No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Under a Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. ' 18-9-122(3). A speaker commits a crime if he communicates by any of these methods, without consent, while within eight feet of any person to whom the communication is addressed. The following questions are presented:

1. Does Colorado=s statutory requirement that speakers obtain consent from passersby on public sidewalks and streets before speaking, displaying signs, or distributing leaflets unconstitutionally burden protected expressive rights in a traditional public forum?
2. Does Colorado=s statutory designation of private citizens as censors of speech, picket signs, and leaflets on public streets and sidewalks impose an unconstitutional prior restraint?
3. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit content-based denials of the right to speak, to display signs, or to pass leaflets subject to strict scrutiny?
4. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit viewpoint-based denials of the right to speak, to display signs, or to pass leaflets unconstitutional per se?

PARTIES

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Supreme Court Rule 29.6.

In addition to the respondent listed in the caption on the cover, the following persons or entities were respondents in the proceedings below and are respondents in this Court:

David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; the City of Lakewood, Colorado; and, Ken Salazar, in his official capacity as Attorney General of the State of Colorado.

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Other Materials

OPINIONS BELOW[1]

The trial court decision is unpublished. Pet. App. 30a. The first Colorado Court of Appeals decision is published as *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995) (Pet. App. 38a). This Court=s prior order in *Hill v. Colorado*, No. 95-1905, is published as *Hill v. Colorado*, 519 U.S. 1145 (1997) (Pet. App. 47a, 48a). The second Colorado Court of Appeals decision is published as *Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997) (Pet. App. 51a). The Colorado Supreme Court decision is published as *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999) (Pet. App. 1a).

JURISDICTION

The Colorado Supreme Court entered its decision on February 16, 1999. Petitioners filed their petition for writ of certiorari on May 17, 1999. This Court granted certiorari on September 28, 1999. This Court has jurisdiction over this matter under 28 U.S.C. ' 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the first and fourteenth amendments to the United States Constitution are set out in the Appendix to the Petition. Pet. App. 64a. C.R.S. ' 18-9-122(3) provides:

> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who

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1. As used herein, APet. App.@ refers to the Appendix to the Petition for a Writ of Certiorari and AJA@ refers to the Joint Appendix.

violates this subsection (3) commits a class 3 misdemeanor.

C.R.S. ' 18-9-122(4) provides,

For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

The entire text of C.R.S. ' 18-9-122 is set out in the Appendix to the Petition. Pet. App. 64a-65a.

STATEMENT OF THE CASE

Statement of Facts

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., oppose legalized human abortion, because, in their opinions, human abortion exterminates innocent human life. JA 45, & 4; JA 52, & 3; JA 54-55, & 3. Petitioners believe that many women who abort their children do so because no one has offered them information about alternatives to abortion. JA 48, & 5; JA 52, & 4; JA 55, & 4.

Petitioners have engaged in an activity they call Asidewalk counseling@ to offer other alternatives to abortion-bound women. JA 49, & 6; JA 52, & 5; JA 55, & 5. Petitioners have educated, counseled, persuaded, or informed passersby about abortion and abortion alternatives through leafletting, sign displays, conversation, and other means. JA 49-50, & 7; JA 53, & 7; JA 55, & 6.

Hill, Himmelmann and Simpson distributed leaflets about abortion and its alternatives, JA 49, & 9; JA 53, & 9 ; JA 56, & 10, on public ways and sidewalks near abortion clinics. Petitioners also communicated by word of mouth. JA 51, & 12; JA 53, & 7; JA 55, & 6. To teach others how to provide sidewalk counseling services, Hill prepared a manual entitled, ASidewalk Counseling Workbook.@ JA 49-50, & 8.

Petitioners prepared signs and posters, containing information about abortion and abortion alternatives for public display. JA 49, & 7; JA 53, & 10; JA 55, & 6. Their posters contained text (e.g., AAbortion Kills Children@) or pictures (e.g., photograph of baby killed by saline abortion). Simpson wore a Asandwich signboard@ with both text and images. JA 56, & 9. Hill has carried a model of an unborn child at ten weeks gestation, which she has displayed to the public as part of the counseling and education process. JA 49, & 7.

Hill, Himmelmann and Simpson do not engage in violence to further their goals. The Colorado Supreme Court assumed, for the purpose of deciding the case below, Athat petitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct.@ Pet. App. 10a n.7.

Prior to the enactment of C.R.S. ' 18-9-122(3), petitioners expressed their opposition to abortion, and engaged in public efforts to advise abortion-bound women that alternatives to abortion are available. They conducted sidewalk counseling on public ways and sidewalks within 100 feet of the entrances of health care facilities and spoke without fear that they could be silenced by those members of the public who might not care to hear, see, or receive their messages. Nor did they fear prosecution for failing to hide their messages from public view or audition. JA 50, & 10; JA 53, & 8; JA 56, & 7. Petitioners distributed leaflets, displayed signs, and communicated orally with the public passing nearby while they were within 100 feet of the entrances of abortion clinics. JA 51, & 12; JA 53, & 9; JA 56, & 7. Their activities occurred within eight feet of other persons. Based on their experience, petitioners have concluded that it is difficult to remain on the public ways or sidewalks, stay at least eight feet away from others, and speak, display

signs, or communicate orally. JA 51, & 13; JA 53-54, & 11; JA 56, & 11.

Hill had successes counseling women. She has seen abortion-bound women change their minds after she spoke with them or gave them pamphlets. JA 51, && 14-15. Hill has counseled women after abortions who grieved for the loss of children through abortion. *Id*.

In 1993, Colorado=s legislature enacted legislation purporting to ensure unobstructed access to health care facilities. *See* Pet. App. 64a-65a. One provision of the legislation, C.R.S. ' 18-9-122(2) directly prohibits conduct that interferes with access to facilities. The legislation also included another provision, C.R.S. ' 18-9-122(3), at issue here, which restricts freedom of expression near health care facilities.

When C.R.S. ' 18-9-122(3) became law, petitioners stopped or altered their public education and protest activities. Simpson discontinued his expressive activities for fear of prosecution. JA 57, & 14. Hill and Himmelmann modified the means by which they sought to communicate with the public about abortion. JA 52, & 16; JA 54, & 13. These changes have made their expressive activities more difficult and less effective. Petitioners plan and desire to resume their expressive activities when they may do so free from the threat of prosecution resulting from possible dissatisfaction of some people with their message. JA 52, & 17; JA 54, & 14; JA 57, & 15.

Course of Proceedings

The federal questions on which this Court granted review have been the focus of this litigation and the principal grounds of the decisions below. Petitioners sued in the District Court of Jefferson County, Colorado, asserting that C.R.S. ' 18-9-122(3) violated several federal constitutional rights, including their

rights to freedom of speech, press, peaceable assembly, due process of law, and equal protection of the laws. *See generally* JA 14-30 (Complaint).

1. *The trial court=s treatment of the federal questions*

The trial court framed the issues this way: AIt is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution.@ Pet. App. 31a. The trial court held, APlaintiff=s [sic] conduct implicates First Amendment rights[,]@ Pet. App. 31a-32a, and A[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute >quintessential= public forum [sic] for First Amendment purposes.@ *Id*. (citation omitted).

Nevertheless, the trial court granted summary judgment for respondent. Pet. App. 36a. The trial court concluded that C.R.S. ' 18-9-122(3) did not regulate speech according to its content or its viewpoint. The court held that, because the statute Aapplies not only to oral protest but to >education= and >counseling[,]=@ the statute Aapplies to all viewpoints, rather then [sic] only certain viewpoints.@ Pet. App. 32a-33a. The trial court reasoned that the Astatute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute.@ Pet. App. 33a.

The trial court found that C.R.S. ' 18-9-122(3) was narrowly tailored because it Atargets the offensive and disturbing conduct taking place outside health care facilities[,]@ and A[i]t address[es] the exact source of evil it seeks to remedy,@ Pet. App. 33a, and because it leaves open ample alternative channels of communication. Pet. App. 33a.

The trial court also held that C.R.S. ' 18-9-122(3) is not unconstitutionally overbroad because the statute was not so Asweeping in its scope as to deter both protected and unprotected speech.@ Pet. App. 34a. The trial court held that Athe statute does not prohibit speech.@ Pet. App. 35a. The trial court also concluded that the statute was not unconstitutionally vague and that it did not impose a prior restraint on expression. *Id*. at 35a-36a.

2. *The Colorado Court of Appeals= treatment of the federal questions on its initial review*

The Colorado Court of Appeals affirmed. Pet. App. 39a. The appeals court stated, A[t]he principal issue in this appeal is whether [the statute] violates the right to free speech contained in the First Amendment to the United States Constitution.@ *Id*.

The appeals court ruled that C.R.S. ' 18-9-122(3) was content-neutral because it did Anot address only the speech of anti-abortion protesters@ and Awould also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant.@ Pet. App. 42a.

