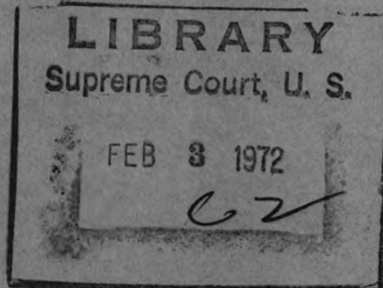
In the

Supreme Court of the United States



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POLICE DEPARTMENT OF THE CITY OF CHICAGO, et al., Petitioners, vs. EARL D. MOSLEY, Respondent.	No. 70-87
RICHARD GRAYNED, Appellant, vs. CITY OF ROCKFORD, Appellee.	No. 70-5106

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IN THE SUPREME COURT OF THE UNITED STATES

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POLICE DEPARTMENT OF THE CITY OF CHICAGO, et al.,

Petitioners,

v. : No. 70-87

EARL D. MOSLEY,

Respondent.

- - - - - - - - - - - - - - - x

RICHARD GRAYNED,

Appellant,

v. : No. 70-5106

CITY OF ROCKFORD,

Appellee.

- - - - - - - - - - - - - - - x

Washington, D. C.,

Wednesday, January 19, 1972.

The above-entitled matters came on for argument at 1:32 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD L. CURRY, ESQ., Corporation Counsel, Chicago, Illinois, for the Petitioners.

MISS SOPHIA H. HALL, Chicago, Illinois, for the Appellant.

HARVEY J. BARNETT, ESQ., Chicago, Illinois, for the Respondent.

WILLIAM E. COLLINS, ESQ., Rockford, Illinois, for the Appellee.

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Miss Sophia H. Hall, for the Appellant	15
Richard L. Curry, Esq., for the Petitioners	28
William E. Collins, Esq., for the Appellee	37

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-87, Police Department of Chiago against Mosley, and 70-5106, Grayned against Rockford.

I understand that the order of appearances now, by request of counsel, will be Mr. Barnett first, Miss Hall second, and Mr. Curry, and then Mr. Collins. Is that correct?

MR. BARNETT: That is correct.

MR. CHIEF JUSTICE BURGER: Very well. You may proceed, Mr. Barnett.

ORAL ARGUMENT OF HARVEY J. BARNETT, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I am the attorney for the respondent Earl D. Mosley. This case is on certiorari to the United States Court of Appeals for the Seventh Circuit, and it has been consolidated with the case of Grayned vs. the City of Rockford, which is on appeal from the Supreme Court of Illinois.

This case concerns a disorderly conduct ordinance of the City of Chicago, which prohibits all picketing on a public way within 150 feet of a primary or secondary school. The ordinance exempts from this prohibition the picketing of a school involved in a labor dispute. It became effective on April 5, 1968.

Since September 1967, respondent Earl D. Mosley had picketed Jones Commercial High School, located in the City of Chicago. He had simply walked on the public sidewalk adjoining Jones High School carrying a sign, which reflected his belief that Jones High School was discriminating against blacks in its admission policies and in the treatment that it afforded him.

It was admitted at trial by the City that at all times Mr. Mosley's activities were peaceful, orderly, and quiet.

It was further admitted at the trial, by petitioners, that at no time did Mr. Mosley's activities in picketing the school by himself or with a few other persons ever cause a disturbance at the school or interfere with traffic around the school.

After being advised of the passage of this ordinance, Mr. Mosley contacted the Chicago Police Department, and was told that he would be arrested if he continued his activities in picketing Jones. The City admitted at trial that it intended to enforce this ordinance, and, in fact, Mr. Mosley would be arrested if he continued to picket the school.

He then filed this declaratory judgment action, seeking a declaratory judgment and an injunction against the enforcement of this ordinance, on the grounds that it violated his right to freedom of speech and that it was a violation of the equal protection clause.

The lower court, after a trial, held that the ordi-

nance was constitutional. On appeal, the Seventh Circuit Court of Appeals reversed, finding that the ordinance on its face violated Mr. Mosley's rights to freedom of speech because the ordinance was overly broad.

This ordinance is a violation of the First Amendment right to freedom of speech because it is overly broad. The vice of this ordinance is that it sweeps within its prohibition protected free speech, such as the quiet and peaceful picketing of respondent Mr. Mosley. In fact, Mr. Mosley engaged in almost the identical activity as that engaged in by Mr. Thornhill in the case of Thornhill vs. Alabama some 30 years ago.

This Court has held that peaceful picketing is protected free speech. And the State can regulate only the abuses of picketing, which has been articulated as a test of the regulation of the manner of picketing or the purpose of picketing, when there is something in the manner or purpose which gives grounds for the disallowance of that picketing.

Q What about place?

MR. BARNETT: If the Court please, at no time have I been able to find any decision of the Court which has stated that place and place alone is sufficient to permit the regulation of picketing. It must be coupled with something in the manner of picketing or the purpose of picketing, which would give grounds for the disallowance of that picketing.

Q Well, do you think the statute would prohibit

you from picketing where you're standing? Period.

MR. BARNETT: Well, I would say, Your Honor, that that statute would be lawful; but, Your Honor, the difference between that case and this case is that we have picketing here on a public way, which in no way -- which prohibits the respondent in this case from lawfully and legitimately exercising his right to freedom of speech. The ordinance which Your Honor, or the statute which Your Honor would propose, I think would be attached to some legitimate State concern.

Q All I'm trying to say is, I think you're putting too much baggage on your train; that's all I was saying.

MR. BARNETT: Thank you.

Q Are you familiar with, I think it's Title 18, Section 1501, that forbids picketing on the sidewalk around this building?

MR. BARNETT: I am not familiar with that statute, Your Honor; I am familiar with the Court's action with the statute in Cox vs. Louisiana, which prohibited the picketing of a courthouse with the intent to influence the administration of justice.

Q That's the same statute.

