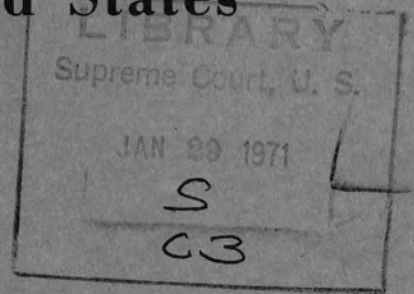


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

-----X  
ORGANIZATION FOR A BETTER :  
AUSTIN, ET AL., :  
 :  
Petitioners, :  
 :  
vs, :  
 :  
JEROME M. KEEFE, :  
 :  
Respondent. :  
 :  
-----X

Docket No. 135

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Place Washington, D. C.

Date January 20, 1971

**ALDERSON REPORTING COMPANY, INC.**

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C O N T E N T S

ARGUMENT OF:

P A G E

David C. Long, Esq., on behalf of Petitioners.

2

Thomas W. McNamara, Esq., on behalf of Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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ORGANIZATION FOR A BETTER )  
AUSTIN, ET AL., )  
)  
Petitioner )  
)  
vs ) No. 135  
)  
JEROME M. KEEFE, )  
)  
Respondent )  
-----

The above-entitled matter came on for argument at  
1:55 o'clock p.m. on Wednesday, January 20, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DAVID C. LONG, ESQ.  
231 South LaSalle Street  
Chicago, Illinois 60602  
On behalf of Petitioners  
  
THOMAS W. MC NAMARA, ESQ.  
135 South LaSalle Street  
Chicago, Illinois 60603  
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 135: Organization for a Better Austin against Keefe.

Mr. Long, you may proceed.

ORAL ARGUMENT BY DAVID C. LONG, ESQ.

ON BEHALF OF PETITIONERS

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

This case is on writ of certiorari to the Appellate Court of Illinois, First District. That court has approved an injunction which prohibits Petitioners from passing out literature of any kind and from picketing anywhere in the City of Westchester, Illinois.

This blanket prohibition on First Amendment activities has been in effect for now over three years. Petitioners, the Organization for a Better Austin, which I will refer to as the OBA, is an integrated community organization in Austin, which is a racially changing neighborhood in the City of Chicago's far west side.

The individual petitioners are certain officers and members of the OBA and the chairman of its Real Estate Practices Committee.

Q Mr. Long, could you give me a little geographic help. How close is Westchester to Austin?



1           A     Respondent's brief refers to it as being  
2 seven miles. There is nothing in the record which indicates  
3 the exact distance, but in general, the Austin community is  
4 the next Chicago community to Oak Park, which is the first  
5 western suburb, and Westchester is further west than that.

6           Q     Are the two adjacent?

7           A     They are not adjacent.

8           Q     Something in between?

9           A     There -- they are roughly connected by some  
10 side roads and a freeway.

11          Q     How large is Westchester?

12          A     Westchester, according to the '60 Census, is  
13 18,000 persons, approximately.

14          Q     I don't want to put you off your argument, but  
15 I know it hasn't been briefed by either of you, but looking  
16 over these papers last night, the question remained in my  
17 mind: is there a final judgment here? This is a state case;  
18 you've got a temporary injunction; and your adversary says he  
19 wants to go to trial and develop the facts. Is this a final  
20 judgment?

21          A     Well --

22          Q     I mean I don't want to argue it. I know you  
23 haven't directed your attention to it, but I should think  
24 possibly you might want to --

25          A     Well, let me deal with that right now, Mr.

1 Justice Harlan. In our petition for certiorari we set out  
2 that this has been -- the injunction was issued, although  
3 denominated temporary, after a full hearing, or at least as  
4 full a hearing as the parties wished at that time, which laid  
5 out the activities and the claim which -- the basis of Mr.  
6 Keefe's claim that his rights had been invaded.

7 We admitted the activities in the trial court; as  
8 a matter of fact, most of the pamphlets which are in evidence  
9 were submitted by defendant because defendants firmly believed  
10 that all this material was protected by the First Amendment,  
11 and attempted to be very candid about their activities.

12 Also we indicated that our sole plan or sole defense,  
13 was First Amendment; and we call Your Honors attention to the  
14 Logan Valley case, the Food Employees versus Logan Valley case,  
15 which arose in almost identical facts to the situation. I  
16 believe it was an interlocutory or temporary injunction which  
17 was considered final by this Court because it remained in  
18 effect until modified by the Court and the same is true, as  
19 we set out in our reply brief with respect to temporary injunc-  
20 tions under Illinois law.

21 Q Are you arguing, in effect, that if the Court,  
22 if this injunction is much the same as one which, by its  
23 terms, was given a three-year life; that is that this activity  
24 was enjoined for a period of three years. Would that then be  
25 final enough for review even though there might be another

1 stage in the proceedings?

2 A Well, according, as I read the Logal Valley  
3 case, this is final because it remains subject to -- it  
4 remains in effect until it could be modified. Also, we have  
5 no other defense but the First Amendment defense. So, for  
6 our purposes --

7 Q you really are going for a theory of degrees  
8 of finality and this is final enough for review because it has  
9 sustained First Amendment rights for three years?

