ORIGINAL

In the

Supreme Court of the United States

BERNARD CAREY, etc.,	)	
	)	
Appellant,	)	
	)	Number:
--vs--	)	79-703
	)	
ROY BROWN, et al.,	)	
	)	
Appellees.	)	

Washington, D.C.
April 15, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

BERNARD CAREY, ETC., Appellant, v. ROY BROWN, ET AL., Appellees.	No. 79-703

Washington, D. C.,

Tuesday, April 15, 1980.

The above-entitled matter came on for oral argument at 11:16 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ELLEN G. ROBINSON, ESQ., Assistant State's Attorney, 500 Richard J. Daley Center, Chicago, Illinois 60602; on behalf of the Appellant

EDWARD BURKE ARNOLDS, ESQ., 315 South Plymouth Court, Chicago, Illinois 60604; on behalf of the Appellees

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-703, Carey v. Brown.

Ms. Robinson, you may proceed.

ORAL ARGUMENT OF ELLEN G. ROBINSON, ESQ.,

ON BEHALF OF THE APPELLANT

MS. ROBINSON: Mr. Chief Justice, and may it please the Court:

This is a residential picketing case, an appeal to this Court from the Seventh Circuit. And this case, like the Fourth Amendment case announced today by Mr. Justice Stevens, raises important questions concerning the nature and the scope of residential privacy.

I am here to argue on behalf of the Illinois residential picketing statute which prohibits all picketing of homes which are used only as places of residence, but it allows labor dispute picketing of houses and homes which also function as a place or the location of employment relationship. The narrow --

QUESTION: Does that mean some kind of an industrial or commercial activity or does it include a house where they have a house maid?

MS. ROBINSON: Yes, I would say that it does, Your Honor.

QUESTION: It does include a house where there

is --

MS. ROBINSON: Yes. In fact, I would say that the labor dispute exception is focused to deal with that kind of employment relationship.

QUESTION: But in order to have the picketing, then there would have to be a dispute between the house maid and the housewife, is that so?

MS. ROBINSON: Yes.

QUESTION: So just the existence of employment on the premises is not enough?

MS. ROBINSON: Yes.

QUESTION: I suppose conceivably there might be a movement among house maids to organize and that picketing would take place at sites where house maids were employed?

MS. ROBINSON: That's correct, Your Honor. The picketing could concern the employment relationship by persons concerning the employment relationship as well as the employee, him or herself.

The narrow question in the --

QUESTION: Ms. Robinson, to get the scope of the ordinance, by residence or dwelling, would that include a dwelling such as Lake Point Towers or one of the very large hi-rise apartment buildings?

MS. ROBINSON: That is a difficult question,

Your Honor. The statute has never been construed by any state court and the state courts apparently have never had an opportunity to construe the statute. On its face and read in terms of common understanding, I would answer yes.

QUESTION: And there are in Chicago I take it some very large buildings that include even supermarts and various kinds of stores, as well as apartments?

MS. ROBINSON: Of course.

QUESTION: So there you could have customary kinds of labor disputes by other than house maids?

MS. ROBINSON: Yes, absolutely. But of course the statute excepts from the overall ban on picketing residences which are used as places of business, and that is a separate exception than the labor dispute exception. So any common place of business can have any kind of picketing.

QUESTION: No, I was referring to a building that contained a large number of dwellings, such as an apartment building, and also contained places of business. This ordinance would apply to that structure and would permit labor dispute picketing but would ban all other picketing?

MS. ROBINSON: No, I don't think so, if I understand your question correctly. The statute on its face permits all picketing of buildings, of residences which

are used as places of business. So if you have a big building that has a supermarket on the ground floor, I think under the terms of the statute, given their common meaning, that you could picket it without reliance on the labor dispute exception.

QUESTION: Well, it would depend upon whether the residence is thought to be the whole apartment building or one of the apartments in it.

MS. ROBINSON: Thank you, Your Honor.

QUESTION: The Illinois court could construe it eitherway, I suppose, without being off the wall.

MS. ROBINSON: Of course, certainly in light of the purposes of the statute we assume that it would give it a fairly narrow construction.

As I say, the question in this appeal is a very narrow one and that is whether, because of the labor dispute exception to the overall prohibition on residential picketing, the statute violates the equal protection clause.

The facts in the case are uncontroverted. The plaintiffs are all members of the civil rights organization, and one evening in 1977, about twenty members of this organization went to the single-family home of the then Mayor of Chicago to picket his house to protest his position on school busing.

Most of the people who were picketing were

arrested and charted with violating the residential picketing statute. They pleaded guilty and they were sentenced to periods of supervision. When the periods of supervision were concluded, they filed suit in Federal District Court in Chicago seeking a declaratory judgment and injunction, claiming that the statute violated both their First Amendment rights and their equal protection rights.

QUESTION: Did they seek to set aside their guilty plea?

MS. ROBINSON: No, they did not in any way attempt to collaterally attack their former state court conviction.

The District Court ruled on cross motions for summary judgment, with theonly evidence in the record being the affidavits of the plaintiffs regarding their intentions to picket in the future. They alleged that they wanted in the future to picket the Mayor of Chicago again as well as various other residences in Chicago neighborhoods.

The District Court upheld the statute on both First Amendment grounds and on equal protection grounds. The plaintiffs appealed and the Seventh Circuit reversed without reaching the First Amendment issues raised. That court struck the statute on equal protection grounds. The Seventh Circuit as impressed by the similarities

between the residential picketing statute and the school picketing statute that this Court held unconstitutional in Mosely.

They noted that each statute contained a general prohibition of picketing in a certain place, with a labor dispute exception. And because of these similarities, the Seventh Circuit wrote that it could find no principal basis of distinction between the two statutes.

