

The Burger Court Opinion Writing Database

Los Angeles v. Preferred Communications, Inc.

476 U.S. 488 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1986

RE: 85-390 - City of Los Angeles & Dept.
of Water v. Preferred
Communications, Inc.

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

6

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 27, 1986

No. 85-390

City of Los Angeles
and Department of Water
and Power v. Preferred
Communications, Inc.

Dear Bill,

I agree.

Sincerely,



Justice Rehnquist

Copies to the Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1986

85-390 - City of Los Angeles v. Preferred
Communications, Inc.

Dear Bill,

Please join me.

Sincerely yours,

A handwritten signature, likely of Justice Byron R. White, written in cursive.

Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1986

Re: No. 85-390 - City of Los Angeles and Department
of Water and Power v. Preferred Communications

Dear Harry:

Please join me in your concurring opinion.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

MAY 21 1986

Circulated: _____

Recirculated: _____

4
 [Handwritten notes and scribbles]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-390

CITY OF LOS ANGELES AND DEPARTMENT OF
 WATER AND POWER, APPELLANTS *v.* PRE-
 FERRED COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[May —, 1986]

JUSTICE BLACKMUN, concurring.

I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e. g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), with *FCC v. League of Women Voters*, — U. S. —, — (1984) (slip op. 15). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 5, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: MAY 29 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-390

CITY OF LOS ANGELES AND DEPARTMENT OF
 WATER AND POWER, PETITIONERS *v.* PRE-
 FERRED COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[June —, 1986]

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and
 JUSTICE O'CONNOR join, concurring.

I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e. g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), with *FCC v. League of Women Voters*, — U. S. —, — (1984) (slip op. 15). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 5, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

MAY 29 1986

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 26, 1986

85-390 City of Los Angeles v. Preferred Communications

Dear Bill

Please join me.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: **MAY 21 1986**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-390

CITY OF LOS ANGELES AND DEPARTMENT OF
WATER AND POWER, APPELLANTS *v.* PRE-
FERRED COMMUNICATIONS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc. sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§ 1 and 2 of the Sherman Act by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. R. Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. We granted certiorari with respect to the latter issue, — U. S. — (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the South Central area of Los Angeles. Jt. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television franchise from the City. Jt. App. 6a. Respondent

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1986

Re: 85-390 - City of Los Angeles v. Preferred
Communications

Dear Sandra:

I would be happy to make changes along the following lines to respond to the suggestions contained in your letter of May 22nd:

(1) Revise the sentence beginning on the last line of page 5 to read as follows:

"Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969), even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interests in regulating by reason of the scarcity of available frequencies."

(2) Revise the last sentence in the first full paragraph on page 6 to read as follows:

"We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them."

Sincerely,



Justice O'Connor

cc: The Conference

STYLISTIC CHANGES THROUGHOUT

pp. 6 & 7

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: _____

MAY 28 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-390

CITY OF LOS ANGELES AND DEPARTMENT OF
 WATER AND POWER, APPELLANTS *v.* PRE-
 FERRED COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[May —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc. sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§ 1 and 2 of the Sherman Act, by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. R. Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. We granted certiorari with respect to the latter issue, — U. S. — (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the South Central area of Los Angeles. Jt. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television franchise from the City. Jt. App. 6a. Respondent

MAY 30 1986

STYLISTIC CHANGES THROUGHOUT

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 85-390

CITY OF LOS ANGELES AND DEPARTMENT
OF WATER AND POWER, PETITIONERS *v.*
PREFERRED COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 2, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc., sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§ 1 and 2 of the Sherman Act, by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. 754 F. 2d 1396 (1985). We granted certiorari with respect to the latter issue, 474 U. S. — (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the South Central area of Los Angeles. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 4, 1986

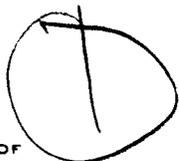
MEMORANDUM TO THE CONFERENCE

Re: Case was held for City of Los Angeles v. Preferred Communications, Inc., No. 85-390.

No. 85-502: National Association of Broadcasters v. Quincy Cable TV, Inc.

In 1979, the FCC issued a report in which it rescinded certain rules governing the cable television industry, but retained its "must carry" rules, which require a cable television operator to include network television stations in its repertoire of channels. Respondent Turner Broadcasting System (TBS) petitioned the FCC to eliminate its "must carry" rules on the ground that they limited TBS's opportunity to engage in speech that is protected under the First Amendment. The FCC declined the invitation to eliminate its rules. Meanwhile, the FCC imposed a \$5,000 fine on respondent Quincy Cable for violating the "must carry" rules. Quincy challenged the rules on the ground that they forced it to engage in speech against its will in violation of the First Amendment. After a formal hearing, the FCC rejected Quincy's claim. The CADC consolidated the appeals from these cases, and petr National Association of Broadcasters intervened. The CADC reversed the FCC's decision, holding that the "must carry" rules violate the First Amendment. The FCC decided not to file a cert petn, but the intervenors did.

The cert petn makes five claims: (1) the "must carry" rules do not abridge the free speech rights of cable operators, (2) the decision creates a conflict with this Court's decisions and with decisions in other circuits, (3) the "scarcity rationale" was improperly rejected, (4) the test set forth in United States v. O'Brien, 391 U.S. 367 (1968), was improperly applied, and (5) the factual record was insufficient to support invalidation of the "must carry" rules.



CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Supreme Court of the United States
Washington, D. C. 20543

May 22, 1986

Re: 85-390 - City of Los Angeles and
Department of Water and Power
v. Preferred Communications, Inc.

Dear Bill:

Please join me.

Respectfully,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 22, 1986

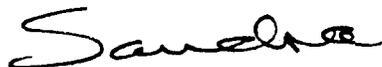
No. 85-390 Los Angeles v. Preferred Communications

Dear Bill,

I expect to join your opinion in this case. I do, however, have two changes I would appreciate your considering. At the top of page 6, the opinion suggests that the activities of cable operators implicate the First Amendment in much the same way as "the activities of wireless broadcasters." Included in the sentence is a citation to Red Lion. I am concerned that lower courts might read this to imply that the standard for First Amendment review of cable regulations should parallel the standard the Court has traditionally applied to broadcast regulations. Because of significant technical differences between the two media, I have my doubts that cable and broadcasting warrant the same approach under the First Amendment. Would you consider changing the sentence in a manner that would avoid any possibility that lower courts would read the opinion to suggest the contrary?

I have a similar concern with respect to the last sentence of the full paragraph on page 6. My sense is that the public forum doctrine is not a particularly helpful analytic tool in this context. And lower courts are presently divided on whether to employ public forum analysis in cases such as this. I am concerned that lower courts will read this sentence as an indication that we have endorsed this approach to the problem. Would you consider making a change that avoids this possibility? Perhaps this could be accomplished with the addition of a footnote reserving the question of the relevance of public forum analysis in this context.

Sincerely,



SDO

Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 22, 1986

No. 85-390 City of Los Angeles v. Preferred
Communications

Dear Bill,

Thank you for offering to make the suggested
changes in this case. Please join me.

Sincerely,



Justice Rehnquist

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MAY 23 1986

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 27, 1986

No. 85-390 City of Los Angeles v.
Preferred Communications, Inc.

Dear Harry,

Please join me in your concurring opinion.

Sincerely,



Justice Blackmun

Copies to the Conference