MR. BARNETT: That statute, Your Honor, as the Court noted, the Cox case was one which specifically dealt with a purpose of picketing. And the Court found in that case that the purpose was legitimate -- could legitimately be regulated

by the State, because the State had a legitimate interest in protecting courts from the undue influence and the interference with the administration of justice.

The problem with the City of Chicago ordinance is that it is not a narrowly drafted enactment, it's aimed specifically at some evil, some abuse of picketing.

Q Well, if this statute had in it -- is it a statute or an ordinance you're talking about?

MR. BARNETT: It's an ordinance, Your Honor.

Q An ordinance. If this ordinance had in it that no one could picket within 150 feet of the school for the purpose of disrupting the school, would you think that would come within the Cox case?

MR. BARNETT: I think that that statute may be constitutional, Your Honor. They would have to -- the City would then be put to proof at a trial in that case that it was the intent of the person to disrupt the school.

Q All right. What if the words were "for the purpose of influencing the administration of the school"?

MR. BARNETT: I wouldn't think that the City would have, in that instance, a legitimate right to be concerned with the influencing the administration of the school.

Q In the Cox case the words were "for the purpose of influencing the administration of justice".

MR. BARNETT: That's correct, Your Honor, and in that

case the Court went on at great length to note that picketing around a courthouse may cause an undue and oppressive influence upon jurors, let us say, who were attending a trial in that particular courthouse; and the hypothetical which Your Honor posed, I would think that someone who picketed the school with the intent to influence the adminstration of that school to get them to, let's say, admit more blacks or to afford blacks different treatment, such as Mr. Mosley's intent, that would be a legitimate concern on his part and the State would not have an overriding interest in preventing that type of conduct and that type of free speech.

Q He could picket it just as much as he could write a letter to --

MR. BARNETT: That's true. That's correct, Your Honor. They're both means of his expressions of freedom of speech.

And that is the problem with this ordinance, because what Mr. Mosley was doing was exercising nothing more than protected free speech. The City admits that he never caused a disturbance or interference with the school. And yet this ordinance arbitrarily creates a 150-foot limit, within which he is prevented from exercising those rights of freedom of speech.

Now, the City harps over and over in their brief about disturbances and disruptions around schools as a means for justifying this ordinance. But the simple answer to that

is that this ordinance is not directed at disturbances, at disruptions, or picketing in such a manner as to create disturbances or disruptions around schools.

Q There's a Federal statute that forbids demonstrations of any kind within either 500 feet or 1,000 feet of an Embassy of a foreign country. Would you think that falls under the same ban as the argument you're making?

MR. BARNETT: I think the Court, in one of its decisions, indicated that the rationale of the Embassy ordinance was that for security purposes; and the government had a legitimate concern in that particular instance of protecting these types of Embassies from potential violence and disruptions.

Q Well, in this case isn't the ordinance for the purpose, and certainly does it not serve the purpose of avoiding distraction of the students from their studies?

MR. BARNETT: It may serve that purpose, Your Honor; but, on the other hand, it brings everything within its ambit. It prohibits all types of picketing, violent and disruptive picketing as well as purely --

Q Well, aren't all types of picketing prohibited under the Embassy statute?

MR. BARNETT: They are, Your Honor, and I would have my doubts as to the constitutionality of that. As I stated, I am not sure if that ordinance -- that statute has ever been passed upon. But I think the rationale was that there was a

certain legitimate concern about security around Embassies.

I would think, however, that one person who is peacefully picketing an Embassy and wanted to picket within the 500-foot limit, that he ought to be entitled to do so under his First Amendment rights to freedom of speech. And that is exactly what we have here in this case, for Mr. Mosley at no time cause a disturbance around the school. He at no time interfered with the administration of the school or disrupted any school activity.

Q Mr. Barnett, does the 150-foot limit carry any weight with you? Suppose there were no limitation at all, could he picket on the school house steps, for instance?

MR. BARNETT: No, I think that there would be -- the State would have the right to prevent people from coming on the school house property as such, certainly in the protection of students. But this ordinance is specifically drafted to be 150 -- picketing within 150 feet on a public way, so that --

Q Well, suppose there were no school yard, some of the old buildings, you know, abut right on the sidewalk.

MR. BARNETT: Yes.

Q What then?

MR. BARNETT: I would think that on a public sidewalk a person should have the right to peacefully picket and express his views. And this Court has always sanctioned the use of the public sidewalks and parks, in the recent Food Employees

case, as areas where historically First Amendment rights to freedom of speech have been sanctioned and have been --

Q What about the hallways of the school building?

MR. BARNETT: Does Your Honor mean that if an ordinance were drafted prohibiting picketing there?

Q Well, let's assume that this ordinance were applied to someone picketing, walking up and down the halls of the school, with the same sign?

MR. BARNETT: I would --

Q And no showing whatsoever of any disturbance or anything else?

MR. BARNETT: No, I would think that the State has a legitimate -- this ordinance itself I don't think could be applied in that fashion, Your Honor, because --

Q Why?

MR. BARNETT: -- because the 150-foot limit is from the exterior of the school, in my understanding of it.

Q All right. But assume that the ordinance did say "in any school building" -- "on public property, in the school building, or within 150 feet of the school"?

MR. BARNETT: I think that the State would have a legitimate right to prevent picketing on its property in order that it may run its school system.

Q Well, why?

MR. BARNETT: Because --

Q Until there's a showing of some disruption?

MR. BARNETT: Well, I think an outsider, Your Honor, rather than a student, that a distinction can be drawn. Because certainly there may be some --

Q Well, it must be, though, in terms of the tendency to disrupt?

MR. BARNETT: I don't think the tendency --

Q Or to distract.

MR. BARNETT: I don't think it's the tendency to disrupt or distract, Your Honor. I think an outsider may be prohibited from coming on school property because of a possible danger to students, a threat of some dis -- harm to students.

Q Well, yes, but that isn't what the ordinance says. The ordinance says you can't come on here to picket.