The appeals court held that the statute was Anarrowly tailored@ and Areasonably necessary to serve a significant government interest@ in ensuring Asafety and unobstructed access for patients and staff entering and departing from health care facilities.@ Pet. App. 43a. The appeals court reasoned that ample alternative channels of communication remained open because Aposters and signs may be made visible at eight feet[,]@ and because Aplaintiffs may continue to communicate . . . at a distance of eight feet or more.@ *Id*.

The appeals court also concluded that the statute was not unconstitutionally vague, *id*. at 44a, and that it did not impose a system of prior restraints on expression, *id*. at 44a-45a. The

appeals court did not explicitly address petitioners= arguments that C.R.S. ' 18-9-122(3) created a viewpoint-based restriction on free speech through its restriction on Aoral protest@ and the requirement of consent and that the statute was unconstitutionally overbroad.

The Colorado Court of Appeals denied petitioners= request for rehearing. Pet. App. 60a. The Colorado Supreme Court denied review. Pet. App. 46a.

3. *This Court=s treatment of the prior petition*

Petitioners sought review of the appeals court decision in this Court. After deciding *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court granted the petition, vacated the judgment of the Colorado Court of Appeals, and remanded the case for further consideration in light of *Schenck*. *See* Pet. App. 47a-48.

4. *The Colorado Court of Appeals= treatment of the federal issues on remand from this Court*

On remand, the Colorado Court of Appeals again affirmed the judgment below. Pet. App. 52a. The appeals court decided that *Schenck* did not govern this case because it involved an injunction rather than a statute. Pet. App. 55a. Instead, the appeals court applied the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). AApplying the *Ward* rationale here, we conclude that the statute meets constitutional muster.@ Pet. App. 56a. Thus, the appeals court again held that section 18-9-122(3) did not violate petitioners= First Amendment rights. Pet. App. 57a.

5. *The Colorado Supreme Court=s treatment of the federal questions*

Petitioners again sought review in the Colorado Supreme

Court, which granted limited review, Pet. App. 58a-59a,[2] and affirmed the decision of the court of appeals, *id*. at 2a, 29a.

The Colorado Supreme Court identified the state interest supporting C.R.S. ' 18-9-122 as the Ainterest in preserving the health and safety of Colorado=s citizens@ and specifically the interest in Aassuring a citizen=s access to medical >counseling and treatment= at Colorado health care facilities.@ Pet. App. 9a-10a. Invoking the Aright to be let alone@, the court concluded that petitioners= freedoms of speech, press, and assembly were subject to restriction in the name of fundamental rights of privacy. *Id*. at 13a-14a. AHere, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was >imperative,= a citizen=s right of access to >counseling and treatment= at Colorado medical facilities.@ *Id*. at 14a (citations omitted). The Colorado Supreme Court concluded that Athe First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual=s right to privacy . . . .@ *Id*. at 15a.

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2. The Colorado Supreme Court denied review on every issue identified by petitioners and considered only the constitutionality of the statute in light of this Court=s prior remand order. Pet. App. 59a.

In the court=s view, *Schenck* was not dispositive because it Ainvolved a judicially created preliminary injunction drawn solely for the parties before the Court@ while Asection 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly . . . .@ Pet. App. 19a. The Colorado Supreme Court decided that Athe appropriate test to be applied in this case is found in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989).@ Pet. App. 16a.

The Colorado Supreme Court concluded that the statute was narrowly tailored, advanced a significant government interest, and left open ample alternative channels of communication. Pet. App. 24a-29a. AIn sum,@ the court concluded, the statute Arepresents a fair legislative balancing of the >right to protest or counsel against certain medical procedures= while protecting >a person=s right to obtain medical counseling and treatment.=@ Pet. App. 29a.

SUMMARY OF ARGUMENT

In a stunning strike against constitutional rights to freedom of expression, Colorado has enacted a statute with the sole effect of restricting the exercise of freedoms of speech, press, and assembly. Under C.R.S. ' 18-9-122(3), an evangelist distributing gospel tracts, a pizzeria employee distributing discount coupons, or a nurse distributing flyers to explain a strike for improved working conditions, who are within 100 feet of any entrance door to any health care facility in Colorado, are prohibited from freely approaching closer than 8 feet to any other person if they want to offer their materials, or even just to speak, to passersby. Instead, pamphleteers and those who approach others to display signs or to speak, must obtain consent while at a distance greater than 8 feet from those with whom they would communicate. Communicating without consent is a criminal offense.

Colorado=s statute flouts several doctrinal considerations relevant to laws affecting expression. The breadth and scope of Colorado=s statutory suppression of speech are remarkable. This Court seldom has confronted a statute embodying such sweeping disregard for freedom of expression.

In practice, Colorado has given its citizens the power to impose a prior restraint on *unwelcome* speech. Under the statute, a prospective speaker must seek and obtain consent from a prospective listener, without approaching closer than eight feet. Decisions to grant or withhold consent will often B if not invariably B turn on the content and viewpoint of the proposed communication. Nonetheless, that decision will determine whether the speech is criminal or free.

The framework for resolving the present dispute is settled. *See Cornelius v. N.A.A.C.P. Legal Defense & Educ. Fund*, 473

U.S. 788 (1985). Initially, this Court must determine whether petitioners= activity is constitutionally protected. *Id.* at 797. Next, this Court Amust identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.@ *Id.* Finally, this Court must decide whether the restrictions on expression survive the requisite constitutional scrutiny. *Id.*

First, the statute regulates petitioners= exercise of core constitutional rights of expression. Distributing leaflets, displaying signs, and orally educating, counseling, or protesting, are paradigms of protected forms of expression. This Court consistently has noted the constitutional value of these expressive activities. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 446 (1938); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Second, the statute regulates protected expression in the traditional public forum. C.R.S. ' 18-9-122(3) operates only in traditional public forum properties, where the constitutional rights of speech, press and assembly enjoy their greatest protection. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (plurality).

Third, the statute does not come close to satisfying the demanding tests for statutes that regulate core speech in the traditional public forum. It is unconstitutionally defective.

Because the statute targets *only* protected expression, not conduct, *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 965-67 (1984), it is facially overbroad. Moreover, the statute is substantially overbroad; in every conceivable application of the statute, constitutionally protected expression is targeted.

The statute creates a prior restraint on speech and press, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), by

imposing requiring advance consent to leaflet, picket, or speak. The statute omits all requisite safeguards for such a system of prior restraint and it grants unbridled discretion to licensors of speech; thus, it is an unconstitutional restraint.

The statute is an unconstitutional content-based restriction: it applies to *all* leafletting and to *all* sign displays, but it applies only to those *oral* communications which constitute protest, counsel or education; thus, it is a content-based restriction, *see, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997) and not narrowly drawn to any relevant, compelling governmental interest. By granting unlimited licensing power to private citizens, Colorado has created a condition under which the right to speak may be denied based on the content- or viewpoint of expression.

Even if the statute were analyzed as a time, place and manner restriction, it fails the requisite scrutiny. It is not reasonable. It is not narrowly tailored. And it fails to leave open ample alternative channels of communication.

Finally, the statute=s commands are drawn in terms too vague to be tolerated under the Constitution, *see Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The statute operates at the core of the rights to freedom of speech, of the press, and of assembly. Consequently, it was the duty of the Colorado General Assembly to craft its restrictions with particular care to safeguard these Adelicate and vulnerable, as well as supremely precious@ freedoms, *NAACP v. Button*, 371 U.S. 415, 433 (1963).

ARGUMENT

COLORADO REVISED STATUTE ' 18-9-122(3) IS UNCONSTITUTIONAL ON ITS FACE

This litigation challenges C.R.S. ' 18-9-122(3) on its face.[3] The statute suffers from a myriad of fatal constitutional flaws.

3. AThe seminal cases in which th[is] Court has held state legislation unconstitutional >on its face=@ resulted from this Court=s determination that Aany attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas.@ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984) (citations and footnotes omitted); *see also FW/PBS v. City of Dallas,* 493 U.S. 215, 223 (1990).

Freedom of expression B an essential ingredient of liberty B must be jealously guarded, particularly when the controversial nature of the speaker=s message has stirred emotions and triggered an attempt to suppress that message. *E.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989). Popular speech and pleasant words have little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech is the protection afforded to unpopular, unpleasant, disturbing, or even despised speech. *Cf. Madsen v. Women=s Health Center*, 512 U.S. 753, 773-74 (1994) (anti-abortion expression); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (cross-burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (scurrilous attacks on public figure). Free speech

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . . There is not room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949).[4]

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4. *Cf.* M. Nimmer, *Freedom of Speech* ' 1.04 (1984) (gathering cases and materials on the Asafety valve@ function of freedom of expression).

The divisiveness of legalized human abortion B including debates over the contours of its legality, its morality, and its availability B provokes expressive activities that irritate, provoke, disturb, and test the patience of many.[5] But Aif absolute assurance of tranquility is required, we may as well forget about free speech.@ *City of Houston*, 482 U.S. at 462 n.11 (editing marks and citation omitted). Here, the vices of C.R.S. ' 18-9-122(3) compel the conclusion that it is unconstitutional. The judgment below must be reversed.

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5. This Court has noted the divisive nature of abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) (AMen and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality@).