10 A That's correct, and I think it would be  
11 speculation on my part to suggest to the Court what the result  
12 would have been one way or the other if it had gone to a  
13 final --

14 Q Supposing you lose this case? What happens?

15 A The case would be remanded under the pro-  
16 cedures and I suppose we could move to dissolve or the Res-  
17 pondent could move to -- that a final order be entered.

18 Q Then nothing more remains to be done down  
19 there?

20 A Actually, I don't believe there is any dispute  
21 between the parties; if there are additional facts, material  
22 facts which we would attempt to get before this Court if it  
23 came here again.

24 Q Well, I just wanted to mention the point that  
25 bothered me a little.

1           The Respondent, Jerome Keefe, is a real estate  
2 broker who does business in Petitioners' neighborhood in  
3 Austin and the OBA believed that his active solicitation of  
4 persons who lived in that neighborhood to sell their homes,  
5 constituted, contributed to the rapid changeover of portions  
6 of the community from integrated to all Black.

7           In short, Petitioners claim that Respondent was  
8 a panic peddler. In the OBA, at a meeting in Austin, at which  
9 -- to which Respondent came, asked questions of Respondent and  
10 asked him to sign a "no solicitation agreement." Respondent  
11 refused and it's following that refusal that the literature  
12 distribution question here took place.

13           Some members of the OBA distributed literature by  
14           the  
15 hand in/Westchester community in which the Respondent lived.  
16 The trial court made a finding with respect to this distribu-  
17 tion after the evidentiary hearing, which is as follows: that  
18 the Petitioners' distribution of leaflets, and I quote:  
19 "Was on all occasions conducted in a peaceful and orderly  
20 manner; did not cause any disruption of pedestrian or vehicular  
21 traffic, and did not precipitate any fights, disturbances or  
22 other breaches of the peace." This literature was distributed  
23 on five different occasions over a two-month period and it  
24 was distributed by leaving at the doorsteps or in the handle  
25 of the screen door of various residents in Respondent's  
neighborhood, unlike Martin v. Struthers, I might add



1 parenthetically, no residents were summoned to the doors to  
2 receive them. There was no complaint from these residents  
3 that they were in any way disturbed.

4 They were distributed at a shopping center and  
5 were distributed in front of a church to which Respondent says  
6 he belongs.

7 However, irrespective of this finding that there  
8 was no disruption, no disturbance whatsoever, the trial court  
9 had enjoined Petitioners, quote: "From passing out pamphlets,  
10 leaflets or literature of any kind and from picketing anywhere  
11 in the City of Westchester, Illinois. And this is the injunc-  
12 tion which has been in effect for the past three years.

13 However, while refusing to enjoin picketing,  
14 peaceful picketing at Respondent's office in Austin, the trial  
15 court did enjoin all picketing in the City of Westchester and  
16 it did this, absent any evidence that Petitioners had engaged  
17 in any picketing in Westchester.

18 The Appellate Court in Illinois sustained this  
19 blanket injunction which the trial court had entered and it  
20 came to the unprecedented conclusion in sustaining it that  
21 Petitioners had no First Amendment rights; there were no First  
22 Amendment rights involved here. And the Appellate Court  
23 justified this conclusion on two bases: first, and I quote:

24 "The purpose of the defendants was not to inform  
25 the public of a matter of public interest, but the sole purpose

1 was to force defendant to sign a "no solicitation" agreement.  
2 The court did not consider relevant to its determination on  
3 this issue whether the subject of Respondent's real estate  
4 activities in a racially-changing area was a matter of public  
5 interest or public concern.

6 The Appellate Court also justified making West-  
7 chester off limits to Petitioners' distribution of leaflets  
8 on the basis of a determination that Respondent's right of  
9 privacy was invaded by this distribution.

10 And finally, the Appellate Court held that the  
11 scope of this restraint, mainly everywhere in the City of  
12 18,000 persons on both literature distribution and picketing,  
13 was not overly broad.

14 I would like to treat first that liberty which the  
15 constitution has traditionally afforded in the peaceful and  
16 orderly distribution of literature by hand; the doctrine of  
17 no prior restraint; then consider how the Appellate Court's  
18 justification for its conclusion that the right of free speech  
19 is not involved here; does not comport with the long history  
20 of decisions involving the First Amendment by this Court.

21 Q You didn't succeed in getting to the Illinois  
22 Supreme Court; did you?

23 A We filed a petition for leave to appeal which  
24 was denied in January, 1970. Following that we petitioned for  
25 certiorari.

1 Historically the liberty of the press and freedom  
2 of speech has embraced pamphlets and leaflets as well as  
3 books and newspapers. Leaflets distributed on streets and  
4 sidewalks, door-to-door and in shopping centers has been the  
5 backbone of political campaigns, religious evangelism and had  
6 played a major role in the advocacy of social and political  
7 and economic causes.

8 Restraints, such as imposed here on the distribu-  
9 tion of noncommercial literature at such places had been  
10 uniformly held unconstitutional. In the past states have  
11 attempted to justify outright prohibition and various other  
12 less serious restraints in terms of the one here, on a variety  
13 of grounds: to prevent littering (the Schneider case); because  
14 it's unpopular, annoying or distasteful, which is Murdock;  
15 because of privacy (Martin v. Struthers) or the possibility of  
16 fraud, which is Schneider and Talley.