MR. BARNETT: That's correct.

Q And there's a lot of strangers permitted on the school property, for all sorts of purposes.

MR. BARNETT: Well, I think that those would all be connected with the school, such as a deliveryman or something like that, Your Honor. But to come on school property as such, inside a building, to picket, I think might cause a disruption and I think the State would have a legitimate concern to protect its students.

Q All right, _might_ cause a disruption.

MR. BARNETT: Yes. But I don't think that --

Q Well, how about the 150 feet? you're simply saying the State hasn't any basis for saying that it might cause a disruption --

MR. BARNETT: No, I don't think the might cause a disruption is enough. In fact, in the recent Tinker case, --

Q Well, it is inside the school building.

MR. BARNETT: Well, I -- I'm not -- my argument on that is twofold, Your Honor: one, it may well cause a disruption of the school activities; and, secondly, I think the State has a legitimate concern in protecting the interests of students in terms of bodily harm to them from outsiders indiscriminately coming inside the school building.

Q Well, you're just saying -- you're just repeating the argument in different words. It's in terms of its tendency to disrupt the school and to impinge on the rights of students.

MR. BARNETT: No, Your Honor, I think it's a difference in -- a qualitative difference, between someone standing outside a school on a public sidewalk, walking in front of that school, as between a person coming in the school, where there may well be a danger of physical harm to students, which certainly the sTate has an interest in protecting.

Q Although the ordinance says you can't come in and communicate with students with a sign in a hallway of the school; that's what the ordinance says.

MR. BARNETT: That's correct,Your Honor.

Q Well, it hasn't anything to do with physical things, does it?

MR. BARNETT: No, the ordinance -- the ordinance --

Q It has to do with insulating -- insulating students and faculty members and anybody else in the building from a communication like this.

MR. BARNETT: The ordinance prohibits, Your Honor, picketing on a public way, within 150 feet of the school.

Q Your time is up, of course, --

MR. BARNETT: Sorry.

Q -- and you haven't said a word about anyone involved in a labor dispute can do everything that this ordinanc says this man couldn't do, could he?

MR. BARNETT: That is correct, sir.

Q And that's your equal protection argument?

MR. BARNETT: Yes, it is, Your Honor.

Q Why should he be -- someone involved in a labor dispute be allowed to do this and this man, Mosley, be prohibited.

MR. BARNETT: That is our argument, Your Honor. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barnett. Miss Hall.

ORAL ARGUMENT OF MISS SOPHIA H. HALL,

ON BEHALF OF THE APPELLANT

MISS HALL: Mr. Chief Justice, and may it please the Court:

My defendant is -- my client is Richard Grayned. He was con- -- he was -- he participated in a demonstration. He was arrested, convicted, and fined for violating two ordinances of the City of Rockford.

One of the ordinances is the same as the one in the Mosley case. It involved a hundred -- not picketing or demonstrating within 150 feet, and excepted the person picketing in support of a labor dispute.

The other ordinance prohibited a person engaged in conduct wherein he wilfully made or assisted in the making of a noise or diversion which disturbed or tended to disturb the peace or good order of the school session.

The defendant -- and we have constantly, throughout the litigation, contended that these two ordinances are both unconstitutional, that they are violative of the Fourteenth Amendment, and that it represents an interference by the State with a person's right to picket or to speak or assemble.

The facts in the Grayned case, prior to the proceeding in this Court, have not been disputed. The record went up to the Supreme Court on a short record, there was no transcript of proceedings of what occurred in the trial. The motion was

made before the Illinois Supreme Court. Without objection of counsel, we submitted the case on the facts as represented in the brief, in the briefs which we submitted.

For the first time, the City of Rockford has disputed the facts in this case. And I submit that they not only have disputed them but they have also made misstatements of fact.

I have with me a report of proceedings that occurred in the Circuit Court of the Seventeenth Judicial Circuit in the case of the City of Rockford vs. Richard Grayned. This report of proceedings was ordered by our office, and at our own expense, it was not supplied by the City of Rockford. We ordered it back in November, and it was delivered to us this past Monday, on January 17th.

I brought this report of proceedings with me because I thought the Court might be interested in seeing what the facts were in this case, since they are now apparently in dispute.

Q Miss Hall, as I read the opinion of the Supreme Court of Illinois, it didn't treat any factual issue. I gather it was just an appeal on the question of whether a statute or ordinance such as this was constitutional. Would you agree that that was a correct reading, at least, of the Supreme Court of Illinois' opinion?

MISS HALL: That is true, but the Supreme Court did mention the facts in the case, as they thought were relevant,

and facts were set out in the briefs. The Supreme Court stated, in the beginning of their opinion, that a demonstration was held in front of the school, at West High School.

Q Was any State law point made to the Supreme Court of Illinois that the evidence was insufficient to support the conviction?

MISS HALL: None whatsoever. The --

Q You're not making any such point as that here?

MISS HALL: Not at all. But the only reason I bring this record to this Court's attention is that there are facts stated in the appellee's brief which are not true.

Q Miss Hall, are you willing to leave that with the Clerk?

MISS HALL: I certainly intend to do so, and I mentioned it to Mr. Collins when I arrived at court, I mentioned it to him before lunch, he said he would think about it, and then after lunch he told me that he would join in the submission of this report of proceedings.

And I intend to leave it with the Clerk before I leave.

Q Is it your submission that if this ordinance had said "all demonstrations of 40 or more people within 150 feet of the school building are prohibited", that if the ordinance said that in so many words, is it your submission that it would be unconstitutional?

MISS HALL: Yes, Your HOnor, it would be.

Q You're not just arguing overbreadth, then?

MISS HALL: I am arguing overbreadth.

Q Is that your fundamental position?

MISS HALL: That's the fundamental position with respect to Section 18.1(i), and we also argue that 18.1(i) violates the equal protection clause.

In our particular case --

Q But you're also saying, I take it, that even if this ordinance were limited to just covering demonstrations of 40 or more people, that it would be unconstitutional?