We appealed because we think that there is an important difference between a statute which protects quiet classrooms and one which promotes residential privacy. And we think that this aspect of the appeal is going to turn on the critical and important differences between homes and between schools.

Mosely was a regulation passed by the City of Chicago to protect quiet schools, and it prohibited all picketing around schools when schools were in session except for labor dispute picketing. But as the court noted in its opinion, both labor picketing and non-labor picketing are equally disruptive of quiet classrooms, and the state couldn't offer any good reason why it would tolerate one kind of deceptive picketing but not another.

Because of this arbitrary choice, the statute was held unconstitutional on equal protection grounds. But Mosely didn't create a per se rule against every labor

dispute exception in a picketing statute. In fact, the opinion itself specifically set forth the circumstances under which such an exception would be constitutional, and that would be where it was narrowly tailored and reflected an important state interest that the state was trying to further. Andwe think that the residential picketing statute is just such a statute.

This statute protects all of our rights to be let alone in our own homes, and the Legislature of Illinois found that this right is disrupted when people picket our homes. But the legislature also recognized that the resident doesn't have the same right to be let alone in his own home by a stranger who invites into his house for an employment relationship. This invitation, this bringing in of a stranger, dilutes his right of residential privacy as to that stranger, and it also creates the, the mere act of forming the employment relationship creates rights under state law to picket the place of employment in case a labor dispute arises.

Because these two factors are present, the dilution and the creation of the substantive right in the employee to picket, it's reasonable to let the residential employee, but nobody else, picket a home which is also a place of employment, in contrast, then, to the labor dispute exception in the Mosely ordinance, which didn't have

any clear reason, in fact. There's a clear reason for allowing a labor dispute exception in the residential picketing statute which protects residential privacy.

We think that the reason that the 7th Circuit couldn't find a basis of a distinction then between this statute and the Mosely ordinance, was that the 7th Circuit focused on the conduct or the picketing that was being prohibited instead of looking at the interests that the state was trying to protect.

Now, having shown what the differences are between the Mosely ordinance and the residential picketing statute, I had planned to talk more about the right of residential privacy and about the judgments about that right that the Illinois legislature made in this statute. In light of the New York Fourth Amendment opinions announced today, I don't think I'll elaborate on residential privacy too much, but I will note that the court has been no less solicitous of the interest of being let alone in our own homes in First Amendment cases than it was today in Fourth Amendment cases.

QUESTION: May I interrupt to ask you a question about the comparison between this case and Mosely? If I understand your argument, you're saying in Mosely you had schools, and the difference between -- just on the kind of picketing, whereas here you've got pure homes and homes

that are partly homes and partly places of employment, and it's fair to distinguish between those two. But isn't there still another problem, and that is that within the category of homes which are also places of employment, you have some picketing that's prohibited and yet labor picketing is permitted, so is there not the same problem that you had in Mosely, if you just focus on the, on those homes that are also places of employment, that the picketing as to those draws a distinction based on content?

MS. ROBINSON: Well, the conduct -- as to the aspect of the conduct which is being prohibited, yes, there is a direct correlation between our statute and the Mosely ordinance.

Our point is that because the interests which are being protected are so different and so differently affected by the two kinds of picketing that we have being prohibited, that this statute is distinguishable from Mosely.

QUESTION: You are saying, if there are two pickets in front of a house that's partly a place of employment, one of the pickets is a non-labor picket and one is a labor picket, that the ordinance is perfectly valid, you may arrest the one but not the other?

MS. ROBINSON: Yes, that's correct.

QUESTION: And you think that's a rational or --

you've got a good enough reason for distinguishing between those pickets?

MS. ROBINSON: Right.

QUESTION: To sustain the ordinance?

MS. ROBINSON: That's right. The reason is basically because Illinois has -- is being jealous to protect the rights of people to be let alone in their homes, while at the same time being careful to not unfairly limit the rights of employees to picket their place of employment.

QUESTION: If we agree with you on the equal protection ground, what do we do then?

MS. ROBINSON: Well, that would leave open the traditional First Amendment question which is irrespective of the --

QUESTION: What would we do, remand?

MS. ROBINSON: You could. We would urge you not to remand. The issue is fully briefed, there is a full opinion by the district court. The questions are so closely intertwined and both the First Amendment and equal protection question both require an inquiry into the scope and the nature of residential privacy, which is before the Court. So we would urge you also to consider the broad First Amendment question raised.

QUESTION: May I ask one other question. In the court of appeals, as I remember the case, you questioned

the standing of these litigants to challenge the distinction as between different kinds of picketing in a place that is used for employment. I don't understand you to be making the same argument here.

MS. ROBINSON: We don't make that argument to this court. We are agreeing with the 7th Circuit that the statute regulates -- doesn't regulate a place in the sense of a geographical location, but merely a home with two different functions.

QUESTION: Thank you.

QUESTION: What do you suppose, Ms. Robinson, the legislature had in mind when it exempted from this legislation the person peacefully picketing his own residence? What kind of a situation would that be?

MS. ROBINSON: If I may go outside the record a little bit, Your Honor, in Illinois there is no legislative history of this kind of statute, but there is a report about it, and according to the report, the thought was that this would allow slum tenants to picket the place where they live in order to protest the terrible --

QUESTION: Protesting their landlord's practices?

MS. ROBINSON: -- conditions. Right.

QUESTION: I see.

QUESTION: In the hypothetical that Mr. Justice White just put to you about the two people, one a labor

picketing and the other some political issue picketing, it would be necessary, I take it, under the ordinance here, under the statute, that there be a labor dispute between the homeowner and the person picketing, is that correct?

