

ORIGINAL

In the

Supreme Court of the United States

COMMUNITY COMMUNICATIONS COMPANY,)
INC.,)

Petitioner)

v.)

CITY OF BOULDER, COLORADO, ET AL)

NO. 80-1350

Washington, D. C.
October 13, 1981

Pages 1 thru 54

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Washington, D. C.

Tuesday, October 13, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:19 o'clock p.m.

APPEARANCES:

HAROLD R. FARROW, ESQ., Oakland, California;
on behalf of Petitioner.

THOMAS P. MC MAHON, ESQ., Assistant Attorney
General of Colorado, Denver, Colorado;
amicus curiae.

JEFFREY H. HOWARD, ESQ., Washington, D. C.;
on behalf of the Respondents.

C O N T E N T S

	<u>PAGE</u>
2 <u>ORAL ARGUMENT OF</u>	
3 HAROLD R. FARROW, ESQ.,	
4 on behalf of the Petitioner	3
5 THOMAS P. MC MAHON, ESQ.,	
6 amicus curiae	17
7 JEFFREY H. HOWARD, ESQ.,	
8 on behalf of the Respondents	26
9 HAROLD R. FARROW, ESQ.,	
10 on behalf of the Petitioner -- rebuttal	52
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

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

2 CHIEF JUSTICE BURGER: We will hear arguments next
3 in Community Communications Company against City of Boulder.

4 Mr. Farrow, I think you may proceed whenever you
5 are ready.

6 ORAL ARGUMENT OF HAROLD R. FARROW, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. FARROW: Mr. Chief Justice, and may it please
9 the Court, Plaintiff in this case is a cable television
10 operator. As such a business, it is a medium of
11 communication, supplying news, information, and
12 entertainment. This includes the origination of programs as
13 well as rebroadcast of broadcast signals and the performance
14 of editorial functions. So, as we look at it from the
15 restraint of trade problems, we are dealing with a restraint
16 of trade and business in the commerce of ideas.

17 QUESTION: Are you arguing an antitrust
18 pre-emption, or are you arguing First Amendment?

19 MR. FARROW: We are arguing an antitrust exemption
20 or pre-emption in terms of a restraint of the First
21 Amendment trade. I don't think we can separate the two. As
22 I understand, it is the posture of the Court that when you
23 are dealing with antitrust you deal on a case by case basis.
24 You would have to look at the nature of the industry and the
25 nature of the particular restraint, and so I don't think as

1 we deal with the question of exemption we can ignore the
2 fact that we are dealing with a First Amendment -- trade and
3 commerce under the First Amendment. That is certainly our
4 posture in the case.

5 QUESTION: Well, what if the City of Boulder had
6 franchised two streetcar companies in the old days to one
7 handle the north side of town and the other handle the south
8 side of the town, and in each of those streetcars there were
9 the typical advertising things that you find in streetcars
10 or buses? Would you feel that was unconstitutional under
11 either the antitrust laws or under the First Amendment?

12 MR. FARROW: I would assume that the advertiser
13 would have access to either one of the transit companies.
14 The transit companies are dealing with a franchise. I think
15 the concept, the connotation of franchise in terms of cable
16 television is totally inappropriate. It implies a special
17 privilege.

18 For example, your transit car had one half of the
19 town, it had a special privilege. The advertiser, though,
20 he had access to either one of those fellows.

21 QUESTION: But the cable television, the two
22 competing cable television companies certainly don't have
23 access to the entire town. One has access to one side of
24 the town, the other has access to the other side.

25 MR. FARROW: You are equating public utility type

1 activity, commercial type activity, if you want to, with the
2 trade of First Amendment, and you are equating a business
3 that ought to be licensed and free for all, subject to
4 reasonable restrictions, to a business that is a special
5 privilege.

6 QUESTION: Why do you say ought to be?

7 MR. FARROW: Because I think -- because there is a
8 current trend among some of the cities in recent years to
9 take the posture that because we are the guardians of the
10 streets, the proprietors of the streets, the landlords of
11 the streets, we can elect and say that we are going to
12 choose one monopolist who only that monopolist can be in the
13 cable television business and purvey the trade of
14 information, news and information. I think that is totally
15 wrong.

16 QUESTION: How different is that from zoning?
17 When you say that one theater shall be built on this block,
18 and we just don't want any other theaters within a mile of
19 it?

20 MR. FARROW: Well, I think that it is different in
21 this respect, that one deals specifically with land use. As
22 such, it is a traditional area of government regulation. It
23 must have some rational basis, and whatever, and what have
24 you, but let's, instead of talking about theaters, let's
25 talk about newspapers.

1 QUESTION: Well, my question is about theaters.

2 MR. FARROW: Yes. As to theaters, if there were
3 some logical reason why that you had to put them 1,000 feet
4 apart, as, for example, they had a demonstrated cause and
5 fact of producing some evil that you wanted to cure, such as
6 a red light district, as I think happens, then the question
7 of the zoning power to say, you can all be in the theater
8 business but you've got to keep a little distance between
9 yourselves, seems like a time, place, and manner
10 restriction, and what we are dealing with here --

11 QUESTION: And it may well be in the number of
12 square miles comprised in the City of Boulder that there are
13 many more applicants for theater licenses than there are
14 permissible sites.

15 MR. FARROW: For theater licenses.

16 QUESTION: Yes.

17 MR. FARROW: Well, I would think that when that
18 happened, then the price of theaters would go up, and he who
19 wanted to be in the theater business would go out and buy
20 out an existing theater, pay a higher price, but not be
21 excluded from the market just because he owned another. If
22 there is only room for 15 of them, and the price, like
23 liquor licenses, go up, he still is there. You don't have
24 -- you don't have a time, place, and manner restriction.

25 What we are dealing with in this case is, we are

1 dealing with no time, no place, no manner, no how is this
2 company allowed to do business in two-thirds of the city,
3 and the only justification we have for it is is that it
4 might be, it might be a natural monopoly, and I think it is
5 just -- it is extraordinarily different from the
6 circumstance of a couple of theaters.

7 I think that one of the confusions we deal with in
8 this thing is, we forget the nature of the particular
9 regulation here involved. We are not dealing with any kind
10 of traditional zoning law, like public utility regulation or
11 commercial regulation, or selling raisins, or even -- we are
12 not even dealing with a question of regulation of cable
13 television, because there is not a single regulation adopted
14 yet about how you conduct the business of cable television.
15 We are not dealing with safety. There is no issue of safety
16 involved. We are not dealing with whether or not you steal
17 from your customers. We are not saying that you can't go
18 out and electrocute your customers, or scare the horses, or
19 anything of that sort. We are dealing with a decision that
20 one city makes that says we think there might be a natural
21 monopoly, and you, this particular company, almost like a
22 bill of pains and penalties, you may not even think about
23 operating over there.

24 Now, it would seem to me it would take the most
25 extraordinary kind of a justification to do that, and the

1 only one I know of in the case law is those dealing with
2 physical impossibility, but in this case we have both in
3 Boulder -- pardon me, Mache One and again in Mache Two,
4 specific findings. There is no physical impossibility.
5 There is no physical impediment. Not only is there room for
6 four on the poles, but after that you can go underground and
7 you've got all the ground from here to China. So that we
8 are not dealing with physical shortage or whatever.

9 The suggestion that we are dealing with economic
10 scarcity is a justification for that. I think it is
11 brand-new to the whole concept of First Amendment freedoms.
12 Brand new.

