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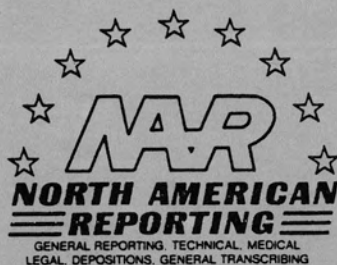
Supreme Court of the United States

METROMEDIA, INC., ET AL.,)	
)	
APPELLANTS,)	
)	No. 80-195
V.)	
)	
CITY OF SAN DIEGO ET AL.)	

Washington, D.C.
February 25, 1981

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ORIGINAL



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EXHIBIT
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IN THE SUPREME COURT OF THE UNITED STATES

METROMEDIA, INC., ET AL.,

Appellants,

v.

CITY OF SAN DIEGO ET AL.

No. 80-195

Washington, D. C.

Wednesday, February 25, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 o'clock a.m.

APPEARANCES:

FLOYD ABRAMS., ESQ., 80 Pine Street, New York, New York 10005; on behalf of the Appellants.

C. ALAN SUMPTION, ESQ., Deputy City Attorney, City of San Diego, Litigation Division, Office of the City Attorney, 233 "A" Street, Suite 300, San Diego, California 92101; on behalf of the Appellees.

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 first this morning in Metromedia, Incorporated v. City of
4 San Diego.

5 Mr. Abrams, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.,

7 ON BEHALF OF THE APPELLANTS

8 MR. ABRAMS: Mr. Chief Justice, and may it please
9 the Court:

10 This is an appeal from a decision of the California
11 Supreme Court upholding against constitutional challenge
12 a San Diego ordinance the purpose and effect of which is to
13 prohibit all off-premise outdoor advertising within the City
14 of San Diego. There has been some dispute between the par-
15 ties in the briefs as to the precise scope of the statute and
16 I would like to begin my argument with that.

17 The parties have stipulated that San Diego, now the
18 eighth largest city in the nation and the second in Califor-
19 nia, is a sprawling 320-mile city filled with hundreds of
20 miles of streets, with a significant industrial and commercial
21 area, and as well, of course, with park areas, beach areas,
22 residential and other areas.

23 QUESTION: Would it make any difference, Mr. Abrams,
24 if this were a town of 10,000?

25 MR. ABRAMS: It would make a difference only in

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1 this sense, Mr. Chief Justice, we do think that it is rele-
2 vant that this is a case which arises entirely out of a ban
3 which takes place in an industrial and commercial area, in
4 part because we are met with the argument by our opponents
5 that outdoor advertising is in its entirety commercial speech,
6 which it is not. But even if it were commercial speech, or
7 even if it is, as it is, more commercial speech than other
8 kinds of speech, then it's surely relevant that we deal here
9 only with an industrial and commercial area. In a smaller
10 community which had an industrial and commercial area, we
11 would be urging on you virtually the same arguments as today.
12 It is conceivable that in some other area, on some different
13 facts, absent the stipulated record here today, that a balance
14 could conceivably be struck in a different fashion than we
15 are urging on you today. It is conceivable that that could
16 be the case in an area of 10,000 people rather than a large
17 industrial city.

18 QUESTION: Mr. Abrams, I gather that you concede,
19 at least implicitly, that outdoor advertising could consti-
20 tutionally be banned in a residential area?

21 MR. ABRAMS: We do concede, Mr. Justice Stewart,
22 that it could be banned in certain residential areas, partic-
23 ularly, for example, a residential area as part of a larger
24 community where it is allowed elsewhere; yes.

25 QUESTION: Some communities are zoned entirely

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1 residential?

2 MR. ABRAMS: Yes, and --

3 QUESTION: Some governmental entities are, almost?

4 MR. ABRAMS: All I'm saying is that we think it
5 does depend, as a number of the cases of this Court in other
6 areas have indicated, upon the relationship between one area
7 and another. If there's a residential area of a city, for
8 example, we certainly do concede that that is doable.

9 QUESTION: Some governmental entities are so-called
10 bedroom communities, under the law entirely residential.

11 MR. ABRAMS: Yes, and that does not raise in the
12 same acute fashion the issue --

13 QUESTION: So the size and characteristics of San
14 Diego are relevant?

15 MR. ABRAMS: Yes, sir.

16 QUESTION: Would that mean that in an area that was
17 mixed, that is, residences and stores and theaters and the
18 usual mix, you'd have a different rule?

19 MR. ABRAMS: We think the rule of law that we would
20 urge on you today would be the same. The only thing that
21 would be different is that to the extent that there is any
22 balance to be struck at all, I must acknowledge to you that it
23 is at least conceivable on a different factual record that
24 the balance could be struck in a different way than we would
25 urge on you today. If you do anything less than establish a

1 per se rule that under no circumstances may outdoor adver-
2 tising be banned -- and we have not gone that far in our ad-
3 vocacy view -- implicit in that is that there could be some
4 circumstance, and that there would be some circumstance, in
5 which it could be proper to ban outdoor advertising.

6 Now, there are factors we think that you should
7 consider. There are things to be weighed in making that
8 decision, but one of them, we think, is that this arises in
9 a commercial and industrial area of a large urban community.
10 I wish to emphasize that based on the stipulated facts we
11 deal here with a case where San Diego has 2.8 percent of the
12 city which is zoned commercial and industrial. All outdoor
13 advertising as the parties have defined it, as legislation
14 generally defines it, is in that area.

15 And by outdoor advertising we mean outdoor adver-
16 tising as distinguished from so-called on-site advertising.
17 On-site advertising is basically advertising about the
18 building, the place itself in which an event, a business,
19 occurs. The service is sold there, the products made there.
20 Outdoor advertising, as the parties have stipulated, is a
21 different thing. It is, as the parties have said, a medium
22 of communication. It is in fact a medium which is distinct
23 and unique in a variety of ways.

24 QUESTION: But it's a medium of communication that
25 is made a medium of communication only by the fact that the

1 city has put in roads which lead past the billboard, is it
2 not? I mean, if you had an --

3 MR. ABRAMS: It would not exist, Mr. Justice
4 Rehnquist, if there were no roads.

5 QUESTION: Well, you wouldn't have a big billboard
6 50 miles out in the desert where no one could see it.

7 MR. ABRAMS: That's correct. One wouldn't choose
8 to build it there, but I would say that it is no less a
9 medium of communication because it's based on roads than sound
10 trucks are, which need roads to travel on. Media of communi-
11 cation are not the same, but the fact that one requires a
12 road to be on or to travel on doesn't seem to us to make it
13 any less a medium of communication.

14 QUESTION: But a billboard wouldn't be constructed
15 before the road was there.

16 MR. ABRAMS: That's correct.

17 QUESTION: A sound truck wouldn't either.

18 MR. ABRAMS: A sound truck wouldn't be there.

19 A leaflet distributor wouldn't have streets to walk on, if
20 he were distributing leaflets, unless the streets were there.
21 I think it fair to say that these things are, in this respect
22 at least, essentially the same. It is perfectly true that
23 for billboards to exist one needs the things, the road near
24 it to exist. And we don't think that makes it any less a
25 medium of communication.

1 QUESTION: Mr. Abrams, does your approach suggest
2 that the analysis is time, place, and manner, rather than
3 content? Rather than compelling state interest?