MS. ROBINSON: Yes, but the labor dispute could exist even if the employee wasn't part of the dispute. For example, if you have a condominium that employs non-union janitors and the non-union janitor is perfectly happy to be there, conceivably union janitors could engage in picketing, very much like a traditional labor law case.

Just briefly to note the cases, the two cases which we feel like the most important regarding First Amendment rights and residential privacy, I would suggest that both the Rowan case and FCC vs. Pacifica Foundation are the most important cases for establishing the power of states to protect people's rights to be let alone in their homes as against unwanted and uninvited intrusions.

In Rowan, a Post Office regulation which allowed the Post Office not to deliver mail which a homeowner found intrusive or offensive was upheld, and in Pacifica Foundation, the FCC censure of a broadcast of a comedian's offensive monologue was upheld. The appellees would suggest that these were really just dirty words cases, but we think that these cases turned on the fact that one of the targets

of the communications was people in their homes, and that the cases stand for the proposition and the government has special power to protect people when they're in their homes. After all, both the communications in Rowan and Pacifica Foundation would have been fully protected if they had been broadcast to a person on the street or in some other public place.

There's a suggestion by the appellees that picketing may not be disruptive of residential privacy. Well, the Illinois Legislature found that it was, and the district court agreed that this finding was a reasonable finding, and we think surely that if under Rowan a piece of mail which could be easily thrown away, and under Pacifica Foundation a radio broadcast which could be simply turned off, were found to be sufficiently disruptive of our rights to be let alone, then clearly a picketer patrolling at our front doorstep should be sufficiently disruptive to sustain state regulation.

QUESTION: Would this apply if there was nobody in the house? Of course it would.

MS. ROBINSON: On its face it would, Your Honor, and I repeat only that the statute has not been construed by the state courts.

QUESTION: That it doesn't apply when there's nobody there?

MS. ROBINSON: On its face, it appears to. On its face. I would suggest, of course, that we don't have picketing with nobody in the house on the facts of this case. We have 20 people picketing a home and in the pleadings there is no allegation as to whether the mayor and his wife and baby were at home or not.

QUESTION: Well, you could restrict the number of pickets.

MS. ROBINSON: The state could?

QUESTION: Why certainly. Don't they do it in labor disputes?

MS. ROBINSON: That would have been one way to handle it.

QUESTION: Well, don't they? They do it regularly. And in --

MS. ROBINSON. Yes.

QUESTION: -- they didn't say a word, and everybody in the house was sound asleep.

MS. ROBINSON: On its face.

QUESTION: Huh?

MS. ROBINSON: On its face it would, Your Honor. We would submit, Your Honor, that this would not be a proper case, given the pleadings as they exist, to strike this ordinance as unconstitutional on its face under the First Amendment, as it might hypothetically be applied to

the conduct you suggested and many, many other ideas that the appellees raised in their briefs. We have here a statute which protects conduct -- I mean which regulates conduct and not merely pure speech. We have a statute that is clearly susceptible to a narrow state construction, and we have here plaintiffs who when they had the opportunity to seek a narrowing construction from the state court, voluntarily forewent that opportunity in order to plead guilty to escape what might have been a more harsh sentence.

So I would urge that the question only be, the First Amendment question only be as applied to the plaintiffs, to the conduct that the plaintiffs actually engaged in, and it's in the record.

As to the traditional First Amendment question, which I was asked about, the issue of course would be whether irrespective of the distinction between labor and non-labor picketing, Illinois can prohibit picketing at a home, and we know, of course, that the state can regulate picketing on sidewalks where that conduct is inconsistent with the youth of the surrounding areas, and that the case would resolve into a very traditional balancing between the rights of the picketers and the rights of the homeowners. And we think that the key in this case to that balancing would be the district court's finding that the picketers here have alternative places where they could

have picketed the mayor. They could have picketed him at city hall or at any of the other public places that he went to in the course of performing his official duties.

QUESTION: The Gregory case come from your City of Chicago.

MS. ROBINSON: Yes, it did.

QUESTION: And what were the facts of that case?

MS. ROBINSON: That case concerned a merge around a four-square-block area in the mayor's neighborhood, and the holding of the court was that the, that Mr. Gregory and his group had been arrested and charged for disorderly conduct, and the holding was that the facts as presented to the trial court did not support a disorderly conduct, and we think that that's a very important case because of Mr. Justice Black's and Douglas' concurrence --

QUESTION: Right.

MS. ROBINSON: -- where it invites states to pass ordinances just like the regulation that Illinois has passed here, to protect the rights of people to be let alone in their homes and free from picketers who would interrupt their privacy. So the picketers here have different places where they can picket, and if they nevertheless want to insist on their right to communicate with people when they're in their own homes, there's other and less intrusive ways they can do it.

They could do door-to-door solicitation. They could write letters. They could have phone calls. They could call at the homes --

QUESTION: Well, they could climb in the windows if they wanted to, I suppose, if they insisted.

MS. ROBINSON: I suppose that they could. That, of course, would --

QUESTION: Raise some questions?

(Laughter.)

MS. ROBINSON: Yes, raise some questions, right.

And each of those methods would be far more preferable than picketing, because the resident can control each of those messages. He can throw away mail that he doesn't want, and hang up on a phone caller. He can post a sign to deter door-to-door solicitation, like the court invited the residents to do in the Schaumburg case which it recently decided.

QUESTION: Of course, he can do all those things, unless he has non-union janitors and the union doesn't like that.

MS. ROBINSON: To that extent, though, Your Honor, the resident has waived his right to be entirely let alone by these employees and these people who want to communicate with or about the employees, to the extent that he has knowingly and voluntarily lived in a place or created an

employment relationship within his own home.

