

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF COLUMBIA AND COLUMBIA OUTDOOR
ADVERTISING, INC., Petitioners
v. OMNI OUTDOOR ADVERTISING, INC.

CASE NO: 89-1671

PLACE: Washington, D.C.

DATE: November 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF COLUMBIA AND COLUMBIA :
OUTDOOR ADVERTISING, INC. :
Petitioners :
v. : No. 89-1671
OMNI OUTDOOR ADVERTISING, :
INC. :
----- X

Washington, D.C.
Wednesday, November 28, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

JOEL I. KLEIN, ESQ., Washington, D.C.; on behalf of the
Petitioner.
A. CAMDEN LEWIS, ESQ., Columbia, South Carolina; on behalf
of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

JOEL I. KLEIN, ESQ.

On behalf of the Petitioner

PAGE

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A. CAMDEN LEWIS, ESQ.

On behalf of the Respondent

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REBUTTAL ARGUMENT OF

JOEL I. KLEIN, ESQ.

On behalf of the Petitioner

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

2 (10:01

3 a.m.)

4 CHIEF JUSTICE REHNQUIST: We'll hear argument
5 first this morning in No. 89-1671, The City of Columbia
6 and Columbia Outdoor Advertising v. Omni Outdoor
7 Advertising.

8 Mr. Klein.

9 ORAL ARGUMENT OF JOEL I. KLEIN

10 ON BEHALF OF THE PETITIONER

11 MR. KLEIN: Mr. Chief Justice, and may it please
12 the Court:

13 Petitioners, The City of Columbia, South
14 Carolina and COA, a private billboard company were found
15 to have violated the antitrust laws by conspiring to
16 restrain competition through the passage of two zoning
17 ordinances. The principal question
18 presented is whether such ordinances, even though they
19 satisfy this Court's test in Town of Hallie, can
20 nevertheless violate the antitrust laws if their enactment
21 was motivated by the city's desire to benefit a private
22 business rather than the public at large. We submit that
23 they cannot for two related reasons. First, municipal
24 regulation that meets the Hallie test is deemed to be the
25 sovereign action of the State and under Parker such action

1 is exempt from the antitrust laws regardless of
2 legislative motive and, second, under the Noerr-Pennington
3 Doctrine, the Sherman Act likewise doesn't apply to a
4 private party's successful effort to seek such an
5 ordinance.

6 If I may then begin with the judgment against
7 the city. The scope of the Parker doctrine was set
8 out -- the scope of the State action exemption, excuse me,
9 was set out in Parker where the court made plain that the
10 Sherman Act doesn't cover a market restraint imposed by
11 the State as sovereign. I want to emphasize that that's a
12 generic exception based on the source of the restraint.
13 This Court has repeatedly made that very point, including
14 recently in Hoover v. Ronwin, where it stated that quote
15 "when a State legislature adopts legislation, its actions
16 ipso facto are exempt from the antitrust laws."

17 Indeed in Ronwin itself, the court squarely
18 rejected an exception to Parker based on the kind of claim
19 at issue here. In that instance that a private bar
20 association and a State supreme court had conspired to
21 take action motivated by a desire to protect the economic
22 interests of lawyers.

23 Now if we agree that had South Carolina passed
24 this statute, it would be exempt. The question remaining
25 is whether the city is entitled to a lesser measure of

1 Parker protection. We think the answer to that
2 question --

3 QUESTION: What do you think would have happened
4 if the court of appeals would have held if the State had
5 passed this statute?

6 MR. KLEIN: My, my understanding from the
7 rationale is that they would have reached the same result.

8 QUESTION: Exactly.

9 MR. KLEIN: That is my view.

10 QUESTION: Well, then if you say we all agree,
11 we've already decided the case.

12 MR. KLEIN: Well, I, I think that is the answer.

13 QUESTION: So you shouldn't say that. You're --

14

15 MR. KLEIN: Well, I think, Your Honor, though
16 that there are two questions. First, is this the same as
17 the State? And I think there is at least some suggestion
18 been made that it isn't. But I do think if it is --

19 QUESTION: But the court of appeals would have
20 reached the same --

21 MR. KLEIN: That, that is my view.

22 QUESTION: All right. All right, then.

23 MR. KLEIN: And I think the answer is as you
24 suggest, Justice White, that that's what Town of Hallie
25 compels. Hallie says in a court of appeals felt -- ruled

1 that it was met here -- Hallie says that once a municipal
2 ordinance passes its test, it is in fact the sovereign
3 action of the State. That's what the analysis calls for.
4 Once that's so, as Justice White has just suggested, that
5 cities get the same measure of Parker protection as do the
6 States and for each that measure of protection doesn't
7 turn on the hows or the whys behind the particular
8 ordinance.

9 Now the court of appeals -- correctly as you
10 point out, Justice White -- took the contrary view and it
11 fashioned a rule, that is, it found an exception to Parker
12 based on the notion that Congress wanted to strike down
13 governmental action when taken for the wrong motives. We
14 simply don't think that's a plausible view for several
15 reasons.

16 First of all, by making antitrust liability turn
17 on the political process, the Fourth Circuit has read into
18 the Sherman Act an intent to regulate politics. But this
19 Court has already made clear Congress had no such intent.

20 QUESTION: Well, what if the city council had
21 been bribed?

22 MR. KLEIN: Your Honor, our view is that if the
23 city council had been bribed that would not be an
24 antitrust violation. And that is --

25 QUESTION: So you would say that Parker still

1 applies?

2 MR. KLEIN: Absolutely.

3 QUESTION: Sure. All right.

4 MR. KLEIN: And we think that for several
5 reasons. First, again --

6 QUESTION: I think you have to say that, I take
7 it, on your theory.

8 MR. KLEIN: Under my first theory I have to say
9 it. My second theory, Justice White, which, which I don't
10 think the Court need reach, is that this case doesn't
11 involve bribery at all. But in any case I, my first
12 position is as you suggest.