4 MR. ABRAMS: We would urge on you, as strenuously
5 as we can, Mr. Justice Brennan, that no less than a compelling
6 state interest test ought to be applied. Now, we believe, for
7 reasons -- I would like to turn --

8 QUESTION: Whether as commercial advertising,
9 ideological or whatever?

10 MR. ABRAMS: That the medium itself can't be des-
11 troyed unless you meet something in the order of a compelling
12 state interest test and a statute drafted as the compelling
13 state interest test requires, of the narrowest possible
14 nature to serve the interest.

15 QUESTION: Well, now, Mr. Abrams, zoning ordinances
16 and zoning laws typically if not universally ban outdoor
17 advertising from residential areas throughout the country.
18 And you're not here taking any issue with such laws as that,
19 are you?

20 MR. ABRAMS: That's correct, Mr. Justice Stewart.

21 QUESTION: Is it also true that the First Amendment
22 issue would be the same if there had been no history of out-
23 door advertising in San Diego but that you wanted to enter
24 the market for the first time?

25 MR. ABRAMS: It would in the main be the same,

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1 Mr. Justice Stevens. The only difference that I can conceive
2 of is this. To the extent that a time, place, and manner
3 test were applied -- as we would urge on you that it is not
4 the correct test, but if that were applied -- alternative
5 channels of communication is one of the aspects of that test.
6 Again, it is conceivable, although I think highly unlikely
7 and it's really not the case in San Diego, that a community
8 which has never ever had any kind of outdoor advertising
9 could in theory have built up such alternatives of such a
10 discreet and unique nature to compensate for the absence of
11 it that maybe in some city or community they have found their
12 way around it.

13 I don't think that's likely and it is our argument
14 to you that the issue is basically the same, for example, in
15 San Diego, whether no billboards had been built or whether
16 there are a number of billboards available now.

17 Now, the reason that we feel freer to say that in
18 San Diego is that we do have a stipulation of the parties
19 which says, in as close to so many words as parties can, that
20 there are no alternative means which do suffice. So I am
21 comfortable at least in the San Diego context of saying to
22 you that whether or not there were a lot of billboards there
23 or not, the result should be the same.

24 QUESTION: I'm not familiar with that part of the
25 stipulation. There are no alternative means that suffice

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1 to do what?

2 MR. ABRAMS: Well, stipulation 28 entered into by
3 the parties --

4 QUESTION: Where can we find that?

5 MR. ABRAMS: It's at page 125a and 126a of the
6 jurisdictional statement. It says: "Valuable commercial,
7 political, and social information is communicated to the
8 public through the use of outdoor advertising. Many busines-
9 ses and politicians and other persons rely upon outdoor ad-
10 vertising because other forms of advertising are insuffi-
11 cient, inappropriate, and prohibitively expensive."

12 We think that goes about as far as parties could,
13 or indeed, a court could, to establish the fact that alterna-
14 tive channels of communication are insufficient to serve the
15 many people who find outdoor advertising indispensable in
16 San Diego. And the language of the stipulation, we think, is
17 clear enough on its face.

18 QUESTION: I suppose that's really just another way
19 of saying there's a market for outdoor advertising? Some
20 people prefer it as the most efficient way of communicating
21 their message.

22 MR. ABRAMS: Well, I think the parties, Mr. Justice
23 Stevens, really would have said "some" if they had meant
24 "some." "Many" --

25 QUESTION: Well, "many."

1 MR. ABRAMS: The dictionary definition of "many" is
2 "large" --

3 QUESTION: Over 20?

4 MR. ABRAMS: Oh, no, no, not over 20. It does
5 seem to us that --

6 QUESTION: However, the number of people who use
7 outdoor advertising probably is related to the number of signs
8 you have up, because they're all being sold and used. So
9 that's what -- you have many signs. So many people are using
10 them. They've obviously found it the most efficient way to
11 advertise.

12 MR. ABRAMS: That's true. But what the stipulation
13 indicates to you and what a brief, for example, submitted to
14 you amicus curiae by users of outdoor advertising in support
15 of the stipulation indicate to you is that this is not a
16 little thing, that this is in fact many businesses, and they
17 find it the best way to communicate. And it's not just busi-
18 ness-oriented, and that they do it because other means are
19 insufficient, inappropriate, and prohibitively expensive.

20 QUESTION: Mr. Abrams, along with my brother Stevens
21 I have trouble with the word "many."

22 MR. ABRAMS: Well, the dictionary definition,
23 Mr. Justice Marshall, is "large." I can't do better than to
24 tell you it's --

25 QUESTION: Well, I mean, without precedent,

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1 our opinion would have to say that the precedent is that in
2 the case where "many businesses" et cetera et cetera, that
3 this would be invalid.

4 MR. ABRAMS: No. If you were to apply a time,
5 place, and manner test, what your opinion, what the prece-
6 dent, as I view it, would be is that where alternate channels
7 of communication are as a matter of fact -- in this case we
8 think it is, as a matter of fact -- and where they are, as a
9 matter of fact, insufficient --

10 QUESTION: But it doesn't say that they're -- this
11 does not say that they are insufficient, it says many people
12 think it is insufficient. Isn't that what it says?

13 MR. ABRAMS: Well, it says, many people of a varie-
14 ty of sorts rely upon it because other means are insufficient,
15 inappropriate, and prohibitively expensive.

16 QUESTION: Well, it doesn't say it's true or not.

17 MR. ABRAMS: I'm sorry?

18 QUESTION: It doesn't say it's a fact or not, it
19 just says, many people think it's a fact.

20 MR. ABRAMS: Well, if I can go back to the Linmark
21 case, for example, which Your Honor wrote a few years ago,
22 in the context of dealing with signs on lawns, the Court in-
23 dicated that it was by no means clear that other means of
24 communication would serve, even though that was a situation
25 in which ads could be put in the newspaper and that there

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1 were other ways to communicate. We don't deny -- how could
2 we? -- that there are other ways to communicate. What we do
3 urge on you is that in the context where you have a distinct,
4 unique kind of communication, that at least the law ought to
5 provide a First Amendment test -- and we think we can meet
6 any First Amendment test, but a First Amendment test -- and
7 not simply a property-oriented test before allowing its com-
8 plete destruction. And that --

9 QUESTION: One more question and then I'm true.
10 Is there any testimony other than that stipulation?

11 MR. ABRAMS: There was no testimony, Your Honor,
12 because this case came up --

13 QUESTION: That's right. So that's the only thing
14 we've got, to say that there are not other means?

15 MR. ABRAMS: That is the record on this subject.

16 QUESTION: That's what I'm saying.

17 MR. ABRAMS: There are briefs which lend support to
18 that record, but the record as such, on that point, is the
19 stipulation. Now --

20 QUESTION: Mr. Abrams, is the joint stipulation of
21 facts in the joint appendix the same stipulation?

22 MR. ABRAMS: Yes, sir.

23 QUESTION: I'd prefer to use it because the one in
24 the jurisdictional statement has an amazing word "prohibi-
25 tilly" in there.

MR. ABRAMS: Yes, that was a typographical error that should be corrected.

QUESTION: It's corrected in the other one and I think the Joint Stipulation probably is the preferred one to use, the one in the Joint Appendix.

MR. ABRAMS: Yes -- I must tell you, though, Mr. Justice Blackmun, that the typographical error was in the stipulation and we corrected it, as it were.

QUESTION: You were not a party to it, anyway.