MISS HALL: If -- if -- are you saying that if the ordinance stated that 40 or more people could demonstrate on --

Q May not -- may not demonstrate.

MISS HALL: May not demonstrate. I would say it was unconstitutional.

Q So your argument is not just overbreadth, then, is it?

MISS HALL: It's not -- it's not --

Q And that this particular activity that was actually carried on may not be prohibited?

MISS HALL: That's right.

Q What about a thousand or more? Same argument?

MISS HALL: Your Honor, I think that to try and use numbers, as 150 feet and the number of people, avoids the whole

problem involved here. We're concerned with the interests of the State, which are involved; we're concerned with what the people who are picketing are concerned about picketing.

Q What about --

MISS HALL: We're concerned about the effect of their conduct.

Q Would you not agree that a thousand people, milling around the entrances of the school, the access streets, would create --

MISS HALL: If a thousand --

Q -- more of a problem than one person?

MISS HALL: If an ordinance was passed which said that there could not be so many people picketing who obstructed the ingress and egress with respect to the school, who stop traffic, who prevented people from using the public way; if that's what the ordinance said, as it -- if that's what the ordinance said, then it would be consistutional.

But there's no evidence of that here.

There were 200 people in our particular instance who walked up and down the sidewalk in front of West High School, carrying signs which said that black cheerleaders may cheer too, black teachers -- we want black teachers for black history courses. They walked up and down in a peaceful and orderly fashion.

And then the police came, they turned on their loud-

speakers, read their ordinances over the loudspeakers and started to arrest people.

Q Miss Hall --

MISS HALL: And the facts in this case show that that's when it appeared that people started to watch what was going on.

Yes?

Q But under 19.2 your clients would have to have been found guilty of wilfully making or assisting in the making of any noise or diversion which disturbs or tends to disturb the peace or good order, would they not?

MISS HALL: That's correct, Your Honor, and I submit that that language is vague and it does not comport with the standards of due process of law in giving due notice to the persons who wish to comply with the law, and who, at the same time, wish to exercise their First Amendment freedoms, does not give them an opportunity to exercise them; because they don't know what they're going to be arrested for.

Q So your attack on that section of the ordinance is not based on the First Amendment but on grounds of vagueness?

MISS HALL: Your Honor, it's also based on the First Amendment, because, by its vagueness which violates due process, it is subject to an overbroad application to perfectly protected constitutional freedoms.

Q You would -- what would be your view of the

statute prohibiting picketing on the sidewalk adjacent to this building? Unconstitutional?

MISS HALL: I would have to -- the people who drafted the statute, what would be their purpose in drafting it? What State interest would they want to protect? Would they want to protect this Court from being disturbed? The statute in Cox vs. Louisiana concerned one that was narrowly drawn, which said, "We will prohibit picketing of persons who seek to disturb" -- I don't have the exact language of it -- "disturb the processes of the administration of justice."

In that particular instance, where it's the court is concerned, and where it's so narrowly drawn, as this Court held it was, I would say that it was --

Q You think it's unreasonable, then, for a legislature, a law-making body, to conclude that as many people as you had here, 200, has the tendency to disturb the educational process?

MISS HALL: I think Justice Stewart made the appropriate statement when he wrote this Court's opinion in Tinker vs. Des Moines. He said: there must be a substantial showing that there would be an interference with the orderly process of the school administration.

There has been no such showing in this particular case, Your Honor. As a matter of fact, I think it is important -- and I am in accord with this decision -- it is important that

students in our schools be allowed to see and to participate in exercising their First Amendment freedoms, so that in the school they are not only taught the Three R's, but they're also taught how to be citizens in this country and how to exercise their rights as guaranteed by the First Amendment.

Q May I ask, Miss Hall, what were the penalties imposed here?

MISS HALL: Mr. Grayned was fined $25 for violating 18.1(i) and $25 for violating 19.2(a). Plus court costs.

Q That's different from the other case?

MISS HALL: The -- what case?

Q The other case involved here.

MISS HALL: In the Mosley case, there was no arrest, there was no conviction, there was no fine. His was a declaratory judgment action.

My client has been --

Q But at least the other action concerns only one ordinance?

MISS HALL: The other action; that's right.

Mine concerns two --

Q Two ordinances?

MISS HALL: Right. 19.2(a) being the second ordinance.

Q 19.2(a) has no exemption to labor unions?

MISS HALL: No, it does not. It applies to "any

person".

Q Do you think it's a denial of equal protection if the law-making body thought a labor dispute was entitled to a higher order of picketing rights than just any other people?

MISS HALL: Yes, I do.

And I also would say that it is significant in my particular case that the City of Rockford has eliminated the labor picketing distinction.

Now Section 18.1(i) is just that all labor picketing -- all picketing, completely, is prohibited within 150 feet. Which shows that at the time this ordinance was applied to my client, it not only is an admission by the City that it not only violated the Constitution, but -- or it shows that obviously the labor picketing exemption had no compelling State interest to warrant it being there.

So that at the time this ordinance was applied to my client, the City admits that it violated the Constitution.

Q I don't suppose the City would agree with you that the change in the ordinance has that meaning and only that meaning, though, would it?

MISS HALL: I would presume that they would bring forth some other reasons. But I submit that this change at this time shows that it has no compelling State interest.

I wanted to make a point about 19.2(a). I already have mentioned that I think it violates due notice, because a

person can't know what conduct is prohibited, so even if he is trying to comply with the law and at the same time exercise his constitutional rights, he does not have an opportunity to -- consequently he cannot act at all, without fear of going to jail.

The other point is that with respect to 19.2(a), as the ordinance is drafted, it says that a person who wilfully makes a noise or diversion would violate that section; and then it seems to modify that with "which disturbs or tends to disturb the peace and good order of the school session". I submit that what is happening is that the person is being convicted when he makes a noise or diversion and his intent is just to make the noise or diversion, not to disturb or -- disturb the peace and good order of the school session.