I. The Operation of C.R.S. ' 18-9-122(3).

To understand the constitutional gravity of the wrong embodied in C.R.S. ' 18-9-122(3), it is necessary to understand the statute=s operation.

C.R.S. ' 18-9-122(3) is a specific intent offense. No offense is committed if, within 100 feet of the entrance door to a health care facility, one person approaches another *without* the purpose of displaying a sign to, passing a leaflet to, or uttering oral protest, counsel or education to, the other. Pet. App. 65a. Thus, greater liberty of movement in public places is granted to persons who are *not* seeking to exercise constitutionally protected rights of freedom of speech, of press, and of assembly. The statute targets *speech*, not physical proximity. Worse still, unlike disabilities imposed by injunction, such as those at issue in *Schenck* and in *Madsen*, C.R.S. ' 18-9-122(3) is not limited in application to those whose prior adjudicated misconduct warrants the imposition of otherwise impermissible disabilities on free expression. Instead, the statute restricts the constitutional rights of every person in that State without prohibiting approaches that might obstruct or approaches that occur for no reason whatever or without a purpose of communicating to others.

A. The Statute Operates A in the Public Way or Sidewalks@

C.R.S. ' 18-9-122(3) restricts speech on

$ all public ways or sidewalks, ways [6] within 100 feet

$ of every entrance door

$ to every health care facility

$ everywhere in the State of Colorado.

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6. These are traditional public forum properties. *See* Argument III, *infra*.

B. The Statute Restricts Activity Undertaken Afor the Purpose of Passing a Leaflet or Handbill to, Displaying a Sign to, or Engaging in Oral Protest, Education, or Counseling@

C.R.S. ' 18-9-122(3) restricts

$ anyone who displays a sign
$ anyone who distributes a leaflet or handbill
$ anyone who utters words constituting oral protests
$ anyone who utters words constituting oral education and
$ anyone who utters words constituting oral counsel.

A would-be communicator is required to obtain consent from

$ any person passing by on the sidewalk, street, or public way
$ before knowingly approaching closer than eight feet for
$ the purpose of communicating with that person in one of the ways restricted under the statute.

C. The Statute Forbids Communication AUnless Such Other Person Consents@

The statute requires consent from *every* person to whom communications will be directed, not just from patients of health care facilities, family members or companions of patients, staff members of health care facilities, or business partners of health care facilities. Instead, the speech-free bubble surrounds *every* person passing within 100 feet of an entrance door to any health care facility in the State, including

$ passersby
$ other sidewalk counselors
$ demonstrators
$ so-called Aclinic escorts@
$ patients and their companions
$ facility employees and contractors

$ and countless others.

D. The Statute Operates Within Aa Radius of One Hundred Feet from any Entrance Door to a Health Care Facility@

The statute is not limited in its operation to the vicinity of abortion clinics. C.R.S. ' 18-9-122(4) defines Ahealth care facility@ as Aany entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment@ in Colorado. Pet. App. 65a. These zones exist outside every

$ ambulatory surgical center
$ hospital
$ urgent care facility
$ medical diagnostic facility
$ general practitioner=s office
$ medical specialist=s office (from allergists to endocrinologists to opthalmologists to vascular surgeons).

In addition to such locations obviously included within the definition of Ahealth care facility,@ numerous other locations may be included because the statute includes any Aentity@ Alicensed, certified, or otherwise authorized or permitted by law to administer medical treatment,@ leaving open, for example, the likely possibility that a school-based clinic or nurse=s office or a industrial plant=s nurse=s station all fall within the scope of the statute, if the entrance doors to such locations are within 100 feet of a public sidewalk or way.

II. Petitioners= Leafletting, Sign Displays, and Oral Communications Are Constitutionally Protected.

C.R.S. ' 18-9-122(3) targets only expression protected by the Constitution, including spoken words, sign displays, and leafletting. Petitioners have used all these means to disseminate information and viewpoints. JA 17-18, && 17-20;

JA 49, & 7; JA 53, & 7; JA 55, & 6. Each of these methods of communication with the public is constitutionally protected.[7]

First, distributing leaflets on the public ways is a form of free speech protected under the Constitution. *McIntyre*, 514 U.S. at 347. There is no doubt that Aleafletting [is an] expressive activit[y] involving >speech= protected by the First Amendment.@ *United States v. Grace,* 461 U.S. 171, 176 (1983). *See also Schenck*, 519 U.S. at 377 (noting that leafletting is a Aclassic form[] of speech that lie[s] at the heart of the First Amendment@). Pamphleteering is a particularly inoffensive means of communication: A[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to

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7. The State conceded this point. *See* Pet. App. 31a (A[i]t is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment@); *id*. at 31a-32a (A[t]here is no question that the Plaintiffs conduct implicates First Amendment rights@); JA at 217-18 (A[a]dmitted@ that A[d]isplay of signs and posters,@ A[d]istribution of free written materials,@ and A[o]ral expression@ are constitutionally protected).

take it out of someone=s hand,@ *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality). This Court=s consistent jurisprudence has recognized free distribution of literature as expression protected by the Constitution. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell*, 303 U.S. at 452; *Heffron v. ISKCON*, 452 U.S. 640 (1981).

Second, displaying signs addressing public issues is a form of free speech resting Aat the core of the first amendment,@ *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (A[p]ublic issue picketing . . . has always rested on the highest rung of the hierarchy of First Amendment values@) (internal quotation marks and citations omitted). *Accord United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (Aclassic expressive gesture of the solitary picket@).

Third, oral communications rest at the very heart of the right to free speech. *City of Houston*; *Gregory*; *Edwards v. South Carolina*, 372 U.S. 339 (1963); *Schenck*, 519 U.S. at 377.

Without question, Petitioners= expressive activities enjoy constitutional protection.

III. The Colorado Public Sidewalks, Streets and Ways Affected by C.R.S. ' 18-9-122(3) are Public Fora for Free Speech.

The public ways and sidewalks of Colorado, including those within 100 feet of the entrances to health care facilities, constitute Aquintessential@ public fora for free speech. *See Perry Educ. Ass=n v. Perry Local Educators= Ass=n*, 460 U.S. 37, 45 (1983); *see also Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality); *cf. Schenck*, 519 U.S. at 377 (Aspeech in public areas is at its most protected on *public sidewalks*, a prototypical example of a traditional public forum@) (emphasis added). ANo particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.@ *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).[8]

IV. Section 18-9-122(3) Fails Constitutional Scrutiny.

The constitutional standards governing restrictions on the right to freedom of speech on the public ways and sidewalks within 100 feet of the entrances to health care facilities, are well-established:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest

8. The State conceded this point, as well. *See* JA at 277 (A[a]dmitted@ that Apublicly owned sidewalks within 100 feet of the entrance to a health care facility are traditional public forums@).

> and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby, 487 U.S. at 481 (editing marks omitted; quoting *Perry*, 460 U.S. at 45). Furthermore, A[c]riminal statutes must be scrutinized with particular care,@ *City of Houston*, 482 U.S. at 459; therefore, A[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.@ *Riley v. National Fed=n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

A statutory ban on leafletting, sign displays, and oral education, protest, and counseling, on public sidewalks, is unconstitutional. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) (place of business); *Grace*, 461 U.S. 171 (courthouse); *Grayned*, 408 U.S. at 119 (school); *Boos*, 485 U.S. 312 (embassy). Petitioners= expressive activities on public sidewalks are classic exercises of the right to free speech. No valid government interest supports Colorado=s restrictions on speech. Indeed, this Court has pointedly noted, A[a] ban on handbilling . . . would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate,@ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). Because Colorado=s ban encompasses so much speech unrelated to any regulable evil, its Acomplete ban on handbilling [is]

substantially broader than necessary to achieve the interests justifying it.@ *Id.*[9]

Colorado cannot justify restrictions on peaceful expression on the basis of the supposed offensiveness of petitioners= message to some viewers. AThe fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker=s opinion that gives offense, that consequence is a reason for according it constitutional protection.@ *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (editing marks and citations omitted).

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9. The Colorado Court of Appeals construed C.R.S. ' 18-9-122(3) to impose just such a flat ban. *See* Pet. App. 56a (Awith reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute@).

Nor can access concerns justify a flat ban on, for example, displaying a placard outside a health care facility.[10] A solitary pedestrian walking on a public sidewalk distributing leaflets, displaying a sign, or communicating orally does not automatically prevent access.[11] Nor is a blanket ban on leafletting, sign displays, and oral expression without advance consent narrowly drawn to address access concerns. The expressive activities burdened by the statute are no more obstructive than countless other activities, such as strolling with

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10. Because the challenge provision does not target obstructive conduct, or unprotected expression, such as fighting words or threats that are independently proscribable and that may interfere with access, it is disingenuous to describe the governmental interest to which the statute is directed as ensuring access to health care facilities. *But see* C.R.S. ' 18-9-122(1), Pet. App. at 64a-65a. The statute only restricts communications. Consequently, it is likely that the actual purpose of the statute is to insulate others from opinions and views with which they may disagree. The court below stated that it was seeking to balance *freedom of expression* with the *constitutional right of privacy*. Pet. App. 14a. That approach is fundamentally flawed. First, this Court has expressed real Adoubt that . . . >the right of the people approaching and entering the facilities to be left alone-Baccurately reflects our First Amendment jurisprudence in this area,@ *Schenck*, 519 U.S. at 383 (citing *Madsen*). Second, the statute restricts only *communicative* approaches; hence, the Aprivacy@ in question is not physical solitude, or freedom from government interference with personal decisions, but freedom from *messages*.