17 The various restraints which have been held un-  
18 constitutional have included, of course, outright prohibition,  
19 which is what is before the Court today, outright prohibition  
20 within a whole town. In the Schneider case it was by ordinance;  
21 here it's by injunction. But, it has also struck down numer-  
22 ous, less serious and less complete restraints: license  
23 requirements and level; taxations in Murdock, or that it is  
24 held unconstitutional, a prohibition on anonymity (the Talley  
25 case).

1 And all of these have been less serious except for  
2 the outright prohibition, which is equivalent to this restraint  
3 here. Moreover, of all the forms of restraint which have  
4 been held unconstitutional, that which has been considered  
5 most serious and most irreparable, is prior restraint.

6 Indeed, the landmark case of Near versus Minnesota  
7 condemned the very type of restraint which has been imposed  
8 here, where there was an injunction against the future dis-  
9 tribution of future publication and circulation of alleged  
10 malicious, scandalous and defamatory newspapers.

11 Q Your argument, then, does go to saying that  
12 even if the leaflets clearly were defamatory, charging a  
13 person with a crime, that the only remedy is to -- is a  
14 damages remedy, damage action rather than any kind of injunc-  
15 tion.

16 A That's true and the damage remedy would, of  
17 course, be subject to the New York Times standards.

18 Q Mmm hmmm.

19 A Petitioner has certainly thrust himself into  
20 the vortex, so to speak, of the public life and public issues  
21 of Austin, qualifying for a public figure, but that issue,  
22 is of course not before the Court, since there is no finding  
23 of falsity.

24 But we are dealing with --

25 Q I was just going to the reach of your prior



1 restraint argument.

2 A That's correct.

3 Q And would your prior restraint argument  
4 purport to eliminate any criminal penalties for libel or  
5 slander?

6 A I wouldn't attempt to answer that, Your Honor.

7 The basic evil of prior restraint is that, as in  
8 this case, regardless of whether you have had -- if you have  
9 a wrongful restraint and the injunction is reversed on appeal;  
10 that injunction would still have prohibited the conduct which  
11 is subsequently held to be protected by the Fifth Amendment  
12 for the duration of the time it took to repeal it. This was  
13 the situation in the Birmingham cases; *Shuttlesworth versus*  
14 *Birmingham* and *Walker versus Birmingham*, where the state law  
15 which can prohibit a person who is brought before the Court  
16 in a contempt proceeding from raising a constitutional issue  
17 has been held to be a valid exercise of state power.

18 Turning now to the Appellate Court's justification  
19 for this sweeping prior restraint, I would like to first ex-  
20 amine the Court's determination that there was an invasion of  
21 privacy -- the injunction here; namely: anywhere in Westchester.  
22 It is implicit that the Appellate Court made the determination  
23 that all of Westchester is within its own privacy, personal to  
24 Respondent and that within this other privacy, Petitioners'  
25 First Amendment activities of passing out literature in an

1 orderly and peaceful manner, critical of Respondent's real  
2 estate activities in Austin, violated his privacy. Indeed, it  
3 is implicit that any literature, regardless of its content,  
4 given the fact that the injunction goes to all literature,  
5 regardless of what it says, would have invaded Respondent's  
6 privacy if distributed by Respondents.

7 In so doing --

8 Q You gave us the 18,000 figure. Does the  
9 record show the square mileage of Westchester?

10 A No; it does not, and I have no idea of what  
11 it is.

12 Q Could be a small place; could be a large one,  
13 geographically?

14 A From my knowledge of the western suburbs,  
15 these are all single family houses, so that I would assume that  
16 it was, quite a low density area, perhaps with a few apart-  
17 ments, of course. Certainly not an urban density.

18 I believethat the Illinois courts in this deter-  
19 mination of privacy have disregarded the authority of Time  
20 v. Hill, which held that the First Amendment rights are  
21 applicable where the state attempts to create rights of  
22 privacy. Indeed --

23 Q Wasn't Time against Hill a libel action?

24 A Your Honor, Time v. Hill was, I believe, a  
25 privacy action where the court said that the nature of the

1 harm which the plaintiffs sought to redress was emotional  
2 harm to himself rather than based on damage to his reputation,  
3 which is one of the classic formulations of the privacy  
4 action.

5 Q It wasn't a prior restraint case in the sense  
6 of Near against Minnesota?

7 A No; that's correct. And we're using Time in  
8 an a fortiori sense, that if a restraint cannot be justified  
9 in the context of substantive punishment, it certainly cannot  
10 be justified in terms of a more serious restraint, which is  
11 prior restraint.

12 Q Has there been any strict prior restraint  
13 case since Near against Minnesota that represented the classic  
14 features of Near against Minnesota?

15 A I know of no case which is near Near versus  
16 Minnesota; cases which the Respondent has cited which would  
17 injunctions have all been picketing cases. And Respondents  
18 asked this Court to declare that the distribution of litera-  
19 ture is equivalent to picketing; something which is contrary  
20 to the longstanding precedents of the Court.

21 And I would also point out that in Time the First  
22 Amendment standards/overcame the privacy cause of action there,  
23 were in the context of false statements, where as I have  
24 indicated, there has been no finding of falsity here.