Q May I ask, Miss Hall, was that record you're going to leave with us, is there evidence in that that there was noise?

MISS HALL: Yes, there's evidence, Your Honor. But the evidence shows that noise came from the use of the police loudspeakers.

Q In other -- well, what I'm really asking you: Is there any evidence that there was any noise by the group whom you represent? How many were there? Forty-odd?

MISS HALL: I -- there were 200 demonstrators who were in front of the school. Forty males were arrested. And I

represented those --

Q Was there any evidence that those forty --

MISS HALL: My client, Richard Grayned --

Q -- were noisy?

MISS HALL: No, there's no evidence with respect to Richard Grayned, because, as you can see from the common-law record, Richard Grayned was not charged and convicted of making a noise, he was charged and convicted of making a diversion. So with respect to him --

Q Well, what's the evidence that he made a diversion?

MISS HALL: I submit the record to this Court to find it.

Q You mean there's none in it, such as to --

MISS HALL: As far as I can see, there's no --

Q Is this a <u>Thompson v. Louisville</u> kind of thing you're suggesting?

MISS HALL: I -- we had not raised that argument in our brief, Your Honor. I would suggest that there was noise at the scene, and the noise came when the loudspeakers were used by the police officers.

Q Well, whatever that may be, is there any affirmative evidence that your -- is the only one we have here Mr. Grayned?

MISS HALL: Mr. Grayned, that's right.

Q Any evidence at all in this record that he was noisy --

MISS HALL: That he was noisy?

Q -- and that he created the diversion?

MISS HALL: There's no evidence that he was noisy, and I am just -- [a sigh] -- I would say there was no evidence that he personally -- personally, himself -- was making a diversion.

Q Were other people --

MISS HALL: Now, whether they would consider assisting in the entire demonstration that they made a diversion, I would say there's no evidence for that, because, I say, that the record will show that at the time there was evidence of a large number of people standing in the windows at the school it was after the loudspeakers were used by the police, in reading the ordinances to them.

Q Miss Hall, you didn't raise any Thompson vs. Louisville point in the Supreme Court of Illinois?

MISS HALL: No, I did not, Your Honor.

Q But you said 40 were arrested?

MISS HALL: There were 40 demonstrators who were arrested.

Q Well, were they all convicted?

MISS HALL: The --

Q I mean, is this a symbolic case or what?

Because it's --

MISS HALL: Because there were 40 cases --

Q -- just that in the case that was brought here is the one that has no record on it as to what the man did.

MISS HALL: And that's the record I'm bringing to you now.

Q Yes. There's nothing in there to show that he did anything?

MISS HALL: That he -- there is evidence in there that he participated in the demonstration. But there's nothing, in my judgment, to show that the diversion -- the diversions were committed by the demonstrators.

Q Well, is there anything in the record that shows that this man Grayned opened his mouth? Said anything?

MISS HALL: I -- I wouldn't be surprised if he said something, Your Honor. And I don't know what the record shows exactly to his commenting to the people around him.

Q I'll read it and find out.

MISS HALL: I submit that I am here for Richard Grayned, and I am asking this Court to sustain the faith of the citizens of Rockford that this Court will protect their right to exercise their freedoms, which are protected from State interference through the Fourteenth Amendment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Hall.

Mr. Curry.

ORAL ARGUMENT OF RICHARD L. CURRY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issues of this case, as viewed by the City of Chicago, are three:

Does the claim of a free man to use the streets as a public forum exclude even modest regulations as to the time and place within which his rights may be exercised?

Two, if modest regulations aren't permissible in protecting substantial governmental interest, is Chicago in error in ascribing such importance to its schools?

And, three, is the Chicago ordinance void by reason of being overbroad?

The City of Chicago believes that the rule of this case ought to answer each question in the negative. The ordinance before the Court is a partial restriction as to picketing and demonstrating around elementary and secondary schools; reasonable as to time, that is during classes and a half hour before and after; and reasonable, I submit, as to place, that is within 150 feet of the school building.

When local government is attempting to harmonize and accommodate conflicting demands for the use of streets, the standards as to time and place are every bit as relevant as the

controls upon manner and purpose.

This ordinance ought not be viewed as a ban on First Amendment rights. It is clearly and properly a phasing or timing of the activities in a recognition that at a certain time and within a certain limited area there does exist competing interest which the City may rightly acknowledge and regulate.

The purpose of the ordinance and the reason for its passage, and the reason for the phasing and timing contained in it, is that the City sought to impose a very simple ordinance on school picketing. The City Council sought to assure that school kids have a setting for education where tranquillity, order, calm and quiet might prevail, or at least not be minimized by introducing picketing or demonstrating and their customary counterparts.

Adderly vs. Florida tells us that there may be some public places which are so clearly committed to other purposes that their use for airing grievances is anomalous.

In *Adderly* it was the private driveway to the jail. In *Cox vs. Louisiana* it was near a courthouse. And in *Cameron vs. Johnson* it was access to public buildings.

Chicago believes that the school house ought to receive similar insulation from what has been traditionally described as speech plus activities while classes are in session.

The ordinance in Chicago was passed in response to widespread and ugly demonstrations which were taking place on a

daily basis at elementary schools where black students were being bused for the first time.

The respondent Mosley would have this Court believe that an ordinance with such a derivation was merely a ploy for stifling his cry for a larger black enrollment at Jones Commercial High School.

Q Mr. Curry.

MR. CURRY: Yes, sir?

Q You say that you're trying to do the same thing that is done in Cox.

MR. CURRY: Yes, sir.

Q And it appears from the decision of the Court of Appeals, Judge Hastings decision, he said: that's just the point, if you all said what Cox said, it would be valid. Isn't that what he said?

MR. CURRY: The court found the ordinance of the City of Chicago to be overbroad and answered no further questions in issue, Justice Marshall.

That's my recollection, sir.

