108 S.Ct. 2495
Supreme Court of the United States

Russell C. FRISBY, et al., Appellants
v.
Sandra C. SCHULTZ and Robert C. Braun.
No. 87–168.
|
Argued April 20, 1988.
|
Decided June 27, 1988.

Abortion protesters brought suit seeking to enjoin enforcement of a municipal ordinance prohibiting picketing before or about residence or dwelling of any individual. The United States District Court for the Eastern District of Wisconsin, 619 F.Supp. 792, John W. Reynolds, Chief Judge, granted preliminary injunction, and town and town officials appealed. On rehearing case en banc, the Court of Appeals for the Seventh Circuit, 822 F.2d 642, affirmed by an equally divided court, and town and town officials appealed. Treating the appeal as a petition for certiorari, the Supreme Court, Justice O'Connor, held that: (1) municipal ordinance prohibiting picketing before or about residence or dwelling of any individual does not ban all picketing in residential areas, but, rather, prohibits only focused picketing taking place solely in front of particular residence, and (2) ordinance serves significant government interest of protecting residential privacy, and is narrowly tailored, and thus does not violate First Amendment.

Reversed.

Justice White filed opinion concurring in judgment.

Justice Brennan filed dissenting opinion with which Justice Marshall joined.

Justice Stevens filed dissenting opinion.

Opinion on remand, 857 F.2d 1175.

West Headnotes (8)

[1] **Federal Courts**
Proceedings to Obtain Review
Federal Courts
Particular Cases, Contexts, and Questions

Preliminary injunction against enforcement of ordinance prohibiting picketing before or about residence or dwelling of any individual raised question of substantial importance, warranting Supreme Court consideration of Court of Appeals' decision affirming district court grant of preliminary injunction by grant of certiorari, so that appeal would be dismissed and treated as petition for certiorari. 28 U.S.C.A. § 2103.

8 Cases that cite this headnote

[2] **Constitutional Law**
Residences
Municipal Corporations
Mode of Use and Regulation Thereof in General

Town's streets, although narrow and of residential character, were traditional "public fora," and thus, ordinance prohibiting picketing before or about residence or dwelling of any individual was required to be judged against stringent standards for restrictions on speech in public fora. U.S.C.A. Const.Amend. 1.

229 Cases that cite this headnote

[3] **Constitutional Law**
Residences

Municipal ordinance making it unlawful for any person to picket before or about residence or dwelling of any individual

could not be read as containing implied exception for peaceful labor picketing on theory that Wisconsin law protected such picketing, and thus, ordinance was content neutral, for First Amendment purposes. U.S.C.A. Const.Amend. 1; W.S.A. 103.53(1).

37 Cases that cite this headnote

[4] **Municipal Corporations**
Prohibitory ordinances

Municipal ordinance prohibiting picketing before or about residence or dwelling of any individual does not ban all picketing in residential areas, but, rather, prohibits only focused picketing taking place solely in front of particular residence.

57 Cases that cite this headnote

[5] **Constitutional Law**
Residences
Municipal Corporations
Mode of Use and Regulation Thereof in General

Municipal ordinance prohibiting picketing before or about residence or dwelling of any individual leaves open ample alternative channels of communication, for purpose of determining whether ordinance violates First Amendment; ordinance prohibits only focused picketing taking place in front of particular residence.

112 Cases that cite this headnote

[6] **Constitutional Law**
Residences
Municipal Corporations
Mode of Use and Regulation Thereof in General

Municipal ordinance prohibiting picketing before or about residence or dwelling of any individual serves significant government interest of protecting residential privacy, and is narrowly tailored, and thus does not violate First Amendment; prohibited picketing is speech directed primarily at those who are presumptively unwilling to receive it, and ordinance prohibits only focused picketing taking place solely in front of particular residence. U.S.C.A. Const.Amend. 1.

262 Cases that cite this headnote

[7] **Constitutional Law**
Private Property

There is no constitutional right to force speech into home of unwilling listener. U.S.C.A. Const.Amend. 1.

46 Cases that cite this headnote

[8] **Constitutional Law**
Narrow tailoring

Statute is "narrowly tailored," for First Amendment purposes, if it targets and eliminates no more than exact source of evil it seeks to remedy; complete ban can be narrowly tailored but only if each activity within proscription's scope is appropriately targeted evil. U.S.C.A. Const.Amend. 1.

175 Cases that cite this headnote

****2497** *Syllabus*[*]

***474** Brookfield, Wisconsin, enacted an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual," and declaring that the primary purpose of the ban is to "protec[t] and preserv[e] the home" through assurance "that members of the community enjoy in their homes ... a feeling of well-being, tranquility, and privacy." Appellees, who wish to picket a particular home in Brookfield, filed suit under 42 U.S.C. § 1983 against appellants, the town and several of its officials, alleging that the ordinance violated the First Amendment. The Federal District Court granted appellees' motion for a preliminary injunction, concluding that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. The Court of Appeals ultimately affirmed.

Held: The ordinance is not facially invalid under the First Amendment. Pp. 2499–2504.

(a) Although the town's streets are narrow and of a residential character, they are nevertheless traditional public fora, *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263, and, therefore, the ordinance must be judged against the stringent standards this Court has established for restrictions on speech in such fora. *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794. Pp. 2499–2500.

(b) The ordinance is content neutral and cannot be read as containing an implied exception for peaceful labor picketing on the theory that an express state law protection for such picketing takes precedence. This Court will defer to the rejection of that theory by the lower courts, which are better schooled in and more able to interpret Wisconsin law. Pp. 2500–2501.

(c) The ordinance leaves open ample alternative channels of communication. Although the precise scope of the ordinance's ban is not further described within its text, its use of the singular form of the words "residence" and "dwelling" suggests that it is intended to prohibit only picketing focused on, and taking place in front of, a particular residence, a reading which is supported by appellants' representations at oral argument. The lower courts' contrary interpretation of the ordinance as banning "all picketing in residential areas" constitutes plain error, and runs afoul of the well-established principle that statutes will be ***475** interpreted to avoid constitutional difficulties. Viewed in the light of the narrowing construction, the ordinance allows protestors to enter residential neighborhoods, either alone or marching in groups; to go door-to-door to proselytize their views or distribute literature; and to contact residents through the mails or by telephone, short of harassment. Pp. 2501–2502.

(d) As is evidenced by its text, the ordinance serves the significant government interest of protecting residential privacy. An important aspect of such privacy is the protection of unwilling listeners within their homes from the intrusion of objectionable or unwanted speech. See, *e.g., FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073. Moreover, the ordinance is narrowly tailored to serve that governmental interest, since, although its ban is complete, it targets and eliminates no more than the exact source of the "evil" it seeks to remedy: offensive and ****2498** disturbing picketing focused on a "captive" home audience. It does not prohibit more generally directed means of public communication that may not be completely banned in residential areas. Pp. 2502–2504.

822 F.2d 642, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post,*, p. ——. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. ——. STEVENS, J., filed a dissenting opinion, *post,* p. ——.

Attorneys and Law Firms

Harold H. Fuhrman argued the cause and filed briefs for appellants.

Steven Frederick McDowell argued the cause for appellees. With him on the brief was *Walter M. Weber.**

* Briefs of *amici curiae* urging reversal were filed for the National Institute of Municipal Law Officers by *William I. Thornton, Jr., Roy D. Bates, William H. Taube, Roger F. Cutler, Robert J. Alfton, James K. Baker, Joseph N. deRaismes,*

Frank B. Gummey III, Robert J. Mangler, Neal E. McNeill, Analeslie Muncy, Dante R. Pellegrini, Clifford D. Pierce, Jr., Charles S. Rhyne, and *Benjamin L. Brown;* for the National League of Cities et al. by *Benna Ruth Solomon* and *Mark B. Rotenberg;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Harvey Grossman, Jane M. Whicher, Jonathan K. Baum, John A. Powell, Steven R. Shapiro,* and *William Lynch;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* and for the Rutherford Institute et al. by *Robert R. Melnick, William Bonner, John F. Southworth, Jr., W. Charles Bundren, Alfred J. Lindh, Ira W. Still III, William B. Hollberg, Randall A. Pentiuk, Thomas W. Strahan, John W. Whitehead, A. Eric Johnston,* and *David E. Morris.*

Charles E. Rice, Thomas Patrick Monaghan, and *James M. Henderson, Sr.,* filed a brief for the American Life League, Inc., et al. as *amici curiae.*

Opinion

***476** Justice O'CONNOR delivered the opinion of the Court.

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing "before or about" any residence. This case presents a facial First Amendment challenge to that ordinance.

I

Brookfield, Wisconsin, is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board therefore resolved to enact an ordinance to restrict the picketing. On May 7, 1985, the town passed an ordinance that prohibited all picketing in residential neighborhoods except for labor picketing. But after reviewing this Court's decision in *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), which invalidated a similar ordinance as a violation of the ***477** Equal Protection Clause, the town attorney instructed the police not to enforce the new ordinance and advised the Town Board that the ordinance's labor picketing exception likely rendered it unconstitutional. This ordinance was repealed on May 15, 1985, and replaced with the following flat ban on all residential picketing:

> "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." App. to Juris. Statement A–28.

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." *Id.,* at A–26. The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants ... [and] has as its object the harassing of such occupants." *Id.,* at A–26—A–27. The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel." *Id.,* at A–27.

On May 18, 1985, appellees were informed by the town attorney that enforcement of the new, revised ordinance would begin on May 21, 1985. Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield and filed this lawsuit in the United States District Court ****2499** for the Eastern District of Wisconsin. The complaint was brought under 42 U.S.C. § 1983 and sought declaratory as well as preliminary and permanent injunctive relief on the grounds that the ordinance violated the First Amendment. Appellees

named appellants—the three members of the Town Board, the Chief of Police, the town attorney, and the town itself—as defendants.

***478** The District Court granted appellees' motion for a preliminary injunction. The court concluded that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. 619 F.Supp. 792, 797 (1985). The District Court's order specified that unless the appellants requested a trial on the merits within 60 days or appealed, the preliminary injunction would become permanent. Appellants requested a trial and also appealed the District Court's entry of a preliminary injunction.

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed. 807 F.2d 1339 (1986). The Court of Appeals subsequently vacated this decision, however, and ordered a rehearing en banc. 818 F.2d 1284 (1987). After rehearing, the Court of Appeals affirmed the judgment of the District Court by an equally divided vote. 822 F.2d 642 (1987). Contending that the Court of Appeals had rendered a final judgment holding the ordinance "to be invalid as repugnant to the Constitution," 28 U.S.C. § 1254(2), appellants attempted to invoke our mandatory appellate jurisdiction. App. to Juris. Statement A–25 (citing § 1254(2)). We postponed further consideration of our appellate jurisdiction until the hearing on the merits. 484 U.S. 1003, 108 S.Ct. 692, 98 L.Ed.2d 644 (1988).