25 Furthermore, the -- Illinois has created a new and

1 surprising definition of privacy to justify this restraint on  
2 First Amendment conduct. The law of privacy has heretofore  
3 never purported to prohibit the distribution of written  
4 materials concerning a person's business activities which  
5 relate to public issues of interest and concern.

6 Taking two heads of privacy which Respondent may  
7 argue are applicable here, which have traditionally been  
8 dealt with in notions of privacy and its brief history since  
9 the Warren Brandeis article; that is first there has been no  
10 interference with Respondent's peaceful enjoyment of his home  
11 and property. Here the distribution was to third persons in  
12 Westchester in a shopping center, door-to-door.

13 There has been no unreasonable publicity given to  
14 his private life, another head: traditional privacy law;  
15 not just a matter of public interest, but it concerned  
16 Respondent's public activities. Indeed, activities in which he  
17 went to a public meeting in Austin to discuss.

18 The Appellate Court's opinion gives us an indica-  
19 tion of what the nature of this newly-created Illinois privacy  
20 right is, and it says there is no evidence to show that  
21 Plaintiff was engaged in panic peddling in Westchester or that  
22 he intended to do business in Westchester.

23 The Appellate Court is apparently making the  
24 determination that the subject of Respondent's activities in  
25 Austin is inappropriate for Westchester and the distribution of



1 leaflets on the subject thus invades Respondent's privacy.  
2 It is significant to know, however, that the court refused to  
3 enjoin the picketing in Austin, so presumably the subject  
4 matter of Respondent's activities was considered appropriate  
5 for Austin but not for Westchester, which even attempting to  
6 use the unlawful purpose doctrine in Austin, the number of  
7 picketing cases would create the anomalous situation of it  
8 not being against public policy to talk about or to distribute  
9 materials concerning a particular issue in one place but in  
10 another, absent the determination that the manner itself was  
11 somehow objectionable.

12 Q Mr. Long, does the record contain evidence that  
13 leaflets were distributed at the church on Sunday?

14 A Yes, it does.

15 Q Do you have any comment as to the propriety of  
16 that particular aspect of your leafleting?

17 A I would refrain from commenting on the pro-  
18 priety of that. I think the issue would have to be posed in  
19 a charge of a privacy violation in terms of: was Respondent  
20 there; did it interfere with his worship, that is whether there  
21 was a conflict between his right to worship and First Amendment  
22 rights

23 Because, I don't think that a person going to and  
24 from a church service out on the sidewalk has a right to be  
25 free from the distribution of leaflets, or a newspaper critical

1 of Respondent, if you will; written material. And Respondent,  
2 indeed, never brought this to the attention of the court.  
3 This was Petitioners who said: we did this, and Respondent  
4 doesn't say he was there.

5 Q Is there something that might be sharpened up  
6 on the hearing to make this injunction permanent?

7 A I don't believe so, Your Honor. I believe  
8 that Respondent had an opportunity at that hearing to tell the  
9 court what the harm was to him. And --

10 Q Well, this is only a temporary injunction.  
11 You don't necessarily have to put on your whole case in order  
12 to get temporary relief; do you?

13 A No; that's true. The issue certainly is, that  
14 we're proposing to the Court, is whether the evidence justi-  
15 fies this type of sweeping injunction. I think it's perhaps  
16 speculative to consider at this time what evidence might  
17 justify such an injunction. Suffice it to say there are no  
18 facts justifying it here.

19 What the Court has done is set up a surveying(?)  
20 enclave into which certain subject matter or the distribution  
21 of literature by hand cannot enter. Furthermore it's granted  
22 him censorship power, both over the literature which Petitioners  
23 can distribute and over the literature over which other  
24 residents of Westchester can receive.

25 Aside from the asserted invasion of privacy here,

1 the other justification for the injunction is that the distri-  
2 bution was not deemed to be for a proper purpose. The Appellate  
3 Court says in its opinion: the purpose of the defendants was  
4 not to inform the public of a matter of public interest, but  
5 the sole purpose was to force Plaintiff to sign the "no  
6 solicitation agreement," that is the agreement that he would  
7 not solicit sellers to sell their homes in Austin.

8 But, speech does not lose its protection of speech,  
9 because it seeks to influence events or to persuade to lawful  
10 action. Indeed, this Court in the recent Brandenburg case,  
11 reaffirmed the right to advocate unlawful action except where  
12 that advocacy is directed to producing imminent lawless action  
13 and where it is likely to incite or produce such action.

14 Q Is it your position that you are entitled to  
15 picket a person's residential in any situation to picket his  
16 business? In any situation where the First Amendment would  
17 protect your picketing his business could you also picket his  
18 home?

19 A I'm trying -- I'm sorry if I didn't make it  
20 clear; I'm trying to confine my present remarks to the dis-  
21 tribution of literature. Our position with respect to picket-  
22 ing is that it's overbroad. We're not taking the position  
23 that picketing in all cases --

24 Q Well, then I'll ask you: do you think that  
25 in any situation where you could distribute handbills in front

1 of his place of business you could distribute handbills in  
2 front of his home?

