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PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: CITY OF LADUE, ET AL., Petitioners, v.

MARGARET P. GILLES

CASE NO: 92-1856

PLACE: Washington, D.C.

DATE: Wednesday, February 23, 1994.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 CITY OF LADUE, ET AL., :
4 Petitioners, :
5 v. : No. 92-1856
6 MARGARET P. GILLES :
7 -----X

8
9 The above-captioned matter came on for oral
10 argument before the Supreme Court of the United States on
11 Wednesday, February 23, 1994.
12 JORDAN B. CHERRICK, ESQ., St. Louis, Missouri; on behalf
13 of the Petitioners.
14 GERALD P. GREIMAN, ESQ., St. Louis, Missouri; on behalf of
15 the Respondent.
16 PAUL BENDER, ESQ., Deputy Solicitor General, Department of
17 Justice, Washington, D.C., on behalf of the United
18 States, as amicus curiae, supporting the Respondent.

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1 PROCEEDINGS

2 (10:20 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 92-1856, the City of Ladue v. Margaret
5 Gilleo. Mr. Cherrick.

6 ORAL ARGUMENT OF JORDAN B. CHERRICK

7 ON BEHALF OF THE PETITIONERS

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

10 This case presents the question of whether the
11 City of Ladue, a small, 8-1/2 square mile residential
12 community, has the right to protect its residents from the
13 proliferation of signs that causes visual blight, harm to
14 the landscape, safety problems, and a deterioration of
15 real estate values.

16 We submit that the sign ordinance at issue here
17 today is constitutional under this Court's time, place, or
18 manner jurisprudence, and we start the analysis with the
19 governmental interests, because under the Court's opinion
20 in Frisby, the Court noted that the governmental interest,
21 the strength of those interests, informs the application
22 of the test and, indeed, those interests are very strong
23 in this case.

24 The City of Ladue has, since its very inception
25 in 1936, made a comprehensive and longstanding commitment

1 to the preservation of its beautiful, aesthetic community.
2 It retained a renowned urban planner, one of the fathers
3 of urban planning in this country, Harland Bartholomew, to
4 devise the city plan which it has consistently followed.

5 The sign ordinance is an essential part of the
6 zoning plan and the comprehensive plan. It is designed to
7 maintain this unique aesthetic ambience of this community,
8 and it has done so on a consistent basis not only with
9 respect to sign regulation but with respect to
10 beautification projects and other issues as well.

11 QUESTION: Mr. Cherrick, your ordinance has some
12 exemptions. Not all signs are banned. There's a list of
13 exemptions, and those exemptions would appear to be
14 content-based as we have used that term in prior cases
15 and, under our existing doctrine, how can you defend those
16 content-based exceptions or exemptions?

17 MR. CHERRICK: Justice O'Connor, we think that
18 the exemptions are neutral in the sense that under Ward
19 the controlling test for content neutrality was, what is
20 the Government's controlling purpose, and here, the narrow
21 exceptions that we required are safety-related and those
22 that, in fact, are required by this Court's jurisprudence
23 in the sense that there are no ample alternative modes of
24 expression, such as an onsite sign.

25 QUESTION: Well, but you have exemptions for

1 sale or for lease signs, which certainly aren't safety-
2 related, and for church signs and so forth, so surely some
3 of those are content-based?

4 MR. CHERRICK: We think that under this Court's
5 jurisprudence -- for example in the Linmark case the Court
6 held that real estate signs must be allowed because there
7 are no ample alternative modes of expression. So what
8 Ladue is doing in this context is not targeting the
9 message, it's targeting the medium of signs, and it is
10 also attempting to allow those signs where there is no
11 alternative onsite --

12 QUESTION: Well, do you think we have to apply
13 our usual strict scrutiny test here, and under that test,
14 do you think that the exemptions survive strict scrutiny,
15 that there is a compelling State interest, that there's no
16 other alternative that would be less burdensome, and so
17 forth?

18 MR. CHERRICK: Justice O'Connor, we think the
19 ordinance does survive the strict scrutiny test, but we do
20 not think the Court needs to reach that test, because what
21 is at issue here today is, in the lower courts what
22 actually happened is that the courts held that if Ladue
23 allows any exceptions whatsoever, the ordinance is
24 content-based, subject to strict scrutiny, and therefore
25 unconstitutional.

1 We think that that places cities in a classic
2 catch-22 position, because on the one hand, under the
3 Court's jurisprudence, for example, in Linmark, certain
4 signs must be allowed when there are no ample
5 alternatives. A safety --

6 QUESTION: Is it your position that you cannot
7 draft an adequate time, place, and manner ordinance that
8 would allow some signs of this character?

9 MR. CHERRICK: Well, Justice Kennedy, under the
10 Ward case the Court has, of course, rejected the least
11 restrictive alternative, and the issue is --

12 QUESTION: Mr. Cherrick, tell me if I'm wrong,
13 but I thought the Ward case was about the decibel level.
14 It was turning down the volume, not excluding the
15 expression, and here, it seems if you're going to use the
16 Ward case the natural application would be to say you can
17 regulate the size of the sign, you could regulate the
18 number of signs, but how can you use Ward, which is
19 turning down the volume but not excluding expression, as a
20 justification for saying you cannot have any sign of this
21 variety?

22 MR. CHERRICK: Justice Ginsburg, proliferation
23 is to signs what volume is to loud music, and what Ladue
24 is doing here is focusing and targeting the medium of
25 expression. The Court pointed out in the Vincent case

1 that signs have a unique problem. It is the medium that
2 creates the problem, and therefore the only way to
3 eliminate this problem of visual blight is to eliminate
4 the medium. We think the logic of Vincent is compelling
5 here today.

6 QUESTION: Is there anything in this record that
7 shows there's a greater danger of proliferation for "Peace
8 in the Gulf" than "House for Sale"?

9 MR. CHERRICK: The record is undisputed that
10 signs proliferate in neighboring communities, and Ladue
11 does not target any particular message, it is focused on
12 the medium, so that this ordinance applies and prohibits
13 in a particular place signs on the landscape,
14 controversial signs, noncontroversial, political,
15 commercial, noncommercial -- it is focused on this medium.

16 But I would like to address the question that
17 you asked about the alternatives, and we -- even though
18 the least restrictive alternative test has been rejected,
19 we cannot achieve the Government's interest here, Ladue's
20 unique interest, with the alternatives, and let me explain
21 if we look at some of these alternatives.

22 If we limit the size, for example, we still have
23 the proliferation problem. There is still the
24 multiplicity of these signs under this uncontested record
25 that are displayed and clutter up the windows and the

1 yards and the trees throughout the neighborhood.

2 Now, it has been suggested that we could limit
3 the number of signs. Well, if we did that, we would come
4 right up against this Court's content-based doctrine which
5 prohibits that, because if we limited the signs to a
6 minimum of one per household, we'd still have over 3,000
7 potential signs.

8 But in addition to that, we would have the
9 problem of Government selecting the speaker and the
10 message, because there could be multiple political races,
11 multiple people living in a home, yet the Government would
12 say that a particular house, there could only be one sign,
13 and in another house a single person would be allowed to
14 speak, and that would offend this Court's jurisprudence,
15 and what we have tried to do is to comply with this
16 Court's First Amendment --

17 QUESTION: So nothing is better than something.
18 That's essentially your argument, that it's more
19 compatible with the First Amendment to allow nothing than
20 to have a regulation that specifies a uniform size.

21 MR. CHERRICK: No, Justice Ginsburg, because
22 under this ordinance numerous modes of expression, ample
23 modes of expression are left open for Respondent to speak.
24 For example, a bumper sticker, a button -- those are
25 inexpensive personal expressions which would have achieved

1 a much larger audience than these signs placed on the
2 landscape that could be seen from the street.