MR. ABRAMS: No, sir, and I don't think anyone's to blame for it. It just happened in the typing of the stipulation.

QUESTION: Mr. Abrams, supposing that the City of San Diego, instead of barring outside advertising, had barred dirigibles from coming below a 500-foot level over the city limits, which carried signs similar to billboard signs? Would you make the same argument?

MR. ABRAMS: I hope not, Mr. Justice Rehnquist. I don't believe that dirigibles carrying signs are a distinct medium of communication. They're certainly not a recognized medium of communication in the same sense as Congress, say, itself in various legislation referring to outdoor advertising, meaning and saying that they mean commercial billboards as outdoor advertising. It's not the same thing in terms of the commonplace use through centuries of outdoor

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1 advertising.

2 QUESTION: Well, we all know that Goodyear or
3 Goodrich, I forget which it is, blimp.

4 MR. ABRAMS: No, I think that, you know, one is
5 entitled -- I would like to put it this way, that the response
6 that I would give to the question of, how can you tell if
7 something is a medium of communication, because I think that's
8 what we're really addressing now, is well put by Mr. Justice
9 Black in the Martin v. Struthers case when he dealt with
10 door-to-door solicitation. And he looked at the history of
11 door-to-door solicitation, he looked at the commonplace nature
12 of door-to-door solicitation, he looked at the fact that it
13 was available and important to diverse groups of citizens.
14 Those things are true, we think, on the stipulated record of this
15 case, and on the facts of this case, with respect to outdoor
16 advertising.

17 I don't think it's true with respect to dirigibles
18 flying over a community. Beyond that --

19 QUESTION: It could be with respect to small air-
20 planes carrying signs in Miami, though. Maybe that isn't
21 the same sort of thing.

22 MR. ABRAMS: That, too -- I mean, the fact that
23 these things happen, and they do, they are really not --

24 QUESTION: And they're a regular, customary method
25 of advertising, frequently used, and some people regard them

as rather an unpleasant sight.

MR. ABRAMS: But if airplanes went about dropping leaflets, say, I don't think one would call that a medium of communication, even though leaflets are. There are some things which become well established enough, we think, for this Court to give it a treatment as if it is something not the same as other things. We think outdoor advertising, by the stipulation of the parties, by the recognition by Congress, by its historical use, has achieved that status.

QUESTION: But you've acknowledged that a residential community which may be growing could start out with no billboard advertising. And what you're saying, I suppose, is that at a point in its growth there would come into being a constitutional right to put billboards up, if it grew gradually from a small residential community to a large city? At some point in its historical development a constitutional right would emerge.

MR. ABRAMS: I responded earlier to Justice Stewart by saying that we do not quarrel with the constitutionality, per se, at least, of zoning regulations which ban outdoor advertising in residential areas. That does not mean, or I don't want to convey to you the proposition that there is never an area which is residential or of sufficient size or of a sufficient nature where outdoor advertising is not in fact a medium of communication of which the public can't

1 be deprived. I could imagine, for example, a different rul-
2 ing from this Court as to sound trucks going through one kind
3 of community and another. It cannot be that sound trucks
4 can be banned in their entirety from the width and breadth
5 of San Diego. It is conceivable that in a community small
6 enough and sleepy enough and quiet enough that the Court might
7 strike a different balance with respect to sound trucks in
8 that area. And I think the same is true, I urge upon you,
9 it would be true with respect to leaflets. It does make a
10 difference where First Amendment rights are claimed. And it
11 seems to us that it makes a difference therefore, whether it
12 is claimed in a residential or an urban area.

13 QUESTION: Do you accept the validity of both the
14 Saia and the Kovacs decisions?

15 MR. ABRAMS: Yes, Mr. Justice Rehnquist.

16 QUESTION: Mr. Abrams, may I add one more easy
17 hypothetical? What would you think of an ordinance adopted
18 by the city government of Washington, D.C., that dealt with
19 billboards of this character in downtown Washington. Would
20 that ordinance banning -- I suppose there may be one; I don't
21 recall seeing any such ads -- would that ordinance be subject
22 to the same infirmities that you suggest for this one?

23 MR. ABRAMS: It would depend, Mr. Justice Powell,
24 it seems to me, on where it is. Washington, for example, now
25 does allow outdoor advertising in its commercial-manufacturing

1 zone. You will see some billboards out on New York Avenue,
2 for example. There are some billboards in certain other
3 areas of town. If the statute related to the area around
4 this Courthouse, say, which is essentially federal land and
5 which would, as I understand it, require a new federal law,
6 in fact, to allow it, it would not be unconstitutional.

7 QUESTION: What about Pennsylvania Avenue?

8 MR. ABRAMS: Pennsylvania Avenue, alone? No, I
9 would not say that that --

10 QUESTION: That area; that area, downtown Washington.

11 MR. ABRAMS: Yes. I would not say that downtown
12 Washington alone is of a sort where it would be per se uncon-
13 stitutional to have a ban on billboards. Because it does
14 depend on the separate facts of the situation.

15 Now, I must qualify my answers at least to this
16 degree. To the extent that factual issues are raised in a
17 variety of questions asked here today, obviously, you would
18 need a new factual record as to the nature of the community,
19 the kind of people that live and work in the community, the
20 size of the community, a variety of factors which we think at
21 least ought to bear upon a decision.

22 QUESTION: To the extent you're admitting that there
23 may be situations where such bans might be constitutional, at
24 least presenting no First Amendment difficulties, is this
25 because in those situations you think your test for compelling

1 state interest could be satisfied? I gathered from what you an-
2 swered me earlier, the analysis you suggested to us has to
3 be in terms, if there's to be any support for the regulation
4 of San Diego, of compelling state interest, isn't it?

5 MR. ABRAMS: We believe that compelling state
6 interest --

7 QUESTION: Well, now, wait a minute. Will you
8 agree that the ban may be constitutional, anyway?

9 MR. ABRAMS: I must say, Mr. Justice Brennan, I
10 was premising my answer on the possibility that an even lesser
11 standard could be applied.

12 QUESTION: Well, I thought, as time, place, and
13 manner ordinarily does apply a significant state interest
14 standard rather than compelling, doesn't it?

15 MR. ABRAMS: If I may, I'd like to do a time, place,
16 and manner analysis for you. Now, we have urged upon you in
17 our brief that a time, place, and manner analysis is insuffi-
18 ciently protective in a situation in which an entire medium
19 is being banned. And I would like to start briefly with that
20 because we do think it's important even though we think we
21 can meet a time, place, and manner analysis. To say this:
22 if there were a ban in let's say a large community or a small
23 community of all magazines or of all something else, the
24 problem with a time, place, and manner analysis is that if
25 the ban gets large enough, sweeping enough, not subject as we

argue with respect to this statute of certain underinclusive-
ness, that it might be able to meet a time, place, and manner
test.

If some community were to object to magazines on
the basis of littering the streets and big trucks going down
the streets delivering magazines, it could be said that that
is a significant governmental interest. It could be said that
it is content-neutral, because they're banning all magazines.
And it could be said, given the theory of the California
Supreme Court at least, contrary to our views, that there are
adequate channels of alternative communication.

QUESTION: But it can hardly be said that it's a
time, place, and manner regulation, if it's a total prohibi-
tion.

