

# SUPREME COURT OF THE UNITED STATES

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RUSSELL FRISBY, ET AL., :

Appellants, :

v. :

No. 87-168

SANDRA C. SCHULTZ AND ROBERT C. :  
BRAUN :

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PAGES: 1 through 48

PLACE: Washington, D.C.

DATE: April 20, 1988  
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1                               IN THE SUPREME COURT OF THE UNITED STATES

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3       RUSSELL FRISBY, ET AL.,                               :

4                               Appellants,                               :

5                               v.                               :               No. 87-168

6       SANDRA C. SCHULTZ AND ROBERT C.                               :  
7       BRAUN   :

8       -----x

9   Washington, D.C.

10    Wednesday, April 20, 1988

11                       The above-entitled matter came on for oral argument  
12       before the Supreme Court of the United States at 12:59 p.m.

13       APPEARANCES:

14       HAROLD H. FUHMAN, ESQ., Milwaukee, Wisconsin, on behalf  
15               of Appellants.

16       STEVEN FREDERICK MCDOWELL, ESQ., Milwaukee, Wisconsin,  
17               on behalf of Appellees.

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
HAROLD H. FUHRMAN, ESQ.	
on behalf of Appellants	3
STEVEN FREDERICK MCDOWELL, ESQ.	
on behalf of Appellees	23

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear argument now  
3 in No. 87-168, Russell Frisby v. Sandra C. Schultz and Robert  
4 C. Braun.

5 Mr. Fuhrman, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF HAROLD H. FUHRMAN, ESQ.

7 ON BEHALF OF APPELLANTS

8 MR. FUHRMAN: Mr. Chief Justice, and may it please  
9 the Court:

10 This case is an appeal from a judgment of the United  
11 States Court of Appeals for the Seventh Circuit. This judgment  
12 was adopted by an equally divided court from a vote of five to  
13 five. The effect of the judgment was to affirm the order of  
14 the United States District Court for the Eastern District of  
15 Wisconsin.

16 That order contained an injunction that enjoined the  
17 enforcement of an ordinance of the Town of Brookfield. That  
18 ordinance provided for the prohibition of picketing before and  
19 about any residence or dwelling in the Town of Brookfield.

20 After that ordinance was adopted, the Appellees  
21 commenced this legal action seeking declaratory relief and an  
22 injunction against the enforcement of the ordinance. They  
23 immediately asked for a preliminary injunction, and that was  
24 granted.

25 In the request for the preliminary injunction, it was



1 argued that there was a violation of the equal protection  
2 clause as well as the First Amendment, and that particular part  
3 of the argument of the Appelles was not ruled upon favorably by  
4 the District Court, and there was no cross appeal from that  
5 particular part of the order.

6 An appeal from the order as a whole was taken by the  
7 Appellants, that is by the Town of Brookfield, and proceeded to  
8 the United States Court of Appeals for the Seventh Circuit.

9 Before all of this occurred, I should point out that  
10 the initial ordinance adopted by the Town of Brookfield  
11 provided an exception to the prohibition against picketing,  
12 namely an exception in favor of labor disputes.

13 When the town attorney became aware of the fact that  
14 that ordinance had been adopted, he advised the chief of police  
15 not to enforce it until he had an opportunity to study its  
16 constitutionality.

17 After he had reread the case of Carey v. Brown, he  
18 advised the town board to repeal that ordinance in deference to  
19 this Court's decision in Carey v. Brown. The town board did  
20 precisely that.

21 Subsequently, they adopted the current ordinance,  
22 which has a uniform prohibition against residential picketing  
23 without any exception. And this also was in recognition of  
24 footnote number two of this Court's decision Carey v. Brown in  
25 which this Court stated that it was reserving judgment on the

1 question of whether or not an ordinance that uniformly  
2 prohibited picketing without exception --

3 QUESTION: Did it say prohibit; it just said  
4 regulate, did it not?

5 MR. FUHRMAN: The --

6 QUESTION: Well, never mind, maybe I have it wrong.

7 MR. FUHRMAN: Well, footnote two reads as follows,  
8 "Because the Court of Appeals concluded that the labor dispute  
9 exception was not severable from the remainder of the statute,  
10 it invalidated the enactment in its entirety. The Court  
11 therefore found it unnecessary to consider the  
12 constitutionality under the First Amendment of the statute that  
13 prohibited all residential picketing. Because find the present  
14 statute defective on equal protection principles, we likewise  
15 do not consider whether a statute barring all residential  
16 picketing regardless of its subject matter would violate the  
17 First and Fourteenth Amendments."

18 And so that situation then is now a situation that is  
19 squarely before the Court today. Because we do have an  
20 ordinance that prohibits all residential picketing without the  
21 labor exception.

22 The fact situation that gave rise to the adoption of  
23 these two ordinances was a period of picketing of approximately  
24 three weeks that had been conducted by the Appellees and their  
25 associates before the home of one Dr. Benjamin Victoria, a

1 resident of the Town of Brookfield. The purpose of the  
2 picketing was to denounce him as an abortionist and as a killer  
3 of babies.

4 The town board had no desire to get involved in this  
5 debate. However, it was appalled at the invasion of privacy  
6 that occurred, and also it was appalled at the very  
7 serious --

8 QUESTION: Now this picketing was at the Doctor's  
9 home, was it not?

10 MR. FUHRMAN: It was at the Doctor's home.

11 QUESTION: He did not operate a clinic, did he, from  
12 his home?

13 MR. FUHRMAN: No, he did it.

14 QUESTION: It was just where he lived?

15 MR. FUHRMAN: That was just where he lived. In fact,  
16 he had two clinics, one in Milwaukee, and one in another city,  
17 but not in his home.

18 QUESTION: None in Brookfield?

19 MR. FUHRMAN: None in the Town of Brookfield, right.

20 So in oral argument today, I propose to concentrate  
21 on three principal points. The first is that the District  
22 Court order was filed, and it was a final order. Second, that  
23 the residential streets of the Town of Brookfield are not  
24 public fora. And third, that assuming arguendo that the  
25 streets of the Town of Brookfield are public fora, that

1 nevertheless that the ordinance is a valid and constitutional  
2 regulation of time, place and manner, and to achieve two  
3 important governmental interests, the one being residential  
4 privacy, and the other being public safety.

5 QUESTION: Mr. Fuhrman, we are reviewing, I guess,  
6 the preliminary injunction.

7 So is our standard of review whether the lower court  
8 abused its discretion in the issuance of the injunction?

9 MR. FUHRMAN: We contend that it is not. And I would  
10 like to point out perhaps at this point that although the order  
11 of the District Court is in form a preliminary injunction,  
12 actually however, it has finally decided the constitutional  
13 issue involved, at least from the standpoint of the District  
14 Court.

15 QUESTION: You still want to go to trial?

16 MR. FUHRMAN: No. Let me explain. The preliminary  
17 injunction so-called said that it would become final in the  
18 event that there were no requests for a trial, number one, by  
19 any party; and number two, that an appeal would be taken.

