In the

Supreme Court of the United States

EDWARD H. HYNES, et al.,

Appellants,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF ORADELL, et al.,

Appellees.

No. 74-1329

Pages 1 thru 36

Washington, D.C.
December 10, 1975

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Wednesday, December 10, 1975

The above-entitled matter came on for argument at 11:08 a.m.

BEFORE:

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

APPEARANCES:

TELFORD TAYLOR, ESQ., Taylor, Ferencz & Simon, 60 East 42nd Street, Manhattan, New York, New York 10017, for the Appellants.

JAMES A. MAJOR, ESQ., Hackensack, New Jersey, for the Appellees.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-1329, Hymes against The Mayor and Council of the Borough of Oradell.

Mr. Taylor, it's good to see you back here again.

ORAL ARGUMENT OF TELFORD TAYLOR ON

BEHALF OF APPELLANTS

MR. TAYLOR: Mr. Chief Justice, and Members of the Court: This is an appeal from a decision of the Supreme Court of New Jersey, which upheld against Federal constitutional challenge a municipal ordinance which requires that any person who wishes to call from house to house in support of a political campaign or cause must first identify himself with the municipal police in writing.

Probable jurisdiction was noted at the past term of court.

Now, your Honors, there are one or two twists in the litigation history of the case which are irrelevant to the posture in which the case now comes before the Court and which I believe and hope are adequately explained in the statement in our brief to which I believe my brother at the bar here has taken no exception. So I am going to content myself with a very brief summary which I hope the Court will find sufficient.

The defendant appellee here, the Borough of Oradell,

has, at least since 1971, had what has come to be known as the Green River Ordinance affecting house-to-house calling by commercial solicitors, salesmen, solicitors for commercial purposes. That being the local state of the law in Oradell in March of 1973, the appellant Hynes, who was then a member of the New Jersey Assembly and a candidate for renomination and reelection and to whose constituency the Borough of Oradell had just been added by a statewide reapportionment, in March of 1973 Hynes went to Oradell and commenced campaigning from house to house. The police accosted him and made him stop canvassing and asked him to leave the borough, although of course, the ordinance then in effect did not cover his situation at all.

A very few weeks after that, the Borough of Oradell enacted the ordinance extending its coverage to solicitors for charitable contributions and any person canvassing for a political campaign or cause.

QUESTION: Incidentally, Mr. Taylor, is Mr. Hynes a Democrat or a Republican?

MR. TAYLOR: Mr. Hynes is a Democrat, your Honor.

QUESTION: And Oradell isn't.

MR. TAYLOR: To the best of my knowledge it is not. I suppose those things can fluctuate.

The ordinance having been enacted, the appellant Hynes and four other plaintiffs, likewise appellants here, who

were residents of Oradell -- Hynes himself was not, though Oradell was part of the constituency -- brought a suit for declaratory and injunctive relief focusing their complaint under the First and Fourteenth Amendments.

They prevailed in the lower courts on a combination of State and Federal grounds, but between the time in the lower courts and the time when the case reached the Supreme Court in New Jersey, a further amendment to the ordinance eliminated the State questions, and so the New Jersey Supreme Court reviewed the case squarely on the basis of the Federal Constitution and upheld the ordinance by a vote of 5 to 2.

Parenthetically I should note that on the same day that they decided this case, they rendered their decision in the Collingswood case which involved a wholly different kind of solicitation ordinance from another borough, and there is some cross-reference between the opinions in the two cases. Therefore, we have included the opinion in the Collingswood case in our appendix. That case is pending here on appeal, and I believe the Court has taken no action on it.

Now, the ordinance in the form in which the Supreme Court of New Jersey reviewed it is in our brief on pages 3 and 4 to which I invite the Court's attention for just a moment. I think the Court will see on page 3 where the "whereas" clauses explain the purpose of the ordinances set out, that the explicit and exclusive purpose of the statute is public

safety against crime, the theory being that people on the pretext of soliciting votes will then engage in breaking and entering or larceny.

On the operative clause of the ordinance, on page 4, the Court will see that it covers any person who is canvassing for charitable cause or for any Federal, State, county, or municipal political campaign or cause, that such a person must notify the police department in writing for identification and that when notification is sufficient for the duration of the campaign or cause.

The penalty clause --

QUESTION: Mr. Taylor, I may be being picky, but in the first whereas, surely they don't practice polygamy knowingly in Oradell -- "Whereas, the Borough is primarily a one-family residential town whose citizens are employed elsewhere, resulting in the wives of the wage earner being left alone during the day."

