

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF CINCINNATI, Petitioner v. DISCOVERY
NETWORK, INC., ET AL

CASE NO: 91-1200

PLACE: Washington, D.C.

DATE: November 9, 1992

PAGES: 1-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF CINCINNATI, :

4 Petitioner :

5 v. : No. 91-1200

6 DISCOVERY NETWORK, INC., ET AL.:

7 - - - - -X

8 Washington, D.C.

9 Monday, November 9, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:46 a.m.

13 APPEARANCES:

14 MARK S. YURICK, ESQ., Assistant City Solicitor,
15 Cincinnati, Ohio; on behalf of the Petitioner.

16 MARC D. MEZIBOV, ESQ., Cincinnati, Ohio; on behalf of the
17 Respondent.

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1 PROCEEDINGS

2 (10:46 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 91-1200, City of Cincinnati v. Discovery
5 Network, Inc.

6 Mr. Yurick, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF MARK S. YURICK

9 ON BEHALF OF THE PETITIONER

10 MR. YURICK: Mr. Chief Justice, and may it
11 please the Court:

12 The issue presented by this case is whether the
13 Respondents and other commercial speakers have a First
14 Amendment right to place newsrack-type dispensing devices
15 upon the public sidewalks of the City of Cincinnati.

16 The critical inquiry here is the interpretation
17 of the fourth prong of the Central Hudson test, which
18 requires a governmental regulation that burdens commercial
19 speech to burden no more speech than is necessary to
20 further the Government's substantial governmental
21 interest.

22 It does not require a least restrictive means
23 test, nor does the test require the regulation to
24 completely accomplish the goal. In other words, the
25 regulation is permitted to be underinclusive.

1 The fourth prong does require a balancing test.
2 However, the Sixth Circuit in the city's opinion balanced
3 the wrong things. The Sixth Circuit held that since a
4 First Amendment right was implicated, that was to be
5 balanced, the First Amendment, against the degree to which
6 the interest was served.

7 The correct balancing test, according to the
8 city, is the State interest taken as a whole versus the
9 incidental burden on speech. Like the billboards in the
10 Metromedia case, newsracks are large, immobile, and semi-
11 permanent structures, although they do have a
12 communicative function.

13 By prohibiting Respondent's newsrack dispensing
14 devices, Cincinnati has done no more than attempt to
15 eliminate the problems posed by the noncommunicative
16 presence of the newsracks.

17 QUESTION: Well, Mr. Yurick, you suggest an
18 analogy to the Metromedia case, but isn't the city's
19 position here perhaps stronger, because Metromedia was a
20 regulation of billboards on private property? Here, the
21 newspapers or the distributors are simply taking over
22 public property, are they not?

23 MR. YURICK: I think that since public property
24 is involved the city's interest in preserving that public
25 property for all of the citizens of Cincinnati is perhaps

1 stronger, and I believe that in the Metromedia case the
2 prohibition was on offsite advertising, both public and
3 private.

4 I believe that the exception in Metromedia was
5 for onsite advertising. In other words, the owner of a
6 commercial establishment could have a billboard on his own
7 property advertising whatever goods were for sale there.

8 QUESTION: But no one was claiming a right to
9 put a billboard on property owned by the State there, were
10 they?

11 MR. YURICK: No, Your Honor, but that is
12 precisely what Discovery Network --

13 QUESTION: Well, that's why I suggest --

14 MR. YURICK: And Harmon Homes are doing here.

15 QUESTION: Your case may be stronger than those
16 of the billboard people, Metromedia.

17 MR. YURICK: Mr. Chief Justice, I would agree
18 with you there, and I think that the point is -- well,
19 it's a very good point.

20 (Laughter.)

21 QUESTION: Mr. Yurick, the city here is trying
22 to draw a distinction, or does draw a distinction, between
23 ordinary newspapers and the papers that were desired to be
24 put out on the street by these Respondents, and yet I
25 suppose ordinary newspapers contain a lot of

1 advertisements as well, don't they?

2 MR. YURICK: Yes, Your Honor.

3 QUESTION: Now, we take this case on some kind
4 of concession that this is commercial speech at issue and
5 that ordinary newspapers are not.

6 MR. YURICK: Yes, Your Honor, I think that the
7 parties agreed that the speech in question, the
8 Respondent's publications, do constitute commercial
9 speech.

10 There was testimony, in fact, at the hearing at
11 the district court level that they were purely
12 advertising, with the exception of Harmon Homes
13 occasionally including an article about interest rates or
14 something of that nature that might conceivably be
15 considered noncommercial speech, but the district court
16 made a finding there that the speech that was in -- even
17 the speech that was in Harmon Homes' publication was not
18 inextricably intertwined with the commercial speech.

19 QUESTION: But in point of fact, you're not
20 making a commercial -- or your ordinance doesn't make a
21 commercial-noncommercial speech distinction, does it?
22 That's not what it turns on.

23 MR. YURICK: Your Honor, my witness said that
24 the same problems are posed by boxes that contain
25 commercial speech and boxes that contain noncommercial

1 speech.

2 QUESTION: Well, that may be, but that is not
3 the way you have drafted your ordinance.

4 MR. YURICK: I'm sorry.

5 QUESTION: Well, your -- as I understand it,
6 your ordinance turns on the predominant dedication of the
7 so-called newspapers to the dissemination of what, news of
8 current events, I guess is the way it's described, isn't
9 it, and yet everything which is excluded by that is not
10 necessarily commercial speech, isn't that true?

11 MR. YURICK: I'm sorry, I think the distinctions
12 made by the ordinances themselves are merely commercial
13 versus noncommercial, and I think that the language used
14 in the ordinances, which distinguish between commercial
15 and noncommercial, use language that's been approved by
16 the court. There was a memorandum --

17 QUESTION: In any case, you take the position
18 that the definition of what we are for shorthand purposes
19 calling newspapers is in fact a definition which divides
20 the world into two categories, newspapers and
21 noncommercial speech, is that correct?

22 MR. YURICK: I think that there are newspapers
23 which are specifically allowed to be distributed from
24 newsracks on the public streets of Cincinnati. I think
25 that there are possibly other noncommercial types of

1 speech which could be, I guess, mixed with commercial
2 speech, although I'm not aware of any that have applied to
3 the city for a newsrack permit.

4 QUESTION: But you are taking the -- if I
5 understand you, you are taking the position that if it
6 does not qualify as a newspaper, and hence does not
7 qualify for the right to be displayed and sold from these
8 boxes, it is -- the publication is noncommercial speech
9 within the meaning of our cases, is that correct? Is that
10 the way you are reading your ordinance?

11 MR. YURICK: I'm not sure that it is. I think
12 that there are possibly some mixed commercial and
13 noncommercial publications that don't qualify as
14 newspapers, although I'm not aware of any. I concede that
15 there may be publications like that. I think, though,
16 that to the --

17 QUESTION: And there would be some nonmixed
18 publications which are not newspapers but which are just
19 as clearly not commercial speech, too.

20 MR. YURICK: That's correct, and I think that
21 the ordinance also allows for the distribution in the
22 public way of noncommercial handbills as defined in the
23 code.