Q He says that it was because it was narrowly drawn to protect a valid State interest. That's what he said in --

MR. CURRY: You're reading from Cox, sir?

Q No, sir; I'm reading from Judge Hastings.

MR. CURRY: Judge -- it's my recollection -- I

certainly don't quarrel with your reading of the order, sir. It's --

Q It's the opinion I'm reading from.

MR. CURRY: The court's order, as my interpretation was, was that it was strictly and solely on overbreadth; that it --

Q Yes, but that's what he --

MR. CURRY: -- did classify --

Q -- said, that if you had written one like Cox, he would have upheld it. That's what I gather from this.

MR. CURRY: No, we submit, Justice Marshall, that this is very narrow; this ordinance is narrow and is not vague. The ordinance is precisely drawn and patently designed to accomplish its objectives. It thus fits the Court's oft-repeated description of the kind of law that should be drawn in the State's exercise of generally unquestioned constitutional power to regulate picketing and street activity.

The ordinance does, as Thornhill directs us, aim specifically at evils within the allowable area of State control and does not leave one to guess at where fanciful possibilities end and intended coverage begins.

Q Well, why the exception, then, for labor picketing?

MR. CURRY: Mr. Justice Brennan, the exemption for labor picketing has its derivation in these facts: the primary

goal of this legislation was public-issue picketing. That was the question that the City of Chicago was confronted with on its streets at the time this ordinance came up. There was then no -- none, nor had there been in the memory of those in the City Council, any public school labor picketing at all.

Q Well, my -- you mean you don't suggest that labor picketing, particularly when it involves schools, is not a public-issue picketing?

MR. CURRY: Yes. But public picketing in Illinois, when it involves school teachers or school employees, public employees generally, is determined by the rule of law in Illinois that that picketing is contrary to public policy and can be enjoined by State action.

Q Well, then, what kind of labor picketing are you going to have around schools?

MR. CURRY: You would have the kind that could be enjoined by appropriate State action, a remedy being available to meet this possibility, the City of Chicago felt in drawing a very narrow ordinance would only relate our ordinance to the experiences that were then prevalent in the streets. That was labor -- not labor picketing, but public-issue picketing.

Q Suppose Mosley was carrying a sign saying that "The City of Chicago is unfair to organized labor"?

MR. CURRY: Within 150 feet of the school --

Q Within one foot.

MR. CURRY: Within one foot. The City of Chicago -- well, that would be picketing -- that would not be labor picketing at a school. He would be in the same posture, I submit, as he was by carrying a sign which said that this school was racially --

Q Well, suppose the Mosley sign said, "I support the labor dispute between Union ABC and the City of Chicago"? I use the words "labor dispute" because that's what your argument says.

MR. CURRY: Right. If -- rather than quarrel on the terms of what Mosley's sign says, if Mosley's sign is clearly or appropriately considered a labor picketing sign, Mr. Justice Marshall, then clearly he would fall within the exception here and the State action against him would be in the nature of an injunction because public --

Q Didn't the State also prosecute him under this ordinance?

MR. CURRY: The City of Chicago would prosecute him under this ordinance only -- only --

Q It couldn't.

MR. CURRY: I'm sorry?

Q It couldn't, could it, because he'd come under the exception?

MR. CURRY: If he was engaged in labor picketing, it could not prosecute him under this ordinance, clearly.

Q And you say this exact same man, with the exact same stick but a different sign on it?

MR. CURRY: A different sign, because there are an array a plethora of remedies available to the law enforcement agencies under the NLRB Act, because he's a public employee, his activities can be enjoined under the public policy of the State of Illinois. This Court has found that classifications would only be stricken if they are invidious. I submit that this is not an invidious classification, it's --

Q Was that argument made to the Court of Appeals?

MR. CURRY: I didn't make the argument there, sir. I'm not certain.

Q Well, was it mentioned in the opinion in the Court of Appeals? This argument?

MR. CURRY: The argument on invidious discrimination? To my recollection, it was not.

Q Mr. Curry, would the National Labor Relations Act cover public employer such as the school?

MR. CURRY: The National Labor Relations Act exempts the public employee, you're right. But that public employee then, if he's picketing, would find that the State would be enacting the thrust of public policy in enjoining his conduct.

Q So it's State pre-emption --

MR. CURRY: Yes, sir.

Q -- as against the City, rather than --

MR. CURRY: It would be State pre-emption for the public employees, and it would be National Labor Relations Board -- national federal pre-emption for those employees who were neither civil, public-issue oriented, public employee related. They would be -- that would be a third category. And we feel -- we felt at the time this ordinance was drafted that there was adequate remedies for the other two eventualities around our schools. There was not adequate protection for the school children against the kinds of distractions and disturbances that generally and usually follow the picketing and demonstrating in the streets.

Q I suppose there's no specific legislative history extant which would show that?

MR. CURRY: There is not, sir.

By his posture in this case, if the Court please, Mosley would arrogate to himself unfettered use of the sidewalk actually abutting the school. His choice of the public forum to remain unencumbered by restrictions as to time and place, so long as he is peaceful. Having thus gained his stage, he addresses his protest to what is clearly a captive audience: the students themselves, forced to attend by State regulations requiring daily attendance.

Having rejected the alternative of being across the street, or the alternative of coming back when the school is out, it is clear that Mosley's protest is intended primarily for

student consumption. And here the analogy between Mosley and the hate-oriented group that meets the bus at the other schools, and which this ordinance is related directly to, becomes clear for the first time.

The analogy is absolutely precise because there, too, the activity is intended for student consumption. While respondent cleverly tests this ordinance without arrest, and jokingly characterizes his presence at Jones as, quote, "sort of a nuisance value, especially when I was in front of the school", the real object of this ordinance, the hissing, booing, snarling, threatening, and intimidating entrance way mob waits in the Illinois appellate court for this decision to resolve their case.