3 A I think it would depend on the conduct which  
4 is in addition to the literature distributable.

5 Q Well, there is no conduct except they are  
6 standing in front of his home distributing handbills.

7 A For example, it might depend on the number of  
8 people.

9 Q One person distributing handbills.

10 A Then I think they are right.

11 Q In any situation that the same person could  
12 stand in front of his business and distribute handbills?

13 A I know no authority which would justify any  
14 other conclusion but that written material cannot be enjoined  
15 when it's distributed by hand. And that isn't the case here  
16 in terms of the facts; there is no evidence that they were  
17 standing in front of his home.

18 Q But there is evidence that they distributed it  
19 to his neighbors?

20 A To his neighbors; yes, just leaving it at the  
21 doorstep.

22 Q And you would carry it one step further if he  
23 had a summer place up at Lake Geneva, Wisconsin?

24 A I would think certainly his neighbors would be  
25 apprised of his peddling activities by the distribution of



1 leaflets in the same manner that they could be apprised by  
2 newspapers of such activities.

3 Q Or in the Colorado Mountains?

4 A Well, there it might be more difficult. Well,  
5 assuming that his neighbors had homes and I should think they  
6 would be subject to receiving literature and to have that  
7 literature be protected by the First Amendment as anywhere  
8 else.

9 Again, I am referring to a situation which does not  
10 amount to picketing; that is patrolling of the person upon  
11 which the criticism is made about. Yes; I would say that.  
12 That's how I read the prior decisions of this Court.

13 What the Illinois Appellate Court has done is to  
14 decide that it does not approve of First Amendment activities  
15 engaged in for certain purposes. That's court's determination  
16 clearly violates the First Amendment because this Court in  
17 Near has indicated that to have to satisfy a judge that speech  
18 is published with good motives and for justifiable ends, is  
19 the essence of censorship.

20 We believe that in this case there has been censor-  
21 ship and outright prohibition for three years. Both of the  
22 Appellate Court's justifications for this prohibition on  
23 literature distribution are dangerous precedents. This  
24 precedent could form the basis for an effective system of  
25 censorship and could justify criminal penalties or damage

1 awards for those that speak a right and distribute literature  
2 for unapproved purposes or in public places within this  
3 widely-defined zone of privacy.

4 This is precedent which licenses that unfortunate  
5 human tendency which is the antithesis of an open society;  
6 namely: the desire to suppress the critic, the advocate of  
7 change and the controversial.


8 For all the reasons presented here today in  
9 Petitioners' brief we respectfully request the Court to hold  
10 this prohibition by an injunction on First Amendment rights,  
11 unconstitutional and order that it be dissolved.

12 Q Well, doesn't your argument really come down  
13 to geography? Because you were permitted to distribute  
14 leaflets in Austin and what you are really complaining about  
15 is Westchester.

16 A That's true.

17 Q So it seems to me it is a geographical  
18 argument rather than one of such broad breadth as your last  
19 remarks were.

20 A Well, the notion of residence, first, is not  
21 a clearly defined concept. People live throughout any urban  
22 area so, in the sense that it is protecting a broadly-defined  
23 residential right of privacy, here a city of 18,000 as being  
24 within that zone. It's precedent for defining other areas  
25 which constitute residences. For example: in Chicago, Marine



1 City is -- Marine City or Outer Drive East or Lakepointe  
2 Towers are certainly residential areas and I think it would  
3 justify enjoining distribution of literature to persons who  
4 were going to and from work from those large tower apartments.

5 Q Well, suppose he lived next door to his place  
6 of business. Do you think that the injunction would have pre-  
7 vented you from distributing leaflets around the whole block?

8 A I don't know, Your Honor, because the court  
9 didn't have before it that situation and I don't know what it  
10 would have done in that case.

11 But I do think that the precedential value of this  
12 decision is far broader than just the geographic scope. I  
13 see it is relating to a court deciding that certain purposes  
14 are unapproved: albeit for a certain geographical area to  
15 talk about certain things in and I think the notion of privacy  
16 here is extremely dangerous.

17 MR. CHIEF JUSTICE BURGER: Mr. McNamara.

18 ORAL ARGUMENT BY THOMAS W. MC NAMARA, ESQ.

19 ON BEHALF OF RESPONDENT

20 MR. MC NAMARA: Mr. Chief Justice and may it please  
21 the Court:

22 I would like to comment briefly on the point raised  
23 by Mr. Justice Harlan and that is whether this matter is ripe  
24 for decision. There is some confusion in the record whether  
25 the court below had entered a temporary restraining order,

1 which is of ten days' duration and would expire automatically  
2 by its terms or whether it entered a preliminary injunction  
3 which remains in force and effect until dissolved or until  
4 there has been a hearing on the merits.

5 Even though I think this point may not be perfectly  
6 clear from the record, the parties have treated this as a  
7 preliminary injunction, and have assumed that the injunction  
8 and prohibition is still in effect.

9 The parties further, however, have assumed that  
10 there would be additional evidence presented when there was a  
11 full hearing on the merits of this matter. And I would direct  
12 the Court's attention to page 66 of the appendix for certain  
13 remarks in that regard.

14 Q Those remarks were made contemporaneously;  
15 were they not, at the time of hearing?

16 A Yes, at the time the trial court indicated he  
17 would deny the one request for --

18 Q Well, at that time do you suppose the people  
19 present anticipated that this temporary restraint would be  
20 in effect for three years?