QUESTION: May I ask a question: I am not entirely clear yet as to who may picket a residence. Let's assume that the 20 people who were picketing this residence were all employed in the neighborhood, say as domestics, but only one of the 20 was employed in the residence of the mayor, and he or she had a disagreement with the mayor or his wife. Could all 20 continue to picket?

MS. ROBINSON: I think on its face if the 19 were picketing in support of the one employee, that the statute would apply to allow the picketing of the entire group.

QUESTION: Would the 19 have to be domestics employed somewhere, or could the one domestic recruit 19 friends from all over the city and bring them there?

MS. ROBINSON: Yes, as to your second hypothetical, I think the answer is clearly yes.

QUESTION: So it could be 100 instead of 19?

MS. ROBINSON: As long as they were all picketing about the labor dispute and the labor relationship which was at the situs of the home.

QUESTION: The statute read literally, can be read, at least, as not to require that the picketing be concerning the labor dispute.

MS. ROBINSON: That's correct, Your Honor, but throughout this litigation all the courts and all the

parties have treated this to mean the same as the Mosely ordinance means, which is that it only allows labor dispute picketing.

QUESTION: In other words, in answer then to my brother Powell's question, the answer would be, I suppose, that so long as the picketing concerned not labor relations, or labor dispute, but rather quite a different subject, that nobody could be allowed to do it?

MS. ROBINSON: That's right.

QUESTION: Even if one of them were the butler for the mayor?

MS. ROBINSON: That's correct.

QUESTION: Who had an argument with his employer, the mayor, or his wife.

MS. ROBINSON: Thank you for clarifying that; that's correct.

QUESTION: In other words, the permissibility of that picketing depends entirely on the content of what they're saying. If they're objecting to the boss's position with respect to the butler, it's permissible, but if they're objecting to his position on busing, it's prohibited?

MS. ROBINSON: That's correct. And of course our position, again, is that that kind of content regulation is perfectly permissible under Mosely, because of the nature

of the state interest, this individual privacy right, which was diluted, as well as which is being protected, as well as the employees' rights to picket at the place of the employment relationship if he gets into a dispute.

It's really just a perfect example, like in the Tree Fruits kind of situation, in pure labor picketing cases, of the state trying to protect two interests at the same time, a resident's right to be let alone and the employee's right to picket at his place of employment when he gets into a dispute. And our assertion is that this is a perfectly reasonable balance that the Illinois Legislature has struck.

QUESTION: To make that argument, don't you have to say there's a greater right to be let alone at home than there is at school?

MS. ROBINSON: Not greater in the sense of volume, but different in that, first of all, every school is a place of employment, so the interest in quiet classrooms is not in any way affected by creating or not creating an employment relationship in the school. It's there.

But the only homes which are, are those in which the resident has voluntarily brought a stranger into his home for the employment relationship.

So if the Court has no further questions, I will reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Ms. Robinson.

Mr. Arnolds.

ORAL ARGUMENT OF EDWARD BURKE ARNOLDS, ESQ.,

ON BEHALF OF THE APPELLEES

MR. ARNOLDS: Thank you, Mr. Chief Justice, and may it please the Court:

Your Honors, what is wrong fundamentally with the Illinois residential picketing statute is simply that it is not narrowly drawn. Because it is not narrowly drawn, it is under-inclusive, and it is over-inclusive, and it is vague, and it violates the rights of free speech and equal protection in due process of law.

Your Honors, the issue in this case is not whether Illinois can constitutionally and by a narrowly-drawn statute protect residential privacy from invasion by noisy, tramping, threatening picketers.

QUESTION: Would you care to suggest, if you could do it very briefly, without using too much of your time, what kind of a narrowing would make it pass muster?

MR. ARNOLDS: Your Honor, I think that constitutionally, Illinois could put a limit on the number of pickets; I think they could --

QUESTION: But couldn't eliminate them entirely; is that your point?

MR. ARNOLDS: Yes. Our contention is that Illinois could not constitutionally prohibit all picketing, all picketing, from streets and sidewalks --

QUESTION: All residential picketing?

MR. ARNOLDS: Yes, Your Honor. We think that there is no compelling reason for eliminating even all residential picketing, that the state's interest in preserving the right to quiet enjoyment of the home is not sufficient to justify the elimination even of all residential picketing, because limits could be put, more narrow limits could --

QUESTION: Of course, that's always been the argument of people who challenge statutes on equal protection grounds, is that you can't do it this way, but you could have done it another way. I mean, it's not a very novel argument to say they didn't do it quite right here?

MR. ARNOLDS: Your Honor, I think there's a difference between disputing exactly what the limits are, how many people can picket at what times, and that sort of thing, and disputing the state's right to totally limit this First Amendment protected activity from the residential streets and sidewalks in the state.

QUESTION: You are conceding, I take it, that Illinois could have regulated residential picketing in a

way, as you put it, more narrowly drawn here. And my comment to you was that this is probably the classic argument of any person assailing a statute or ordinance on the equal protection grounds, is thaat, not that you couldn't do it at all, but that you just should have done it a little differently or a little more narrowly, or allowed a little more latitude.

MR. ARNOLDS: I agree that that is the argument, Your Honor, though here they have totally banned it, and the contention is they did not have to totally ban it in order to safeguard any interest they might have in protecting residential privacy. However, this is really our second argument, our contention that the statute is over-inclusive. I think our principal argument is that the statute violates equal protection in the First Amendment because it is not under-inclusive; that is, because it makes an exception for labor picketing, and that distinction is clearly a content-based distinction.

QUESTION: MR. Arnolds, let me get your advice as to this: I'm going to quote to you a Federal statute.

MR. ARNOLDS: Yes, sir.

QUESTION: "Whoever with the intent of influencing any judge pickets in or near a residence occupied or used by such judge shall be" -- and so forth. If you prevail here, will that Federal statute also go down the

drain?