MR. TAYLOR: I would have to observe there is a slight sexist phraseology in the ordinance, your Honor, yes. The attitude apparently is that only men work and the women are home. On that point I will have a little more to say later, but I think it doesn't affect the apparent purpose of the ordinance is directed in terms of public safety against crime.

There is a penalty in the underlying Green River

Ordinance applicable here which is a fine of $500 or 90 days in jail accumulative day by day.

The New Jersey court, the majority --

QUESTION: Mr. Taylor, this ordinance, 598-A, is an --

MR. TAYLOR: An amendment.

QUESTION: Well, it's more than an amendment. It's a subsection of Ordinance 573, or it's an exception to the basic Green River Ordinance, isn't it?

MR. TAYLOR: Yes. And it's phrased as an exception which is a little curious because it was excepting things that weren't in there before. It was at one and the same time an extension to other people but with a different requirement --

QUESTION: It would be a sanction; it's not an absolute prohibition.

MR. TAYLOR: Well, sanction, but different requirements to validate the soliciting.

QUESTION: The other ordinance, the basic ordinance, 573, requires what?

MR. TAYLOR: That covers commercial solicitation and it specifies in considerable detail what the notice filed with the police shall be, and then, of course, there has to be a license for that, which is not the case here.

QUESTION: Under any of these ordinances, Mr. Taylor, is a person required to receive a card that is used as identification in some way?

MR. TAYLOR: I think that is true if you are commercially soliciting, but it is not true with respect to the part that's in question here now.

QUESTION: Does a commercial solicitor have to pay for his license?

MR. TAYLOR: I would have to check it in the appendix, Mr. Justice Rehnquist. The ordinance, of course, is set forth there.

QUESTION: Don't speak to it, then.

MR. TAYLOR: Now, we, of course, recognize that public safety is legitimate and indeed a very vital public interest, and we are not contending here that calling house to house is totally immune from legislative restriction. I am not standing here and supporting any such absolute.

But our position is that the Supreme Court in New Jersey did very badly misjudge the constitutional factors that are at work here in these contending values and that we think a proper judgment on them would require a contrary conclusion.

QUESTION: Mr. Taylor, if this kind of door-to-door soliciting isn't immune from some regulation, can you conceive of a less onerous regulation than the one that the Borough has imposed?

MR. TAYLOR: Oh, yes, indeed. That question, of course, was put to counsel by the New Jersey court, and the court seems to have taken the position that there was no lesser

thing.

We touched on that in the brief; a limitation on the time of day at which you could call from house to house might well be legitimate; legislation in support of householders who gave notice they did not want people using their front sidewalk and ringing the bell for this purpose would be sufficient. I think beyond that one would have to say it would depend upon the kind of use that was troubling the City Council.

QUESTION: Of course, the point you mention puts the burden both on the householder and the town to enforce it in a way that this doesn't, if the individual has got to go and make the complaint himself.

MR. TAYLOR: Maybe I didn't put it clearly. The restriction on time of day would put no --

QUESTION: No, I meant the second one.

MR. TAYLOR: The second, I suppose, would mean that the householder would have to give some indication that he did not want solicitors coming to the door.

Of course, it seems to me that whether going beyond that is permissible or not must depend upon assessing how deep is the infringement on the First Amendment here and how great is the municipal interest that requires the restriction. And that is what I propose to address myself to now.

With respect to the depth of the infringement here, both in terms of the scope and the depth, I'd like to make some

observations. The case here has proceeded continually on the basis that the main effect of this is the restriction on a candidate, that a candidate must register. The affidavit of the chief of police of Oradell attached to the answer here is exclusively concerned with the obligation of the candidate. But, of course, the restriction here isn't limited to candidates, it applies to any person, and that means all canvassers, anyone who is going to get signatures in behalf of candidates is affected by this.

The court below saw this as a way of protecting the community against strangers infiltrating into the community, but the ordinance is not so limited. It covers residents of the community as well as people coming in from outside. The talk has all been about campaigns, but it's not restricted to campaigns, it covers political causes.

Now, a combination of all this would mean, I submit, that if a householder in Oradell wishes to canvass his own block, wishes to call from house to house in his own block in support of or in opposition to the equal rights amendment or to school busing, to charter reform, that he must first register with the police -- he or she must first register with the police.

QUESTION: Or a curbing program to put new curbs or sidewalks in.