24 QUESTION: How does it do that? Maybe I'm just
25 forgetting what I should have read better. How does the

1 ordinance provide for those noncommercial but nonnewspaper
2 distributions?

3 MR. YURICK: Noncommercial handbills are
4 specifically in the exact section of the code. It's cited
5 again in the briefs, but they are specifically permitted
6 to be distributed.

7 QUESTION: They are expressly exempted from
8 the --

9 MR. YURICK: Yes.

10 QUESTION: From the ban. Okay.

11 QUESTION: May I ask, while you're being
12 interrupted, commercial hand -- do these newspapers here
13 come within the definition of commercial handbills within
14 the ordinance?

15 MR. YURICK: Newspapers --

16 QUESTION: No, I'm not talking about newspapers,
17 I'm talking about the other sides to the publications.

18 MR. YURICK: Yes, they do, and --

19 QUESTION: Does that mean that they may not only
20 not use these stationary devices, but they can't be
21 distributed at all on the streets?

22 MR. YURICK: That would be correct, not on the
23 public streets in the city.

24 QUESTION: They can't be handed out either.

25 MR. YURICK: According to the code, no, they

1 wouldn't. However, Your Honor, I believe that Your Honor
2 has asked me an overbreadth question, and --

3 QUESTION: I just asked you a factual question,
4 whether, under the ordinance, as I understand it, your
5 opponent's publications could not be either distributed
6 through the stationary boxes or by having people hand them
7 out to passers-by.

8 MR. YURICK: That's correct, Your Honor.
9 However, I would point out that there is no indication in
10 the record that either of the Respondents want to do that,
11 and there's -- there are also various alternative means
12 for the Respondents to communicate their commercial
13 message.

14 QUESTION: Mr. Yurick, I understand that the
15 real estate brochure involved here sometimes contained
16 matter other than the mere listing of homes. I mean, it
17 might comment on whether the market is soft or hard or
18 what interest rates are, things of that sort.

19 MR. YURICK: That's correct.

20 QUESTION: Why -- but that isn't enough to make
21 it qualify as a newspaper?

22 MR. YURICK: I think that under this --

23 QUESTION: How many ads do you have to have to
24 be not a newspaper anymore?

25 MR. YURICK: Well, I don't think that the code

1 makes any sort of percentage, or has any sort of
2 percentage requirement, and I'm not certain that there
3 is -- there should be any percentage requirement, because
4 to the extent that even a small proportion of
5 noncommercial speech is inextricably intertwined with
6 commercial speech, that would render the enter publication
7 noncommercial and the City of Cincinnati would permit that
8 publication to occupy sidewalk space.

9 However, in this case, as I said, the district
10 court made a finding, and it was not contested, that these
11 articles that were in the Harmon Homes publication were
12 not inextricably intertwined with the commercial message.

13 QUESTION: I don't under -- they were not
14 inextricably intertwined. You mean, they could have been
15 separated from the --

16 MR. YURICK: That's correct, Your Honor.

17 QUESTION: As opposed to the advertising in
18 newspapers, which is inextricably intertwined?

19 MR. YURICK: Your Honor, the district court
20 didn't make a finding on that and it wasn't really an
21 issue in this case because neither of the Respondents
22 claimed that they published newspapers. I don't know
23 whether an argument could be made --

24 QUESTION: Never mind the argument, does the
25 city apply that test to newspapers --

1 MR. YURICK: No, they don't.

2 QUESTION: That only advertising -- if the
3 advertising can be separated -- no, it doesn't.

4 MR. YURICK: No. No, it doesn't. Newspapers of
5 general circulation are --

6 QUESTION: Even if they put all their
7 advertising in one section at the end, you know,
8 advertising section, and all the rest is news, it would
9 still qualify, right?

10 MR. YURICK: That's correct.

11 QUESTION: But this real estate brochure was not
12 allowed to qualify on that basis.

13 MR. YURICK: The district court made a finding
14 that they didn't qualify --

15 QUESTION: And you support -- and the city
16 supports that finding, correct? I mean, the city says
17 that it will exclude this magazine because although it
18 contains nonadvertising matter, that advertising matter
19 is -- could be separated, and that's the reason the city
20 will exclude it.

21 MR. YURICK: That's correct.

22 QUESTION: But it won't exclude newspapers on
23 that basis.

24 MR. YURICK: No, it won't, Your Honor, and Your
25 Honor, might I say the ordinance is, or it could be

1 considered underinclusive on that point.

2 I don't think that the distinction is
3 nonsensical merely because the City of Cincinnati is only
4 trying to address a very limited portion of its safety and
5 aesthetic problem. I don't think that the city should be
6 forced to address or incidentally burden even a larger
7 group of speech.

8 QUESTION: Well, assuming that to be true, isn't
9 your real problem here as you're describing it not that
10 the audience is perhaps underinclusive but that the
11 ordinance is inarticulate, and we have no way of knowing
12 what the city might decide to do next either in drawing
13 the kind of distinction that Justice -- or applying the
14 kind of distinction that Justice Scalia was discussing to
15 what we would call regular newspapers, or in deciding what
16 the percentage mix between advertising and news ought to
17 be. In point of fact, the city is left under the
18 ordinance with a standardless discretion, isn't it?

19 MR. YURICK: No, Your Honor, I don't think it is
20 left with a standardless discretion. Again, I think that
21 commercial, noncommercial, and newspaper standards are
22 sufficient. It's not a case like --

23 QUESTION: Well, let's just get down to the
24 definition of what we're calling newspapers. I don't have
25 the text of the ordinance in front of me. Doesn't it

1 refer to what we're calling newspapers as something which
2 is predominantly or primarily devoted to the dissemination
3 of news of current events? Is that the scheme?

4 MR. YURICK: There was a memorandum sent from
5 the city manager, who is the chief executive officer --

6 QUESTION: Well, first, how about just the text?
7 Help me out on the text.

8 MR. YURICK: The text of the ordinance doesn't
9 say anything about --

10 QUESTION: It says nothing whatsoever. So the
11 language that I was thinking of was in this memorandum.

12 MR. YURICK: It was in a memorandum from the
13 city manager, who is the chief executive officer of the
14 city, to the city engineer.

15 And what that memo stated, paraphrasing, is that
16 from this point forward, in terms of applying
17 regulation -- administrative regulation number 38, which
18 is an administrative -- an internal administrative
19 direction from the city manager to the departments about
20 how to apply the ordinances and how to interpret them,
21 that in interpreting the term, or in interpreting the
22 term, newspapers of general regulation, for purposes just
23 of allowing a box on the sidewalk, which is what
24 administrative regulation 38 deals with, that newspaper of
25 general circulation should be interpreted as relating to

1 publications which predominantly cover current events or
2 political affairs, things of that nature.

3 QUESTION: Did he later testify that, roughly
4 speaking, he would suppose that predominantly applied --
5 predominantly implied that there would be something better
6 than 50 percent of the space devoted to the current
7 events?

8 MR. YURICK: I think what the city engineer, Tom
9 Young, testified to was that that would present a very
10 close case.