[1] Appellees argue that there is no jurisdiction under § 1254(2) due to the lack of finality. They point out that the District Court entered only a preliminary injunction and that appellants requested a trial on the merits, which has yet to be conducted. These considerations certainly suggest a lack of finality. Yet despite the formally tentative nature of its order, the District Court appeared ready to enter a final judgment since it indicated that unless a trial was requested a permanent injunction would issue. In addition, while appellants initially requested a trial, they no longer adhere to this position and now say that they would have no additional arguments to offer at such a trial. Tr. of Oral Arg. 7. In the context of this case, however, there is no need to decide ***479** whether jurisdiction is proper under § 1254(2). Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari. Accordingly, we dismiss the appeal and, treating the jurisdictional statement as a petition for certiorari, now grant the petition. See 28 U.S.C. § 2103. Cf. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,*, 487 U.S. 354, 369, n. 10, 108 S.Ct. 2428, at 2437 n. 10, 101 L.Ed.2d 322. For convenience, however, we shall continue to refer to the parties as appellants and appellees, as we have in previous cases. See *ibid.*; *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, n. 4, 108 S.Ct. 896, 898, n. 4, 99 L.Ed.2d 75 (1988).

II

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720–21, 11 L.Ed.2d 686 (1964), we have traditionally subjected restrictions on public issue picketing to careful scrutiny. See, *e.g., Boos v. Barry,* 485 U.S. 312, 318, 108 S.Ct. 1157, ——, 99 L.Ed.2d 333 (1988); *United States v. Grace,* 461 U.S. 171 (1983); *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Of course, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational* ****2500** *Fund, Inc.,* 473 U.S. 788, 799, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985).

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Specifically, we have identified three types of fora: "the traditional public forum, the public forum created ***480** by government designation, and the nonpublic forum." *Cornelius, supra,* 473 U.S. at 802, 105 S.Ct., at 3449.

[2] The relevant forum here may be easily identified: appellees wish to picket on the public

streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. See, *e.g.*, *Boos v. Barry*, *supra*, 485 U.S., at 318, 108 S.Ct., at ——; *Cornelius*, *supra*, at 802, 105 S.Ct., at 3448–49; *Perry*, 460 U.S., at 45, 103 S.Ct., at 954–55. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. See *ibid.*; *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963–64, 83 L.Ed. 1423 (1939) (Roberts, J.). Appellants, however, urge us to disregard these "clichés." Tr. of Oral Arg. 16. They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication. See Brief for Appellants 23 (citing *Perry*, *supra*, 460 U.S., at 46, 103 S.Ct., at 955–56).

We reject this suggestion. Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In *Carey v. Brown*—which considered a statute similar to the one at issue here, ultimately striking it down as a violation of the Equal Protection Clause because it included an exception for labor picketing—we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." 447 U.S., at 460–461, 100 S.Ct., at 2289–2291. This rather ready identification virtually forecloses appellants' argument. See also *Perry*, *supra*, 460 U.S., at 54–55, 103 S.Ct., at 960 (noting that the "key" to *Carey* "was the presence of a public forum").

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliché," but recognition that "[w]herever the title of ***481** streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*, *supra*, 307 U.S., at 515, 59 S.Ct., at 964 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the antipicketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

> "In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." ****2501** *Perry*, *supra*, 460 U.S., at 45, 103 S.Ct., at 955 (citations omitted).

[3] As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. Appellees argue that despite its facial content-neutrality, the Brookfield ordinance must be read as containing an implied exception for labor picketing. See Brief for Appellees 20–26. The basis for appellees' argument is their belief that an express protection of peaceful labor picketing in state law, see Wis.Stat. § 103.53(1) (1985–1986), must take precedence over Brookfield's contrary efforts. The District Court, however, rejected this suggested interpretation of state law, 619 F.Supp., at 796, and the Court of Appeals affirmed, albeit ultimately by an equally divided court. 822 F.2d 642 (1987). ***482** See also 807 F.2d at 1347 (original panel opinion declining to reconsider District Court's construction of state law). Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts ... to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499–500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). See *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). Thus, we accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and

whether it "leave[s] open ample alternative channels of communication." *Perry,* 460 U.S., at 45, 103 S.Ct., at 955.

[4] Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. As Justice WHITE's concurrence recounts, the lower courts described the ordinance as banning "all picketing in residential areas." *Post,* at 2505. But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, see Webster's Third New International Dictionary 1710 (1981), a characterization in line with viewing the ordinance as limited to activity focused on a single residence. ***483** Moreover, while we ordinarily defer to lower court constructions of state statutes, see *supra,* at 2500, we do not invariably do so, see *Virginia v. American Booksellers Assn., supra,* 484 U.S., at 395, 108 S.Ct., at ——. We are particularly reluctant to defer when the lower courts have fallen into plain error, see *Brockett v. Spokane Arcades, Inc., supra,* 472 U.S., at 500, n. 9, 105 S.Ct., at 2800, n. 9, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. See, *e.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916–2917, 37 L.Ed.2d 830 (1973). Cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, ——, 99 L.Ed.2d 645 (1988). Thus, unlike the lower courts' judgment that the ordinance does not contain an implied exception for labor picketing, we are unable to accept their potentially broader ****2502** view of the ordinance's scope. We instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." Tr. of Oral Arg. 8. The picket need not be carrying a sign, *id.,* at 14, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence, *id.,* at 9. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. *Id.,* at 15. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

[5] So narrowed, the ordinance permits the more general dissemination of a message. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain:

> ***484** "Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching.... They may go door-to-door to proselytize their views. They may distribute literature in this manner ... or through the mails. They may contact residents by telephone, short of harassment." Brief for Appellants 41–42 (citations omitted).

[6] We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy. See App. to Juris. Statement A–26.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U.S., at 471, 100 S.Ct., at 2296. Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," *Gregory v. Chicago,* 394 U.S. 111, 125 [89 S.Ct. 946, 954, 22 L.Ed.2d 134] (1969) (Black, J., concurring), and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey, supra,* 447 U.S., at 471, 100 S.Ct., at 2295.

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, cf. *Erznoznik v. City of Jacksonville, supra,* 422 U.S., at 210–211, 95 S.Ct., at 2273–74; *Cohen v. California,* 403 U.S. 15, 21–22, 91 S.Ct. 1780, 1786–1787, 29 L.Ed.2d 284 (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech ... does not mean we must be captives everywhere." *Rowan v. Post Office Dept.,* 397 U.S. 728, 738, 90 S.Ct. 1484, 1491, 25 L.Ed.2d 736 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability ***485** to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, *e.g., FCC v. Pacifica Foundation,* 438 U.S. 726, 748–749, 98 S.Ct. 3026, 3039–3040, 57 L.Ed.2d 1073 (1978) (offensive radio broadcasts); *id.,* at 759–760, 98 S.Ct. at 3045–3047 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan, supra* (offensive mailings); *Kovacs v. Cooper,* 336 U.S. 77, 86–87, 69 S.Ct. 448, 453–54, 93 L.Ed. 513 (1949) (sound trucks).

[7] This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. See, *e.g.,* ****2503** *Schneider v. State,* 308 U.S. 147, 162–163, 60 S.Ct. 146, 151–152, 84 L.Ed. 155 (1939) (handbilling); *Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider,* for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin,* we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' " *Kovacs,* 336 U.S., at 86, 69 S.Ct., at 453. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Ibid.* There simply is no right to force speech into the home of an unwilling listener.

[8] It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808–810, 104 S.Ct. 2118, 2130–2132, 80 L.Ed.2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property ***486** because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself." *Id.,* at 810, 104 S.Ct., at 2131.

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. See, *e.g., Schneider, supra,* 308 U.S., at 162–163, 60 S.Ct., at 151–152 (handbilling); *Martin, supra* (solicitation); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (solicitation). See also *Gregory v. Chicago, supra* (marching). Cf. *Perry,* 460 U.S., at 45, 103 S.Ct., at 954–55 (in traditional public forum, "the government may not prohibit all communicative activity"). In such cases "the flow of information [is not] into ... household[s], but to the public." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971). Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:

" 'To those inside ... the home becomes something less than a home when and while the

> picketing ... continue[s].... [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.' " *Carey, supra,* 447 U.S., at 478, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting) (quoting *Wauwatosa v. King,* 49 Wis.2d 398, 411–412, 182 N.W.2d 530, 537 (1971)).

***487** In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy. See *Carey,* 447 U.S., at 478–479, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting) ("Whether ... alone ****2504** or accompanied by others ... there are few of us that would feel comfortable knowing that a stranger lurks outside our home"). The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned. Cf. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 83–84, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (STEVENS, J., concurring in judgment) (as opposed to regulation of communications due to the ideas expressed, which "strikes at the core of First Amendment values," "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment").

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. See *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 542, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). Cf. *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S., at 72, 103 S.Ct., at 2883. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Cf. *Cohen v. California,* 403 U.S., at 21–22, 91 S.Ct., at 1786–1787 (noting ease of avoiding unwanted speech in other circumstances). Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home," *Carey, supra,* 447 U.S., at 478, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting), is "created by the medium of expression itself." See *Taxpayers for Vincent, supra,* 466 U.S., at 810, 104 S.Ct., at 2131. Accordingly, the Brookfield ordinance's ***488** complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance—to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident—may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy, App. to Juris. Statement A–26, and since it speaks only of a "residence or dwelling," not a place of business, *id.,* at A–28. Cf. *Carey, supra,* 447 U.S., at 457, 100 S.Ct., at 2288 (quoting an antipicketing ordinance expressly rendered inapplicable by use of home as a place of business or to hold a public meeting). Moreover, since our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail. The contrary judgment of the Court of Appeals is

Reversed.

Justice WHITE, concurring in the judgment.

I agree with the Court that an ordinance which only forbade picketing before a single residence would not be unconstitutional on its face. If such an ordinance were applied to the kind of picketing that

appellees carried out here, it ***489** clearly would not be invalid under the First Amendment, for the picketing in this case involved large ****2505** groups of people, ranging at various times from 11 individuals to more than 40. I am convinced, absent more than this record indicates, that if some single-residence picketing by smaller groups could not be forbidden, the range of possibly unconstitutional application of such an ordinance would not render it substantially overbroad and thus unconstitutional on its face.

This leaves the question, however, whether the ordinance at issue in this case forbids only single-residence picketing. The Court says that the language of the ordinance suggests that it is so limited. But the ordinance forbids "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Brookfield, Wis., Gen.Code § 9.17(2) App. to Juris. Statement A–28. That language could easily be construed to reach not only picketing before a single residence, but also picketing that would deliver the desired message about a particular residence to the neighbors and to other passersby. Arguably, it would also reach picketing that is directed at the residences which are located in entire blocks or in larger residential areas. Indeed, the latter is the more natural reading of the ordinance, which seems to prohibit picketing in any area that is located "before or about" any residence or dwelling in the town, *i.e.,* any picketing that occurs either in front of or anywhere around the residences that are located within the town.