20 So the protect the interests of the Town of  
21 Brookfield, we did appeal and we did file a request for a  
22 trial. But it is clear from a reading of the order that the  
23 Court had already determined that it would be unnecessary to  
24 have an evidentiary hearing.

25 And there were two reasons for that. Number one, it



1 was stipulated by both parties that an evidentiary hearing was  
2 not necessary. And number two, the way in which this ordinance  
3 was attacked by the Plaintiffs was not in a factual context at  
4 all. They attacked it facially before it ever had an  
5 opportunity to be enforced.

6           Shortly after the ordinance was adopted, there was a  
7 request for the preliminary injunction. And so this particular  
8 ordinance has yet to be enforced. And so there is no factual  
9 context within which the District Court could construe the  
10 ordinance. It is purely a matter of law. If there were to be  
11 a trial, the trial would be purely on that constitutional  
12 issue.

13           QUESTION: Mr. Fuhrman, can I ask whether this  
14 ordinance would prohibit someone picketing generally, that is  
15 suppose a picket was not stationed in front of this Doctor's  
16 house, but would a group of people be able to parade through  
17 the neighborhood carrying signs and just leave?

18           MR. FUHRMAN: Yes.

19           QUESTION: What does picketing consist of under the  
20 ordinance?

21           MR. FUHRMAN: Although the ordinance contains no  
22 definition section, in our opinion, picketing would be having  
23 the picket proceed on a definite course or route in front of a  
24 home. Because keep in mind, the ordinance only prohibits  
25 picketing before and about a dwelling or a residence.

1 QUESTION: And that means that you have to be  
2 concentrating on one dwelling?

3 MR. FUHRMAN: That is right.

4 QUESTION: If you were just walking through the  
5 neighborhood, that would not qualify?

6 MR. FUHRMAN: That would not qualify.

7 QUESTION: Suppose you were walking by a home with a  
8 picket sign that said, "I am against the war in the Asian  
9 Gulf", would that be a violation of the statute?

10 MR. FUHRMAN: In the Town of Brookfield, under this  
11 ordinance, it would be.

12 QUESTION: And what would that damage be to the city?

13 MR. FUHRMAN: The damage would be to privacy.  
14 Because the ordinance is content neutral. It has nothing to do  
15 with the message at all.

16 QUESTION: So if you had some people marching up and  
17 down these streets saying vote for so and so for sheriff, that  
18 would be banned, too?

19 MR. FUHRMAN: If as Justice Scalia asked, it was a  
20 march, the answer would be that it would not be in violation of  
21 the ordinance. However, if the pickets actually pursued a  
22 route only in front of this particular house, any particular  
23 house which is targeted, then it would be a violation.

24 QUESTION: Do the findings of fact indicate that  
25 there is a commercial area or business area in which picketing

1 can take place, was that a stipulation or a finding?

2 MR. FUHRMAN: It is an uncontested fact, yes. There  
3 are two commercial areas in the Town of Brookfield along the  
4 Bluemound Road.

5 QUESTION: Near this residence, is the commercial  
6 area anywhere near this residence?

7 MR. FUHRMAN: No.

8 QUESTION: Is the Doctor's clinic in Brookfield or is  
9 it elsewhere?

10 MR. FUHRMAN: It is elsewhere.

11 QUESTION: How far away is the nearest commercial  
12 area on Bluemound Road from this residence?

13 MR. FUHRMAN: I would estimate approximately three  
14 miles.

15 QUESTION: What is the width of the street there?

16 MR. FUHRMAN: The width of the residential streets in  
17 the Town of Brookfield are thirty feet.

18 QUESTION: Any sidewalks?

19 MR. FUHRMAN: And there are no sidewalks, and no curb  
20 and gutter. And this, of course, brings you into focusing upon  
21 the public safety aspect. And I should point out that in our  
22 brief that we incorporated by reference the opinion of  
23 Judge Coffey of the Seventh Circuit, and it was his dissenting  
24 opinion.

25 And the reason that we did that was because among

1 other things, he has in his opinion a very good analysis of the  
2 safety aspect of this case, and it is printed in the joint  
3 appendix. And if it has not been read by any member of the  
4 Court, I would urge its being read, because I think that it is  
5 very helpful to understand the case.

6 QUESTION: We have no record as to the conduct of the  
7 pickets; there was picketing, was there not?

8 MR. FUHRMAN: There was picketing. And there is a  
9 record of its conduct. The picketing occurred, however, prior  
10 to the adoption of the ordinance. And the reason why that  
11 record exists is because the picketers had to show their  
12 standing to bring the action. And they, of course, had been  
13 picketing right up until the time that the legislation was  
14 adopted. So when the legislation was adopted, they then  
15 commenced their action and applied for the preliminary  
16 injunction.

17 QUESTION: And what was their conduct?

18 MR. FUHRMAN: Well, there were pickets of eleven to  
19 forty people picketing off and on over a period of  
20 approximately three weeks. Their conduct was to denounce the  
21 Doctor.

22 QUESTION: How, vocally or signs?

23 MR. FUHRMAN: Both, both vocally and by sign. He was  
24 described as a baby killer, and there were other picturesque  
25 phrases that are in the record.



1 QUESTION: Stop abortion, and abortion is murder?

2 MR. FUHRMAN: Yes, among other things. Yes,  
3 Justice Marshall.

4 QUESTION: Here you are not complaining about that?

5 MR. FUHRMAN: No, we are not complaining about that.  
6 We are complaining about two things. The invasion of the  
7 privacy of this residence, and also the threat to public  
8 safety.

9 QUESTION: You are still relying on the threat to  
10 public safety?

11 MR. FUHRMAN: Yes, we are.

12 QUESTION: Although you just told me that there would  
13 be no problem if the picketers kept moving throughout the whole  
14 neighborhood, I mean it is less of a threat if it occurs in the  
15 whole neighborhood than if it occurs in front of one house?

16 MR. FUHRMAN: As we pointed out in our brief, in the  
17 event that you have a parade rather than simply a picket, you  
18 do have a less hazardous situation. We concede, first of all,  
19 that any walking on the street by pedestrians is dangerous.  
20 But it is more dangerous if you have a picket line. Because  
21 you have these people not actually in continuing movement, but  
22 you have them moving only a short distance, and then following  
23 their picket route, you see.

24 QUESTION: You will forgive me if I do not find that  
25 self-evident. I think that it surely depends on how people are

1 walking and what they are doing. And you could be walking the  
2 same way throughout the whole neighborhood, two abreast or back  
3 and forth or whatever.

4 It seems to me that if you are focusing on the fact  
5 that it is in front of one house, that it must have something  
6 to do with matters other than safety.

7 QUESTION: Well, your record certainly contains  
8 instances of interference, does it not?

9 MR. FUHRMAN: Well, the record contains instances of  
10 interference, which of course goes beyond picketing, such as  
11 obstructing the driveway and trespassing upon property. Now as  
12 has been pointed out by the Appellees, there are ordinances  
13 addressed to those particular problems. The point that we are  
14 discussing today really is the picketing ordinance itself.