11 QUESTION: Okay, but in -- and in point of fact
12 I gather it's in the record that most newspapers are
13 70 percent advertising.

14 MR. YURICK: I don't think that there -- that is
15 in the record.

16 QUESTION: There was no testimony to that
17 effect?

18 MR. YURICK: I don't think there is any
19 testimony.

20 QUESTION: They just put that in the brief.

21 MR. YURICK: I don't think --

22 QUESTION: Okay.

23 MR. YURICK: I don't -- I don't think there's
24 any testimony to that in the record, Your Honor.

25 QUESTION: All right, well --

1 MR. YURICK: I think the testimony related to,
2 again, Respondent's particular publications which were
3 admittedly not newspapers.

4 QUESTION: Okay, so in any case, you stand on
5 the fact that the city's construction of its ordinance
6 involves the word predominantly, and predominantly would
7 call for a publication with 50 percent news as opposed to
8 50 percent advertising, and that's the way the ordinance
9 is going to be interpreted and applied, is that the
10 position that you rest on?

11 MR. YURICK: Yes.

12 QUESTION: Aren't there other ordinances that
13 expressly permit the distribution of newspapers on a
14 public right-of-way?

15 MR. YURICK: Yes, there are. I'm sorry --

16 QUESTION: 911-17 and 862-1.

17 MR. YURICK: Yes, Your Honor, newspapers of
18 general circulation are expressly permitted, and again, I
19 guess I would have to say whether they --

20 QUESTION: Do they have definitions of what is a
21 newspaper of general circulation?

22 MR. YURICK: No. No, and again I would have to
23 say that the 50-50 distinction was said by the city
24 engineer to present a closed case. I don't mean to
25 suggest that if a particular newspaper only had 30 percent

1 noncommercial speech in it and 70 percent commercial
2 speech that they would not be permitted to occupy space on
3 the city sidewalks.

4 QUESTION: Do you measure this by words or by
5 area, the 30 percent/50 percent?

6 MR. YURICK: I'm sorry, Your Honor, I think that
7 Your Honor's question points out that perhaps there should
8 be no exact percentage.

9 QUESTION: Yes.

10 MR. YURICK: A newspaper I think is not such a
11 vague term that it can't be understood, or that the use of
12 the word newspaper of general circulation in the statutory
13 scheme can't be understood by a reasonable person.

14 As a matter of fact, at the hearing in the case
15 at the district court, the Respondents were both asked,
16 did the publications constitute newspapers, and they were
17 both able to answer the question rather quickly. I don't
18 think it's such a vague term that it gives the city
19 unbridled discretion.

20 QUESTION: May I ask just one other basic
21 question? As I read the ordinances in the district
22 court's opinion, or the findings, they don't say anything
23 about these devices. They talk about distribution of
24 handbills and newspapers. Is there any mention of the
25 vending devices in any city ordinance?

1 MR. YURICK: There is no specific mention of the
2 devices in the city ordinances.

3 QUESTION: So however --

4 MR. YURICK: However, in the administration
5 regulation --

6 QUESTION: So all the law out of this is an
7 administration regulation by the city engineer or city
8 manager, something like that.

9 MR. YURICK: The city manager --

10 QUESTION: Yes.

11 MR. YURICK: Who is the chief executive officer.

12 QUESTION: But the ordinances themselves don't
13 even tell us anything about these devices or the number
14 that might be appropriate, or anything like that.

15 MR. YURICK: No, just the administrative
16 regulation.

17 QUESTION: Well, doesn't the newspaper or
18 anybody else that wants to put one of these have to get a
19 permit?

20 MR. YURICK: Yes, they do have to apply for a
21 permit.

22 QUESTION: But that's just by regulation.

23 MR. YURICK: That's pursuant to the
24 administrative regulation. There's no ordinance that
25 grants them the right to a permit. That's all in the

1 administrative regulation.

2 QUESTION: But I take it it would be
3 inconsistent with the ordinances, or would it, for the
4 city to deny the right to newspapers to distribute the
5 newspapers through these boxes.

6 MR. YURICK: It's newspapers of general
7 circulation in the ordinances, specifically or excepted
8 from the prohibition.

9 QUESTION: Well, I know, but it doesn't say that
10 the ordinances doesn't protect the right of a newspaper to
11 put -- to distribute through these boxes by occupying
12 public property.

13 MR. YURICK: No, Your Honor, the
14 administrative -- through the administrative regulation
15 they have been afforded the privilege of placing these
16 boxes on the city sidewalks. I'm -- the only case that
17 I'm aware of on this subject, this Court's prior, left the
18 question specifically open. That was the Lakewood v.
19 Plain Dealer case.

20 QUESTION: But is it not true that it would be
21 consistent with the ordinances for the city manager to say
22 we're just not going to have these boxes at all.

23 MR. YURICK: If the administrative regulation
24 were to be repealed and --

25 QUESTION: Who promulgates --

1 MR. YURICK: There's no reason whether the
2 ordinance --

3 QUESTION: Who promulgates the administrative
4 regulations?

5 MR. YURICK: The city manager.

6 QUESTION: So the city manager could change his
7 regulation and say we're not going to use any boxes, or he
8 could also say we're going to allow 500 boxes, and that's
9 going to be enough, and he could also say they'll all be
10 painted red, or they'll all be painted green.

11 MR. YURICK: That would be correct.

12 QUESTION: You've said several times newspapers
13 of general circulation. I don't find the phrase, of
14 general circulation, in -- maybe I don't know where it is,
15 but I don't find it in the --

16 MR. YURICK: I'm sorry.

17 QUESTION: In the code. It may be --

18 MR. YURICK: It may just say newspaper.

19 QUESTION: I think that's what it says.

20 MR. YURICK: In this case, the regulatory scheme
21 as applied, and by prohibiting Respondent's newsrack
22 devices, does no more than attempt to eliminate the
23 problems posed by the noncommunicative presence of the
24 boxes.

25 The entire burden, again, is limited to the

1 elimination of newsracks, and no portion of the incidental
2 burden on the speech fails to serve the city's substantial
3 governmental interest in eliminating the safety and
4 aesthetics problems posed by the newsracks.

5 QUESTION: Mr. Yurick, why do you pick on
6 commercial speech? I'm thinking back -- of the important
7 decisions I've made in my life, certainly buying a house
8 is enormously important. I mean, much more important to
9 me than the latest state of the war in Bosnia, and your
10 city manager makes the decision that people must be
11 allowed to find out the latest news from Bosnia but cannot
12 be given from these same boxes information on the choices
13 they have in buying a house.

14 Why is that speech so unimportant that it can be
15 suppressed this way?

16 MR. YURICK: Well, it's certainly not
17 unimportant, Your Honor. That's not the city's
18 contention.

19 QUESTION: Well then, what else is the matter
20 with it? Is it obscene?

21 MR. YURICK: The city's contention is --

22 (Laughter.)