3 In fact, the respondent did not even contest the
4 issue in this case in the summary judgment proceedings
5 that there were, in fact, ample alternative methods,
6 which -- we have affidavits that listed over 20.
7 Handbills are allowed.

8 QUESTION: Well, Mr. Cherrick, why would a rule
9 of one sign per house -- why would that violate this
10 Court's precedents?

11 MR. CHERRICK: We think that would create a
12 content-based problem, because in that instance the
13 Government in effect would be imposing a decision to be
14 made by individuals that in a -- for example, the multiple
15 issues that face -- people want to speak on, they would
16 have to put a sign on one issue, and there may be --

17 QUESTION: Well, they would presumably choose
18 the right to speak on one issue rather than the right to
19 speak on no issues.

20 MR. CHERRICK: Well, the problem would be is
21 that you would have -- you would have neighboring people
22 who -- who, for example, would be allowed to speak on a
23 specific issue because they would have the one sign, and
24 there may be just one person living in that house.

25 But I think this goes back to the rationale of

1 the content-based doctrine that Government should not
2 force people to pick and choose the topics for public
3 debate, and in fact there would be an advantage given to
4 certain households over the others where this is --

5 QUESTION: You should just prohibit the debate
6 entirely.

7 MR. CHERRICK: Well, Mr. --

8 QUESTION: Do you -- excuse me. No, please
9 answer his question.

10 MR. CHERRICK: Thank you. Mr. Chief Justice,
11 the debate is preserved completely, because there are all
12 these uncontested ample alternative modes of expression --
13 handbills and pickets and fliers and bumper stickers and
14 buttons -- and all of this is protected.

15 QUESTION: Don't you have a handbill ordinance?
16 Do you allow handbills all over the place?

17 MR. CHERRICK: Well, that -- those -- those --

18 QUESTION: You do? You allow handbills to be
19 distributed?

20 MR. CHERRICK: Well, they do --

21 QUESTION: It seems to me that would be
22 inconsistent with this very -- very fine neighborhood to
23 have handbills scattered all over the place.

24 QUESTION: You have to wear colonial costumes
25 when you hand them out.

1 (Laughter.)

2 MR. CHERRICK: Justice Stevens, as the Court
3 pointed out in Vincent, the problem of handbills can be
4 dealt with in different ways.

5 You have a littering problem. That is the
6 governmental problem here, but as the Court pointed out in
7 the Vincent case, and as your dissenting opinion in the
8 Metromedia case points out, this is the medium that causes
9 the problem, and therefore the only direct and effective
10 way to eliminate the problem is to eliminate the medium.
11 It's a unique type of situation.

12 QUESTION: Would you confirm one thing I really
13 want to be sure about? Do you actually prohibit, during
14 election campaigns, "Vote for Ike" in the window, or "Vote
15 for Adlai," or something like that? That's not even
16 permitted in an election campaign?

17 MR. CHERRICK: No, Justice Stevens, because if
18 we permitted that we would be favoring that speech over --

19 QUESTION: And is that ordinance completely
20 enforced and obeyed, that they've never even put election
21 signs up in the windows? Does the record tell us whether
22 there's complete compliance with that?

23 MR. CHERRICK: Well, the record is clear that
24 for 55 years that this ordinance has been consistently
25 enforced and applied in a constitutional --

1 QUESTION: Although didn't this come to light
2 because of a complaint that the sign had been vandalized,
3 so it hadn't been -- this wasn't a case of initial
4 enforcement. Didn't this come to the town's attention
5 because the homeowner complained that her sign had been
6 vandalized?

7 MR. CHERRICK: Yes, and the town enforced this
8 consistently. It does not allow any political or
9 nonpolitical signs.

10 QUESTION: But there's no indication that if she
11 hadn't made the complaint, or the sign hadn't been
12 disturbed, anything would have happened.

13 MR. CHERRICK: Well, the record is clear that
14 whenever there have been signs and the police have been on
15 notice of it they have applied this across the board to
16 whatever the message -- whatever sign there was that was
17 causing the problem, and I stress here, too, that this
18 Court in the Ward case pointed out that deference must be
19 given to local judgment of city officials to deal with
20 these types of problems, and here we have --

21 QUESTION: Was Ward a time, place, and manner
22 case?

23 MR. CHERRICK: Ward?

24 QUESTION: Yes.

25 MR. CHERRICK: Yes.

1 QUESTION: Is this a time, place, and manner
2 case?

3 MR. CHERRICK: Yes, Justice Kennedy, because it
4 is focused on the medium, the manner of expression --
5 signs -- at a particular place, signs on the landscape
6 that can be seen from the street.

7 QUESTION: You are also interpreting time,
8 place, and manner as I understand it to authorize you to
9 make a complete prohibition of, I gather, all signs, if
10 you wanted to go that far, is that correct? I understood
11 you to be alluding to Vincent a moment ago as authority
12 for the proposition that you could have gone further than
13 you did, is that correct? Is that your position, and do
14 you so read Vincent?

15 MR. CHERRICK: If I understand your question,
16 Justice Souter, Vincent and --

17 QUESTION: Could you have -- in your view, would
18 Vincent have authorized the town to prohibit not only the
19 signs prohibited here, but also the -- at least the
20 private signs allowed here, commercial signs in front of
21 stores, for sale signs, identification signs -- could you
22 have gone the whole hog, as you read Vincent?

23 MR. CHERRICK: Well, signs for which there is
24 no --

25 QUESTION: Well, how about -- what about the

1 answer to my question?

2 MR. CHERRICK: Oh, I'm sorry. No, in this
3 respect --

4 QUESTION: Okay.

5 MR. CHERRICK: -- and let me explain. Signs
6 where there is no ample alternative mode of expression,
7 this Court in Vincent and Ward and the other time, place,
8 and manner cases has held that those signs must be
9 allowed, and that's -- what Ladue is doing here is
10 allowing those signs that for neutral governmental reasons
11 it must allow, such as an onsite sign. You must have
12 those types of signs to get to a particular place. A
13 safety sign, that must be allowed. A real estate sign,
14 under the Linmark case, must be allowed. But the --

15 QUESTION: Is that also your view on the
16 religious sign that the red brief referred to? The red
17 brief took the position that under the ordinance a church
18 would be allowed to display a sign saying, "Say No to
19 Abortion." Is that your view that it would, and is the
20 reasoning for allowing it what you've just stated?

21 MR. CHERRICK: A church would only be allowed to
22 have a sign identifying the church and what is going on at
23 that particular premises. It would not be allowed to have
24 a sign placed in the churchyard, "Say No to Abortion,"
25 just as other political or religious or commercial signs

1 would not be allowed, but that is an onsite sign where as
2 a matter of public necessity and convenience people must
3 know what's happening at the church, where it is --

4 QUESTION: And I assume you think, Mr. Cherrick,
5 also, that one of the other reasons why you don't think it
6 would be satisfactory simply to say everybody can have one
7 sign of any sort is, you think that would be too many
8 signs. You don't want a sign up in every house in this
9 neighborhood, do you?

10 MR. CHERRICK: Well, that's absolutely correct.

11 QUESTION: Even one. Now, theoretically that
12 could happen under your scheme, but it's not likely to
13 happen. It's not likely to happen. Every house in the
14 neighborhood's not going to be up for sale.

15 MR. CHERRICK: Well, those signs are not,
16 naturally, limited in number, and there are many types of
17 signs that can be placed here, and the record is
18 undisputed that this city has followed the counsel of some
19 of the most expert land-use planners to -- who have
20 advised the city that this -- based on this city's unique
21 interest, the comprehensive city plan and the zoning
22 interest, this is necessary.