21 A I am sure they did not, Your Honor. Normally  
22 there would be a hearing in a matter of weeks or months after  
23 a temporary injunction. The purpose of this, of course, is  
24 to keep the matter in status quo until there can be a full  
25 hearing on the merits of the complaint, which normally would

1 occur in a very short period of time.

2 Q Who could have brought that on for hearing  
3 in --

4 A Well, once the notice of appeal was taken  
5 then the jurisdiction then was transferred from the trial  
6 court so it's in effect then the appeals that have delayed  
7 the --

8 Q How long after they entered the order was the  
9 appeal noted?

10 A I think it was within 30 days. In an appeal  
11 of this character you have to file your notice of appeal  
12 within 30 days. The Illinois Appellate Court has had a  
13 tremendous backlog of cases and it's not unusual to have 16  
14 to 18 months between the time of appeal and the time of its  
15 disposition, so that accounts, I think, for a great deal of  
16 the delay here.

17 Q Mr. McNamara, what about this page 68:  
18 : "Mr. Long: I take this as of ten days' duration."  
19 "The Court: You know the law; follow the law;  
20 this is a temporary injunction."

21 And what is the law in Illinois as to a temporary  
22 injunction?

23 A Well, by statute there are two different  
24 restraining orders of a preliminary nature. One is a  
25 temporary restraining order which, in the notice --



1 Q I know that, but what is the --

2 A -- which expires in ten days automatically.

3 Q And the temporary injunction is what under  
4 Illinois law?

5 A Well, I think a preliminary injunction is  
6 what I would more normally call it --

7 Q This says -- the court calls it a temporary  
8 injunction.

9 A I think it was a loose label in there, Your  
10 Honor. I think what the parties have understood it to be  
11 and have treated it as is a preliminary injunction which has  
12 been in effect until now.

13 I think there are several facts which have to be  
14 highlighted here considering the propriety of what the court  
15 did below.

16 First, Mr. Keefe's real estate business and  
17 activities were solely confined to the west side of Chicago.  
18 He did no business in Westchester; he did not use his personal  
19 residence in any way in connection with his business; he did  
20 not solicit his neighbors for listings; his only relationship  
21 with his people in his immediate community was that typical  
22 neighbor relationship: the social relationship; relationships  
23 we all have with people who reside near by.

24 Q Well, suppose there was a radio station which  
25 served this 18,000 community where he lived. That 18,000

1 figure represents the community in which his residence was  
2 located; is that right?

3 A That's correct, Your Honor.

4 Q And suppose there was a small weekly newspaper,  
5 as there is often in a community of that size. And each of  
6 them: the radio station and the newspaper had said in their  
7 way everything that was said here, would that be subject to  
8 any injunction?

9 A No, indeed, Your Honor; that is in part the  
10 case here. There is a local newspaper: the Westchester News,  
11 which printed as part of the record here a telegram about Mr.  
12 Keefe from the Organization for a Better Austin --

13 Q They are not parties here; are they?

14 A Who is that?

15 Q The newspaper.

16 A No, Your Honor; there has never been a claim  
17 made or attempt to enjoin, prohibit or otherwise interfere in  
18 any way with newspaper publications. We recognize, I believe,  
19 a different standard there.

20 Q Different standard for a newspaper and a private  
21 party?

22 A No; a different standard between publications,  
23 Your Honor; by newspapers and by the distribution of the  
24 nature that occurred here in this.

25 Now, there's an invasion of privacy in a sense in a

1 newspaper publication that's derogatory. Obviously your  
2 neighbors are exposed to facts you would prefer that they not  
3 see.

4 Q Well, in the Near case Mr. Near did not  
5 publish a newspaper. All Mr. Near did was periodically get  
6 out what amounts to pamphlets. They looked somewhat like a  
7 newspaper but they were not regular publications.

8 A Here, Your Honor, I think you have a situation  
9 where there has been a calculated invasion of privacy for the  
10 purpose of coercing action which I do not think was the Near  
11 case.

12 Here they said: we're going to get Keefe where he's  
13 most vulnerable; we're going to go where we can have some  
14 influence on his neighbors and on his family and get him to  
15 bend to our will. So I think you have the medium of the  
16 message really was the problem here. You had a use of hand-  
17 bills to, in effect, bludgeon Keefe into conduct with just the  
18 incidental point of communicating with neighbors.

19 The record shows that they first went out to the  
20 house with the handbills in hand and met with Mrs. Keefe, his  
21 wife, and said: unless Mr. Keefe can meet with us we are going  
22 out and distribute these to your neighbors. And at that point  
23 in time a meeting took place.

24 Q Do you think the newspaper which published a  
25 -- could be enjoined from publishing a special story on --

1 A Absolutely not, Your Honor, under no circum-  
2 stances.

3 Q Even though a newspaper were doing it  
4 deliberately to influence his neighbors or to influence him?

5 A Well, I think first there are two matters of  
6 distinction there. I think our policy of a free press is,  
7 has a greater and more overriding importance than the policy  
8 of permitting protesters access to a residential neighborhood.  
9 I think there is no element of personal confrontation in  
10 newspaper distribution.

11 Q So you would permit, you would say you could  
12 not enjoin the mailing of these same leaflets to Mr. Keefe's  
13 neighbors?