23 MR. YURICK: Certainly not, Your Honor -- that
24 noncommercial speech throughout the precedence of this
25 Court's prior cases has been afforded a lesser degree of

1 First Amendment protection.

2 QUESTION: For purposes that had something to do
3 with the distinctive nature of commercial speech, but
4 commercial speech doesn't clutter up your sidewalks
5 anymore than noncommercial speech does, does it?

6 MR. YURICK: That would be correct, Your Honor.

7 But again, I think that to the extent that we
8 didn't make a distinction between commercial versus
9 noncommercial speech -- in other words, do what the Sixth
10 Circuit said and just provide for a limit to the number of
11 total boxes and apply the scheme on a first-come-first-
12 served basis -- that to the extent that there was one
13 slot, one box space open and both -- we had an application
14 from both a commercial speaker and a noncommercial
15 speaker, to the extent that we were to allocate that
16 public space to a commercial publication to the exclusion
17 of a noncommercial publication, we would probably be in
18 violation of the Metromedia case which says that a
19 regulatory scheme which makes a distinction between
20 commercial versus noncommercial speech cannot give a
21 preference to commercial speech over noncommercial speech.

22 QUESTION: Well, we're not talking about giving
23 a preference, we're just talking about equal treatment.

24 MR. YURICK: Well, Your Honor, I think that
25 whether it's a specific preference in the ordinance or a

1 preference that simply occurs as a result of an inadequate
2 scheme, I'm not certain that that makes a difference.

3 QUESTION: I don't -- what are you going to do
4 when you have too many noncommercial publications to fill
5 up your news boxes?

6 MR. YURICK: I don't think that making --
7 again --

8 QUESTION: You think you have to allow as many
9 noncommercial --

10 MR. YURICK: No, Your Honor.

11 QUESTION: Can you have a first-come-first
12 served?

13 MR. YURICK: Yes, we can. Among noncommercial
14 speakers --

15 QUESTION: Well --

16 MR. YURICK: I think that we could.

17 QUESTION: Just among noncommercial, but not
18 among commercial.

19 MR. YURICK: I believe that's correct. Again,
20 Metromedia --

21 QUESTION: Bosnia wins again.

22 MR. YURICK: Yes, Your Honor. I believe that to
23 the extent that, again, the ordinance or statutory scheme
24 that the city would promulgate would allow a commercial
25 speaker to have a space while forbidding a noncommercial

1 speaker to have that access, that it would be a violation
2 of Metromedia.

3 QUESTION: Well, what -- you -- the city seems
4 to say that commercial speech does not enjoy the same
5 protection as noncommercial speech does under the First
6 Amendment --

7 MR. YURICK: That's correct, Your Honor.

8 QUESTION: And therefore you should be able to
9 ban these boxes.

10 MR. YURICK: We should be able to regulate these
11 structures in the public way.

12 QUESTION: But I thought you -- I thought the
13 lesser protection given to commercial speech was based on
14 its content, don't you agree?

15 MR. YURICK: I would say the difference in the
16 degree of deference due a local government in regulating
17 commercial versus noncommercial --

18 QUESTION: Well, my question is, what do you
19 think justifies giving commercial speech less protection
20 than noncommercial speech? Isn't it its content?

21 MR. YURICK: The distinction has to be made on
22 content, but I don't --

23 QUESTION: Well then, what has that distinction
24 got to do with cluttering up the streets, whether
25 commercial distributors should have less opportunity to

1 distribute on the streets?

2 MR. YURICK: Well, again, I guess to the extent
3 that the legislature has a greater degree of latitude in
4 regulating commercial speech as opposed to regulating
5 noncommercial speech, my answer to the question would be
6 that it's not necessarily that that ought to be the
7 decision that the legislature makes, but it is one that it
8 can make under this Court's prior precedents.

9 QUESTION: Does that latitude --

10 QUESTION: Do the Respondents charge for their
11 brochures or flyers?

12 MR. YURICK: No, they don't, Your Honor, they
13 are distributed free.

14 QUESTION: Well, I suppose the city might
15 conclude that something that you get for free you're more
16 likely to throw away on your way home than something you
17 paid for like a newspaper.

18 MR. YURICK: I think that the city could
19 conclude that, Your Honor.

20 I think there might be danger in the city
21 regulating on that basis, because the third prong of the
22 Central Hudson test which has been satisfied here -- and I
23 think both courts have found that this ordinance directly
24 affects the city's substantial governmental interest -- an
25 argument could be made that as in *Schneider v. the State*,

1 this Court has said that banning hand-billing because the
2 handbills might be used as litter wasn't a -- there wasn't
3 a direct enough nexus.

4 I don't think there's that problem here.

5 QUESTION: Does the city's latitude that you
6 contend for, it's latitude in regulating commercial
7 speech, permit it to regulate substantially more
8 commercial speech than is necessary to accomplish its
9 interest?

10 MR. YURICK: No, Your Honor, and again, in this
11 case I think that the interests posed were the interests
12 in the safety and aesthetics of the sidewalks, and I think
13 there was testimony that these boxes detracted from the
14 safety and aesthetic interest of the sidewalks, and that
15 is exactly what is being banned.

16 Again, both Discovery Network and Harmon Homes
17 have alternative means of distributing their
18 communications. In Harmon Homes' case, 85 percent of
19 their publications are distributed through other means,
20 and in Discovery Network's case, 66 percent are
21 distributed through other means.

22 QUESTION: What about the local newspaper? What
23 percentage of theirs are distributed by home delivery?

24 MR. YURICK: I'm not really certainly, Your
25 Honor.

1 QUESTION: Probably very high, isn't it? I
2 mean, in that respect there's no reason to think that the
3 newspapers are any different from the commercial
4 publications.

5 MR. YURICK: That might be so, Your Honor. I
6 don't know that it's in the record. Again, this was
7 treated more as an as-applied challenge than a facial or
8 an overbreadth challenge, so --

9 QUESTION: May I ask, your section 701(c), the
10 ordinance that prohibits handbilling on the public streets
11 entirely, has that been in effect since a long, long time
12 ago. It seems to be almost unconstitutional on its face.

13 MR. YURICK: I don't think that it's
14 unconstitutional on its face, I think that it was drafted
15 probably closely after the Christensen -- Valentine v.
16 Christensen case --

17 QUESTION: Yes.

18 MR. YURICK: Because the language in that
19 statute closely resembles that in the Christensen case.

20 QUESTION: Long before the Court had held that
21 commercial speech had any protection under the First
22 Amendment this ordinance was drafted.

23 MR. YURICK: That's correct --

24 QUESTION: Yes.

25 MR. YURICK: But I don't necessarily think that

1 that makes the ordinance unconstitutional on its face.

2 QUESTION: No, of course that wouldn't but --

3 QUESTION: Thank you, Mr. Yurick.

4 Mr. Mezibov, we'll hear from you.

5 ORAL ARGUMENT OF MARC D. MEZIBOV

6 ON BEHALF OF THE RESPONDENTS

7 MR. MEZIBOV: Mr. Chief Justice, and may it
8 please the Court:

9 In this case the City of Cincinnati seeks to
10 enforce against Harmon and Discovery's publications an
11 outright ban on the distribution in public areas of
12 important and valuable information concerning economic and
13 educational opportunities as part of a regulatory scheme
14 which on its face allows city officials to make
15 unprincipled and standardless decisions about what kinds
16 of speech and what speakers can be on the public areas.