MR. ABRAMS: Well, our view is that it is not. It
cannot be a time, place, and manner regulation if it is a
total prohibition, for the reasons that I stated. A total
prohibition is, at its essence, something which is not
time, place, and manner restriction.

QUESTION: It's self-contradictory.

MR. ABRAMS: Now, it happens in this case that we
believe, for reasons I've indicated earlier, that even if we
had to show you the absence of alternative channels of com-
munication, that the stipulation of the parties goes a long
way, and that for reasons stated in our brief the statute is

underinclusive in other ways, and so we think it can't be shown by them, as they must show, even in the time, place, and manner test, it can't be shown by the City of San Diego that it is in fact content neutral, because of what it leaves untouched.

QUESTION: Mr. Abrams, in your answer to Justice Powell's question a moment ago, you said that if it were federal land here in the District involved, it perhaps could be sustained. And yet the First Amendment is directed against the Federal Government, and it presumably incorporated only by the Fourteenth as against the states. Are you suggesting that the Federal Government has more right to ban than the states?

MR. ABRAMS: Absolutely not. I was simply trying to be informational about what I understand to be the law here. My answer was not at all premised on the fact that it is federal land. I agree with everything your question said. My answer was premised on my own observation absent, I must say, a factual record, but my own sense of the City of Washington. There is an area in Washington which I know as a commercial-industrial area. There are outdoor advertising displays in that area. There is an area of Washington which is of a special, scenic, governmental, other-nature. It has never been our contention in this case that it is a flat ban or that it is unconstitutional to keep outdoor advertising

1 out of certain parts of cities and that that was the basis
2 of my answer.

3 QUESTION: How can you justify a ban on billboards
4 across the street from the Supreme Court, as you suggested?

5 MR. ABRAMS: I can justify that as a time, place,
6 and manner limitation. It seems to me that if we are told that
7 there there is a part of a city in which billboards are not
8 to be allowed but that they are to be allowed elsewhere, that
9 is a classic time, place, and manner limitation, precisely
10 the same as if you said, no sound trucks outside the Supreme
11 Court, or certain other limitations so long as there are
12 other places where it can be done.

13 QUESTION: Well, if Washington had been limited to
14 the governmental buildings and the park and historic areas
15 and residential areas and there had been no manufacturing
16 area, could there be a total ban in the city of Washington?

17 MR. ABRAMS: Mr. Justice Stevens, I don't think
18 there could be a total ban, but I would have to concede that
19 the balance would be a different kind of balance.

20 QUESTION: How about the city of Williamsburg,
21 Virginia, historic restoration? Could they totally ban it?

22 MR. ABRAMS: I would give the same answer, that a
23 different balance would have to be struck based on the nature
24 of the community and the activities which occur.

25 QUESTION: But your basic answer, Mr. Abrams,

1 I think is that it would depend upon what you produced by
2 the evidence in such a case.

3 MR. ABRAMS: Yes, in each of these cases there
4 would necessarily be a different factual record.

5 QUESTION: What you're really saying, I think, is
6 a constitutional right to have billboards if you have fac-
7 tories.

8 MR. ABRAMS: No, I'm not saying, if you have fac-
9 tories. What I am saying is that --

10 QUESTION: Well, what other than factories, what
11 kind of community that does not have any manufacturing dis-
12 trict in it could not ban billboards? It seems to me you've
13 conceded that they could be banned in historic areas, con-
14 ceded they could be banned in residential areas. But if the
15 city adds a manufacturing area, then is it the constitutional
16 duty to allow billboards?

17 MR. ABRAMS: Well, what I'm saying is that the
18 easiest case for determination is one in which there is a
19 manufacturing area, and that that, in and of itself, ought to
20 at least presumptively lead you to say that you can't have a
21 total ban. The hardest --

22 QUESTION: Because esthetic considerations of the
23 governmental entity are minimal within such an area.

24 MR. ABRAMS: Yes; absolutely. Now, the hardest
25 case for me to argue to you, that a ban, a total ban is

unconstitutional, is in the smallest, most Williamsburg-like area. Now, again, I'm not saying that because there's an industrial area that's the only area in which you have to allow some billboards, and that that is not our position at all. Like so many First Amendment cases, the facts and the factors differ. Where things occur, what traditionally occurs in an area, whether or not there are factories, bears upon the decision in the case.

QUESTION: But, Mr. Abrams, if in the Williamsburg case, to the extent you say that the ban does not offend the First Amendment, it has to be because esthetics around Williamsburg might be said to be a compelling state interest?

MR. ABRAMS: One of the --

QUESTION: Is that the reason?

MR. ABRAMS: The reason in part, about Williamsburg. And it is, really, where Williamsburg is and its relationship to other communities.

QUESTION: I'm trying to get to the First Amendment analysis that you're submitting to us. So it

MR. ABRAMS: Yes.

QUESTION: If you concede that that might be, at least, I think you've said, a constitutional, notwithstanding, a First Amendment attack, on your submission isn't this because the state interest there is compelling, in esthetics?

MR. ABRAMS: On my submission, what I am conceding

1 arguendo is that a sufficient showing of esthetic claim
2 could conceivably be made and proved by the state, which has
3 the burden of proving it.

4 QUESTION: Of proving what? By what standard?

5 MR. ABRAMS: Of proving even by compelling state
6 interest test.

7 QUESTION: What is a compelling state interest?

8 MR. ABRAMS: Well, it is something more than a
9 significant state interest. It is of overriding importance.

10 Now, we think that there is some real doubt as to, and,
11 indeed, we urge upon you that the simple assertion of esthe-
12 tics should in no circumstance be deemed a compelling state
13 interest. It is conceivable in the Williamsburg situation --

14 QUESTION: Let me -- this test, this so-called
15 test, I'm sure, is meaningful to many members of the Court
16 and maybe to every member of the Court except one, but to at
17 least one it is no test whatsoever.

18 QUESTION: Well, and if -- I don't know if my
19 brother Stewart referred to himself or to me but if he re-
20 ferred to himself he can add me.

21 QUESTION: Mr. Abrams, I suppose we'd all acknow-
22 ledge and recognize that radio and television advertising is
23 a multibillion dollar business today. Could Congress totally
24 ban all advertising on radio and television?

25 MR. ABRAMS: Notwithstanding that radio and

1 television is a regulated industry and that Congress has a
2 significant amount of power with respect to it, I believe it
3 would raise very grave constitutional problems.

4 QUESTION: But they've banned some kinds of adver-
5 tising?

6 MR. ABRAMS: They have indeed, Mr. Chief Justice,
7 but to have a total ban would in effect preclude radio and
8 television from covering the news, because they wouldn't be
9 able to do it, from doing other things which on anyone's
10 theory in this room would be First Amendment-protected. And
11 that is also one --

12 QUESTION: Well, in some countries they do it
13 without advertising.

14 MR. ABRAMS: In some countries they do it without
15 advertising. It would be my view, perhaps for another day,
16 that given the nature of broadcast regulation as we have in
17 this country, to switch it so as totally to deprive broad-
18 casters of the opportunity to stay in business and hence to
19 do all the First Amendment-protected things that then they do,
20 would at least raise very serious First Amendment problems.

21 QUESTION: Mr. Abrams, suppose the ordinance per-
22 mitted signs carrying noncommercial advertising, but forbade
23 commercial advertising in this commercial zone? And by the
24 way, on its face this ordinance just applies to the commer-
25 cial zone, doesn't it?