13 And I say that for several reasons. One,
14 bribery is a political issue. It's a political question
15 and the Court has already said the Sherman Act doesn't
16 regulate politics. Second, once you open up this kind of
17 exception you're going to totally undermine the rationale
18 of Parker itself. In that case, of course, the Court
19 explained that in the absence of a clear indication from
20 Congress, it was not prepared, it would be inappropriate
21 to conclude that the antitrust laws meant to restrict a
22 State's sovereign prerogatives. Yet that's precisely what
23 an inquiry based on governmental motive would do.

24 Let's take, for example, the kind of zoning
25 ordinance at issue in this case. That ordinance obviously

1 serves, such ordinances routinely serve a public purpose.
2 Yet, they necessarily restrain trade, because by
3 definition they restrict supply. Given that set of
4 circumstances it's no surprise that a private party --

5 QUESTION: But Mr. Klein, do you think that the
6 zoning power would give the city the authority to grant an
7 exclusive franchise in the billboard advertising field to
8 a particular company?

9 MR. KLEIN: I, I think it might, Your Honor.
10 It's a question that is I think the city would have that
11 power under South Carolina law. Now then the question
12 would be whether it acts --

13 QUESTION: You think it has the power to
14 grant -- say it was given an exclusive franchise in all
15 the restaurants in town so that presumably it could zone
16 restaurants. It could have given an exclusive franchise
17 to one chain of restaurants, say no other chains can come
18 into the town.

19 MR. KLEIN: No question that would, that would
20 violate the commerce clause presumably --

21 QUESTION: Well, what about the antitrust law?

22 MR. KLEIN: I don't believe it would if it was
23 properly authorized under Hallie.

24 QUESTION: Well, but would it be properly
25 authorized under Hallie simply because the State had given

1 the city the zoning power? Would the zoning
2 power -- could it be properly used within Hallie to grant
3 exclusive franchises to various kinds of businesses?

4 MR. KLEIN: I think it could. I think the
5 inquiry under Hallie is -- in order to protect those
6 zoning interests -- in other words the basic interests in
7 restricting undue clutter and so forth --

8 QUESTION: That you can give them -- give all
9 the business to one particular --

10 MR. KLEIN: The city would take that approach
11 consistent with the antitrust laws. Yes, sir?

12 QUESTION: Mr. Klein, what you said about
13 bribery suggested to me a question similar to Justice
14 Stevens'. I don't know what the law is but suppose you
15 have, suppose you have a State that says that a, a bribed
16 official act is invalid? Suppose that's the law of a
17 particular State, therefore it's not State action.

18 MR. KLEIN: I think --

19 QUESTION: It's invalid. It's not State action.
20 Would that be a violation of the antitrust laws then?

21 MR. KLEIN: I think it wouldn't be because
22 frankly -- if I can fight the premise, Justice Scalia -- I
23 don't think that it wouldn't be State action. In fact, if
24 I refer you to the Bates case, this Court found that that
25 action there was protected by Parker even though it

1 violated the First Amendment. That is the validity well
2 known under State law, of a State -- of an action. It
3 doesn't test State action. I mean that's of course the
4 whole rationale of Monroe v. Peyton and so forth. So I
5 don't think it turns on that kind of inquiry.

6 QUESTION: Well, it doesn't, it doesn't
7 determine what State action for those constitutional
8 purposes, but it might well determine what States -- what
9 is State action for purposes of Parker.

10 MR. KLEIN: But, but I, I don't think that's
11 consistent with Bates and frankly that is, I think, that's
12 flatly what the Court held in Bates. But frankly I think
13 it would be an impossible rule. What it would mean,
14 Justice Scalia, is that whenever you have an antitrust
15 case, the first issue would be this kind of case. Did the
16 State -- did the city violate State law or did the State
17 violate State law? Sometimes that's going to turn on a
18 jury trial. Sometimes it's going to be a procedural
19 default, so antitrust courts would be in the business of
20 essentially having a State case first as a prerequisite to
21 jurisdiction and I don't think that makes any sense.

22 Now the other thing I want to suggest aside from
23 the fact that once you allow -- once you acknowledge that
24 zoning laws are going to lead to people who benefit from
25 them lobbying aggressively, making campaign contributions,

1 then if you allow that to lead to an antitrust case,
2 you're going to undo Parker all together. Because every
3 time, just as in this case, one person wins, one person
4 loses, then the threat or the actuality of an antitrust
5 action is there and that I understood was what Parker
6 tried to prevent.

7 QUESTION: Mr. Klein, could I go back to Justice
8 Stevens' question and inquiry. Now the courts below
9 clearly found that the zoning law met the Town of Hallie
10 test?

11 MR. KLEIN: That's correct, Justice O'Connor.

12 QUESTION: And there's no cross appeal --

13 MR. KLEIN: That, that issue --

14 QUESTION: -- on that.

15 MR. KLEIN: -- that's not been argued before
16 this Court.

17 QUESTION: Although the respondent does raise in
18 a, a footnote, I believe, the argument again, that Town of
19 Hallie doesn't even apply.

20 MR. KLEIN: That is correct as well.

21 QUESTION: Do we need to address that, do you
22 think?

23 MR. KLEIN: I, I don't believe you do, but
24 if --

25 QUESTION: I mean if we have the concerns that

1 Justice Stevens expressed that perhaps a zoning ordinance
2 authority does not enable towns to purposely exclude
3 everybody but one from a particular business.

4 MR. KLEIN: Well, Your Honor, I don't think the
5 issue is here, but I think if the issue was here the
6 answer is clear and let me, let me make, make that -- what
7 I mean by that paren.

8 That is this, this -- the city didn't confer a
9 franchise. This was an open market and COA had developed
10 a significant, very significant market share. Under South
11 Carolina law expressly, cities are encouraged to zone, to
12 zone billboards. That is affirmatively encouraged. Now I
13 submit that that must -- it must take into recognition
14 that there will be anticompetitive effects. It may not be
15 a monopoly. It could be an oligopoly or what have you.

16 Second of all, South Carolina goes so far -- and
17 in this sense I think this is a stronger case than
18 Hallie -- it goes so far as to say with respect to Federal
19 highways which the city has passed an ordinance,
20 Federal-funded highways. If a -- which the State has an
21 ordinance -- if a city ordinance is stricter than the
22 State's with respect to billboard zoning, the city
23 ordinance trumps the State's. So I think this is a clear
24 case within Hallie.