17 QUESTION: Now, Mr. Mezibov, you want us to
18 consider the case on the assumption that your clients
19 engage only in commercial speech, is that right?

20 MR. MEZIBOV: Justice O'Connor, we did not take
21 up the matter of whether we are or are not commercial
22 speakers.

23 QUESTION: So you want us to decide it on the
24 basis that your clients engage only in commercial speech.

25 MR. MEZIBOV: Your Honor, we feel that this case

1 can be decided --

2 QUESTION: Yes, or no?

3 MR. MEZIBOV: As if we are commercial
4 speakers --

5 QUESTION: Okay.

6 MR. MEZIBOV: Just as the lower courts have
7 determined --

8 QUESTION: All right.

9 MR. MEZIBOV: In accordance with the Central
10 Hudson criteria.

11 QUESTION: And you want us to assume, do you,
12 that the newspapers that the city allows to be placed in
13 newsracks are entitled to greater protection than that of
14 commercial speech.

15 MR. MEZIBOV: Certainly not in these
16 circumstances.

17 Your Honor, we did not concede that we are
18 commercial speakers, and although we have not appealed
19 that issue, we have never conceded that newspapers are not
20 also commercial speakers within the city's own dictionary.
21 They are, by definition, as much commercial speakers as we
22 are. The city's scheme is quite confused on that point.

23 QUESTION: But that kind of withdraws your
24 answer to Justice O'Connor in a way, doesn't it, because
25 we have held that in -- I think in the New York Times v.

1 Sullivan case, didn't we, that the fact that there was --
2 the libel might arise out of an advertisement did not make
3 it just commercial speech. At least it was entitled to
4 full First Amendment protection.

5 MR. MEZIBOV: Well, the city has drafted a
6 scheme of ordinances which includes in it definitions of
7 commercial speech -- commercial handbills, that is -- and
8 a definition of noncommercial handbills. There is no
9 definition whatsoever of what constitutes a newspaper.

10 On the one hand, newspapers are expressly
11 permitted on the city streets by reason of 911-17. On the
12 other hand, the city expressly prohibits the distribution
13 of commercial handbills in all public areas.

14 According to the city's own scheme of regulating
15 commercial handbills, a commercial handbill is any printed
16 matter which advertises for sale any merchandise, product,
17 commodity or thing, or which directs attention to any
18 business or mercantile or commercial establishment or
19 other activity for the purpose of directly promoting the
20 interest thereof by sales, or which directs attention to
21 or advertises any meeting, theatrical performance,
22 exhibition, or event of any kind for which an admission
23 fee is charged for the purpose of private gain and profit.

24 I submit, Mr. Chief Justice, that there is no
25 newspaper on the streets of Cincinnati which does not

1 constitute a commercial handbill under the city's own
2 scheme of definitions.

3 QUESTION: No, but they have a separate
4 ordinance -- 911-17 -- that expressly allows the
5 distribution of newspapers, and it was enacted later, so
6 it's in the nature of -- notwithstanding the definition of
7 handbill, a newspaper can be distributed.

8 MR. MEZIBOV: A newspaper can, but a newspaper
9 is not defined. A newspaper could as easily fall within
10 this definition --

11 QUESTION: Well, it does fall within that
12 definition --

13 MR. MEZIBOV: As any other definition.

14 QUESTION: Without any doubt --

15 MR. MEZIBOV: Exactly.

16 QUESTION: I mean, that's true. Wouldn't you
17 read the later ordinance as saying, but we are not
18 applying this handbill prohibition to newspapers?

19 MR. MEZIBOV: If I knew what a newspaper was
20 under the city's scheme.

21 QUESTION: Well, there is some merit to the
22 notion that we have some idea that what are on these boxes
23 are probably newspapers.

24 MR. MEZIBOV: Well, the city itself has --

25 QUESTION: Maybe your paper could also qualify

1 as a newspaper, but you don't make that contention.

2 MR. MEZIBOV: No, we do not.

3 QUESTION: Yeah.

4 MR. MEZIBOV: But it is our contention that we
5 are no more commercial within the city's scheme than is a
6 newspaper.

7 QUESTION: Now, does the city ordinance only
8 allow the sale of newspapers, not the distribution if
9 there's no sale?

10 MR. MEZIBOV: I believe it's the distribution.

11 QUESTION: I thought the language was sale.

12 MR. MEZIBOV: They may be sold from racks,
13 that's correct.

14 QUESTION: You can't give them away.

15 MR. MEZIBOV: 911-17 says they must be sold.

16 QUESTION: And apparently only in the morning or
17 afternoon, not in the evening. You don't have an evening
18 newspaper in Cincinnati.

19 MR. MEZIBOV: No longer.

20 QUESTION: It's a very beautifully drafted
21 ordinance.

22 (Laughter.)

23 QUESTION: Either in the morning or afternoon
24 where permission has been obtained.

25 MR. MEZIBOV: Since at least 1971, the city has

1 had on its books this ordinance which prohibits the public
2 distribution of all printed matter which satisfies the
3 city's definition of a commercial handbill, and it was
4 this ordinance which the city invoked when they directed
5 our clients to remove their newsracks only from the city
6 right-of-way.

7 There's no question, therefore, that this scheme
8 is subject to a facial challenge, as it affects not only
9 the use of newsracks on the city streets, but the
10 distribution of all printed matter on the city streets.

11 QUESTION: When you say this ordinance, Mr.
12 Mezibov, you're referring to, what, section 714-23 --

13 MR. MEZIBOV: That's correct, Mr. Chief Justice.

14 QUESTION: And any other parts -- the
15 definitional section 714-1-C --

16 MR. MEZIBOV: And 714-1-N, which defines as a
17 noncommercial handbill anything not contained in the
18 definition of a commercial handbill.

19 This scheme obliterates any meaningful or
20 discernible distinction among publications. If our
21 publication is commercial, so, too, is a daily newspaper,
22 and while a city argues that there should be or is a
23 bright line distinction, the First Amendment purpose as
24 between commercial and noncommercial speech, its inability
25 to make such a distinction is demonstrated by this

1 legislative scheme as well as by the letter regulation by
2 the city manager, who advanced --

3 QUESTION: This wasn't really the basis for the
4 court of appeals opinion, was it?

5 MR. MEZIBOV: No, it was not. The court of
6 appeals looked at this case from the Central Hudson --

7 QUESTION: Well, are you defending the court of
8 appeals rationale?

9 MR. MEZIBOV: Oh, I think the court of appeals
10 correctly decided this case --

11 QUESTION: That isn't what I asked you.

12 MR. MEZIBOV: -- Central Hudson.

13 (Laughter.)

14 QUESTION: Do you defend the way they arrived at
15 the result?

16 MR. MEZIBOV: Yes. The court of appeals did not
17 reach the facial argument, they decided the case on an
18 applied basis, but certainly this is a fair approach to
19 this regulatory scheme, because it continues to be
20 problematic.