23 QUESTION: You consider that a visual blight to
24 have a sign up in every house -- you walk down the street,
25 every house has a sign, vote for him, vote for the other.

1 You don't want that, right?

2 MR. CHERRICK: Well, that's correct, and it's in
3 the reasonable judgment of city officials, as this Court
4 has said, to make the decision about what is beautiful and
5 what is ugly and whether sign proliferation should be
6 allowed, and that is what this city has done, and has done
7 so in a constitutional fashion by only allowing the
8 limited safety and onsite signs.

9 QUESTION: Why is it that rectangular flags can
10 say anything at all? Rectangular flags can say "Vote for
11 Ike," isn't that right?

12 MR. CHERRICK: Yes.

13 QUESTION: That's how you interpret the
14 exception for flags which is contained in the ordinance.
15 You say that means so long as it's a rectangular banner,
16 you can put anything on that banner you want. The message
17 involved here could have been flown on a flag, right?

18 MR. CHERRICK: That's correct.

19 QUESTION: But not a pennant. Not a pennant?

20 MR. CHERRICK: That was a land-use judgment --

21 (Laughter.)

22 MR. CHERRICK: -- a judgment made by --

23 QUESTION: A pretty stupid judgment. I don't
24 understand any sense behind that at all. That's totally
25 irrational, isn't it?

1 MR. CHERRICK: No, Justice --

2 QUESTION: It's not irrational?

3 MR. CHERRICK: It's not irrational.

4 QUESTION: All right. Tell me why -- why
5 triangles are worse than rectangles.

6 (Laughter.)

7 MR. CHERRICK: The judgment of the city was --
8 is that there's certain types of signs that proliferate,
9 such as a pennant and a banner. Those cause more aesthetic
10 problems than flags. Flags have never presented the
11 problem that the city was faced with.

12 QUESTION: I think if you're talking about
13 patriotic flags, you know, on holidays and things like
14 that, I can understand it, but you haven't interpreted the
15 thing that way. You've interpreted it to say, you can put
16 anything on your house you want, so long as you put it on
17 a rectangular piece of cloth, but not if you put it on a
18 triangular piece of cloth, or a bunting. Bunting is no
19 good either, right?

20 MR. CHERRICK: Well, the city --

21 QUESTION: I don't understand that at all.

22 MR. CHERRICK: Justice Scalia, the city made a
23 reasonable judgment to deal with this problem, and it --
24 at the same time it allowed that type of expression on a
25 flag for people to display all types of messages, but this

1 was -- the city was trying to limit its ordinance to the
2 problems that it saw, and under the Burson case the Court
3 has said that the First Amendment does not require to deal
4 with problems that don't confront them, but --

5 QUESTION: I don't really think that's what they
6 meant when they made the exception for flags, I really
7 don't. I think they probably meant by a flag, a flag.
8 You know, as in follow the flag. I love the flag.

9 MR. CHERRICK: Well, they -- there are
10 different -- people can put different messages on flags,
11 and while it can be an American flag, it can also be a
12 flag containing a different message, but the -- I think
13 that --

14 QUESTION: Has this come up in the
15 administration of the zoning ordinance? Have people put
16 up different kinds of flags with different messages on
17 them?

18 MR. CHERRICK: Yes. Yes, they have, and those
19 have been allowed, and I think the ultimate question as on
20 a constitutional level before the Court is whether this
21 Court is going to act as second-guessing a land-use
22 decision, part of a comprehensive land-use plan. Will it
23 make the judgment that certain types of signs should be
24 permitted, certain types of --

25 QUESTION: Mr. Cherrick, is your position that

1 you're forced into the flag position you've just taken
2 that Justice Scalia just questioned as irrational by this
3 Court's precedent in Street, the peace symbol on a flag,
4 and that you're forced into the "for sale" because of this
5 Court's decisions so you're preserving what you can but of
6 course recognizing this Court's precedent? Is that --

7 MR. CHERRICK: Well, the city is trying to
8 comply with this Court's precedents, while at the same
9 time achieving the city's unique aesthetic interest, and I
10 think it's important to focus --

11 QUESTION: But is it your position that all of
12 the exceptions here which create what some members of the
13 Court have described as content-based problems for you are
14 required by decisions of this Court, so that all of the
15 exceptions are necessities, constitutional necessities, is
16 that your theory?

17 MR. CHERRICK: Yes, Justice Souter, and the
18 problem that the lower court has placed the city and other
19 cities in is this catch-22 problem, because the lower
20 court has said that all signs must be banned. There can
21 be no exceptions, yet as a practical matter, how can a
22 city exist without safety signs?

23 QUESTION: Well, if we were to take the position
24 that you are not constitutionally required to allow square
25 or rectangular flags displaying this particular message,

1 and -- would that then knock out your theory of content-
2 based justification?

3 MR. CHERRICK: No, Justice Souter, because in
4 that situation the city was making a judgment that flags
5 have not created the problem of proliferation and visual
6 blight, and so therefore it permitted that unique mode.

7 QUESTION: Well then, you're going to a
8 different rationale, then. You're saying there are two
9 rationales. One is, some of these exceptions are required
10 by the Court. The other one is, some of these exceptions
11 do not present risks of blight. Is that it?

12 MR. CHERRICK: Yes, and --

13 QUESTION: And they can be identified without
14 any content base.

15 MR. CHERRICK: That's correct, and the Court in
16 the -- the lower courts have created this very difficult
17 problem that applies not only for a city like Ladue, but
18 would apply, frankly, in other contexts.

19 The Highway Beautification Act follows the very
20 analogous structure of the Ladue ordinance. It prohibits
21 on private property all signs, with very limited
22 exceptions, very closely following what Ladue has done.
23 It allows -- it does not allow political signs, although
24 the Solicitor General is now taking the position it allows
25 a few political signs.

1 QUESTION: Mr. Cherrick, where -- what section
2 of the ordinance is it that deals with flags?

3 MR. CHERRICK: The -- it is the definitional
4 section under page 120 of the joint appendix. The
5 definition of "sign" does not include flags, and a flag
6 was left out of the definitions because the city has not
7 seen that as a problem that it has faced with respect to
8 visual blight.

9 QUESTION: And this ordinance was adopted in
10 1935, you say?

11 MR. CHERRICK: No -- well, the present ordinance
12 was adopted in 1991, although the city has had sign
13 ordinances ever since the beginning of the city.

14 QUESTION: And you say cases have come up since
15 1991 in which people have flown flags that weren't
16 national flags or State flags, or that sort of thing, and
17 the city has known about it and said that's perfectly
18 okay?

19 MR. CHERRICK: Yes. Flags have never been
20 prohibited, and for example there are Halloween flags that
21 people display, family name flags, these -- they have
22 never been prohibited, and they have never created the
23 type of problem the city had, and therefore it didn't make
24 the judgment that it needed to prohibit that particular
25 mode of --

1 QUESTION: But under your view I suppose they
2 could have prohibited flags. If a different community
3 thought flags were just as obnoxious as these window
4 signs, I suppose it could prohibit the flags too, couldn't
5 it?

6 MR. CHERRICK: If it was creating a problem. I
7 think it would depend on the city's --

8 QUESTION: Well, in their judgment. I suppose
9 you've always prohibited them. You don't really know how
10 bad the problem would be if you didn't have this
11 ordinance, do you?

12 (Laughter.)

13 MR. CHERRICK: Well, there is an --

14 QUESTION: Ever since 1935 you've said no "I
15 Like Ike" signs.

16 MR. CHERRICK: Well, Justice Stevens, there is
17 an uncontested record here that in six neighboring
18 communities, residential communities, there is a
19 proliferation of small, temporary signs, and so that is a
20 problem, a real problem that exists for the city.