25 Now let me also suggest if you start down this

1 path -- mind you we're now looking at the antitrust laws,
2 and if you start down that path, courts are going to have
3 to resolve a series of questions that go to the heart of
4 the political process without any guidance from Congress
5 whatsoever. For example, how should the courts identify
6 the substantive standard for deciding what State action is
7 protected by Parker and what isn't? Now we've talked some
8 about bribery. The Fourth Circuit seemed to think that
9 favoritism toward a private constituent or perhaps some
10 campaign contributions -- that's a difficult area when it
11 comes to Government relations -- process.

12 How about causation? How do we deal with
13 causation in this kind of situation? Must a majority of
14 the legislators have been affected by the taint or just
15 the margin by which it won? And how about as to each
16 individual legislator? That is to say, does it have to be
17 a sole motive, dominant motive, or some lesser standard
18 acceptable? We just think it's inconceivable that
19 Congress wanted this Court and the lower courts to address
20 all of those political concerns; and they're delicate ones
21 under the antitrust laws.

22 Now in the time remaining --

23 QUESTION: I suppose that you would say that,
24 that this city council just went to a lot of trouble for
25 nothing. They could just have passed an ordinance and

1 said that nobody but X may put up billboards in town, as
2 far as the antitrust laws are concerned.

3 MR. KLEIN: I think that's true under the
4 antitrust laws, Justice White.

5 QUESTION: Yes, it may not be consistent with
6 State laws or something --

7 MR. KLEIN: Maybe --

8 QUESTION: -- but as far as the antitrust laws,
9 they can do that.

10 MR. KLEIN: And it may violate the commerce
11 clause or other provisions. But I think that's right. I
12 think it's just not an anti -- antitrust concern. And of
13 course, I mean as far as the antitrust laws go, this Court
14 has recognized in numerous instances the State can give a
15 sole franchise to a business; taxicabs, at -- airports, to
16 a cable TV station. That's never been a question. Now if
17 the private party --

18 QUESTION: Yeah, but do you think the zoning
19 ordinance -- the power to zone normally implicitly
20 includes the power to grant exclusive franchises?

21 MR. KLEIN: I don't -- I think, I think it
22 may --

23 QUESTION: I think you do.

24 MR. KLEIN: -- depending on the circumstances,
25 yes.

1 QUESTION: Well, what are the circumstances?

2 MR. KLEIN: The circumstances are that if the
3 city decides that one company --

4 QUESTION: If the city decides it wants to do
5 it. It can't be the city's decision if you say the grant
6 from the State embraces that, then the city always has
7 that authority.

8 MR. KLEIN: It, it does have that authority I
9 think. Just as in, in --

10 QUESTION: Just in franchises and fast food
11 operations and billboards and --

12 MR. KLEIN: Under the antitrust --

13 QUESTION: -- motion picture theaters, all
14 because they have the power to zone.

15 MR. KLEIN: Under the antitrust laws and I, I
16 think --

17 QUESTION: Yeah, but Mr. Klein, the -- I thought
18 the Parker rule always required that the State statute
19 clearly articulate, very clearly articulate that the
20 locality may replace competition with noncompetition.

21 MR. KLEIN: Well, that I think is a necessary
22 consequence of zoning. I mean Justice Stevens asked. It
23 may be true that the results of the zoning order --

24 QUESTION: It -- that may not be a clear
25 articulation of local power.

1 MR. KLEIN: It may not, but I think this one was
2 clear and I also would suggest that every zoning
3 ordinance, if in fact there is a single chain and the city
4 passes an ordinance, it's going to protect it just like a
5 taxicab franchise and so forth. I don't see that there's
6 any difference --

7 QUESTION: Well, the taxicab franchise authority
8 doesn't rest on the zoning power.

9 MR. KLEIN: No, it doesn't.

10 QUESTION: It rests, rests on a deliberate
11 decision to have one operator in a particular field of
12 business. But I don't understand the State has made a
13 decision that there shall be only one billboard operator
14 in each city.

15 MR. KLEIN: The city hasn't make that decision
16 either.

17 QUESTION: Or has it delegated the power to the
18 city?

19 MR. KLEIN: The city has made a decision that
20 there shall be --

21 QUESTION: There shall be zoning.

22 MR. KLEIN: -- spacing and let me look at Town
23 of Hallie for you, because the Court was unanimous there.
24 In Town of Hallie what the State of Wisconsin told the
25 city was that you could set up a sewerage service and you

1 could define your market for service as you see fit. It
2 didn't say you could exclude competitors, didn't say you
3 could only serve those people that didn't sweat in your
4 market. The Court had no trouble finding that it was
5 authorized for Parker.

6 Now this case I think is easier, because the
7 State has said you should enact these kind of ordinances
8 and if yours is stricter than ours, we'll defer to yours.

9 Now if I could, in the limited time remaining, I
10 would just like to say a couple of words about the
11 Noerr -- the COA liability and I think much of the --

12 QUESTION: Could I ask you a certain -- before
13 you do that. Did the city -- were these ordinances passed
14 pursuant to their zoning power?

15 MR. KLEIN: Yes, yes, they were. Yes.

16 QUESTION: Okay.

17 MR. KLEIN: Now if, if I, if I might then I, I
18 think much of the discussion about whether there's a
19 coconspiracy exception so to speak, it's two sides of the
20 same coin so I think it applies here. But let me -- it
21 applies to COA as well. But let me make two brief points.

22 First of all, if the ordinances are valid under
23 Parker, under Parker and Hallie, it follows automatically
24 that COA, the private party, is protected under Noerr, and
25 second, that COA's activities in any case are

1 independently protected by the First Amendment. And
2 respondent's belated suggestion frankly prompted some
3 questions that this case involves bribery or extortion is
4 just flatly wrong.

5 As to our first point, that is the Noerr point
6 simpliciter, the question is whether Congress -- did it
7 intend the Sherman Act to police lobbying activities even
8 when it has no intention to police the resulting
9 governmental restraint? That's what Parker immunity
10 means. That question was answered 30 years ago in Noerr
11 where the court held flatly that the antitrust laws have
12 no concern with the methods used to influence valid
13 legislative action. It's a view that the court has never
14 deviated from since and was recently reaffirmed in Allied
15 Tube a couple of years ago.