15 QUESTION: Mr. Fuhrman, would the town prohibit  
16 Appellees from standing in the street in front of the house and  
17 handing out leaflets containing the same messages as on the  
18 signs?

19 MR. FUHRMAN: No. It is our understanding that  
20 leafleting is not covered by this ordinance. Now I could  
21 conceive of a situation where a picketer might have leaflets  
22 and do two different things. But leafleting is not picketing.

23 QUESTION: But what is a picket, does a picket have  
24 to have a sign?

25 MR. FUHRMAN: He does not have to have a sign.

1           QUESTION: Suppose he just stands there handing out  
2 leaflets, but he stands right at the one stop, is that  
3 picketing?

4           MR. FUHRMAN: If he is following a picket route, he  
5 is picketing.

6           QUESTION: I will give you the facts. The lot is  
7 sixty feet. And just in order to amuse himself, he goes up on  
8 the sixty feet until somebody comes out, and then he gives him  
9 the leaflet.

10          MR. FUHRMAN: All right. What I am saying is that he  
11 is performing two functions. One, he is picketing; and one, he  
12 is leafleting.

13          QUESTION: Suppose he just stands in one spot and  
14 hands out the leaflet, is that a picket?

15          MR. FUHRMAN: Not a picket.

16          QUESTION: But if he moves ten feet of the way, then  
17 that is a picket?

18          MR. FUHRMAN: If he is moving and following a picket  
19 route, he is a picket, right.

20          QUESTION: Even if he is not carrying a sign?

21          MR. FUHRMAN: That is true. For instance, although I  
22 am not aware of any Appellate Court decisions on this, there  
23 have been instances where a member of the Ku Klux Klan has  
24 picketed from one point to another point following a picket  
25 route in a residential area. And that would be a violation of

1 the ordinance.

2 QUESTION: Let us assume that he was in a black  
3 neighborhood and he walked up and down a whole block and did  
4 not concentrate on one house, is that picketing?

5 MR. FUHRMAN: Then it would not be picketing within  
6 the meaning of our ordinance.

7 QUESTION: Well, he is concentrating on all of the  
8 houses there, all of the houses.

9 MR. FUHRMAN: I understand what you are saying. And  
10 I am simply drawing a distinction between picketing and parade.

11 QUESTION: Mr. Fuhrman, do you say that a single  
12 picketer, let us say present one hour a day, in front of a  
13 residence substantially interferes with the residential  
14 privacy?

15 MR. FUHRMAN: I certainly do. Let us just take the  
16 Ku Klux Klan picketer that I just mentioned before. Certainly,  
17 one picket making that route back and forth in front of one  
18 home that he is targeting would violate the privacy.

19 QUESTION: For one hour a day or half an hour a day?

20 MR. FUHRMAN: Yes, ma'am. I would say so.

21 QUESTION: Or once a week?

22 MR. FUHRMAN: I would say that if he did it once a  
23 week, that it would also be a violation of the privacy of that  
24 home.

25 QUESTION: Sufficiently substantial to justify the



1 First Amendment infringement?

2 MR. FUHRMAN: It certainly would.

3 The second point that we planned to discuss was the  
4 matter of the streets of Brookfield not being a public fora.  
5 Now we realize, of course, that there are cases that have  
6 substantial dicta indicating a repetition of the cliché that  
7 streets are quintessential public fora since time immemorial.

8 And we believe that the key word in that cliché is  
9 the word immemorial. We realize that --

10 QUESTION: One man's cliché is another man's  
11 fundamental principle. Be careful here.

12 MR. FUHRMAN: Touche. Nevertheless, I think that we  
13 have to really realize the historical origin of this. Many,  
14 many years ago, the streets of Ancient Rome converged upon a  
15 public square known as the Forum. And all of the principal  
16 buildings were at the Forum, and that Forum was certainly the  
17 place of discussion and of debate. And all other forums have  
18 derived their names from that location.

19 We submit, however, that in 20th Century United  
20 States that to say that every street is a public forum is  
21 simply a statement contrary to fact.

22 Take for instance, the major arteries of the  
23 interstate highway system. Here you have a system of arteries  
24 that penetrate all of the major cities of the United States.  
25 And nevertheless, they are --

1           QUESTION: Billboards are forbidden on some of them,  
2 are they not?

3           MR. FUHRMAN: I beg your pardon.

4           QUESTION: Billboards are forbidden on some of them,  
5 are they not?

6           MR. FUHRMAN: Right. But they are cordoned off by  
7 cyclone fences from the pedestrians and for a darn good reason.  
8 Because the volume of traffic and the velocity of traffic is  
9 such that to say that that would be a forum for picketing and  
10 other forensic activity is just ridiculous. And nevertheless,  
11 we have the old cliché or fundamental principle.

12           And on the other hand, we have the opposite extreme.  
13 We have these thirty foot roads in suburban Brookfield which  
14 are so small and so narrow that only one car can travel in each  
15 direction at the same time, no curbs, no gutters, no sidewalks.  
16 Basically, it is an inherently hazardous situation for any  
17 pedestrian as a matter of *res ipsa loquitur*, simply by  
18 accepting these basic facts which are undisputed.

19           QUESTION: That argument might cut two ways. Because  
20 if there are no sidewalks, I presume that when someone has to  
21 go for a walk, that person must walk on the street, so drivers  
22 should realize.

23           MR. FUHRMAN: Or across his neighbor's lawn.

24           QUESTION: They encourage trespassing in Brookfield.

25           MR. FUHRMAN: Well, trespassing is a matter of

1 intent, because of the neighbor consensus.

2 QUESTION: But is it not normal that in a lot of  
3 neighborhoods like that that you do in fact walk along the edge  
4 of the road, do you not?

5 MR. FUHRMAN: This does happen.

6 QUESTION: So I would think that the drivers would be  
7 aware of the fact that it is not a heavily trafficked area, I  
8 am sure, and they would know that you have to drive rather  
9 carefully.

10 What is the speed limit, about fifteen miles an hour?

11 MR. FUHRMAN: No, it is twenty miles an hour.

12 QUESTION: Twenty miles an hour. So it is not high  
13 traffic and high speed driving.

14 MR. FUHRMAN: No. And of course, I would concede  
15 that any pedestrian on these streets is to some  
16 extent --

17 QUESTION: That sounds like the ordinance is enacted  
18 for the protection of the picketer.

19 MR. FUHRMAN: Well, this is the reason why I am  
20 suggesting reading the dissenting opinion of Judge Coffey.  
21 Because he not only talks about the protection of the picketer,  
22 but he also discusses the responsibility of the municipality  
23 for the safety of all people on the public highways.