21 In addition, there is --

22 QUESTION: I'm sorry, you say there is a
23 prolifer -- not in Ladue.

24 MR. CHERRICK: In -- no, six neighboring
25 communities.

1 QUESTION: Oh.

2 MR. CHERRICK: That -- that's --

3 QUESTION: But they weren't planned by this same
4 architectural expert, were they?

5 (Laughter.)

6 MR. CHERRICK: Well, those cities do not make
7 this prohibition, and they have a visual blight --

8 QUESTION: Do the homes in those neighboring
9 cities sell for anything like the price that you get in
10 Ladue?

11 MR. CHERRICK: Well, Justice Stevens, the record
12 is uncontested also that one of the effects of this land-
13 use plan and this zoning ordinance --

14 QUESTION: Is to protect values.

15 MR. CHERRICK: -- is that real estate values are
16 increased.

17 QUESTION: Right. Incidentally, what if you
18 parked your car in your driveway and had a sign in the
19 window of the car, and you just left it there. Would that
20 violate the ordinance?

21 MR. CHERRICK: No, and that would be another
22 alternative mode of expression. It would be very easy for
23 respondent to have a bumper sticker on her car, or a sign
24 on her car, and the reason, Justice Stevens, is that what
25 Ladue is focused on is signs attached to the landscape.

1 People are captive to those signs, and those proliferate.

2 QUESTION: What about a child's wagon sitting
3 out there, and put the sign on the wagon? I suppose that
4 would be all right.

5 MR. CHERRICK: Yes, but it is important to
6 consider the overall land-use plan, not the individual
7 case, and under a typical land-use plan like this, if
8 everyone keeps the plan, then the entire community
9 benefits in terms of quality of life and real estate
10 values.

11 QUESTION: If she had a wheelbarrow that she
12 rolled onto her front lawn and propped up the sign on
13 that, would that violate the ordinance?

14 MR. CHERRICK: No, but that -- again, we think
15 it is not appropriate to look at the individual case.

16 As the Ward court pointed out, one must look at
17 the overall governmental purpose, and here we're dealing
18 with a land-use plan, a comprehensive zoning plan, and you
19 have to look at all of -- what would happen if Ladue
20 allowed one sign, it would allow all of these signs, and
21 it is when those signs that are attached to the land, that
22 is when the visual blight and the proliferation problem
23 exists, and therefore that is the reasonable judgment that
24 this city has made.

25 Mr. Chief Justice, I reserve the balance of my

1 time.

2 QUESTION: Mr. Cherrick, before you do, let me
3 ask, give me the names of one or two of the adjoining
4 suburbs that have gone to pot because they don't have this
5 regulation.

6 MR. CHERRICK: Justice Blackmun, the -- the
7 suburbs are indicated on pages 154 and 155 of the joint
8 appendix, but those suburbs -- each community has the
9 right, in our view, to make its own decisions of quality
10 of life, and this is a particularly --

11 QUESTION: I asked you to give me the names of
12 one or two of them. Can you give me the names of one or
13 two of them?

14 MR. CHERRICK: Yes.

15 QUESTION: I know St. Louis fairly well.

16 MR. CHERRICK: Justice Blackmun, Ferguson would
17 be one, Manchester would be another, that were mentioned
18 by the expert.

19 Thank you.

20 QUESTION: Very well, Mr. Cherrick. Mr.
21 Greiman, we'll hear from you.

22 ORAL ARGUMENT OF GERALD P. GREIMAN

23 ON BEHALF OF THE RESPONDENT

24 MR. GREIMAN: Thank you, Mr. Chief Justice, and
25 may it please the Court:

1 This case concerns a small sign displayed by a
2 citizen at her own home to communicate her views on an
3 important public issue to her fellow citizens. If the
4 First Amendment does not protect the kind of speech at
5 issue in this case, it's hard to imagine what it does
6 protect.

7 Certainly, cities like Ladue may adopt
8 reasonable sign regulations addressing size, number, and
9 other aspects of time, place, and manner, but Ladue may
10 not virtually ban small signs as a mode of expression
11 within its borders.

12 QUESTION: Well, it hasn't done that. This
13 is -- I mean, if you say that time, place, and manner
14 restriction is okay, why is this not a place restriction?
15 She can have this sign anywhere she wants. She just can't
16 put it on her house.

17 MR. GREIMAN: Justice Scalia, this Court has
18 made clear that no time, no place, and no manner does not
19 mean a regulation of time, place, and manner.

20 QUESTION: This isn't no time, no place, and no
21 manner. It's just on her house. She can put it on her
22 car. She can walk in front of the house holding a sign.
23 That's not no place.

24 MR. GREIMAN: This Court has said that distinct
25 modes of expression must be judged by their own rule. We

1 believe that a small sign at one's own house in a fixed
2 location is a distinct mode of expression.

3 QUESTION: Time, place, and manner doesn't apply
4 to this case, then, is that it?

5 MR. GREIMAN: Time, place, and manner would
6 apply if this was --

7 QUESTION: It does. But then why isn't it
8 perfectly reasonable to say the only place she can't do
9 this is by putting a sign on her house?

10 MR. GREIMAN: Your Honor --

11 QUESTION: It seems to me you're enlisting
12 support from a feeling that, you know, a woman's home is
13 her castle, and she should be able to do whatever she
14 wants with it, but she can. I mean, she can't -- she
15 probably cannot paint her house puce in this community, I
16 would suppose. That's perfectly okay, but for some reason
17 we must allow her to put a sign in her house.

18 Whatever feeling you have against that it seems
19 to me comes from the home is the castle point of view,
20 once you acknowledge that place restrictions on speech are
21 okay.

22 MR. GREIMAN: Your Honor, Ladue does not allow
23 Ms. Gilleo to maintain this sign anywhere else. We
24 believe that being able to speak at one's house is a very
25 important feature, that there are property rights involved

1 in this case, the right to do what one will --

2 QUESTION: Well, they did say -- I thought your
3 opposing counsel acknowledged this morning that it would
4 have been all right to put the sign in her car window and
5 park it in the driveway.

6 MR. GREIMAN: Your Honor, I heard Mr. Cherrick
7 say that, although the record in this case showed that
8 Ladue has enforced its ordinance in a number of instances
9 against cars parked in driveways or in front of houses
10 with for sale signs on them, so I'm not sure that
11 interpretation is valid.

12 Even assuming that it is, a small sign on a car
13 is a different mode of expression. A sign on a car
14 typically communicates when a car is moving. A sign
15 posted in a fixed position at a house has a very special
16 communicative impact. It conveys not only the message
17 contained in the sign, but the fact that a resident at
18 that house believes in that message. It therefore has
19 special impact upon people who know the speaker, or
20 know --

21 QUESTION: Well, that doesn't entitle you to do
22 it. I mean, sleeping in a park has special impact, too,
23 but we don't allow people to sleep in some parks, even if
24 that would be the very best place to make your message
25 known, so long as there are other adequate ways.

1 Now, the community here has said for some
2 purposes yes, you have to use your house -- for example,
3 if you're putting your house up for sale. Then there is a
4 special need to have the sign there. That's a very
5 reasonable exception. But simply to say that any message
6 in the world you have to be able to hang a sign on your
7 house about it, I -- except for the fact that I feel
8 strongly about a person's house being his castle, I don't
9 see why, as far as the First Amendment is concerned,
10 there's anything distinctive about it.

11 MR. GREIMAN: Justice Scalia, sleeping in the
12 park may be regulated because that involves conduct mixed
13 with speech. Here we are talking about virtually pure
14 speech, and we believe the State simply may not restrict
15 that in the manner that Ladue has tried to do.