16 Finally, and in all events, the judgment against
17 the private petitioner, COA, must be reversed regardless
18 of the city's protection. The activities on which that
19 judgment rests are constitutionally protected. In this
20 case, there is no allegation, no proof and no jury
21 instruction to support a finding that COA bought these
22 ordinances with a few relatively modest, properly
23 disclosed campaign contributions made over a 6-year
24 period. Without that kind of express finding, campaign
25 contributions are fully protected under the First

1 Amendment. They are, as Justice White said in United
2 States v. Brewer, a routine and well-established part of
3 our political process, often made with the expectation or
4 hope that a legislature -- legislator will champion a
5 constituent's point of view.

6 I would reserve the balance of my time, Mr.
7 Chief Justice.

8 QUESTION: Very well, Mr. Klein. Mr. Lewis.

9 ORAL ARGUMENT OF CAMDEN LEWIS

10 ON BEHALF OF THE RESPONDENT

11 MR. LEWIS: Mr. Chief Justice, and may it please
12 the Court:

13 I disagree that this case has anything to do
14 with lobbying, that this case is a case where there is far
15 more than just the, as the Court has said in many cases;
16 merely the solicitation or the asking of an ordinance to
17 be passed. Judge MacMahon in the very first order in this
18 case said that the ordinances were but two of the overt
19 acts of a conspiracy.

20 And when we get into the facts of the case and
21 you see all of the things that were done -- you see, for
22 example, on the part of COA, there was a lot of
23 nonordinance activity. They gave away space so Omni could
24 not compete. They made disparaging remarks about Omni.
25 They interfered with Omni's receipt of goods. They got

1 secret information from the city and used it against Omni.
2 They procured frivolous litigation. They stole or
3 double-billed so as to give them an advantage and contrary
4 to Mr. Klein, you'll find in footnote 4 of the Fourth
5 Circuit opinion that there is indeed the exchange of
6 billboards for favors in this case.

7 QUESTION: I thought that was from Parker?

8 MR. LEWIS: This is for Noerr.

9 QUESTION: All right. All right.

10 MR. LEWIS: You -- I would go back to Parker. I
11 was taking them in reverse order --

12 QUESTION: Okay. Go ahead. Go ahead.

13 MR. LEWIS: -- because that's just the way my
14 notes ran. So when we and I apologize -- when we look at
15 the -- Noerr, when we look at whether or not there is an
16 exception to Noerr, the sham exception, we don't just have
17 lobbying. We have conduct. We have conduct that, and I
18 think it's clear in this case and I think it's important,
19 that the conduct of COA was directed to closing the
20 legislative, administrative or judicial process.

21 QUESTION: Well, what are you saying was a sham
22 here, Mr. Lewis?

23 MR. LEWIS: Okay, what am I -- I'm saying is the
24 sham is the efforts and the -- really if you want to get
25 down to it, it's the prior agreement, the 1980 agreement.

1 QUESTION: Well, that's, that's not a -- to say
2 that an agreement was, was a sham is not consistent with
3 our cases. Our cases talk about a sham exception as being
4 the use of a governmental process in some way simply to
5 delay without any hope of success.

6 MR. LEWIS: No, sir --

7 QUESTION: Certainly these people had not only a
8 hope of success, they succeeded with the city council.

9 MR. LEWIS: On, on one they succeeded in the
10 city council on one of the two ordinances. They procured
11 and went forward with frivolous litigation. There was an
12 unconstitutional finding of an ordinance which they
13 required it go forward with it. They, and I do say they
14 had what I -- they gave favors for billboards. They had
15 --

16 QUESTION: How does that have anything to do
17 with the sham exception, that they gave favors for
18 billboards?

19 MR. LEWIS: Because as I read the sham
20 exception, the sham exception comes to play when the
21 conduct that the individuals use is directed toward the
22 foreclosure of the citizen from meaningful access to the
23 legislative decision making process. That's what the
24 Fourth Circuit found; that they had denied our access,
25 that the conspiracy between the two of them had denied our

1 access so we had no right, we had no ability to go to the
2 legislative process and therefore, that the whole process,
3 that the whole process was a sham. And it's biased the
4 process. You've used a lot of words. They usurped the
5 decision making process. They shut down the machinery of
6 the process. They closed the process. All they
7 did -- they did that.

8 QUESTION: Well, where, where does all this
9 language that you're using come from that they usurped the
10 process, they shut down the process? Does that come from
11 our cases?

12 MR. LEWIS: Some of them and they --

13 QUESTION: Well, what, what cases of ours do
14 those two phrases that you just used come from?

15 MR. LEWIS: Okay, biased the process comes from
16 Allied Tube. Usurps the process, I believe, comes from
17 Motor Transport. Shuts down the machinery was Justice
18 Douglas, and I'm sorry I don't remember that particular
19 case. So those all come down -- the Fourth Circuit
20 particularly said in their case that when it forecloses a
21 citizen from meaningful access to the legitimate decision
22 making process, they said once that happens it's a sham.
23 And that's what we have.

24 Once that you take the process away, what,
25 what -- and I believe you'll find when you look at the

1 amicus briefs -- you'll find that the whole concept of
2 Noerr they say is that the representation, the concept of
3 representation depends upon the ability of the people to
4 make their wishes known to their representatives. That
5 ability was gone. From the -- there was a longstanding
6 agreement from 1980 before we ever came that we proved
7 that the city and COA entered into such that in return for
8 the favors -- .

9 QUESTION: You were certainly able to make your
10 views known to the city's representatives. You say they
11 were biased against you, but as a factual matter you were
12 certainly able to make your views known. Were you not?

13 MR. LEWIS: We were able --

14 QUESTION: Were, were you able? Were you not?

15 MR. LEWIS: We were able to go there --

16 QUESTION: Were you able to make your views
17 known to them?

18 MR. LEWIS: No, sir. We were not able to make
19 our views known.

20 QUESTION: I, I thought the record showed
21 otherwise that --

22 MR. LEWIS: The record shows that we went to
23 meetings that were closed, that were predetermined, that
24 there was no ability for us to participate.