MR. TAYLOR: I should think so. Things have a way

of becoming political issues that perhaps shouldn't, but all those sorts of things are political in the sense that the political authorities will pass on them, and therefore it would be, it seems to us, a very chilling effect on that sort of community political consultation.

QUESTION: Do you agree, Mr. Taylor, that police authorities have some reason to believe that a great many breaking and entering cases, attacks on householders have come by people who gained entry by getting the door open by representing themselves in some way as a solicitor or a caller?

MR. TAYLOR: Well, that's an extremely relevant question to the other side of the coin here, that is, the extent of the necessity for this kind of restriction, and I will address myself to that directly now.

The record here is, I think, wholly insufficient to establish any such thing. The only evidence touching on this point is contained in Chief Brugnoli's affidavit in support of the answer in which -- it's the last thing in the appendix, if your Honors wish to look at it. It's on page G-4 of the appendix. And the part of it that speaks to your question contains some statistics on the number of breakings and enterings within the Borough in 1969, '70, '71, and '72, and so forth.

But there is absolutely nothing in his affidavit or anywhere else in the record which indicates that a single

one of those breakings and enterings had anything to do with door-to-door solicitation. There is a total lack of --

QUESTION: What page did you say?

MR. TAYLOR: I beg your pardon, it's the tail end of the appendix, G-4.

QUESTION: Oh, G-4.

MR. TAYLOR: Yes. The statistics on breaking and entering in Oradell we have compared in our brief with the statistics nationwide. The rate is very considerably lower than the nationwide rate. On the last page of our brief we have compared Oradell with the New Jersey crime statistics in other boroughs of comparable size. There is no indication that thereare in any sense any peculiar conditions in Oradell. There are several boroughs with much higher rates, several with slightly lower rates. It seems to be wholly characteristic. So there is neither any showing of a pervasive nationwide need, no showing of local peculiarity, and absolutely no showing that a single one of the breakings and enterings was the result of somebody posing as a canvasser and then, as your Honor says, getting a foot in the door. There is nothing there.

QUESTION: Would it be irrational for the decision-makers to conclude that since this does happen in some places, they are entitled to take preventive measures to see that it doesn't happen in Oradell? Or do you think that would

not be an appropriate consideration?

MR. TAYLOR: I think it's an appropriate consideration, but it seems to me that here where -- one would expect if that were so, your Honor, that some other places where this had broken out would have felt a need for this kind of ordinance. We have done our best to find if there are any other places which have felt this necessity, and although it's virtually impossible to canvass all the municipal legislation of the United States, we have done our best and have not come across any indication that any other place has done this.

Then, of course, there is the particular history here that this ordinance came on the heels of a particular episode.

I have a couple more things to say later about the rationality of the ordinance in terms of its purpose, but I think not, and I think that again since we are in the First Amendment area here, that this speculation that it might have happened somewhere else is quite insufficient to justify the depth of the infringement on the First Amendment here.

The New Jersey court --

QUESTION: May I ask, Mr. Taylor, I gather the ordinance you gave us before we put some questions to you is basically an overbreadth argument, is it?

MR. TAYLOR: Well, it's more than that. We have a

vagueness argument which I haven't touched on yet.

Yes, it is an over --

QUESTION: But it is also an overbreadth argument.

MR. TAYLOR: Yes, that's true.

I haven't come to the respects in which this seems to me so deep an infringement. The New Jersey court seems to have thought that just registering with the police is really no trouble to anybody, and why should anybody be excited about it. But if one thinks about this in terms of the political process that this Court is repeatedly confronted with in recent years on requirements that minority parties, parties that haven't been major parties before, get signatures in order to get on the ballot, other parts of the political process that this Court has upheld, I believe in one of them Mr. Justice White emphasized the vital role that dedicated volunteers must play in an effective political process.

If one thinks in those terms, the difficulties of recruiting volunteers to get signatures, to urge people to go to the polls, and so forth, if they must first go to the police station or mail in their notification, is very considerable. The mailing in may not suit --

QUESTION: Do you think that people who would be successful in getting people to sign up on a door-to-door basis are the kind of people that would be loath to register with the police?

MR. TAYLOR: I think in many instances that is true, your Honor, yes, and I don't mean to say that such people are very much different from anybody else. If we are in a political campaign --

QUESTION: They are probably not going to be blushing violets, are they?

MR. TAYLOR: They may well not be people who look happily on a visit to the police station.

QUESTION: They don't even want to go there, not even to visit.