16 QUESTION: Well, could the State restrict you to
17 one sign per house?

18 MR. GREIMAN: Chief Justice Rehnquist, certainly
19 the State may reasonably limit the number of signs. We
20 don't believe that one per household, especially in the
21 context of a political season, would be reasonable, but
22 certainly they can adopt reasonable numerical limitations.

23 QUESTION: Do you have any order of magnitude in
24 mind?

25 MR. GREIMAN: I don't have a specific number,

1 Your Honor. It has to allow reasonable opportunities for
2 expression.

3 QUESTION: Would a limitation of half a dozen be
4 permissible?

5 MR. GREIMAN: Perhaps, Your Honor. Perhaps it
6 would depend upon what time of year we're talking about.
7 Perhaps the number would need to be expanded during
8 political seasons.

9 QUESTION: How about a limitation as to size?

10 MR. GREIMAN: We believe the city may properly
11 regulate size, Chief Justice Rehnquist.

12 QUESTION: Well, if you expand according to the
13 political season, that's content-based, isn't it? Some
14 people are much more interested in sports than politics.

15 MR. GREIMAN: Well, Justice Kennedy, we don't
16 believe that if you adopted an expanded number during a
17 political season that it would be appropriate to limit
18 that expanded number only to political campaign signs.

19 QUESTION: Oh, but your reason is to accommodate
20 politics. You're saying that you don't have to give the
21 real reason for what your ordinance is?

22 MR. GREIMAN: Well, we're talking --

23 QUESTION: That's kind of tricky, isn't it?

24 MR. GREIMAN: We're talking about time, Your
25 Honor, and so long as we're talking about time, and we're

1 doing it in a content neutral way, and we're allowing
2 reasonable opportunities for expression, I believe that's
3 okay.

4 QUESTION: Well, I take it the purpose for your
5 expanding the number of signs in this hypothetical
6 ordinance during the political season was to accommodate
7 political speech. I mean, what other reason would you
8 have for doing that?

9 MR. GREIMAN: Yes, Your Honor, I believe that's
10 right.

11 QUESTION: And I ask why isn't that content-
12 based?

13 MR. GREIMAN: Well, the regulation in terms of
14 its effects is not content-based because it allows an
15 expanded number of signs --

16 QUESTION: But the purpose of your statute is
17 content-based. That's the underlying purpose.

18 MR. GREIMAN: Well, Your Honor, if one has a
19 purpose to allow speech consistent with the First
20 Amendment, and one goes about implementing that in a
21 content-neutral way to allow all speech along with the
22 particular type of political speech that you have most in
23 mind, I believe that's okay.

24 QUESTION: One of your arguments was that you
25 didn't have -- or that the people of this town didn't have

1 reasonable alternatives. Counsel on the other side has
2 conceded or represented this morning that they can scatter
3 leaflets at will. Doesn't that take care of your
4 reasonable alternative? Leaflets are cheap.

5 MR. GREIMAN: I don't believe it does, Justice
6 Souter. I believe the test for whether there are ample
7 alternative channels of communication is whether there are
8 alternative channels of the same nature and quality.

9 If the test was simply, is there any other way
10 you can express your message, then certainly the Linmark
11 case would have been decided differently, or a city could
12 say, we can ban newspapers altogether, because you can get
13 your news from television, or we can ban movies on grounds
14 that there are books. We have to look at the nature and
15 quality of communicating via small signs.

16 QUESTION: So alternative has got to include a
17 sign alternative then, in your view.

18 MR. GREIMAN: Well, alternatives have to include
19 something that is of the same nature and quality, and we
20 believe --

21 QUESTION: Well, what else is of the nature and
22 quality of a sign except a sign?

23 MR. GREIMAN: In the context of a resident
24 speaking at her own home, we maintain nothing. We believe
25 that there are very important and unique attributes to

1 speaking through a small sign at one's home that aren't
2 duplicated by other modes.

3 QUESTION: Well then, in fact it's not so much
4 the sign that you're relying on, it's the capacity to
5 speak from one's own property, isn't that it?

6 MR. GREIMAN: That's part of our position, Your
7 Honor, but here we're talking about a particular mode of
8 expression, and we're talking about whether there's some
9 alternative to that mode of expression that is of equal --

10 QUESTION: No, but as I understand what you were
11 just saying, if the city said, we're going to set aside
12 two acres on one of the downtown streets, and anyone can
13 put up a sign down there, this particular woman can go
14 down and put up a sign about the Gulf War, you would not
15 find that an adequate alternative, isn't that correct?

16 MR. GREIMAN: That's correct, Justice Souter.

17 QUESTION: And the reason you wouldn't is that
18 you believe the speech has got to be allowed from one's
19 own property.

20 MR. GREIMAN: That's correct, and the reason is
21 that speaking from one's own property has special
22 communicative impact. It conveys not only the message on
23 the sign, but that a resident at that site believes in
24 that message.

25 QUESTION: Well, what is your best authority for

1 that? If we accepted that proposition, what case would we
2 cite to support that -- Adderly v. Florida, the jail case,
3 went the other way.

4 MR. GREIMAN: I believe the Linmark case would
5 be the best authority, Justice Kennedy. Certainly there
6 are other ways to sell one's house -- via newspaper --

7 QUESTION: Well, but it seems to me -- because
8 that has just a common sense functional aspect to it. If
9 you're going to sell the house you should put a sign on
10 the house that this is the house.

11 MR. GREIMAN: Well, we believe we're talking
12 about the same thing here, Justice Kennedy.

13 QUESTION: The woman is an extension of her
14 house?

15 MR. GREIMAN: Absolutely. We have a resident
16 who holds deeply seated views on a very important public
17 issue and wants to communicate those views to neighbors
18 and other residents. The house is a uniquely effective
19 place for doing that.

20 QUESTION: Well, what if she holds strong views
21 about selling lemonade, can she put a sign up, "Lemonade
22 for sale at this house"?

23 MR. GREIMAN: Well, Your Honor, that is a
24 commercial undertaking, and I believe that via zoning
25 laws, cities may regulate commercial activity.

1 QUESTION: So the city could prohibit that sort
2 of a sign?

3 MR. GREIMAN: Well, perhaps. It depends on what
4 kind of a sign regulation it is adopting.

5 QUESTION: Well, supposing it were just a flat
6 prohibition of all commercial signs?

7 MR. GREIMAN: Commercial signs it has greater
8 ability to regulate, Your Honor, because there are other
9 alternatives for engaging in commercial speech. Again, it
10 depends on what distinctions the city is drawing. It may
11 have greater ability to regulate in that area, but it has
12 no greater ability to discriminate on the basis of
13 content. I believe this Court made that clear in
14 Discovery Network.

15 QUESTION: I suppose she has an equivalent right
16 to speak on her own property, at least, so I guess the
17 city could not prevent her from setting up, you know, a
18 soapbox and holding forth about the evils of the Gulf War,
19 or about her favorite political candidate, and attracting
20 a crowd on the street because she's a very good speaker,
21 and people milling around in this residential
22 neighborhood. You couldn't stop that because she's doing
23 it on her own property.

24 MR. GREIMAN: You may not ban that, and
25 certainly again --

1 QUESTION: Right. You can do time, place, and
2 manner, but not this place. This place is sacred. She
3 can speak, she can put up signs, can do anything she wants
4 because it's her property. Is that the position?

5 MR. GREIMAN: Not quite, Justice Scalia. You
6 can impose time, place, and manner regulations relating to
7 private property as well, but they have to be time, place,
8 and manner, not total bans.

9 QUESTION: Supposing she wants to get a bullhorn
10 to amplify her message? Can the city prohibit her from
11 getting a bullhorn to speak from her own property?

