any candidate.

Q When you carry the one for Quacky Breakfast Meal does that show approval of Quacky Breakfast Meal?

MR. DONALDSON: No, it does not. But I don't think the public looks at that as it might look at the same thing of a political candidate.

Q If you carried the advertisement of the opponent to the present Mayor in office, would that be considered that the mayor was approving his opponent? Do you think anybody is that stupid?

MR. DONALDSON: No, not if we carried both of them, but one of the biggest problems with our particular system, and I call the Court's attention to the Petition for a Writ on page 13A. It sets forth the -- part of the contract of Metromedia, Inc., and the bottom paragraph, Item 10 of the contract, which is a standard contract used throughout the country, "Political advertising will not be accepted on the following systems: the Shaker Rapids, Maple Heights, North Elmstead and Euclid."

And I think there is a good reason for this, even though political advertising is accepted on larger systems, and that is that we have only 55 rapid transit vehicles. We have

20 spaces in each vehible.

Usually, when somebody advertises, they take the ad for a full month on a -- to cover one space in each of the 55 cars, because at times some of these cars are out of service. They are in the car shop for repairs, or for cleaning. Some are not used during non-rush hours, and in the wee hours of the morning, and things of that nature.

With a bedsheet-type ballot, this is very common in our area, we would end up with more candidates than -- could conceivably end up with more candidates than we have space.

Also, these ads --

Q So, therefore, because you have too many, you bar all?

MR. DONALDSON: That's right.

Q Merely because it is political. Now, is there any other reason?

MR. DONALDSON: Well, there is one other reason, that we would then -- if we gave up all of the space to the political advertisers --

Q Suppose you had all of the space bought up by the Quacky Breakfast food.

MR. DONALDSON: We would not permit anyone to buy up all the space.

Q Couldn't you put the same rule to the political ads, and limit them?

MR. DONALDSON: We could limit them, but I don't think we would have enough space to go around. Very often, we have many more than 20 candidates running in our own city.

Q How many applications did you have this time?

MR. DONALDSON: I really don't know how many applications there were. This is the only one that was called to my attention.

MR. DONALDSON: What other reason do you have that you can take any other kind of ad under the sun but political?

MR. DONALDSON: Right. We had dvertisers that took pre-Christmas ads at the same time being advertised that political ads would be on during the month of October and early part of November.

If we took all political ads, we would then be losing that business which we might not get back.

Q I understand that this case doesn't involve taking all political ads. This case involves taking one ad.

MR. DONALDSON: I think if we open the forum, Your Honor, to one ad, then we must take all political ads, anybody who wants to advertise. That's been the difference in all these other cases.

Q And what evidence do you have of that? That that would happen? Your theory, that's about all it is, isn't it -- your educated guess?

MR. DONALDSON: Oh, I think that wherever one candidate

advertises, others follow suit and determine that's a proper forum for them, and they will use it too. If they think they can get votes, those running for political office --

Q Is there any other reason for barring political ads?

MR. DONALDSON: Well, we feel that this is the fairest and best policy. It has the least room for abuse. We have a non-partisan government ourselves. We want to keep it that way. We have no denial here of Equal Protection. It's the -- there is no vague or standardless policy involved. We feel this is the best policy for the entire community, because we do have a small system and a very limited system. Our system runs from the City of Shaker Heights into the City of Cleveland and would cover all those candidates running for county office, City of Cleveland offices, or Shaker Heights offices.

Q How many spaces are committed for long periods to ordinary commercial advertising?

MR. DONALDSON: As far as I know, each space is taken for a month at a time. Now whether they take them for more than one month, I think that probably depends on the requirements that the advertising company has.

Q I take it an application is honored only when there is an available space?

MR. DONALDSON: Yes.

Q Do you have any standard practice in that respect? I mean, if you have a number of applications, is it on a first-

come-first-served basis?

MR. DONALDSON: Probably on a first-come-first-served basis, and probably take newer ads over older ones, so we keep the business circulating.

Q Well, if you were required to take political advertising, I take it you'd have to adapt the same procedure to them.

MR. DONALDSON: Well, yes and no, except that political ads are usually only on the rapid transit for a two month period. It would normally be on for approximately a one-month period prior to the primary and general elections.

Q But it would still be a problem, I expect, of available spaces?

MR. DONALDSON: It would be very much of a problem of equal space and equal time.

Q Then, I suppose, you would have the problem of which you take, if you do it on a first-come-first-served basis, or some other comparable neutral procedure. I don't imagine your problems would be any different than they are with ordinary commercial advertising, would they?

