

ORIGINAL

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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF CHICAGO, Petitioner v. JESUS MORALES, ET
AL.

CASE NO: 97-1121 0-1

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-1121, the City of Chicago
5 v. Jesus Morales.

6 Mr. Rosenthal.

7 ORAL ARGUMENT OF LAWRENCE ROSENTHAL

8 ON BEHALF OF THE PETITIONER

9 MR. ROSENTHAL: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 As the record before the Chicago City Council
12 makes plain, gang crime is different from most other forms
13 of criminal activity. Most criminals, of course, do not
14 commit their crimes in broad daylight, in full view of
15 law-abiding citizens, and on the public way. Not so with
16 gang crime.

17 Street gangs rely on their ability to so
18 terrorize their neighborhoods that they may commit crimes
19 with impunity while law-abiding persons are afraid to
20 cooperate with the police, indeed, afraid to even use the
21 public spaces in their own neighborhoods. When police are
22 present, however, all they see is gang members pretending
23 to innocently loiter.

24 On that record, the city council enacted the
25 gang loitering ordinance. It provides that whenever a

1 police officer sees a group of loiterers in a public place
2 and reasonably believes a member of a criminal street gang
3 to be present, he may order the group to disperse.

4 This morning, I will discuss the two holdings
5 below and explain why this ordinance is neither
6 impermissibly vague nor inconsistent with principles of
7 substantive due process.

8 QUESTION: Just one question. Do the police
9 have special training and instructions to know who members
10 of the gangs are?

11 MR. ROSENTHAL: The general order that govern
12 enforcement, 92-4 -- it is in the petition appendix --
13 contains quite explicit instructions and demanding
14 standards for making determinations of gang membership
15 and, of course, even respondents do not challenge --

16 QUESTION: And it takes some experience and
17 expertise to know this?

18 MR. ROSENTHAL: It does. For example, under the
19 order, not all police officers are permitted to enforce
20 this ordinance, only gang specialists, tactical officers,
21 and other specially designated personnel familiar with the
22 gang files of the Chicago Police Department are permitted
23 to make arrests under the ordinance.

24 QUESTION: Well then, how does the person who's
25 not a member of the gang know that he is doing something

1 unlawful?

2 MR. ROSENTHAL: Well, interestingly, Justice
3 Kennedy, the critical point here is that, on the question
4 of fair notice, as Your Honor's question points out, it is
5 not unlawful to loiter in the City of Chicago. When one
6 loiters with a gang member one is not breaking the law.

7 Under this ordinance, it is a crime only, after
8 having received an order to disperse, to fail to obey that
9 order, order --

10 QUESTION: Does the police tell the person who
11 is not a gang member, this is a gang member and therefore
12 you must disperse? Does he say that?

13 MR. ROSENTHAL: The ordinance does not provide
14 for that?

15 QUESTION: Well, how does the person know? How
16 does the nongang-member know that the other person's a
17 gang member?

18 MR. ROSENTHAL: Well, what the person has --
19 what the police are told, what the police do is, they give
20 an order in terms of common parlance to disperse. That
21 provides fair notice of what the constitution requires,
22 how to conform one's conduct with the requirement of the
23 law.

24 Of course, individuals ordinarily ought to
25 presume that when police issue orders they do so for

1 appropriate police power reasons. Presumably --

2 QUESTION: Well, maybe they should and maybe
3 not. I mean, I suppose that if the police are without the
4 predicate to issue the order, an individual is within his
5 rights to say no, I'm not going to move.

6 MR. ROSENTHAL: Of course, the way to test the
7 order is in court, and it is a defense --

8 QUESTION: Well, regardless of whether one wants
9 to test it or not, if the police do not have the predicate
10 for the order the individual doesn't have to move.

11 MR. ROSENTHAL: Well, the traffic laws provide a
12 good example. When a police officer refuses to let cars
13 go down a street, we know of no principle of
14 constitutional law that says the police officer must
15 explain why that street has been closed and that there is
16 sufficient ordinance authority.

17 QUESTION: Mr. Rosenthal, are you saying, then,
18 that if the law -- simply read, it would be much easier if
19 a police officer gives you a command to disperse and you
20 don't obey you've committed an offense.

21 MR. ROSENTHAL: Justice Ginsburg, we think that
22 that is what this law reads for purposes of fair notice.
23 The --

24 QUESTION: And you think that that's -- if the
25 Chicago ordinance said nothing but that, you think it

1 would be constitutional?

2 MR. ROSENTHAL: We think it would supply fair
3 notice. There might be other problems with an ordinance.

4 QUESTION: What other problems? If it simply
5 said, the police ordered you to disperse, you disperse,
6 otherwise you've committed an offense --

7 MR. ROSENTHAL: Well, that ordinance is so broad
8 it might reach picketing demonstrations, activity
9 protected by the First Amendment.

10 What people are told on a point of fair notice
11 is what they must do, disperse.

12 Now, there are other standards for enforcement
13 under the ordinance.

14 QUESTION: Suppose the hypothetical were changed
15 so that it says, the police give you a lawful order to
16 disperse.

17 MR. ROSENTHAL: Well, again, I -- we think that
18 that would be --

19 QUESTION: Which means that they would have to
20 have good reason.

21 MR. ROSENTHAL: That -- and we think this case
22 is no different, Justice --

23 QUESTION: And suppose --

24 QUESTION: You think that would be okay.

25 MR. ROSENTHAL: We do, at least on the question

1 of fair notice. There might be other issues about whether
2 their enforcement discretion has been circumscribed or
3 not.

4 QUESTION: Suppose the police had secret
5 guidelines for when they give you the order to disperse.

6 MR. ROSENTHAL: If those guide --

7 QUESTION: But they were -- no one else knew
8 them.

9 MR. ROSENTHAL: Well --

10 QUESTION: Would you have to assume that the
11 order's valid?

12 MR. ROSENTHAL: I think on a facial challenge,
13 one could bring a facial challenge to such an ordinance
14 and if the police refused to disclose the guidelines, the
15 court obviously could compel disclosure of the guidelines
16 and if the guidelines were not on principle then there
17 might be a basis.

18 The FBI, for example, has all kinds of rules
19 that they don't necessarily disclose to the public.

20 Our point is, it is important not to conflate
21 the issue of fair notice and standards for enforcement.
22 When people are told to move on, they are given notice of
23 what the law requires them to do. That --

24 QUESTION: I think that comes back to the point
25 we keep raising. They are given notice of the fact that

1 the police officer has concluded that, but the question
2 that is bothering some of us is, on what basis can they
3 come to a conclusion that they have, in fact, violated the
4 ordinance.

5 MR. ROSENTHAL: We know of no principle of
6 constitutional law --

7 QUESTION: Strike that. I've misspoken. On
8 what basis can they come to a conclusion that the police
9 officer has the necessary predicate to give them the
10 order? That's what's bothering us.

11 MR. ROSENTHAL: The city -- we start with the
12 ordinance. The city council passed an ordinance, it's
13 public record which grants to the police the authority
14 under these specified circumstances when a member of a
15 criminal street gang is present, to issue the order.

16 The public, of course, has notice of the
17 authority that is conferred on the police.

18 QUESTION: When he tells them to disperse, does
19 he tell them why?

20 MR. ROSENTHAL: Under the ordinance, people are
21 only told to disperse, and again, we know of no principle
22 of constitutional law that entitles one to be given a
23 reason.

24 If the police are clearing the street in
25 Washington because the President is about to walk by, we

1 know of no rule that says they have to explain to people
2 the reason you need to move is that the President is
3 coming.

4 QUESTION: Well, I can accept that, but it seems
5 to me that's not the problem. The problem is whether the
6 individual has notice of the standard of conduct to which
7 he must conform, or to which he can refer when he decides
8 whether the police officer is worthy of obedience legally
9 in making the order that he makes, and that's -- that's --
10 you know, it seems that was behind Justice Kennedy's
11 question, I think it's behind a lot of our questions.

