AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Klein v. San Diego County, 463 F.3d 1029** (9th Cir. 2006)

*In 2002, San Diego county passed an ordinance that prohibited “picketing activity that is targeted at and is within three hundred feet of a residential dwelling in the unincorporated areas of the County of San Diego.” August Caires was the general manager of the Padre Dam Municipal Water district. At a water district board meeting a water district employee made fun of the physical appearance of a member of the water district board. In September 2003, a group of individuals including Steve Klein thought Caires should have disciplined the employee, and when he did not they organized a protest at Caires’s house in an unincorporated area of San Diego county. Sheriff deputies arrived and ordered the protestors to move at least three hundred feet away from Caires’s property, and the protestors dispersed. This order turned out to be a mistake because the dwelling was itself three hundred feet from the property line, and thus the protestors were not in violation of the ordinance when they assembled at the edge of Caires’s property.*

*The protestors filed suit in federal district court seeking monetary damages and an injunction blocking future enforcement of the ordinance. The court declined to issue an injunction on the grounds that the ordinance was a reasonable time, place, and manner regulation that was narrowly tailored to advancing a significant government interest in the privacy of a home. On appeal, a panel of the federal circuit court affirmed that ruling.*

JUDGE PREGERSON.

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An ordinance is facially unconstitutional only if "it is unconstitutional in every conceivable application, or . . . seeks to prohibit such a broad range of protected conduct that it is unconstitutionally `overbroad.'" *Members of City Council v. Taxpayers for Vincent* (1984). . . .

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The Supreme Court noted in *Frisby v. Schultz* (1988) that public streets are “the archetype of a traditional public forum.” . . . Moreover, *Frisby* held that a street does not lose its status as a public forum "simply because it runs through a residential neighborhood." It is well-settled, then, that the residential streets and sidewalks covered by the County's ordinance are public fora.

. . . . A time, place, and manner restriction on speech is valid if it: (a) is content neutral, (b) is narrowly tailored to serve a significant government interest, and (c) leaves open ample alternative channels for communication. . . .

Plaintiffs concede, as they must, that the ordinance is content neutral on its face; the ordinance prohibits residential picketing within a certain zone no matter what the topic of the protest or the viewpoint of the protester. As such, this first prong is not disputed.

It is not disputed that the government has an interest in protecting residential tranquility. *Frisby v. Schultz* (1988). . . .

At the same time, the Court recognized the "careful scrutiny" given to restrictions on public issue picketing, given the importance of "uninhibited, robust, and wide-open debate on public issues." Accordingly, it defined more specifically the "evil" to be prevented by residential picketing ordinances: that such picketing might render the targeted resident a captive audience to unwanted speech. . . .

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Thus the district court erred when it stated that residential occupants are entitled to "an unencumbered enjoyment of the tranquility and privacy of their homes." Instead, residential picketing ordinances must carefully balance two valid and competing interests: the right of residents not to be captive audiences to unwanted speech and the right of picketers to convey their message. Residential picketing ordinances require a more nuanced approach than the one implied by the district court's formulation of the right to residential privacy.

Even though we disagree with the district court on this point, we nonetheless affirm its conclusion that Plaintiffs cannot state a valid facial challenge to the County's ordinance. The ordinance *is* problematic in several aspects: The 300-foot ban imposed by the County will, in many cases, put picketers farther away from the targeted residence than they would be under those ordinances that have been deemed constitutional by other courts. . . . In addition, the ordinance imposes a one-size-fits-all approach to residential picketing, which in some cases will allow picketing directly in front of the targeted home if the home is situated on a large lot, but will put the picketers several lots away from the targeted audience if the residence is situated on a small lot. Moreover, . . . the ordinance does not consider more limited restrictions, such as limitations on the number of picketers, the time of day, or the duration of picketing.

Despite the problematic aspects of the ordinance, we cannot say that the ordinance is unconstitutional in every application, primarily because the ordinance did not have an unconstitutional effect in the test case that led to the instant suit. A correct interpretation of the ordinance would have allowed Plaintiffs to picket on the sidewalk or street directly in front of Caires's home, or anywhere else in the neighborhood, because Caires's home was set back more than 300 feet from the street. Thus, for all practical purposes, had the officers correctly interpreted the ordinance, the ordinance would have had no impact on the Plaintiffs' right to picket at Caires's residence. Had a *Frisby* ordinance been in place in the County, Plaintiffs would have been pushed *farther* away from the residence than they were under the County's ordinance. Courts have accepted ordinances that prohibit picketing directly in front of the targeted resident's home. . . . Because the ordinance functions as a more narrow prohibition than the one at issue in *Frisby* in *some* circumstances, we cannot say that the ordinance is unconstitutional in every application. Plaintiffs' claim is therefore not appropriate for a facial challenge.

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While we admit that Plaintiffs may, in some cases, have a special interest in reaching willing listeners in the target resident's neighborhood, we must deny Plaintiffs' claim for the same reason that we deny their narrowly tailored challenge. That is, Plaintiffs have not shown that the ordinance impacts their ability to communicate with willing listeners in *every* case. In some cases, as was the case in Caires's neighborhood, the ordinance would have no impact on Plaintiffs' ability to communicate their message to Caires or Caires's neighbors. Without violating the ordinance, Plaintiffs could demonstrate directly in front of Caires's home or could picket throughout the neighborhood to educate Caires's neighbors about the actions of the water district. Because the ordinance leaves ample alternatives for communication in at least *some* cases, including the test case before us, we cannot say that the ordinance is unconstitutional in every application. Accordingly, Plaintiffs' facial challenge fails.

Plaintiffs also argue that the County's ordinance is unconstitutionally overbroad. While a facial challenge on time, place, and manner grounds asserts that the statute is unconstitutional in every conceivable application, an overbreadth challenge asserts that the restriction's scope includes a substantial amount of protected conduct. A law is overbroad if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. . . ." *Thornhill v. Alabama* (1940). . . .

Plaintiffs' overbreadth challenge rests on the contention that the County's ordinance bans messages that the targeted resident wants to receive. Plaintiffs offer several examples. First, Plaintiffs argue that the ordinance would prohibit a little league team holding a "Get Well Soon Tommy" sign in front of their teammate's house. . . .

We believe the strong remedy of striking this ordinance down on overbreadth grounds is not called for here. First, we note that the ordinance prohibits only picketing targeted at a *single* residential dwelling. . . .

Second, the ordinance is unlikely to have any substantial effect on truly welcome picketing. If the message is desired by the targeted resident, it is unlikely that the police would be called to enforce the ordinance. And even if police threatened to enforce the ordinance, the resident who wished to hear the speech could simply invite the picketers onto their private property. . . .

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*Affirmed*.