Furthermore, there is no authoritative construction of this ordinance by the Wisconsin state courts that limits the scope of the proscription. There is, however, the interpretation that has been rendered in this case by both the lower federal courts with jurisdiction over the town whose law is at issue, which we rarely overturn and to which we routinely defer unless there is some fairly compelling argument for not doing so—an established practice that the Court relies on to resolve another aspect of this case. *Ante,* at 2501. As I understand ***490** the District Court, it did not accept the construction of the ordinance which is urged here, holding instead that the ordinance was not narrowly tailored to meet the town's stated objectives, but "completely bans all picketing in residential neighborhoods," 619 F.Supp. 792, 797 (ED Wis.1985), and is not "a constitutional time, place, and manner regulation of speech in a public forum," *id.,* at 798. The panel that heard this case in the Court of Appeals, the opinion of which was of course vacated below, also thought that the question raised by the ordinance concerned the general validity of picketing "*in a residential neighborhood,*" 807 F.2d 1339, 1348 (CA7 1986) (emphasis in original), and observed that the ordinance "restricts picketing" in the town "to the commercial strip along West Bluemound Road," *ibid.* The dissenting judge also understood the ordinance to have confined the ambit of lawful picketing to "any non-residential area." *Id.,* at 1356 (Coffey, J., dissenting). Finally, I do not read the briefs filed by appellants in this Court to have argued that the ordinance should be narrowly construed to apply only to single-residence picketing. To the contrary, appellants' briefs in this Court repeatedly refer to the ordinance as banning all picketing in residential areas. Brief for Appellants 12–13, 13, 41, 42, 43; Reply Brief for Appellants 2, 8.

The Court endorses a narrow construction of the ordinance by relying on the town counsel's representations, made at oral argument, that the ordinance forbids only single-residence picketing. In light of the view taken by the lower federal courts and the apparent failure of counsel below to press on those courts the narrowing construction that has been suggested here, I have reservations about relying on counsel's statements as an authoritative statement of the law. It is true that several times in the past the Court, in reaching its decision on the validity of a statute, has relied on what it considered to be reliable and perhaps binding representations made by state and federal officials as to how a particular statute will be enforced. ***491 **2506** *DeFunis v. Odegaard,* 416 U.S. 312, 317–318, 94 S.Ct. 1704, 1706–1707, 40 L.Ed.2d 164 (1974); *Ehlert v. United States,* 402 U.S. 99, 107, 91 S.Ct. 1319, 1324–25, 28 L.Ed.2d 625 (1971); *Gerende v. Board of Supervisors of Elections of Baltimore,* 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951). But in none of these cases did the Court accept a suggested limiting construction of a state law that appears to be contrary to the views of the lower federal courts.

There is nevertheless sufficient force in the town counsel's representations about the reach of the ordinance to avoid application of the overbreadth doctrine in this case, which as we have frequently emphasized is such "strong medicine" that it "has

been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face and hence prohibit its enforcement against those, like appellees, who engage in single-residence picketing. At least this would be the case until the ordinance is limited in some authoritative manner. Because the representations made in this Court by the town's legal officer create sufficient doubts in my mind, however, as to how the ordinance will be enforced by the town or construed by the state courts, I would put aside the overbreadth approach here, sustain the ordinance as applied in this case, which the Court at least does, and await further developments.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, though, the Court errs in the final step of its analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial and legitimate goal. Accordingly, I must dissent.

The ordinance before us absolutely prohibits picketing "before or about" any residence in the town of Brookfield, ***492** thereby restricting a manner of speech in a traditional public forum.[1] Consequently, as the Court correctly states, the ordinance is subject to the well-settled time, place, and manner test: the restriction must be content and viewpoint neutral,[2] leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Ante,* at 2501; *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 954–55, 74 L.Ed.2d 794 (1983).

Assuming one construes the ordinance as the Court does,[3] I agree that the regulation reserves ample alternative channels of communication. *Ante,* at 2501–2502. I also agree with the Court that the town has a substantial interest in protecting its residents' ****2507** right to be left alone in their homes. *Ante,* at 2501–2502; *Carey v. Brown,* 447 U.S. 455, 470–471, 100 S.Ct. 2286, 2295–2296, 65 L.Ed.2d 263 (1980). It is, however, critical to specify the precise scope of this interest. The mere fact that speech takes place in a residential neighborhood does not automatically implicate a residential privacy interest. It is the intrusion of speech into the ***493** home or the unduly coercive nature of a particular manner of speech around the home that is subject to more exacting regulation. Thus, the intrusion into the home of an unwelcome solicitor, *Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), or unwanted mail, *Rowan v. Post Office Dept.,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), may be forbidden. Similarly, the government may forbid the intrusion of excessive noise into the home, *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), or, in appropriate circumstances, perhaps even radio waves, *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). Similarly, the government may prohibit unduly coercive conduct around the home, even though it involves expressive elements. A crowd of protesters need not be permitted virtually to imprison a person in his or her own house merely because they shout slogans or carry signs. But so long as the speech remains outside the home and does not unduly coerce the occupant, the government's heightened interest in protecting residential privacy is not implicated. See *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971).

The foregoing distinction is crucial here because it directly affects the last prong of the time, place, and manner test: whether the ordinance is narrowly tailored to achieve the governmental interest. I do not quarrel with the Court's reliance on *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), for the proposition that a blanket prohibition of a manner of speech in particular public fora may nonetheless be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the very "evil" the government seeks to eradicate. *Ante,* at 2502–2503; *Vincent,* 466 U.S., at 808, 104 S.Ct., at 2130–31; *id.,* at 830, 104 S.Ct., at 2142 (BRENNAN, J., dissenting). However, the application of this test requires that the government demonstrate that the offending aspects of the prohibited manner of

speech cannot be separately, and less intrusively, controlled. Thus here, if the intrusive and unduly coercive elements of residential picketing can be eliminated without simultaneously eliminating residential picketing ***494** completely, the Brookfield ordinance fails the *Vincent* test.

Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. As the District Court found, before the ordinance took effect up to 40 sign-carrying, slogan-shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. 619 F.Supp. 792, 795 (ED Wis.1985). Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and ****2508** forth with a sign. Cf. *NLRB v. Retail Store Employees,* 447 U.S. 607, 618, 100 S.Ct. 2372, 2379, 65 L.Ed.2d 377 (1980) (STEVENS, J., concurring in part and concurring in result). Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

The Court nonetheless attempts to justify the town's sweeping prohibition. Central to the Court's analysis is the determination that:

> ***495** "[I]n contrast [to other forms of communication], the picketing [here] is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." *Ante,* at 2503.

That reasoning is flawed. First, the ordinance applies to all picketers, not just those engaged in the protest giving rise to this challenge. Yet the Court cites no evidence to support its assertion that picketers generally, or even appellees specifically, desire to communicate only with the "targeted resident." (In fact, the District Court, on the basis of an uncontradicted affidavit, found that appellees sought to communicate with *both* Dr. Victoria and with the public. 619 F.Supp., at 795.) While picketers' signs might be seen from the resident's house, they are also visible to passersby. To be sure, the audience is limited to those within sight of the picket, but focusing speech does not strip it of constitutional protection. Even the site-specific aspect of the picket identifies to the public the object of the picketers' attention. Cf. *Boos v. Barry,* 485 U.S. 312, 331, 108 S.Ct. 1157, ——, 99 L.Ed.2d 333 (1988). Nor does the picketers' ultimate goal—to influence the resident's conduct—change the analysis; as the Court held in *Keefe, supra,* 402 U.S., at 419, 91 S.Ct., at 1577–78, such a goal does not defeat First Amendment protection.

A second flaw in the Court's reasoning is that it assumes that the intrusive elements of a residential picket are "inherent." However, in support of this crucial conclusion the Court only briefly examines the effect of a narrowly tailored ordinance: "[E]ven a solitary picket can invade residential privacy. See *Carey, supra,* [447 U.S.,] at 478–479 [100 S.Ct., at 2299] (REHNQUIST, J., dissenting) ('Whether ... alone or accompanied by others ... there are few of us that would feel comfortable knowing that ***496** a stranger lurks outside our home')." *Ante,* at 2503 (ellipses in Court's opinion). The Court's reference to the *Carey* dissent, its sole support for this assertion, conjures up images of a "lurking" stranger, secreting himself or herself outside a residence like a thief in the night, threatening physical harm. This hardly seems an apt depiction of a solitary picket, especially at midafternoon, whose presence is objectionable because it is notorious. Contrary to the Court's declaration in this regard, it seems far more likely that a picketer who truly desires only to harass those inside a

particular residence will find that goal unachievable in the face of a narrowly tailored ordinance substantially limiting, for example, the size, time, and volume of the protest. If, on the other hand, the picketer intends to communicate generally, a carefully crafted ordinance will allow him or her to do so without intruding upon or unduly harassing the resident. Consequently, the discomfort to which the Court must refer is merely that of knowing there is a person outside who disagrees with someone inside. This may indeed be uncomfortable, but it does not implicate the town's interest in residential privacy and therefore does not warrant silencing speech.

A valid time, place, or manner law neutrally regulates speech only to the extent necessary to achieve a substantial governmental ****2509** interest, and no further. Because the Court is unwilling to examine the Brookfield ordinance in light of the precise governmental interest at issue, it condones a law that suppresses substantially more speech than is necessary. I dissent.

Justice STEVENS, dissenting.

"GET WELL CHARLIE—OUR TEAM NEEDS YOU."

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the period of time necessary to convey its friendly message to its intended audience.

***497** The Court's analysis of the question whether Brookfield's ban on picketing is constitutional begins with an acknowledgment that the ordinance "operates at the core of the First Amendment," *ante,* at 2499, and that the streets of Brookfield are a "traditional public forum," *ante,* at 2500. It concludes, however, that the total ban on residential picketing is "narrowly tailored" to protect "only unwilling recipients of the communications." *Ante,* at 2502. The plain language of the ordinance, however, applies to communications to willing and indifferent recipients as well as to the unwilling.

I do not believe we advance the inquiry by rejecting what Justice BRENNAN calls the "rogue argument that residential streets are something less than public fora," *ante,* at 2506, n. 1. See *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 833, 105 S.Ct. 3439, 3465, 87 L.Ed.2d 567 (1985) (STEVENS, J., dissenting). The streets in a residential neighborhood that has no sidewalks are quite obviously a different type of forum than a stadium or a public park. Attaching the label "public forum" to the area in front of a single family dwelling does not help us decide whether the town's interest in the safe and efficient flow of traffic or its interest in protecting the privacy of its citizens justifies denying picketers the right to march up and down the streets at will.

Two characteristics of picketing—and of speech more generally—make this a difficult case. First, it is important to recognize that, "[l]ike so many other kinds of expression, picketing is a mixture of conduct and communication." *NLRB v. Retail Store Employees,* 447 U.S. 607, 618–619, 100 S.Ct. 2372, 2379, 65 L.Ed.2d 377 (1980) (STEVENS, J., concurring in part and concurring in result). If we put the speech element to one side, I should think it perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it seems equally clear that a sign carrier has a right to march past a residence—and presumably pause long enough to give the occupants an opportunity to read his or her message—regardless of whether the reader agrees, disagrees, or is simplyindifferent ***498** to the point of view being expressed. Second, it bears emphasis that:

> "[A] communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message." *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 546–547, 100 S.Ct. 2326, 2338, 65 L.Ed.2d 319 (STEVENS, J., concurring in judgment) (footnotes omitted).

Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to do

more than convey a message of opposition to the character of the doctor's practice; it was intended to cause him and his family substantial psychological distress. As the record reveals, the picketers' message was repeatedly redelivered by a relatively large group—in essence, increasing ****2510** the volume and intrusiveness of the same message with each repeated assertion, cf. *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). As is often the function of picketing, during the periods of protest the doctor's home was held under a virtual siege. I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I ***499** agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably "overbroad" in that it prohibits some communication that is protected by the First Amendment. The question, then, is whether to apply the overbreadth doctrine's "strong medicine," see *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), or to put that approach aside "and await further developments," see *ante*, at 2506 (WHITE, J., concurring in judgment). In *Broadrick*, the Court framed the inquiry thusly:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S., at 615, 93 S.Ct., at 2918.