13 And while we are touching that point, I think one
14 of the extraordinary things is in Boulder, too, now, which
15 has now clarified its holding in Boulder One dealing with
16 the antitrust issue and then brought up this question of
17 economic scarcity. We have this funny situation where the
18 Appellate Court has twice now set aside or ignored the
19 specific findings of fact of the Trial Court without
20 reviewing the Trial Court record.

21 As far as we can tell, nobody but Judge Markey has
22 ever looked at the record other than Judge Mache. In that
23 record, in that very record dealing with economic scarcity,
24 there is a document there produced by BCC, the
25 co-conspirator, put in evidence by the City of Boulder,

1 which contains a five-year economic projection of BCC.

2 Now, you remember that BCC were the people who
3 said in July of 1979, give us a permit, we are prepared
4 today to compete with this company, and the city said, no,
5 no, we want to stop and think about it. We are going to
6 think that maybe it's a natural monopoly, and then make it a
7 natural monopoly, or make it an unnatural monopoly.

8 That piece of paper in there, that five-year
9 projection, demonstrated that BCC anticipated putting \$1.3
10 million in equity in Year One and none thereafter. In the
11 fourth year, they anticipated a \$3.9 million distribution to
12 the partners, and as of the time they anticipated
13 distribution they would have recovered all but \$45,000 of
14 their \$1.3 million by depreciation, by the recapture of
15 capital, and they would still own a business that in its
16 fifth year they anticipated would produce \$85,000 worth of
17 taxable net income, and \$490,000 more worth of cash flow.

18 Now, you know, evidence of economic scarcity is
19 just not there. The contrary is there. That is why we say,
20 you know, that the major error with this case and the
21 finding in the major distribution areas is that the Circuit,
22 the Tenth Circuit has refused to review the record, refused
23 to look at the record.

24 QUESTION: But certainly we don't ordinarily take
25 cases in which the Court of Appeals has held or disagreed

1 with findings of the District Court, do we?

2 MR. FARROW: I understand. I think that -- of
3 course, I can't guess why you took the case. I would think
4 there are two logical reasons. One is, it does deal with
5 the cable television industry, which is an emerging First
6 Amendment speaker, and is of very significant national
7 import, and there are certainly current abuses being
8 reported daily in the press of this concept of the RFP
9 process.

10 The other thing is, we have the concept that a
11 city in the State of Colorado has apparently decided that
12 because it is a home rule city, that it is -- it is the
13 sovereign, and free to take the kind of action it took,
14 apparently on the theory that because it represents directly
15 the people of the state by its constitutional stature, it
16 has the power, and then of course it supervises it, it
17 satisfies the tests of LaFayette and Midcalf.

18 Well, it got that lofty status, if it got it at
19 all, by virtue of that state constitution, and that state
20 constitution says in it, I think it is Article 10, Section
21 2, that constitution -- "No law shall be passed impairing
22 the freedom of speech. Every person shall be free to speak,
23 write, or publish whatever he will on any subject, being
24 responsible for all abuse of that liberty."

25 So, it is difficult for me to understand how a

1 city who claims its power to come from that Constitution can
2 say that same Constitution contemplated to be able to pass
3 something it calls a law that totally locks out a given
4 speaker from two-thirds of a city, at the same time saying
5 they are going to hold that two-thirds open so they can
6 select another monopolist which they can totally control.

7 I just don't believe there is any contemplation,
8 or any mandate. I think that is a clear prohibition.

9 Now, in Boulder Two, we have Judge Seymour, I
10 guess it is, who says in her Footnote Number 3, we didn't
11 say it was purely local in Boulder One. I misunderstood
12 her. I thought that's what they were saying, and apparently
13 everybody else thought that, because that's the point that
14 is briefed throughout these cases. But if she didn't say
15 that, what she was saying then is that there is a local
16 interest and a state interest, and if there is a local
17 interest and a state interest, then of course any state
18 action in the matter is controlling.

19 Now, there is no specific state statute dealing
20 with cable television, but there are two things that clearly
21 control. One is the state antitrust statute, which
22 recognizes its policy of pro-competition. And the other
23 thing is the state constitution, which forbids it, just like
24 it forbids the City of Boulder --

25 QUESTION: Aren't you again asking us to second

1 guess the reading by the Court of Appeals which sits in that
2 circuit and in that state, of a state constitutional
3 provision?

4 MR. FARROW: No, sir. I think that it is not the
5 function of this Court to struggle with the inner workings
6 of cities versus states. I think that what we are talking
7 about here is an implementation of the national policy of
8 antitrust, and the national policy of antitrust as it
9 affects the First Amendment in particular, and I am saying
10 that no matter how Colorado internally wants to rearrange
11 its organization is of no interest either to us or to you.

12 QUESTION: Well, I thought you were just quoting
13 the Colorado Constitution.

14 MR. FARROW: We did that, Your Honor, I meant to
15 do that in connection with the LaFayette-Midcalf test, which
16 indicates where the city claims the exemption or pre-emption
17 or immunity of the state if it can demonstrate the state
18 made it do it, and it is in contemplation of what the state
19 wanted to do, and the point of the demonstration is, the
20 state didn't make it do what it did, nor did the
21 Constitution, nor did the Constitution contemplate it. As a
22 matter of fact, the Constitution and the antitrust laws of
23 the state seem to me to prohibit the very kind of activity
24 we are talking about, so that I don't believe there is any
25 possibility that the city of Boulder can say whether it is

1 the agent or the state of Colorado, as being the legislature
2 and the Governor, or whether it is an agent of the state of
3 Colorado as being the people who adopted the Constitution,
4 no matter who the basic source is, the direction is the
5 contrary, the opposite of what they claim, and there is no
6 justification, I believe, for this type of activity.

7 QUESTION: Except that, I am sure you would say,
8 and others would agree, that a city or a state can't
9 experiment with First Amendment values. Doesn't this fall
10 somewhere in reach of what Justice Brandeis said about
11 letting new problems, particularly, be dealt with in the
12 laboratory of local control?

13 MR. FARROW: Well, it --

14 QUESTION: I assume you would agree that this
15 whole matter of cable television is something that is in a
16 state of rather swift --

17 MR. FARROW: It is. It is in a very fluid state.
18 I think it is reflected by the fluidity of this case. We
19 have five forums at one time, concurrently. Surely it is
20 that, but I think the problem is the form of experimentation
21 that we are taking is in clear derogation of both the
22 national policy of antitrust and the national First
23 Amendment rule.

24 And I say that because what has happened, this
25 process that is developing, and the process we are dealing

1 with here is the process in which the city says, I own the
2 streets, I am the proprietor of the streets, I've got my
3 toll gate between you, the speaker, and the people who want
4 to be customers, and if you want to do business in my town
5 we are going to do it on an RFP basis. You give me a
6 request for proposals, and then I am going to shop among
7 you, and I am going to find which of you will pay the most
8 in money or in services, but most important of all, and most
9 extraordinary of all, in subservience. Which of you will
10 promise you won't sue me? Which if you will waive your
11 rights to get into the business? Which of you will sign a
12 contract that says that I can forever control your
13 programming? That is the process we are dealing with, and
14 that is exactly the process we are having in Boulder, and it
15 is not just in Boulder. It is going on, and it is time we
16 do something about that to say that kind of experimentation
17 is too much and too far.