MR. TAYLOR: Most people don't go to the police station for pleasant reasons. They go either because their car has been stolen or they have stolen somebody else's car. The whole business here, you cannot schedule canvassing, it's a matter of getting volunteers by hook or by crook.

QUESTION: There is nothing in the ordinance that requires anybody to go to the police station, as I read it. You can make a telephone call, can't you?

MR. TAYLOR: It has to be in writing.

QUESTION: Does it?

MR. TAYLOR: It has to be in writing, specifically under the ordinance. Yes.

QUESTION: But you don't have to appear personally under the ordinance, do you?

MR. TAYLOR: You have to get your writing there

either by mail or by personal delivery. You could send it by somebody else, but if one canvasser has a sick daughter or something and can't go and you want to send somebody else, there won't be time to do that other than by going down.

QUESTION: How about sending a --(inaudible)

MR. TAYLOR: It wouldn't do it fast enough. It's a matter of getting somebody else on the spot notice.

QUESTION: How about sending just a whole list of people that these are substitutes and they will be doing it, too. Isn't one of your problems here the fact that you have never really done this, and so you don't know what the mechanics or details of the thing would be when they are worked out.

MR. TAYLOR: Well, I think that in this area there are certain matters of common knowledge the Court can recognize. I don't know, I don't believe there has ever been a campaign where at the outset of it one had a complete list of all people who might be going to canvass. One of the big things about a campaign is persuading people to come and do it, and if when you try to persuade them to come, you have got to say in the same breath, "Well, I'm sorry, but before you can do any of this, you've got to get word to the police and identify yourself."

We are overlooking entirely up to this point, your Honors, the whole question of ethnics, of political viewpoints,

the candidate, particularly for local offices, may be a person the police department doesn't like very much or they don't like what he is standing for. Suppose it's for a civilian review board to review police brutality? There are all kinds of things that may make people very reluctant to do this.

QUESTION: But if you had a record showing that, we could take some account of it. But this is simply an action for declaratory judgment without ever anybody going and doing it.

MR. TAYLOR: Well, the only record we have of the necessity is that affidavit, and I submit it's totally insufficient to warrant a restriction which I think as a matter of common knowledge one can see it will be a considerable chiller, Mr. Justice Rehnquist. I don't see how one can doubt that the whole matter of recruiting people to do this very necessary and arduous task would be rendered enormously more difficult by this kind of requirement.

This further factor of anonymity, of course, the problem that Talley v. California covers, it may generally be that candidates don't act anonymously, but for canvassers and others the situation is quite different. They may be quite willing to identify themselves to the householder they go to see, but not nearly as keen about identifying themselves to the police if their cause is one that is likely to be

unpopular with the police. Police have ethnic and class prejudices like other people do.

QUESTION: But you are asking us to assume that without any showing in the record that that's the case here.

MR. TAYLOR: Well, in the first plase it seems to me a reasonably safe assumption, and in the second place, I think you must also examine the record --

?

QUESTION: The slight to police over 50, Mr. Taylor.

MR. TAYLOR: Pardon?

?

QUESTION: The slight to police over 50.

MR. TAYLOR: Well, whether over or under 50, I think they will still reflect the same prejudices and attitudes that seem to me are troublesome here.

QUESTION: Wouldn't the ordinance be easier for you if it were the town clerk?

MR. TAYLOR: Whether enough, is another matter, but in fact it's the police here, not the town clerk.

QUESTION: But you think there would be a difference in constitutionality or could be, either the town clerk or --

MR. TAYLOR: Probably the chilling effect would be somewhat less, but since the purpose here is public safety, the whole purpose of this statute would be frustrated, Mr. Justice Rehnquist, if you made it the town clerk. The whole purpose is to get it in the hands of the police right away. So that's really not our situation.

The point on vagueness which I will just take a minute on if I may. Once again the Jersey court seems to have thought that the ordinance was crystal clear, and it certainly is clear enough in terms of the kinds of speech that it covers, that is, the charitable solicitation, the political canvassing, and so forth. But I submit that the "notify in writing for identification only" is quite insufficient. What can the police legitimately require for identification purposes? As far as the record shows they have put out no rules. They have put out no forms. The police chief has made a couple of remarks about it in his affidavit, but of course they don't seem to be in any way binding on him or his successor.

If the purpose of the ordinance is to help the police, know where canvassing is going on, it would seem to require some indication of where in the borough you are going to be. The ordinance doesn't say one way or the other. Are these lists to be kept confidential or made public? The ordinance doesn't help us.