21 QUESTION: So you think they were quite right in
22 identifying the kind of a balance that they thought they
23 should apply.

24 MR. MEZIBOV: I think Judge Boggs who wrote the
25 opinion was quite correct --

1 QUESTION: Yes or no.

2 MR. MEZIBOV: Yes.

3 Shortly after our publications were directed to
4 be removed from the public right-of-way the city manager
5 passed a regulation which attempted to put some definition
6 into the city scheme.

7 That letter regulation defined as noncommercial
8 that which is a daily or weekly publication primarily
9 presenting coverage of or commentary on current events,
10 and as we know from the record below, the city engineer is
11 unable and remains unable to give a clear definition of
12 what constitutes a noncommercial publication,
13 notwithstanding the city manager's letter.

14 While the city's inability to establish clear
15 standards with regard to a distinction between
16 noncommercial and commercial speech is not necessary in
17 resolving this matter, the facial infirmities of the
18 scheme are such that it warrants further consideration
19 insofar as it points out the difficulties in dealing with
20 speech and with the possibilities of favoritism and bias
21 when a city is unable to define with any certainty what
22 constitutes commercial and what constitutes noncommercial.

23 In this situation, that threat is not merely
24 potential or hypothetical. We believe the record
25 demonstrates that the threat is palpable.

1 In this case, the record reveals that the City
2 of Cincinnati works on an ongoing basis with certain
3 publishers, namely the city's daily newspapers, in coming
4 up with regulations governing newsracks. That's
5 significant, because it indicates that there is a threat
6 of favoritism or bias on the part of a city in dealing
7 with different speakers, when the speakers are essentially
8 publishing the same types of materials.

9 QUESTION: Do you think the city could
10 distinguish between newspapers of general circulation, or
11 whatever you want to call it, on the one hand, and
12 commercial handbills on the other as to distribution if it
13 precisely defined each category so that the city manager
14 would not be chargeable with any unbridled discretion?

15 MR. MEZIBOV: It may be possible to draw such a
16 distinction, but there would be no need for a distinction
17 insofar as newsracks are concerned. If the city's problem
18 here is newsracks, then it ought to be newsracks which it
19 regulates. There's no reason here, certainly none
20 developed by the record, which would demonstrate a need to
21 regulate newsracks based on the content of the
22 publications contained in it.

23 QUESTION: So you say, then, the city could not,
24 even with proper and careful definitions, distinguish
25 between newspapers and commercial flyers with respect to

1 distribution by newsracks.

2 MR. MEZIBOV: There certainly would be no reason
3 to, based on the ostensible reasons for the city's passing
4 the codes.

5 QUESTION: Well, supposing it passed an
6 ordinance that did that, do you think it should be upheld?

7 MR. MEZIBOV: No, it may not be attacked
8 necessarily on facial grounds, but it certainly would be
9 on an applied basis if, as in this instance, the city's
10 reasons, which ostensibly are safety and aesthetics, have
11 nothing to do with the content of the publications.

12 QUESTION: Well, suppose the ordinance forbade
13 newsracks that dispensed the material for free and
14 permitted only those that are coin-operated. Would that
15 be permissible?

16 MR. MEZIBOV: No, I don't believe that would be
17 permissible. That would place a burden on speech and
18 speakers which would be unnecessary and not related to the
19 city's --

20 QUESTION: Well, suppose it were shown that in
21 the case of coin-operated racks they did not have many of
22 the evils that free ones do -- they were not receptacles
23 for garbage, they were better maintained.

24 If the city had that factual background, could
25 it then enact the ordinance that I suppose?

1 MR. MEZIBOV: I think under those circumstances
2 it may be possible for the city to do that, so long as the
3 reason for that ordinance is not based on the notion that
4 to be commercial or noncommercial is determined by whether
5 or not you charge a fee, and so long as the amount of
6 money that's required to operate that machine is not of
7 such an amount that it would place a burden on one speaker
8 or another.

9 QUESTION: Well, suppose the minimum were a
10 quarter -- 25 cents?

11 MR. MEZIBOV: That may be reasonable, if it
12 advances a legitimate governmental interest. If that
13 would curb the problem, perhaps --

14 QUESTION: I thought the ordinance here just
15 allowed the selling of newspapers in newsracks, not giving
16 them away.

17 MR. MEZIBOV: 911-17, Justice O'Connor, does say
18 that cities are permitted to sell news --

19 QUESTION: Just sell.

20 MR. MEZIBOV: Newspapers by newsracks.

21 QUESTION: Nothing else.

22 MR. MEZIBOV: That's correct.

23 QUESTION: You can't give them away.

24 MR. MEZIBOV: Not according to 911-17, but our
25 publications cannot be distributed on city streets by any

1 means, newsracks or otherwise.

2 QUESTION: Couldn't you distribute them by
3 adding them as inserts to the newspapers?

4 MR. MEZIBOV: If our publishers were to buy
5 space in the city newspapers, that potentially could
6 happen, but that would change our entire means of
7 operation, and also, of course, there's never any
8 guarantee that newspapers will accept advertising from all
9 advertisers.

10 So it may well be that if we are banned from
11 newsracks and banned from distributing by hand or
12 otherwise in public areas, we may be totally banned from
13 distributing our publications throughout the city by any
14 means.

15 QUESTION: What if the city were to provide in
16 an ordinance that the only way you can put a newsrack --
17 anybody, newspaper, flyer, or anything else, on a city
18 street is to lease the space from the city, since it owns
19 the space?

20 MR. MEZIBOV: Well, I think that would present a
21 large problem for publishers such as ours who do not have
22 the financial wherewithal --

23 QUESTION: Yes, lots of laws do present
24 financial problems to people in business. Would this law
25 be unconstitutional?

1 MR. MEZIBOV: I believe that there is underlying
2 the right to distribute speech in public areas the right
3 to erect newspapers, unless --

4 QUESTION: The right to just take over public
5 property?

6 MR. MEZIBOV: Mr. Chief Justice, I don't believe
7 that if a city has a scheme of regulation by which
8 publishers are licensed to use space in accordance with
9 terms established by the city that they are appropriating
10 public property for private purposes.

11 QUESTION: But supposing the city just repeals
12 all its present ordinances and says, you know, they've got
13 us into a lot of litigation, one case went all the way to
14 the Supreme Court, we're just going to have a flat
15 regulation that first-come, first-served, anybody who
16 wants to put a newsrack on public property can do so, so
17 long as they pay the fair value of the lease for the
18 period of time they're occupying it.

19 MR. MEZIBOV: Depending on the amount of money
20 needed to get that leasehold, Your Honor, I suppose the
21 city might be able to do that, so long as that scheme is
22 not contrary to public forum considerations. After all,
23 newsracks --

24 QUESTION: Does the public forum doctrine
25 require the city to let private people appropriate public

1 property indefinitely?

2 MR. MEZIBOV: Public forum doctrine speaks to a
3 tradition in this country, which is that people expect to
4 see and be seen and hear and be heard on public streets.

5 Newsracks meet the expectations and needs of
6 citizens. They're found in virtually every city. They're
7 found on many street corners. That's because people
8 expect to find them there. People use them.