25 QUESTION: Well, okay -- just, just a minute.

1 You say you went to meetings that were closed. If they
2 were closed, how did you get in?

3 MR. LEWIS: Closed in the fact that they -- we
4 went there and if you'll read the record, they said when
5 we got there we were told what it would be. We had no
6 input into it. We were told what it would be.

7 QUESTION: That, that's quite different from
8 being unable to make your views known. The fact they
9 didn't listen to your views or pay attention to them,
10 doesn't mean that you didn't have, you didn't have some
11 sort of a way of expressing yourself.

12 MR. LEWIS: Yes, sir, I think that if you
13 have -- if everybody sits there and they have their ears
14 covered up and they turn their back to you and they say
15 that you have the ability to talk, you might as well be
16 talking to the wall. I think that's not what we had the
17 ability --

18 QUESTION: Well, that will make a lot of
19 legislative committee hearings subject to some sanctions.

20 (Laughter.)

21 MR. LEWIS: No, sir. No, sir, I don't think so,
22 because in a legislative committee hearing and I think
23 it's important. In this case we had an agreement, a 1980
24 agreement between the city and COA, based upon the
25 exchange of favors which said, we will never again allow

1 anybody in here and any time you need us, Mr. COA, we'll
2 use our power to keep them out. We'll close the
3 administrative process. We'll close the legislative
4 process to them and we'll do what you say. They sold
5 their office out. And I think that's important and once
6 you do that there is a sham. Noerr-Pennington doesn't
7 protect that.

8 QUESTION: Mr. Lewis?

9 MR. LEWIS: Yes, sir.

10 QUESTION: Is your only complaint that you were
11 outmaneuvered?

12 MR. LEWIS: No, sir, we never got a chance to
13 maneuver.

14 QUESTION: Was any money exchanged?

15 MR. LEWIS: There were --

16 QUESTION: In the record?

17 MR. LEWIS: Yes, sir.

18 QUESTION: What was it?

19 MR. LEWIS: All right, in the record you will
20 find and contrary to Mr. Klein, there were free billboard
21 space or discounted billboard space given to the
22 councilmen which they did not -- and you can look at
23 it -- they did not report as campaign contributions. They
24 were given special locations --

25 QUESTION: How much was that?

1 MR. LEWIS: That would vary according to the
2 particular councilman, but it would go anywhere from \$300
3 up to \$1,000. I don't know the exact amount. You'd have
4 to take your chart and you'd run it. There was exchanges.
5 They didn't report it. They got free and --

6 QUESTION: They got paid \$1,000. How many
7 people split the \$1,000?

8 MR. LEWIS: Well, there was different people had
9 different amounts of free advertising space.

10 QUESTION: All together it was \$1,000?

11 MR. LEWIS: Maybe \$1,500 altogether.

12 QUESTION: Maybe \$1,500.

13 MR. LEWIS: Yes.

14 QUESTION: And that's all we're talking about?

15 MR. LEWIS: We're talking about -- well, we're
16 talking about --

17 QUESTION: That's a real horrible deal.

18 MR. LEWIS: No, sir, we're talking about more
19 than that. We're also talking about the fact that in the
20 exchange they had the power of this monopoly billboard
21 that made sure they get back into office. There's no
22 other billboard industry. Sir?

23 QUESTION: They got this monopoly for free?

24 MR. LEWIS: They got the -- they got the
25 monopoly's power. They got the use of the monopoly power

1 in exchange for keeping the monopoly a monopoly. Yes,
2 sir, that's absolutely true in this record.

3 QUESTION: Well, how does that get to the Parker
4 case if they do something for free?

5 MR. LEWIS: All right. The Parker case. If
6 we --

7 QUESTION: If they do something for free --

8 MR. LEWIS: If we go back over to Parker, you're
9 coming in now and I do not agree that the Hallie, whether
10 or not this is a State action or not State action is
11 closed, because to get to Parker by its very nature you
12 have to first determine, and we have in our footnote
13 raised that question that's been fully briefed in the
14 court below, and we do not believe for one instance that
15 the zoning laws of the State of South Carolina allow for
16 this economic --

17 QUESTION: You didn't cross-petition for
18 certiorari though, did you?

19 MR. LEWIS: We did not cross-petition for
20 certiorari because in the petition for certiorari they
21 raised the question of Parker and to get to the Parker
22 particular question you must necessarily raise the
23 question of whether Parker on its very foundation has met
24 that requirement that it's State action. So no, we did
25 not. We put it in our footnote.

1 One of the things I think is important, too, is
2 as you look at this case and as we look at a jury
3 verdict -- we have a jury verdict. We have a jury verdict
4 based on a sham exception.

5 QUESTION: The jury, Noerr?

6 MR. LEWIS: Yes. And we have a jury verdict
7 based upon the coconspirator exception to Parker. So what
8 we --

9 QUESTION: Well, that's a -- the issue is
10 whether there is one.

11 MR. LEWIS: Yes, sir, and the whole
12 question -- I'm -- that's what -- on Parker the whole
13 question is whether or not there is a coconspirator
14 exception to Parker. Now, Mr. Judge MacMahon said, and it
15 has been our position all along, that Parker does not come
16 into play, because in this instance you do not show or do
17 not have a clearly articulated State purpose that would
18 allow people to conspire. And once you bring in
19 conspiracy and you show a conspiracy, Parker does not
20 apply.

21 In your case of Parker, of course, and all these
22 cases flow from that when it was said in Parker, it said
23 that you did not have here before you that the, that the
24 city was a coconspirator or was in conspiracy with the
25 people. And that's what starts all of this.

1 QUESTION: I, I --

2 MR. LEWIS: Yes, sir.

3 QUESTION: You mean a conspiracy with the public
4 officials to do something that's not in the public
5 interest I -- that they don't really believe is in the
6 public interest?