24 MR. FUHRMAN: This is quite a separate argument from  
25 frankly what to me is more persuasive, the interest of the

1 resident in not having someone who is arguably hostile out in  
2 front all day long. That is the interest frankly that would  
3 concern me more than worrying about whether the fellow would  
4 step in front of fifteen mile an hour school bus or something  
5 like that.

6 QUESTION: And that is the interest that Carey spoke  
7 about, Carey v. Brown.

8 MR. FUHRMAN: Well, Carey v. Brown primarily dealt  
9 with the matter of privacy.

10 QUESTION: Yes.

11 MR. FUHRMAN: And in fact --

12 QUESTION: Why do you not talk about that. I really  
13 think a whole lot of us want to hear about this.

14 MR. FUHRMAN: We believe that this Court should  
15 follow its own precedent that it established in the City of  
16 Renton case, and protect residential privacies. In  
17 Carey v. Brown, this Court stated, "Preserving the sanctity of  
18 the home, the one retreat to which men and women can repair to  
19 escape from the tribulations of their daily pursuits, is surely  
20 an important issue. Our decisions reflect no lack of  
21 solicitude for the right of an individual to be let alone in  
22 the privacy of a home, sometimes the last citadel of the tired,  
23 the weary and the sick."

24 QUESTION: Mr. Fuhrman, do you think that the First  
25 Amendment under that precedent would enable a city to prevent



1 door to door solicitation and the actual ringing of the  
2 doorbell?

3 MR. FUHRMAN: I would say that personally that an  
4 ordinance to that effect could be constitutionally valid. I  
5 would have to naturally recognize --

6 QUESTION: Do you think that this Court's precedence  
7 would support your view?

8 MR. FUHRMAN: First of all, I believe at this time,  
9 we are not arguing that point of course, and we believe that  
10 there has been a division among the Circuits on that issue.  
11 And as far as the Seventh Circuit is concerned, the Seventh  
12 Circuit in the Watseka case, had determined that this type of  
13 activity is unconstitutional.

14 QUESTION: I thought that this Court had spoken to  
15 that issue.

16 MR. FUHRMAN: This Court did, because it actually  
17 confirmed the decision in the Watseka case.

18 QUESTION: The Green River ordinance cases,  
19 *Murdock v. Pennsylvania*, and *Struthers*, those are pretty much  
20 what Justice O'Connor is talking about, too, are they not?

21 MR. FUHRMAN: Yes.

22 QUESTION: What about the *Austin* case and the City of  
23 Boston back in 1971. They said that door to door picketing was  
24 all right, door to door leafleting was all right.

25 MR. FUHRMAN: Leafleting.

1 QUESTION: And you would draw a line between  
2 leafleting and picketing.

3 MR. FUHRMAN: As a matter of fact, I said that I do  
4 draw a line between leafleting and picketing. And  
5 Justice O'Connor had asked that question before.

6 QUESTION: I still have not gotten your answer.

7 MR. FUHRMAN: The ordinance of the Town of Brookfield  
8 only relates to picketing. It does not relate to leafleting.

9 QUESTION: And the difference between leafleting and  
10 picketing is what from a constitutional standpoint?

11 MR. FUHRMAN: From a constitutional --

12 QUESTION: They both disturb, do they not?

13 MR. FUHRMAN: Well, they do to some extent. Although  
14 picketing is more invasive, because you are actually --

15 QUESTION: You are disturbing, are you not?

16 MR. FUHRMAN: I beg your pardon.

17 QUESTION: Is that not what you are against,  
18 disturbing the resident?

19 MR. FUHRMAN: We are against invading the privacy of  
20 the home. And leafleting is less invasive in that regard than  
21 picketing.

22 QUESTION: It is less disturbing then?

23 MR. FUHRMAN: Less disturbing, yes.

24 QUESTION: I suppose that you suggest a bright line,  
25 that any street that could be classified as a residential

1 street could be subject to an ordinance like this?

2 MR. FUHRMAN: The rule that we believe that the Court  
3 should follow is the rule of *Cornelius v. NAACP*. We believe  
4 that like other publicly owned property, that each street  
5 should be determined as to whether or not it lends itself to  
6 the First Amendment activity.

7 QUESTION: If the focus of the ordinance is an  
8 individual home, what difference would it make what kind of  
9 street it is, as long as the picketing is aimed at one home on  
10 a particular street, as the invasion of privacy is just as  
11 great?

12 MR. FUHRMAN: I agree. But we have in our argument  
13 really two propositions. Number one, we are arguing that  
14 streets, the residential streets of Brookfield, are not public  
15 fora. And the reason that we are making that argument is  
16 because that establishes a different standard for evaluating  
17 the ordinance. But we are arguing, number two, that in the  
18 event that this Court should find that notwithstanding  
19 everything that I have said that all streets without exception  
20 are public fora, that then in that event that the ordinance is  
21 still constitutional as a valid time, place and manner,  
22 regulation of two important governmental interests.

23 QUESTION: It is going to take a lot of litigation to  
24 litigate every street in the country to figure out whether they  
25 are public fora or not.

1           MR. FUHRMAN: Well, if you had litigation on each and  
2 every street, yes. But on the other hand, we believe that  
3 reason would enter in here. Because if you look at the streets  
4 of the Town of Brookfield, and you know that they are thirty  
5 feet in width, you should know that you do not have public  
6 fora.

7           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fuhrman.

8           We will hear now from you, Mr. McDowell.

9           ORAL ARGUMENT BY STEVEN FREDERICK MCDOWELL, ESQ.

10                   ON BEHALF OF APPELLEES

11           MR. MCDOWELL: Mr. Chief Justice, and may it please  
12 the Court:

13           Before this Court today is an attempted appeal from  
14 an order affirming a preliminary injunction. There is no  
15 finality, no ultimate determination on the merits of the  
16 constitutional issue, and therefore no appeal jurisdiction.

17           In light of the preliminary nature of the case, this  
18 case may well be more appropriately handled by way of summary  
19 affirmance rather than a comprehensive review of the town's  
20 claims, claims which we contend lack support in either the  
21 record nor the decisions of this Court.

22           The town's case rests fundamentally upon a challenge  
23 of two basic premises of First Amendment law. That streets are  
24 quintessential public fora; and that picketing, a legitimate  
25 peaceful forum of First Amendment expression is to be permitted

1 in such public fora areas.

2 The District Court, we contend and we believe, did  
3 not abuse its discretion in determining that the picketers were  
4 likely to prevail on the merits of their First Amendment  
5 claims.

6 QUESTION: The District Court or Court of Appeals,  
7 either one, Mr. McDowell, indicate that they thought more facts  
8 were necessary in order for them to reach a conclusion on the  
9 constitutional issue?

10 MR. MCDOWELL: The District Court's opinion indicated  
11 that based upon the facts that are currently in the record that  
12 there were sufficient facts to grant the preliminary injunction  
13 and in fact to grant a final injunction.