12 Gang -- identification of the gang member is one
13 thing. Identification of the conduct of loitering, so
14 defined, is another.

15 MR. ROSENTHAL: Well, Justice Souter, as the
16 Illinois supreme court acknowledged, as a matter of
17 ordinance construction, the term loiter has a common and
18 accepted meaning. That court embraced dictionary
19 definitions of the term loiter, and it acknowledged --

20 QUESTION: Well, the meaning here involves the
21 absence of an apparent purpose, right?

22 MR. ROSENTHAL: That is the definition of the
23 term, loiter. In addition --

24 QUESTION: Well, don't most -- I mean, it -- I
25 have difficulty with that, because it seems to me that

1 there usually is an apparent purpose for most of what we
2 call loitering.

3 Some people, for example, with nothing better to
4 do like to sit and -- or stand and watch the cars go by.
5 That's a purpose, it seems to me that under this
6 ordinance, the problem is not that there is no apparent
7 purpose but that the ordinance necessarily is making some
8 silent assumptions that some purposes are worthy and some
9 are not, and it's difficult, I would think, for a person,
10 particularly for a non gang member, to stick with Justice
11 Kennedy's first question, to know in advance what purpose
12 is, in fact, going to be an acceptable one under the
13 ordinance or to the police.

14 MR. ROSENTHAL: Well, the ordinance -- what is
15 critical under the ordinance is if an individual's purpose
16 for remaining in any one place is apparent. If the
17 officer cannot tell --

18 QUESTION: Is what?

19 QUESTION: Apparent?

20 MR. ROSENTHAL: If the person's purpose for
21 remaining in any one place is apparent, if the officer
22 does not know if the reason the individual is standing
23 still, the group are standing still, is they're enjoying
24 the night air, or they're going to resume dealing drugs
25 from their specified location as soon as the officer

1 leaves, the purpose for remaining still, for standing
2 still is not purpose, is not apparent.

3 But Justice Souter, I think what's even more
4 critical is, is to consider the premise whether people are
5 doing anything wrong when they're loitering under this
6 ordinance.

7 One of the premises for this regulation is that
8 the nongang member is at risk when he is standing still at
9 public. When people know they're with gang members, at
10 least you can say that they're assuming the risks that
11 adhere in standing still with someone who is --

12 QUESTION: Well, I think you have to assume that
13 the ordinance is broad enough that some people would not
14 know they happen to have a gang member present. I mean,
15 maybe some would, maybe some wouldn't.

16 Has any attempt been made in any other city
17 ordinance to focus on some action by the so-called gang,
18 intimidation of people, or seeking to obtain physical
19 control of an area for some illicit purpose?

20 I mean, if it were something like that in the
21 ordinance, then it seems to me people would understand if
22 they engaged in activity like that --

23 MR. ROSENTHAL: Well --

24 QUESTION: That it's --

25 MR. ROSENTHAL: -- Justice O'Connor --

1 QUESTION: -- suspect.

2 MR. ROSENTHAL: Justice O'Connor --

3 QUESTION: Yes.

4 MR. ROSENTHAL: Justice O'Connor, Illinois has
5 an intimidation statute. One should not underestimate,
6 however, the difficulty of enforcing laws when a
7 neighborhood is so terrorized by gang crime they are
8 afraid.

9 The only way to bring an intimidation case when
10 the police are not present is to put oneself in harm's way
11 by offering to be a witness. The great virtue of this
12 ordinance is that people call the police and, instead of
13 being told, sorry, unless you're willing to testify
14 there's nothing I can do for you, they see visible
15 results.

16 The loiterers are dispersed, and not only does
17 that inhibit crime and violence, but it also energizes the
18 community in a host of ways when they see a visible pay-
19 off for cooperating with the police in a host of --

20 QUESTION: I suppose, Mr. Rosenthal, the streets
21 would be cleaner and clearer if the city just said, anyone
22 who loiters in a public place and doesn't move when told
23 to move on commits an offense.

24 MR. ROSENTHAL: Well, and I don't --

25 QUESTION: And would you defend the

1 constitutional of such a statute that said, anyone who
2 loiters and is told to move on commits an offense?

3 MR. ROSENTHAL: Well, and on the question of
4 vagueness, I don't mean to say the end justifies the
5 means. What I do mean to say is, even putting loitering
6 aside, there is one unquestionably objective standard for
7 enforcement. First, people need to be standing still. No
8 question that's objective. Even if one doesn't know what
9 loitering is, enforcement is delimited to people who
10 aren't walking.

11 Second, enforcement is limited when there is a
12 reasonable belief that a member of a criminal street gang
13 is present, and always there, even if another individual
14 doesn't realize he's next to a gang member.

15 QUESTION: So it isn't really loitering. It's
16 prohibited -- it's loitering with a member of a street
17 gang.

18 MR. ROSENTHAL: That's correct. There is --

19 QUESTION: Let's just take loitering. I guess,
20 what I gather from your response to Justice Ginsburg, that
21 you concede that loitering is a constitutionally protected
22 right?

23 MR. ROSENTHAL: We do -- we find nothing in the
24 Constitution that protects the right to loiter.

25 QUESTION: Is it better than smoking cigarettes,

1 for example, which, you know, people used to have a right
2 to do --

3 (Laughter.)

4 QUESTION: -- and the State decides it's a bad
5 idea, so it prohibits it. Why is loitering above smoking
6 cigarettes, for example?

7 MR. ROSENTHAL: We see no constitutional
8 protection in the right to loiter.

9 QUESTION: Much less loitering with a member of
10 a gang.

11 MR. ROSENTHAL: And absolutely no right to join
12 a criminal street gang under our Constitution and not to
13 stand next to a criminal street gang with no -- with or
14 without an apparent purpose.

15 Kolender, the --

16 QUESTION: This isn't the Court's first
17 encounter with a loitering statute, and there are cases
18 like Papachristou, where the Court found, at least those
19 statutes were problematic because of the discretion given
20 to the officers.

21 MR. ROSENTHAL: Well, and of course Papachristou
22 was a drag net. There was no order to disperse given, and
23 anyone outdoors at night could be arrested.

24 QUESTION: But you were going to mention
25 Kolender, and that's on this same point as Justice

1 Ginsburg made. I think the Court was very careful to say
2 that what we're really concerned about in Kolender was
3 that the police have -- there are no standards to guide
4 the police for when it's going to enforce the order.

5 MR. ROSENTHAL: What I think is so interesting
6 about Justice O'Connor's opinion in Kolender is, loitering
7 was an element of that offense. Not a single member of
8 the Court identified any problem with using loitering as a
9 member of the offense. Justice Brennan even wrote
10 separately, because he thought there was an additional
11 constitutional infirmity.

12 QUESTION: But the opinion says the important
13 thing is that there be minimal guidelines to those who
14 enforce the ordinance.

15 MR. ROSENTHAL: Yes. That's correct, and --

16 QUESTION: And it seems to me we can't affirm,
17 or rule in your favor unless we modify that, or somehow
18 confine it.

19 MR. ROSENTHAL: I quite agree there must be
20 minimal guidelines, although Kolender hypothesized a law
21 with loitering as an element that would be constitutional
22 and didn't identify loitering as the invalid element in
23 that statute.

24 But here, even if loitering alone would be
25 fatally imprecise, enforcement is delimited only to a

1 particular class of potentially dangerous people when a
2 member of a criminal street gang is present. That is a
3 limit on enforcement discretion, limits enforcement only
4 when the potential danger identified by the legislature is
5 present.

6 No question this law is, like most prophylactic
7 laws, tough. It will occasionally be applied to
8 individuals who in fact -- whose hearts are in fact pure.
9 That does not create a problem of vagueness, however.

