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

REPLY BRIEF FOR PETITIONERS

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202)337-2273

Attorneys for Petitioners

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THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE

I. Respondents= Discussion of Unsworn Statements in the Legislative Record is Irrelevant to the Statute at Issue.

Respondents and their amici expansively discuss the unsworn statements in the legislative record. *See* Respondents= Brief (AResp. Br.@) 1-4; Brief Amicus Curiae of the United States (AU.S. Amicus Br.@) 3-4; Brief Amici Curiae of the American College of Obstetricians and Gynecologists *et al*. (AACOG Amici Br.@) 3-6. This discussion is irrelevant to a proper analysis of C.R.S. ' 18-9-122(3) (hereinafter, Athe statute@).[1]

1. Respondents= discussion is not a *legislative* finding. Principally, it is a recitation of unsworn statements elicited during hearings on the bill that included the challenged statute. ADeference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.@ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (citation omitted). *A fortiori*, this Court is not limited by deference to Respondents= recitation.

Two points bear emphasis. First, nothing in Respondents= discussion implicates Petitioners (or the vast majority of Coloradans) whose constitutional rights of expression are nonetheless chilled by the statute. Respondents dredge up examples of physical abuse, grabbing, pushing, shoving, punching, crowding, or blocking access. Petitioners engaged in none of these activities and claim no right to do so.[2] *See* Pet. App. 10a n.7 (Colorado Supreme Court assumes Apetitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct@).

Second, to the extent Respondents= invocation of violent misconduct has any relevance to this case, it is only to reinforce the statute=s lack of narrow tailoring. Respondents and some who offered unsworn statements during legislative hearings preceding adoption of the statute emphasized the problem of threatening conduct. The statute at issue here, however, criminalizes protected speech, not such conduct. Indeed, the statute does not mention, let alone target or ban, physical abuse, grabbing, pushing, shoving, punching, crowding, or blocking access.

II. Respondents and Their Amici Have Misstated the Holdings of this Court.

At the outset, it is necessary to correct various misstatements made concerning this Court=s precedents.

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2. Because Petitioners do not contest Colorado=s power to enact appropriate public health and safety legislation, there is no need to pause over the arguments offered by the amici States in the Brief Amici Curiae of the State of New York *et al.* (ANew York Amici Br.@). The power to enact appropriate public health and safety legislation does not shelter Colorado=s decision to target constitutionally protected expression directly. *See, e.g.*, *Schneider v. State*, 308 U.S. 147, 162 (1939).

Respondents cite *United States v. Grace*, 461 U.S. 171 (1983), for the proposition that this Court may interpret the statute to Aeliminate any possible constitutional question.@ Resp. Br. 22. Respondents show a fundamental misunderstanding of federalism. *Grace* is inapposite to the contended point. There, this Court authoritatively construed a *federal* statute, which it may do. Here, Respondents seek to have this Court authoritatively construe a *state* statute in a way that the *state* courts have declined to do. Even so, in *Grace*, this Court held that the statute, even as construed, was not narrowly tailored. 461 U.S. at 182.

Respondents cite *Rowan v. U.S. Post Office Dep=t.*, 397 U.S. 728, 737 (1970), for the proposition that Colorado may grant to private citizens the power to deny to others the right to communicate in public. Resp. Br. 23. *Rowan* does not stand for that proposition. In *Rowan*, this Court upheld a postal regulation enforcing the right of individuals to prevent the mailing of provocative materials to their homes. *See* 397 U.S. at 730. Thus, *Rowan* stands for the different, and quite limited, proposition that the occupants of a private home are the best judges of whether a written communication received *into the home* is an impermissible invasion. *Rowan* does not authorize Colorado to prohibit protected expressive activities in traditional public fora.[3]

Respondents rely on *Burson v. Freeman*, 504 U.S. 191 (1992), to justify Colorado=s decision to use a content-

3. Similarly, *Breard v. City of Alexandria*, 341 U.S. 622 (1951), does not support Respondents= position. Resp. Br. 23. *Breard* addressed a restriction only on commercial solicitations directed to homes, not to the traditional public fora where the challenged statute regulates speech.

discriminatory statute that targets only constitutionally protected speech. Reliance on *Burson* is misplaced. *Burson* addressed a legislative response to the unique problem of election fraud and corruption that restricted speech only on a single topic, only on election day. Under the electioneering ban, *any topic*, except elections, could be discussed. Here, by contrast, the statute restricts the speech of every person, every day, near every health care facility in Colorado, unless the listener consents. Contrasting this statute with *Burson* only underscores how content and viewpoint discriminatory the statute is in practice. If the Tennessee legislature had adopted the Colorado model, Republican voters could use criminal sanctions to suppress unwelcome political speech from Democrats, and vice versa.