14 We believe that this is in fact an appropriate  
15 determination. Because based upon the normal assumptions that  
16 are normally made about streets, that they are normally public  
17 fora, and also based upon the normal conclusion that picketing  
18 is a legitimate form of expression, just based upon the facts  
19 as developed there, that there would be a sufficient record to  
20 make that determination.

21 However, if other facts are sought to be introduced,  
22 such as for example, the question of whether one must move or  
23 remain stationary to constitute picketing in the Town of  
24 Brookfield, perhaps it may be necessary to go back for a  
25 further determination.



1           QUESTION: But the town says that it does not have  
2 anything else to offer.

3           MR. MCDOWELL: That is correct. And if that be the  
4 case, then it would seem that this Court may well wish to go  
5 ahead with a final decision on the merits. However, we would  
6 point out that there are a number of facts that the town has  
7 asserted in its brief, such as the lack of past use of the  
8 streets of the Town of Brookfield for picketing, which are not  
9 currently in the record.

10           So if this Court wishes to rely on such facts, it may  
11 be necessary for a further determination. But based upon the  
12 facts now in the record, there is in fact evidence sufficient  
13 to support a preliminary injunction in favor of the picketers  
14 in this case.

15           QUESTION: Well, if the town wants the issue decided  
16 on the present record, does that make it a final judgment?

17           MR. MCDOWELL: I am not certain of that fact, because  
18 I am not certain of that point. Normally, a preliminary  
19 injunction is considered a non-final order. And secondly,  
20 there has not been a square holding on the constitutional issue  
21 as of yet. Because all that we have at this point is a  
22 preliminary injunction. A final injunction was never issued.

23           The town could have simply allowed a final injunction  
24 to be issued, in which case there would be no problem with  
25 finality in this case. It chose not to do so.

1 QUESTION: Did they not ask for a trial? I thought  
2 that they asked for a trial.

3 MR. MCDOWELL: They did.

4 QUESTION: So they obviously are not satisfied with  
5 the record.

6 MR. MCDOWELL: Well, that is the way that the  
7 picketers have to construe the status of the case at this  
8 point.

9 QUESTION: But before us today, I guess that  
10 Mr. Fuhrman says that he does not now want a trial.

11 Is that what you heard?

12 MR. MCDOWELL: That is what I heard. So that is  
13 something that is Mr. Fuhrman's decision to make, and not the  
14 decision of the picketers, since we did not request a trial.

15 QUESTION: The problem here is not finality at all, I  
16 do not think, under the provisions of the statute. An order  
17 granting a preliminary injunction is appealable. The only  
18 question is what standard of review do you use in judging  
19 whether or not the preliminary injunction was correctly  
20 granted.

21 Everybody concedes that there was at least a  
22 preliminary injunction. That is appealable to the Seventh  
23 Circuit, and we have jurisdiction to review a case that is in  
24 the Seventh Circuit.

25 MR. MCDOWELL: Yes, it would be reviewed on the basis

1 of an abuse of discretion standard in such a situation.  
2 However, there is a question of whether there is a square  
3 holding on the constitutional point. Because the lower court  
4 judge utilized the normal standard that is used in the Seventh  
5 Circuit, which is the standard of whether one is likely to  
6 prevail upon the merits.

7 QUESTION: You were just talking about appellate  
8 jurisdiction, were you not, not certiorari jurisdiction?

9 MR. MCDOWELL: That is correct. We were speaking of  
10 appellate jurisdiction.

11 QUESTION: So if you are talking about jurisdiction,  
12 we can always just grant cert.

13 MR. MCDOWELL: Oh, certainly.

14 QUESTION: But that would still leave the standard of  
15 review that the Chief Justice was talking about.

16 MR. MCDOWELL: That is correct. And in fact, the  
17 District Court did not abuse its discretion in granting the  
18 preliminary injunction in this case.

19 When we turn to the substance of the case and the  
20 merits of the case on the free speech issue --

21 QUESTION: Mr. McDowell, is this a facial attack on  
22 the ordinance?

23 MR. MCDOWELL: The attack is more in line of a facial  
24 attack, in that what the picketers are challenging is the  
25 application of the ordinance to picketers in general and into

1 activity that they would wish to engage in. So it basically is  
2 a facial challenge.

3 QUESTION: Well, if it is, then I take that if there  
4 is any set of facts that we can think about picketing to which  
5 the ordinance could constitutionally be applied, you lose, do  
6 you not, if it is a facial attack?

7 MR. MCDOWELL: If it is a facial attack, there the  
8 question that this Court would have to determine is whether the  
9 ordinance could appropriately be subject to a limiting  
10 construction.

11 In this case, the town in its brief indicated that  
12 limiting constructions might or might not be possible, but that  
13 the town wished to forbid all picketing.

14 QUESTION: You are not relying on the overbreadth  
15 doctrine then, I take it?

16 MR. MCDOWELL: The overbreadth doctrine is a point  
17 that we have relied upon at various points. It was not the key  
18 issue upon which the District Court granted its injunction.  
19 However, the overbreadth doctrine has been raised both at the  
20 District Court and at the Seventh Circuit. And in this case,  
21 there may well be that the ordinance sweeps substantially  
22 overbroadly with respect to protected expression.

23 QUESTION: If you can only conceive of one instance  
24 in which it is okay and only one, one might suspect that it is  
25 overbroad.

1 MR. MCDOWELL: That is absolutely correct.

2 QUESTION: I would think so.

3 MR. MCDOWELL: Yes.

4 QUESTION: I must confess that I am a little puzzled.

5 Your complaint suggests that you are concerned about your  
6 client's own right to picket.

7 MR. MCDOWELL: Yes.

8 QUESTION: Because they have been threatened with  
9 arrest. But the District Court found what kind of picketing  
10 that they had engaged in the past, namely eleven to forty  
11 people, and there were some unfortunate remarks and one thing  
12 or another of that kind.

13 Should we ask the question whether that particular  
14 type of picketing is constitutionally protected?

15 MR. MCDOWELL: That type of picketing serves as a  
16 background certainly that this Court can consider and can  
17 consider in terms of the motivation perhaps of the town in  
18 passing this ordinance.

19 QUESTION: What if we were to assume that that is all  
20 that it really prohibits, and that is all that you really care  
21 about, because you want to engage in exactly what you have done  
22 before, and then focus on that issue instead of all of these  
23 hypothetical things like leafleting.

24 Would you say that you could picket with forty  
25 persons out in front all day long seven days a week in front of



1     this house?

2                 MR. MCDOWELL: The problem is that the ordinance  
3     forbids more than simply that.

4                 QUESTION: Well, first answer my question, would you.

5                 MR. MCDOWELL: We do not believe that the picketers  
6     have an absolute right to picket without respect to  
7     considerations.

8                 QUESTION: Do you think that they have a  
9     constitutional right to engage in the kind of picketing that  
10    the District Court found in this case?

11                MR. MCDOWELL: Yes, I do.

12                QUESTION: You do. Forty persons seven days a week  
13    right straight through.

14                And if that is true and if we are focusing on this  
15    picketing, what was the audience at which this picketing was  
16    directed?