7 MR. LEWIS: It's a conspiracy with, with the
8 public officials to -- in that, in this case -- was to
9 eliminate any access or competition with a preference --

10 QUESTION: What if, what if the public officials
11 have the, the famous attitude what's good for General
12 Motors is good for the country? What if, what if they
13 really think this local company employs a lot of local
14 people? It's local money, local investment? Suppose they
15 think it's, it's in the interest of the whole city that
16 the billboard trade should be monopolized by this
17 particular company? Why isn't that a valid public
18 purpose?

19 MR. LEWIS: I think that if that is what
20 happened which is not our case that you may have -- there
21 are ways to go about passing ordinances that are, that are
22 legal. I'm not about to say that.

23 QUESTION: So just favoring a particular company
24 and excluding other companies simply because you've agreed
25 with one company can be all right?

1 MR. LEWIS: Simply agreeing, that's, that's,
2 that's what we call the persuasion. You agree to the
3 persuasion of one over the persuasion of another. That's,
4 that's, we have no qualms of that. We don't have that
5 here.

6 QUESTION: No, but I favor this company, because
7 I know the people. They've been good citizens of this
8 community. They're not some fly-by-night outsider who's
9 coming in. I think that it's in the interest of the
10 community to favor this company. Why is that -- why is
11 that not a public, public motive rather than a private
12 motive? I mean can you draw the line between the two?

13 MR. LEWIS: Yes, sir, I certainly can draw the
14 line. And I draw the line in this case is when they come
15 together and they make that agreement prior to
16 any -- they've had that agreement, that 1980 agreement and
17 I still think that's very important. That's before
18 anybody was here and it was when there was another
19 billboard company was coming into town. The COA, Mr.
20 Cantey, went to the city officials and he got a promise
21 from them that anytime he needed their protection, they'd
22 give it to him and in return he would make sure that they
23 had billboard space, that they would have discounted
24 billboard space. That's in the record. So you have this
25 agreement and that agreement was put into effect in this

1 case as soon as Omni came to town. It was put into effect
2 --

3 QUESTION: Did the court of appeals think there
4 was such an agreement?

5 MR. LEWIS: Yes, sir. They talked about it. If
6 you'll read their opinion, they talk about that agreement.
7 They even quote the letter that set up that agreement in
8 1980. They talk about that and they show that agreement
9 and they show how it went forward. The court of -- the
10 court of appeals' opinion is very good. It's a thorough
11 opinion. It talks about the facts. It talks about in
12 footnote 4 the fact that it was trading, trading
13 billboards for favors.

14 We even had the fact that they would, COA, would
15 go out and paste over billboards, validly sold
16 billboards --

17 QUESTION: Where is, where, where do we find the
18 discussion by the court of appeals of the 1980 agreement?
19 Well, don't take up a lot of your time to try to find it.
20 I just hadn't noticed any particular discussion about it
21 and I wondered what you were relying on, but --

22 MR. LEWIS: I'm relying on page 13a of the
23 petition for cert and he talks about in December 1980, he
24 wrote Mr. Naeggele another outdoor advertising -- and
25 that's the agreement we're talking about.

1 QUESTION: Did, did the court of appeals
2 characterize it as an agreement?

3 MR. LEWIS: At the next, at the next, the quote
4 right on that same page, that the, the, Cantey had
5 testified that he sought these assurances from the mayor
6 regarding the desired ordinance in order to keep Naeggele
7 out of Columbia. Assurances -- that to me that's an
8 agreement right there on page 13a. That's what they say
9 and that's the discussion of that very letter that I'm
10 talking about and that is where I'm referring to.

11 QUESTION: Thank you.

12 MR. LEWIS: And of course it was in our opinion
13 a prior agreement for private benefit. Now --

14 QUESTION: Suppose a congressman from Detroit
15 agrees with General Motors that, that he thinks it's, it's
16 in the interest of General Motors and hence of his
17 district to keep out all foreign car imports and he says,
18 you know, I, I -- that's what I'm going to do. And the
19 congressman says, is that contrary to public policy? Is
20 that?

21 MR. LEWIS: Just the pure agreement?

22 QUESTION: Yeah, to favor a particular local
23 company.

24 MR. LEWIS: We don't -- and I guess I'm not
25 being clear -- I, I do not think that favoring one over

1 the other in what we call the, the -- a legitimate
2 legislative process, Having that process and you going
3 into it and winning over the congressman by your
4 persuasion, by merely persuading him, that's nothing wrong
5 with that. We don't have that. We have, first of all, we
6 have an arena that we can't even get into and a, and a
7 congressman that has in effect been bought. So no, we
8 don't even have that particular instance.

9 QUESTION: The, the congressman would have to
10 talk to Japanese automakers before he could agree with
11 General Motors --

12 MR. LEWIS: No, sir.

13 QUESTION: -- let's keep out Japanese imports.

14 MR. LEWIS: No, sir. What I'm saying is in our
15 case we don't have the -- he can refuse to talk to them,
16 but the refusal to talk to them is his choice, is
17 his -- he is the congressman and there -- he has put
18 his -- the agenda out there as to cars and he's done that
19 and you get to talk to him. The Japanese try to talk to
20 him and he can refuse to but they have the opportunity to
21 try to talk to him. He hasn't sold his office out. He
22 hasn't said to the General Motors, because you give me
23 free cars, I am never going to talk to the Japanese and I
24 promise you because of those cars and you keeping me in
25 office and using your power, General Motors, I'm going to

1 make sure that I do everything you want me to. That's
2 what we have here.

3 QUESTION: But as I understand your case, you're
4 not claiming the individual councilmen are conspirators.
5 You're claiming the city is, aren't you?

6 MR. LEWIS: I'm complaining that the city is
7 the -- is in the conspiracy through the --

8 QUESTION: The conspiracy is between the city
9 and your competitor?

10 MR. LEWIS: That's correct, through
11 their -- they can only act through their actors.

12 QUESTION: That's right.

13 MR. LEWIS: That's correct. I, I can't talk to
14 the city except through their actors and they -- and their
15 actors -- for example, if you look and see what the city
16 did to us, that's pretty important I think. If you look
17 what the city did, they did far more than just passing an
18 ordinance. They -- Mr. Finlay -- he berated Omni on the
19 radio and at meetings. You'll read the testimony and they
20 said that you couldn't get a word in edgewise, that COA
21 sign locations -- they gave them special treatment sign
22 locations. They let them have historic zone sign
23 locations. They gave them secret information that allowed
24 them to get sign locations.