11. If an individual actually interfered with public passage, then the proper approach would be to enforce relevant criminal laws such as C.R.S. ' 18-9-122(2), which directly prohibits obstructive conduct. *Infra* note 13. Such laws may not be selectively invoked as a pretense for suppressing an objectionable message. *See, e.g., Coates v. Cincinnati,* 402 U.S. 611 (1971).

a friend, walking with a cane, stopping to talk with friends, walking a dog, riding in a wheelchair, etc. The expressive activities targeted by C.R.S. ' 18-9-122(3) are not the Aevil@ B obstruction of access B that motivated the General Assembly to enact the statute. *Cf. Frisby*, 487 U.S. at 485 (Acomplete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil@). Finally, if access concerns could justify these burdens on freedom of expression outside of health care facilities, the same rationale would apply to such activities outside *any* business or government facility. Free speech would be a mere shadow.[12]

12. Colorado may not, Aby its own ipse dixit[,] destroy the >public forum= status of streets and parks which have historically been public forums . . . .@ *U.S. Postal Service v. Greenburgh Civic Ass=n*, 453 U. S. 114, 133 (1981); *see also Grace*, 461 U.S. at 179-80.

If Colorado is concerned with disturbing noises, it is free to enact and enforce a noise control statute. If the problem is obstructive or disorderly conduct, there are laws tailored to such conduct.[13] But the face of C.R.S. ' 18-9-122(3) reveals a different and profoundly disturbing purpose: to suppress uninvited *messages.* The Constitution protects the petitioners against such censorship. *Simon & Schuster,* 502 U.S. at 118 (and cases cited); *Street v. New York,* 394 U.S. 576, 592 (1969).

A. C.R.S. ' 18-9-122(3) is Overbroad

13. Colorado has numerous laws directly targeting unprotected conduct. *See, e.g.,* C.R.S. ' 18-3-202 (assault, first degree); C.R.S. ' 18-3-203 (assault, second degree); C.R.S. ' 18-3-204 (assault, third degree); C.R.S. ' 18-9-106 (disorderly conduct); C.R.S. ' 18-9-107 (obstructing passage); C.R.S. ' 18-9-111 (harassmentBstalking); C.R.S. ' 18-9-114 (hindering transportation); C.R.S. ' 18-9-122(2) (obstructing access to health care facilities); C.R.S. ' 18-13-107 (interference with persons with disabilities).

C.R.S. ' 18-9-122(3) is unconstitutionally overbroad.[14] Every person passing within 100 feet of any entrance door to every health care facility in Colorado is enveloped by a speech free bubble with an eight foot radius. The zones surround persons having no present business with, or interest in, the hospitals, clinics, labs, diagnostic facilities, ambulatory surgical centers, outpatient mental health facilities, and the offices of general practitioners and medical specialists.[15] The operation

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14. In the usual facial challenge based on overbreadth, a court must determine whether the overbreadth of a statute is substantial. *E.g.*, *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (citing cases). That analysis is appropriate to statutes that imperfectly address a valid core of conduct that is subject to proscription or regulation, and the question is whether the restriction also restricts a substantial amount of free speech. *Id*.; *Secretary of State v. J.H. Munson Co.*, 467 U.S. 847, 864-65 (1984).

> *Substantial overbreadth* is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .

Munson, 467 U.S. at 864-65 (emphasis added). The Asubstantial overbreadth@ test does *not* apply, however, where Athere is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits.@ *Id*. at 865-66. In such a case, the statute is facially unconstitutional, and no inquiry into the substantiality of other overbroad applications is necessary. *Id*. In this case, C.R.S. ' 18-9-122(3) is unconstitutional regardless of which overbreadth standard applies. In every obvious application of the statute, protected expression is criminalized.

15. The foregoing examples are only the *obvious* ones, but the statute creates similar floating speech free zones outside the entrance doors to Aany entity that is licensed, certified, or otherwise authorized or *permitted* by law to administer medical treatment@ in Colorado. *See* Pet. App. 65a, C.R.S. ' 18-9-122(4). And in every case (other than certain abortion clinics) these

of the zones, conditioning communication on consent, is not limited to persons with a history of bad conduct; Colorado assumes that no one can be trusted to communicate in these circumstances without abusing his constitutional rights.[16]

As in *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847 (1984), A[t]he flaw in the [Colorado] statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise,@ 467 U.S. at 966. Colorado has ignored this Court=s teaching that A[t]he Constitution does not allow such speech to be made a crime.@ *City of Houston,* 482 U.S. at 462. The false premise here is that the State may subject *all* expression in public fora to a Aheckler=s license.@

The only activities Areached@ by the statute are paradigmatic forms of constitutionally protected expression: leafletting, sign displays, oral utterances. C.R.S. ' 18-9-122(3) is overbroad because it Aimposes a direct restriction on protected First Amendment activity@ and the Ameans chosen to accomplish the State=s objectives are too imprecise, so that in all its

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zones were imposed without any evidence of a problem regarding access, and without any demonstrated need for the vast reach of the Statute.

16. Although the Colorado Supreme Court accepted, Pet. App. 10a, that petitioners had not engaged in such abuses, it recognized that the legislature attributed such abuses generally to anti-abortion protestors, *id*.

applications the statute creates an unnecessary risk of chilling free speech.@ *Munson*, 467 U.S. at 967-68 (footnote and citation omitted).

> Colorado Revised Statute ' 18-9-122(3)
> violates the constitutional right of free assembly and association. [This Court=s] decisions establish that mere public intolerance or animosity cannot be the basis for the abridgment of these freedoms. . . . The First and Fourteenth Amendments do not permit [Colorado] to make criminal the exercise of the right of assembly simply because its exercise may be >annoying= to some people.

Coates, 402 U.S. at 615.

That Colorado=s statute operates in the vicinity of every health care facility in that State, rather than *everywhere* cannot salvage the statute. A restriction is no less unconstitutional because it only applies in certain locales, such as airports, *Board of Airport Comm=rs v. Jews for Jesus*, 482 U.S. 569, 570-71 (1987), public school buildings, *Lamb=s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or the Supreme Court grounds, *Grace*.

C.R.S. ' 18-9-122(3) is overbroad because it Adoes 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 or of the press.@ *Thornhill*, 310 U.S. at 97 (emphasis added). Such an Aoverbroad@[17] law Adirectly restricts protected

17. The term Aoverbreadth@ has two distinct meanings in constitutional law. *Munson*, 467 U.S. at 965 n.13. Petitioners use the term to describe Aa statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest.@ *See id.* (citation omitted).

expression activity and does not employ means narrowly tailored to serve a compelling governmental interest.@ *Munson*, 467 U.S. at 965 n.l3. Colorado=s statute flies in the face of established doctrine: APrecision of regulation must be the touchstone in an area so closely touching our most precious freedoms.@ *Riley v. National Fed=n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

Such precision results only from careful legislative effort to draw a statute narrowly to the service of a government interest. A law is Anarrowly tailored if it targets and eliminates no more than the exact source of the >evil= it seeks to remedy.@ *Frisby*, 487 U.S. at 485 (citation omitted). By contrast, C.R.S. ' 18-9-122(3) is overbroad B not narrowly tailored B because Athere is no core of easily identifiable and constitutionally proscribable conduct that the [law] prohibits.@ *Munson*, 467 U.S. at 965-66.

C.R.S. ' 18-9-122(3) bans virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements. *Cf. Board of Airport Comm=rs*, 482 U.S. at 574 (regulation Areaches the universe of expressive activity, and . . . prohibit[s] *all* protected expression@).

An important signal that C.R.S. ' 18-9-122(3) is overbroad is that Athe enforceable portion of the [statute] deals not with core criminal conduct, but with speech.@ *City of Houston*, 482 U.S. at 460. The Acore@ of Colorado=s statute is free expression, and it is free expression that Colorado has treated as a Atargeted evil.@ Nor is the statute narrowly drawn to restrict only the bad acts of wrongdoers (as in the cases of an injunction or a recidivism statute). *See* Pet. App. 10a n.7.

C.R.S. ' 18-9-122(3) is much more sweeping than the ordinances struck down in *Houston* and in *Lewis v. City of New*

Orleans, 415 U.S. 130 (1974). Houston=s ordinance only prohibited speech that A>in any manner . . . interrupt[s] an officer.=@ 482 U.S. at 461. New Orleans= ordinance forbade A>any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.=@ 415 U.S. at 132. In contrast, C.R.S. ' 18-9-122(3) applies to *all* leafletting, *all* sign displays, and *all* oral utterances which constitute education, counsel or protest. AThe Constitution does not allow such speech to be made a crime.@ *City of Houston*, 482 U.S. at 462. Petitioners Aare not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct.@ *Federal Election Comm=n v. National Conservative PAC*, 470 U.S. 480, 501 (1985).