10 People are told precisely what they must do, and
11 there are standards for who can receive the order. The
12 problem that creates, like any prophylactic law, is at
13 most a problem of substantive due process, and it is to
14 that question that I will now turn.

15 On the question --

16 QUESTION: Before you turn to it, I'm still
17 bothered by the seemingly open-ended possibilities of
18 determining what is -- what is or is not an apparent
19 purpose. How do you address the vagueness of that and the
20 discretion of the officer to decide whether he will accept
21 the appearance of a purpose or not?

22 MR. ROSENTHAL: Well, the officer is in many
23 ways like a camera. When he goes to court and testifies
24 to support his order, all he does is describe what he saw.
25 If the judge saw a picture and could tell why people are

1 remaining in one place -- they're playing basketball on a
2 court, they're looking at Christmas windows at a
3 department store -- there is an objective basis.

4 QUESTION: They want to watch the cars go by. I
5 mean, people -- there are communities in Florida in which
6 people apparently spend most of their time sitting on park
7 benches watching this. Their purpose is perfectly
8 obvious.

9 MR. ROSENTHAL: Well, but in --

10 QUESTION: I suppose people standing on a street
11 corner can have that purpose. There is an apparent
12 purpose, but I would suppose that under this ordinance it
13 would not be accepted as an apparent purpose.

14 MR. ROSENTHAL: Well, Justice Souter in these --

15 QUESTION: Would it? Would it?

16 MR. ROSENTHAL: It would not, Justice Souter,
17 and the reason is in these neighborhoods police can't tell
18 if one's standing still to watch the cars go by or because
19 that's where you deal drugs as soon as the police leave,
20 but if you are so --

21 QUESTION: They can't tell, so that in order to
22 make the ordinance work they have to make a judgment about
23 what they will accept as a sufficient, or a sufficiently
24 obvious purpose, or a sufficiently legitimate purpose. I
25 mean, they do have to make that judgment, don't they?

1 MR. ROSENTHAL: With -- there is a judgment, but
2 I think it is actually the reverse. When the police
3 officer cannot tell, that's when he can't make a judgment.
4 The ordinance is rigid in that respect.

5 But assume with me, Justice Souter, loitering
6 alone would be fatally imprecise. Nevertheless, a law
7 that says, one cannot stand still in the City of Chicago
8 when ordered to move on by a police officer, is not vague.
9 Whatever else it is, it is not vague. The most you can
10 say --

11 QUESTION: But that's not the basis upon which
12 you're basing your ordinance here, and your ordinance is
13 based upon a judgment, and it seems to me that either that
14 judgment can always be made -- I mean, you know, Benjamin
15 Franklin said, we can always find a purpose for everything
16 that is done, or it's a judgment which is left entirely to
17 the discretion of the officer to decide on a normative
18 basis whether the apparent purpose is, in fact, a
19 legitimate one, and I don't see how you get around that
20 problem.

21 MR. ROSENTHAL: Well, because the law does
22 require minimal standards, and even if apparent purpose
23 alone is not enough, Kolender does not say every loitering
24 law in the country is unconstitutional.

25 If there are other criteria --

1 QUESTION: Why does the law require minimal
2 standards?

3 MR. ROSENTHAL: Well, that is what this Court
4 said in the Kolender case.

5 QUESTION: To give -- but to give adequate
6 notice, I assume.

7 MR. ROSENTHAL: No. No. That part of the
8 Kolender opinion, Justice Scalia, addressed the danger of
9 arbitrary and discriminatory enforcement. Justice
10 O'Connor did not have a problem, and the Court did not
11 identify a problem in that opinion with fair notice.
12 There was plenty of notice in Kolender. It was the second
13 prong of the due process inquiry that the Court centered
14 on in Kolender.

15 QUESTION: Well, there is a concern here, of
16 course, as well with the potential for arbitrariness by
17 the police in interpreting it. You could have a situation
18 as, I assume, in many poor neighborhoods of the country
19 where some person might be trying to persuade gang members
20 to change their ways, and be out on the streets where
21 they're gathered to talk to them.

22 Now, the officer wouldn't be able to detect an
23 apparent purpose. It's just a bunch of people including a
24 gang member or two standing around on the street, so it's
25 open to the officer to say, outta here.

1 MR. ROSENTHAL: It is, and that simply shows --

2 QUESTION: And that's the concern.

3 MR. ROSENTHAL: That -- and that shows that
4 there are hypotheticals where this ordinance can --
5 there's certainly a standard, but it nevertheless can be
6 applied.

7 What is critical, though, it's so interesting
8 that after tens of thousands of applications respondents
9 can't identify a single case where that actually happened,
10 and the legislative findings explain why.

11 In these communities, law-abiding people are
12 afraid to use their public spaces. People are afraid to
13 stand with gang members because gang members do not want
14 law-abiding people in their midst. The legislature could
15 rationally conclude that since the burden under this
16 ordinance is so minimal, usually just a minor
17 inconvenience, moving on, and these hypotheticals are so
18 unlikely to occur, that the benefits of creating this
19 prophylactic law to deal with enormous evils associated
20 with gang loitering make this ordinance amply rational and
21 hence constitutional.

22 QUESTION: Do most loitering laws refer to
23 specific places where you can't loiter, in public rest
24 rooms, or around schoolyards, or something like that?

25 MR. ROSENTHAL: As the amicus briefs describe, I

1 think there are a great variety of loitering laws. Some
2 are much more general. Loitering with intent, for
3 example, was quite -- the Model Penal Code recommends a
4 loitering law that is entirely general. Some are
5 specific.

6 Would the Chief Justice --

7 QUESTION: Could I --

8 QUESTION: I can understand a zoning approach
9 where you concluded in certain areas, public areas it's
10 sufficiently dangerous that it ought to be prohibited
11 altogether.

12 MR. ROSENTHAL: And the general order here does
13 provide that the ordinance will only be enforced where a
14 district commander has determined that gang loitering has
15 a demonstrable effect on the activities of law --

16 QUESTION: Oh, but that's not on the face of the
17 statute. The public doesn't know that, presumably.

18 MR. ROSENTHAL: Well, the general order is
19 public. It is also in the record, and this Court has over
20 and over again said, from Hoffman Estates on, facial
21 attacks should be considered in light of these kind of
22 administrative practices.

23 QUESTION: I thought the designated areas were
24 not known to the public.

25 MR. ROSENTHAL: That's correct. The general

1 order, the standard for designation is in the record, in
2 the general order. The general order itself is public.
3 Which areas are designated, that was not made public.

4 QUESTION: But this is a facial attack, so that
5 if there is -- I guess theoretically if there is any
6 direction to the police which would render it
7 constitutional it would be okay, but you're appealing to
8 one that is actually extant.

9 MR. ROSENTHAL: We are, one that --

10 QUESTION: You're going to say that if that is
11 followed at least it's okay, so a facial attack --

12 MR. ROSENTHAL: We are. It's a facial --

13 QUESTION: To what extent must a member of the
14 general public under our jurisprudence know precisely what
15 a criminal statute means?

16 I mean, take the Screws case. Do you think that
17 the people who have been prosecuted under that statute
18 know precisely the state of mind that is required by the
19 court?

20 MR. ROSENTHAL: I think not. All the court
21 requires is fair notice of what to do in order to conform
22 one's conduct in the law. Here, the order to disperse
23 gives fair notice in terms of --

24 QUESTION: Assume that there's fair notice for
25 purposes of my question. I want you to get back to where

1 you were going, what you call substantive, or maybe it's
2 procedural. I'm not sure what kind of due process, but
3 think of not the category of gang members -- gangs mean
4 people who engage in very serious crimes -- but people who
5 are not members of the gang.