In this case the overbreadth is unquestionably "real." Whether or not it is "substantial" in relation to the "plainly legitimate sweep" of the ordinance is a more difficult question. My hunch is that the town will probably not enforce its ban against friendly, innocuous, or even brief unfriendly picketing, and that the Court may be right in concluding that its legitimate sweep makes its overbreadth insubstantial. But there are two countervailing considerations that are persuasive to me. The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; while we sit by and await further developments, potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. Accordingly, I respectfully dissent.

All Citations

487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, 56 USLW 4785

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court today soundly rejects the town's rogue argument that residential streets are something less than public fora. *Ante*, at 2499–2500. I wholeheartedly agree with this portion of the Court's opinion.

2 The Court relies on our "two-court rule" to avoid appellees' argument that state law creates a labor picketing exception to the Brookfield ordinance, and thus that the law is not content neutral. *Ante*, at 2500–2501. However, I would not be as quick to apply the rule here. The District Court's opinion focuses solely on the language and history of the town ordinance and does not refer to state law, 619 F.Supp. 792, 796 (ED Wis.1985); the panel simply deferred to the District Court; and the en banc court issued no opinion. I cannot find even *one* court, let alone two, that has clearly passed on appellees' argument. Cf. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395, 108 S.Ct. 636, ——, 98 L.Ed.2d 782 (1988). However, nothing in the Court's opinion forecloses consideration of this question on remand.

3 Like Justice WHITE, I am wary of the Court's rather strained "single-residence" construction of the ordinance. Moreover, I give little weight to the town attorney's interpretation of the law; his legal interpretations do not bind the state courts, and therefore they cannot bind us. *American Booksellers, supra,* 484 U.S., at 395, 108 S.Ct., at ——. However, for purposes of this dissent, I will accept the Court's reading.

463 F.3d 1029
United States Court of Appeals,
Ninth Circuit.

Steve KLEIN; Aaron Bagley; Roxann Bagley; Linda Bebee; Michael Bebee; Chris Bell; Gary Cass; Isaac Cass; Joshua Cass; Frank Dawson; Russ Dearborn; David Kidder; Lorraine Klein; Phil Magnan; Cindy Moles; Jack Oben; Sandra Olafson; Judith Olafson; Marin Olafson, a minor through her guardian ad litem, Judith Olafson; Taryn Olafson, a minor through her guardian ad litem, Judith Olafson; Ted Skelton; Allyson Smith; Anthony Sotille; Daniel Stephens, aka Daniel Stevens; Ralph Thompson,
Plaintiffs–Appellants,
v.
SAN DIEGO COUNTY; Does 1–100,
Defendants–Appellees.

No. 04–55819.
|
Argued and Submitted Dec. 6, 2005.
|
Filed Sept. 18, 2006.

Synopsis
Background: Action was brought challenging constitutionality of county's residential picketing ordinance. The United States District Court for the Southern District of California, Rudi M. Brewster, J., dismissed the claims and plaintiffs appealed.

Holdings: The Court of Appeals, Pregerson, Circuit Judge, held that:

[1] ordinance was a valid time, place, and manner restriction on speech;

[2] ordinance was not unconstitutionally overbroad; and

[3] ordinance was not unconstitutionally vague.

Affirmed.

West Headnotes (13)

[1] **Constitutional Law**
Facial invalidity
Constitutional Law
Ordinances in general

An ordinance is facially unconstitutional only if it is unconstitutional in every conceivable application, or seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.

Cases that cite this headnote

[2] **Constitutional Law**
Residences
Counties
Governmental powers in general

County residential picketing ordinance, requiring picketers to remain at least 300 feet from targeting dwelling, was a valid time, place, and manner restriction on speech in a public forum; ordinance was neutral on its face since it prohibited picketing within a certain zone regardless of protest topic, government had significant interest in protecting residential tranquility, prohibition was narrow, and ordinance did not impact protesters ability to communicate with willing listeners in every case. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
Government Property and Events

The level of restriction that can be placed on speech depends on whether the forum is a traditional public forum, a limited

public forum, or a nonpublic forum. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] **Constitutional Law**
Justification for exclusion or limitation

The proper analysis for a challenge to an ordinance that restricts speech in a public forum is whether the restriction is a valid time, place, and manner restriction on speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Time, Place, or Manner Restrictions

A time, place, and manner restriction on speech is valid if it: (1) is content neutral; (2) is narrowly tailored to serve a significant government interest; and (3) leaves open ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Freedom of Speech, Expression, and Press

An alternative method of communication to that foreclosed by government regulation is inadequate under the First Amendment if the speaker's ability to communicate effectively is threatened. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Picketing

While a picketer has no right to force speech on those who do not want to hear it, the First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Freedom of Speech, Expression, and Press

An alternative method of communication to that foreclosed by government regulation is inadequate under the First Amendment if it precludes the speaker from getting the attention of willing listeners in a specific intended audience. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Residences
Counties
Governmental powers in general

County residential picketing ordinance, requiring picketers to remain at least 300 feet from targeting dwelling, was not an unconstitutionally overbroad restriction on speech; ordinance prohibited only picketing targeted at a single residential dwelling and ordinance was unlikely to have substantial effect on truly welcome picketing. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[10] **Constitutional Law**
Overbreadth

A law is overbroad if it does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Statutes in general

Because a facial overbreadth challenge is a strong remedy, the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

Cases that cite this headnote

[12] **Constitutional Law**
Residences
Counties
Governmental powers in general

County residential picketing ordinance, requiring picketers to remain at least 300 feet from targeting dwelling, was not an unconstitutionally vague restriction on speech; language of statute was not ambiguous, assessor's maps were available from county tax assessor's office showing lot sizes, and a would-be picketer with a lot map should be able to estimate boundary with some level of precision. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[13] **Constitutional Law**
Ordinances

An ordinance is unconstitutionally vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of California; Rudi M. Brewster, District Judge, Presiding. D.C. No. CV–03–01896–RMB.

Before: PREGERSON, COWEN,* and THOMAS, Circuit Judges.

Opinion

PREGERSON, Circuit Judge:

Plaintiffs challenge the constitutionality of a residential picketing ordinance enacted by the Defendant San Diego County ("the County"). Because we conclude that the ordinance is not unconstitutional in every conceivable application and is not unconstitutionally vague, we affirm the district court's order dismissing Plaintiffs' constitutional claims.

I. Factual Background

In 2002, the County passed an ordinance to regulate the conduct of people wanting to picket in residential neighborhoods. The ordinance reads: "No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet

of a residential dwelling in the unincorporated areas of the County of San Diego." San Diego County Code § 311.103. Violation of the ordinance is punishable as a misdemeanor. *Id.* § 311.104.

On September 13, 2003, Plaintiffs went to a residential neighborhood in an unincorporated area of San Diego County, a neighborhood that included the home of August Caires, General Manager of the Padre Dam Municipal Water District. During a water district board meeting, Deborah Baczynski, a water district employee, had ridiculed Joel Anderson, a member of the water district board who suffers from Bells–Palsy, by pulling down ***1032** one side of her face with her hands and speaking in slurred speech, mimicking the effects of Bells–Palsy on Anderson. Plaintiffs were upset that Caires did not reprimand Baczynski. They decided to picket outside Caires's home with three goals: (1) to convince Caires to set up a third-party investigation of abuses against disabled persons, (2) to ensure that such conduct did not occur in the future, and (3) to educate neighbors and the public at large about the water district's discrimination against the disabled.

Appellants held signs and walked a circuitous route the length of the block that included Caires's home. After a short period, two deputy sheriffs from the County ordered Plaintiffs to move at least 300 feet away from Caires's property line and threatened to arrest Plaintiffs if they did not move.[1] Plaintiffs ended their demonstration and left.

All parties agree that the officers misinterpreted the County's picketing ordinance. The ordinance requires that picketers remain at least 300 feet from the targeted *dwelling,* not 300 feet from the property line of the targeted residence. It was later shown that Caires's dwelling is set back more than 300 feet from the property line. As such, Plaintiffs' actions on September 13, 2003 did not violate the ordinance.

Plaintiffs filed a complaint that raised both facial and as applied challenges to the ordinance. Plaintiffs asked for a declaratory judgment that the ordinance violated their free speech and due process rights under the United States and California Constitutions. They also requested injunctive relief and monetary damages. On November 19, 2003, the district court granted a preliminary injunction that temporarily prohibited the County from enforcing the ordinance.

The district court held a hearing on the constitutionality of the ordinance on December 9, 2003. On December 29, 2003, the district court made a fact-finding "field trip" to four residences in the County and to a football field. At the various locations, the court had court personnel stand at the 300–foot boundary, hold signs, and make noise so that it could determine the impact of the ordinance.

Based on its trip, the court made several factual determinations. First, it found that at each of the four homes, occupants of the house could not see picketers or signs at 300 feet away because there was no line-of-sight between the homes and the picketers.[2] At the football field, the court found that a person could see the signs 300 feet away, but could not read them with the naked eye. The court also found that, on an empty football field, a person could only hear "a little underground sound" if the "picketers" spoke at a conversational tone at a distance of 300 feet. If they "raised their voice a little bit" the court could tell "that there was activity there." And, when the picketers were yelling, the court could hear and understand their message.

On March 30, 2004, the court issued its decision. The court found that Plaintiffs had standing to bring their facial challenges to the ordinance, but not an as ***1033** applied challenge. It then denied their facial challenge on the merits. First, the court rejected the Plaintiffs' argument that the ordinance was impermissibly vague. It found that a person of ordinary intelligence would understand how the 300–foot distance was measured. In response to Plaintiffs' argument that the statute is vague because no public record indicated how far dwellings are set back from the property line, the court found that: (a) if there were no "no trespassing" sign, a picketer could walk up to the house and measure the distance; (b) a would-be picketer could use a hand-held rangefinder, topographical map, or public record to measure 300 feet from the residence; or (c) a would-be picketer could measure the distance in an adjacent area and then "estimate very ably" the 300–foot distance.

Second, the court held that the ordinance was a reasonable time, place, and manner restriction, because the 300–foot ordinance was narrowly tailored to a significant government interest, namely, preventing "intrusion upon the right to

privacy in the home." The court stated that "so long as the targeted picketing interferes with an individual's residential privacy rights, the government has a significant interest in regulating the speech." The court further noted that "[t]he Constitution does not ... require the occupants to come in from their porches or decks, shut their windows and doors, and draw their shades in an effort to avoid targeted picketing activity." Rather, "occupants are entitled to unencumbered enjoyment of the tranquility and privacy of their homes without being subjected to unwelcome speech, and the First Amendment may not trample those rights." Because the ordinance "does not completely shield a resident from awareness of undesired targeted picketing," the court concluded that the ordinance was a reasonable time, place, and manner restriction on speech. The district court dismissed Plaintiffs' constitutional claims and dissolved the temporary injunction. Plaintiffs filed a timely appeal to this court.

II. Analysis

This case presents a facial challenge to the County's ordinance on First Amendment grounds. Accordingly, we review the district court's decision de novo. *See United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir.1996).