It seems to me there are just too many questions left unanswered here. And I refer the Court to Justice Pashman's dissent below where he stresses, it seems to me, very effectively the special risks of harassment, discriminatory enforcement, and so forth, that are inherent in the vague quality of this restriction.

Now, in conclusion may I say that with the total lack of any indication of need here, with the obvious effect it is going to have on the political process on neighborhood discussion, that the whole balance here was misjudged below and that the case calls for reversal.

Thank you, Mr. Justice .

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

Mr. Major.

ORAL ARGUMENT OF JAMES A. MAJOR ON BEHALF OF APPELLEES

MR. MAJOR: Mr. Chief Justice, and Members of the Court: Before I commence my argument, Mr. Justice Brennan, Mr. Hynes in this case is a Democrat. I voted for him.

QUESTION: Have things changed since I left New Jersey? Is Oradell still a Republican town?

MR. MAJOR: Yes, indeed. We have a Democratic legislature and a Democratic Governor.

QUESTION: But Mr. Oradell is a town councilman? What is Mr. Hynes position?

MR. MAJOR: I beg pardon?

QUESTION: He is in the State legislature?

MR. MAJOR: Hynes, yes, sir.

QUESTION: From that district?

MR. MAJOR: An Assemblyman, yes.

QUESTION: From that district.

QUESTION: No. Oradell was added to the district from which he was originally elected, wasn't it? Under the reapportionment. Oradell, a Republican community, was added to the district which had originally elected him.

MR. MAJOR: They have apportioned the districts, Justice Brennan.

QUESTION: He wanted to go into Oradell, have the people of Oradell know who he was.

MR. MAJOR: When he canvassed me, Mr. Justice Brennan, he lived in Maywood, and I lived in Hackensack.

QUESTION: I would have expected you to vote for the Democrat, Mr. Major, because I remember you.

MR. MAJOR: Yes.

QUESTION: Very favorably, I might say.

MR. MAJOR: It hasn't done me any harm, sir.

(Laughter.)

In this particular case, the problem that we have, and I would like to lay it right on the table so that you understand what we are driving at, we do have a small community, we do not have what you would call policemen on regular patrol and what not, and we have people coming into the town. I am going to say, for instance, Justice Jackson pointed this out in one of his dissenting opinions, what happens, and it will lead up to what I say as to the reason we adopt these ordinances.

People will come to town in a colony and they will descend on your town, and they will debark a group of canvassers, and through your town they go, knocking at doors, "We are soliciting this," "We are soliciting that," and so forth and so on.

Now, as I point out in my brief and I think as the Justices will recognize, the man who has in mind casing a house for future burglary doesn't announce that fact. He is going on the guise of a solicitor whether for a charitable campaign or whatever it is.

Now, ever since this Court laid down the decision in the Valentine case, we have taken the position that commercial free speech, if I can coin a phrase, is subject to regulation and in some cases to prohibition.

Now, we have adopted, and you will find it -- you asked counsel about the initial ordinance -- you will find it on E-1, which is our original canvassing ordinance, and you will notice there that the person who applies for a permit must fill out a form, answer certain questions, describe the goods that he is soliciting,and so forth. Those ordinances have been upheld in the State of New Jersey, and I understand they are not attacked here.

Now, we take a step further. We have people come to the town and they say, "We are soliciting votes. We are running for this, we are running for that, and we want to go

from house to house.

Now, as carefully as I have read the decisions of this Court, and I read them in preparing this particular ordinance, I have found nowhere does it say as a premise that a person has a right to ring my doorbell. I may forbid him, and the Court probably is familiar with buildings where there are signs, "Solicitors prohibited," "Soliciting prohibited," and the like.

Now, these people come in and say, "We are soliciting, running for office," so forth and so on. And the question then is should we have some idea who they are? And I think when counsel says there is nothing in the record to indicate why this was done, I think the Court would really sit up in its restrictive chairs if I said that we have 12 unsolved murders in our vicinity and therefore there is fear in the minds of the householders.

Now, you may say it's an unjustifiable fear, it's one of the incidents you have to put up with in living in civilized society. But if a legislative body is going to be responsive to the will of its people, it has to recognize these conditions and therefore the first amendment to this ordinance was passed.

Now, here is where we had trouble. It came before the trial judge on the return of an order to show cause. There was not a plenary hearing, no testimony was taken, and counsel

who then appeared for Mr. Hynes and his fellows took the position that this was an unreasonable regulation, and I emphasize that position, an unreasonable regulation of the right of free speech, and it was on that hypothesis that the case was argued.