25 I don't know if you know about the moratorium.

1 It was, it was a secret moratorium that was written on the
2 back of a napkin on March 10th and it was passed by the
3 city. It was a moratorium, and then on March the 9th, the
4 day before, the COA went out and got sign locations in the
5 very area that this moratorium covered.

6 2 weeks later the moratorium mysteriously
7 changed -- no one takes any credit for it -- to become a
8 larger moratorium, be city-wide. On the day before that
9 or 2 days before that, the COA is out getting more sign
10 locations in this area that is to become a moratorium. So
11 they had secret information. They harassed -- even after
12 Judge Cureton issued his order saying that the zoning or
13 that the moratorium was unconstitutional and in that order
14 he said, you -- they will -- you're enjoined from
15 not -- from keeping them from building their signs
16 whatsoever. They get to build their signs no, no matter
17 what.

18 They went out and they harassed them, Omni, us.
19 They arrested Omni, us. They threatened Omni, us, even in
20 the face of that order of Judge Cureton. They then went
21 ahead and --

22 QUESTION: Excuse me, when you say they, did
23 --did you -- I forget the numbers of people on the city
24 council -- did you establish that it was a majority of the
25 city council --

1 MR. LEWIS: Yes, sir. Yes, sir.

2 QUESTION: -- that was in effect with free
3 billboard space and all that thing.

4 MR. LEWIS: Yes, sir. We certainly -- free or
5 discounted billboard space and the use of the power of the
6 COA. Yes, sir, we surely did.

7 Now -- and also you'll find in the record that
8 the city was advised by their lawyers that, that this was
9 an unconstitutional ordinance. They passed it anyway.
10 They were advised that they should not -- we then filed
11 suit against them. They were advised that you'll lose
12 your suit and they said -- it's in the record -- continue
13 that litigation, cause we need the delay. We need to keep
14 the delay so Omni can't come in here. Now that's what we
15 have in the record. You can -- you start with that first
16 agreement and you go forward and you look at all the
17 action as Judge MacMahon clearly said, the ordinances are
18 but two of the overt acts of this conspiracy.

19 If you look at the Fourth Circuit, and they went
20 into a big discussion about the evidence and I'd like you
21 to look at it, because it's very good. And you have the
22 question here and they say, well, we're going to somehow
23 chill the right to petition. We're going to make people
24 scared to petition. Well, I think the way that I look at
25 this case that to do anything other than affirm this case

1 chills the right to petition. Because what this case
2 does, if you do anything but affirm it seems to me is you
3 put the stamp of approval on a factual scenario that
4 eliminates, that eliminates the process and closes it and
5 turns it over to private individuals.

6 Now that's what we have seen in the cases that
7 we've tried not to do. We try to keep the process open
8 and if we lose on a playing field, we lose, but we've got
9 to get onto it. And when you close that playing field,
10 when you say that you can trade your power, trade your
11 billboards, trade that to keep your monopoly and to keep
12 them in power, then there is no process. It's not unlike
13 many of the cases that you already talked about; Allied
14 Tube, Motor Transport, and those type cases.

15 In closing, I'd like to make a couple of points.
16 And one of them everybody seems -- well, Mr. Klein doesn't
17 but when you read the writings and the cases -- everybody
18 seems to say that bribery should not be allowed. It's a
19 bad word. Bribery -- we should not allow it. That should
20 and -- subject the bribery people to antitrust liability.
21 Okay, did you ever -- if you go behind bribery, look and
22 see what it is. You have giving of money for favors.
23 Okay.

24 What, what, what it has to do with that bribery.
25 It isn't that the guy gets rich off of the money that's so

1 offensive. It's the fact that he has eliminated and sold
2 his office. He has in effect -- what we have here -- he
3 has closed the process. So what bribery is and when you
4 break it down, it's nothing more than paying money to
5 close the process and I don't think anybody -- at least
6 from the writings that I've seen -- wants to say that the
7 antitrust, Noerr-Pennington, or the Parker should be okay
8 even in the face of bribery.

9 And if we look at that, if we look at the
10 Affiliated Capital case from the Fifth Circuit where it
11 was en banc with a lot of judges, you see a thorough
12 discussion of this, these principles. You see one in the
13 Fourth Circuit and it comes down to, I think in this case,
14 they're asking you to draw these lines.

15 And I'd point to one last point. And that is if
16 you look at the charges requested by the COA as to what
17 you, the jury must find, to make us liable, this is what
18 it says. It's on 172 of the Joint Appendix. It says,
19 this protection of the citizen fails, however, when one or
20 more of the public officials joins in an illegal agreement
21 or a conspiracy with the person seeking the political
22 action. That is what they ask and said that their
23 protection failed when that happened. That request for
24 charge was theirs. That very statement or words to that
25 effect was charged to the jury and the jury came back in

1 an affirmative, yes, they conspired.

2 And you say under what criteria could they find
3 a conspiracy? It's very important, I think, for the Court
4 to look at Judge Perry's instruction on conspiracy,
5 because we had to overcome the strictest of burdens and
6 this is on -- found on page 76 of the Joint Appendix and
7 it says, that we the plaintiff must not just prove a
8 factual scenario that supports a conspiracy. We must
9 prove a factual scenario that doesn't allow or
10 doesn't -- can't be understood to also be innocent or
11 nonconspiratorial. Now that's a heavy burden.

12 QUESTION: Yes, Mr. Lewis, but the court of
13 appeals affirmed in the Noerr aspect of the case on the
14 sham theory rather than the coconspirator theory, didn't
15 it?

16 MR. LEWIS: That's correct. Now there is a
17 separation in the case law of that, but the unobjected to
18 charge on the sham exception is found at page 81 of the
19 Joint Appendix, and this is what it says and this was
20 unobjected to. No one took issue with it. If you find
21 the defendants conspired together with the intent to
22 foreclose the plaintiff from meaningful access to a
23 legitimate decision making process with regard to the
24 ordinance in question, then your verdict would be for the
25 plaintiff on that issue. So, when they --

1 QUESTION: Thank you -- Mr. Lewis, your time has
2 expired. Please sit down.

3 Mr. Klein, do you have any rebuttal?

4 REBUTTAL ARGUMENT OF JOEL I. KLEIN

5 ON BEHALF OF THE PETITIONER

6 MR. KLEIN: Very briefly, Mr. Chief Justice.

7 I regret burdening the Court with issues of the
8 record, but I view bribery as a very serious charge. And
9 I don't think it should be made without support.