[1] An ordinance is facially unconstitutional only if "it is unconstitutional in every conceivable application, or ... seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.' " *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Plaintiffs raise three challenges to the County's ordinance: (a) that the ordinance is not a valid time, place, and manner restriction; (b) that the ordinance is overbroad; and (c) that the ordinance is unconstitutionally vague.[3]

A. Invalid Time, Place, and Manner Restriction Challenge

[2] [3] To determine the proper analysis for Plaintiffs' claims, the threshold question is the nature of the forum in which the ordinance limits speech. The level of restriction ***1034** that can be placed on speech depends on whether the forum is a traditional public forum, a limited public forum, or a nonpublic forum. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

The Supreme Court noted in *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), that public streets are "the archetype of a traditional public forum." *Id.* at 480, 108 S.Ct. 2495. " 'Time out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmark of a traditional public forum." *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Moreover, *Frisby* held that a street does not lose its status as a public forum "simply because it runs through a residential neighborhood." *Id.* It is well-settled, then, that the residential streets and sidewalks covered by the County's ordinance are public fora.

[4] [5] The proper analysis for a challenge to an ordinance that restricts speech in a public forum is whether the restriction is a valid time, place, and manner restriction on speech. *Perry*, 460 U.S. at 45, 103 S.Ct. 948. A time, place, and manner restriction on speech is valid if it: (a) is content neutral, (b) is narrowly tailored to serve a significant government interest, and (c) leaves open ample alternative channels for communication. *Id.* Again, because Plaintiffs raise a facial challenge, we cannot strike down the ordinance unless it is "unconstitutional in every conceivable application." *See Taxpayers for Vincent*, 466 U.S. at 796, 104 S.Ct. 2118.

1. *Content Neutral*

Plaintiffs concede, as they must, that the ordinance is content neutral on its face; the ordinance prohibits residential picketing within a certain zone no matter what the topic of the protest or the viewpoint of the protester. As such, this first prong is not disputed.

2. *Narrowly Tailored to Serve a Significant Government Interest*

[6] It is not disputed that the government has an interest in protecting residential tranquility. In *Frisby*, the Supreme Court considered a Brookfield, Wisconsin residential picketing ordinance that prohibited picketing directly in front of a targeted residence. *See* 487 U.S. at 483, 108 S.Ct. 2495. The Court discussed the nature of the

right to residential privacy in broad terms:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that pre-serving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.

Id. at 484, 108 S.Ct. 2495 (internal quotation marks and citations omitted).

At the same time, the Court recognized the "careful scrutiny" given to restrictions on public issue picketing, given the importance of "uninhibited, robust, and wide-open debate on public issues." *Id.* at 479, 108 S.Ct. 2495. (quoting *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Accordingly, it defined more specifically the "evil" to be prevented by residential picketing ordinances: that such picketing might render the targeted resident a captive audience to unwanted speech. *See id.* at 484–85, 487, 108 S.Ct. 2495 ("[I]ndividuals are not required to welcome unwanted speech into ***1035** their own homes and ... the government may protect this freedom."). Having defined the right this way, the Court upheld a facial challenge to the Brookfield ordinance, because picketing directly in front of the home would make the targeted resident captive in the residence. *See id.* at 487, 108 S.Ct. 2495 ("The target of the focused picketing banned by the Brookfield ordinance is just such a 'captive.' The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.").

This narrowed definition of the right to residential privacy was reiterated in *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). In *Madsen,* the Court considered an injunction that prohibited picketing within 300 feet of the residence of abortion clinic employees. *See id.* at 774, 114 S.Ct. 2516. The Court noted, again, that the house is the "last citadel of the tired, the weary, and the sick." *Id.* at 775, 114 S.Ct. 2516 (quoting *Frisby,* 487 U.S. at 484, 108 S.Ct. 2495). It found, however, that the 300–foot prohibition was "much larger" than the zone of protection provided in *Frisby.* It held that the ordinance burdened more speech than necessary to protect the government's interest because "limitation[s] on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.* Such measures would both protect residents from being a captive audience in the home and protect picketers' First Amendment rights.[4] Thus, the Court found this provision of the injunction to be unconstitutional.

The combined teaching of *Frisby* and *Madsen* is that the government's interest in residential privacy does not trump all other rights. The government certainly has a significant interest in preventing picketing that renders the targeted resident a captive audience to the picketers' message. But the right to residential privacy does not encompass a right to remain blissfully unaware of the presence of picketers. *See Murray v. Lawson,* 138 N.J. 206, 649 A.2d 1253, 1267 (1994) ("[K]eeping [picketers] at such a great distance, thereby rending[the resident's] awareness of the picketing most unlikely as a practical matter, is unnecessary to protect [the resident's] residential-privacy interest").

Thus the district court erred when it stated that residential occupants are entitled to "an unencumbered enjoyment of the tranquility and privacy of their homes." Instead, residential picketing ordinances must carefully balance two valid and competing interests: the right of residents not to be captive audiences to unwanted speech and the right of picketers to convey their message. *See Frisby,* 487 U.S. at 487, 108 S.Ct. 2495. Residential picketing ordinances require a more nuanced approach than the one implied by the district court's formulation of the right to residential privacy.

Even though we disagree with the district court on this point, we nonetheless affirm its conclusion that Plaintiffs cannot state a valid facial challenge to the

County's ordinance. The ordinance *is* problematic ***1036** in several aspects: The 300–foot ban imposed by the County will, in many cases, put picketers farther away from the targeted residence than they would be under those ordinances that have been deemed constitutional by other courts. *See Thorburn v. Austin,* 231 F.3d 1114, 1120 (8th Cir.2000) (upholding an ordinance that prohibited picketing within fifty feet of the targeted resident's property line, but that allowed picketing on the sidewalk across the street from the targeted residence); *Douglas v. Brownell,* 88 F.3d 1511, 1520–21 (8th Cir.1996) (upholding an ordinance that banned picketing in front of the targeted house and one house on either side, but that permitted picketing on the sidewalk across the street from the targeted residence); *see also Kirkeby v. Furness,* 92 F.3d 655, 660 (8th Cir.1996) (striking down an ordinance that banned picketing within 200 feet of a targeted residence); *Murray,* 649 A.2d at 1267–68 (striking down an injunction that banned picketing within 300 feet of the targeted residence).[5] In addition, the ordinance imposes a one-size-fits-all approach to residential picketing, which in some cases will allow picketing directly in front of the targeted home if the home is situated on a large lot, but will put the picketers several lots away from the targeted audience if the residence is situated on a small lot. Moreover, as in *Madsen,* the ordinance does not consider more limited restrictions, such as limitations on the number of picketers, the time of day, or the duration of picketing.

Despite the problematic aspects of the ordinance, we cannot say that the ordinance is unconstitutional in every application, primarily because the ordinance did not have an unconstitutional effect in the test case that led to the instant suit. A correct interpretation of the ordinance would have allowed Plaintiffs to picket on the sidewalk or street directly in front of Caires's home, or anywhere else in the neighborhood, because Caires's home was set back more than 300 feet from the street. Thus, for all practical purposes, had the officers correctly interpreted the ordinance, the ordinance would have had no impact on the Plaintiffs' right to picket at Caires's residence. Had a *Frisby* ordinance been in place in the County, Plaintiffs would have been pushed *farther* away from the residence than they were under the County's ordinance. Courts have accepted ordinances that prohibit picketing directly in front of the targeted resident's home. *See, e.g., Frisby,* 487 U.S. at 483, 108 S.Ct. 2495 ("[O]nly focused picketing taking place solely in front of a particular residence is prohibited."); *Vittitow v. City of Upper Arlington,* 43 F.3d 1100, 1105 (6th Cir.1995) (noting that "any linear extension beyond the area 'solely in front of ***1037** a particular residence' is at best suspect, if not prohibited outright"). Because the ordinance functions as a more narrow prohibition than the one at issue in *Frisby* in *some* circumstances, we cannot say that the ordinance is unconstitutional in every application. Plaintiffs' claim is therefore not appropriate for a facial challenge.[6]

3. *Leaves Open Ample Alternatives for Communication*

In the alternative, Plaintiffs claim that the ordinance is unconstitutional because it does not leave open adequate alternatives to communicate to the targeted resident and to the resident's neighbors. The County contends that the ordinance leaves open the opportunity for general dissemination of the picketer's message, including picketing in other neighborhoods, direct mail and telephone contact with those in the neighborhood, and, of course, picketing more than 300 feet from the targeted residence.

[6] [7] [8] A valid time, place, and manner restriction must leave open alternative methods of communication. An alternative method of communication is "constitutionally inadequate if the speaker's ability to communicate effectively is threatened." *Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1229 (9th Cir.1990) (internal citations and quotations omitted). While a picketer has no right to force speech on those who do not want to hear it, *see Frisby,* 487 U.S. at 487, 108 S.Ct. 2495, "the First Amendment protects the right of every citizen to reach the minds of *willing listeners* and to do so there must be opportunity to win their attention." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 655, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (emphasis added, internal citations and quotations omitted). An alternative is inadequate if it precludes the speaker from getting the attention of willing listeners in a specific intended audience. *Bay Area Peace Navy,* 914 F.2d at 1229.

While we admit that Plaintiffs may, in some cases, have a special interest in reaching willing listeners in the target resident's neighborhood, we must deny Plaintiffs' claim for the same reason that

we deny their narrowly tailored challenge. That is, Plaintiffs have not shown that the ordinance impacts their ability to communicate with willing listeners in *every* case. In some cases, as was the case in Caires's neighborhood, the ordinance would have no impact on Plaintiffs' ability to communicate their message to Caires or Caires's neighbors. Without violating the ordinance, Plaintiffs could demonstrate directly in front of Caires's home or could picket throughout the neighborhood to educate Caires's neighbors about the actions of the water district. Because the ordinance leaves ample alternatives for communication in at least *some* cases, including the test case before us, we cannot say that the ordinance is unconstitutional in every application. Accordingly, Plaintiffs' facial challenge fails.

B. Overbreadth Challenge

[9] [10] [11] **Plaintiffs also argue that the County's ordinance is** unconstitutionally overbroad. While a facial challenge on time, place, and manner grounds asserts that the statute is unconstitutional in every conceivable application, an overbreadth ***1038** challenge asserts that the restriction's scope includes a substantial amount of protected conduct. A law is overbroad if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech...." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *see also Clark v. City of Los Angeles*, 650 F.2d 1033, 1039 (9th Cir.1981). Because a facial overbreadth challenge is a strong remedy, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800, 104 S.Ct. 2118. Rather, the Supreme Court has required that the overbreadth "not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (emphasis added).

Plaintiffs' overbreadth challenge rests on the contention that the County's ordinance bans messages that the targeted resident wants to receive. Plaintiffs offer several examples. First, Plaintiffs argue that the ordinance would prohibit a little league team holding a "Get Well Soon Tommy" sign in front of their teammate's house. *See Frisby*, 487 U.S. at 496–97, 108 S.Ct. 2495 (Stevens, J., dissenting) (noting that a child carrying a sign reading " 'Get Well Charlie—Our Team Needs You' " was unlawful conduct under the majority's interpretation of the residential picketing ordinance). Second, Plaintiffs claim that the ordinance would prevent a child from protesting on the sidewalk in front of her parent's house, even if her parents encouraged such a demonstration as training in social activism. And, finally, Plaintiffs allege that the ordinance would cover a picketer who wished to "target" a neighborhood to warn them about some danger in a neighborhood, for example, that a sex offender had moved in nearby.