Along came the trial judge,and counsel and I are agreed on one thing, it is very hard to follow that opinion. I don't know whether it was correctly transcribed or what. But the upshot of it was that he said that if you are running for office, you don't have to comply with any regulations. The right to run for office is absolute.

Now, I know of no decision by this Court going back to Justice Black and the others who were absolutists to the effect that the right of free speech was not subject to regulation which took that position. So we tried, I might say parenthetically, the amended ordinance was defective because it had no sanctions, and an ordinance without sanctions is no ordinance. So we amended it, and amended it in the light of the challenge that was made, compared the amended ordinance with the one which you will find on E-1 which requires answers to questions and identification and so forth. The only requirement that we put in here, and we thought we were complying not, Justice Brennan, with the idea of keeping Democrats out of Oradell or anything of the sort, but with the idea of analyzing competing principles. Surely a man has a right to

run for office, surely he has a right to solicit signatures on nominating petitions, and the like. Also, we ought to have some idea of who you are, and therefore we only said one thing, "Identify yourself in writing to the police chief, say you are Mr. Hynes and you are going to be in Oradell soliciting house to house. Say you are so and so."

QUESTION: Mr. Major, may I interrupt you at this point? How would you construe the requirement of identification in writing? Would a postcard suffice?

MR.MAJOR: I would say that it can be done in writing. I would say anything in the way of a driver's license or anything that I am what I pretend to be.

QUESTION: Your answer suggests that one would have to go to the police station and prove the correctness of his identity. Is that in your thinking?

MR. MAJOR: The ordinance says "in writing." It does not require a personal appearance at the police station. Now, the only time, I think, that the suggestion you have in mind or the thought that may be troubling you would come into play is if the person were not recognized by his writing.

QUESTION: Suppose I lived in Trenton and just sent a postcard to the police saying that one of these days I am going to be soliciting for this charity or that charity or that campaign, or some other, what would happen from then on?

Would that be adequate to comply with the statute or the ordinance?

MR. MAJOR: I would definitely say contrary to what is said in appellant's brief that there would be no discretion in the police chief to say that's not a recognized charity or anything of the sort.

QUESTION: I am thinking about my postcard sent from Trenton saying, "My name is Powell, I live on such and such a street."

MR. MAJOR: I had in mind Cantell v. Connecticut.

QUESTION: But would that answer my question?

MR. MAJOR: The Secretary of State was empowered to determine whether it was a charity, recognized charity, and so forth. We have not gone into that.

QUESTION: What I am leading up to is whether you think -- I agree that the ordinance has not been put into effect yet -- that a postcard would suffice. And I take it you do.

MR. MAJOR: I would say that would be sufficient.

QUESTION: Right. Would you follow up then and discuss for an appropriate period how you think that sort of regulation would prevent crime?

MR. MAJOR: Definitely not.

QUESTION: It would not.

MR. MAJOR: No, sir.

QUESTION: You think the ordinance does not serve the purpose for which it was enacted.

MR. MAJOR: Definitely.

QUESTION: Wouldn't that dispose of the case?

MR. MAJOR: I might call to your attention in the opinion of the Supreme Court that you will find on A-11 -- I beg your pardon, that is in the dissenting opinion. But on page A-7, quoting from that opinion, "At oral argument the attorney for plaintiff Hynes candidly admitted, as indeed he was obliged to by the circumstances, that he could conceive of no lesser form of intrusion on the right of free speech, other than absolutely no intrusion, than the identification device here."

Now, contrariwise, Justice Pashman on whom the appellant relies, says this: "The Oradell ordinance" -- I am reading from A-11 -- "The Oradell ordinance, which, in its amended form, merely requires a single registration by each canvasser during each campaign, solely for purposes of identification, would, on its face, appear to impose no serious burden on the exercise of first amendment rights."

Then, having said that, he goes on to imagine what might happen. Now, after all is said and done, the best we can do is draft an ordinance which we think is clear to everybody, and of course, if you draw the language to its extreme, I suppose you could make it almost nonsensical. But as

I say, that's the purpose we had in mind, identification and only that. And in the brief that I have filed here, I have pointed out to the Court that the last thing in the world we want to do is deprive Hynes or anybody else of the right to come in and solicit, so long as we know who they are.