14 A I think I would have to agree with that, Your  
15 Honor, because of the element of personal confrontation here.  
16 Although I do think that when we consider privacy and the right  
17 of privacy it's hard to describe for all time which is un-  
18 reasonably intrusive conduct.

19 Q So you would say that these people could have  
20 been enjoined from talking personally to his neighbors?

21 A For instance, Your Honor, let's say we --

22 Q Putting leaflets only aside, they could be  
23 enjoined from talking to Mr. Keefe's neighbors?

24 A Yes; let me give you an example if I might,  
25 Your Honor. Let's assume the OBA began to phone on a daily

1 basis everyone on Mr. Keefe's block and said: When Mr. Keefe  
2 stops bothering us we'll stop bothering you. Now, I think a  
3 telephone call is certainly a protected First Amendment  
4 activity; the right to communicate by telephone.

5 Q Even if it becomes a nuisance?

6 A Well, this is the point I'm making, Your  
7 Honor, but I think the First Amendment protection, Your Honor,  
8 of that type of harrassment and conduct is so minimal that it  
9 should be weighed in the balance against the right of privacy  
10 of the parties concerned; and not be permitted.

11 Q Well, that isn't all this injunction prevented.  
12 This prevented any distribution in the residential area.

13 A As I read it, Mr. Justice White, it prevented  
14 the physical distribution by members of the OBA in the  
15 community of Westchester.

16 Q Any distribution by them?

17 A Yes; passing out, I believe was the words of  
18 the injunction order.

19 Q Am I correct that under this first paragraph  
20 of this injunction, no member of OBA could pass out leaflets  
21 in the City of Westchester, Illinois, advocating motherhood?

22 A I don't know that any of them have passed out  
23 such leaflets, Your Honor, but --

24 Q Well, would that prohibit them from doing it?

25 A I think the language was perhaps unduly broad



1 there, because I believe it was Mr. Keefe's activities to which  
2 this injunction was directed and I am sure that had that matter  
3 been called to the trial court's attention by either of the  
4 parties, the order would have been so limited.

5 Q But it is before us.

6 A That is correct.

7 Q It hasn't been changed?

8 A Under Illinois law it is held that a specific  
9 objection to orders of this character if not made to the trial  
10 court could not later be raised on appeal.

11 Q Well, what can you do with this?

12 A I interpret it, Your Honor, as the parties  
13 have, of limiting it to prohibiting activities directed only  
14 to Mr. Keefe.

15 Q You mean the Petitioner recognizes that?  
16 Where did he recognize that?

17 A I have not seen anywhere in his argument or  
18 briefs that he has filed to date, Your Honor; I could be mis-  
19 taken, any reference to --

20 Q But you want us to put our approval on an  
21 injunction that is this broad which says that a man, as long as  
22 he lives may never pamphleteer or pass out any literature,  
23 including the Bible?

24 A Well, I would say this, Mr. Justice Marshall --

25 Q Including a sample ballot.

1           A     I would not -- show this up as a model of  
2     draftsmanship, but again the parties involved here assumed  
3     there would be a hearing on the merits within a space of weeks  
4     or months and a final order either granting or denying the  
5     injunction.

6           Q     But you haven't objected to the jurisdiction  
7     of this Court; have you?

8           A     No, Your Honor. I did in the response to the  
9     request for certiorari. I did raise the point that this was a  
10    preliminary injunction and it seemed to me somewhat unusual  
11    that at this stage the Court would consider it ripe for deter-  
12    mination.

13           I would like to comment, if I could on what I think  
14    is the real vice of the activity in Westchester here. We are  
15    all most vulnerable, I think, in our relationship with our  
16    families and with our neighbors and here I think is a very  
17    calculated attempt to play on this weakness and to direct  
18    activities at us that will compel us to take some action, not  
19    because we're persuaded it's correct, but simply because we  
20    need to buy peace. WE don't want to cause embarrassment to our  
21    neighbors; we don't want to see neighbors turned against  
22    neighbors; we don't want our families disrupted.

23           And I think we are going now to the areas that  
24    really go to the core of privacy. If privacy means anything at  
25    all it should grant us protection in the area of our home; in

1 the area of the relationship with our neighbors; in our  
2 communal relationships.

3 The Organization for a Better Austin takes the  
4 position that it has an absolute and unqualified right to  
5 handbill whenever and wherever, for whatever purpose it cares  
6 to do it. It seems to treat handbilling under all circum-  
7 stances as the equivalent of newspaper distribution. And I  
8 think, looking at what has occurred here that that would be  
9 sloganeering to say that it is always entitled to that same  
10 protection.

11 I think there is handbilling and handbilling.  
12 Certainly in many, many instances it is clearly entitled to  
13 full First Amendment protection. But I think the conduct of  
14 the Organization for a Better Austin here is more akin to our  
15 peaceful picketing cases in which we have said: certainly this  
16 is a protected First Amendment activity; it is communication;  
17 but it is something more than communication, and being some-  
18 thing more than speech -- we are entitled to reasonably  
19 regulate it.

20 I think Hughes versus the Superior Court, decided  
21 some 20 years ago about this Court -- by this Court, is a good  
22 example of such circumstances. In the Hughes case they en-  
23 joined peaceful picketing by Negroes who were seeking to urge  
24 a store in which they shopped to hire in proportion to their  
25 Negro trade. The court there held that such activity could be

1 examined to see what the purpose of the picketing was. The  
2 purpose having been examined and found to be improper, the  
3 court said it was subject to reasonable regulation by the  
4 State of California.