18 What we need is a clear statement from this Court
19 saying that, you know, it is one thing to experiment in a
20 way to improve or increase the thing, but it is another
21 thing to set aside national policies, it is another thing to
22 get to a position where you can and will, and demonstrably
23 so, are abusing the process.

24 QUESTION: Well, tell me, Mr. Farrow, what do you
25 think Colorado could do to bring itself within the -- to

1 bring this situation within the Parker Brown exemption?

2 MR. FARROW: I think it ought to take a look and
3 see if there is an abuse out there, and if there is an
4 abuse, it ought to cure the abuse.

5 QUESTION: No, what I am trying to get at is, what
6 is missing here? A legislative statute permitting Boulder
7 to do this?

8 MR. FARROW: Yes, right, what is missing --

9 QUESTION: Would that be enough?

10 MR. FARROW: A legislator saying, set forth some
11 kind of regulation.

12 QUESTION: Suppose the state legislature --

13 MR. FARROW: Yes, sir.

14 QUESTION: -- were to enact a statute which
15 authorized Boulder to do exactly what it did. Would you be
16 here?

17 MR. FARROW: No, I don't think so. No. Then I
18 don't think so. I don't believe --

19 QUESTION: You would not --

20 MR. FARROW: No, sir, I don't believe --

21 QUESTION: I didn't catch your answer. Would you
22 be here?

23 MR. FARROW: No. No, no. The answer is not
24 there. If the state legislature were to enact a law that
25 said there could only be one newspaper in the state, or one

1 cable television in the state, I think they would not have
2 any immunity --

3 QUESTION: That is what I am trying to get at.
4 You would say, a statute authorizing Boulder to do this,
5 passed by the Colorado legislature --

6 MR. FARROW: Would be invalid.

7 QUESTION: -- would be invalid under the First
8 Amendment.

9 MR. FARROW: Under the First Amendment, and I
10 believe under the antitrust also. I cannot believe --

11 QUESTION: What is the Parker exemption?

12 MR. FARROW: Well, you know, you can read those
13 cases a lot of ways, but it seems to me to be extraordinary,
14 the thing that a state could secure immunity from a Federal
15 national policy, a Congressional statute, by violating the
16 Constitution.

17 QUESTION: Well, I know. That is your First
18 Amendment argument.

19 MR. FARROW: Yes.

20 QUESTION: That is your First Amendment argument.

21 MR. FARROW: Yes, sir.

22 QUESTION: But Parker and Brown certainly
23 permitted state legislatures to get themselves out of, as
24 states, the restraints of the --

25 MR. FARROW: Oh, yes, sir, I think -- we are

1 dealing with ordinary commercial activity.

2 QUESTION: But your answer to me is, that couldn't
3 work here --

4 MR. FARROW: It couldn't work here.

5 QUESTION: -- because of the First Amendment
6 provision.

7 MR. FARROW: Yes, sir, and I don't think you can
8 separate the two.

9 I would like to reserve a moment for rebuttal if I
10 may, so if I can resign and sit down for a moment, I would
11 like to.

12 CHIEF JUSTICE BURGER: Very well.

13 Mr. McMahon?

14 ORAL ARGUMENT OF THOMAS P. MC MAHON, ESQ.,

15 AMICUS CURIAE

16 MR. MC MAHON: Mr. Chief Justice, and may it
17 please the Court, I appear on behalf of the 23 amici states,
18 including Colorado, who believe that home rule cities should
19 not have state action antitrust immunity in the
20 circumstances which exist in this case.

21 In the view of the amici states --

22 QUESTION: I gather this is independently of the
23 First Amendment argument.

24 MR. MC MAHON: This is correct, Your Honor. I
25 attend to address the state action question, Your Honor.

1 In the view of the amici states, the state action
2 immunity issue presented here is whether in the absence of
3 any competition displacement policy or supervision by the
4 state itself, and based solely on the grant of general home
5 rule self-governing authority, the actions and policies
6 undertaken by home rule cities on their own initiative can
7 satisfy the test for state action immunity which this Court
8 has previously articulated.

9 Now, the amici states have an interest in this
10 question because they are desirous of securing the benefits
11 of competition to their citizens through broad application
12 of the Federal antitrust laws and also the state antitrust
13 laws which in many instances are construed in accordance
14 with the Federal antitrust laws.

15 QUESTION: Well, don't they also have an interest
16 in seeing that the city lobbyists in the state legislature
17 have as little influence as possible?

18 MR. MC MAHON: Your Honor, if I understand your
19 question, it is to what extent should these decisions be
20 left to the localities.

21 QUESTION: Well, to what extent do the states have
22 a right to come to this Court and say, in spite of the
23 provision of our constitution and statutes and so forth, do
24 we nonetheless have a right to have this Court pronounce a
25 rule that says the home rule provisions of our constitutions

1 are virtually meaningless because of some overriding Federal
2 consideration?

3 MR. MC MAHON: Your Honor, in view of the amici
4 states, the provisions of the home rule constitutions are
5 not themselves meaningless, but there are really two
6 separate questions that are involved here. One has to do
7 with the allocation of power between the state and its
8 political subdivisions through home rule powers or
9 otherwise, and the other matter that is at issue here is the
10 national competition policy that is embodied in the
11 antitrust laws, and these -- this sort of collision has
12 occurred before, as Your Honor knows, three years ago in the
13 City of LaFayette case before this Court.

14 In the views of the amici states, the states
15 themselves are free to allocate power by means of home rule
16 to their municipalities. When they do that, they may do it
17 in a certain way which may result in antitrust immunity
18 under the prior decisions of this Court, or they may do it
19 in a way which does not manifest antitrust immunity. If
20 they choose the latter course, then those municipalities,
21 when they exercise the powers that have devolved on them
22 through the state constitution should do so in a way that
23 complies with the antitrust laws.

24 The amici states view that as the appropriate
25 balance, really, Your Honor, between the state powers and

1 the Federal national competition policy of the antitrust
2 laws.

3 QUESTION: I am not sure I get that, Mr. McMahon.
4 Is that to say that home rule states, the municipalities are
5 to be treated as the sovereign for the purposes of the
6 Federalism issue that is involved?

7 MR. MC MAHON: No, Your Honor. I am arguing
8 exactly the other side of that issue.

9 QUESTION: That is what I thought. In other
10 words, the state as between the Federal Government and the
11 states, only the states are sovereign.

12 MR. MC MAHON: Yes, Your Honor.

13 QUESTION: What the states individually want to do
14 as between the state and the municipality is no concern of
15 the Federal issue that is involved.

16 MR. MC MAHON: That's correct, Your Honor.

17 QUESTION: Is that it?

18 MR. MC MAHON: That is exactly our position. In
19 that regard, Your Honor had asked previously what would have
20 sufficed here, and I think I can address that question. In
21 the view of the amici states, the narrowest ground for
22 decision by this Court would be that there was simply no
23 contemplation here that the home rule city of Boulder should
24 engage in the kind of anti-competitive activity alleged in
25 this instance.

1 There is nothing expressed in the state
2 constitutional provisions conferring power on Boulder that
3 indicates that it should engage in this kind of activity.
4 That brings up the question then whether that kind of power
5 should be implied.

6 In the view of the amici states, it should only be
7 implied if it is necessary to effectuate a state regulatory
8 scheme, and in this instance there is no state regulatory
9 scheme. In the view of the amici states then, the question
10 can be resolved right there for purposes of this case.