6 The ordinance seems to say on its face that all
7 the people who are not members of the gangs in this
8 ordinance can't use the public streets to stand in when a
9 gang member is present. Now, that I have to say, to me
10 anyway, is of some concern.

11 MR. ROSENTHAL: Well, they can stand there until
12 a police order is given, when --

13 QUESTION: Well, it says the police shall order
14 them to disperse, so if you read this statute it says that
15 the people who are not gang members who are standing on a
16 public street and want to talk to a member of the gang, or
17 he's one of the group, that they can't stand on that
18 street because if a policeman comes along he shall order
19 them to disperse.

20 MR. ROSENTHAL: And under those circumstances
21 the legislature could rationally conclude that
22 hypothetical is unlikely, because they heard from the
23 citizens, who are scared to use the public --

24 QUESTION: Oh, no, no, there are some gang
25 members and some nongang members. I take it a lot of

1 people stand around on the street. I doubt that there's
2 evidence here that says the only people who stand on the
3 street, even in the worst neighborhood problem areas, are
4 just gang members.

5 MR. ROSENTHAL: There is certainly ample
6 testimony that law-abiding people are afraid to stand with
7 gang members, who are going to be dealing drugs and
8 don't --

9 QUESTION: Can a city council pass an ordinance
10 that says, we've had some gang problems in a certain area.
11 Therefore, no one can stand on the street. No one.

12 MR. ROSENTHAL: Certainly, nothing vague about
13 that law --

14 QUESTION: No, nothing vague about it. I'm
15 asking you if --

16 (Laughter.)

17 QUESTION: I agree. That's right. So can they
18 do it?

19 MR. ROSENTHAL: If rational, given the
20 legislative record, and here, we of course confine our
21 argument to the evidence and the findings of the city
22 council. We do think that would be rational.

23 I'd like to reserve --

24 QUESTION: As long as it's -- is that -- but I
25 don't want you to stop now. If I -- if -- is that the

1 standard for people being able to stand on the street?

2 I mean, all they want to do, innocent, not
3 members of the gang, I want to stand on the street today.
4 That's -- I -- my house isn't very big, and it's
5 unpleasant there, and it's hot, and I want to go and stand
6 on the street and talk to people. Some of my friends are
7 gang members, I agree.

8 Now, the city council says, you can't, all
9 right. What's the standard that we're supposed to judge
10 under the Constitution whether they can do that?

11 MR. ROSENTHAL: In our view, rational basis, we
12 find no fundamental constitutional right to stand still.

13 QUESTION: Mr. Grossman, do you know anybody who
14 would rather smoke a cigarette in a bar than stand on the
15 street?

16 MR. ROSENTHAL: I -- sure, I've met such --

17 QUESTION: I know several people like that.

18 (Laughter.)

19 QUESTION: They're disabled from doing it, and
20 nobody thinks it's a problem.

21 MR. ROSENTHAL: And of course, one can walk
22 wherever one wants, and one can stand alone whenever one
23 wants.

24 I would like, Mr. Chief Justice, to reserve the
25 balance of my time.

1 QUESTION: May I just ask if you would apply
2 that same reasoning to -- if the statute said, instead of
3 gang member, reasonably suspected of being a prostitute,
4 reasonably suspected of being a beggar? They would all be
5 equally effective.

6 MR. ROSENTHAL: The kind of terror to the point
7 where law-abiding people won't even be able to use their
8 streets and are at risk of drive-by shootings and other
9 things where they're near gang members, that kind of
10 terror doesn't exist, I think, Justice Ginsburg, in your
11 hypotheticals. I doubt that ordinance would be rational,
12 and I doubt that anyone -- any legislature would pass that
13 ordinance.

14 QUESTION: Thank you, Mr. Rosenthal.

15 Mr. Grossman, we'll hear from you.

16 ORAL ARGUMENT OF HARVEY GROSSMAN

17 ON BEHALF OF THE RESPONDENTS

18 MR. GROSSMAN: Mr. Chief Justice, and may it
19 please the Court:

20 The City of Chicago has enacted a statute which
21 is inherently vague and overbroad. At its core, it
22 defines no conduct that --

23 QUESTION: Mr. Grossman, the question of
24 overbreadth isn't before us, is it? The supreme court of
25 Illinois didn't rest on that basis.

1 MR. GROSSMAN: It did not, Your Honor, but we
2 have preserved that issue. The Illinois appellate court
3 did rule that the statute -- the ordinance was overbroad.

4 QUESTION: Well, you've preserved it what, as an
5 alternate ground for affirmance?

6 MR. GROSSMAN: Yes, we have, Your Honor.

7 This law requires a police officer to engage in
8 a surreal exercise of seeking to determine whether or not
9 someone has a purpose that qualifies for exclusion or
10 exclusion under this vaguely worded law.

11 Nothing has changed linguistically in our
12 culture over the last 100 years. At the turn of the
13 century the supreme court of Missouri struck down the
14 first loitering law that a court held unconstitutional in
15 this country, and the progression has been continuous.
16 There is no debate about the issue amongst a overwhelming
17 majority of modern courts.

18 QUESTION: But what issue, whether you can
19 prohibit loitering?

20 MR. GROSSMAN: Whether a police officer will
21 have sufficient guidance under a law that prohibits
22 nothing more than mere loitering, in this case defined as
23 having no apparent purpose, when that officer seeks to
24 apply it in the field.

25 There is a surreal construct. Most of the time

1 we ask police officers to gauge behavior within a
2 construct of wrongful purpose or wrongful behavior.

3 In fact, although Mr. Rosenthal suggested that
4 Kolender was a case in which this Court was only upset
5 about the question of arbitrary enforcement, in fact
6 loitering there had been construed by the California court
7 to require reasonable suspicion of commission of another
8 crime. It had transposed the Terry standard into
9 Kolender, so when this Court looked --

10 QUESTION: This is admittedly a prophylactic
11 measure, and maybe sometimes it will pick up situations
12 that were not dangerous, but how do you distinguish it
13 from, as far as police discretion is concerned, nighttime
14 road blockades to check for drunken drivers?

15 MR. GROSSMAN: Well --

16 QUESTION: Now, that's a situation where you're
17 stopping somebody's freedom to move instead of somebody's
18 freedom to stand still, but it's entirely up to the
19 policeman at the blockade which car he's going to stop and
20 which car he isn't going to stop.

21 Is the constitutional right to move any greater
22 than this constitutional right to stand still?

23 MR. GROSSMAN: Well --

24 QUESTION: And isn't that entirely up to the
25 discretion of the police officer to say it's okay?

1 MR. GROSSMAN: No, I think that it matters if it
2 is a regul -- if it is regulatory in nature. I think that
3 there is a safety interest in regulatory stops to check
4 license or check sobriety, and that this Court has limited
5 discretion, and what kind of road block --

6 QUESTION: Regulatory in nature? That makes the
7 difference for the Constitution? Here you're --

8 MR. GROSSMAN: I think the situs --

9 QUESTION: Wow.

10 MR. GROSSMAN: If I could go on, I don't
11 think --

12 QUESTION: Protecting against drunken drivers is
13 better than protecting against criminals?

14 MR. GROSSMAN: No. It is a different kind of
15 interest. One has to look at what the person is doing
16 when they're exercising their right of free movement. In
17 this instance we're talking about limiting, indeed
18 banishing from the public place people who are involved in
19 free movement on the most basic site that our country
20 recognizes as a place for both the presence of people,
21 their streets and sidewalks.

22 QUESTION: That's not a question of vagueness.
23 There's nothing vague about being told by a police officer
24 to move on. Perhaps your argument is really overbreadth,
25 but I don't think you should call it vagueness.

1 MR. GROSSMAN: Your Honor, I respectfully
2 disagree. The issue about whether or not move on cures, a
3 move-on order cures the question of notice I think is a
4 high level of sophistry that the city is engaging in.