17                MR. MCDOWELL: The picketing was directed at both  
18    Dr. Victoria and his neighbors.

19                QUESTION: I see, thank you.

20                MR. MCDOWELL: That is what the affidavits show and  
21    the record shows in this case.

22                QUESTION: What do you mean directed at, was it in  
23    front of the neighbors' houses or in front of his house?

24                MR. MCDOWELL: It was in front of his house.

25                QUESTION: Well, that is generally referred to as

1 picketing him, not picketing his neighbors.

2 MR. MCDOWELL: That is correct. The question I  
3 believe that Justice Stevens has was a question as to who the  
4 proper audience was. Certainly, neighbors going back and forth  
5 would be able to see the signs, and obviously would be an  
6 audience.

7 QUESTION: Mr. McDowell, you mentioned a couple of  
8 basic principles of First Amendment law when you started off.  
9 On another one, and we just issued an opinion today that averts  
10 to it indirectly, is that picketing is different from other  
11 First Amendment activities. It can be intimidating. It is  
12 different from leafleting, and it is different from pure  
13 speech.

14 As far as the merely informative content of letting  
15 the neighbors know that this man is an abortionist and that you  
16 disapprove of it, as far as that is concerned, you would  
17 leaflet, you could slip information under the doors of the  
18 neighbors, and you could march around the whole neighborhood  
19 with a sign, as counsel for the city says is permissible under  
20 this ordinance.

21 But you do not want to do that. You want to  
22 essentially hassle this doctor, to put it in the vernacular.  
23 You want to be in front of his house and bring home to him your  
24 displeasure with him in, maybe intimidating is not the word,  
25 but an annoying fashion essentially.

1           Is that not what is going on, is there any other  
2   reason why you have to picket his house?

3           MR. MCDOWELL: We do not claim a right to harass.  
4   And in this case, that is not what was involved. Because  
5   public issue picketing is in many ways quite similar to  
6   leafleting. Because what is involved is the transmission of a  
7   message, in this case a message of opposition to abortion.  
8   Picketing was a means utilized.

9           However, what was involved here was not the type of  
10   perhaps signal that one might have in a labor picketing  
11   instance, but instead merely a use of the signs and the  
12   picketing to indicate disapproval.

13          QUESTION: When you picket a store, that is a logical  
14   place to do that, because you are sending your message to the  
15   customers of that store or a business. Or you are picketing a  
16   plant that is on strike. You are sending the message to the  
17   other workers who might want to come in.

18          To whom are you sending the message here, that they  
19   could not get it anywhere else, why is this a logical place to  
20   get this message across to anyone except the doctor whose  
21   privacy you are invading?

22          MR. MCDOWELL: Well, it is a legitimate place, as the  
23   picketers noted in their affidavits, to transmit their message  
24   both to the doctor and also to his neighbors.

25          QUESTION: You can get it to his neighbors very

1 easily. His neighbors do not congregate in front of his house.

2 MR. MCDOWELL: The reason why picketing may be a  
3 particularly sensible type of procedure by which to transmit  
4 such a message is that a picket sign is a sign that a neighbor  
5 or anyone going by can look at and notice what the opinions are  
6 of the picketers. It is in essence something like a mass media  
7 that can be done at a minimum amount of expense to the  
8 picketers involved.

9 QUESTION: You can do that walking around the  
10 neighborhood. In fact, it would be better. You would not have  
11 to rely on the neighbors happening to come out by the house.  
12 You do not want to do that. You want to stand right in front  
13 of his house. You want to stick your thumb in his eye  
14 essentially.

15 Is that not what it is about, the annoying nature of  
16 picketing?

17 MR. MCDOWELL: I do not believe that it is in this  
18 case. Because the picketers' desire is a desire simply to  
19 transmit their message involved, and they wish to utilize  
20 picketing which has been recognized as a legitimate First  
21 Amendment protected means of expression.

22 QUESTION: Why not picket him at his clinic?

23 QUESTION: You can go up to Appleton or into  
24 Milwaukee and picket him at his clinic.

25 MR. MCDOWELL: It is possible to picket at other

1 locations. However, the mere fact that one can picket at  
2 another location does not permit a picketing ban in a certain  
3 location unless such a ban is narrowly tailored to support  
4 specific interests, either in safety or in residential privacy.

5 QUESTION: But I think that any court familiar with  
6 our cases might be more likely to uphold a ban on residential  
7 picketing if there was an opportunity to picket the individual  
8 that they desire to bring the message home to somewhere else.

9 MR. MCDOWELL: Certainly, alternative channels can  
10 figure into the analysis. However, once again, the key point  
11 is is this ordinance which forbids all picketing flatly in the  
12 Town of Brookfield an ordinance which is narrowly tailored to  
13 support the interests involved.

14 QUESTION: Why do you say that it is not narrowly  
15 tailored to support privacy and safety?

16 MR. MCDOWELL: Turning first to safety, the reason  
17 why it is not narrowly tailored to support the safety interests  
18 is number one, because the ordinance prohibits only picketing  
19 but permits a number of expressive and non-expressive  
20 activities which can have just as severe an effect upon the  
21 interests of free vehicular movement and free pedestrian  
22 movement and the like as anything else.

23 Furthermore, the ordinance addresses the problem in a  
24 way which does not make much sense. If the problem is with the  
25 picketers' safety and with the safety of the community with



1 concerns about traffic, what is done is that the picketers are  
2 moved off of a property where perhaps there is less traffic and  
3 moved on to Bluemound Road, a busy highway. Where seemingly if  
4 one is concerned about safety, and traffic, and the like, that  
5 the distractions will be greater than in the residential  
6 neighborhood.

7 QUESTION: As to privacy?

8 MR. MCDOWELL: As to privacy, the reason --

9 QUESTION: How do you tailor this more narrowly than  
10 an absolute prohibition?

11 MR. MCDOWELL: Well, a number of different options  
12 are available to the town. First, with respect to the adverse  
13 effects of picketing, the town has a number of ordinances  
14 currently in effect, ordinances banning such things as  
15 littering, obstruction of the streets and so forth, which apply  
16 equally to expressive and non-expressive activity, which could  
17 suitably apply to this case.

18 QUESTION: For example, they have an ordinance or law  
19 of some kind under which the picketers for crowding and such  
20 numbers on the lawn could be arrested?

21 MR. MCDOWELL: Well, there is a trespass ordinance  
22 which would apply to such activity on the lawn.

23 QUESTION: Could they be arrested for violation of  
24 that ordinance?

25 MR. MCDOWELL: That is correct. They could, if they

1 were on the lawn, under the construction of the state  
2 constitution.

3 QUESTION: Is there any way that they could not be on  
4 the lawn?

5 MR. MCDOWELL: They would be on the streets. And  
6 there, you have the question of whether such activity would  
7 obstruct the street. And there, what one could do perhaps, and  
8 the town has not done this -- the point is that the town has  
9 banned all picketing irrespective of numbers -- the town could  
10 perhaps place some limitation on the numbers of picketers, some  
11 limitation on the time at which the picketers could be out  
12 there, but it has not done that.