The liberty guaranteed by the Constitution is liberty regulated by law in social compact, and in order that all men may enjoy liberty, it is but the tritest truism to say that every man ought, if not must, renounce unbridled license.

Liberty can only be exercised, this Court reminded us in the Cox case, liberty can only be exercised in a system of law which safeguards order.

For these reasons, and for those elaborated in our principal reply brief, and in recognition of the substantial governmental interest in education and the relevancy of the time and place criteria established by the Chicago ordinance, in protecting that substantial governmental interest from dis-

turbance and distraction, I would hope that this Court would reverse the decision of the Court of Appeals of the Seventh Circuit and uphold the validity of the Section 193 of the Municipal Code of the City of Chicago.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Curry.

Mr. Collins.

ORAL ARGUMENT OF WILLIAM E. COLLINS, ESQ.,

ON BEHALF OF THE APPELLEE

MR. COLLINS: If the Court please:

As you now know, this Rockford appeal is identical to the Chicago one, in that the anti-picketing ordinances in both cities were identical.

It differs in some respects;as counsel pointed out, the City of Rockford recently amended the anti-picketing ordinance by eliminating deleting the provisions providing that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute.

Counsel comes to the conclusion that this represents admission on the part of the City that the anti-picketing ordinance, as originally passed, was obviously unconstitutional. We recognize, of course, that the amendment the City of Rockford made has no bearing whatsoever on appellant's personal situation.

However, when we're talking about motivation

that counsel provides us, the fact is that there could be a question on the Fourteenth Amendment, and the discriminatory provisions of the labor dispute exemption. There could be. And the City of Rockford, the City Council felt, as, incidentally do other City Councils and other school boards throughout the length of this country, that if that is the problem we will delete and we did delete the labor dispute exception.

It is by no means an admission that the Fourteenth Amendment has been violated.

Q How would a particular school in Chicago, as distinguished from a department of education, have a labor dispute with someone? What would be the occasion?

MR. COLLINS: In Rockford we couldn't. We have a school board that, not too long ago, was co-terminus with the City. Our school board now is completely apart, elected at different elections. I don't know how the school board is in Chicago.

Q Well, I mean in Rockford. I was misspeaking myself.

MR. COLLINS: Yes.

Q How could your "a particular school" in Rockford have a labor dispute? Is it possible?

MR. COLLINS: The only way I know of -- yes, I suppose the building trades doing the construction of the school may have some dispute, and possibly --

Q Does that have to do with the particular school or with the contracting authority?

MR. COLLINS: Well, if I were running the labor union, my pickets would be down at the Board of Education offices. But I -- I think it's possible that there could be some labor dispute. It's never happened in our town, it could happen. And I suppose it's possible, and that's what counsel is talking about, possibilities; that there could be some pickets that they use non-union labor to build Eisenhower school, for instance.

Ordinarily it wouldn't have any application to this ordinance, because it's confined to while the school is in session. And ordinarily you don't have the school in session until the school is built.

Anything is possible. I have the same question. That's about all I can say.

Is it probable? And the reason, or one of the reasons that our legislative body exempted labor disputes is, frankly, we have no trouble in that connection; and legislators, being what they are, generally legislate toward some specific situation.

Q Which ordinance came first, Chicago's or Rockford's?

MR. COLLINS: We copied the Chicago ordinance. And that very often happens in --

Q Was this adopted in hyperbola verses?

MR. COLLINS: Identical. Identical.

Q You're referring to --

Q But didn't pay that much attention, perhaps, to this --

MR. COLLINS: Had I known at the time that this was going to happen -- [laughing] -- I would have thought up my own ordinance.

Q You're referring now to 18.1 rather than --

MR. COLLINS: 18.1, yes.

Now, there's another difference in that in the Rockford situation we have a set of facts which apparently, so far as the appellant is concerned, did not become important until a couple of days ago.

I might add that neither side wrote a transcript of the testimony until two days ago, and this Court, on April 25th, 1969, there was no demand made by counsel upon me at any time for a transcript, and there was no effort made, as can be done in Illinois, if we're talking about facts, to get an agreed statement of facts.

Q Well, you don't -- you don't suggest that the -- that you should have judgment here because this case may have involved a lot of people or that --

MR. COLLINS: No. No. The only way we know it involved any people is counsel, in its brief, appellant's brief, mentions there were 200 people. And now we have the

transcript of testimony. I hope --

Q Would you --

MR. COLLINS: -- this case is not going to be --

Q Would you suggest that you should lose this case if the ordinance is unconstitutional if applied to one person picketing?

MR. COLLINS: I'm not sure. And of course the opinion in Coates vs. Cincinnati is what gives me pause on that. Whether this may develop, that --

Q Well, the --

MR. COLLINS: -- the ordinance is unconstitutiönal in its application.

Q Yes. The ordinance on its face would apply to one person picketing the school?

MR. COLLINS: Yes, it would. And there's no question about that.

Q And if it would, and if it were unconstitutional if it did that, would you say the ordinance is invalid on its face?

MR. COLLINS: I frankly don't know. In Coates vs. Cincinnati, apparently I think you, yourself, had some question about whether --

Q Well, I said that wasn't a speech case. I approached it as a non-speech case.

MR. COLLINS: That is right. And picketing, of course,

is not strictly a speech case.

Q Well, not strictly, but it does have those elements.

MR. COLLINS: I personally would be willing to stand on the ordinance as written. And although we had 200 people, we had a four or five-hour disturbance, and Mosley was just walking up and down all by himself, I suppose that one has to trust somewhat into the discretion of the school administrators and the police.

Q Well, would you say that it would be fair to your side to consider this case as though we had a one-person picket and the ordinance was applied to that?

MR. COLLINS: I don't know if it'd be fair, but I can see where this Court might take that attitude.

The -- we did have 200 people, and we had disruption and when counsel speaks of this transcript, apparently she and I may not have the same transcript. But the one I have indicates that there was disruption and things came to a halt inside the school for about three or four hours.