11 QUESTION: Well, could the states lay down
12 regulations binding upon the municipalities in this area?

13 MR. MC MAHON: Your Honor, I think they could.
14 The Tenth Circuit in Boulder Two has basically said, as we
15 have argued all along, that cable TV is an area of mixed
16 state and local concern. In that situation, both the state
17 can legislate on it, as the Tenth Circuit has recognized,
18 and the city can, and as long as there is no conflict, both
19 sets of regulations can exist.

20 If there is a conflict, the state policy would
21 predominate in that situation.

22 QUESTION: Well, suppose the states had
23 "pre-empted" this area, or undertaken to do so by
24 legislative action.

25 MR. MC MAHON: Correct, Your Honor.

1 QUESTION: Then what if a municipality said, we
2 have come to the conclusion there is too much television, we
3 don't want any more television, cable or otherwise. They
4 couldn't do that?

5 MR. MC MAHON: If the municipality decided to
6 completely prohibit, Your Honor, I think that would get more
7 -- that's a different situation from this case -- that would
8 get more into an area where the municipality might be free
9 to act, but that is a different question from the antitrust
10 immunity question here.

11 QUESTION: Well, I am only addressing the power
12 question, the governmental power question that Mr. Justice
13 Rehnquist was addressing.

14 MR. MC MAHON: Yes, Your Honor. I think -- I
15 think that the city conceivably could do that, but there
16 would be First Amendment concerns if they were to do it, but
17 what we have envisioned as sort of a hypothetical construct,
18 Your Honor, in terms of the way that state action immunity
19 could be achieved, is that there should be a competition
20 displacement policy clearly articulated, affirmatively
21 expressed, and actively supervised by the state, coming from
22 the state in a particular subject matter area, such as cable
23 TV.

24 The implementation of that policy could be left at
25 the local level, to the municipalities, as long as there was

1 oversight and review by the state itself. There are
2 approximately eleven states, Your Honor, that do have
3 oversight of cable TV on a statewide basis, and I think more
4 than half of those allow the municipalities to have a
5 significant amount of input in that area.

6 When you get into a matter of an area of mixed
7 state and local concern, and this may correct what I said
8 previously if I misspoke, in an area of mixed concern, if
9 the city statute conflicted with the state law, the city's
10 ordinance conflicted with the state statute, the state
11 statute would prevail, so that if the city tried to
12 legislate cable TV out of existence, there would be a good
13 chance that that would not control.

14 QUESTION: What if the city statute conflicted
15 with the state statute, but conformed to the state
16 constitution?

17 MR. MC MAHON: If it conflicted with the state
18 statute, Your Honor, under Colorado law, and if it were an
19 area of both municipal and state concern, the state statute
20 would predominate.

21 QUESTION: I am asking a hypothetical question.
22 What if it conflicted with the state statute but comported
23 with the state constitution granting unlimited home rule to
24 certain --

25 MR. MC MAHON: But it would not conflict, Your

1 Honor, because the state statute conveys so-called unlimited
2 power only on purely local and municipal matters. That is
3 the extent of it.

4 QUESTION: But you are arguing for 33 states, you
5 say. I mean, conceivably in one of them it might not.

6 MR. MC MAHON: Yes, Your Honor. In that instance,
7 in our view, if the -- if the state legislation conformed to
8 the state constitution, and were not itself violative of the
9 state constitution, it would generally control.

10 QUESTION: Mr. McMahon, I think I misheard you.
11 The state would bar all cable television?

12 MR. MC MAHON: No, Your Honor. I think the Chief
13 Justice asked me, could the city do it, and I think I may --

14 QUESTION: Well, could the city --

15 MR. MC MAHON: I may have misspoke in answer to
16 that.

17 QUESTION: Yes, that is what I was asking.

18 MR. MC MAHON: My ultimate answer is that I think
19 that is an area of mixed state and local concern, and the
20 state law would predominate, and if there were a conflict on
21 it --

22 QUESTION: Well, you know, there is a Federal law
23 on that, too.

24 MR. MC MAHON: That is correct, Your Honor,
25 because cable TV also has interstate implications, as this

1 Court is well aware from its prior decisions.

2 QUESTION: But in any event, I gather your
3 position is that Colorado does not have presently, in any
4 event, any state policy --

5 MR. MC MAHON: That is exactly correct.

6 QUESTION: -- to displace competition in cable TV
7 with a regulation or monopoly public service.

8 MR. MC MAHON: That is exactly correct, Your
9 Honor, and if I could just --

10 QUESTION: And to have it, the state legislature
11 has to enact it. Is that it?

12 MR. MC MAHON: That is correct, Your Honor. Now,
13 the contemplation --

14 QUESTION: And that the constitutional provision,
15 home rule provision does not --

16 MR. MC MAHON: That does not do that. A
17 constitutional home rule provision could, in our view, Your
18 Honor, go to the contemplation standard or the compulsion
19 standard that was discussed by this Court in City of
20 LaFayette, but it would have to be more specific than this
21 one to do that, and then there would need to be some
22 comprehensive state policy in the form of legislation
23 besides.

24 I might just point out that the amici states feel
25 that this case is controlled by the fact that if the home

1 rule municipalities across the country, which number in the
2 thousands, are able themselves to satisfy the state action
3 immunity tests, then the national competition policy will be
4 severely impaired.

5 QUESTION: How many states are home rule states?
6 Nineteen or so?

7 MR. MC MAHON: No, 35, Your Honor --

8 QUESTION: Thirty-five.

9 MR. MC MAHON: -- that have home rule provisions.
10 Yes, Your Honor. I believe the chart to the Petitioner's
11 brief --

12 QUESTION: I take it they differ in degree,
13 though, do they not?

14 MR. MC MAHON: That is correct, Your Honor. There
15 are nine states that have powers like Colorado's and a total
16 of 35 where if the city is exercising authority in a
17 particular local area and there is no conflicting state
18 legislation, the city can occupy the field in that instance.

19 Thank you.

20 CHIEF JUSTICE BURGER: Mr. Howard?

21 ORAL ARGUMENT OF JEFFREY H. HOWARD, ESQ.,

22 ON BEHALF OF THE RESPONDENTS

23 MR. HOWARD: Mr. Chief Justice, and may it please
24 the Court, I think it is appropriate to begin by analyzing
25 what the city of Boulder did here. The city of Boulder has

1 one cable TV operator who has operated in town for about 16
2 years.

3 QUESTION: How long?

4 MR. HOWARD: About 16 years. The city wished to
5 go out into the market and solicit other operators to come
6 in and file bids. It ultimately did that, mailed out 50
7 requests for bids and published an ad in the Wall Street
8 Journal. To facilitate that process, and feeling, based on
9 the record before it, that the continued wiring of town by
10 the existing operator would preclude any chance of people
11 coming in from the outside, the city did one thing, and that
12 is the thing before the Court. It adopted a 90-day
13 suspension of construction for new cable by that operator.
14 That is the only action. There is no monopolization of the
15 business. There is no taking over of the service of cable
16 TV. There is none of that kind --

17 QUESTION: Well, Mr. Howard, isn't it clear that
18 the city plans to have an exclusive operator in the future?

19 MR. HOWARD: As a matter of fact, Your Honor, the
20 city has taken final action in this matter, and has taken
21 the advice --

22 QUESTION: Exclusive operator in particular
23 portions of the city.

24 MR. HOWARD: -- has taken the advice of the state
25 attorney general's office and divided the city into

1 districts, and proposes to issue cable permits for each
2 district.