Now, Justice Pashman, in his dissenting opinion, referred to some of the cases which were before this Court, particularly those involving Jehovah witnesses and the like, where they were very much in the minority. I heard it said many times that the majority doesn't need a constitution and the majority doesn't need anything else. It's got the votes.

Now, in this particular case, I cannot conceive that this ordinance or any of its prototypes enacted in other places would prevent Democrats or Republicans or anybody else from soliciting.

QUESTION: Doesn't the ordinance require you to register while a campaign is going on?

MR. MAJOR: Doesn't it require what, sir?

QUESTION: When do you have to register? When do you have to identify yourself?

MR. MAJOR: Before you start soliciting from house to house. If you are not soliciting from house to house, you need not register with anybody.

QUESTION: I understand that. But do you think you

have to say what campaign you are interested in?

MR. MAJOR: I don't know whether you would even have to go that far.

QUESTION: You can just send in a name and say some day I am going to either solicit for a charity or solicit for a candidate for office.

MR. MAJOR: I would definitely say that it might be preferable --

QUESTION: How about is it required? Is it required to identify the campaign that you are interested in?

MR. MAJOR: I would think so, yes. I would think so.

QUESTION: And do you have to say what side you are on?

MR. MAJOR: No. No.

QUESTION: But you do have to say what campaign you are going to be in?

MR. MAJOR: I would say that a letter to the police chief that I am so and so and I will be soliciting house to house in the Borough of Oradell in support of my candidacy would be sufficient. I don't think that a letter that I will solicit house to house for some unnamed cause or for some unnamed person could answer the question of identity. The question is what are you doing in the town.

QUESTION: So you do have to tell the police for whom you are going to be soliciting.

MR. MAJOR: That would be my interpretation, yes, sir.

QUESTION: And you don't think that would deter anybody from soliciting?

MR. MAJOR: No, sir. And in the dissenting opinion below it refers to what is called chilling, whatever that means. I'll take it. I think it would have to be pretty close to a freeze to deter the average political candidate from announcing what he is running for, because unless he says that, I don't know how he can solicit votes.

QUESTION: Yes, but this doesn't apply just to candidates; this applies to anybody who is soliciting on any side.

MR. MAJOR: Precisely.

Now, suppose they are going to solicit six signatures for a nominating petition. And they ring a doorbell. Surely they would have to say this is a nominating petition for Mr. Hynes or Mr. Byrne, or somebody or other, would you sign it, and what they are running for. Otherwise, you would be put in the position of saying, "Here I have a petition, would you sign it?" And so far as anonymity is concerned, soon, you take a town the size of Oradell, that you are stopping at house to house it becomes known that you are soliciting.

Now, in all of these cases, I recognize fully that you have competing principles striving for mastery. The last

thing in the world that we want, as I said, is to keep anybody from running for office or from soliciting. We thought this was a way we could do it.

Now, in the argument that is made here which was not made below, we have this question as to the type of identification and so forth and so on. What we wanted to find out and what we dropped in the lap of the Supreme Court of New Jersey when we amended the ordinance was, Can we do this? Now, if it is a fact that there are some facets of this ordinance which require amplification, no reason in the world why that can't be done. The point that we are leaving with the Court is we would like to know if consistent with the Constitution we can adopt an ordinance towards this end, and the reason for it is quite obvious.

Now, they said there was no testimony taken. Obviously, the trial court proceeded on what is called a facial attack on the ordinance. If there was in fact some question as to whether the police needed this kind of an implement, that testimony could have been produced by the number of unsolved murders. As a matter of fact, while this case was pending, in the adjacent town of Waldwick, a woman by the name of Hynes, not related to this petitioner, was taken from her home, taken someplace and killed from her home.

Somebody is going to say, well, aren't the women of

Oradell constituted of sterner stuff? The answer is apparently they are not. But that's the point I leave with the Court. We are interested in this $64 question, is this a condition subject to municipal regulation? If the particular ordinance goes too far, that's one thing. But as I understood at the trial level, the trial judge said, "You can't do it at all." And there's where we parted company.

MR. CHIEF JUSTICE BURGER: Mr. Taylor.

REBUTTAL ARGUMENT OF TELFORD TAYLOR ON BEHALF OF APPELLANTS

MR. CHIEF JUSTICE BURGER: Do you see anything in the ordinance, Mr. Taylor, that requires you to identify the particular objective of your solicitation? That is, would it be sufficient if you sent a postcard and said, "Beginning next week I intend to solicit support for my favorite candidate in the upcoming election?"