12 MR. GREIMAN: Chief Justice Rehnquist, they may
13 regulate that aspect, because once you get into bullhorns,
14 you're getting into the Ward type situation, you're
15 getting into the Kovacs Sound type situation, and you are
16 talking about regulating volume now. You're talking about
17 regulating non --

18 QUESTION: Because it goes off of her property,
19 is that it? So the city -- as far as I know, the city
20 permits signs that can't be seen off of the property.

21 MR. GREIMAN: That's correct.

22 QUESTION: I mean, if she wants to put a sign
23 behind a hedge, where only people who come on her property
24 see it, that's okay. Isn't that the equivalent of letting
25 her speak, but not with a bullhorn? She can speak on her

1 property, but don't annoy people outside the property.

2 MR. GREIMAN: I don't believe so, Your Honor,
3 because Ms. Gilleo's sign stands silently on her own
4 property. You don't see it unless you choose to look.

5 QUESTION: It's not visually -- this is visual
6 clutter. Isn't that the words, something like that? It's
7 not visually silent. It's very noisy visually.

8 MR. GREIMAN: It is visually silent, Justice
9 Scalia, unless you choose to look over on Ms. Gilleo's
10 property.

11 QUESTION: Then why don't you take the position
12 that if the city can prohibit the signs in the manner in
13 which it's trying to do here, you can equally, or could
14 equally well prohibit the person from standing on the
15 soapbox and speaking in a manner that could be heard next
16 door.

17 MR. GREIMAN: Well, Justice Souter, I believe I
18 said that they may regulate volume, they may impose other
19 time, place, and manner regulation.

20 QUESTION: Yes, but we're not talking about the
21 bullhorn, or let's say just in a manner that could be
22 heard on the street. If the city can do this, can the
23 city prevent the person from standing on the soapbox and
24 speaking in a way that could be heard on the sidewalk and
25 the street because the people in the town don't want audio

1 clutter?

2 MR. GREIMAN: I don't believe that the City of
3 Ladue may ban that mode of expression entirely.

4 QUESTION: Well, that may be, but if they can
5 ban what they're purporting to ban here, can they ban that
6 as well?

7 MR. GREIMAN: If you accept that they can ban
8 what they ban here, I believe the implication of that
9 position is yes, they can ban her from standing on a
10 soapbox at her property.

11 I believe the implication is that they could ban
12 private conversation on the sidewalks on the notion that
13 that interferes with the ability to hear birds chirping.
14 Or I believe that they could ban gatherings on public
15 sidewalks on the notion that clumps of people impair the
16 visual beauty of the natural landscape. That certainly
17 cannot be the law, and is not the law.

18 QUESTION: Well, except the problem there is
19 you'd suddenly find yourself in the public forum doctrine,
20 and the city's claim here is there's no public forum.
21 They're simply using private property to create clutter.
22 So I think your argument's got to be that they couldn't
23 use private -- that if the city is right, then by the same
24 token the city could ban using private property as a
25 source for the speaking that could be heard out on the

1 street.

2 MR. GREIMAN: Justice Souter, on the continuum
3 of nonpublic forum, limited public forum, we believe that
4 Ms. Gilleo's private home here has to be viewed as either
5 the equivalent of a public forum for protected purposes,
6 or even stronger, because again we're talking about a
7 citizen's right to speak from her own home, as the Court
8 recognized had special significance in the Vincent case,
9 the Court recognized that in Spence, the Court has
10 recognized that in a number of other cases.

11 QUESTION: Can you tell me -- it's not a very
12 important question -- do they prohibit "Keep off the
13 grass" signs?

14 MR. GREIMAN: They don't, Your Honor. They
15 allow directional signs.

16 QUESTION: "Keep off the grass" is a directional
17 sign?

18 MR. GREIMAN: They've made clear that "No
19 trespassing" signs are allowed. You may have those in any
20 number, and they may be up to 12 square feet in size.

21 QUESTION: And "Beware of the dog."

22 (Laughter.)

23 QUESTION: "Beware of the dog," similarly. You
24 can have that sign.

25 MR. GREIMAN: "Beware of dog" is also permitted

1 in any size, and in any number.

2 QUESTION: But I just want to make one thing
3 clear. Do you agree that there is no ordinance which
4 prohibits leaflets and pamphlets?

5 MR. GREIMAN: I'm not aware of any, Your Honor.

6 QUESTION: Mr. Greiman, would it be a reasonable
7 alternative if at some public and prominent site within
8 the community -- for instance, city hall -- there were a
9 space or a big bulletin board allowed where the homeowners
10 could place signs of any type, and could identify
11 themselves as being homeowners within the city, so that
12 everyone who saw it would know, this is the expression of
13 the view of the homeowner who put it up?

14 MR. GREIMAN: I don't believe so, Justice
15 O'Connor, for this reason. By speaking in that manner
16 rather than at your own home, you lose the special
17 communicative impact that you gain from your own home.

18 QUESTION: Well, how is that if the sign itself
19 allows you to identify yourself as a homeowner in the
20 community?

21 MR. GREIMAN: Well, for example, a "Tax the
22 Rich" sign posted in front of an affluent home carries a
23 different communicative impact than would the exact same
24 sign displayed in a less affluent area. I believe that
25 you lose those communicative impacts by relegating

1 everyone to a single space.

2 QUESTION: Mr. Cherrick, if you reject the
3 notion that this is a place restriction and therefore
4 okay, what about the notion that it's simply a manner
5 restriction and therefore okay?

6 Apparently, any sign is okay so long as it's on
7 a flag. Now, that's just a manner. All you have to do is
8 take it out of your window, put it on a rectangular piece
9 of cloth, and hang it outside. It's all right. That's
10 manner.

11 MR. GREIMAN: Well, Justice Scalia, that gets
12 into arbitrariness, and perhaps viewpoint discrimination.
13 American flags are readily and easily available --

14 QUESTION: Not American flags, any flag. Any
15 piece of cloth qualifies as a flag under this ordinance.
16 You can have a cloth that says, "Oppose the Gulf War," and
17 hang that outside, and that's okay.

18 MR. GREIMAN: That suggests that if one wants to
19 display an American flag at one's home, one can very
20 easily go down to the corner store, buy one, and put it
21 up, but if you want to display a custom-made flag message
22 you have to go to a great deal of trouble, perhaps, or a
23 great deal of expense to have your own sign custom-made.

24 QUESTION: All you've got to do is get a piece
25 of cloth and some paint.

1 MR. GREIMAN: That may be more difficult, Your
2 Honor --

3 QUESTION: Is it more difficult than making a
4 sign? You've got to get a piece of cardboard and some
5 paint.

6 MR. GREIMAN: Well, Ms. Gilleo didn't have to
7 make her own signs. They were being distributed by
8 groups. She could --

9 QUESTION: Sign-makers and flag-makers can make
10 them equally easily, can't they?

11 MR. GREIMAN: They may make them, but they don't
12 make them, and if one has to custom-make --

13 QUESTION: Well, they don't because the word
14 hasn't gotten out, but I mean the flag business is --

15 (Laughter.)

16 QUESTION: I don't think a lot of people have
17 known that the city has been interpreting its ordinance
18 this way, but now that the word is out, the flag-makers
19 will have a --

20 QUESTION: -- boom business.

21 (Laughter.)

22 MR. GREIMAN: Perhaps, and it hasn't been clear
23 to me through the city's position in this case whether
24 they concede that you can make your own sign out of a bed
25 sheet, for example.

1 QUESTION: Well, if it's true, what about the
2 answer to Justice Scalia's question? Why isn't simply a
3 manner restriction?