1 MR. ABRAMS: Yes, sir.

2 QUESTION: But other ordinances keep it out of the
3 city entirely?

4 MR. ABRAMS: Yes, sir.

5 QUESTION: Now, how about my first question?

6 MR. ABRAMS: We think it would violate the First
7 Amendment if the statute contained a flat ban on all of com-
8 mercial speech. For one thing, it would discriminate --

9 QUESTION: No, I mean, billboard advertising,
10 commercial billboard --

11 MR. ABRAMS: Yes, sir. I'm sorry.

12 QUESTION: The same argument as you've been making,
13 with respect to that?

14 MR. ABRAMS: Yes, I would think that the same argu-
15 ment I would be making, I would perhaps emphasize a little
16 more, that even if you were to apply the commercial speech
17 cases of this Court, and even if you were to assume that there
18 was nothing more to protect here than that which this Court
19 has said must be protected in the area of commercial speech,
20 that this statute cannot meet a test which says that it's no
21 more extensive than necessary.

22 QUESTION: But that isn't the compelling interest
23 test, is it?

24 MR. ABRAMS: No, I 'm saying that even if you apply
25 a much lower level test, even if you apply a pure commercial

1 speech test, that a statute which is a flat ban on all com-
2 mercial billboard speech within a commercial area --

3 QUESTION: So your facial attack on this ordinance
4 is really an overbreadth attack?

5 MR. ABRAMS: That that is one of the devices
6 of this statute.

7 QUESTION: To the extent that you're invoking the
8 compelling state interest, you're really arguing that the
9 ordinance is invalid because it bans noncommercial billboard?

10 MR. ABRAMS: No, sir, I'm saying that it is, that
11 the reason we urge upon you a compelling state interest test
12 or a test of that order of magnitude is because of the flat-
13 ness of the ban here.

14 QUESTION: Well, and because it's -- but if it
15 only banned commercial speech, you wouldn't invoke the com-
16 pelling state interest?

17 MR. ABRAMS: If it only banned commercial speech
18 I would urge upon you a test which is of less protection --

19 QUESTION: Well, I know, but the only reason then
20 that you're urging on us the compelling state interest test
21 is because it is a flat ban and includes noncommercial bill-
22 boarding things.

23 MR. ABRAMS: But, what I'm saying --

24 QUESTION: Is that right or not?

25 MR. ABRAMS: It is correct that the advocacy of the

1 compelling state interest test arises out of the totality of
2 the ban which includes ideological and commercial speech.

3 QUESTION: Well, why -- well, in that event, why
4 wouldn't we have to divide the case up into whether the ordi-
5 nance is valid with respect to commercial speech and valid
6 in -- and the test would be the noncommercial speech?

7 MR. ABRAMS: Well, let me say, first of all because
8 we have agreement of the parties here that if commercial
9 speech is not allowed there can be no so-called ideological
10 speech on outdoor advertising. We urged that in our brief;
11 Mr. Sumption agreed to it in his brief. He's --

12 QUESTION: Well, I know, but you can't stipulate
13 us in --

14 MR. ABRAMS: I'm not saying that you are bound
15 by that, I'm saying that it is certainly relevant in your
16 consideration of the effects of a total ban. And what I am
17 saying is that even if you were to give us the most minimal
18 test afforded by this Court under the commercial speech doc-
19 trine, that there is no way that the final prong of that
20 doctrine can be met on the basis of a flat ban. That prong
21 is that the regulation can be no more extensive than is
22 necessary to serve the state interest which is asserted.
23 And flat bans such as this --

24 QUESTION: Mr. Abrams, it seems to me that you're --

25 MR. ABRAMS: -- given the assertion by them of the

1 state interest that they assert and the total failure on this
2 record of San Diego to meet any burden whatsoever, other than
3 saying we haven't met a burden, would in and of itself resolve
4 this case in our favor.

5 QUESTION: Mr. Abrams, it seems to me that your
6 response to Justice White of a hypothetical of a partial
7 ban would be even more objectionable than the total ban be-
8 cause (a) it wouldn't take down the billboards and (b) it
9 would be content-related.

10 MR. ABRAMS: Well, it would be content-related and
11 it would have the vice of all content-related statutes. We
12 have urged indeed that the very statute before you is, be-
13 cause of various factors relating to it, content related.
14 But I should have added that in response to Justice White.

15 QUESTION: Mr. Abrams, perhaps we haven't given you
16 very much time to argue your own case but I might relieve
17 you of any apprehension about Colonial Williamsburg. There
18 is an ordinance in that town which says that nothing may be
19 located within a historic area that wasn't there in the 18th
20 Century. Were there any billboards in the 18th Century?

21 MR. ABRAMS: Mr. Justice Powell, having been to
22 Williamsburg, I can assert to the Court that on the outskirts
23 of Williamsburg one sees more than a share of billboards.

24 QUESTION: But not in the historic --

25 MR. ABRAMS: Not in the historic section, and that

1 again we believe --

2 QUESTION: You're talking to the man who drew the
3 ordinance. Take care.

4 MR. ABRAMS: Maybe I should stop. But Williamsburg
5 really is a good example, if I can sum up on that, that it's
6 perfectly proper to say in the historic section of
7 Williamsburg, you're not going to have billboards. And one
8 of the reasons that it's proper is that in fact you do have
9 exposure to outdoor advertising outside that central district.
10 And that's all that we've come here to talk about today, that
11 that is precisely what San Diego does not allow to any degree,
12 not even in its business and commercial area.

13 QUESTION: Mr. Abrams, your point about the outside
14 area reminds me that I meant to ask you, does your argument
15 also apply to a total ban on billboards within a certain dis-
16 tance of interstate highways? I suppose it does, doesn't it?
17 That's also unconstitutional?

18 MR. ABRAMS: No, I wouldn't say that it applies to
19 that. Except in the circumstance where the totality of
20 the effect of that in an area large enough to be of consti-
21 tutional --

22 QUESTION: The whole State of California there,
23 you're talking about, or the western part of the United States.
24 No billboards with 100 yards of the highway, or whatever
25 it is.

1 MR. ABRAMS: That too we think is again a classic
2 time, place and manner test. That's not unconstitutional. The
3 California statute, which --

4 QUESTION: Which could be a fortiori unconstitu-
5 tional.

6 MR. ABRAMS: Because there are limits on the dis-
7 tance from the highway? Not at all, Mr. Justice Stevens.

8 QUESTION: They've got to be very, very large or
9 you can't even see them.

10 MR. ABRAMS: We would urge on you, as an example of
11 how a statute can be drafted to meet constitutional demands,
12 the California statute which is referred to at page 2 of our
13 reply brief. California has passed a statute, over 40 other
14 states have passed statutes, which do have limitations on
15 where billboards can be, which do have limitations on the
16 relationship between a billboard and an intersection, for
17 example. That's not unconstitutional. What's unconstitu-
18 tional is a flat ban of the sort, of the nature, of the
19 totality that San Diego has done.