Q What did this man, Gerhart or whatever his name is -- do?

MR. COLLINS: Grayned.

Q Grayned.

MR. COLLINS: Well --

Q That's in the record.

MR. COLLINS: That's in the record before you or the transcript that we're submitting to you, sir?

Q Either or both.

MR. COLLINS: Well, what's in the record before you: nothing. Absolutely nothing.

What's in the transcript, again there seems to be some question as to what's in the transcript. I read it last night carefully. Grayned, without any question, was a member of the 200 people that were going up and down the sidewalk. Grayned --

Q Did he make any noise?

MR. COLLINS: There -- to my knowledge -- is not direct -- the testimony is, everybody was chanting; there is no direct testimony, to my knowledge, that Grayned was chanting. This was a group of 200 people. There is testimony that he was, I think, demonstrating or raising his hand.

Q How was he convicted?

MR. COLLINS: Because the anti-noise, anti-picketing -- anti-demonstration ordinance says: whosoever shall wilfully make noise or demonstrate as to disrupt the classroom. It reads: "Who shall wilfully make or assist in the making of any noise or diversion which tends -- which disturbs or tends to disturb the peace and good order of such school session or class thereof."

Q What did he do?

MR. COLLINS: There was testimony that Grayned, this

one particular defendant, was walking up and down. I believe some people said he had a sign, some didn't. There was testimony that everybody was chanting. And of course there was testimony by various school teachers that things sort of stopped inside for a long period once this started.

Q Well, what -- I assume that if the testimony was that everybody was chanting, a man who was in that group who was deaf and dumb could get convicted under this statute -- ordinance, I mean?

MR. COLLINS: Deaf and dumb? I doubt that he'd be convicted, if he showed that he --

Q But he'd be arrested.

MR. COLLINS: -- couldn't -- if he was dumb --

Q Isn't it a fact that the way this statute was administered in this particular case was that anybody in that group was subject to arrest?

MR. COLLINS: I think not. If we read the record, and now we're talking about the transcript not the record before this Court --

Q Well, I'm talking about this --

MR. COLLINS: -- Grayned --

Q We have one man here before us, don't we?

MR. COLLINS: You have one man and you have an ordinance.

Q And I'd still, just personally for myself, I don't

see what he has been proved to have done to violate the ordinance, even if it's constitutional. You see my trouble?

MR. COLLINS: Yes, I understand.

If we get into trying the facts of this case, which, incidentally, took two whole days to try, there is controverted testimony, first. Mr. Grayned said, "I just happened to be there, and the police came along and put me in" -- and this, and all of the testimony is controverted. I'm speaking about the City's testimony, and the two verdicts of the jury.

The jury found, one, that the plaintiff was guilty of the anti-picketing; two, they found him guilty of making a diversion, not a noise.

Q How does Illinois define "diversion"?

MR. COLLINS: The Supreme Court of Illinois -- this was brought up there -- now, this isn't just a diversion, if the Court please, but it is a diversion"wilfully make or assist in the making of any diversion which tends --'disturbs or tends to disturb the peace and good order of such school while it is in session."

That's how the ordinance reads.

As to the definition of "diversion", I believe the Illinois Supreme Court took that up specifically, the word itself, and I hope I can find it immediately -- or I'm in trouble here!

It said: We do observe, while the defendant charges

that the terms appearing in the ordinance, such as noise and diversion -- I'm reading from the Illinois Supreme Court opinion -- lack constitutional precision and are too indefinite, terms such as alrm, disturb, interfere with, and hinder have been determined to comply with the Constitutional requirements of specificity.

The terms here are not constitutionally objectionable.

Q I suppose the jury was instructed?

MR. COLLINS: The jury was instructed --

Q How were they instructed?

MR. COLLINS: -- on the words of the ordinance. I don't think they were instructed on a dictionary definition of diversion. It occurs to me, though, however, a diversion: to divert, to take from the normal course, where you have testimony that a good part of the students spent most of the day looking out the windows instead of studying, I think diversion in the context of this ordinance is they were diverted from the usual procedure that goes on in school; namely, learning and teaching, I assume.

Q Did the defendant make any request for charge in the trial court on the meaning of diversion?

MR. COLLINS: The colloquy concerning instructions are in this transcript.

Q No point was raised --

MR. COLLINS: And there's no point, that I know of.

I didn't read --

Q And not raised in the Supreme Court of Illinois on that, I suppose?

MR. COLLINS: Nor in the magistrate's court. However, I didn't try the case. But it does not appear here. And there does appear in this transcript the discussion concerning instructions to be submitted to the jury.

So probably it didn't occur. At least it wasn't reported.

Now I see my time is almost expired.

It seems to me basically that the Rockford ordinances do not differ greatly from the ordinance in the second Cox case. Both ordinances.

They're specific as to place. 150 feet is quite definite, and, incidentally, reasonable. 15 feet wouldn't help much, and 1500 feet probably would be too far.

They're specific as to time. Incidentally, the anti-noise, anti-diversion ordinance says ground adjacent to the school. The school property, not the building. The picketing ordinance, the measurement starts at the building not at the property.

Especially these are specific, I think, as ordinances can be. From the standpoint of time,they're both restricted, as to -- a little different, however -- the picketing ordinance, a half hour before and after school is in session; the anti-

noise and diversion ordinance, while school is in session, or, if they have a meeting, any time during the day or night when a meeting is being held in the school house.

Q Well, what interests beyond noise and diversion -- what interests beyond protection against noise and diversion does the anti-picketing ordinance protect against?

MR. COLLINS: None. I think that the -- and in the preamble of the anti-noise ordinance, it's for the protection of schools, so that the educational process will continue uninterrupted. That's the rationale of both ordinances. And they were passed just for that purpose, and for no other purpose.

I believe my time is up.

MR. CHIEF JUSTICE BURGER: Thank you.

MR. COLLINS: I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 2:32 o'clock, p.m., the case was submitted.]

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