4 MR. GREIMAN: If it is true, then that confirms
5 the arbitrariness and the content-discriminatory nature of
6 the ordinance, and the lack of validity to their asserted
7 reasons, because certainly a homemade sign on a bed sheet
8 has no lesser impact on so-called visual blight than does
9 a small, 8-1/2 X 11 inch sign posted inside a window of
10 somebody's home.

11 Perhaps the major flaw in Ladue's position
12 throughout this case is that it largely ignores the
13 existence of the First Amendment. Ladue goes on at length
14 on principles of zoning law and land-use law, but it
15 overlooks the fact that the First Amendment imposes
16 constraints.

17 QUESTION: Well, just to be sure of where your
18 position takes you, I would assume you would have to say
19 that the Federal Highway Beautification Act is similarly
20 invalid.

21 MR. GREIMAN: We do not say that at all, Justice
22 O'Connor. We believe the Highway Beautification Act
23 imposes a very different regulatory scheme than Ladue's
24 ordinance.

25 Thank you.

1 QUESTION: Thank you, Mr. Greiman. Mr. Bender,
2 we'll hear from you.

3 ORAL ARGUMENT OF PAUL BENDER

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 QUESTION: Mr. Bender, I take it you would agree
7 with that last comment, that the Highway Beautification
8 Act is a different --

9 MR. BENDER: Right, it is different, and perhaps
10 I should start there.

11 QUESTION: How is that different?

12 MR. BENDER: The difference is that Highway
13 Beautification Act -- there's several differences. I
14 think that the main one is that the Highway Beautification
15 Act does not constitute a complete ban on this medium of
16 expression in a community. The Highway Beautification Act
17 only applies within a narrow strip of land adjacent to
18 interstate highways. Even then, it --

19 QUESTION: But that narrow strip might consist
20 of somebody's home.

21 MR. BENDER: Certainly --

22 QUESTION: Their only home.

23 MR. BENDER: Right --

24 QUESTION: Their only opportunity to put up a
25 political sign.

1 MR. BENDER: It might, but the Highway
2 Beautification Act does not deprive them of that only
3 opportunity to put up a political sign. They can put up
4 the sign in a way that faces away from the highway,
5 probably the street on the other side of the highway.
6 Very few -- very few houses have their driveways off a
7 major interstate highway.

8 QUESTION: Well, that's like saying she can put
9 a sign in the backyard.

10 QUESTION: Right.

11 MR. BENDER: Where no one can see it, right.

12 QUESTION: You know --

13 (Laughter.)

14 QUESTION: -- I mean, if you say you can put a
15 sign on I-95, but you've got to face away from the
16 highway, that's not --

17 QUESTION: Facing the back 40.

18 MR. BENDER: Well, no, I think that --

19 (Laughter.)

20 MR. BENDER: -- I think there's an important
21 point there. People like Mrs. Gilleo who put up signs are
22 not trying to communicate with people passing by on an
23 interstate highway. They're primarily trying to
24 communicate with their neighbors.

25 The Highway Beautification Act is a very small

1 interference, if any, with people's ability to communicate
2 with their neighbors.

3 QUESTION: Well, you're just saying though, that
4 the audience on I-95 is bigger than the audience that
5 passes through Ladue. That doesn't --

6 MR. BENDER: No, I'm not talking about the fact
7 that there are all those cars, I'm talking about the
8 purpose of the expression here, and I think it's very
9 important. The purpose of the expression, I think, is for
10 her to communicate an adherence to a principle to the
11 people in her community. That is, I think, the --

12 QUESTION: Well, why is that different than the
13 purpose to communicate your opposition to drunk driving,
14 and you want the people who are driving cars to be
15 particularly aware of that communication?

16 MR. BENDER: That is a different kind of
17 interest that somebody might also have. The difference
18 there is that -- and I think this is the central factor
19 that one needs to look at in analyzing this case, is that
20 with the Highway Beautification Act there is a strong
21 reason for prohibiting that kind of a sign, because if you
22 had every house that an interstate highway went by with a
23 sign like that it really would be cluttered.

24 The only reason that the City of Ladue gives
25 here in either the ordinance or their brief for

1 prohibiting this sign is that the proliferation of an
2 unlimited number of signs in the community is an evil.

3 They do not say, I don't think they mean, and I
4 don't think they could possibly say that single signs, or
5 very small numbers of signs, are a problem.

6 QUESTION: I'm not sure I follow the argument.
7 I thought that you began with the premise that the Highway
8 Beautification Act is sustainable because there will be --
9 there is a real danger of proliferation, and then you say,
10 and the only thing that Ladue says to justify its
11 ordinance is proliferation. I see there a parallel
12 between the two and not a distinction between the two.

13 MR. BENDER: I think you have to look first at
14 the reason why the governmental unit is trying to impose
15 the regulation.

16 In the case of the Highway Beautification Act, I
17 think it's a feeling that insofar as possible, when people
18 drive down highways they should see the scenery and
19 shouldn't see signs. Ladue has not said that it's -- when
20 people look out of their window they shouldn't see a sign.
21 What Ladue is worried about is the unlimited proliferation
22 of signs, and I think what they've done wrong here is that
23 to assert the interest in unlimited proliferation they
24 have just stopped all signs altogether.

25 At the very least, I think they should be

1 required to try a more modest kind of regulation. If in
2 fact that doesn't work, if in fact there is a problem,
3 then perhaps sometime they might be able to do this, but
4 without any showing that there is a problem of unlimited
5 proliferation in this community, to ban all signs in the
6 name of stopping unlimited proliferation seems to me
7 irrational.

8 QUESTION: Well, I don't know that you give the
9 city the entire benefit of the doubt that perhaps ought to
10 be accorded them. If unlimited proliferation is bad, I
11 presume they think that considerable proliferation is
12 almost equally bad. In other words, the idea that only
13 unlimited proliferation would bother them I don't think
14 makes much sense. It's any real proliferation at all.

15 MR. BENDER: Even if you talk about real
16 proliferation, Ladue says there might be as many as 3,000
17 signs in the community if everyone had one sign -- for
18 example, if there were a one-sign limit. There almost
19 6,000 acres in this community. That would be one sign for
20 every 2 acres. It's hard for me to see how you can relate
21 to it, and of course --

22 QUESTION: Does the Federal Government have a
23 one-sign limit in the highway act? Does it let -- the
24 Federal Government -- everybody put up one sign?

25 MR. BENDER: No, there's not a one sign limit

1 for that --

2 QUESTION: Isn't the real justification --

3 MR. BENDER: -- but I think --

4 QUESTION: Why is that okay? I don't understand
5 that.

6 MR. BENDER: I think you can't just look at
7 that, you've got to look at the impact on the community,
8 and I think it's extremely important that the Highway
9 Beautification Act does not shut off a means of
10 communication within an entire community.

11 QUESTION: I think you lose on that one. I'm
12 much more concerned about what I have to see when I look
13 out my front window than I am about what I'm driving by on
14 Interstate 90. Gee, I think the interest of the city is
15 much more than the interest of --

16 MR. BENDER: That may be your concern, but the
17 Federal Government's concern is with what you see when you
18 drive by on Interstate --

19 QUESTION: Well, you say your concern,
20 Mr. Bender. What we're asking is whether or not there's a
21 plausible, reasonable basis for the city's interest.

22 MR. BENDER: Right.

23 QUESTION: And you say that there's less of an
24 interest in a city, in a neighborhood, to prevent signs
25 than on a highway. That just doesn't make sense.

1 MR. BENDER: I think it's not only that there's
2 less of an interest, first of all I think you have to look
3 at what the city says, and the city talks about an
4 unlimited proliferation. I think you have to take them at
5 their word. They wrote this preamble, and that's what
6 they said.