20 QUESTION: I think we have that point clear,
21 Mr. Abrams.

22 MR. ABRAMS: Thank you, Mr. Chief Justice.

23 MR. CHIEF JUSTICE BURGER: Mr. Sumption.

24 ORAL ARGUMENT OF C. ALAN SUMPTION, ESQ.,

25 ON BEHALF OF THE APPELLEES

E Z E R A S E

1 MR. SUMPTION: Mr. Chief Justice and may it please
2 the Court:

3 I'd like to get straight at the outset a few fac-
4 tual statements that I think need some elucidation.

5 First of all, the City of San Diego's ordinance does
6 not prohibit all off-premise signs. I believe that was
7 Mr. Abrams' statement. What it does is prohibit certain types
8 of off-site advertising that is commonly referred to as
9 billboards. The California Supreme Court specifically nar-
10 rowed, gave a narrowing construction to the ordinance,
11 applying it against the commercial type billboard, and indi-
12 cated that it would not apply to small yard signs or things
13 of this nature, of picket signs evidencing a labor dispute,
14 things of this nature.

15 The stipulation No. 28 that Mr. Abrams refers to
16 does not say that there are no alternative means of communi-
17 cation or advertising. First of all, the language of the
18 stipulation is ambiguous. Secondly, subsequent to entering
19 into that stipulation the ordinance was amended to add I be-
20 lieve it was either the 12th or 13th exception to the signs
21 prohibited by excepting out temporary political campaign
22 signs, a rather large area of signs.

23 QUESTION: Do you think that amendment strengthens
24 or hurts your case?

25 MR. SUMPTION: It strengthens the case, Your Honor,

1 because without it it would mean, it would ban political cam-
2 paign signs. And part of the reason that the stipulation was
3 entered into was that, I think it's a commonly known fact
4 that certain politicians do make use of off-site advertising
5 to advertise their campaigns.

6 And the last point on the stipulation is that the
7 California Supreme Court indicated that to the extent that a
8 person may feel that he cannot convey his message without the
9 use of an off-site billboard-type sign, that that person could
10 come in and challenge the ordinance as applied to him. But
11 the court said that that was not sufficient to strike down
12 the ordinance on its face.

13 Another statement was made, that the City of San
14 Diego has agreed somehow that if you can't have commercial
15 speech you can't have noncommercial or political and social
16 speech. That's an incorrect statement of the City position.
17 What we did is, by way of argument in our brief, that that is
18 in fact the position of the billboard companies. We just
19 turned their own argument around against them in the context
20 of saying that this demonstrates even further that what we're
21 talking about is a commercial means of exploiting speech;
22 that the income behind it is what enables the limited numbers
23 of noncommercial speech to even exist. We do not concede
24 that.

25 QUESTION: Is that sufficient?

1 MR. SUMPTION: Yes, Your Honor?

2 QUESTION: Is the fact that it's commercial suffi-
3 cient for you to win?

4 MR. SUMPTION: Is the fact that it's commercial
5 sufficient? I think that's an important aspect, and to the
6 extent --

7 QUESTION: Is it sufficient, was my question.

8 MR. SUMPTION: I think that in view of some of the
9 past decisions of this Court the fact that it's commercial
10 is sufficient.

11 QUESTION: Mr. Sumption, let me get back to your
12 amendments. What justification is there for exempting a tem-
13 porary political campaign sign, but prohibiting other politi-
14 cal signs such as are demonstrated in the jurisdictional
15 statement?

16 MR. SUMPTION: Well, there are several reasons, I
17 think, behind that. First of all, campaigns come and go.
18 They are temporary in nature. The typical campaign type post-
19 er is not anywhere near as extensive as the permanent bill-board
20 board-type structure that's there long after the message goes.
21 The courts have said --

22 QUESTION: I take it that this one on "Welcome to
23 San Diego, Home of the 1,100 Underpaid Cops," is somewhat
24 temporary?

25 MR. SUMPTION: The copy itself may be somewhat

1 temporary, but the sign is there long after the message is
2 gone.

3 QUESTION: Wasn't there a campaign on for an increase
4 in the salary of city employees?

5 MR. SUMPTION: I believe that's correct. That's my
6 understanding.

7 QUESTION: But if they succeed in getting their
8 raise, presumably the owner of the billboard will just find
9 another customer to put another message on?

10 MR. SUMPTION: That's also my understanding of the
11 way they operate their business.

12 Also, as I started to say, the courts have given
13 political speech, campaign-type speech, placed it on the
14 highest level. And that's another reason why campaign-type
15 advertising was excepted out from the prohibitions of this
16 ordinance.

17 QUESTION: Mr. Sumption, I'm not entirely clear
18 on the amendment to the ordinance after the stipulation, does
19 that allow the permanent billboards to be used for these
20 political ads? Or is it something less?

21 MR. SUMPTION: Well, the actual language of the
22 exception simply says they're not prohibited by the ordinance,
23 so it's permanent.

24 QUESTION: I mean, can they use the permanent bill-
25 board structures on these temporary political -- ?

1 MR. SUMPTION: The ordinance is silent on the
2 intent.

3 QUESTION: But what are you telling us here? You
4 seem to think it's significant, and is it significant in the
5 sense that it allows these billboards to be used, or that they
6 can just use posters, which I guess they could have, anyway?

7 MR. SUMPTION: I think that the logical intent would
8 be that political campaign signs should be something less
9 than on permanent structures; of the structures remaining,
10 because of the esthetic justifications and rationale of the
11 ordinance.

12 QUESTION: So this amendment will not change the
13 need to tear down all the permanent structures??

14 MR. SUMPTION: That would be correct. I think a
15 correct statement, Your Honor.

16 QUESTION: Where do we find the amendment, in the
17 papers we have?

18 MR. SUMPTION: It's in the version of the ordinance
19 that is --

20 QUESTION: On page 106a?

21 MR. SUMPTION: It begins at page 104a in the
22 Appendix to the jurisdictional statement, Your Honor. And the
23 actual exception itself would be on page 112a, No. 12. It's
24 the last exception under a list of twelve exceptions.

25 QUESTION: And when was that added?

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1 MR. SUMPTION: That was added, Your Honor, while
2 the case was pending before the California Supreme Court,
3 before they heard oral argument the first time on the case.

4 QUESTION: So that is before us?

5 MR. SUMPTION: Yes, it certainly is, Your Honor.
6 The California Supreme Court had construed it as written.

7 QUESTION: 112a, I think you said?

8 MR. SUMPTION: That's correct, Your Honor. And as
9 I indicated, the California Supreme Court further narrowed
10 the application of the ordinance to make sure it didn't apply
11 to such things as yard signs and other non-commercial-type
12 signs.

13 QUESTION: The history of this case was that it
14 was -- I know, in the California Supreme Court, there was but
15 one dissenter. As it came up through the court system what
16 was the case's history?

17 MR. SUMPTION: As it came up, all the way up, or
18 from the California Supreme Court level?

19 QUESTION: No, as it came up through the California
20 court system?

21 MR. SUMPTION: As it came up, the trial court issued
22 summary judgment on cross-motions for summary judgment. Each
23 side brought motion for summary judgment; denied the cities,
24 granted the Metromedias, the billboard companies. It was
25 appealed to the District Court of Appeal, the intermediate

1 appellate court. They upheld the trial court's granting sum-
2 mary judgment. It was appealed to the --

3 QUESTION: That court's judgment was reversed by
4 the Supreme Court of California --

5 MR. SUMPTION: That court's judgment was reversed
6 by the California --

7 QUESTION: In which Justice Clark dissented.

8 MR. SUMPTION: Yes, Your Honor, and the California
9 Supreme Court did grant a rehearing on the case, and it was
10 argued a second time before the California Supreme Court.
11 At that time the California Supreme Court seemed mostly
12 interested in an amendment to the Federal Highway Beautifica-
13 tion Act as it related to a compensation question, and that's
14 an issue that has been raised by the City of San Diego be-
15 cause it was decided against us by the California Supreme
16 Court on a petition for writ of cert. that's now pending
17 before the Court, but not before it here today.