5 What this Court is dealing with is not a
6 dispersal ordinance. A dispersal ordinance is the one
7 that I think was described by Justice Souter. This is a
8 ordinance which prohibits loitering and association. An
9 element of the offense here is loitering.

10 When you go to court, you are not charged with
11 failing to disperse. You are charged first with
12 loitering, having no apparent purpose and, in fact, when
13 the city argues that we should deal with this on an as-
14 applied basis, the city is --

15 QUESTION: How do you know that? I mean,
16 certainly I would not read the ordinance that way. I
17 would think that the charge would be failing to obey the
18 order of a police officer to move on.

19 MR. GROSSMAN: The Court can freely examine the
20 charging documents in this case that are of record. That
21 is not the nature of the charge. The charge is that you
22 were loitering. You were found on the street with no
23 apparent purpose with a person reasonably suspected of
24 being a gang member, and that you failed to disperse, and
25 that is --

1 QUESTION: Mr. Grossman, the section reads this
2 way. I don't see how you can say that.

3 It reads, whenever a police officer believes a
4 person he reasonably -- observes a person he reasonably
5 believes to be a criminal street gang member loitering in
6 any public place with one or more other persons, he shall
7 order all such persons to disperse and remove themselves
8 from the area. Any person who does not promptly obey such
9 an order is in violation of this section.

10 It doesn't say that anybody else is in violation
11 of the section.

12 MR. GROSSMAN: Well, Your Honor, I respectfully
13 disagree with you. I not only understand --

14 QUESTION: You disagree with the words of the
15 statute?

16 MR. GROSSMAN: I disagree with how you're
17 parsing the statute, and I also disagree with how it is
18 that the city views this statute in reality, because
19 whenever the city talks about whether or not this
20 ordinance inappropriately sweeps within its prosecution
21 scope persons who it thinks shouldn't be prosecuted or is
22 embarrassed to say should be prosecuted, or fears that if
23 it does agree that they would be subject to prosecution
24 that it would violate even minimal notions of rationality,
25 it says they are free to go to court and prove they

1 weren't loitering.

2 QUESTION: But Mr. --

3 MR. GROSSMAN: In fact, Mr. Rosenthal did it as
4 he stood up here. He said, they'll tell the judge they
5 were window-shopping. They'll tell the judge --

6 QUESTION: That's in the ordinance as an
7 affirmative defense, isn't it?

8 MR. GROSSMAN: No, it is not. In fact, the only
9 affirmative defense in this ordinance is that you
10 weren't -- that somebody wasn't a gang member. The burden
11 is on you to prove that the person that you were standing
12 with was not a gang member, an impossible burden.

13 QUESTION: Well, Mr. Grossman, wouldn't you take
14 the position if you were defending someone that the
15 complaint certainly should charge the predicate of the
16 order, that is, loitering in the company of a gang member?

17 MR. GROSSMAN: Absolutely.

18 QUESTION: All right.

19 MR. GROSSMAN: And the charging documents do do
20 that.

21 QUESTION: That's what they do, so --

22 MR. GROSSMAN: Absolutely.

23 QUESTION: So in fact they charge both the
24 loitering, the identity of the gang member, and the
25 refusal to disperse.

1 MR. GROSSMAN: They do, and they make a
2 distinction. 34 of the defen -- 34 of the 66 defendants
3 here were charged in a document that only accused them of
4 being in the presence of a gang member.

5 The remaining members of the 66 defendants were
6 charged with being gang members, and I'd like to stress to
7 the Court that there is nothing in the evidentiary record
8 before the city council that speaks to nongang members,
9 nothing whatsoever.

10 QUESTION: Has anybody been charged who did not
11 disobey a police order to disperse?

12 MR. GROSSMAN: There is no one --

13 QUESTION: Is there anybody who has been charged
14 at all in Chicago who did not disobey a police order to
15 disperse?

16 MR. GROSSMAN: There is no one of the 66
17 defendants who has a charging document that does not
18 recite verbatim --

19 QUESTION: Are you answering my question --

20 MR. GROSSMAN: Yes --

21 QUESTION: -- or some other question?

22 MR. GROSSMAN: Your Honor, I am answering your
23 question within my capability. I cannot speak to anyone
24 other than the 66 defendants. 90,000 people have been
25 swept up by this ordinance.

1 QUESTION: Do you know of any --

2 QUESTION: He asked a question, Mr. Grossman.
3 Answer the question, then explain.

4 MR. GROSSMAN: Mr. Morales testifies -- excuse
5 me, Your Honor. I do not mean to be evasive.

6 Mr. Morales testifies that he was not ordered to
7 disperse. That is the only -- there are only 6 of the
8 66 --

9 QUESTION: I'm asking whether he was charged.

10 MR. GROSSMAN: He was charged that way, yes,
11 sir.

12 QUESTION: And as far as you know, everyone who
13 has been charged has been charged with disobeying the
14 order to disperse?

15 MR. GROSSMAN: All 66 of the defendants before
16 the Court have been so charged.

17 QUESTION: And you don't know of anybody else
18 who has been charged who hasn't been charged with failing
19 to disobey the order?

20 MR. GROSSMAN: I do not, Your Honor.

21 QUESTION: Okay.

22 MR. GROSSMAN: I'd like to reiterate that there
23 is nothing in this record, the evidentiary record before
24 the city council, that spoke to nongang members at all.

25 The city can't have it both ways. In one breath

1 they stand before this Court and they say that the streets
2 are so dangerous, that these gang members are so
3 threatening, that no one stands around them, and then in
4 the next minute they try to justify an ordinance that
5 broadly and without an evidentiary basis, certainly no
6 substantial --

7 QUESTION: So what, in your opinion, could --
8 look, what could Chicago do? What they're saying, and
9 they have something in the record to support them, is that
10 in these neighborhoods the choice is who will stand on the
11 sidewalk.

12 Either poor people, who are not members of
13 groups that murder, sell drugs -- you know, it's defined,
14 a gang is defined as a group of people who have
15 substantial activities are murder, drugs, et cetera. They
16 say that the terrible choice is, either they stand on the
17 sidewalk, or people who are poor and honest stand on the
18 sidewalk. You can't do both. And they have drafted an
19 ordinance that you think has many flaws in it.

20 Is it your view that the Constitution says, if
21 that factual predicate is true the poor people have to
22 stay in their houses, or is it your view that it is
23 possible to draft an ordinance that would satisfy this --
24 their need and, if so, what?

25 MR. GROSSMAN: I think that the Illinois supreme

1 court, as many other courts -- in fact, we cite People v.
2 Caswell, which is a California supreme court, which
3 reviews in some detail the way that the States have
4 treated this matter.

5 They all, as Illinois -- the Illinois supreme
6 court stated, have dealt with the issue of whether a
7 loitering type ordinance can be made constitutional by
8 adding a scienter requirement.

9 This Court has recognized that as both assisting
10 and providing notice and also in helping to limit
11 discretion of police officers to put a construct of
12 wrongful purpose or behavior on a police officer and on
13 the citizen. They make a distinction between innocent
14 loitering and criminal loitering.

15 I think that if we give people that kind of
16 notice, it will look different. The person who's window
17 shopping doesn't look like a -- doesn't loiter the way
18 that a person --

19 QUESTION: I suppose the city's answer to that
20 is that it's unenforceable because we have to have a
21 nongang member neighborhood resident testify, and they
22 won't testify, and the police come by and the police see
23 nothing. I assume that's their answer.

24 MR. GROSSMAN: Well, but the other States have
25 been living with intent to -- loitering with intent to

1 deal drugs, loitering with intent to engage in
2 prostitution, and there are --

3 QUESTION: What other --

4 MR. GROSSMAN: -- massive numbers of
5 prosecutions under those laws. You can read the appellate
6 decisions affirming that.