MR. ARNOLDS: Your Honor, I don't believe so necessarily, because I believe the object of the picketing in that case is what has traditionally been regarded an illegal object, an intent to obstruct justice or to influence justice, and in that case I think certainly a distinction can be made.

QUESTION: Well, is there a difference between influencing justice and influencing legislation, then?

MR. ARNOLDS: Well, I think that if the intent of the picketing is to interfere with justice, with the process of justice, or to influence justice in some way, as I think the argument really, the rationale behind Cox v. Louisiana, if I understand, is that the picketing there was aimed at an illegal, had really an illegal object, that the preservation of really the right to a fair trial, of justice that was uninfluenced by things that should not influence the decisions of courts, and really was a compelling reason for prohibiting the picketing in that circumstance.

QUESTION: Do you think Illinois could have enacted a statute assuming Illinois elects judges, that would have prohibited the picketing of the residence of a judge?

MR. ARNOLDS: Your Honor, it would -- if Illinois

could show that picketing the residence of a judge was likely to result in the obstruction of justice, or likely to impair the quality of justice in Illinois, then I think they would have at least an argument, they would have a compelling reason or arguably a compelling reason, if they could show that.

QUESTION: Well, suppose it was clear this picketing was just designed to have the judge come out a certain way in a very controversial case at a time close to the time at which he was up for re-election?

QUESTION: In other words, let's take it right to this case, too, as an additional question: Could you picket a judge's home down in the 7th Circuit while this case was under advisement in the court?

MR. ARNOLDS: Could someone have picketed his home --

QUESTION: Picketing him out at his home, yes, and also respond to MR. Justice Rehnquist on an elective judge who might or might not be more responsive.

MR. ARNOLDS: Your Honor, under the Illinois statute, picketing Judge Tone's home in this case would have been prohibited. The statute would have prohibited it.

QUESTION: Yes, the statute, yes.

QUESTION: You say the statute is invalid, that

you have a constitutional --

MR. ARNOLDS: Right.

QUESTION: -- freedom.

MR. ARNOLDS: Our position would be that Illinois could -- my position would be that Illinois could not constitutionally prohibit picketing Judge Tone's home without making some showing that that kind of picketing was actually going to result in the -- in influencing decisions.

QUESTION: Showing in a particular case, or showing generally supporting the legislation?

MR. ARNOLDS: I think generally supporting the legislation.

QUESTION: Well, Balcamp v. Florida and other cases say the judges are supposed to be resolute and strongminded people who aren't affected by these things.

MR. ARNOLDS: Indeed, I'm sure they are, generally, but I believe that if Illinois could make that showing, then they would have at least --

QUESTION: A mere finding by a legislature wouldn't be enough?

MR. ARNOLDS: I don't believe a mere statement of the legislature --

QUESTION: It would have to show it in litigation.

MR. ARNOLDS: It would be my --

QUESTION: In your submission?

MR. ARNOLDS: Yes. At least the mere finding --

QUESTION: Varying from judge to judge?

MR. ARNOLDS: I am sorry, Your Honor?

QUESTION: Would it vary from judge to judge?

MR. ARNOLDS: No, I would not think so, insofar as the question of the constitutionality of the statute was concerned. In this case there is no legislative history that shows --

QUESTION: Some judges might be lighter sleepers than others, for example.

MR. ARNOLDS: Your Honor, I am not contending that if such a statute were passed, in order for it to be upheld constitutionally it would have to be shown in every case that the picketing was reasonably likely to influence the judge in any way. I simply say that I think the hypothetical statute can be distinguished from this case because there there would be at least arguably some compelling reason for the distinction, whereas in this case, there is no reason for allowing labor picketing and for not allowing any other form of picketing.

The only distinction between this case --

QUESTION: Then that's your equal protection argument?

MR. ARNOLDS: Yes, Your Honor.

QUESTION: I thought we were talking about your First Amendment argument. But perhaps I was mistaken.

You have two separate arguments, two separate attacks on this, do you not?

MR. ARNOLDS: Yes, actually we have three. And the third goes to the vagueness of the statute.

The first attack is based on the content discrimination, which I believe may be characterized as either a 14th Amendment attack or a First Amendment attack.

QUESTION: They are both 14th Amendment attacks, aren't they? This is state legislation.

MR. ARNOLDS: Yes. One under the equal protection clause, so I believe this can be characterized, our first argument may be properly characterized as an equal protection argument and a first amendment argument, because there is no compelling reason for discriminating among the pickets, and also the statute attempts to control the content of the message on the picket signs.

The second argument is the First Amendment argument as applied to the states by the 14th Amendment due process clause.

Your Honors, the only distinction that the state can draw between this case and the Mosely case is the ordinance in Mosely attempted to safeguard the right of the quiet classrooms, and in this case the right is quiet

enjoyment of the home. I submit that that difference makes absolutely no difference in terms of the equal protection argument. There is no more reason for allowing labor picketing at a school and prohibiting all other picketing than there is for allowing labor picketing at a residence and prohibiting --

QUESTION: I suppose most residences these days, most dwellings, are not places of employment, are they?

MR. ARNOLDS: Well, it depends, Your Honor, on that the term "places of employment" includes. Most residences, I assume, do not have maids or gardiners. On the other hand --

QUESTION: Household employees, home --

MR. ARNOLDS: Domestic employees. On the other hand, most homes do bring in workmen, and under this statute it seems to me that if a workman is working at the home, the home is a place of employment, and if he's a non-union workman, the union can picket both the workman and the homeowner.

QUESTION: But certainly one doesn't think of schools as places of, quote, "privacy," close quote, as they do of homes, do they? It may serve an equal or perhaps more important value, but isn't that in large part for the state to decide?