9 The use of newsracks I don't believe, Mr. Chief
10 Justice, is contrary to the purposes of cities regulating
11 streets. It seems to be a consistent application.

12 QUESTION: Well, very likely because the cities
13 know that people want to buy, have newsracks available,
14 but I don't think that answers the question of whether the
15 cities might charge the fair value of a year-to-year lease
16 for that small bit of property.

17 MR. MEZIBOV: Again, I think perhaps that
18 problem may be addressed by whether or not the amount of
19 money charged is placing too large a burden on speech.

20 If the amount of money would not be such as to
21 prohibit or prevent all speakers from using that
22 leasehold, then perhaps in those circumstances that might
23 be a constitutional ordinance.

24 QUESTION: What if the city has a large
25 auditorium that it makes available to private groups and

1 you have to lease the auditorium. You have to pay for the
2 janitorial service, the lights, and so forth, and one
3 group says, well, we want to use this auditorium, but we
4 just can't afford that price, even though we concede it's
5 fair value.

6 Do you think they have a constitutional right to
7 use that auditorium?

8 MR. MEZIBOV: Your Honor, I have not considered
9 that issue in the context of this case because our case is
10 in part a public forum case. I'm not sure that the Chief
11 Justice's --

12 QUESTION: Well, Mr. Mezibov, downstairs in the
13 public areas of this building there's a little section set
14 aside where there are three or four newsracks. Now, is it
15 your position that it would be unconstitutional for this
16 Court to refuse to provide additional newsracks for
17 commercial speech such as your clients have here, or can
18 we limit that space somehow and say, we have a very small
19 space, and we have to allocate it somehow so we're going
20 to allocate it only to fully protected speech?

21 MR. MEZIBOV: Justice O'Connor, your question
22 poses a hypothetical which is not present in our case,
23 that being limited resources. It's important to note that
24 in this --

25 QUESTION: Well, what is your answer?

1 MR. MEZIBOV: The answer is, in the absence of
2 limited resources --

3 QUESTION: Well, if there are limited resources,
4 what is your answer -- limited space?

5 MR. MEZIBOV: That it may be necessary for the
6 Court or for the governing body to make some distinctions.

7 QUESTION: Can you draw the line on the basis of
8 commercial versus noncommercial speech --

9 MR. MEZIBOV: I think that --

10 QUESTION: In that circumstance?

11 MR. MEZIBOV: The answer is, I'm not sure. It
12 may be of such a limited space that --

13 QUESTION: Assuming it's viewpoint neutral, just
14 all commercial speech, no.

15 MR. MEZIBOV: The Court has placed a higher
16 priority on noncommercial speech, that we know, but only
17 when it is necessary to regulate.

18 QUESTION: Well, in a sense, aren't city streets
19 a finite resource? At some point they're too cluttered,
20 or they interfere with traffic, or what-have-you. Can the
21 city make that kind of a distinction out on the streets?

22 MR. MEZIBOV: That situation has not presented
23 itself in Cincinnati, but it could be that we get down to
24 a last street corner, and I would suggest that in those
25 circumstances what the city with a governing body must do

1 is develop objective, content-neutral criteria to
2 determine who that final speaker will be on that street
3 corner.

4 QUESTION: Well, the content-neutral criteria is
5 all commercial speech. We're not going to allow it.

6 MR. MEZIBOV: I don't believe that would be a
7 content-neutral distinction.

8 If here, for example, the problem with our
9 publications is that it's commercial speech, then the city
10 ought to -- and I'm not suggesting this is what they ought
11 to do, but to be fair they should ban all commercial
12 speech, that contained in our publications and that which
13 falls out of the daily newspapers on a daily basis.

14 They've not chosen to do that, nor have they
15 chosen -- what they have chosen to do is make a
16 distinction based on content, which does not meet the
17 city's real needs.

18 QUESTION: Mr. Mezibov, I guess I don't
19 understand your position, then. I had thought from your
20 briefs that your answer to Justice O'Connor's question
21 would have been that you do not acknowledge -- you do not
22 acknowledge that commercial speech is not fully protected
23 speech in the same sense that all speech is -- I mean, in
24 one sense no speech is fully protected speech, because it
25 can't be given everywhere.

1 There are restrictions that can be placed as to
2 time, place, and manner. I thought that's what your brief
3 said, that commercial speech is speech, and it's entitled
4 to constitutional protections.

5 MR. MEZIBOV: It is our position that --

6 QUESTION: It can be limited more than other
7 speech only because of particular dangers that commercial
8 speech may have and with respect to those particular
9 dangers, but when those particular dangers are not
10 present, it has to be treated like other speech.

11 I thought that's what your brief said, but it's
12 certainly not what your answer says. Your answer says now
13 that in our building here we can say no commercial speech,
14 just noncommercial speech. We can do that.

15 MR. MEZIBOV: No, it is our position --

16 QUESTION: It depends on how much space we have
17 for racks, you now tell us.

18 MR. MEZIBOV: What I said in response to Justice
19 O'Connor, Justice Scalia, is that there may be such a
20 limited resource situation not present in the case we have
21 here --

22 QUESTION: I thought your whole case was that
23 limitation of resources has nothing to do with the
24 distinction between commercial and noncommercial. Fraud
25 does, prior permission perhaps does, but certainly not

1 space. Commercial and noncommercial take up just as much
2 space. Isn't your answer totally inconsistent with what
3 you said in your brief?

4 MR. MEZIBOV: Mr. Justice Scalia, I believe -- I
5 did not make myself as clear as I should have. I believe
6 that in a limited resource situation the governing body
7 should develop objective, content neutral basis to make
8 that decision about what speaker is there, and perhaps I
9 did misspeak or did not speak as clearly as I should have.

10 QUESTION: And content neutral means no
11 distinction between commercial and noncommercial.

12 MR. MEZIBOV: Unless there is a reason to
13 grant --

14 QUESTION: yes.

15 MR. MEZIBOV: To make that distinction, which is
16 not present here.

17 QUESTION: With respect to space or aesthetics,
18 there is no such reason, isn't that your point?

19 MR. MEZIBOV: That's correct.

20 QUESTION: Okay.

21 QUESTION: What about the reason the Chief
22 Justice suggested, that if it's given away free it's more
23 apt to be tossed on the sidewalk than if you have to pay
24 for it.

25 MR. MEZIBOV: There's absolutely --

1 QUESTION: Maybe it isn't a sufficient reason,
2 but at least it would be a reason, wouldn't it?

3 MR. MEZIBOV: There's absolutely nothing here in
4 the record to establish --

5 QUESTION: Oh, I understand that. We're off in
6 the realm of hypotheticals here today.

7 (Laughter.)

8 MR. MEZIBOV: Thank you.

9 QUESTION: None of this has anything to do with
10 this case, really.

11 (Laughter.)

12 QUESTION: It's just fun.

13 QUESTION: Yes. Do you understand my question?

14 MR. MEZIBOV: I do.

15 QUESTION: And you would agree that at least is
16 a reason. If you said 25 cents or more, it's less apt to
17 be litter than if it's free stuff.