7 What it looks like when you watch somebody is
8 that they aren't looking in a window. They're moving
9 furtively across, they're talking to people in cars,
10 they're engaging in the kind of behavior that's probative
11 of wrongful conduct, and that's something that a police
12 officer can do.

13 A police officer can, within those boundaries,
14 make appropriate judgments. We ask them to do that all
15 day long when we ask them to --

16 QUESTION: If they will accommodate by engaging
17 in criminal conduct while the police officer is looking at
18 them.

19 MR. GROSSMAN: No, I think that people have
20 to -- I think that there are different -- well, first of
21 all they do do that.

22 QUESTION: As soon as they see a police car in
23 the area they just hang out, and that's the problem.

24 MR. GROSSMAN: Well, they do --

25 QUESTION: Their mere presence hanging out

1 terrorizes the neighborhood and prevents the people of the
2 neighborhood from using the streets.

3 MR. GROSSMAN: Well, they do in some places and
4 they don't in some places. In the places that are hot, on
5 corners where there's open air drug market, policemen
6 should and do do surveillance. They don't drive up in a
7 police car. They do surveillance and they identify people
8 and they make arrests, every single day in the City of
9 Chicago, of people who are engaged in selling drugs on the
10 street.

11 QUESTION: Some of the problem is not just
12 dealing drugs. Some of the problem is simply the
13 maintenance of gangs.

14 Gangs perpetuate themselves by showing
15 themselves publicly, by showing off being on the street
16 with a bunch of other members of the gang, whether they're
17 dealing drugs or not, and that's how gang violence occurs.
18 One gang comes and shoots up the other one and so forth.
19 Don't they have a right to stop that kind of activity?

20 MR. GROSSMAN: They have a right to try to stop
21 that activity through various means, not necessarily a
22 broadly worded loitering ordinance that includes within
23 its sweep nongang members.

24 QUESTION: How about if they just cut out the
25 nongang members? Everything else is the same, but the

1 only one that the police can arrest is someone reasonably
2 suspected to be a gang member.

3 MR. GROSSMAN: Apparent purpose, no apparent
4 purpose is still too vague for a police officer to operate
5 under.

6 The only thing that you're doing is taking the
7 same law that people for 100 years have recognized as
8 being too vague to provide notice and saying that we're
9 going to impose that on a subset of the population, and
10 I'd like to stress that this ordinance --

11 QUESTION: So that -- so then your argument has
12 very little to do with the fact that nongang members are
13 subject to this ordinance.

14 MR. GROSSMAN: Excuse me?

15 QUESTION: So then you're arguing it has very
16 little to do with the fact that nongang member are subject
17 to this ordinance, then.

18 MR. GROSSMAN: No, it -- I think that those are
19 both vices of this ordinance. I don't think that they're
20 mutually exclusive, and I wouldn't accept the ordinance if
21 no apparent purpose was the standard.

22 I think that there are limits with what we can
23 do in trying to balance what is the right of people to
24 move on the street and to communicate on the street.

25 I want to stress that there are people who are

1 nongang members who associate with persons who are
2 reasonably suspected of being gang members on the street,
3 that those people are involved in all sorts of forms of
4 communication and protected activity, that all of the
5 neighborhoods don't look the same, that places, in some
6 places it is very hot on a corner and a very dangerous
7 place to be, and in that place you'll find no nongang
8 members, but in the broad remainder of the community you
9 will find interaction, because suspected gang members --

10 QUESTION: Don't the police rules handle that?
11 Don't the police rules say, only certain neighborhoods
12 will be targeted where, indeed, there is this gang
13 activity?

14 MR. GROSSMAN: Well, first of all --

15 QUESTION: I mean, you're making a facial
16 challenge here.

17 MR. GROSSMAN: I am --

18 QUESTION: It seems to me Chicago has tried to
19 implement it in a way that will only identify what you
20 call the hot spots.

21 MR. GROSSMAN: I am, Your Honor. I am bound by
22 this ordinance. This ordinance on its face is not limited
23 to any particular place. The police department has
24 created general orders which this Court should look at, in
25 which it says it will designate them, but it is not

1 limited in the number that it can designate.

2 Of the 66 defendants before this Court, they
3 were arrested in 28 different locations. 90,000 people
4 have been swept from the streets of the City of Chicago.

5 There are thousands and thousands and thousands
6 of areas that have been designated, street corners, city
7 blocks, parks -- there is no limitation to what the city
8 can designate. The discretion of the police to designate
9 those areas are unreviewable.

10 This isn't for example, a tightly worded
11 injunction like the Acuna case out of California. It
12 doesn't bound a significant -- a small area that's been
13 shown to a court under a discrete evidentiary record to
14 impact in the way that we're discussing.

15 QUESTION: But if you say you can designate
16 thousands of areas under it, you're denying the fact that
17 the ordinance can reasonably be limited in our review of
18 it by what has been in fact provided in the police
19 regulation implementing the ordinance.

20 MR. GROSSMAN: It does --

21 QUESTION: In theory, you could designate
22 millions of places, but they say, we will only designate
23 those places that are hot spots.

24 MR. GROSSMAN: Thousands and thousands have been
25 designated.

1 QUESTION: Well, I don't care, maybe there are
2 thousands -- do you know that there are not thousands and
3 thousands of hot spots?

4 MR. GROSSMAN: If there are thousands and
5 thousands of hot spots, Your Honor, then what we're
6 talking about is a broad omnibus ordinance that stretches
7 across the entire city, and we're no longer talking about
8 a place, an ordinance that's focused, and limited, and
9 applied with surgical precision.

10 QUESTION: This order is not currently enforced
11 because of the Illinois supreme court decision, is that
12 right?

13 MR. GROSSMAN: It has not been enforced for 3
14 years because of the Illinois appellate court decision.
15 It was at that point in time, December of '95, that the
16 city chose to stop enforcement of the ordinance.

17 QUESTION: Has there been a substitute? Has
18 there been some alternate technique used?

19 MR. GROSSMAN: No, although the city continues
20 to do sweeps, and we have in our brief before the Court
21 indicated --

22 QUESTION: Sweeps under what statute, if this
23 ordinance is no good?

24 MR. GROSSMAN: I think that they continue to use
25 a disorderly conduct ordinance which requires, of course,

1 a threat to -- an imminent breach of peace, a threat to --
2 an immediate threat to the public safety, and that's an
3 individualized determination that's made about a
4 particular person on the street.

5 QUESTION: May I ask if -- you suggested earlier
6 that it would be the same problem if there were -- nongang
7 members were not included in the ordinance. Would it
8 change your view of the case if the number of persons that
9 had to congregate were increased to say, 10 -- what if the
10 ordinance said, if the police find 10 or more people whom
11 they have probable cause to believe are gang members, they
12 can order them to disperse --

13 MR. GROSSMAN: I think that --

14 QUESTION: -- if they loiter without apparent
15 purpose.

16 MR. GROSSMAN: I think --

17 QUESTION: Would that be valid?

18 MR. GROSSMAN: I think that at some point a city
19 could make a judgment that a congregation of a certain
20 size posed a de facto obstruction of the street, for
21 example. I think that one could begin to approach it
22 based on numbers.

23 I think that one could begin to approach it on
24 the basis of specific locales. Loitering --

25 QUESTION: Well, if it's a de facto obstruction

1 of the street that has nothing to do with gang membership,
2 then your ordinance would say, any group of 10 or more, no
3 matter, without referencing -- Justice Stevens was asking
4 you about gang members.

5 MR. GROSSMAN: I -- the way this ordinance is
6 phrased is suspected gang members. I suppose that if you
7 tailored it more closely to gang members, and if you
8 presented a construct of wrongful purpose, or wrongful
9 behavior, it would be permissible.