10 First of all, the issue of how this case was
11 tried, I suggest the Court look at page 59 of the Joint
12 Appendix, the respondent's argument to the jury and the
13 instructions have nothing to do with bribery. More
14 significantly, the issue of free campaign contributions,
15 the facts --

16 QUESTION: Mr. Klein, would you help me on the
17 defendant's requested charge that your opponent referred
18 to? Do you think that's a correct statement of the law?

19 MR. KLEIN: I don't, Your Honor, but it came
20 after a variety of other legal positions had been
21 rejected.

22 QUESTION: So you don't endorse that position
23 anymore?

24 MR. KLEIN: We don't, no, sir. Second of all,
25 the issue in response to Justice Marshall about what these

1 campaign contributions are, I just say briefly -- the
2 Court can check the record -- there was one contribution
3 of free billboard space to the mayor when he was running
4 for city council in 1978. The mayor declared that as a
5 contribution on his campaign disclosure form that's in the
6 record.

7 Second --

8 QUESTION: More, more, more than one billboard?

9 MR. KLEIN: There were six billboards.

10 QUESTION: Six billboards.

11 MR. KLEIN: Six billboards. Second, there were
12 two reduced fee, that is, approximately a one-third
13 discount off the official rate, that is the card rate.
14 Both city council members that received that -- they were
15 after this litigation was instigated -- both city council
16 members who received those declared them as expenditures
17 on their form because they paid, that is, their staffs
18 paid \$550 out of \$750.

19 Next, respondent in question, in answering you,
20 Justice Scalia, says they proved that a majority was
21 involved. Let me say two things on that. The court of
22 appeals, their brief's position was one was enough. But
23 second, they pointed out that three people that they said
24 made up the majority. One of those three people was Mr.
25 Adams, who the record will show received no campaign

1 contribution at any time from any of my clients.

2 QUESTION: Mr. Klein, are telling us, because
3 this is such a sharp contradiction here, that there is
4 nothing in the record to support your opponent's claim
5 that there were some either discounted billboards or free
6 billboards provided that were not declared?

7 MR. KLEIN: There were none that were not
8 declared. The discount, Justice Stevens, was -- in other
9 words, say the billboards would have cost \$600 --

10 QUESTION: Well, you can kind of say yes or no,
11 I think, to my question.

12 MR. KLEIN: They were declared as expenditures
13 which they were paid for, the ones that were discounted.

14 QUESTION: In other words, if they -- if the
15 price was \$1,000 and they paid \$600, they reported the
16 payment of \$600, but they did not report the fact they got
17 a \$400 discount.

18 MR. KLEIN: That's correct.

19 QUESTION: I see.

20 MR. KLEIN: Okay, now, and one of the three
21 people who is identified as a so-called conspirator
22 received no campaign contributions.

23 And finally, let me end by suggesting to the
24 Court, if this was a case about bribery, there's a Federal
25 law right on point. It's the Rico statute. They could

1 have brought this case and proved it. And what's going on
2 here and what I think everyone will try to do with the
3 antitrust laws is you start with Government regulation
4 that is necessarily and frequently restraining. It's
5 better to have -- instead of having to prove corruption,
6 you smuggle a corruption case under the antitrust laws.

7 Congress has spoken in one area. There's no
8 reason to open up another.

9 QUESTION: Mr. Klein, would this case have come
10 out the same way in the Fifth and Eighth Circuits?

11 MR. KLEIN: In the Eighth Circuit?

12 QUESTION: Yeah.

13 MR. KLEIN: I don't believe it would in the
14 Eighth Circuit. It certainly would not in the Ninth
15 Circuit.

16 QUESTION: How about the Fifth?

17 MR. KLEIN: In the Fifth this case probably
18 would have come out under Affiliated Capital the same way.
19 But in the Eighth Circuit, the Ninth Circuit, and the
20 Seventh Circuit, in fact, in Metro Cable --

21 QUESTION: Have there -- are there cases that
22 would show that, that are in direct conflict with the
23 decision alone?

24 MR. KLEIN: With this decision?

25 QUESTION: Yes.

1 MR. KLEIN: Yes, there's a case by Justice
2 Kennedy in the Ninth Circuit. There's a case in the
3 Seventh Circuit in Metro Cable. There's a case called
4 Boone in the Ninth Circuit and several others.

5 QUESTION: Is the Fifth Circuit the only one
6 that is, that has so recognized a so-called conspirator?

7 MR. KLEIN: Coconspirator exception?

8 QUESTION: Yes.

9 MR. KLEIN: I believe that's so, although a
10 variety of -- even in the Fifth Circuit, there's some
11 inconsistencies, but I believe they are -- now they in the
12 Fourth.

13 QUESTION: The Eighth has never approached --

14 MR. KLEIN: The Eighth in a case called Kay Jeer
15 I think has talked about it but not with the same clarity
16 as the Fourth, that is, it hasn't demarked the lines.

17 QUESTION: Well, there's some pretty interesting
18 language in the Eighth Circuit case against you, isn't
19 there?

20 MR. KLEIN: There is some language, that's
21 correct. But I also think there's other language in there
22 that's helpful.

23 QUESTION: Did either party request instructions
24 on the elements and definition of bribery?

25 MR. KLEIN: No party requested such

1 instructions, Justice Kennedy.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klein.

4 The case is submitted.

5 (Whereupon, at 10:49 a.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
the attached pages represents an accurate transcription of
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Supreme Court of The United States in the Matter of: 89-1671*

City of Columbia and Columbia Outdoor Advertising, Inc.

petitioners v- Omni Outdoor Advertising, Inc.

*and that these attached pages constitutes the original transcript
of the proceedings for the records of the court.*

BY *Robert H. Antel*
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