MR. DONALDSON: Well, I think, probably, what would happen is we would just discontinue the policy and lose our $12,000 a year income, which is a very important income to the city, and particularly your transportation systems, which find it extremely difficult to operate these days out of the fare box, at which point the petitioner would gain no rights

whatsoever and no one would have any right to advertise on the rapid transit.

The only thing that would happen is that these taxpayers of the City of Shaker Heights would lose their revenue.

In each of the cases that have been cited by the petitioner, we feel there is a forum that has been previously opened up.

Petitioner states on page 8 of his brief that Wirta case -- Wirta v. Alameda-Contra Costa Transit District, allowed only commercial advertising.

I would like to point out to the Court that the Wirta -- that the Alameda-Contra Costa Transit District allowed political advertising in connection with and at the time of a duly called election being held within the boundaries of the district.

The Court went on to state that, "Our problem, therefore, is to reduce to a situation in which the governmental agency has refused to accept an advertisement expressing ideas admittingly protected by the First Amendment for display at a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements."

In that case, we did have a forum that had been previously opened.

No so in the instant case.

The other case which the petitioner relies on is

that of Mosely -- Police Department of the City of Chicago v. Mosely, in which an ordinance prohibited all picketing within 150 feet of a school, except peaceful picketing involving labor disputes.

Again, a distinction. Peaceful picketing involved in labor disputes was okay, but any other kind of peaceful picketing was not.

And the Court said, "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

But, our argument, again, is that a forum has been opened up. There has been discrimination in that particular case.

In Valentine v. Chrestensen, this was the first case squarely presenting to the Supereme Court the issue of First Amendment protection of commercial advertising.

Here, Mr. Chrestensen owned a submarine which he brought to New York City to exhibit and was informed that a city ordinance prohibited the distribution of handbills.

He then printed a protest on the reverse side of those handbills against the ordinance and against the Police Department.

This Court stated at page 54 of its opinion that,

"We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."

And, that, again, is our point. This is only commercial advertising, and that there has been a distinction made by this Court between commercial advertising and other kinds of advertising.

In the Pittsburgh Press case, which was just decided last year by this Court, the ordinance prohibited classified want ads for employment listed by sex.

Justice Powell, in his opinion, held the ordinance did not violate the newspaper publishers' First Amendment rights.

The respondent relied principally on the argument that this regulation is permissible because the speech is commercial speech, unprotected by the First Amendment, traceable to the Valentine case.

Although the Court acknowledged the principle of the Valentine case, it distinguished the same, in this case, because the ads furthered an illegal purpose, that is, sex discrimination.

The question here, as I see it, is: does commercial advertising create an unlimited forum? Does the acceptance of commercial advertising -- or how does the acceptance of commercial advertising which does not involve any First

Amendment rights, operate to create First Amendment rights where none existed to begin with?

We have public service signs in hospitals, libraries, public buildings, and so forth. Does this mean that we have opened a political forum for political signs -- or opened a forum rather for political signs? Or, can every candidate who is running for public office insist on placing his political signs in any Federal building displaying public service advertising?

There is,and must continue to be, a distinction between commercial public service and political advertising as a matter of practicality.

Or, to put it another way, are the places where political signs are permitted the only places where commercial signs and public service signs are to be permitted?

We strongly feel that the policy of the City of Shaker Heights is the fairest and the best policy, involves no discrimination, is, in fact, not a forum for political signs.

Q Mr. Donaldson, what would you have to say about the ad that the League of Women Voters or the Junior Chamber of Commerce wanted to put in in the month preceding the election which recited, simply, It is your duty as a citizen to vote on November 4th, or whatever the election day is? Would you regard that as commercial or political?

MR. DONALDSON: We would regard that as a public service advertisement, which we do accept. The League of Women Voters does not take a stand on candidates. If they took a stand on an issue -- I think they do take a stand on issues -- if they took a stand on an issue we would not accept the ad. We would regard it as political.

In the Zucker case quoted by the petitioner in this case -- it dealt with the right of high school students to publish a paid advertisement in their school newspaper opposing the Vietnam war. And, the court in that case held that a newspaper is a forum for the dissemination and exchange of ideas and the essence of the First Amendment protection is extended to this media. That, again, places newspapers in the category with magazines, television and radio advertising.

Q Newspapers that were published at a government university, isn't that what that involved? Certainly, if you were a newspaper, you would have an absolute right. You'd have a constitutional right to turn down any advertising you wanted, wouldn't you?

MR. DONALDSON: This is a newspaper operated by the school, in a high school.

Q Well, it was a public school, wasn't it? Tax-supported school?

MR. DONALDSON: Right.