C.R.S. ' 18-9-122(3) is even more flagrantly unconstitutional than the Afloating,@ consent-to-speak restrictions struck down in two recent decisions by this Court. *Schenck*, 519 U.S. at 367; *Madsen*, 512 U.S. at 773-74. In *Madsen*, the provision this Court struck down was limited so that the defendants in that case were unable to approach Aany person seeking the services of the Clinic@ without consent. 512 U.S. at 773. In *Schenck*, the provision this Court struck down was limited so that the defendants in that case were required to give way to Apersons entering or leaving, working at or using any services at any facility at which abortions are performed@ in the Western District of New York. 514 U.S. at 367 (emphasis added). Notably, the *Madsen* and *Schenck* injunctions only restricted those persons whose previously adjudicated misconduct

warranted the entry of injunctive relief.[18]

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18. The court below fundamentally erred when it held, simplistically, that

identical restrictions in a statute face less demanding scrutiny than in injunctions. True enough, *Madsen* directs that injunctive restrictions on expressive activity face Aa somewhat more rigorous standard,@ 512 U.S. at 765-67; *but cf. Madsen*, 512 U.S. at 778 (Stevens, concurring and dissenting) (concluding that, because Alegislation is imposed on an entire community, regardless of individual culpability,@ Ainjunctive relief should be judged by a more lenient standard than legislation@) (citation omitted). But *application* of the standard also differs. An injunction, by its nature, restricts only those already found to have engaged in (or threatened to engage in) unlawful activity, while a statute restricts *everyone*, no matter how innocent. As a consequence, just because a record of extraordinary misconduct may justify exceptional restrictions on free speech (e.g., a Astay away@ order in a domestic dispute or stalking case), by no means would such restrictions pass muster in a statute of general applicability, even under a Aless rigorous@ test.

By contrast, in Colorado, a speech-free bubble envelopes every man, woman, and child, regardless of their destination or purpose, who passes within 100 feet of every entrance door to every health care facility in Colorado. The bubble is not limited to patients, families or companions of patients, employees of such facilities, physicians, nurses, or other health care personnel, or business associates. Instead, speech-free bubbles enshroud all those present on the public ways or sidewalks who happen to be within 100 feet of the entrance to a Ahealth care facility.@ Businessmen walking to a lunch counter, construction workers leaving a work site, families taking a leisurely stroll to a popular landmark, all are enveloped by zones that are purportedly designed to secure access to health care facilities. Moreover, the obligation to obey the statute and respect the speech-free bubbles applies to everyone, whether they have engaged in any misconduct upon which liability could be imposed or not. A[N]o conceivable governmental interest would justify such an absolute prohibition of speech.@ *Board of Airport Comm=rs,* 482 U.S. at 575.

B. Section 18-9-122(3) Imposes an Unconstitutional Prior Restraint.

Section 18-9-122(3) is a prior restraint. As with any other classic prior restraint, under the Colorado statute, speech can proceed if permission is granted, but will result in criminal liability if permission is denied. The statute restrains and inhibits speech before it takes place, and subjects such speech

to the permission of a person deputized by the state.[19] AAny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.@ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

19. This Court has held that Athe regulations we have found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.@ *Ward*, 491 U.S. at 795 n.5 (internal quotation marks and citation omitted).

Respondents have contended that the speech licensing system C.R.S. ' 18-9-122(3) imposes is not a prior restraint because the challenged statute grants licensing authority to private citizens.[20] Despite that contention B Awhether ingenious[] or ingenuous[],@ *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) B C.R.S. ' 18-9-122(3) falls neatly within the prior restraint doctrine.

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20. This Court has indicated that governmental grants of censorial power to private actors are constitutionally problematic. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997), this Court rejected a narrowing construction of the Communications Decency Act proffered by the Government because A[i]t would confer broad powers of censorship, in the form of a >heckler=s veto,= upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child, a >specific person . . . under 18 years of age,= would be present.@ *Reno*, 521 U.S. at 880 (citation omitted). *Cf. Larkin v. Grendel=s Den*, 459 U.S. 116, 122, 127 (1982) (faulty state scheme to donate powers usually exercised by state to churches for their Aunilateral and absolute@ use). *Reno* and *Larkin* guide analysis of the present case, in which licensing powers normally reserved to a governmental agency have been transferred over to the unilateral and absolute power of private persons. *See also Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) (A[t]he controlling legal principles are plain. . . . [C]onstitutional rights . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted >ingeniously or ingenuously=@) (quotation marks and citations omitted); *cf. Evans v. Newton*, 382 U.S. 296, 299 (1966) (A[c]onduct that is formally >private= may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action@); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961) (Awhen a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself@).

The statute compels speakers to obtain consent to speak and it authorizes private citizens to deny petitioners= requests to engage in expressive activities. Behind that authority is the State=s criminal law enforcement mechanism. With consent, all is well for the would-be speaker. Without consent, petitioners and other citizens leaflet, speak or display signs at the peril of criminal prosecution for a class 3 misdemeanor.[21]

Under the Constitution, Colorado=s statutory speech licensing scheme is clearly defective. This scheme neither has nor is capable of providing any of the procedural safeguards identified by this Court as prerequisites to the imposition of an otherwise unconstitutional prior restraint. Far from solving the constitutional problems, Colorado=s attempt to circumvent prior restraint doctrine by delegating censorship powers to individuals makes matters worse by removing any possibility of procedural safeguards.

1. The Statute Grants Unbridled Discretion to Speech Licensors.

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21. In fact, Colorado has admitted that, under its statute regime, Asigns, pamphlets and/or literature@ could constitute Athe evidence of a violation@ because they were Aused in the commission of the offense.@ JA 280.

C.R.S. ' 18-9-122(3) assigns to private citizens unlimited power, enforced by the State, to grant or deny a request for permission to distribute literature, display a sign, or engage in oral protest, oral counseling, or oral education. A[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.@ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).[22] Nothing in the statute curtails its application to protected speech; rather, C.R.S. ' 18-9-122(3) precisely and deliberately targets protected expression.

C.R.S. ' 18-9-122(3) grants unbridled discretion to those from whom speakers must obtain permission to speak. Under the law, passersby may deny petitioners the right to speak because of petitioners= race, gender, content of their speech, opinions, hair color, or for no reason at all. Colorado has codified a speech licensing approach that other locales may want to duplicate. Officials in Skokie, Illinois, or Cummings, Georgia, may conclude that those who reside along a parade

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22. This Court has Apreviously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship >as applied= without standards by which to measure the licensor=s action.@ *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988).

route should have the right to decide whether a parade or demonstration permit will be granted. *Cf. National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). For that matter, Colorado could cripple the initiative process by banning circulators from approaching qualified voters without advance consent. *Cf. Meyer v. Grant*, 486 U.S. 414 (1988).

There is no workable means of curing such boundless discretion by imposing an external review process because A[e]ven if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision maker=s discretion.@ *City of Lakewood*, 486 U.S. at 771.

2. Section 18-9-122(3) Lacks the Necessary Procedural Safeguards

C.R.S. ' 18-9-122(3) lacks the procedural safeguards required of a licensing scheme. Such safeguards reflect the significance of expressive freedoms. *Cf. Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (Aprocedural safeguards often have a special bite in the First Amendment context. The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns@) (citations omitted). The courts below concluded that the statute did not impose a prior restraint upon expression. Consequently, no effort was given to scrutinizing the nature of the restraint imposed to determine whether the constitutional requisites identified by this Court, *see*, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Riley*, 487 U.S. at 802, were included in the scheme.

In fact, it is doubtful that a workable system of restraints employing private parties as licensors could be crafted that

would pass constitutional muster. In the present case, however, it is clear that none of the requisite safeguards were included in the prior restraint scheme imposed by C.R.S. ' 18-9-122(3). Thus, the statute fails constitutional scrutiny.

C. C.R.S. ' 18-9-122(3) Unconstitutionally Discriminates Based on Content and Viewpoint of Expression.

1. C.R.S. ' 18-9-122(3) is content-based.

The challenged statute is content-based on its face with regard to oral utterances. C.R.S. 18-9-122(3) applies to *all* leafletting and to *all* sign displays, *but only applies to* those *spoken* exercises of the right to freedom of speech that constitute *Aeducation,@ Acounseling,@ or Aprotest.@*[23] No prosecution arising from an unconsented oral utterance could succeed without evidence being tendered of what a speaker had said. Consequently, the content of oral speech must be taken into account in determining whether the statutory ban was violated.[24] When Ait is the content of the speech that determines whether it is within or without the statute=s blunt prohibition,@ the law is plainly content-based, *Carey v. Brown*, 447 U.S. at 462. Thus, the statute is subject to strict scrutiny. *See, e.g., Turner Broadcasting System v. FCC*, 512 U.S. 622, 641-43 (1994).[25] The Colorado statute is also content-based, as to leafletting, sign displays, and oral utterances, because it subjects the right to free speech to the listener=s reaction. *Forsyth County*, 505 U.S. at 134.