3 QUESTION: Doesn't that proceed on the assumption
4 that it would be lawful for the city to grant an exclusive
5 contract?

6 MR. HOWARD: Under state law as I understand it --

7 QUESTION: No, I am talking about Federal law
8 right now.

9 MR. HOWARD: I think under Federal law that would
10 be lawful. It would not be subject to Sherman Act attack.

11 QUESTION: Why not? Suppose it was a milk
12 business. Could they give a license to one dairy to operate
13 in the city in exchange for 5 percent of the revenue, say?

14 MR. HOWARD: Well, if we are talking about the
15 standards that this Court has enunciated in the prior
16 decisions, particularly the City of LaFayette case, I think
17 the city would pass the test, even --

18 QUESTION: They could do this in any industry.
19 They could say, we are going to have a monopoly in this
20 particular business, and we will take 5 percent of the
21 profits as the price of the franchise?

22 MR. HOWARD: Of course, we believe that is not the
23 case in this particular situation.

24 QUESTION: Well, why isn't it?

25 MR. HOWARD: Because all the city of Boulder has

1 done here is adopt a 90-day suspension on further
2 construction. The final act, to be sure, was a districting
3 of the city and a granting of franchises in particular
4 areas, but as Mr. Justice Rehnquist points out, cities have
5 since they were created granted that kind of an exclusive
6 franchise to have a railroad car or a city railway on the
7 north side of town and another one on the south side of town.

8 QUESTION: Or grant one city the inside track.

9 MR. HOWARD: Grant one operator the inside loop
10 and another the outside loop, or even grant one operator the
11 whole town.

12 QUESTION: Is there any analogy with the old
13 private water suppliers, which I suppose have largely
14 disappeared.

15 MR. HOWARD: They have largely disappeared, Your
16 Honor, but there is a very close analogy there, particularly
17 in the west, where Boulder is, because long ago, private
18 water service was done commercially by private water
19 purveyors. Part of the home rule process in Colorado at the
20 turn of the century immediately affected water service. The
21 state of Denver as one of its first acts as a home rule city
22 took over the provision of water service on a monopoly basis
23 in that city, and still provides water service by the city
24 today.

25 QUESTION: But your position is across the board

1 Regardless of the industry and the physical scarcity and all
2 the rest, a municipality could legitimately require a
3 monopoly in any industry in its city.

4 MR. HOWARD: I don't think that is our position.
5 No, it is not.

6 QUESTION: Well, what is your position --

7 MR. HOWARD: Our position --

8 QUESTION: -- with respect to when may they
9 require only -- when are they permitted to have monopoly
10 conditions apply?

11 MR. HOWARD: As in other areas of local
12 governmental action, it is important to consider whether the
13 matter at issue is within the scope of legitimate local
14 concern. The city of Boulder has no interest in making
15 Rubic's cubes, a popular game the children are using today,
16 and selling them outside the city limits, nor could it grant
17 an exclusive franchise for Rubic's cubes manufacture, but if
18 the city has a special interest in the provision of water
19 service, the city has a special interest in the maintenance
20 of its right of way for transport, communication, and other
21 traditional things that have taken place there, then the
22 equation is a little different.

23 QUESTION: What is the special interest here?
24 What is the special interest here?

25 MR. HOWARD: One of the --

1 QUESTION: Is it that the poles will only hold one
2 set of cables?

3 MR. HOWARD: One of the things that caused cities
4 to be formed, both in the east and in the west, was the
5 administration of the public right of way. Perhaps one of
6 the first things was to have a public water service.
7 Naturally, those pipes went in that public right of way.
8 Perhaps the next thing was a street for transport, and a
9 street railway, and then there were telegraph lines, and
10 communication cables.

11 What we have today is another cable. It is a
12 different technology, a new kind of device the scientists
13 have come up with, but the principle is no different. When
14 the people of Colorado amended their constitution in 1902 to
15 put that --

16 QUESTION: I still didn't hear the answer to my
17 question. What is the special interest of the city here?
18 Is it the interest in controlling the streets?

19 MR. HOWARD: The city has several interests, as
20 were revealed in the final districting ordinance that was
21 adopted. One, of course, is the control of the streets and
22 the public right of way. Another is to assure diversity of
23 cable service around the community. The existing operator
24 has consistently refused to provide two-way communication
25 service, consistently refused to provide burglar alarms and

1 fire alarms hooked up to the city police department, and so
2 forth.

3 One of the things the city went out into the
4 market to see if it could get were people who would provide
5 that kind of service. The city has a legitimate local
6 interest in those things.

7 In the Tenth Circuit's opinion in the second
8 Boulder case, the court addressed the legitimate interests
9 of that nature. Those are unique to cable, I believe, don't
10 apply to water service, stronger interests. They may also
11 involve the competing interests of Boulder citizens and
12 First Amendment hearing.

13 QUESTION: Are they interests that make it
14 necessary to have only one operator?

15 MR. HOWARD: I am sorry, Your Honor.

16 QUESTION: Are they interests which make it
17 appropriate to have only one operator?

18 MR. HOWARD: Well, we would submit that is not the
19 situation here, but the situation here is this.

20 QUESTION: Only one operator in any portion of the
21 city then.

22 MR. HOWARD: There has only been one operator in
23 any city in the United States, out of 6,000 cable systems,
24 the record here shows. Across the country. No more than
25 six have more than one operator. This Petitioner itself

1 operates 130 systems or more across the country, and all of
2 those are one operator.

3 QUESTION: Well, maybe there are an awful lot of
4 violations of law going on, but the question really is, is
5 whether or not the city has a legitimate interest in having
6 only one operator, and requiring, I mean, as a matter of
7 law, excluding all but one from the market.

8 MR. HOWARD: Well, in this case, we would say that
9 the justifications for the districting ordinance may well be
10 broader and different than the justifications for a 90-day
11 suspension of construction. Those justifications have
12 already been litigated in the second Boulder case, and the
13 Court of Appeals has reversed the Trial Court's issuance of
14 an injunction. That case involves more fully the question
15 of when can a city district itself and issue, in effect,
16 single operator permits for each particular district.

17 It is not an unusual process. The city of Los
18 Angeles, the city of New York, the city of Philadelphia, and
19 others have all done that kind of thing. Cities use that
20 technique for a variety of local purposes. They use it to
21 try to assure coverage of the entire city or uniform
22 service. If free market forces were allowed to prevail, you
23 might well have and have had in some cities a situation
24 called cream skimming, when the cable service only hooks up
25 to the rich side of town and doesn't hook up to the other

1 side of the tracks.

2 Districting gives the cities a better opportunity
3 to police that kind of activity and prevent it, if that is
4 what they believe is in the public interest. But also --
5 excuse me.

6 QUESTION: Mr. Howard, you have used the word, or
7 the term "city interest". Are you analogizing cable TV to
8 the sort of traditional type of businesses affected with the
9 public interest, like providing gas, electricity, water, and
10 transportation?

11 MR. HOWARD: Absolutely, Your Honor. In fact,
12 there is no contest over that point in this case, because in
13 the Manor Vail case in the Colorado Supreme Court, a
14 subsidiary of this Petitioner was involved, and in their
15 answer in that case, this Petitioner conceded that cable
16 television was a private business affected with the public
17 interest, and in that case they supported the home rule
18 authority of a Colorado city to fix the rates for cable
19 television.