7 QUESTION: Well, even that's odd, because it
8 means that if everybody's very interested in this speech,
9 then all of a sudden we can suppress it, so I have
10 problems with that rationale as well.

11 MR. BENDER: But I think you also have to look
12 at the impact of the regulation on the people who are
13 being regulated. Ladue is shutting off people from a
14 traditional means of communication. I think it's
15 important -- and this is a response to Justice Scalia's
16 question earlier. Yes, I think there is a separate
17 character of somebody putting up a sign or a flag at their
18 house. I think that's why people fly flags from their
19 house.

20 QUESTION: Why does that mean that your argument
21 is good with respect to billboard companies that in fact
22 can put billboards up in other places than along the
23 highway but not good and not a sufficient justification
24 with respect to the homeowner whose backyard backs up to
25 the highway and doesn't have another place to put up a

1 sign?

2 MR. BENDER: When those interests come into
3 collision in that way, I think you have to give the
4 decision to the governmental interest if it's reasonable,
5 but there is a situation, if the only place the homeowner
6 can put a sign is facing on the highway, then there the
7 Federal interest in keeping the highways beautiful I think
8 overwhelms that. But here, the -- because the Federal
9 Government has an interest, based on past history of
10 unlimited proliferation of signs along highways.

11 But here you don't have that kind of history,
12 and you don't even have the community saying that that's
13 the problem they're worried about.

14 QUESTION: So in effect you're saying the
15 justification falls in the city's case and it doesn't
16 fall --

17 MR. BENDER: Exactly.

18 QUESTION: -- in the Government's case.

19 MR. BENDER: Exactly.

20 QUESTION: The ordinance says proliferation, not
21 unlimited proliferation.

22 MR. BENDER: It is hereby declared that the
23 proliferation of an unlimited number of signs -- sorry.
24 It's the proliferation of an unlimited number, rather than
25 an unlimited proliferation.

1 And I think it's very important to think about
2 the communicative -- the special communicative quality of
3 a sign at one's home. It's not, Justice O'Connor, like
4 putting a sign in a downtown place. If you want to fly a
5 flag from your house -- I remember when I walked to school
6 during the Second World War going past houses that had
7 signs indicating that people from that house, children and
8 fathers, were in the service. There's some special
9 quality of doing that.

10 When people put yellow ribbons around trees in
11 front of their house to express support for the return of
12 the hostages, that's nothing that you can --

13 QUESTION: But you can't do it on a Federal
14 highway.

15 MR. BENDER: You can't do it on a Federal
16 highway, I suppose, that would be dangerous, but you could
17 also do it --

18 (Laughter.)

19 QUESTION: You're reading things very literally
20 today.

21 MR. BENDER: The Highway Beautification Act I
22 don't think affects yellow ribbons, and also, another
23 point about the Highway Beautification Act, you've got to
24 worry about the scale.

25 The Highway Beautification Act does not deal

1 with signs that can't be read, seen from the road.

2 Normally, unless the house is right next to the road, and
3 then I don't know how you're going to communicate with
4 your neighbors, a small sign like the sign in this case
5 would not violate the Highway Beautification Act. If the
6 house were, say, 100 feet from the road, it would not be
7 considered a sign because it's not visible. The Highway
8 Beautification Act is dealing with large-scale billboards.

9 QUESTION: I think the city's the same. I think
10 signs that can't be seen from the street would not violate
11 the city's ordinance. It's exactly like the Government.

12 MR. BENDER: Except that with the Highway
13 Beautification Act, that limitation means that people can
14 preserve the right to communicate with their neighbors who
15 might walk in front of the house, between the highway and
16 the house and see the sign, without injuring the Federal
17 interest of cluttering up the landscape for people driving
18 by.

19 This prevents people from using that traditional
20 means of expression to communicate with their neighbors
21 entirely, and there's no basis that we know of for doing
22 that. There's never been a clutter problem in Ladue.
23 There is no indication --

24 QUESTION: Does the city have to wait until
25 there is a clutter problem before dealing with it? I

1 think we said in City of Renton that a city doesn't have
2 to wait until the evils materialize before dealing with
3 it.

4 MR. BENDER: I think there has to be a
5 substantial chance that the evil will materialize, and I
6 don't think this record shows any substantiality of that
7 chance.

8 QUESTION: Thank you, Mr. Bender. Mr. Cherrick,
9 you have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF JORDAN B. CHERRICK

11 ON BEHALF OF THE PETITIONER

12 MR. CHERRICK: Thank you, Mr. Chief Justice.

13 The fact is, there's an undisputed record in the
14 summary judgment proceedings that in six neighboring
15 cities there was sign proliferation, so this is a real
16 problem that the city faces.

17 With respect to the Highway Beautification Act,
18 I think --

19 QUESTION: I think one could know that one way
20 or another now because the city has not been allowed to
21 have this ordinance for sometime, right?

22 MR. CHERRICK: It has been enjoined, and --

23 QUESTION: So -- I think for some 3 years, so
24 there is -- it's not in this record, but it is --

25 MR. CHERRICK: There's nothing in the record,

1 and I don't think you'd want me to discuss what's off the
2 record of the problems that have --

3 QUESTION: Presumably the only people who live
4 in the city are people who don't like signs. That's one
5 reason they've moved there. But once the ordinance is
6 gone, gradually the neighborhood will change and you'll
7 have all sorts of people coming in.

8 (Laughter.)

9 MR. CHERRICK: Well, Justice Scalia, I think
10 it's important to emphasize the limiting principles of our
11 submission. What we're dealing with here is a unique
12 aesthetic community, an 8-1/2-square-mile community that
13 has comprehensively protected aesthetics in every way
14 since its inception.

15 This -- it is -- we're also dealing with an
16 ordinance that is part of a land-use plan and a zoning
17 ordinance which has traditionally --

18 QUESTION: Are you saying that the community
19 that Justice Blackmun -- that you told Justice Blackmun
20 about couldn't now see the light and say, oh, we want to
21 do what Ladue -- because they've already -- they've just
22 gone downhill and they can't improve their situation?

23 MR. CHERRICK: Well, Justice Ginsburg, it's up
24 to every city to define its sense of values, its sense of
25 community, and we're not saying that every city has to

1 have this ordinance. What we are saying is --

2 QUESTION: But every city that wants it can have
3 it?

4 MR. CHERRICK: Yes, if that's -- and that is
5 what a land-use and zoning plan is all about. That is
6 what a comprehensive plan is, developing a sense --

7 QUESTION: Would a city need anything more
8 than -- you're not suggesting that because Ladue has all
9 these other regulations it can have this one as well, or
10 are you suggesting that? If -- suppose the Court were to
11 uphold the ordinance, then couldn't every other town in
12 the State of Missouri have the same ordinance?

13 MR. CHERRICK: If it had the same type of
14 interest that Ladue has and did it in a constitutional
15 fashion, but --

16 QUESTION: Just copy this ordinance word for
17 word.

18 MR. CHERRICK: Well, that may well be the case,
19 but not all cities would want to live in a type of
20 aesthetic community that Ladue had.

21 QUESTION: If they wanted to they could, though,
22 and it wouldn't matter that they didn't have a fancy city
23 planner come in at the outset.

24 MR. CHERRICK: Yes. Yes, that's accurate, much
25 as the Highway Beautification Act protects the highways,

1 but the question before the Court is, will a city like
2 this be disabled from regulating and protecting the
3 essential values that it has had since its very inception,
4 and is the Court -- my time has expired.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you,
7 Mr. Cherrick. The case is submitted.

8 (Whereupon, at 11:20 a.m., the case in the
9 above-entitled matter was submitted.)

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