18 Another statement that has been made here today by
19 counsel for Metromedia is that somehow the nature of a com-
20 munity and whether or not signs are in commercial versus
21 noncommercial zones areas has a bearing, if not a crucial
22 bearing, on whether or not billboards can be kept out of the
23 city. It seems to me that in essence the logical conclusion
24 that's reached from that statement is that somehow the First
25 Amendment is triggered by local zoning.

1 And of course zoning, the considerations behind
2 local zoning, really, are done for reasons completely inde-
3 pendent from First Amendment and perhaps other constitutional
4 considerations. For example, there are some cities, the
5 largest one that comes to mind is Houston, that doesn't even
6 have zoning. But, what do you do in a city that doesn't have
7 any zoning?

8 And along those lines I think in essence what one
9 is --

10 QUESTION: Does Houston have outdoor advertising in
11 some areas?

12 MR. SUMPTION: I'm not certain, Your Honor, if they
13 do. My guess would be they do, but I don't know.

14 QUESTION: Last time I was there they did. Maybe
15 they're gone now.

16 MR. SUMPTION: The other thing about allowing bill-
17 boards in commercial zones but not in others is, it seems to
18 me that the esthetic justification of the ordinance should
19 apply equally in commercial areas because municipalities in-
20 cluding San Diego are recognizing perhaps their past mistakes
21 in allowing commercial areas to be eyesores and trying to
22 improve those areas. And I don't think we should be doomed
23 to failure by saying, well, they're not that attractive now,
24 we're bound to leave them that way.

25 QUESTION: Is San Diego's only justification here

1 the esthetic one?

2 MR. SUMPTION: It's esthetics and traffic safety
3 and along the esthetic lines it is also to the extent that
4 esthetics have an economic or a monetary value by encouraging
5 tourists to come. San Diego is highly dependent upon its
6 tourist trade, it being a coastal city with beaches and bays,
7 and upholding land values and preserving open space and public
8 investment in highways and landscaping highways, but it's --

9 QUESTION: But that's in the content of esthetics?

10 MR. SUMPTION: It's all tied into esthetics.

11 QUESTION: Before this argument, Mr. Sumption, was
12 there any limitation on kinetic signs, the kind that have
13 something moving to attract the eye?

14 MR. SUMPTION: San Diego has attempted to broach
15 the subject of regulating signs by dividing them into off-
16 premise or off-site and on-site. We have a separate ordinance
17 that deals with on-site signs, and it does not allow any
18 moving, flashing, et cetera type signs.

19 QUESTION: So, what about signs -- there's an excep-
20 tion here, among one of these, about signs for news?

21 MR. SUMPTION: Yes, and that is specifically, de-
22 fined, those public message, or public service --

23 QUESTION: You mean it isn't a moving --

24 MR. SUMPTION: No.

25 QUESTION: It isn't a moving sign that has spot

1 news on it?

2 MR. SUMPTION: No. They are controlled by the
3 on-site sign ordinance which specifically says they shall not
4 move from side to side, laterally; or --

5 QUESTION: Well, what kind of news goes on those
6 signs?

7 MR. SUMPTION: What they're talking about is if it
8 comes on and shows a time or temperature or a word message,
9 but it cannot appear to move, and it cannot have flashing
10 lights.

11 QUESTION: Oh. But it can change every five min-
12 utes?

13 MR. SUMPTION: It can change, and I think there is
14 some time period so that it isn't just constantly coming on
15 and coming off. I couldn't answer the specifics.

16 QUESTION: Now, is San Diego submitting that its
17 esthetic justification is a compelling state interest or
18 something less?

19 MR. SUMPTION: Well, Your Honor, again I think we
20 get into semantics. I would answer your question by saying,
21 yes, we do feel it's a compelling state interest. And,
22 secondly, this Court in its O'Brien decision cited in our brief
23 has indicated that really there's a series of four or five
24 words that have been used almost interchangeably: strong,
25 prevailing, substantial, compelling. And they all basically

1 boil down to the same thing.

2 QUESTION: Significant?

3 MR. SUMPTION: Significant. I don't think the
4 Court has attempted to distinguish by giving a special defini-
5 tion. Basically, the idea is that it's a strong interest
6 that supports the legislation.

7 QUESTION: One writer has suggested that the com-
8 pelling state interest as a test is a test that a state can't
9 pass.

10 MR. SUMPTION: I'm sorry. I don't follow that a
11 state can't pass.

12 QUESTION: I was just picking up what Justice
13 Stewart and Justice Rehnquist had mentioned about this seman-
14 tical problem that you mentioned.

15 MR. SUMPTION: Yes, and I think --

16 QUESTION: The test is one that simply can't be met.

17 MR. SUMPTION: Yes, I think it's very difficult.

18 QUESTION: Since the ban is a total one, I gather
19 you're not defending this as a time, place, and manner justi-
20 fication?

21 MR. SUMPTION: I am defending it as time, place,
22 and manner, and that's where we get into --

23 QUESTION: Oh, I see. Even though it's a total ban?

24 MR. SUMPTION: And that's where we get into the
25 other semantical --

1 QUESTION: But it says, no time, no place, in no
2 manner, doesn't it??

3 MR. SUMPTION: First of all, Mr. Justice Marshall,
4 what we're talking about is signs, more specifically off-site
5 signs. And more specifically yet, a specific type of off-
6 site sign known as a billboard. Now, off-site signs are
7 allowed by this ordinance. They are not toally prohibited.
8 The particular type of sign, the manner of use of a particu-
9 lar type of sign, a billboard, is prohibited.

10 It depends now on how you look at it. We contend
11 we're regulating off-site signs. We allow some and we do not
12 allow others. And secondly, I don't think the compelling
13 state interest test or whatever has any bearing on whether or
14 not it's -- or rather, that the time, place, and manner test
15 has anything to do with whether or not there's a total
16 prohibition.

17 QUESTION: Well, large parts of the entire state of
18 Vermont are regulated in such a manner that there may be no
19 billboards whatever except a sign white on black, two feet
20 high and three feet wide, and on site. And I suppose one
21 could say there's a total ban of all billboard advertising
22 except that kind of sign?

23 MR. SUMPTION: That's the kind of semantical problem,
24 I think, that we get into when we start putting these in cate-
25 gories like "total prohibition," "total ban." But time,

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1 place, and manner, as I understand the Court's decisions, is
2 really a means of distinguishing from a regulation that's
3 attempting to get at the content of speech, when we're talking
4 about First Amendment rights. And it's clear that we're not
5 dealing with the primary effects of a particular message
6 that's being advertised on a billboard.

7 As stated in the Linmark case, we're talking about
8 the adverse secondary effects from the manner in which the
9 messages are portrayed or put before the public. And there-
10 fore it is a time, place, and manner regulation.