20 The fact is that cities have been forced to
21 address problems with cable television in a variety of
22 fronts. Absent price competition, cities have been faced
23 with the question of how do we keep the prices that don't
24 have any price competition in line? Absent service
25 competition, when there is only one provider, how do they

1 provide high quality service that the market would otherwise
2 provide?

3 That is the kind of background that is at issue
4 here. More particularly, there is a traditional line of
5 regulating cable TV in this manner in Colorado, a long prior
6 history of such regulation both from the Federal Government
7 and local governments.

8 The Federal Communications Commission has since
9 1972 encouraged local authorities to bring their special
10 expertise, as the Commission called it, to these problems,
11 and has recognized that local cable TV regulation, including
12 the franchise terms, the rates, districting, which is the
13 issue in Boulder Two, and similar cable matters are
14 "uniquely within the competence of local authorities". That
15 is at Page 18 of our brief, where we quote from the FCC.

16 In terms of traditional city functions, cable
17 strung in the right of way is just the latest development in
18 the use of the right of way. We submit that when the people
19 of Colorado in 1902 amended their constitution to give this
20 local autonomy, they did not contemplate that the
21 constitution would have to be amended for each new
22 technological development. They gave the local autonomy
23 over that right of way to the local city government, run by
24 nine elected council members.

25 Colorado cities have always recognized that power

1 and exercised it. The amicus brief of the Colorado
2 Municipal League here points out that about 85 cities in
3 Colorado have now regulated cable TV. This pattern dates
4 back to the early sixties. The Colorado Supreme Court has
5 recognized the validity of this kind of regulation by home
6 rule cities in the Manor Vail case, and the Tenth Circuit
7 has now so held twice in this case, Boulder One and Boulder
8 Two.

9 In Colorado, however, as in the vast majority of
10 states, the state legislatures have chosen not to adopt
11 legislation on cable.

12 QUESTION: May you assert the Parker Brown
13 exception without state legislative --

14 MR. HOWARD: Yes, we do, Your Honor.

15 QUESTION: You do. That is your principal
16 argument, I gather, isn't it?

17 MR. HOWARD: That is our principal argument.

18 QUESTION: That the home rule aspects under the
19 Colorado constitution are sufficient to qualify the
20 municipality for the Parker Brown exception?

21 MR. HOWARD: Well, we basically have two arguments
22 about that, Your Honor. One is that we meet the test even
23 of the plurality in City of Lafayette, because although the
24 Court indicated that authorization or direction was
25 required --

1 QUESTION: From the state legislature.

2 MR. HOWARD: -- from the state --

3 QUESTION: Wasn't that opinion rather explicit?

4 MR. HOWARD: Yes, it was.

5 QUESTION: In that it required authorization from
6 the state legislature --

7 MR. HOWARD: That's correct.

8 QUESTION: -- which we do not have here. What we
9 have here, if there is authorization, is in the state
10 constitutional home rule provision. Is that right?

11 MR. HOWARD: We would submit, Your Honor, that the
12 state legislature is merely the creation of the people of
13 Colorado. They must look to the constitution, too, for the
14 scope of their authority.

15 QUESTION: But don't we have to make up our minds
16 here whether sovereign for the purposes of the Parker Brown
17 exception includes a home rule city?

18 MR. HOWARD: I think what the Court has to
19 recognize is whether the state --

20 QUESTION: Don't we have to decide that?

21 MR. HOWARD: I think the Court has to decide
22 whether the state has recognized the power of these
23 municipalities in such a way that it passes those tests.

24 QUESTION: Well, whatever may be the relationships
25 between the states and municipalities, there is still a

1 question whether for purposes of the Parker Brown rule a
2 municipality can ever be sovereign, isn't there?

3 MR. HOWARD: I don't think the Court addressed
4 that in any prior case, other than to say that authorization
5 or direction --

6 QUESTION: Don't we have to decide it here?

7 MR. HOWARD: Pardon me?

8 QUESTION: Don't we have to decide it in this case?

9 MR. HOWARD: I don't think the Court has to, and I
10 submit our second argument for why we meet the test. We
11 think the kind of tracing back to a legislative mandate that
12 the pluralities seem to contemplate in City of Lafayette is
13 unnecessary where the challenged municipal act is a
14 governmental regulatory enactment, a 90-day moratorium, and
15 applies solely within the city's political jurisdiction,
16 rather than the operation of a business enterprise outside
17 the city's political authority and political jurisdiction,
18 and that in this kind of a case, much different from the
19 private venture of the city outside its boundaries in
20 Lafayette, that kind of tracking back for particular
21 authority is unnecessary.

22 It is our position that in that case it is
23 sufficient that the city's act is authorized, and the
24 distinction as a matter of state law whether it is
25 authorized by a statute, which can be changed by the

1 legislature at its whim, or by the people in the
2 constitution is irrelevant.

3 QUESTION: Then you are saying the home rule
4 factor is what is the fulcrum here.

5 MR. HOWARD: Yes, Your Honor, the home rule factor
6 is the fulcrum here that was missing in Lafayette, and a
7 factor that makes the question broader than whether we pass
8 the test. It makes the question one more of democracy at
9 work at the local level, if you will, because if the rule
10 were changed, if a home rule city could not act within the
11 scope of Parker immunity, absent going back to the
12 legislature for each particular act and a new technology
13 each time, to get a new authorization, in effect the Court
14 under the antitrust laws will be holding that there can be
15 no home rule, because cities cannot afford in this day and
16 time to allow the continued exposure to potential treble
17 damages in all of these areas in which they act that may
18 have an anticompetitive aspect to them to keep on ringing
19 up. They are going to have to find that safe harbor, and to
20 do so would mean abandoning their whole tradition of home
21 rule.

22 QUESTION: But this argument, if I understand it
23 correctly, as to the ability of a home rule city to require
24 an exemption just because it is a home rule city, is not
25 confined to the cable TV industry. It would apply to every

1 industry, wouldn't it? It would apply to dairies, and they
2 could say, for example, in Boulder, we will fix the prices
3 of all the products sold in this city at such and such a
4 price, and so forth.

5 MR. HOWARD: Well, I think the question again, to
6 answer --

7 QUESTION: The condition and sale of public
8 utility service on purchasing lamps, as they did in the
9 Cantor case, we can do that in this city.

10 MR. HOWARD: No, you can't, Your Honor. I think
11 the basic question would still remain the same. Cities can
12 only act in areas where they have a legitimate governmental
13 interest. They may well have no legitimate interest in the
14 sale of lamps, but they certainly have a strong interest in
15 some kinds of local activities. Cable is one of them, and
16 zoning is the other.

17 The Court and my worthy opponent now have
18 recognized --

19 QUESTION: Well, let's say the sale of milk then,
20 or the sale of bread, the sale of foodstuffs in the city. I
21 suppose they would be exempt there, wouldn't they?

22 MR. HOWARD: The last term, in the Minnesota
23 Cloverleaf Creamery case, the Court dealt with a question
24 involving non-returnable milk bottles. There it was the
25 state, to be sure, not a city.

1 QUESTION: The sale of milk cartons.

2 MR. HOWARD: But there was a principle there
3 involving milk cartons that is relevant here, we submit.
4 Mr. Justice Brennan, writing for the Court, in Footnote 6,
5 pointed out, and I quote, "The states are free to allocate
6 lawmaking function to whatever branch of state government
7 they may choose." And I think the dissent agreed with that
8 notion.