13 QUESTION: Let me interrupt you. You told me a  
14 minute ago that this picketing of forty persons all day long  
15 was constitutionally protected.

16 How could they put a limit on, you mean no more than  
17 fifty would be the limit, or could they put a limit on no more  
18 than one or two?

19 MR. MCDOWELL: We believe, and obviously this is a  
20 legislative question which the town would have to address, and  
21 it would present a different constitutional question.

22 QUESTION: It is not a legislative question. You are  
23 telling us what they could constitutionally do, that they  
24 constitutionally could do these alternative things, all of  
25 which are different from what you a few minutes ago told me

1     that they could not constitutionally do.

2                 MR. MCDOWELL: Let me clarify then my statement of a  
3     few minutes ago. The basic protection of picketing is  
4     something that is constitutionally protected. Certainly,  
5     numbers of picketers could be regulated to the extent that  
6     numbers of picketers interfere either with free use of the  
7     streets or with the interests of the town in privacy.

8                 QUESTION: Well, specifically, could they pass an  
9     ordinance saying that you may not picket with more than ten  
10    persons in front of a house for more than eight hours a day?

11                MR. MCDOWELL: We would have with respect to that  
12    ordinance the similar analysis that would have to be applied.  
13    That is does the ordinance restrict picketing.

14                QUESTION: I understand the analysis. I am curious  
15    to know what your answer is.

16                MR. MCDOWELL: All right. My answer would be that  
17    ten picketers would raise a severe question, because there  
18    would be a question of whether a limitation --

19                QUESTION: I understand that there is a severe  
20    question, but what is the answer to it?

21                MR. MCDOWELL: Okay. I would say that that would not  
22    be constitutional, because there would not be a significant  
23    enough impact upon public safety interests to justify the  
24    ordinance.

25                QUESTION: In other words, you gave me the same

1 answer that you did before, the picketing that you engaged in,  
2 you think was constitutionally protected. And therefore, these  
3 alternatives about changing numbers or hours are purely just  
4 argument. You do not really believe that.

5 MR. MCDOWELL: The question with respect to whether  
6 the picketers would believe that or not, I think would largely  
7 be determined if the town passed such an ordinance, would the  
8 picketers then challenge it as an unreasonable limitation on  
9 their speech. And that is a question for a future case.

10 QUESTION: But it is not so much the picketers. You  
11 are giving answers saying that although the town cannot do what  
12 it has done, that it could do these other things. But then  
13 that seems inconsistent with the answer that you think that the  
14 Constitution protects the way that you actually picketed here,  
15 which would be prohibited by some of the alternatives that you  
16 propose. So the question is how serious you are about the  
17 alternatives.

18 MR. MCDOWELL: I would answer the question this way.  
19 We are serious about the alternatives. It is possible that  
20 some of the picketers' activities might have violated the  
21 Constitution under a narrowly tailored ordinance. This  
22 ordinance, however, is not narrowly tailored.

23 QUESTION: Suppose that we thought that as applied to  
24 the picketing that actually had taken place and presumably  
25 would take place again, that the ordinance was quite

1 constitutional, what if we thought that.

2 Should we not then just sustain the ordinance, or  
3 what else do you have to offer?

4 MR. MCDOWELL: I would again go back to points that  
5 have been emphasized with respect to the entire discussion of  
6 this case. What is not involved here is an enforcement action  
7 on picketing which took place after the ordinance was passed.

8 QUESTION: I know. But if this is a facial attack,  
9 and suppose we say that as applied to this picketing as applied  
10 by the District Court, that this ordinance is quite  
11 constitutional.

12 Now is not your only rejoinder then, well, that may  
13 be so, but it is overbroad?

14 MR. MCDOWELL: That is right. That is right. If our  
15 activity is not protected, then it becomes an overbreadth  
16 challenge.

17 QUESTION: And then what do we have to do, do we have  
18 to imagine the reach of the ordinance. It may not be  
19 substantially overbroad.

20 MR. MCDOWELL: That is perhaps a question that would  
21 then have to be determined at trial. There might have to be  
22 additional facts and so forth put out as to the enforcement  
23 policies of the town, which might need to be dealt with at that  
24 point.

25 QUESTION: Well, that may be. But to do that, we



1 should just reverse, we should reverse the Court of Appeals?

2 MR. MCDOWELL: No, but --

3 QUESTION: We could never decide an overbreadth case  
4 if we had to do that, to go back to see exactly how the statute  
5 would be applied in these situations. That is not how we do  
6 overbreadth.

7 MR. MCDOWELL: Overbreadth is --

8 QUESTION: If it is overbroad, it is overbroad, is it  
9 not?

10 MR. MCDOWELL: Right. Overbreadth is basically a  
11 question of applying the sweep of the statute, and in essence  
12 determining that the statute can apply very clearly to  
13 protected activity. And that is apparent with respect to this  
14 ordinance which bans all residential picketing in a  
15 neighborhood without any concerns.

16 QUESTION: Have we ever applied overbreadth to an  
17 ordinance or a statute dealing just with picketing?

18 MR. MCDOWELL: I believe that the Thornhill case,  
19 which overbreadth was first utilized, was a picketing case. So  
20 picketing cases are subject to overbreadth analysis.

21 QUESTION: Have you ever checked on how many times  
22 Thornhill has been cited?

23 MR. MCDOWELL: I have not checked out how many times,  
24 but I believe with some degree of frequency in my reading of  
25 this Court's First Amendment cases in preparation here.

1               QUESTION: In your answer to Justice Stevens, you  
2 indicated that privacy is a protectable interest insofar as the  
3 state is concerned, the privacy of homes?

4               MR. MCDOWELL: Privacy of homes is a protectable  
5 interest.

6               QUESTION: Can it be protected from picketing in any  
7 degree?

8               MR. MCDOWELL: In applying such an analysis, what has  
9 to be determined is what precisely is the character of the  
10 privacy interest. For example, in the Keith case, this Court  
11 seemed to indicate that there were questions with respect to  
12 the application of --

13              QUESTION: Do you have a right to a quiet street?

14              MR. MCDOWELL: Excuse me.

15              QUESTION: Is there a right to a quiet street?

16              MR. MCDOWELL: The residential privacy interests can  
17 extend to some extent to cover interests in tranquillity and  
18 quiet. A noise ordinance, for example, is a proper means to  
19 address that interest.

20              QUESTION: But some picketing can be regulated in  
21 order to preserve the character of the residential  
22 neighborhood?

23              MR. MCDOWELL: The abuses that go with certain  
24 picketing could be regulated. However, an inherent  
25 proscription of all picketing --

1 QUESTION: So picketing can interfere with privacy  
2 and with residential character, and to that extent can be  
3 regulated?