10 QUESTION: No, I'm assuming that the -- you
11 still have the same loitering condition, and the same
12 definition of loitering, no apparent purpose, but
13 you're -- you have two major changes. You take out the
14 nongang members, and you increase the number of gang
15 members, so if there are, say, five or more gang members
16 loitering in an area, they can be ordered to disperse by
17 the officer, and if they don't obey, it would be a
18 violation of the ordinance.

19 MR. GROSSMAN: No, I would still have problems
20 with the vagueness of the ordinance.

21 QUESTION: And what would be the defect, the
22 principal defect in that ordinance?

23 MR. GROSSMAN: The principal defect would still
24 be unbounded discretion of a police officer, because he
25 has to make the judgment, or she has to make the judgment

1 about no apparent purpose.

2 But this Court did do something in Boos that is
3 very close to what you're talking about, Your Honor. You
4 approved a congregation ordinance in Boos v. Berry that
5 prohibited congregations near an embassy.

6 You found it in the first instance problematic,
7 because it was in effect phrased in the manner that you're
8 describing. It simply allowed a -- once there was a
9 congregation, it was within 500 feet, it could be
10 disbanded.

11 But once the court of appeals construed it as
12 being a congregation which posed a threat to safety, at
13 that point in time it required an individualized
14 determination on the street, and if that kind of an
15 ordinance were phrased, an anticongregation ordinance that
16 complied with the provisions of Boos, which this Court
17 said would be problematic in the absence of those
18 qualifiers --

19 QUESTION: Protesting in front of an embassy is
20 a First Amendment activity. I mean, to compare this
21 hanging out on a street corner with a desire to make First
22 Amendment statements of protest seems to me entirely
23 unrealistic.

24 MR. GROSSMAN: The Boos -- the Boos ordinance
25 did not speak at all about First Amendment activity. It

1 was 500 feet away, and it spoke of all congregations.

2 QUESTION: It was obviously directed at protests
3 in front of embassies that were intending to make First
4 Amendment points.

5 MR. GROSSMAN: Well, I can't agree or disagree
6 with you about the legislative intent on that particular
7 ordinance.

8 QUESTION: You disagree that it was treated as a
9 First Amendment case, as a First Amendment problem by the
10 Court, and is this case a First Amendment case?

11 MR. GROSSMAN: I agree that the Court considered
12 it problematic without too much definition, and that it
13 must have been concerned about First Amendment rights, but
14 I don't think that First Amendment rights are not present
15 in this case.

16 The city itself has indicated that there is a
17 range of communications which it will permit and will not
18 permit under this ordinance.

19 It will allow formal demonstrations, but
20 something less than a formal demonstration, people talking
21 to each other, it's used -- it has offered its own
22 examples, people debating the constitutionality of the
23 ordinance, people engaged in common discussion, those
24 people who the city recognizes are involved in
25 communicative activities the city says will be swept off

1 the street under this ordinance, so there --

2 QUESTION: The issue as to whether it's a First
3 Amendment case is whether the ordinance is directed at
4 First Amendment activities. Any law can affect First
5 Amendment activities.

6 The law prohibiting smoking in bars stops some
7 people from going in bars, wherefore they cannot converse
8 with the bartender.

9 MR. GROSSMAN: Well, Your Honor, this is a
10 regulation of the public street and in Kolender, the last
11 time this Court saw a pure loitering ordinance, it said
12 that it implicated freedom of movement, and that it had
13 the potential to arbitrarily suppress First Amendment
14 freedom.

15 The same is true of Shuttlesworth, the same was
16 true in Thornhill, and there isn't a case that this Court
17 has looked at in the last 60 years which deals with street
18 regulation that has this broad a scope that it has not
19 recognized that implicit in that law is the ability to
20 sweep from the street people involved in communicative
21 activity.

22 QUESTION: We do give -- I'm thinking of Justice
23 Stevens' hypothetical statute. Three or more members of
24 an organization that has a substantial activity, murdering
25 people et cetera, they can't use the street to stand

1 around in.

2 MR. GROSSMAN: Excuse me?

3 QUESTION: They, the statute says, can't use the
4 street to stand around in. Not some other people, but
5 they can't use the street to stand around in.

6 Now, if the Constitution permits quite a lot of
7 authority to be given to traffic policemen to control the
8 streets because driving risks death, why doesn't it give
9 the police a similar kind of discretion to control the
10 movements of gang members on the street, because after all
11 there's also that kind of a risk.

12 MR. GROSSMAN: Because when you are attempting
13 to regulate the street there are a multitude of interests
14 and activities which the citizen possesses. There are a
15 multitude of activities in which that person can engage
16 in.

17 And so when this Court has approved efforts to
18 regulate the sidewalk, and notwithstanding concerns that
19 hanging out is not communicative activity, this definition
20 of no apparent purpose embraces and includes communicative
21 activity, the Court has required individualized
22 determinations of wrongdoing.

23 For example, in Grayned, when this Court looked
24 at an antinoise ordinance in close proximity to a school,
25 it approved it as opposed to a general breach of the peace

1 statute because it said it made an individualized -- it
2 required an individualized determination that that person
3 continuing to make noise presented a direct threat to the
4 interest the city sought to protect.

5 QUESTION: All right. What about an ordinance
6 that does not have the feature of no apparent purpose, but
7 simply provides that whenever, let's say, five or more
8 individuals reasonably suspected of being gang members are
9 seen standing and not moving on a public street, they may
10 be ordered to disperse, the justification legislatively
11 being that we can simply -- we can simply prove, based on
12 experience, that whenever you have a congregation of gang
13 members trouble is soon to follow. Constitutional?

14 MR. GROSSMAN: No, I think that it is not, Your
15 Honor. I think it's still --

16 QUESTION: Why?

17 MR. GROSSMAN: Because --

18 QUESTION: We don't have the purpose problem
19 here.

20 MR. GROSSMAN: We have always allowed people to
21 continue to assemble on the streets in public fora so long
22 as their immediate behavior does not threaten public
23 safety. We have not, for example --

24 QUESTION: Okay. There's no vagueness problem,
25 and there's no discretion problem --

1 MR. GROSSMAN: There is not, Your Honor.

2 QUESTION: So we're into substantive due
3 process.

4 MR. GROSSMAN: We are. We're also into an
5 overbroad ordinance which potentially sweeps within it
6 protected expression.

7 QUESTION: So you say there is a constitutional
8 right to loiter.

9 MR. GROSSMAN: No, I do not. I say --

10 QUESTION: I thought that's what your point was.

11 MR. GROSSMAN: Excuse me, Your Honor. I did not
12 mean to say that, if that's how I was understood.

13 What I intended to say is that we've looked at
14 ordinances -- for example, Coates talks about conduct --
15 assembly -- assembling on a sidewalk and engaging in
16 conduct annoying to other people. I mean, clearly that
17 can be any kind of nonverbal, noncommunicative conduct.

18 QUESTION: Sure, but it's also extraordinarily
19 vague. Here, we don't have that kind of vagueness
20 problem.

21 We've got gang membership. We've got a
22 legislative predicate that congregations of individuals
23 with gang memberships tends to lead to the effectuation of
24 the gang's purposes. We're not affecting anybody else.
25 The nongang members are not involved, so none of those

1 problems.

2 Aren't you really forced to say that gang
3 members, too, have a right to congregate on the street,
4 and that is a substantive right? Wouldn't that have to be
5 the basis for your objection?

6 MR. GROSSMAN: Well, I do believe that that's
7 true, and that you can't prophylactically ban that
8 activity under a criminal statute.

9 What I think that one needs to do is to try to
10 break down the interests and not simply say that they are
11 substantive due process.

12 If you try to regulate conduct in a public forum
13 on the streets, on the sidewalks, in our parks -- for
14 example, the city has identified that two people sitting
15 on a park bench are subject to arrest under this
16 ordinance.