MR. ARNOLDS: Your Honor, I don't think so in

terms of equal protection, in terms of the difference between labor picketing and all other picketing. I will agree that the right, that schools are different from residences, and the right of privacy in, residential privacy is certainly different from the right of quiet classrooms, from the interest in maintaining quiet classrooms. But that is no justification for allowing only labor picketing in one case and not allowing only labor picketing in the other case.

In other words, the fact that the rights -- it just doesn't make any sense to say that that justifies discrimination in favor of labor picketing in a residential situation but doesn't justify it in a school situation.

QUESTION: But in the residential situation, as I understand it, the statute says only when the owner has allowed other people who are strangers to him on the premises is labor picketing allowed. And it's used as a place of business.

MR. ARNOLDS: The point is that there is no compelling reason for making that distinction. What the statute says in effect is that if you bring a non-union carpenter in to work on your roof, you have waived the right to privacy insofar as labor picketing is concerned.

But if your home is a landmark and you attempt to alter it, that does not waive your right of privacy insofar as the historical society is concerned, and they cannot come in and picket because you are altering a landmark.

Our position is, there is no reason, and certainly no compelling reason, for making that discrimination in favor of labor disputes and against everyone else.

QUESTION: Who decides whether the place is a landmark, the picketers or some public body? You use the phrase, "landmark."

MR. ARNOLDS: Yes, Your Honor. I was assuming in my hypothetical that if everyone would concede that it was a landmark, perhaps --

QUESTION: Everyone except the owner.

MR. ARNOLDS: Even if it was not clearly a landmark, if the picketers --

QUESTION: Want to make it a landmark, could they picket? They're trying to persuade somebody to make it a landmark?

MR. ARNOLDS: I suppose that that hypothetical would work also, though not quite as well, for me.

QUESTION: Well, then, of course, a bunch of picketers could go out and picket in this case of yours and say, "We really want to make Judge Tone's home a landmark."

"That's what we're picketing for." Are you suggesting that? That would be a basis for picketing?

MR. ARNOLDS: No, Your Honor. What I'm suggesting is that there is no reason for saying that the homeowner waives his right to privacy if he brings a workman into his home. I am not saying that he waives that right to privacy for the myriad other purposes about which people might picket him. For example, if he puts an opposing political candidate's poster in the window of his home, the opposite party is not allowed to carry a sign in front of the home in favor of some other candidate. And yet why, if he brings a workman into his home, does he waive his right to privacy? But he doesn't waive that right if he puts a political poster in the window? There is simply no compelling reason for making that distinction.

It is -- moreover, in this case we have a legislative -- statement of legislative finding and intent, and nowhere in the statement of legislative finding and intent is there any indication that the Illinois Legislature was interested in providing a forum for labor picketing, and in fact, in the statement of intent, the Illinois Legislature declares that they find all residential picketing, no matter how just the cause, to be disruptive. There is nothing to show that they were intending to afford a forum for labor disputes and not for anything else.

QUESTION: We don't know anything about the legislative history of this law, do we? Whether or not it was amended after --

MR. ARNOLDS: There is no official history, Your Honor. The only -- there is an article that appears, cited in our brief that appears at 61 Northwestern Law Review that does indicate some history.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION - 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Mr. Arnolds, you may continue.

MR. ARNOLDS: Mr. Chief Justice, and may it please the Court:

A couple of questions Your Honors addressed to Mr. Robinson that I would like to comment on. Mr. Justice Stewart I believe asked a question about the Gregory case, and I would simply like to note that it is clear from the appendix in the Gregory case that the marching, parading in that case took place in exactly the same neighborhood as in this case, that while not the same mayor was involved, the Mayor of the city of Chicago -- the residence of the Mayor of the city of Chicago was the target of the picketing and in addition to that the message was the same. The picketing concerned desegregation of the Chicago public schools.

QUESTION: That was a different mayor but they lived in the same neighborhood?

MR. ARNOLDS: That's correct.

QUESTION: Was there a parade permit in the Gregory case of any kind?

MR. ARNOLDS: I'm not sure, Your Honor, but I don't believe so. I don't believe a permit was involved. I may be wrong about that.

QUESTION: Would it make a difference if there was an ordinance which said you can do something if you get a parade permit but impliedly you can't do it if you don't get a permit?

MR. ARNOLDS: I think that if the parade permit ordinance would be constitutional, could be constitutional if the discrimination -- if it were in no way based on content, in other words if the permits were awarded in a totally content-free manner. I think if the permit ordinance required that the content of the message be reviewed before the permit were granted --

QUESTION: Permit ordinances are usually neutral in the sense of simply requiring notice so that they can handle traffic problems and that sort of thing.

MR. ARNOLDS: And I believe that when they are they are generally upheld as being constitutional.

QUESTION: No parade permit has ever been upheld here, has it, that went into the matter of content?

MR. ARNOLDS: Not that I am aware of, no, sir.

What I wish to point out about the Gregory case was that this Court in Gregory specifically said that if the parading and marching in that case was peaceful, it was certainly protected by the First Amendment, and the state has conceded in this case that both the past conduct of the plaintiffs-appellees and their post conduct is

peaceful. Therefore we conclude that under Gregory, their conduct is protected by the First Amendment.

Mr. Justice Stevens, I believe you asked a question going to the place of business exception in the statute. Our position is that it is not clear from the statute just exactly what picketing is allowed at a place of business: For example, if the highrise Lakepoint Towers has a restaurant in the building, it is clear that the restaurant may be picketed, and not only for labor matters but for other matters.