11 Furthermore, because of the blight that they have
12 aesthetically, you know, we talk about more narrowly drawn
13 measures, which Mr. Abrams has mentioned, saying that this is
14 not narrowly drawn because this is a total ban; we get into
15 subjective decisions on, for example, well, let's talk about
16 the height, or the square footage of the sign. If we were to
17 put a regulation in either of those two respects or the dis-
18 tance between billboards, the next thing you have is, well,
19 if we have 1,000 feet between billboards, why not 900 feet?
20 It could have been more narrowly drawn, and you go on and on
21 and on. I think that these things --

22 QUESTION: And the claim could be made that it's a
23 total ban of any billboard in that 1,000-foot stretch?

24 MR. SUMPTION: That's correct. These things are
25 debatable, and better left to the legislative discretion,

1 especially when you're in the area of esthetics.

2 Where we've been damned because the ordinance is
3 overinclusive, we've been damned because it's underinclusive,
4 and these are the types of legislative judgments that neces-
5 sarily have to be made when one attempts to deal with a prob-
6 lem of this sort.

7 QUESTION: Yes, but I suppose, as Mr. Abrams
8 pointed out, that magazines and newspapers sometimes create
9 environmental problems, an awful lot of garbage is created,
10 and litter, and trucks driving at night, waking people up,
11 throwing to the newsboys, and all the rest. I suppose you'd
12 make the same kind of argument for a total ban of other forms
13 of communication media too, based on environmental or esthe-
14 tic considerations?

15 MR. SUMPTION: Well, but the distinction between
16 that category of case is that the problem can really be
17 dealt with. The problem is, in one instance, litter. And you
18 can easily pass an ordinance that makes it against the law to
19 litter. It's not the handing of the message, the leaflet, to
20 somebody that should be banned, because people may want that
21 message and somebody else may want to convey it. But it's
22 you know, the dropping of it on the ground and leaving it
23 there that's the problem. I don't think we have that type of
24 situation with the billboard. How can we better, more narrow-
25 ly, get at the problem?

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1 QUESTION: Well, I suppose you could regulate the
2 size of structures, size and shape of structures, as you do
3 with buildings, and say, "no structure....," you know. And if
4 it's on the wall of a factory, for example, you'd say it
5 doesn't affect the structures, just let them put a sign up.

6 It is at least theoretically possible, it seems to
7 me, to conceive of --

8 MR. SUMPTION: I think you're right and I think
9 different people could differ on that type of thing. You
10 know, what steps could be taken that would make the appear-
11 ance better. But again, I think we're in an area that we're --
12 you know, a city can be second-guessed. In instances where
13 cities have regulated billboards the same First Amendment
14 arguments are raised, simply because if it hurts the stan-
15 dardized manner in which they do business, the billboard
16 companies, the way they do business, then suddenly the First
17 Amendment crops up. I think to a large degree their argument
18 is predicated upon economics. The reason why they say --

19 QUESTION: Could Los Angeles ban all billboards?

20 MR. SUMPTION: Does Los Angeles ban billboards?

21 QUESTION: Could they, under your argument?

22 MR. SUMPTION: Could they? I think they could.

23 Certainly.

24 QUESTION: Any city could?

25 MR. SUMPTION: Yes. I don't think it depends on

1 the particular facts of a particular city. I think the things
2 are a blight on any community and I think the communities --
3 and to the extent that traffic safety is involved, the same
4 considerations. They're put there on a highway intended with
5 all the art and skill of the manufacturers to make people
6 driving in automobiles look at them. To the extent that that
7 causes a momentary distraction, there's a potential for
8 some sort of action.

9 QUESTION: Well, why don't you ban women walking
10 down the street?

11 MR. SUMPTION: Well, there are certain things that
12 obviously, you know, we just can't get rid of women. We're
13 stuck, fortunately or unfortunately, with women walking
14 down the street.

15 It would seem to me, as I indicated, to a large ex-
16 tent the arguments set forth by the billboard companies are
17 predicated, though, upon where they want to be, where it's
18 advantageous to them to be to make money. And to the extent
19 that we keep them out of areas that they feel they need to be
20 in for the economics of the system to present a showing,
21 as set forth in the stipulated facts, that national adver-
22 tisers buy a program of local exposure throughout a community.
23 Their argument that, what if a community has one small com-
24 mercial area? And they say they have a right to be in the
25 commercial area. They probably wouldn't want to be there,

1 because one sign in one small commercial area isn't going to
2 be monetarily feasible to them. So I think, to a large degree
3 those arguments are not predicated upon the effect of the
4 First Amendment, but upon --

5 QUESTION: Well, the arguments are that the First
6 Amendment protects their freedom to do exactly as they wish
7 in this regard in the commercial and industrial areas, at
8 least, of San Diego. It's not simply that they want to do
9 it, but it's that the First Amendment protects their freedom
10 to do it.

11 MR. SUMPTION: To that extent, I think they're
12 incorrect. I don't --

13 QUESTION: I know you do.

14 MR. SUMPTION: The First Amendment does compel
15 that.

16 QUESTION: At least it's that argument.

17 MR. SUMPTION: Yes. This Court has never held that
18 there's a constitutional right to a particular mode of ex-
19 pression or the most cost-efficient means of getting a message
20 across, and to the extent that these signs are intrusive and
21 in effect invade the very privacy of people that are unwill-
22 ing to receive the messages, there's no ability to refuse
23 the message, as there is in virtually every other means of
24 communication. And when billboard companies say this is a
25 unique means of communication, I would have to agree with

1 them in the sense that it is unique, because it's making use
2 of public highways and forcing the message upon the public,
3 taxpayers that pay for beautification of the highways and
4 yet, you know, may not choose to have the messages forced on
5 them.

6 QUESTION: Mr. Sumption, does San Diego allow
7 advertising in -- do you have buses or street cars? I suppose
8 buses ?

9 MR. SUMPTION: We have buses and we are soon to have
10 a street car system in San Diego.

11 QUESTION: Is there going to be advertising in -- ?

12 MR. SUMPTION: There is advertising, and that's
13 on buses, and the signs -- specifically exempts that category
14 of off-site advertising as well as on taxicabs and other
15 vehicles.

16 QUESTION: What about in your ballpark or your
17 football stadium?

18 MR. SUMPTION: There has been -- that's been a
19 matter of controversy. I believe that at the present time
20 there are some advertisement panels that face in to the
21 stadium but are not visible from the public rights-of-way
22 outside the stadium, and I believe that those messages change
23 to some degree, but I think for the most part they stay there
24 either for quite a while or semi-permanently.

25 QUESTION: Of course, in that area there would be

1 no traffic safety arguments, I would assume?

2 MR. SUMPTION: That's correct. If the Court has no
3 other questions, I would just conclude by saying that I think
4 that justifications have been set forth and that this case is
5 not easily squeezed into mechanical principles of other First
6 Amendment cases. This is not a content-based ordinance, and
7 the principles that are cited by counsel for billboard com-
8 panies have been applied in a very different context, and I
9 don't think that they're applicable or binding in this
10 fact situation. And I would close on that note.

11 QUESTION: Before you sit down, Mr. Sumption, I
12 for one would like to congratulate you for getting through
13 an entire argument without using the word analysis.

14 MR. CHIEF JUSTICE BURGER: And we would add to that
15 your yielding some of the Court's time back to us.

16 MR. SUMPTION: Thank you, Your Honor.

17 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 (Whereupon, at 11:10 o'clock a.m., the case in the
20 above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-195

METROMEDIA, INC., ET AL.

V.

CITY OF SAN DIEGO ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. Gibson

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