9 What we've got here, so long as the matter is a
10 legitimate governmental concern, and I am presuming that --
11 not everything in the world is. So long as it is --

12 QUESTION: No, but milk, and milk cartons, and
13 price of food, and all that would be subject to the Parker
14 Brown exemption in the home rule states just on the basis of
15 the city's own action.

16 MR. HOWARD: Not necessarily.

17 QUESTION: That is your view, isn't it?

18 MR. HOWARD: That is not our position. Our
19 position is, it would have to be a matter of legitimate
20 local concern. Milk cartons may not be.

21 QUESTION: Well, but those examples I gave you
22 would be, would they not, examples of legitimate local
23 concern --

24 MR. HOWARD: I am not certain --

25 QUESTION: -- disposal of milk cartons, and the

1 garbage, and that sort of thing?

2 MR. HOWARD: I am not certain whether milk cartons
3 would. It may well be a statewide concern, because of the
4 transport of trash, and bringing in of the materials from
5 outside the city. It may not be a legitimate local
6 concern. I think we have to take those case by case.

7 QUESTION: But the reasons we have a legitimate
8 local concern in cable TV is the interest of the city in
9 two-way communication, and in diversity of programming, and,
10 I suppose, in the revenues in the franchise fee, and in the
11 use of the streets with the cables. Those are the reasons.

12 MR. HOWARD: Those are among the reasons. There
13 are more, if I may. Cable television only arises within a
14 particular city. This cable system doesn't apply to anyone
15 outside of Boulder. It only affects Boulder citizens. It
16 only uses the Boulder right of way. It only collects money
17 from Boulder citizens, and all of the hardware for the
18 system is in the city of Boulder, and everyone who is hooked
19 up is in the city of Boulder.

20 So, in terms of distinguishing Boulder from the
21 rest of the political jurisdictions, it affects Boulder's
22 interests much more than it affects an adjacent county or
23 town with whom this system has no interaction. In that
24 context, I would agree with the Court.

25 QUESTION: Who makes the decision as to whether or

1 not this is, one, a governmental interest, and the type of
2 governmental interest that is covered by the home rule
3 provision of the constitution? Who is to make that
4 determination?

5 MR. HOWARD: I would submit, Your Honor, that that
6 is a question of state law to be determined in the first
7 instance by the state courts. The Supreme Court of the
8 state in the Manor Vail case at least implicitly recognized
9 the home rule power of cities in Colorado to regulate the
10 rates of cable television, and also by the Tenth Circuit
11 Court, which in this case has now twice held that cable
12 television, at least the incidence within the city's
13 limits --

14 QUESTION: And now we have to decide.

15 MR. HOWARD: Well, we would submit that some
16 deference is due to the Supreme Court of the state and to
17 the Circuit Court in those decisions, Your Honor.

18 QUESTION: But that we will have to decide for
19 Boulder and Podunk and Jumpoff and all of the different home
20 rule towns in this country.

21 MR. HOWARD: Your Honor --

22 QUESTION: And they will be different, won't they?

23 MR. HOWARD: Your Honor, I think the decision
24 before the Court is not whether to permit it, but whether to
25 stop what has happened now for 20 years, since this new

1 technology began, because the history shows and the record
2 shows that cable regulation has worked, by and large, at the
3 local level, and it continues to work. It has always been
4 done by cities and towns. It is being done by Los Angeles
5 and New York and every city in the country.

6 QUESTION: Always?

7 MR. HOWARD: Since the first inception of this --

8 QUESTION: You jumped from 20 years to always.

9 That is a big jump.

10 MR. HOWARD: Well, in the life of the technology,
11 it may be a long -- a big jump, because the technology may
12 only have a short life span, and it may be replaced by the
13 next new technology that comes down the pike, so always may
14 be forever for cable TV if it is replaced next year by some
15 new technology.

16 QUESTION: I assume, counsel, that a city could
17 pretty well control the location of parking lots by zoning,
18 by its zoning authority. Could a city with the proper
19 declarations of the matters of traffic congestion, traffic
20 safety, and the need for uniform standards, take over
21 control of all the parking lots in the city? And if you
22 know, have any cities done that?

23 MR. HOWARD: I think cities have regulated parking
24 lots as part of their land use planning, their zoning. I am
25 not aware of any cities that have taken over it, but taking

1 over the parking lot would be -- perhaps be interpreted as a
2 proprietary kind of activity, if there were city attendants
3 instead of the private attendants charging money to park in
4 the lot.

5 That is not what we have here, Your Honor, we
6 submit. The city is not trying to run the cable business.

7 QUESTION: When the city puts up a lot of these
8 meters along the streets, are they engaging in a
9 governmental or a proprietary function?

10 MR. HOWARD: We would say that they are engaging
11 in a governmental function, and we would say that --

12 QUESTION: Well, is it much different if they they
13 do that on a collective basis?

14 MR. HOWARD: The reason we would submit, Your
15 Honor, is that whether it is governmental can't be decided
16 simply because it was once done in a proprietary -- by
17 private operators, or that the city gets money from it.
18 There may well be certain integral functions of the city,
19 administering traffic in the city and things like that, that
20 even though they have a commercial tone to them qualify as
21 an integral governmental function, and the parking meters
22 may well be one of those things.

23 Water service, we would submit, surely is. It was
24 once done commercially, with a private vendor of water,
25 taken over by the city, and is now being done by cities for

1 about 80 years in this country, at least in the west. That,
2 we would submit, surely constitutes an integral local
3 governmental function.

4 QUESTION: There is nothing in the Federal
5 Constitution that would prevent the state from taking that
6 function over from the cities, is there?

7 MR. HOWARD: Nothing whatsoever in the Federal
8 Constitution. There may be something in the state
9 constitution, and in Colorado, if a matter has been
10 determined to be purely local, certain incidents of cable TV
11 may be, for all we know, then the state legislature is
12 without power to act.

13 A perfect example is zoning in Colorado. Home
14 rule cities are able to zone not by virtue of some state
15 legislative mandate. There is no legislative mandate for
16 zoning. The power for home rule cities to zone comes
17 entirely from their status as home rule cities. And the
18 problem, we would submit, if the Court were to reverse in
19 this case, is exemplified by zoning, long a traditionally
20 recognized local function, because in Colorado and other
21 home rule places, the cities' acts could turn to no specific
22 mandate from the state legislature, and in effect their
23 zoning would then be subject to attack under the Sherman Act.

24 QUESTION: And therefore they would be subject to
25 treble damages every time they turned down a zoning

1 application.

2 MR. HOWARD: Exactly, Your Honor, and there are
3 many kinds of zoning activities that may restrain trade.
4 The Court has dealt with some in City of Tiberon and
5 American Mini-Theaters recently, different attacks on those
6 zoning ordinances there, but we would submit, if Colorado
7 home rule cities can't find Parker immunity, then the same
8 attacks that were made in City of Tiberon and in American
9 Mini-Theaters now will lie against home rule cities in
10 Colorado, merely by being reformulated under an antitrust
11 theory.

12 QUESTION: Well, there is quite a difference with
13 the Mini-Theaters case, because there the city of Detroit
14 had no financial interest whatsoever in the operation of the
15 theaters. It was purely a regulatory situation. But here,
16 as I understand it, the city gets a percentage of the
17 revenues or something, doesn't it?