It is not clear whether the residences that are also located in Lakepoint Towers may be picketed for anything other than labor disputes, and I think neither is it clear if a highrise contains only condominiums or apartments, whether or not that building is a place of business. In addition, I don't believe it's clear whether the --

QUESTION: Is this a vagueness argument?

MR. ARNOLDS: Yes, Your Honor, it is. Our third argument is a vagueness argument. I believe the question went to that argument.

QUESTION: So it's not, strictly speaking, an equal protection argument?

MR. ARNOLDS: No, sir.

QUESTION: Actually, my question went to the equal protection point too, because it's in the area of

as I understand the ordinance, of dwellings where there are employees where you get the situation that Justice White described where one picket carrying a sign that's unfair to the union can do so, and another picket saying it's unfair not to hus cannot do so.

MR. ARNOLDS: Right.

QUESTION: And I was trying to think through the scope of how many places are there that are dwellings of that category. You were saying, if I understand you -- I hadn't thought of that before -- that any dwelling really could be, because if you bring a plumber in, he's presumably a member of the union and he does some work there, and while he's there, I guess the ordinance applies to him, is your argument, isn't it? Or applies to that residence?

MR. ARNOLDS: Yes.

QUESTION: Of course, in any apartment house where they have janitors and people who keep the place warm and electricians and all would be covered, I suppose.

MR. ARNOLDS: Yes, and I think it is important to point out that both the employee and the employer may be the target of the picketing under the exception. In other words, the union --

QUESTION: You may have non-union employees and the union wants to organize.

MR. ARNOLDS: So that the statute does not

afford a forum simply for an employee to picket.

QUESTION: Through the ordinances permitting the picketing, say, of a hall of an apartment building where a plumber is inside, or simply the outside entrance to the apartment building?

MR. ARNOLDS: Your Honor, in this case, the plaintiffs were always on public property, the streets and sidewalks in front of the residence, and the statute is being enforced against persons on public streets and sidewalks, and we are not -- now, it is not clear whether this statute would permit picketing, also prohibit residential picketing if that picketing occurred on private property but with the consent of the owner.

QUESTION: You don't have standing to raise that, or at least you don't raise it, I take it?

MR. ARNOLDS: We do raise the argument, and we argue that although it was not involved in our case, because the picketers in our case were not on private property; they were on public property. We do argue that this court can consider the facial overbreadth of the statute, because the statute infringes on First Amendment protected conduct.

QUESTION: So that's a First Amendment argument, then?

MR. ARNOLDS: Yes, Your Honor.

I would also like to comment, the state has mentioned that FCC vs. Pacifica and the Rowan case have only been distinguished on the grounds that they are "dirty words" cases, and they certainly are "dirty words" cases. But in addition, in both those cases there was an actual physical intrusion, if you will, into the residence, into the home. That is not the case here, where the plaintiffs are on public streets and sidewalks.

QUESTION: Well, except neither of those cases involved physical intrusion of people. One was a radio or television set, only if the householder turned it on and kept on that channel or wavelength or station, and the other was a piece of mail, wasn't it?

MR. ARNOLDS: Yes.

QUESTION: Which the householder was free to throw away.

Here, while it's outside, these are human beings and the householder can't change the channel, so to speak.

QUESTION: But in Rowan, itwasn't just a matter of throwing away the mail. It was the statutory right of the householder to stop the mail from ever coming into his mailbox. That's even a little different from either of the other two, isn't it?

MR. ARNOLDS: Yes, and I certainly can see that there are differences between the cases.

QUESTION: Well, Rowan is more comparable to ... stopping the picketing, perhaps.

MR. ARNOLDS: Well, I would contend that if a line has to be drawn, and I think that lines do have to be drawn, that the residential privacy is certainly a compelling reason for keeping any intrusion, anyone from intruding into the --

QUESTION: The laws of trespass take care of that.

MR. ARNOLDS: Yes, Your Honor.

QUESTION: You don't need an ordinance like this.

MR. ARNOLDS: No.

QUESTION: But the claim in the Rowan case was that every person had a First Amendment right to mail any mail he wanted to to any person he wanted to, and Congress said there are limits and the court sustained those limits. You cannot mail everything and anything you want.

MR. ARNOLDS: Certainly that the householder had a right to request that erotic and sexually-provocative material not be mailed into his home. I don't think it would perhaps extend, if the matter contained in the mailing was political material, and in this case we have the message clearly is at the very heart of political speech.

Your Honors, our first argument was that by allowing peaceful labor picketing and totally prohibiting all other picketing, the statute violated both equal

protection and the First Amendment because its discrimination is based solely on the content of the speech and there is no compelling reason for the discrimination.

As in Mosely, the statute's exception for labor picketing --

QUESTION: Do you find the word "compelling" in Mosely?

MR. ARNOLDS: No, Your Honor.

QUESTION: So what do you think the Mosely standard is for justification?

MR. ARNOLDS: I think Mosely states that there is no reason for content control of messages, at least to the extent that government may not --

QUESTION: Mosely said it's never permitted?

MR. ARNOLDS: I don't think Mosely should be interpreted, Your Honor, as saying it's absolutely never permitted in the sense that perhaps in time of war, troop movements could -- letting out information about the time the troops were going to sail might be prohibited, and I suppose to a certain extent that is based on content. I don't think I would want to make the statement absolutely.

I do think, however, that an absolute statement, close to an absolute statement can be made that government cannot control what public issues may be discussed in public forums, and I think that is the problem that we have

in this case. And I think as in Mosely, the statute's exception for labor picketing really fatally impeaches any rationale that this statute might have for prohibiting all other peaceful picketing, and in this case, the state has conceded that the picketing is peaceful.

QUESTION: You don't deny that the state has some additional reason for permitting labor picketing than other kinds of picketing? At least there is a reason, but you're suggesting it just is inadequate?