Q Tax-supported newspaper.

MR. DONALDSON: Right.

Q I hope you are not -- you've said, now, twice, that a newspaper has a duty to carry any advertising that's proffered to it. I would suggest to you that it has an absolute constitutional right not to.

MR. DONALDSON: Well, the cases involved here are those involving schools --

Q Government-run newspapers.

MR. DONALDSON: Right.

In the case of CBS v. the Democratic National Committee, in 1973, Chief Justice Burger held the Public Interest Standard of Communications Act of 1934, which invites reference to the First Amendment principles, does not require broadcasters to accept editorial advertisements.

The FCC was justified in concluding that the public interest in having access to the marketplace of ideas and experiences would not be served by ordering a right of access to advertising time.

There is a substantial risk that such a system would be monopolized by those who could and would pay the costs, and that the effective operation of the Fairness Doctrine itself would be undermined.

Q There the initial decision was by broadcasters who were not government-owned, wasn't it?

MR. DONALDSON: That's correct, but they do come under

the government standards and government control under the Federal Communications Act.

We submit that our policy is the same, that there -- this very well could be monopolized with a small number of cars that we have and the small number of advertising spaces.

Q Wasn't the precedent of the opinion, in the CBS case, as you've called it, that there was no State action involved in the functioning of broadcasters? So, for that limited purpose, although not necessarily for other purposes, the broadcaster was equated to a newspaper.

MR. DONALDSON: Right.

Q Do you have non-partisan elections in your city?

MR. DONALDSON: Yes, sir.

Q You don't allow anybody to run on a ticket, do you, partisan ticket?

MR. DONALDSON: No, sir.

Q So, you keep people from speaking about politics in your election campaign?

MR. DONALDSON: No, it's just the way they file for the election --

Q But, nevertheless, they don't run as a party?

MR. DONALDSON: They don't run as a party, but they file non-partisan, and run on a non-partisan ballot. But, during the campaign, they can speak on anything they wish.

Q What about the --

MR. DONALDSON: They are certainly identifiable as members of both the major political parties.

Q They file non-partisan, but as they run, do they act as though they are a partisan candidate?

MR. DONALDSON: Some do, some don't.

Q There is no rule against it?

MR. DONALDSON: No, sir.

Q Mr. Lehman's candidacy, I take it, was for the State Representative in the General Assembly, and that would have been a partisan designation, one way or the other?

MR. DONALDSON: Yes.

Q Even though he was in a district that included Shaker Heights?

MR. DONALDSON: Right. But, again, that shows you how broadly the forum could be opened up, to include State candidates, as well as county, City of Cleveland and the City of Shaker Heights. So, we could end up with a very lengthy group of people who would like to advertise on the rapid transit, and I don't know of any way that we could properly handle all of them.

Hillside v. the City of Takoma, the specific -- this is the specific performance action on a contract with Takoma Transit Authority asking the respondent to remove the End-the-Vietnam-War signs as objectionable.

The general rule of law in this respect is that while

a State is under no duty to make its public facilities available for private purposes, if it elects to do so, it must make them available on a non-discriminatory basis, and with due regard to the constitutional right of freedom of expression.

We maintain that here, again, we have a non-discriminatory policy, and that we have not opened up a forum to any political advertising whatsoever.

Q Do you get payment in advance from your commercial advertisers, or do you bill them after the ad is run?

MR. DONALDSON: I notice, in reading the contract, that they require -- form contract -- requires that paid political advertisements shall be paid for in advance. So, I would presume that, apparently, they don't ask for the commercial advertising in advance -- maybe some deposit, or something like that.

Q Do your commercial ads include literature, movies being shown, like the Last Tango, or books, or anything like that?

MR. DONALDSON: No, sir. Public service ads involve the Boy Scouts, things of that nature.

Q Why do you draw the line on literature? That's commercial, I'd assume?

MR. DONALDSON: Well, I don't know why the line has been drawn. Again, I was not in this case in the beginning, and

I don't think that issue, from my reading of the case, that that issue ever arose during the trial.

Q Mr. Donaldson, are you suggesting that you wouldn't accept a commercial ad for a bookstore or for a daily newspaper or for a radio station?

MR. DONALDSON: Oh, no. I think we'd accept those.

Q Well, I misunderstood you then in your answer to my brother Douglas.

MR. DONALDSON: No. I thought he was referring to a specific book or a specific movie.

Q I was giving an example.

Q Would you not accept a commercial ad for a particular movie? If not, why not?

MR. DONALDSON: I really couldn't answer that.

Q Do you have censorship in Shaker Heights?