MR. TAYLOR: If the question, your Honor, is whether it can be done by a postcard, that is to say, by mail, that's one matter to which the New Jersey court did advert, but in a somewhat ambivalent way. It's on page A-5 of the appendix. And the court said the requirement may be satisfied in writing, suggesting that resort may be had to the mails.

I was going to make reference to that in connection with Justice Powell's question. Of course, that doesn't seem to me to be an interpretation, it's a suggestion this might be

so. I believe that my basic answer to your question, Mr. Chief Justice, is that on most of these matters the ordinance is impossibly vague. It does not tell us.

I think it does tell us the answer to Justice White's question about campaigns because there is this sentence that the notification shall be good for the duration of the campaign or cause, and it's hard to see how that can be implemented unless the campaign or cause is specified. Whether you have to say which side of the campaign you are on is the further question which, again, I think the ordinance gives no answer.

Might I just say again in response to Justice Powell's colloquy with my brother at the bar here, I think you remarked that the ordinance is not yet in effect. I don't believe that is so. The relief granted by the trial court was declaratory only. That, of course, was reversed in the Supreme Court, and my understanding is that the ordinance is in effect. What the practical result has been in terms of the administration of it, the record is, of course silent on. But I believe the ordinance is now in effect.

QUESTION: Under the New Jersey practice, if you are that familiar with it, could the courts, as most courts could, have a narrowing construction of this ordinance saying that you need not specify the party or candidate but merely are required to say that you will be soliciting support in

connection with that election?

MR. TAYLOR: I must confess I don't know in detail the New Jersey decision on the scope of an appellate court's power there.

QUESTION: I don't mean our doing it, I mean the State courts in New Jersey.

MR. TAYLOR: That's what I say, I don't know the scope of New Jersey law.

QUESTION: Maybe I can help.

MR. TAYLOR: I should hope so, Mr. Justice Brennan, yes.

QUESTION: Do you suppose a State could say to solicitors, "Please knock before you enter the house"?

MR. TAYLOR: Yes, I should think so. If they don't, probably the criminal law would --

QUESTION: So that is another criminal law like this one. It's a condition on this criminal law, it's a condition on the place of where you are going to solicit. If you want to enter private property, we want to know who you are. And if you want to enter on private property, you are supposed to have consent before you enter.

MR. TAYLOR: This Court said in Breard v. Alexandria that failing some explicit withdrawal of the invitation on the part of a householder, that the front path and the doorknocker relieve the entry of the character of trespass.

QUESTION: Up to the door.

MR. TAYLOR: Up to the door.

QUESTION: I don't know that any times are indicated here, but would you think it would be fatal to such a provision if it said during daylight hours only, or not after 9 p.m.?

MR. TAYLOR: The latter certainly. It would seem to me that a --

QUESTION: That would be reasonable?

MR. TAYLOR: -- limit of that kind ought to be OK.

I think we have to bear in mind that with political canvassing, contrary to the impression one gets from this ordinance, it isn't very effectively done until the latter part of the afternoon or evening when the working members of the family of whichever sex, Mr. Chief Justice, are at home. One wouldn't go canvassing until that was so. So that the emphasis here on daylight hours and all when the working man or woman is away, seems to be rather misplaced.

I don't believe in summary that the ordinance exhibits a rational connection between the announced objective and the terms it imposes.

QUESTION: In other words, a limitation to daylight hours might be unreasonable, but the limitation to canvassing up to 9 p.m. would be reasonable.

MR. TAYLOR: Well, certainly, the impingement on First Amendment values would be much less in the 9 p.m. case.

I have stressed that because the recent decisions of this Court have exhibited great solicitude for the function of canvassing.

QUESTION: The right of privacy, to some extent.

MR. TAYLOR: And privacy, too.

QUESTION: Mr. Taylor, the basic ordinance to which this is an extension, No. 573, is of course drafted in much more detail. Among other things, it has a 9 a.m. to 5 p.m. restriction. But it's my understanding--you tell me if I am mistaken in that understanding -- that none of the provisions of 573 carry over into this ordinance. This ordinance stands or falls on its own.

MR. TAYLOR: Only the penalty provision. That is carried over by --

QUESTION: And that was remedied.

MR. TAYLOR: That was remedied, yes.

QUESTION: So none of the substantive provisions carry over into the ordinance now before us.

MR. TAYLOR: That is my understanding.

QUESTION: That is my understanding.

MR. TAYLOR: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:58 p.m., the oral argument in the above-entitled matter was concluded.]