We believe the strong remedy of striking this ordinance down on overbreadth grounds is not called for here. First, we note that the ordinance prohibits only picketing targeted at a *single* residential dwelling. *See* San Diego County Code § 311.102 (defining targeted picketing as picketing "targeted at a particular residential dwelling"). The "Purposes and Intents" section of the ordinance confirms this interpretation: "This ordinance is not intended to preclude the right to picket in a residential area generally and in such a manner that does not target or focus upon a particular residence or household." *Id.* § 311.101(f). Thus, if the goal of the picketing is to reach an entire neighborhood with a message, the ordinance would not apply.

Second, the ordinance is unlikely to have any substantial effect on truly welcome picketing. If the message is desired by the targeted resident, it is unlikely that the police would be called to enforce the ordinance. And even if police threatened to enforce the ordinance, the resident who wished to hear the speech could simply invite the picketers onto their private property. *See Thorburn v. Roper*, 39 F.Supp.2d 1199, 1214 (D.Neb.1999). Because there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment protection," *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. 2118, the Plaintiffs' facial overbreadth challenge is denied.

C. Vagueness Challenge

[12] [13] An ordinance is unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). ***1039**

Where a case involves the First Amendment, a greater degree of specificity and clarity is required. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir.2001). At the same time, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Plaintiffs allege that the County's ordinance is unconstitutionally vague in that it is impossible to determine, from public records or by any other means, where the boundary of the 300–foot zone lies. They argue that picketers are forced to guess whether they are obeying the ordinance. They also point out that the statute contains no scienter element that might protect protesters from an honest mistake as to whether they were violating the ordinance.

As the district court noted, the language of the statute itself is not ambiguous. Thus, this is not the typical vagueness challenge where ambiguous text makes it difficult to determine what conduct is proscribed. But the ordinance might nonetheless be unconstitutionally vague if it were impossible for the picketers to determine the 300–foot boundary with any precision and if the lack of a scienter element left picketers strictly liable for any violation. A law that requires a person to "steer far wider of the unlawful zone" because of doubt about the boundary cannot stand. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (citations omitted).

In this case, the district court found that picketers could walk up to the house and measure out the 300 feet, as long as there was no "No Trespassing" sign at the targeted residence. The court also suggested that picketers could use "an inexpensive hand-held rangefinder, topographical maps, or publicly available land records" to measure the 300 feet. And, failing all other options, would-be picketers could measure the distance elsewhere and then "estimate very ably" the distance to the house.

The district court overstated the options. We disagree that picketers, already unwelcome guests, should be forced to march across the targeted resident's lawn to measure the distance, even if they might do so without violating trespassing laws. Such a "solution" promises to escalate tension at the picket site. Furthermore, while a rangefinder would help a would-be picketer determine the distance with precision, the Court has been cautious of options that would require money as an entrée to speech. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 113, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (striking down a $1.50 licensing fee because it served as a "flat tax" levied on "the enjoyment of a right granted by the federal constitution"); *Fernandes v. Limmer*, 663 F.2d 619, 632 (5th Cir.1981) ("Were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep.").

Plaintiffs presented uncontroverted evidence that no public record contained a setback distance so that would-be picketers could measure *precisely* the 300–foot boundary. But assessor's maps available from the County Tax Assessor's office do show lot sizes. While the maps do not indicate exactly where the residence sits on the lot, a would-be picketer, with the lot map in hand, should be able to estimate the boundary with some level of precision. A statute is not unconstitutionally vague unless it requires would-be speakers to "steer *far* wide" of the boundary—a result we believe is unlikely here. Accordingly, we will not strike down the ordinance on vagueness grounds.

***1040 D. California Constitutional Claims**

Plaintiffs argue that they should be granted relief under the California Constitution as well. The California courts have noted that protection of expressive activity under the California Constitution is in some respects broader than the protection provided by the First Amendment of the United States Constitution. *See Kasky v. Nike, Inc.*, 27 Cal.4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243, 255 (2002). Plaintiffs have not, however, pointed to any specific protection provided by the California Constitution or the California courts that affects our analysis. Accordingly, we decline to grant Plaintiffs' claims on state law grounds.

III. Conclusion

For the foregoing reasons, the district court's decision is AFFIRMED.

All Citations

463 F.3d 1029, 06 Cal. Daily Op. Serv. 8789, 2006
Daily Journal D.A.R. 12,609

Footnotes

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1 The record shows that Plaintiffs called the police themselves.

2 The parties submitted maps for the record showing the impact of the ordinance at various residential sites. At one site, a house located on a cul-de-sac, picketers could not be on the cul-de-sac where the house was located or on the road that accessed the cul-de-sac, but could picket around the corner from the house. At a second site, picketers could protest on the same street six lots away from the targeted residence or on a connecting road, three lots away. As already mentioned, at Caires's home, picketers could be directly in front of the targeted residence.

3 The district court found, and neither party disputes on appeal, that Plaintiffs have standing to bring a facial challenge to the statute. Because "the plaintiff[s] ha[ve] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder," we agree with the district court that they have standing to bring their claims. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

4 *Madsen* does not necessarily foreclose the County's argument that its 300–foot zone is proper. In *Madsen,* the Court was reviewing the constitutionality of an injunction, which must be "no more burdensome ... than necessary" to protect the government interest. *Id.* at 765, 114 S.Ct. 2516. In contrast, a generally applicable ordinance must be "narrowly tailored" to the government's interest. *Id.* at 764, 114 S.Ct. 2516. The standard governing ordinances is less stringent than the standard governing injunctions, *see id.,* although neither the Supreme Court nor this court has articulated a practical distinction between the two standards.

5 In defending its ordinance, the County points to the California Court of Appeal's decision in *City of San Jose v. Superior Court,* 32 Cal.App.4th 330, 38 Cal.Rptr.2d 205 (Ct.App.1995), which upheld an ordinance banning picketing within 300 feet of a targeted residence. We believe *City of San Jose* wrongly characterized the right at issue—it concluded that residential picketing is "highly offensive conduct," a "disfavored activity not entitled to a high level of First Amendment protection." *Id.* at 209, 210, 38 Cal.Rptr.2d 205. Contrary to the California court's characterization, the United States Supreme Court has called public issue picketing on streets and sidewalks "an exercise of ... basic constitutional rights in their most pristine and classic form." *Carey v. Brown,* 447 U.S. 455, 466–67, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (alteration in original) (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963)). Moreover, *Frisby* and *Madsen* make clear that residential picketing enjoys First Amendment protection. While *Frisby* noted that targeted picketing is inherently intrusive on residential privacy, it did not suggest that, where the two clash, the right to residential privacy necessarily trumps the rights of picketers. *See Frisby,* 487 U.S. at 486, 108 S.Ct. 2495. That is to say, residential picketing is not the black sheep of the First Amendment family.

6 Plaintiffs urge us to ignore their technical failure to violate the ordinance in their test case, because the district court created a thorough record regarding the effect of the residential picketing ordinance. We appreciate the district court's extensive efforts to study the effect of the ordinance. Its careful study gave us a fuller picture of the ordinance's impact. But we cannot ignore the circumstances giving rise to this suit because they clearly show that the ordinance is not unconstitutional in every application.

32 Cal.App.4th 330
Court of Appeal, Sixth District, California.

The CITY OF SAN JOSE, Petitioner,
v.
SUPERIOR COURT of Santa Clara County, Respondent;
Terry L. THOMPSON, et al., Real parties in interest.

No. H013078.
|
Feb. 15, 1995.
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Rehearing Denied March 17, 1995.
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Review Denied May 25, 1995.

After defendants were charged with misdemeanor violations of city ordinance prohibiting targeted picketing within 300 feet of residential building, defendants sought extraordinary review of denial of demurrers on ground that ordinance was unconstitutional. The Superior Court, Santa Clara County, No. 736204, Socrates Peter Manoukian, J., issued writ of mandate directing municipal court to sustain demurrers. City sought review. The Court of Appeal, Wunderlich, J., held that: (1) Supreme Court case in which 300 foot injunction around residences of abortion clinic staff, prohibiting picketing, was found invalid did not apply to application of First Amendment principles to public law, and (2) ordinance prohibiting targeted picketing within 300 feet of residence was valid and constitutional.

Peremptory writ issued.

West Headnotes (12)

[1] **Constitutional Law**
Abortion and health care

Case in which antiabortion protestors were permanently enjoined from blocking or interfering with public access to abortion clinic and in which buffer zone around staff residences was found to be overbroad did not apply to application of first amendment principles to city ordinance prohibiting person from engaging in picketing activity within 300 feet of residential dwelling. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] **Constitutional Law**
Injunctions and restraining orders

When evaluating constitutionality of content neutral injunction, court must ask whether challenged provisions of injunction burden no more speech than necessary to serve significant government interest.

Cases that cite this headnote

[3] **Constitutional Law**
Residences
Municipal Corporations
Prohibitory ordinances

Ordinance outlawing targeted picketing within 300 feet of targeted residence, which was both content neutral and not complete ban on parties' rights of expression was valid absent showing that it constituted unreasonable time, place, and manner of regulation. U.S.C.A. Const.Amend. 1; San Jose, Cal., Municipal Code § 10.09.010.

Cases that cite this headnote

[4] **Constitutional Law**

Picketing

Targeted picketing is highly offensive conduct not entitled to same level of First Amendment protection as is more general expression of political or social views. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Narrow tailoring

In order to pass constitutional muster, ordinance which affects First Amendment rights must be "narrowly tailored" to achieve specific end, which means that ordinance achieves substantial government interests that could not be achieved as effectively without regulation or injunction and does not require that regulation be least restrictive means of achieving end. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Reasonableness

Ordinance is not invalid as an unreasonable restriction on time, place, and manner of expression of protected speech simply because there is some imaginable alternative that might be less burdensome, but, rather, test is whether regulation promotes substantial governmental interests that would be achieved less effectively absent restriction.

Cases that cite this headnote

[7] **Constitutional Law**
Safety

Constitutional Law
Pursuit of happiness
Constitutional Law
Particular Issues and Applications
Municipal Corporations
Prohibitory ordinances

City ordinance prohibiting targeted picketing within 300 feet of targeted residence was appropriate restriction to preserve individual's right to pursue safety, happiness, and privacy as guaranteed by California Constitution.

Cases that cite this headnote

[8] **Constitutional Law**
Residences
Municipal Corporations
Prohibitory ordinances

City ordinance restricting targeted picketing to no closer than 300 feet from targeted residence was valid, particularly as it was in accord with governmental choice of 300 foot zone, which appeared in other real property laws, as that within which direct impact on residence would occur. West's Ann.Cal.Gov.Code §§ 53096(a), 65091(a)(3), 66474.64; San Jose, Cal., Municipal Code § 10.09.010.

Cases that cite this headnote

[9] **Constitutional Law**
Residences
Municipal Corporations
Prohibitory ordinances

City ordinance restricting targeted picketing to areas further than 300 feet from targeted residence was valid absent showing as matter of law that 300 foot zone was substantially broader than necessary to protect right of residential privacy involved.

1 Cases that cite this headnote

[10] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Legislature is required to act reasonably and its choices are traditionally entitled to judicial deference unless they run clearly afoul of constitutional requirement.