18 MR. HOWARD: We submit that that --

19 QUESTION: Is that correct?

20 MR. HOWARD: That is correct.

21 QUESTION: So there is that difference.

22 MR. HOWARD: Let me tell the Court exactly what
23 the facts are. The facts are, the city gets 2 percent of
24 gross as its franchise fee. We would submit that does not
25 change the legal character of the act. In Parker versus

1 Brown --

2 QUESTION: Well, it gives the city an interest in
3 the business, though.

4 MR. HOWARD: In Parker versus Brown, the state got
5 \$2.50 per ton of raisins, in the state of California. It
6 gave the state the same kind of an interest. The more
7 raisins that were sold, the more fee the state of California
8 got, and the Court had no trouble --

9 QUESTION: Of course, the state's interest there
10 was in curtailing the sale of raisins.

11 MR. HOWARD: Well, the state's interest there was
12 in keeping the price high, as the opinion --

13 QUESTION: Curtailing the sale. Right.

14 MR. HOWARD: -- indicates.

15 QUESTION: Will you refresh my recollection? Does
16 the city contemplate regulating the rates of cable
17 television licensed by it?

18 MR. HOWARD: Those matters have not been decided
19 by the city at this time, Your Honor, and there is nothing
20 in the record to indicate. The city has thought of all
21 kinds of activities that might be important to be addressed,
22 and rates were one of them, in a model ordinance they
23 floated as a proposal long ago.

24 QUESTION: In most of the businesses deemed to be
25 affected with the public interest, rates are regulated.

1 MR. HOWARD: Yes, Your Honor, and the pattern
2 across the country in cable television seems to be
3 increasingly to consider rate regulation where there is no
4 price competition.

5 QUESTION: If the city has a percentage of the
6 gross, the city's interest may be adverse to the public's.
7 The higher the rates, the more revenue the city derives.

8 I don't know whether this system is working or
9 not. Can you hear me?

10 MR. HOWARD: I can hear you, Your Honor.

11 QUESTION: All right.

12 MR. HOWARD: Well, there could be multiple
13 situations where a city's interests can be either directed
14 in one direction or the other.

15 QUESTION: It could be adverse, though, couldn't
16 it?

17 MR. HOWARD: It could be adverse in that case. I
18 think in this case, with a 90-day moratorium, the city's
19 stake in the enterprise through a 2 percent fee, which is
20 very small, would cut the other way. It would be in the
21 city's interest to have these people stringing cables
22 everywhere, so that they could get a greater return.

23 QUESTION: Isn't there a new proposal to increase
24 that fee to 5 percent?

25 MR. HOWARD: No, that is not correct, Your Honor.

1 QUESTION: I thought I saw something about a 5
2 percent fee in the record.

3 MR. HOWARD: There was a 5 percent proposal in the
4 model ordinance, but the ordinance that has been adopted in
5 this case, including districting, specifically says -- we
6 reprinted that in an appendix to our brief, because it was
7 left out of the joint appendix -- specifically says that
8 these people will have no increase in their fee whatsoever.

9 The impacts beyond zoning go into a variety of
10 other areas. In our brief we discuss low cost housing,
11 waste regulation, as local and traditional governmental
12 functions which in Colorado are only based upon home rule
13 constitutional power, not based on a statutory authorization.

14 These kinds of things, we submit, all demonstrate
15 legitimate local concerns which have traditionally been
16 performed at the local level, and which may well have
17 anticompetitive aspects to them. The significance from our
18 standpoint, we would submit, is that if the Petitioner here
19 were to get its way, Colorado home rule cities would be
20 unable to act because the liability for potential treble
21 damages would force them to go back to the legislature each
22 time and in effect do away with the whole home rule
23 principle of government.

24 The Colorado Supreme Court has repeatedly held
25 that Article 20 of the Constitution gives home rule cities,

1 and I quote, "every power theretofore possessed by the
2 legislature". Thus, by virtue of Article 20, a home rule
3 city is not inferior to the general assembly concerning its
4 local and municipal affairs.

5 We submit the Court should respect that allocation
6 of power, and that to do otherwise would have disastrous
7 consequences. First, as a practical matter, it would tear
8 asunder the traditional pattern of home rule, because
9 municipal governments couldn't afford to let the clock of
10 treble damages keep on accruing. They would have to go back
11 and give up their home rule power.

12 But far more important than that in the long term,
13 and even more troubling from a constitutional standpoint, if
14 home rule cities can only avoid antitrust litigation and
15 achieve immunity by going back to the state legislature each
16 time for renewed authority, then for practical purposes
17 there cannot be any home rule.

18 This result, we submit, is a result the Court
19 should consider carefully and should avoid. This is a
20 result, we submit, that Congress never intended the
21 antitrust laws to bring about, whatever their application to
22 ordinary commercial ventures by cities outside their
23 boundaries. And this is a result which we submit the
24 principles of our system, which the Court has addressed in
25 the National League of Cities case, and the deference

1 traditionally owed to the state constitutional choice by the
2 people in allocating their legislative power does not allow.

3 If the Court has no further questions.

4 CHIEF JUSTICE BURGER: Very well.

5 You have about two minutes remaining, Mr. Farrow.

6 ORAL ARGUMENT OF HAROLD R. FARROW, ESQ.,

7 ON BEHALF OF THE PETITIONER -- REBUTTAL

8 MR. FARROW: Thank you, Your Honor.

9 I will not be able to cover everything I obviously
10 want to say here. I would start off by saying, I commend to
11 you the dissent by Justice Markey. I think that dissent was
12 one of the more extraordinary documents I have had occasion
13 to read as a lawyer, and of course I loved it, but it, I
14 believe, answered almost every point raised by counsel,
15 opposing counsel today.

16 Let me quickly just indicate to you this whole
17 business of sovereignty, who is the sovereign, the Supreme
18 Court of the State of Colorado has itself in City of Denver
19 versus Sweet, which is quoted in ours, settled the fact that
20 cities are not sovereigns. They are not city states. I
21 think the law is closed.

22 On the question of regulation, now, we are dealing
23 with regulation. We find here that when it is appropriate
24 to talk in terms of proposed 5 percent, we move from the
25 90-day moratorium to the total prohibition, which came along

1 later on, it says, until 1984, which happened to be the date
2 on which they believe that they are going to be running this
3 Petitioner completely out of town, will only charge 2
4 percent.

5 So that it is sophistry to talk in terms of a
6 90-day moratorium. The 90-day moratorium by the very words
7 of the city attorney himself was a contractual ploy. We
8 will cancel their existing permit, we will enact a new
9 permit with a geographical limitation, they will accept it
10 by performance, by continuing to serve, and we will have
11 them by contract. If they don't, they can't operate at
12 all. So that wasn't regulation.

13 The only regulation, if you want to call it
14 regulation, is the pure prohibition, which came about in
15 July. They said, no time, no place, no manner, no how. If
16 you could do that to a newspaper, then maybe you can do it
17 to cable. It is just exactly the same thing. They are
18 saying to you that you can't deliver your papers on the
19 other side of town. I believe that is exactly what we are
20 dealing with.

21 With respect to the --

22 CHIEF JUSTICE BURGER: Your time has expired now,
23 Mr. Farrow.

24 MR. FARROW: Thank you, Your Honor.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen. The

1 case is submitted.

2 (Whereupon, at 2:18 o'clock p.m., the case in the
3 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

COMMUNITY COMMUNICATIONS COMPANY, INC., vs. CITY OF BOLDER, COLORADO, et al.

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

BY Suzanne Young

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