18 MR. MEZIBOV: I could, but Mr. Justice Stevens,
19 I think I could also say that maybe the best things in
20 life are free, in response to your question, and that is
21 there's no record here to establish that that happens --

22 QUESTION: I understand that, and there's no
23 record here to show there's a --

24 MR. MEZIBOV: And there's no reason to believe
25 that that necessarily happens.

1 QUESTION: They never approach the scarcity
2 limit that they seem to me would have to have to justify
3 what they're doing.

4 MR. MEZIBOV: Justice Stevens, if someone goes
5 to the newsrack to take out one of our publications, I
6 think we can draw the inference that they want that
7 publication because it affords them information about
8 educational and economic opportunities which are valuable
9 to them and they will take that with them just as they
10 would a daily newspaper.

11 QUESTION: Nobody will pick it up just out of
12 curiosity and say I wonder what this is. People do that
13 with free things in all sorts of places. They pick it up,
14 look at it, and see if they're not interested.

15 MR. MEZIBOV: Well, in this situation they have
16 to go to the box and remove it. It's not being foisted
17 upon them.

18 QUESTION: No, I understand.

19 QUESTION: Mr. Mezibov, I would have thought
20 your answer to that question would have been that whether
21 you charge for it or not has nothing to do with whether or
22 not it's commercial speech. Newspapers are not commercial
23 speech and they are generally charged for.

24 MR. MEZIBOV: That's correct.

25 QUESTION: Some types of purely advertising

1 brochures, I think there are real estate things or
2 automobile things that you pay money for even though it's
3 all advertising.

4 MR. MEZIBOV: Yes, whether or not you charge or
5 do not charge does not make something commercial or
6 noncommercial.

7 QUESTION: You have no problem with charging --
8 with a law that says you have to charge for it, do you?
9 No boxes unless you pay for them.

10 MR. MEZIBOV: If that price, as I indicated
11 before, does not place too large a burden on one speaker
12 or another, if it's an inordinate price, or if it's used
13 to discriminate against one speaker than another, if it
14 serves a legitimate purpose, if 25 cents per box was --

15 QUESTION: Yes, but 25 cents a box you'll let
16 all the newspapers on the stand, they won't let your
17 publications on. You wouldn't want this if you had to --
18 if people had to pay 25 cents for your publication.

19 MR. MEZIBOV: No, we would not.

20 QUESTION: So a 25 percent charge would have the
21 exact same effect as this ordinance has --

22 MR. MEZIBOV: If the 25 --

23 QUESTION: In this case.

24 MR. MEZIBOV: That's correct, it could, although
25 in this situation the regulatory scheme doesn't just place

1 a burden with respect to newsracks, the city would have us
2 off the city streets entirely, by any means.

3 I should also point out that in this situation
4 there were 62 newsracks utilized by Harmon and Discovery's
5 publishers, whereas 2,000 newsracks approximately would be
6 permitted to remain on the city streets, according to the
7 city's enforcement of this regulatory scheme.

8 In effect, as the lower courts have found, this
9 scheme is an ineffective means of regulation. It never
10 directly advances any legitimate governmental interest,
11 because when our 62 are removed, we can anticipate that
12 they will be replaced by 62 supposed noncommercial
13 speakers, the daily newspapers.

14 QUESTION: Did you dispute in the courts below
15 that your publication was commercial speech?

16 MR. MEZIBOV: We disputed it in the district
17 court level. We did not appeal the district court's
18 decision that we are commercial speakers. The reason --

19 QUESTION: So that issue in this case is just
20 not open. You didn't carry it up to the court of appeals.

21 MR. MEZIBOV: No, we did not. We feel that this
22 case can be properly decided on Central Hudson bases, that
23 both the district court and the court of appeals properly
24 applied Central Hudson --

25 QUESTION: Well, did your publication contain an

1 offer of sale?

2 MR. MEZIBOV: There are two publications here,
3 Justice White, the Harmon Homes contains real estate
4 listings, a picture of a real estate offering, price
5 information about that, as well as, from time to time,
6 additional information. Discovery's publication has
7 information concerning its course listings.

8 QUESTION: So I suppose at least the first
9 publication you describe really fits the definition of
10 commercial speech.

11 MR. MEZIBOV: To the extent the definition of
12 commercial speech means proposes a commercial transaction,
13 then indeed it does.

14 QUESTION: While you acknowledge that you do not
15 have presented before us whether you are commercial
16 speech, you also claim, however, that you are free to
17 argue here that newspapers are as much commercial speech
18 as you are.

19 MR. MEZIBOV: That's correct. That's one of the
20 problems with this scheme, is that it is devoid of any
21 meaningful standards.

22 Finally, the city has argued that the
23 regulations in this case are content-neutral. That
24 contention is unsupported by the record.

25 First, the regulation is directed expressly and

1 explicitly at commercial speech. Second, only
2 publications with commercial speech has been banned from
3 newsracks.

4 QUESTION: Well, isn't your strongest argument
5 on the lack of content neutrality that when you make a
6 distinction between commercial and noncommercial which is
7 not for the purposes for which the commercial speech
8 regulation has been accepted by this Court, that that is
9 by definition a content-based distinction? I mean, you
10 don't have to go any further than that, do you?

11 MR. MEZIBOV: That's correct, Justice Souter.
12 The city by invoking this ordinance has made a content-
13 based --

14 QUESTION: Whereas if the city were regulating
15 fraud in commercial speech, it would not be invalid simply
16 because -- as content-based.

17 MR. MEZIBOV: That's correct.

18 QUESTION: Yes.

19 MR. MEZIBOV: That's correct.

20 QUESTION: May I ask one last question? Your
21 opponents have given us amended regulation 38 at the end
22 of their brief, which I guess is something that came
23 later, signed by Sylvester Murray. Is he the city
24 manager?

25 MR. MEZIBOV: He was a previous city manager.

1 QUESTION: Is there something in the record that
2 defines the scope of the authority of a city manager? Do
3 we know what -- is he kind of like a czar who can do
4 anything he wants to --

5 (Laughter.)

6 QUESTION: Or is there some limitation on his
7 power?

8 MR. MEZIBOV: I'm not sure that that is clear in
9 the record.

10 QUESTION: Well, doesn't one of the ordinances
11 give the city manager some -- and provided further that
12 newspapers of general circulation in the City of
13 Cincinnati be sold from racks, containers and bags,
14 attached to poles, a-da-da, in accordance with rules and
15 regulations promulgated by the city manager.

16 MR. MEZIBOV: There's no question that the city
17 manager can promulgate the rules and regulations. I
18 misunderstood the earlier question. I understood it had
19 to do with interpretation.

20 The city manager does promulgate the rules and
21 regulations, and it appears to be left to other city
22 officials to interpret and apply those rules and
23 regulations. In this case, it would have been the city
24 engineer, primarily, who had responsibility to interpret
25 and then apply the regulations.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Mezibov. The case is submitted.
3 (Whereupon, at 11:46 a.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

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Cincinnati V Discovery Network

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BY Ann-Mari Federico

(REPORTER)