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23. For example, suppose two women march along a sidewalk within 100 feet of a health care facility, deliberately approaching within 8 feet of a man headed to the facility to have a disfiguring wart removed. Without obtaining consent, one says, AGood morning,@ while the second tells passersby, ANatural is best, don=t put plastic surgery to the test.@ The second woman

Not only does the statute embody direct content discrimination as described above; by its omission of clear standards prohibiting citizens from denying speakers the right to speak based on disagreement with content or viewpoint, C.R.S. ' 18-9-122(3) authorizes private citizens to decide whether expression may take place on the basis of content. Criminal liability will hinge on whether consent is obtained. The statute leaves it to private actors to decide whether consent will be granted. In these circumstances, it is hard to imagine that consent will turn on anything other than content and

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would be violating Colorado law (if permission is not obtained), but not the first woman B yet the only difference is the content of the message.

Or suppose two lab technicians on a coffee break while working at a community hospital, are walking over to a smokers= hospitality zone and, while within 100 feet of the entrance to the hospital they deliberately approach within 8 feet of a third person. Without first asking consent, one man recites a few lines of *Jabberwocky* by Lewis Carroll, and the second declares, AI object to the hospital board=s penurious treatment of staff.@ The second man would be guilty of uttering an oral protest, while the first man presumably would not.

24. Colorado has contended that content is irrelevant to the statute=s restriction on oral communications. JA 291-96. The only way that this could be true would be if *all* oral communication were deemed to be Aprotest, education, or counseling.@ Under this construction, the statute would restrict Athe universe of [oral] expressive activity,@ *Board of Airport Comm=rs*, 482 U.S. at 574, rendering the provision undeniably overbroad, *id*. at 575.

25. C.R.S. ' 18-9-122(3) also is Aan absolute prohibition on . . . particular type[s] of expression[,]@ *Grace*, 461 U.S. at 178; thus, it is subject to strict scrutiny. Moreover, that the statute discriminates on the basis of content raises equal protection grounds for invalidation. *See, e.g.*, *Police Dep=t v. Mosley*, 408 U.S. 92, 94 (1972).

viewpoint of the proposed expression. The State=s careless deputization of private citizens permits content- and viewpoint-based discrimination. Thus, the statute is subject to strict scrutiny.

2. Content-based restrictions are presumptively unconstitutional

Content-based restrictions on leafletting, picketing, and oral protest, counseling, or education fail to meet the strict governing constitutional standards:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control . . . .
>
> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley, 408 U.S. at 95-96; *accord Carey*, 447 U.S. at 462-63.[26] The ban on oral protest, counseling or education is openly content-based. The lawfulness of a given utterance in the first instance depends on whether its content constitutes oral education, oral protest, or oral counseling.

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26. This Court concluded that the injunctions in *Madsen* and *Schenck* were not *content*-based. The difference between the present statute and those injunctions is that the injunctions were crafted, albeit ineptly, to remedy the continuing problems of persons adjudicated to have engaged in continuing misconduct. *Madsen*, 512 U.S. at 763; *Schenck*, 519 U.S. at 380.

This is raw censorship for which the interest in access to health care facilities cannot be sufficient. Under this Court=s decisions striking down content-discriminatory statutes, *see*, *e.g.*, *Carey*, *Boos*, and *Reno*, C.R.S. ' 18-9-122(3) is grossly unconstitutional because it discriminates on the basis of the content of speech in public places.

3. No conceivable government interest, let alone one that is compelling, justifies Colorado=s decision to secure access to health care facilities by suppressing freedom of expression in the traditional public forum.

The State=s ostensible interest in protecting access to health care facilities does not justify the raw censorship which C.R.S. ' 18-9-122(3) imposes.

The Colorado General Assembly enacted C.R.S. ' 18-9-122 purportedly to balance Athe exercise of a person=s right to protest or counsel against certain medical procedures . . . against another person=s right to obtain medical counseling and treatment in unobstructed manner,@ C.R.S. ' 18-9-122(1). The Colorado Supreme Court also identified the right to privacy of persons seeking treatment as the purpose of C.R.S. ' 18-9-122(3). *See* Pet. App. 14a-16a. These same purposes animated the floating bubble zone at issue in *Schenck* and the no approach zone in *Madsen*.[27] Despite comparable interests, described in *Schenck* as significant, *id*. at 376, this Court struck down the floating bubble zone, *Schenck*, 519 U.S. at 377, just as it had done with the Aconsent to speak@ provision of the *Madsen* injunction, 512 U.S. at 773-74. No other result can be justified here.

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27. *See Schenck*, 519 U.S. at 360-65, 367, 369, 376; *Madsen*, 512 U.S. at 757-59, 767-68.

Moreover, the interest Colorado asserts and that the court below found sufficient in Abalancing@ away free speech rights is not *legitimate* for purposes of constitutional review:

$ the interest is *not* unrelated to suppressing expression, *see United States v. O=Brien*, 391 U.S. 267, 377 (1968), but rather targets speech directly and deliberately.

$ the right to privacy B which only protects against government action B is not jeopardized by the expressive activities of private citizens communicating to passersby in the traditional public forum, *see Bray v. Alexandria Women=s Health Clinic*, 506 U.S. 263, 278 (1993);[28] *cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-12 (1975) (concluding that privacy rights of passersby did not justify ordinance restricting *all* public theatrical displays of motion pictures containing scenes with nudity).

$ the suppression of even peaceful speech in a public forum cannot qualify as a legitimate interest. *Grace*, 461 U.S. at 182.

Hence, no relevant, valid interest supports the Colorado statute.[29]

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28. As this Court explained in *Schenck*, 519 U.S. at 383:

> A[w]e doubt that the District Court=s reason for including that provisionB>to protect the right of the people approaching and entering the facilities to be left alone=Baccurately reflects our First Amendment jurisprudence in this area. Madsen sustained an injunction designed to secure physical access to the clinic, but not on the basis of any generalized right >to be left alone= on a public street or sidewalk.@

29. Freedom of speech cannot be made subject to prevailing notions of taste or to preferences for particular forms of expression: Aso long as the means are peaceful, the communication need not meet standards of acceptability.@ *Organization for a Better Austin*, 402 U.S. at 419. Just as Colorado is without power to Aprotect@ private citizens from Aoffensive@ or controversial speech, so too is it without power to prohibit speech to avoid disharmony.

4. Even if securing access to health care facilities constitutes a compelling government interest, C.R.S. ' 18-9-122(3) is not narrowly drawn to serve that interest.

Even short of a total ban, regulation of speech activity in public fora is Asubject to the highest scrutiny.@ *ISKCON v. Lee*, 505 U.S. 672, 678 (1992); *accord United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality). A restriction on leafletting, picketing, or meaningful oral expression is therefore unconstitutional unless it can satisfy the Astringent standards@ governing Arestrictions on speech in traditional public fora.@ *Frisby*, 487 U.S. at 481. In particular, a Acontent-based exclusion,@ is impermissible unless the government can Ashow that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end.@ *Id.* (internal quotation marks and citation omitted). Despite the assertion that C.R.S. ' 18-9-122(3) is necessary to ensure access to health care facilities, the statute is not confined to obstructive conduct, or to expressive activities that are unprotected and obstructive. *Cf. Madsen*, 512 U.S. at 774 (A[t]he >consent= requirement . . . burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic@); *Schenck*, 519 U.S. at 377 (Abecause this broad prohibition on

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Cf. Boos, 485 U.S. at 321 (A[t]he emotive impact of speech on its audience is not a >secondary effect=@).

speech ›floats,= it cannot be sustained on this record@).

The use of a consent to speak provision demonstrates that the statute is not narrowly drawn to any valid state interest, *see supra* ' IV(A). The statute rests the ultimate decision on consent, and the consequent determination of whether speech is criminal or free, on the judgment of the prospective listener. Unfettered discretion is not evidence that a statute has been drawn narrowly. The prospective listener will likely decide whether speech may be uttered for reasons far removed from the government=s purportedly compelling interest. Instead, decisions will turn, unsurprisingly, on whether the speech is *welcome* or *unwelcome*. Such a regime cannot be squared with the Constitution.

E. C.R.S. ' 18-9-122(3) does not Survive Scrutiny as a Regulation of Time, Place and Manner of Speech.

Even if time, place and manner analysis provides the appropriate standard, C.R.S. ' 18-9-122(3) cannot qualify as a reasonable time, place and manner regulation.

1. The ban on all unconsented oral protest, counsel and education, on all unconsented sign displays, and on all unconsented leafletting is not reasonable.

In *Madsen*, 512 U.S. at 773-74, this Court struck down an injunctive provision that barred the *defendants* in that case from approaching *persons seeking access to the facility* to speak with them without first receiving from such persons an indication of their Adesire to communicate.@ In that case, the trial court had confronted demonstrators whose persistent conduct obstructed access to an abortion clinic. *Id*. at 758-59. Nonetheless, this Court concluded that the Aconsent to speak provision@ was untenable because Ait is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of

the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.@ *Id*.