Cases that cite this headnote

[11] **Municipal Corporations**
Validity in General
Municipal Corporations
Construction and operation

Ordinances are to be construed and tested differently from injunctions in that injunction may be no broader than necessary, while ordinance is valid if it reasonably supports government purpose in such way that anything less would do inferior job.

Cases that cite this headnote

[12] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

Because it is not judicial function to write statutes but injunctions are crafted by trial courts, much broader review power may appropriately come into play when reviewing court scrutinizes injunction.

Cases that cite this headnote

Attorneys and Law Firms

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Michael Millen, San Jose, for real parties in interest.

Opinion

WUNDERLICH, Associate Justice.

The Respondent Superior Court has declared unconstitutional, under the First Amendment, a San Jose City Ordinance which outlaws targeted picketing within 300 feet of a targeted residence. The City of San Jose seeks expedited review of this decision by writ of mandate. Although the ordinance does not apply specifically to anti-abortion protesters, the present controversy arose when real parties in interest were charged with anti-abortion picketing within the proscribed distance of the homes of staff members of a clinic where abortions are performed.

Procedural History of the Case

The City of San Jose (City), petitioner, charged defendants, the real parties in interest, in the municipal court, with misdemeanor violations of an ordinance of the City of San Jose, Municipal Code Section 10.09.010, which prohibits any person from engaging in picketing activity that is "targeted at and is within three hundred (300) feet of a residential dwelling."

Defendants demurred on the ground the ordinance is unconstitutional. After the municipal court overruled the demurrers, defendants petitioned the superior court for extraordinary review. The superior court issued a writ of mandate directing the municipal court to sustain defendants' demurrers.

The superior court determined that the ordinance was content neutral and not vague, and that it left "open, ample, and alternative channels of communication." However, in the same statement

of decision the court found that under compulsion of the decision of the United States Supreme Court in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, the 300–foot buffer zone mandated by the ordinance was unconstitutionally broad.

City seeks review in this Court by writ of mandate or prohibition, asserting that it has no other effective remedy since it wishes to immediately enforce its ordinance.

***334** City has no routine appellate remedy in this Court. Normally it would have an appeal to the superior court from a municipal court order dismissing or terminating an action before jeopardy, or giving judgment for the defendant upon the sustaining of a demurrer. (Pen.Code, § 1466, subds. (a)(1)(B), (C).) However, here the superior court has already declared that such a demurrer must be sustained, has indeed mandated that result by writ. Therefore there is no further appellate remedy.

Routine appeals to this Court are not generally available in misdemeanor prosecutions. However, this case implicates the validity of a public law. Also, current debate regarding what restrictions may appropriately be imposed upon residential protesters and picketers has generated much controversy and ****208** many legal challenges. We believe this case is a matter of sufficient public importance to be entitled to review in this Court, which can only be accomplished by writ.

Discussion

[1] We hold that *Madsen* which involved application of First Amendment principles to an *injunction,* does not control this case, which involves application of First Amendment principles to a *public law.*

In *Madsen,* a Florida state court permanently enjoined anti-abortion protesters from blocking or interfering with public access to an abortion clinic, and from physically abusing persons entering or leaving the clinic. Despite the injunction, however, the protesters continued to impede access to the clinic. As a consequence, the clinic operators sought and obtained an expanded injunction which, inter alia, excluded demonstrators from a 36 foot buffer zone around the clinic entrances, restricted excessive noisemaking within earshot of the clinic, prohibited protesters from approaching patients unwilling to talk within 300 feet of the clinic, and created a 300 foot buffer zone around the residences of clinic staff.

The Court found that the 36 foot buffer zone around the clinic entrance and the noise restrictions were valid. On the other hand, it held that the 300 foot no approach zone around the clinic was more burdensome than necessary to accomplish the government goal of preventing intimidation and ensuring access to the clinic. Likewise, it found that the 300 foot buffer zone around the residences of clinic staff was too broad. The Court noted that on the record before it, it appeared "that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." (—— U.S. at p. ——, 114 S.Ct. at p. 2530.)

***335** [2] The Court emphasized, however, that "[i]f this were a content-neutral, generally applicable statute, instead of an injunctive order," a different and less "stringent application of general First Amendment principles" would apply. (At p. ——, 114 S.Ct. at p. 2524.) "Ordinances," the Court explained, "represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree.... [¶] Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis [such as is used in the case of an ordinance] is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at pp. —— – ——, 114 S.Ct. at pp. 2524–2525.) Applying this "more stringent" (*id.* at p. ——, 114 S.Ct. at p. 2524) standard, the Court found that the 300 foot buffer zone around the staff residences swept more broadly than was necessary to protect the tranquillity and privacy of the home.

According to *Madsen,* the standard to assess the constitutionality of a content-neutral ordinance is that set forth in *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 and similar cases, namely, whether the time, place, and manner regulations are " 'narrowly tailored to serve a significant governmental

interest.' " (—— U.S. at p. ——, 114 S.Ct. at p. 2524, quoting from *Ward v. Rock Against Racism, supra,* 491 U.S. at p. 791, 109 S.Ct. at p. 2753.)

As the trial court correctly found, the ordinance before us is content neutral since it applies to all picketers and not just to those who oppose abortion. (See e.g., *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346; *Kaplan v. Prolife Action League* (1993) 111 N.C.App. 1, 431 S.E.2d 828, 843; *Dayton Women's Health Ctr. v. Enix* (Dist.1991) 68 Ohio App.3d 579, 589 N.E.2d 121, 127.)

The trial court also found that the ordinance leaves open alternative channels of communication. This finding is likewise correct. The issue arose on a demurrer, which raises no factual issues, only issues of law such as facial invalidity of the ordinance. Real parties did not demonstrate that as a matter of law they had no alternative channels of communication. They made no undisputed ****209** showing that targeted picketing is the only way for real parties to communicate their message of anti-abortion sentiments to a general public.

[3] Accordingly the ordinance, being both content neutral and not a complete ban on real parties' rights of expression, is plainly valid unless it does not ***336** constitute a reasonable time, place and manner regulation as defined by the foregoing cases.

The seminal case regarding targeted residential picketing is *Frisby v. Schultz* (1988) 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420. That case, like this one, involved an ordinance. The ordinance, for the declared purpose of protecting residential privacy, made it unlawful for persons to engage in picketing before or about the residence or dwelling of any individual. (*Id.* at p. 477, 108 S.Ct. at p. 2498.) The court construed the ordinance as applying only to "targeted" picketing, that is, picketing specifically directed at the occupants of the picketed homes, and found it constitutionally valid as such. (*Id.* at p. 483, 108 S.Ct. at p. 2501.)

Since the ordinance in *Frisby,* as here, was content neutral but applied in a public forum, the court applied the standard of constitutionality stated above, whether the ordinance was narrowly tailored to serve a significant governmental interest and whether it left open ample alternative channels of communication. (*Id.* at p. 482, 108 S.Ct. at p. 2501.)

The court found the ordinance was intended to protect an important privacy interest, that of residential privacy, which includes protection of the unwilling listener in his home. (487 U.S. at p. 484, 108 S.Ct. at p. 2502.) "There simply is no right to force speech into the home of an unwilling listener." (*Id.* at p. 485, 108 S.Ct. at p. 2502.) Pointing out the especially offensive nature of targeted picketing, the court said that such picketing "is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas.... Here in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the ... ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt...." (*Id.* at p. 486, 108 S.Ct. at p. 2503.)

Other decisions have upheld zoning laws aimed at preserving the values of seclusion and quiet repose in a residential setting. (E.g., *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797.)

[4] In short, the United States Supreme Court has described targeted picketing as highly offensive conduct which is not entitled to the same level of First Amendment protection as is more general expression of political or social views.

***337** The ordinance here is limited to targeted picketing within 300 feet of the targeted residence, and narrowly defines targeted picketing as picketing that is focused on the home and "proceeds on a definite course or route in front of or around that particular residential dwelling." (Section 10.09.010, subd. (C).) This is the very activity that the *Frisby* court found "especially offensive" and inimical to residential privacy. (*Frisby v. Schultz, supra,* 487 U.S. at p. 486, 108 S.Ct. at p. 2503.)

The only difference between *Frisby* and our case is

that here the ordinance sets a 300 foot buffer zone whereas in *Frisby* the ban applied to picketing " 'before or about' " a residence or dwelling. (487 U.S. at p. 477, 108 S.Ct. at p. 2498.) Given the necessary vagueness of the concept "before or about," we believe that the more precise 300 foot zone is less onerous. It leaves no doubt how to obey the law. Application of a bright line standard in this area is far preferable to a more general restriction. Picketers who respect the statutory boundary are protected, and there is less chance of discriminatory or uneven enforcement by the police.

[5] In order to pass constitutional muster, an ordinance impacting First Amendment rights must be "narrowly tailored" to ****210** achieve a specific end. *Ward v. Rock Against Racism, supra,* 491 U.S. 781, 109 S.Ct. 2746, held that a narrowly tailored regulation or injunction is not necessarily the least restrictive means of achieving the end, but rather, one which achieves a substantial governmental interest that could not be achieved as effectively without the regulation or injunction. (*Id.* at p. 799, 109 S.Ct. at p. 2757.)

Although *Madsen* has probably overruled this test as to injunctions, it remains the test applicable to ordinances. (*Madsen v. Women's Health Center, Inc., supra,* 512 U.S. 753, 114 S.Ct. 2516; *Frisby v. Schultz, supra,* 487 U.S. 474, 108 S.Ct. 2495.)

A variety of cases have permitted "clear zones" in various demonstration contexts. These include an ordinance banning targeted congregating within 500 feet of a foreign embassy (*Boos v. Barry* (1988) 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333); a ban on picketing near a courthouse (*Cox v. Louisiana* (1965) 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487); and many cases involving anti-abortion protests. (E.g., *Northeast Women's Center, Inc. v. McMonagle* (3rd Cir.1991) 939 F.2d 57, 63–64 [upholding injunction prohibiting all but 6 pickets within 500 feet of clinic]; *Kaplan v. Prolife Action League, supra,* 431 S.E.2d at pp. 844–847 [300 foot restriction against residential anti-abortion protesters].)

The ordinance here is a legislative choice opting to protect residential privacy within a 300 foot zone of the targeted home, at the expense of ***338** targeted picketing. As we noted above, targeted picketing is a disfavored activity not entitled to a high level of First Amendment protection. Further, the ordinance leaves ample room for dissemination of anti-abortion ideas in a general way through marches, demonstrations and placards employed in residential neighborhoods and other places, provided individuals are not targeted within 300 feet of their homes. This zone compares quite favorably with the 500 foot zone in *McMonagle* or the 500 foot zone in *Boos v. Barry* protecting not residential privacy but the privacy of foreign diplomatic personnel in their embassy. (Note, too, that the ordinance in *Boos v. Barry* was content based, unlike here. See *Boos v. Barry, supra,* 485 U.S. at p. 321, 108 S.Ct. at p. 1163.)