MR. DONALDSON: No, we do not, other than -- provides that the City can --

Q Do you prosecute books that are allegedly obscene?

MR. DONALDSON: The contract provides that vulgar, greedy, immoral, monopolistic, illegal or unfair advertisements are not --

Q Those are political advertisements, aren't they?

MR. DONALDSON: And political advertisements.

Q Aren't those -- isn't that language confined to political -- any political copy? Isn't that what it says?

I'm looking at Footnote 5 on page 4 of the petitioner's brief.

MR. DONALDSON: That's right.

Q The policy -- well, do you consider an advertisement for a movie political copy?

MR. DONALDSON: No.

Q I am going to be -- this is quite important, I think. Are you telling us that you would not accept a commercial advertisement for a bookstore or a newspaper or a particular radio program, or a particular movie?

MR. DONALDSON: We do accept commercial advertisements for newspapers, I know that.

Q I thought you could -- your whole point was you accepted commercial advertising of all kinds.

MR. DONALDSON: Well, we do, basically.

Q Have you ever been tendered an ad for a particular newspaper, so that you have something in your actual experience to know whether or not you'd take it?

MR. DONALDSON: I've seen ads advertised in both the daily newspapers in the Cleveland area. We do take those kinds of ads, whether we would take one for a particular movie, or not, I presume we do. The question has just never come up and I've never had to rule on whether we would accept one or not. These are mainly handled through our advertising agency which is one of the respondents in the case, Metromedia.

Q I notice that the form contract at 15A, number one,

says it will not display advertising copy that is false, misleading, deceptive, and/or offensive to the moral standards of the community or contrary to good taste, copy which might be contrary to the best interests of the transit system, or which might result in public criticism of the advertising industry, and/or transit advertising, will not be accepted.

Who polices that provision?

MR. DONALDSON: Metromedia has policed it for us, through the 27 years that we've owned the system, and, to my knowledge, only once before has anything ever been challenged, any ad has ever been challenged to the city, directly.

Q I take it, an advertisement that suggested, "See the Exorcist," at such and such a theater, might, under this, be refused?

MR. DONALDSON: I don't think so. Ten years ago, maybe, but not today.

I would just like to reiterate that we feel, again, that our policy is fair, and it is the best one for the entire community to operate under, and that it presents no discrimination. There is an absolute prohibition and it has never been violated. There is no censorship involved and no vague or standardless policy, as has been set forth in some of the -- all of the cases -- and that every one of the cases cited by the petitioner can be distinguished from the instant case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Donaldson.

Do you have anything further, Mr. Schwartz?

REBUTTAL ORAL ARGUMENT OF LEONARD J. SCHWARTZ, ESQ.,

ON BEHALF OF PETITIONER

MR. SCHWARTZ: Very quickly, I'd like to answer a few things.

The rates for advertising -- for political advertising -- shown in Appendix at page 15A, Mr. Justice Marshall, is $2.90 per card per car. This is a one-month rate. The testimony says that the rate was somewhat less than $2.90 for a period over one month, but it does not state how much less.

Q Assuming that you are right and political advertising must be accepted, what do you say of the problem of limited space?

MR. SCHWARTZ: I'd like to refer the Court to page 13a of the -- little "a" of the Petition for Writ of Certiorari -- which is the copy of Metromedia's regulations, paragraph 8. "Equal opportunity to purchase space will be offered and allotted for each opposing candidate, bond issue or referendum. If necessary, contracts for political advertising will be held until 30 days prior to the contract posting date, at which time metro transit advertising will allocate advertising space to each candidate, issue or referendum.

As to the argument of --

Q This means it will refuse all other commercial

advertising for that 30-day period -- twenty spaces to the twenty candidates?

MR. SCHWARTZ: No, sir. If they've already contracted, of those twenty, for five --

Q Let's take eighteen.

MR. SCHWARTZ: Well, the point is, they would allocate the spaces that are not contracted for. And it may be that if there are more applications per car, they would have to allocate that you can only have one on every four cars.

Q Suppose they've contracted all twenty, regular commercial or institutional advertising? Then what?

MR. SCHWARTZ: In that case, they would not have to accept --

Q Any political advertising.

MR. SCHWARTZ: Any political advertising.

It is only if there is space available. In this case, the testimony shows there was.

The argument that if respondents lose this case they are going to cease advertising, and, thereby, lose $12,000 annually, seems to me rather strained, and we are willing to take the chance that they will not close down their total advertising.

And, finally, in conclusion, I submit that what respondents would like this Court to do is turn Valentine upside-down.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:50 o'clock a.m., the case in the above-entitled matter was submitted.)