Here, Colorado has identified obstructing access to health care facilities as the evil it sought to avert by enactment of C.R.S. ' 18-9-122(3). *See* Pet. App. 64a-65a. But C.R.S. ' 18-9-122(3) does not restrict obstructive conduct. Nor is the statute limited to expression accompanied by obstructive conduct. Nor is it drawn only to limit fighting words or threats, which are independently proscribable. *Cf. Madsen*, 512 U.S. at 774. Colorado has set out a standard for engaging in protected expressive activities that requires petitioners to assume a death-mask of passivity.[30] The judgment of the Colorado General

30. The Colorado Supreme Court construed C.R.S. ' 18-9-122(3) to be inapplicable to leafletting, sign displays, and oral communications so long

Assembly, embodied in C.R.S. ' 18-9-122(3), was simply unreasonable and untenable.

Indeed, the challenged provision is *counter productive* to its supposed justification. By imposing a consent-to-communicate requirement, Colorado converts every meaningful communication into, at first, a solicitation of consent. As a consequence, pristine expression normally considered undisruptive and nonthreatening is converted into a transaction that disrupts passage. *Cf. Kokinda*, 497 U.S. at 734 (A[a]s residents of metropolitan areas know from daily experience confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with

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as Apetitioners stand still while inside the floating buffer zone.@ Pet. App. 21a. But if petitioners communicate without having consent and their movement within eight feet of another constitutes a *knowing* approach while within the multitudinous floating zones created under the statute, they risk arrest and prosecution under the statute. Such burdening of communication makes a parody of free speech.

a person giving out information@).

2. The ban on freedom of expression is not narrowly tailored.

Other than a ban on Aall First Amendment activities,@[31] it is difficult to imagine a law less narrowly tailored than C.R.S. ' 18-9-122(3). The court below erred in concluding otherwise. *See supra* ' IV(A).

31. *Board of Airport Comm=rs*, 482 U.S. at 570 (regulation prohibiting all AFirst Amendment@ activities in airport terminal overbroad).

First, C.R.S. ' 18-9-122(3) restricts speech, not conduct. The Colorado Supreme Court concluded that the General Assembly adopted C.R.S.' 18-9-122(3) out of concern for public safety issues regarding the conduct of some protesters at various health care clinics that was directed at both patients and staff. Pet. App. 14a-15a. C.R.S. ' 18-9-122(3), however, prohibits only constitutionally significant speech and expression; that provision leaves unfettered obstructive and threatening conduct. *See* C.R.S. ' 18-9-122(3) (Apassing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling@). Thus, although the court below concluded that the general assembly acted to prohibit *obstructive conduct*, the statute imposes direct restrictions only on protected speech. C.R.S. ' 18-9-122(3) does Anot aim specifically at evils within the allowable area of [Colorado=s] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech or of the press.@ *Thornhill*, 310 U.S. at 97. Because the statute restricts expression rather than obstruction, it is not narrowly tailored.[32] *Supra* ' IV(A). AThe >consent= requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to insure access to the clinic.@ *Madsen*, 512 U.S. at 774.

Second, the requirement of obtaining consent to speak is not

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32. The restriction on leafletting adequately evidences the fact that C.R.S. ' 18-9-122(3) is not narrowly tailored. Time and again, this Court has warned against even time, place and manner restrictions on that activity. *See, e.g., Ward*, 491 U.S. at 799 n.7 (A[a] ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate@).

limited to health care patients and their families, staff, and those with business at health care facilities. Petitioners= expressive activities are not limited to one-on-one communications. Rather, their leafletting, sign displays, and oral communications are directed to all passersby as well as to women seeking abortions and their companions. JA 49-51, && 7, 10, 12-13; JA 53, && 7-9; JA 55, && 6-8. Respondents may argue that petitioners are not required to seek consent from everyone in their vicinity in order to speak, asserting that the only persons from whom consent must be obtained are the individual targets of petitioners= expressive activity. Under that construct, however, petitioners, because they seek to communicate generally to the public, *see* JA 49-51, && 7, 10, 12-13; JA 53, && 7-9; JA 55, && 6-8, are required to obtain consent from every passerby or bystander before coming within eight feet of them because every one of them is the target of petitioners= communications. Neither *Madsen*=s Aconsent to speak@ provision nor *Schenck*=s Afloating bubble zone@ were so overbroad, yet both were held to violate the Constitution.

The injunction in *Schenck* only applied in the vicinity of abortion facilities in the Western District of New York. *Schenck*, 519 U.S. at 367. C.R.S. ' 18-9-122(3) is not so limited. The statute creates floating speech free zones outside every hospital, every doctor=s office (whether general practitioners or specialists), every ambulatory surgical center, every public health facility, every urgent care business, every

diagnostic services or laboratory services facility, in Colorado.[33]

33. Morever, unlike *Schenck*, 519 U.S. at 360-65, where an adjudicated record of misconduct by identified parties led to imposition of injunctive restrictions in places for which demonstrable problems of access existed, C.R.S. ' 18-9-122(3) restricts petitioners- (and everyone else-s) rights in the absence of any record evidence of misconduct by them at all.

Nor is the Statute=s scope limited to the foregoing matters. The *Schenck* injunction offered its limited protection only to those seeking to use or provide the services of the protected medical facilities. *Schenck*, 519 U.S. at 367 n.3.[34] Colorado=s statute creates speech-free, floating bubbles around every human being within 100 feet of the entrance to any health care facility in Colorado. These zones surround tradesmen walking to local lunch counters, simply because of the happenstance that their routes pass near the doorway to dentists= offices or county health departments. These zones surround out-of-state tourists walking to the United States Mint in Denver, simply because they parked in a garage that exits onto a sidewalk running adjacent to a health care facility. These zones surround vehicles driving nearby when petitioners or others walk along a sidewalk at curbside in order to display their signs to those driving past. The list of those covered by this statute C because it is disconnected from the provision of or need for health care services C is as long as the list of those who live in, or visit, Colorado.

Moreover, if C.R.S. ' 18-9-122(3) is intended to secure access to health care facilities, imposing on speakers a requirement that they obtain consent from all persons who are in the vicinity of health care facilities is certainly not narrowly tailored. For example, in *Schenck*, the floating bubble zone only enveloped and protected those persons entering or leaving the medical facilities. 519 U.S. at 367 n.3. Unlike the *Schenck* injunction, floating speech-free zones engulf every person who

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34. Similarly, the injunctive floating bubble zone in *Madsen* was limited in its protective scope to those seeking access to the Aware Women=s Health Center in Melbourne, Florida. *See Madsen*, 512 U.S. at 773.

passes by any health care facility in the State within 100 feet of its entrance doors. These zones absorb persons whose presence is not a function of health care needs or the provision of health care services. Rather, because the challenged statute is indiscriminate, its speech-free zones envelope everyone who, by happenstance of geography, employment or otherwise, passes near health care facilities without any intent to use them.

Third, another provision of the same statute demonstrates that C.R.S. ' 18-9-122(3) is not narrowly tailored to secure access to health care facilities. C.R.S. ' 18-9-122(3) is but one provision of the legislation enacted by the General Assembly. The General Assembly also enacted C.R.S. ' 18-9-122(2): A[a] person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person=s entry to or exit from a health care facility.@ Unlike C.R.S. ' 18-9-122(3), the offense described by C.R.S. ' 18-9-122(2) actually addresses B and seeks to ensure B access to health care facilities. Given the direct ban on conduct that Aobstructs, detains, hinders, impedes, or blocks another person=s entry to or exit from a health care facility,@ the superfluity of C.R.S. ' 18-9-122(3) as a means of securing access to health care facilities is patent. Thus, the statute is demonstrably not narrowly drawn because other means already protect the interest the State ostensibly seeks to protect.

3.C.R.S. ' 18-9-122(3) does not leave open ample alternative channels of communication.

No alternative channel of communication exists allowing petitioners effectively to express their messages to, and associate with, those members of the public who are seeking access to the very health care facilities whose operations concern petitioners. The Colorado Court of Appeals clearly

understood one implication of the statute, namely that *all handbilling* within one hundred feet of the entrance doors to every Colorado health care facility would be banned under the statute. Pet. App. 56a-57a (A[f]inally, with reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute@). Nonetheless, that court upheld the statute=s constitutionality and, in its turn, the Colorado Supreme Court affirmed that judgment. Pet. App. 3a.

The judgment affirmed below had concluded that the statute left open Aample alternative channels of communication other than leafletting,@ including Aspeech for those without hearing disabilities, placards for those with hearing deficiencies, and other visual items for the sighted patients and staff.@ Pet. App. 57a. This conclusion is wrong, and the cavalier analysis that led to it is unprecedented. In essence, the court below justifies the substantial burdens of the statute by telling picketers to use their voices, speakers to use signs, leafletters to call out from a distance, and everyone to relinquish that most sacred archetype of free speech and free press, the hand-to-hand distribution of free literature.