4 MR. MCDOWELL: What we have in essence is a balance  
5 in such a situation. Picketing may have some impact upon  
6 residential privacy interests. However, in looking at that  
7 analysis, it is important to remember that normally, as in the  
8 Keith case, the interest in residential privacy does not extend  
9 to forbid activity taking place on a public forum property.  
10 Second, it is important to realize --

11 QUESTION: But you indicate that it can in some  
12 instances?

13 MR. MCDOWELL: The Court has not applied the analysis  
14 of residential privacy to forbid activity in a public forum of  
15 the picketing nature.

16 QUESTION: Well, has the Court confronted a case  
17 where the public forum doctrine has squarely measured against  
18 the interest of the homeowner and privacy and quiet?

19 MR. MCDOWELL: The closest that this Court has come  
20 to that situation was the Carey case. And in the Carey  
21 case --

22 QUESTION: And that went off on equal protection  
23 grounds.

24 MR. MCDOWELL: Well, in the Carey case --

25 QUESTION: And in that case, we also said that there

1 is a very strong interest, a very strong constitutional  
2 recognition, of the right of privacy.

3 MR. MCDOWELL: Granted, you are absolutely correct.  
4 However, I would also point out that in the Carey case in  
5 footnote that this Court indicated that its justification and  
6 the reason for its analysis in the Carey case was the presence  
7 of a public forum there. And so it would appear that public  
8 forum analysis does appropriately apply to residential streets,  
9 which are not significantly different in any major way from the  
10 streets and sidewalks in other particular areas.

11 Furthermore, getting back to the residential privacy  
12 interests, it is important to remember --

13 QUESTION: And under Justice Stevens' question, this  
14 could go on 365 days a year as far as you are concerned?

15 MR. MCDOWELL: I believe that it could go on for a  
16 substantial period of time, yes.

17 QUESTION: 365 days a year?

18 MR. MCDOWELL: Yes, I think it could. However, that  
19 is an issue that again is not precisely before the Court.  
20 Because what we have here is an absolute flat ban on all  
21 residential picketing irrespective of how long it extends.

22 QUESTION: I do not understand how you can say that  
23 the length has anything to do with it. I mean either it  
24 invades the privacy or it does not invade the privacy.

25 Does it not invade the privacy if it only happens one

1 hour a day? That means that it is an one hour's invasion. I  
2 mean some activities you can say if they are at a lower volume,  
3 you can say that they do not annoy anybody. So a difference in  
4 degree can make a difference in kind. It is no longer an  
5 annoying activity.

6 But if this is an invasion of privacy, it is an  
7 invasion of privacy if it occurs one hour or 24 hours, is it  
8 not?

9 MR. MCDOWELL: We do not believe that -- to a certain  
10 extent, there will always be a degree of privacy invasion. But  
11 the problem is that what has to be weighed in the balance is  
12 this privacy invasion, whatever it may be, vis-a-vis the  
13 important interests of the picketers in the First Amendment  
14 expression.

15 QUESTION: Right. Now let us talk about that.

16 What is it that you can only do by picketing that you  
17 cannot do by some other form of activity, handing out leaflets  
18 and parading around, picketing in the sense in which this  
19 ordinance uses the term, parading around the whole  
20 neighborhood, handing out leaflets, picketing or doing whatever  
21 you want in front of the doctor's offices, what is there  
22 distinctive about this, is there anything distinctive about  
23 this activity except the invasion of this man's privacy?

24 MR. MCDOWELL: What is distinctive about picketing  
25 activity is that by use of signs and by use of perhaps a



1 limited degree of movement that it creates a place where people  
2 can determine and people can see a message that is broadcast by  
3 way of signs.

4 And there is a question that perhaps could be turned  
5 the other way with respect to that, what is the significant  
6 difference between picketing and marching. If marching is to  
7 be prohibited, what is there about picketing that makes it so  
8 substantially different that there is a more extensive need to  
9 regulate such activity.

10 QUESTION: I suggest that if you have a parade in  
11 your neighborhood and then have a picket at your house, that  
12 you will see the difference.

13 MR. MCDOWELL: Perhaps so, perhaps so. But the  
14 essential question though that has to be determined when one  
15 deals with the interest in residential privacy is that this  
16 interest is not an interest in restricting content. There mere  
17 emotional impact that one may receive from the content of  
18 speech is not relevant. That I believe is the message of the  
19 Boose case.

20 What is involved here and what is critical to  
21 remember is that this ordinance would prohibit picketing  
22 activity where it were friendly or unfriendly. For example,  
23 one under this ordinance could go back and forth in front of  
24 Dr. Victoria's house indicating that Dr. Victoria adhered to  
25 the finest standards of the medical profession. If one were to

1 do that, under this ordinance, it would be prohibited, under  
2 the definition that the town has utilized.

3 QUESTION: The doctor would probably invite them in  
4 for a cup of coffee.

5 MR. MCDOWELL: He might, he might, but he could also  
6 report them to the police. Anything is possible under this  
7 ordinance.

8 QUESTION: If they liked him that much, of course,  
9 they would go away if he asked them, I am sure. I mean he  
10 would open the door and say, gee, I really like that, but you  
11 fellows are invading my privacy. The best to do if you really  
12 like me is to be gone.

13 MR. MCDOWELL: The key point here though is that the  
14 ordinance sweeps so broadly that it prohibits all of these  
15 types of activity. And furthermore, the presence of the  
16 interest in residential privacy is an interest which must be  
17 considered without respect to the content of speech.

18 If the town's real interest is in prevention of  
19 embarrassment to Dr. Victoria, then such an interest should be  
20 appropriately dealt with in other fashions. But the First  
21 Amendment does not seem to protect an interest in avoiding the  
22 embarrassment or other emotional harm which may result from  
23 this type of activity or from other types of content based  
24 activity.

25 QUESTION: The town is willing to let you march

1 around Dr. Victoria's neighborhood with a sign saying  
2 Dr. Victoria is an abortionist or whatever harsher language  
3 that you want to use. They are not worried about protecting  
4 him from criticism. They are willing to let you do that.

5 MR. MCDOWELL: However --

6 QUESTION: They just do not want you to annoy him in  
7 his home.

8 MR. MCDOWELL: The town's ordinance though --

9 QUESTION: Is there anything to stop you from  
10 picketing his office? No.

11 MR. MCDOWELL: No.

12 QUESTION: So he is right.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. McDowell.  
14 The case is submitted.

15 (Whereupon, at 1:59 p.m., the case in the  
16 above-entitled matter was submitted.)  
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REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-168

CASE TITLE: RUSSELL FRISBY v. SANDRA C. SCHULTZ AND  
ROBERT C. BRAUN,

HEARING DATE: April 20, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
are contained fully and accurately on the tapes and notes  
reported by me at the hearing in the above case before the  
United States Supreme Court,  
and that this is a true and accurate transcript of the case.

Date: April 20, 1988

*Margaret Daly*  
\_\_\_\_\_  
Official Reporter

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