5 Q Mr. McNamara, in your opposition to the  
6 petition for certiorari you made this statement: It is only  
7 the physical presence of the Members of the OBA in Westchester  
8 that is involved. They are at liberty to communicate with Mr.  
9 Keefe and his neighbors by letter, newspaper advertisement,  
10 telephone or any other form of communication which does not  
11 involve a bodily entry into the community."

12 Do I understand that that, in effect, represents  
13 your position here today?

14 A Yes, Your Honor; I believe the temporary order  
15 restricts only their physical presence in the community of  
16 Westchester.

17 I think one of the serious issues we have here is  
18 whether in contemporary America, with our many confrontations,  
19 dissent, protests, that whether we will permit the residential  
20 neighborhood to become a part of the battlefield. It is  
21 certainly true that it is an effective place to fight the  
22 battle. Men who could not be persuaded by reasoning; men who  
23 could not be deterred by economic pressures, may certainly be  
24 forced by pressure placed upon their family life and their  
25 community relations to take actions which they would not

1 be willing to take.

2 I think we should consider in looking at this case,  
3 the heavy burden upon our public servants, the men who guide  
4 our cities and the urban problems that they have. It was not  
5 too long ago this Court had before it the Gregory case, which  
6 involved a march in the vicinity of Mayor Daley's neighbor-  
7 hood. And I think thought was given to what this type of  
8 activity should be encouraged or permitted which is so dis-  
9 ruptive of family and neighborhood life.

10 I think the activity here by the Organization for a  
11 Better Austin, insofar as it was directed towards the community  
12 in which Mr. Keefe resides, suffers from the same thing.  
13 Indeed, I would say it resembles here residential picketing  
14 which, in every reported case it has been concluded that  
15 residential picketing has either been enjoined; it has either  
16 been made the subject of criminal sanction or administrative  
17 cease and desist orders.

18 There is no reported case that I have been able to  
19 find, and I refer also to Professor Kamin's article on  
20 residential picketing and the First Amendment.

21 Q Well, is there residential picketing involved  
22 here?

23 A The injunction order -- there was no residen-  
24 tial picketing in Westchester.

25 Q I gather that all that happened in Westchester



1 was the distribution in --

2 A In his neighborhood, in his church and in his  
3 shopping center.

4 Q Of the handbills.

5 A That is correct.

6 Q But we're not really concerned, are we with  
7 residential picketing?

8 A I think we are to this extent: when we con-  
9 sider what residential picketing is, it's not typical picket-  
10 ing. They were not trying to keep people from passing in and  
11 out of a residence. There's not the element of intimidation,  
12 at least in the reported cases, but you have one or a group  
13 of people standing in front of someone's home with some form  
14 of message, usually of a derogatory nature. Now, I see no  
15 particular difference as far as the homeowner is concerned, to  
16 having someone standing in front of his home with a derogatory  
17 placard that can only been seen by his neighbors for the most  
18 part, and going door-to-door with that same message and dis-  
19 tributing to them.

20 So, I think the conduct of the Organization for a  
21 Better Austin here is very analogous to what our residential  
22 picketing situations are.

23 Quite recently in the Rowan case I had occasion to  
24 consider, in a different context, of course, but the fact that  
25 there is a right to be let alone which must be balanced with

1 the right of others to communicate and I think we are faced  
2 again with a similar resolution of conflicting rights here.

3 Q Well, would that be relevant unless you had  
4 an injunction here that prohibited delivering any material to  
5 this man's house. That's what's involved in Rowan.

6 A Yes. There you were involved with the mail  
7 order listing of the --

8 Q If your injunction here just simply prohibited  
9 any activity by way of delivering pamphlets or written  
10 materials to the home of your client you might have a Rowan  
11 type of situation.

12 A Yes. I don't claim, Mr. Chief Justice, that  
13 this is an analogy to the Rowan case, but I do think the  
14 opinion expressed there, that there must be a balancing and  
15 certain circumstances between the right to communicate on the  
16 one hand and the right to be left alone on the other had  
17 applicability to this case.

18 I might say parenthetically the State of Illinois  
19 last December 15th has adopted a new constitution which, as  
20 part of its bill of rights has expressly provided for the right  
21 of privacy, along with the -- as part of the search and  
22 seizure provision of the act.

23 In summary, I would say because we accept and  
24 tolerate as part of our society what I would consider inci-  
25 dental invasions of our privacy for a greater good because of

1 freedom of the press, because of circulation of ideas, I do  
2 not think that we must therefore legitimize direct, inten-  
3 tional invasions of privacy made for the purpose of forcing  
4 conduct which cannot otherwise be secured, and where the  
5 purpose of communicating is obviously secondary.

6 I thank the Court for its attention.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr.  
8 McNamara.

9 Your time is up, Mr. Long. But, we would invite  
10 you to submit a memorandum on the finality issues and you may  
11 respond after you receive his memorandum on the subject of  
12 finality and whether we have an appealable order here.

13 Thank you gentlemen; the case is submitted.

14 (Whereupon, at 3:00 o'clock p.m. the argument in  
15 the above-entitled matter was concluded)