Whatever the meaning of Aample alternative channels of communication,@ the constitutional principle is well-established: Aas we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.@ *Schneider v. State*, 308 U.S. 147, 160-61 (1939).

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55-56 (1994), this

Court rejected a ban on signs displayed on one=s own property. The City defended its ordinance on the basis that Aresidents remain[ed] free to convey their desired messages by other means, such as hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches and neighborhood or community meetings.@ 512 U.S. at 56. This Court was not Apersuaded that adequate substitutes exist for the important medium of speech that Ladue had closed off.@ *Id*.

Here, Aadequate substitutes@ do not exist for the oral communications, sign displays, and hand-to-hand distribution of leaflets that the State of Colorado has closed off. *Cf. Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (leafletting, sound trucks, demonstrations, and the like, are less likely to reach intended audience and are less effective than the real estate AFor Sale@ signs prohibited under the challenged ordinance); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (same). The appeals court=s Aample alternative channels@ conclusion flies in the face of the constitutional rights of free expression: AThat [a regulation] leave open >more burdensome= avenues of communication, does not relieve its burden on First Amendment expression.@ *Meyer v. Grant*, 486 U.S. 414, 424 (1988). This is so because, A[t]he First Amendment protects [speakers=] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.@ *Id*.

The courts below erred in concluding that the statute preserved ample alternative channels of communication.

F. C.R.S. ' 18-9-122(3) Is Unconstitutionally Vague.

C.R.S. ' 18-9-122(3) is unconstitutional because it employs terms that are so Avague that men of common intelligence must

necessarily guess at [their] meaning and differ as to [their] application.@ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). C.R.S. ' 18-9-122(3) does not Agive the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.@ *Grayned*, 408 U.S. at 108. While all laws must be reasonably clear, laws which regulate or restrict free speech, such as ' 18-9-122(3), must satisfy Aa more stringent vagueness test,@ *Village of Hoffman Estates*, 455 U.S. at 499 (footnote omitted).

Moreover, because of this statute=s ambiguous breadth, the concern arises that violations will be defined by subjective, varying, ad hoc judgments. That concern is exacerbated here, where private citizens are empowered to license speech. *Grayned*, 408 U.S. at 108-09. APrecision of regulation must be the touchstone in an area so closely touching our most precious freedoms.@ *Riley*, 487 U.S. at 801 (internal quotation marks and citations omitted). This Court has counseled:

> [v]ague laws offend several important values. First, . . . [v]ague laws may trap the innocent by not providing fair warning. Second, . . . [a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. Third, . . . where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

Grayned, 408 U.S. at 108-09 (footnotes and editing marks omitted). *Accord Village of Hoffman Estates*, 455 U.S. at 498.

Applying C.R.S. ' 18-9-122(3) to peaceful sign displays, to leafletting, or to oral communications, on a public sidewalk

raises a host of thorny interpretive questions. No arbitrary, post hoc response by the State can remedy the very practical but hopelessly intractable ambiguities that result from the decision to subject the right to freedom of speech and of the press to the undefined duty to obtain consent before speaking in public places and in public ways.[35]

35. At this juncture, the vagueness of C.R.S. ' 18-9-122(3) cannot be cured by deferring to the Colorado courts. Having had the opportunity to clarify the statute, the Colorado Court of Appeals refused to do so. Pet. App. 44a. The Colorado Supreme Court declined to consider the vagueness issue. Pet. App. 46a.

C.R.S. ' 18-9-122(3) forbids only such oral utterances as constitute Aprotest,@ Acounseling,@ or Aeducation.@ But what counts as Aprotest@?[36] As Aeducation@? As Acounseling@? The expression, ADown with Dr. Smith,@ for example, is presumably a protest. But what about APray for Dr. Smith@ or APlease change your mind, Miss Jones@? Does the statement, AWe can help you find a naturopathic treatment for your illness,@ count as Acounseling@? Does a warning about the side effects or aftermath of abortion constitute Aeducation@? What about alerting the abortion-bound woman to the possible link between abortion and increased risk of breast cancer?[37] Does AMay I help you?@ or ACan I help you keep your baby?@ count as Acounseling@? No ready answers appear to these highly practical questions petitioners must face on pain of criminal liability. The meanings of Aprotest,@ Acounseling,@ and Aeducation@ are Aso vague that men of common intelligence must necessarily guess at [their] meaning[s] and differ as to [their] application[s],@ *Connally*, 269 U.S. at 391; hence, a

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36. Petitioners argued below that the term Aprotest@ indicates that the *viewpoint* expressed will determine the lawfulness of the speech, because the usual meaning of that term includes only speech in opposition to something. The Colorado Court of Appeals held that Aprotest@ in the statute includes all speech about a medical procedure, not only speech in opposition to something. Pet. App. 44a. While that construction, implausible as it is, cured the statute of *one* of the viewpoint-based defects its suffers, it also significantly expands the scope of an already overbroad statute.

37. *Cf.* Kindley, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595; Loose, *Antiabortion Message Gets Free Ride on Metro System; Ads Linking Procedure, Breast Cancer Disputed*, Washington Post, Jan. 22, 1996, at A1.

restriction based on such terms is unconstitutional. *Grayned*, 408 U.S. at 108-09. Petitioners are forced to proceed at their own peril B or to censor their speech out of fear of prosecution. The Constitution forbids such government-imposed guessing games. *Grayned*, 408 U.S. at 108-09.

And what of the statutory requirement of Aconsent[]@? The statute restricts protected expression within eight feet of another person unless that other person Aconsents.@ While it may be clear to the *listener* whether he or she consents to the speech, it is often far from clear to the *speaker*. Is the apparent acquiescence of the auditor or recipient sufficient? A nod or a shrug? An audible grunt or groan? An obvious pause in the listener=s pace? If the sullen boyfriend of an abortion-bound woman tells one of the petitioners to shut up, does that command operate as a denial of consent for all covered expression? For such expression directly targeting the father of the soon-to-be aborted baby? The abortion-bound woman? If a loitering youth flashes a rude hand gesture, will picketers be criminally liable for failing to hide their signs from public view as they walk past the youth?

Moreover, although the statute restricts Aknowingly approaching@ others, the statute does not indicate whether approaches are measured from the body or from the limbs or from personal property in the physical possession of the speaker, such as signs, leaflets, or pamphlets. Will the stretching outward of an arm constitute Aapproaching@? Will the tendency of an orator to rock forward on the balls of his feet as he speaks transform otherwise protected expression into a crime? The court below was satisfied to observe that persons seeking to exercise fundamental rights of expression could do so if they Astand still while inside the floating buffer zone,@ Pet.

App. 21a. But this touches only the tip of the vagueness iceberg. The statute does not clarify in a constitutionally sufficient manner whether the motion of a hand, intentionally extended toward another person while the pamphleteer *stands* still, violates the statute.

> A[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.@ *Smith v. California*, 361 U.S. 147, 149 (1959). This Court has reiterated this more stringent scrutiny of vague laws that impinge on first amendment rights. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (Ageneral test of vagueness applies with particular force in review of laws dealing with speech@). Stringent scrutiny, together with specificity in legislation, preclude the chill on free speech that results from vague laws:
>
> > [t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Button, 371 U.S. at 433 (citations omitted). C.R.S. ' 18-9-122(3) fails to establish a definite standard of conduct; thus, it violates due process because Aeveryone is entitled to know what a statute requires or forbids.@ *Hynes*, 425 U.S. at 620.

C.R.S. ' 18-9-122(3) is vague in yet another respect. The statute leaves enforcement too much to the unfettered discretion of private citizens deputized by Colorado to enforce the law: Alaws must provide explicit standards for those who apply

them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . .@ *Grayned*, 408 U.S. at 108-09. Just as Cincinnati could not constitutionally regulate conduct Athrough the enactment and enforcement of an ordinance whose violation may entirely depend on whether or not a policeman is annoyed[,]@ *Coates*, 402 U.S. at 614, Colorado is barred from elevating those personal predilections to a constitutional stature greater than the free speech right itself.

The statute provides no objective guidelines for permitting sign displays, leafletting, or the utterance of educational, counseling, or protest speech. Auditors may decide, from their own values, whether a person=s constitutionally protected expression will be permitted. The right to free speech cannot depend on the good will or eccentricities of those enforcing the law. Such was the case in *Coates*, 412 U.S. at 615-16, where this Court noted that a statute that prohibits Aannoying conduct@ is an open and Aobvious invitation to discriminatory enforcement.@ Subjective application of C.R.S. ' 18-9-122(3) creates a real danger that citizens will be Achilled@ in the exercise of their rights of free speech, press and assembly. This is intolerable. Not only those who protest abortion will be silenced: Athe free dissemination of ideas [will be] the loser.@ *Smith*, 361 U.S. at 149.

CONCLUSION

C.R.S. ' 18-9-122(3) preconditions freedom of expression on the consent of passersby. It directly restricts constitutional rights. While purporting to serve an interest in securing access to health care facilities, it does not prohibit obstructive conduct at all. Instead, it suppresses freedom, without a close fit between expressive activities and the asserted interest in ensuring access to health care facilities.

The judgment below should be reversed.

Respectfully submitted,

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