[6] Where ordinances are concerned, it is not the business of the court to write the statute. Review of legislative acts does not encompass quibbling over "a few feet." (See *Portland Fem. Women's H. Ctr. v. Advocates for Life* (9th Cir.1988) 859 F.2d 681, 686.) A regulation of time, place and manner is not invalid " 'simply because there is some imaginable alternative that might be less burdensome on speech.' [Citation.]" (*Ward v. Rock Against Racism, supra,* 491 U.S. at p. 797, 109 S.Ct. at p. 2757.) The test, again, is whether the regulation promotes a substantial governmental interest that would be achieved less effectively absent the restriction. (*Id.* at pp. 798–799, 109 S.Ct. at pp. 2757–2758.) "So long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Id.* at p. 800, 109 S.Ct. at p. 2757.) Another case, upholding a 100 foot boundary line around a polling place, has also stated that it is not the court's job to draw the line, and that it is not a question of constitutional dimension whether the boundary line of the buffer zone could be somewhat tighter. (*Burson v. Freeman* (1992) 504 U.S. 191, 209, 112 S.Ct. 1846, 1857, 119 L.Ed.2d 5.)

City cites several examples of buffer zones of comparable size which have been legislated. These include a ban on picketing within 500 feet of a funeral home, church or temple where funeral services are being held (Mass.Gen.L. ch. 272, § 42A (1990)); a prohibition on picketing within 300 feet of an exit from any justice building or residence used by a judge, juror, or other participant in a legal proceeding (N.C.Gen.Stat. § 14–225.1 (1993)); a ban on labor picketing within

200 feet of a hiring area (Me.Rev.Stat. tit. 26, § 595 (1988)); ban on soliciting driver training within 200 feet of a DMV office (Veh.Code, § 11110); ban on soliciting traffic violator school instruction within 500 feet of any court (Veh.Code, § 11215); sentence enhancement for committing certain substance ****211** abuse offenses within 1,000 feet of a public school ***339** (Health & Saf.Code, § 11353.6) ban on reselling tickets within 1000 feet of the place of entertainment (N.Y.Arts & Cult.Aff. § 25.11 (1994)).

These statutes show that a 300 foot buffer zone contained in the ordinance before us is not an unusual or remarkably large protective space.

[7] City also cites examples of the common use of 300 foot buffer zones in stay-away orders issued in harassment injunction lawsuits. (E.g., *Kobey v. Morton* (1991) 228 Cal.App.3d 1055, 278 Cal.Rptr. 530; see also *Glenside West Corp. v. Exxon Co., U.S.A.* (D.N.J.1991) 761 F.Supp. 1118.) The court in *Kobey v. Morton* viewed the 300 foot restriction there imposed as appropriate to preserve an individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution. (228 Cal.App.3d at p. 1059, 278 Cal.Rptr. 530.) The ordinance here is equally appropriate to preserve those same rights.

[8] Also, the 300 foot buffer zone is consistent with standard notice requirements set forth in local and state laws for land use decisions. For instance, both state and local law require that notice be given to all owners of real property within 300 feet of real property subject to a land use decision. (Gov.Code, §§ 53096, subd. (a), 65091, subd. (a)(3), 66474.64; San Jose Municipal Code, §§ 13.48.120, 17.24.070, 20.08.360, 20.40.130, 20.44.070, etc.) The purpose of the 300 foot notice requirement is to ensure that property owners directly impacted by the land use decision have notice of the impending decision and an opportunity to give input. (E.g., *Concerned Citizens of Murphys v. Jackson* (1977) 72 Cal.App.3d 1021, 1025–1026, 140 Cal.Rptr. 531; see also *Sundance Saloon, Inc. v. City of San Diego* (1989) 213 Cal.App.3d 807, 261 Cal.Rptr. 841 [upholding an ordinance permitting a cabaret to be open after 2:00 a.m. if it is 300 feet from any single or multi-family residence].) Thus these ordinances and laws reflect a governmental choice of the 300 foot zone as that within which direct impact on the resident occurs. It is wholly reasonable to apply that same concept in the context of protection of residential privacy, by removing from that area of impact the targeted picketing which invades such privacy.

[9] To succeed in their claim of facial invalidity, real parties here must show as a matter of law that the 300 foot zone is substantially broader than necessary to protect the right of residential privacy involved. There has been no such showing made. The trial court has made no such finding.

Although we do not believe that on demurrer City has any burden to show a reasonable factual basis for the ordinance, it has made such a showing. ***340** City points out that the minimum standard lot frontage in San Jose subdivisions is 55 feet. (San Jose Municipal Code, § 19.36.200.) Many lots have larger frontages. At most, therefore, the 300 foot buffer zone keeps pickets from coming within 5 ½ homes on either side of the targeted residence. City says the legislature has reasonably chosen this buffer zone to provide a minimum degree of protection to the residents of targeted homes. But the zone does not prevent picketers from disseminating their message to the general public or even to the residents of the targeted homes, from a lawful distance.

The *Madsen* court explained that ordinances are entitled to greater deference than injunctions because they "represent a legislative choice regarding the promotion of particular societal interests." (—— U.S. at p. ——, 114 S.Ct. at p. 2524.) The societal interests promoted by the instant ordinance—residential privacy, and freedom from targeted harassment and intimidation—are evident. The trial judge struck down the ordinance only because he felt bound by *Madsen*. In that, he erred.

The trial judge believed that the language in *Madsen* permitting less rigorous scrutiny of ordinances than injunctions did not apply to the holding that the 300 foot buffer zone was too broad. He stated that strict scrutiny applies to the size of the boundary. However, we find no such language in *Madsen*. Nowhere does it say that 300 feet is always too much nor that the size of the boundary is subject to strict scrutiny. The decision carefully scrutinizes that with which it deals—an ****212** injunction—to make sure it is no broader than necessary. Then, the Court considers whether something less than 300 feet would be adequate. But that is not the way to review an ordinance, and

nothing in *Madsen* says that it is.

We know of no case which attempts to second-guess a legislature by initiating a judicial inquiry whether the legislature could have picked a smaller boundary zone. There is no general rule that a legislature must act as restrictively as possible. As the United States Supreme Court has said, "The 'less-restrictive-alternative analysis ... has never been a part of the inquiry into the validity of a time, place, and manner regulation.' [Citation.] Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.' [Citation.]" (*Ward v. Rock Against Racism, supra,* 491 U.S. at p. 797, 109 S.Ct. at p. 2757.)

[10] [11] A legislature must act reasonably, and its choices are traditionally entitled to judicial deference unless they run clearly afoul of a constitutional requirement. (E.g., ***341** *Lockport v. Citizens for Community Action* (1977) 430 U.S. 259, 269, 272, 97 S.Ct. 1047, 1053, 1055, 51 L.Ed.2d 313; *N.O. Public Service v. New Orleans* (1930) 281 U.S. 682, 686, 50 S.Ct. 449, 450, 74 L.Ed. 1115; *Frisby v. Schultz, supra,* 487 U.S. at p. 483, 108 S.Ct. at p. 2501; *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830.) Thus in *Frisby,* the ordinance did not even say that it applied to targeted picketing but banned all residential picketing, yet the court construed it as applicable to targeted picketing in order to save its validity. And *Madsen,* as stated above, carefully points out that ordinances are to be construed and tested differently from injunctions. An injunction may be no broader than necessary, whereas an ordinance is valid if it reasonably supports the government purpose in such a way that anything less would do an inferior job.

City has stated many valid concerns which have prompted its enactment of this ordinance. In analyzing a substitute ordinance which City has enacted for the duration of our review, the City Attorney states that "Picketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy for its occupants and instill identical feelings of captivity, fear and intimidation in the targeted residents as do picketers directly in front of the residence. If picketers are close to a residence, it becomes impossible for the residents to access or leave their homes without having to run a gauntlet and confront picketers. For this reason, as other courts have recognized, buffer zones are needed to prevent the siege upon the home and the offensive intrusions of residential privacy caused by targeted residential picketing activities." The preamble to the instant ordinance recites similar concerns; for example it recites that "picketing activity that is targeted at a particular residence or household whose occupants do not welcome such activity may harass and intimidate such occupants, is inherently and unreasonably offensive to and intrusive upon the right to privacy in the home and may cause the occupants of such home to experience great emotional distress." Further: "[S]uch unwelcome and targeted picketing activity creates a 'captive audience' situation because the occupants of a residence or household cannot readily move to another residence or household in order to avoid the unwelcome picketing activity being directed at them."

These recitals reflect the underlying legislative judgment that targeted residential picketing is a harmful phenomenon which needs to be limited. Defendants do not and cannot demonstrate that such conclusions are so unreasonable and arbitrary as to be beyond the power of the legislature. To the contrary, these recitals are consonant not only with the philosophy expressed in many of the United States Supreme Court decisions discussed herein, but also with common sense.

***342** [12] The greater deference applied to ordinances in the *Madsen* opinion is not arbitrary. The checks and balances built into our political system rely on separation of powers. (See generally, e.g., ****213** *Myers v. United States* (1926) 272 U.S. 52, 292–293, 47 S.Ct. 21, 84–85, 71 L.Ed. 160 (dis. opn. of Brandeis, J.).) The judiciary does not have plenary powers of review over the legislature; it is not a judicial function to write statutes. (E.g., *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 395, 47 S.Ct. 114, 120, 71 L.Ed. 303; *Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 417, 205 Cal.Rptr. 576; *Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604, 135 Cal.Rptr. 41, 557 P.2d 473; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, 202 P.2d 38; *Coffee–Rich, Inc. v. Fielder* (1972) 27 Cal.App.3d 792, 810, 104 Cal.Rptr. 252.) But injunctions are crafted by trial courts, and it is the job of reviewing courts to review trial courts. Accordingly, a much broader review power

may appropriately come into play when scrutinizing an injunction. When it comes to a personal injunction, which is probably the most onerous relief which a trial court can give, a reviewing court does have broad powers of review to ensure that the trial court has not overstepped the proper limits of equitable relief. (E.g. *Grey v. Webb* (1979) 97 Cal.App.3d 232, 236–237, 158 Cal.Rptr. 595; *Western Electroplating Co. v. Henness* (1959) 172 Cal.App.2d 278, 283, 341 P.2d 718; *Schwartz v. Arata* (1920) 45 Cal.App. 596, 601, 188 P. 313.) But the reviewing court has no such power over a legislature. (Cf. *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 2 L.Ed. 60.)

Accordingly, the distinction which *Madsen* so carefully draws between review of an injunction and review of an ordinance is not a trivial or gratuitous part of the opinion; it is an appropriate and statesmanlike expression of the difference between review within the judicial branch, and beyond it. To assume that this distinction applies only to some undefined part of the ordinance other than the choice of 300 feet is incorrect.

Real parties' reliance on *Gregory v. Chicago* (1969) 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134, is misplaced. That case found insufficient evidence to convict of charges of disturbing the peace based on an orderly civil rights march which the police disrupted. The concurring opinion (Black, J.) pointed out that residential picketing can indeed be controlled by the City, but that in *Gregory* it had not enacted any ordinances to do so but relied on the ad hoc conclusion by the police that the particular demonstration was unlawful. (See conc. opn. of Black, J., at p. 125, 89 S.Ct. at p. 953.)

Further, on the subject of the government's right to limit targeted residential picketing, Justice Black should be quoted in full: "Were the authority of ***343** government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life.... But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." (*Gregory v. Chicago, supra*, 394 U.S. at pp. 125–126, 89 S.Ct. at pp. 953–954.)

Conclusion

Let a peremptory writ of mandate issue, commanding respondent court to vacate its order of September 14, 1994, and to issue a new order denying the petition for writ of prohibition requested by real parties.

COTTLE, P.J., and PREMO, J., concur.

All Citations

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