17 If you make that broad and that sweeping a
18 declaration of the type of conduct which you are going to
19 penalize -- dispersal on pain of arrest -- I think that
20 you have to understand that you will sweep within it not
21 simply hanging out, but a multitude of human activity that
22 this Court would give protection to.

23 If I have a right to stand on the street --

24 QUESTION: Well, what is specifically the
25 activity that you're concerned about in the congregation

1 of the five gang members, speech? I mean, is that it?
2 They want to talk to each other.

3 MR. GROSSMAN: Yes. I do believe -- and I don't
4 think that it's low grade speech necessarily. Like it or
5 not, political street -- street gangs in the City of
6 Chicago engage in all sorts of political processes.

7 QUESTION: They're probably complaining about
8 the police, which is --

9 (Laughter.)

10 QUESTION: Which is, you know, the height of
11 First Amendment protest activity.

12 (Laughter.)

13 MR. GROSSMAN: They are probably doing that.
14 There's a substantial movement on the West Side of Chicago
15 right now challenging police behavior, and Congressman
16 Rush has it as a major agenda item on his run in the
17 mayoral election in February, and I have no question that
18 members of street gangs are active in that dialogue, and
19 that they have a right to engage in that dialogue.

20 They also have a right to work for precinct
21 captains, which they have historically done. We have
22 cited Spergel's historic work on gangs in our brief before
23 this Court.

24 You will find that quite upright aldermen in the
25 City of Chicago retain street gang members to organize,

1 that the Urban League in the City of Chicago has given a
2 subcontract to organizations identified as having
3 substantial gang support and membership, and it is a fact
4 of life.

5 QUESTION: Mr. Grossman, could I ask you a
6 question about a fact of life? The amicus briefs are a
7 little confusing to me in describing the extent to which
8 the -- this ordinance was supported by the African
9 American aldermen in Chicago. Do you know what the answer
10 is to that?

11 MR. GROSSMAN: The answer to that, Your Honor --
12 and we have not gotten into that fray, but the answer to
13 that, Your Honor, is that eight African American aldermen
14 opposed the ordinance, and six voted in favor.

15 QUESTION: What about the assertion in the
16 petitioner's brief that in the last year in which the
17 ordinance was enforced, gang-related homicides dropped 26
18 percent, a considerable -- considerably steeper decline
19 than the 9 percent drop in the overall homicide rate, and
20 that in the first year in which the ordinance was not
21 enforced because it was enjoined, although the overall
22 homicide rate fell another 4 percent, the level of gang-
23 related homicide increased 7 percent.

24 Do you contest those figures?

25 MR. GROSSMAN: I would agree with those figures,

1 and then I would add one for clarity, and that is, in
2 1997, after the ordinance was no longer in effect for 2
3 years, that gang-related homicides dropped 19 percent to a
4 figure of 183, and while those are significant, each and
5 every murder, of course, is significant, that in 1993,
6 when this whole process started, there were 223 gang-
7 related homicides so gant-related homicides have decreased
8 over the last 5 years, and they are down to 183 in the
9 city.

10 QUESTION: Thank you, Mr. Grossman.

11 Mr. Rosenthal, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF LAWRENCE ROSENTHAL

13 ON BEHALF OF THE PETITIONER

14 MR. ROSENTHAL: United States Attorney's Office
15 for the Northern District of Illinois estimates there are
16 100,000 gang members in the City of Chicago.

17 Mr. Grossman says we must use laws that require
18 individualized determinations. Well, it was the failure
19 of those laws to satisfactorily address the problem that
20 led to the enactment of this ordinance and, indeed, gang
21 crime has been rising since the ordinance was no longer in
22 effect in '97.

23 More people got shot as a result of gang-related
24 shootings. The fatality rate went down. More people have
25 gotten shot again this year. In fact, drive-bys are up

1 40 percent this year in the City of Chicago without this
2 ordinance.

3 What does that tell us? Well, on the vagueness
4 prong -- there are two prongs, of course, to vagueness
5 inquiry.

6 Fair notice. Mr. Grossman doesn't really
7 address that, because no criminal sanctions are available
8 under this ordinance for loitering alone. Criminal
9 sanctions come into play only after an officer
10 specifically informs an individual that he has loitered in
11 that officer's -- the officer's determined he's loitered
12 with a gang member in a public place and is subject to an
13 order to disperse.

14 Mr. Grossman therefore focuses on the second
15 prong. The second prong the Court describes as minimal
16 standards. There is not some manual for how to write
17 statutes lurking in the Due Process Clause and here,
18 whatever the imprecisions in loitering, even if this
19 ordinance can be potentially applied to all people
20 standing still, remaining in any one place, in the City of
21 Chicago there remains an enforcement standard.

22 There must be a reasonable belief that a member
23 of a criminal street gang is present and that has dangers
24 associated with it, as the legislature found, not only
25 dangers to the gang member, dangers to the innocent

1 bystanders that are nearby.

2 When innocent bystanders are ordered to move on,
3 it is not because they've done anything wrong. It is to
4 protect them from the dangers of drive-by shooting, as
5 well as the dangers of gang recruitment, and of the --

6 QUESTION: Mr. Rosenthal, would you explain why
7 their purpose wouldn't be accomplished as well if the only
8 target of the arrest and the crime were the suspected gang
9 member?

10 MR. ROSENTHAL: By ordering everyone to move on,
11 it is far simpler, rather than sorting through a crowd and
12 telling each individual who must stay and who -- who may
13 stay and who must go. It is far more effective to issue
14 these dispersal orders generally and, of course narrow
15 tailoring is not required in rational basis analysis under
16 the substantive Due Process Clause.

17 The efficacy of the order to move on is greater
18 if the police do not have to, while they are on there, in
19 a potentially dangerous situation, trying to sort through
20 a crowd and make again what Mr. Grossman calls
21 individualized determination.

22 QUESTION: And I thought you also assumed that
23 in the ordinary case there wouldn't be terrorized local
24 residents of the housing projects hanging out on the
25 corner with the gang members.

1 MR. ROSENTHAL: Absolutely, Justice Scalia.

2 QUESTION: Sort of a birds of a feather flock
3 together principle.

4 MR. ROSENTHAL: Justice Scalia, it is so
5 interesting that the respondents have chosen to dwell in
6 the realm of hypotheticals on a facial challenge, after
7 there were tens of thousands of applications of this
8 ordinance.

9 The legislative findings do tell us that law-
10 abiding people are afraid to use these public spaces, and
11 that's what makes the legislative judgment here rational,
12 that these hypothetical law-abiding people get swept up.
13 At most, it is a minimal inconvenience. Maybe --

14 QUESTION: I thought he said that about 33 out
15 of the 100 or something, a lot of them are not gang
16 members who are being --

17 MR. ROSENTHAL: The police did not have -- were
18 not able to establish a reasonable belief that they were
19 gang members. Nevertheless, those individuals are at risk
20 of being recruited into the gang, are at risk of drive-by
21 shootings -- there are a variety of reasons why the
22 legislature can discourage this association.

23 The Constitution does not protect the right to
24 stand next to a gang member. That is not a protected form
25 of associational activity.

1 Here, the legislative findings amply explain why
2 the legislature could reasonably conclude -- at most,
3 people will have to stand on private property, on
4 somebody's lawn, since the ordinance is limited to public
5 places.

6 That modest inconvenience, if you will, by
7 having to obey the order, is amply justified by -- taking
8 -- in -- when the legislature instead is able to create a
9 law that does not depend on individualized determinations,
10 that will in turn depend on civilian witnesses, since the
11 police cannot be everywhere --

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. Rosenthal.

14 QUESTION: -- and for that reason, we ask that
15 judgment be reversed.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 11:03 a.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CITY OF CHICAGO, Petitioner v. JESUS MORALES, ET AL.
CASE NO: 97-1121

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Maria Federico-----

(REPORTER)