MR. ARNOLDS: Yes. Certainly a reason can be invented, but I think the reason does not even rise to the level of a rational reason; certainly not to a compelling reason, and in no way can it be sufficient to permit the state to control the content of speech in the sense that in no way should it be allowed to be judged sufficient to control what public issues may be discussed in public forums.

QUESTION: Well, your argument is that Mayor Bilandic's house is a public forum?

MR. ARNOLDS: No, Your Honor. Our argument is that public streets and sidewalks in the neighborhood in which Mayor Bilandic's house is located are public forums.

QUESTION: Well, the sidewalk in front of his house is what we're talking about, not just the general residential area he lived in, isn't it?

MR. ARNOLDS: Well, the statute does not prohibit picketing in the general residential area. It prohibits picketing before and about residences.

QUESTION: Yes. Not in residential areas generally.

MR. ARNOLDS: But the effect of the statute if it's upheld would be virtually to eliminate picketing in residential, on public streets and sidewalks before and about residences, which -- in residential areas.

QUESTION: Do you think -- would your view of the statute be the same in application if instead of picketing there at the Mayor's place, the pickets just picked out arbitrarily some residential district, picketed for one hour in front of your house and one hour in front of someone else's house, and just went down the line, with no specific target?

MR. ARNOLDS: With a message, Your Honor, or with just --

QUESTION: A message, yes.

MR. ARNOLDS: My position --

QUESTION: The same message as involved here.

MR. ARNOLDS: Our position would be that that picketing, as long as it was peaceful, would be --

QUESTION: In other words, it would be in the same category whether the Mayor was the target, or just

some taxpayer?

MR. ARNOLDS: Well, this statute does not distinguish between public officials and truly private persons. It's not narrowly drawn in that way. I don't think this case requires a decision about whether or not there is a difference.

Thank you very much.

MR. CHIEF JUSTICE BURGER: If you haven't anything further: Ms. Robinson.

ORAL ARGUMENT OF ELLEN G. ROBINSON, ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MS. ROBINSON: Just a couple of points.

At the outset, I'm concerned about the characterization that we've conceded the 20 people picketing in front of a home at six o'clock was peaceful. It's not in the record whether or not that particular picket was peaceful or not. We have only conceded that the plaintiffs allege that they intended to engage in future peaceful picketing if the statute were held unconstitutional.

QUESTION: Is it not true that the statute has the same effect on peaceful picketing as it does on non-peaceful picketing?

MS. ROBINSON: On its face it does, Your Honor.

QUESTION: I take it that it would prevent just marching with signs in any residential neighborhood?

MS. ROBINSON: On its face it would, Your Honor.

QUESTION: Well, I guess that's what we are talking about, isn't it?

MS. ROBINSON: Well, I --

QUESTION: You know, picketing just doesn't mean picking out a target -- on its face -- I suppose if they just marched, if a hundred people marched up and down a mile, they just made a circuit of a mile in a residential neighborhood, they didn't have any bunting, they're just electioneering, say?

MS. ROBINSON: I don't think that would be picketing within the meaning of this statute. I think that would be a march like we had in the Gregory case, and I think that the Illinois courts, in light of their other decisions regarding picketing, would construe picketing to mean patrolling back and forth in front of a single limited geographical area.

QUESTION: A block? How about a block?

MS. ROBINSON: When it says -- I think the statute hasn't been construed on its face, and in light of Illinois' other decisions regarding picketing, I think -- and the purpose of the statute -- I think that the courts would construe it to mean in front of a residence, just the way the picketers in this case were picketing right in front of the Mayor's house.

QUESTION: Well, say the county political chairman and you're just wanting him to support one of your candidates, so you get a sign and you march up and down in front of his house saying support so-and-so for sheriff. That's certainly covered.

MS. ROBINSON: Certainly within that act, yes.

QUESTION: You would concede that in the context of labor disputes, the labor area generally, there are special and different reasons to extend protection to labor picketing as distinguished from all other types?

MS. ROBINSON: Exactly, Mr. Chief Justice. And as a matter of fact, Illinois has a special statute which protects labor picketing in the situs of an employment relationship.

QUESTION: Well, so analogies between labor picketing and other types aren't terribly helpful, are they?

MS. ROBINSON: I don't think so, Your Honor, not in this case.

QUESTION: If the county chairman not only was in his house but he had his district captains, they were having a meeting at his house, and so the three or four pickets with the signs say, "Support so-and-so for sheriff." That would be covered?

MS. ROBINSON: Yes, it would be --

QUESTION: Even though he certainly has invited a lot of people into his house and he might, perhaps -- shouldn't expect the same kind of privacy as he --

MS. ROBINSON: Of course, that's the contention of the appellees in the case, if we waive the right of residential privacy when we invite an employee, then we should waive it as to everybody else who comes in.

QUESTION: And what's your answer to that?

MS. ROBINSON: And our answer to that is that it's only the employees and the rights of employees to picket, that Illinois has given special legislative protection to, in a separate, distinct statute, the labor anti-injunction of labor dispute picketing statute which I set forth in my brief.

And because of this special protection that Illinois has always given to employees to picket at their place of employment in case a labor dispute arises, it was reasonable for the Illinois Legislature, when they were deciding to protect residential privacy, to also simultaneously protect employee picketing.

QUESTION: So that you draw a line between officials who have help in house and those who don't?

MS. ROBINSON: Yes, sir, and any other working person who has a help in the house.

QUESTION: It may be that organized labor was

pretty influential in Springfield, too, when the statute was passed.

MS. ROBINSON: It may have been, Your Honor.

If there are no further questions, my time is up.

MR. CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

(Whereupon, at 1:20 o'clock p.m., the case in the above-entitled matter was submitted.)

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