Respondents invoke *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-85 (1979). Resp. Br. 10. *Baptist Hospital*, which was not a First Amendment case, upheld the NLRB=s determination that a hospital=s ban on solicitation by employees inside the hospital, in the cafeteria, gift shop, or first floor lobbies, *was not justified* by the hospital=s invocation of patient care needs, 442 U.S. at 786. *A fortiori*, the health care needs of patients provide even less justification for suppressing speech here, because the statute burdens constitutionally protected expression on public sidewalks, streets, and ways *outside* health care facilities.[4]

Finally, the United States argues that the zones struck down

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4. For the same reasons, Respondents= invocation of *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring), is incorrect. There, this Court overturned a prohibition on leafletting and solicitation *inside* Beth Israel Hospital=s cafeteria and coffee shop.

by this Court in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), encompassed passersby as well as those seeking to use or provide the services of protected clinics. *See* U.S. Amicus Brief 11. The explicit terms of the injunction in *Schenck*, 519 U.S. at 367 n.3, however, show that the invalidated zones only protected persons seeking access to the facilities.

III. Respondents and Their Amici Have Misstated the Operation of the Statute.

Only C.R.S. ' 18-9-122(3) is at issue here.[5] Nonetheless, Respondents have misstated the purpose and scope of the statute that is the subject of Petitioners= challenge. In fact, Respondents spend much of their brief defending a statute that the Colorado legislature did not pass.

From Respondents= brief, one would assume that the challenged statute:

- prohibits only Aabusive conduct,@[6] Aobstructive and uncontrolled demonstrations outside health care facilities,@[7]

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5. Other subsections of C.R.S. ' 18-9-122 criminalize conduct that Aobstructs, detains, hinders, impedes, or blocks another person=s entry to or exit from a health care facility;@ grant to certain cities and counties the power to adopt additional regulations to controlling access to health care facilities; and, authorize the imposition of civil liability for violations of the statute. *See* Pet. App. 65a. Of course, C.R.S. ' 18-9-122(2) remains relevant because it is a direct response to unlawful conduct. The existence of the speech-restrictive ' 18-9-122(3), on top of ' 18-9-122(2)=s limitations on conduct, reinforces the absence of narrow tailoring.

6. Resp. Br. 3; *id*. at 1.

7. Resp. Br. 1.

Anose-to-nose harangues,@[8] and Aunconsented-to advocacy@ that is Acoercive, physically intimidating and inescapable@;[9] and

$ suppresses only Aphysical altercations between demonstrators and family members of patients, triggered by demonstrators= confrontational, in-your-face tactics.@[10]

Respondents characterize the statute as mere legislative fine-tuning of Aexisting laws against assault.@[11] The United States also asserts that the conduct prohibited by the statute includes Acrowding, harassing, threatening, and coercive conduct in close proximity to patients.@ U.S. Amicus Br. 19.

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8. Resp. Br. 8; *id.* at 7, 23.

9. Resp. Br. 30; *id.* at 1, 26.

10. Resp. Br. 2; *id.* at 8, 13.

11. Resp. Br. 25.

The statute, however, does nothing to regulate crowding and threatening, and coercive conduct close to patients. This statute regulates only protected expression, not conduct. The statute does not even mention, let alone limit its reach to, assault, punching, threatening, intimidation, obstruction, haranguing, or surrounding.[12] The statute targets Apassing a leaflet or handbill [], displaying a sign [], or engaging in oral protest, education or counseling. . . .@ Pet. App. 65a. It regulates approaches undertaken to communicate with others whether or not accompanied by misconduct.

Respondents= characterization of the class of persons protected by the statute is also wrong. Nothing in the statute limits its protection to communicative approaches to disabled persons, medical patients, medical personnel, or their families and companions. In fact, Respondents state that A[t]he statute applies to all persons within this medical entrance zone. . . .@ Resp. Br. 11.

Finally, the United States argues that the statute does not create floating speech-free zones Aaround persons who enter, leave or pass by a health care facility.@ U.S. Amicus Br. 11. The assertion flatly contradicts the description of the statute offered by the Colorado Supreme Court: A[t]he statute creates

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12. If the Colorado General Assembly had intended to restrict such unlawful conduct, it could have done so through the enactment of a statute targeting that conduct. The enactment of this statute, directly targeting protected speech, does not serve that intention.

a limited floating buffer zone. . . .@ Pet. App. 3a.

IV. The Statute Fails Constitutional Scrutiny.

Respondents do not dispute constitutionally significant conclusions about the activities affected by the statute and the nature of places where the statute operates. First, there is no dispute that the statute regulates constitutionally protected expression, *see* Pet. Br. at 16-17; J.A. 289-90 (Responses to Requests to Admit). Second, there is no dispute that the statute regulates speech in traditional public fora. *See* Pet. Br. 18; J.A. 290 (Responses to Requests to Admit). Where Respondents err is in applying the relevant scrutiny to the statute=s restrictions on protected expression in the traditional public forum.

A. The Statute is Overbroad.

The statute is hopelessly overbroad.[13] While Respondents invite this Court to focus its attention on threatening approaches to patients and staff, they ultimately concede that the statute applies to all persons within 100 feet of the entrances to health care facilities, Resp. Br. 11, and that the statute is not limited to any particular type of health care facilities, *id*. Now Respondents request that the statute be construed to prohibit A*all communications* in order to eliminate any constitutional question.@ Resp. Br. 22 (emphasis added). Accordingly, the statute regulates not just abortion protestors, but everyone who comes within the zone, even if only to distribute pizza coupons. Despite the broad reach of the statute to *all* meaningful expression, uttered near *every* health care

13. The statute=s overbreadth is aggravated by its vagueness, *see* Pet. Br. 45-50, and by Respondents= attempt to cure that vagueness by defining the key terms, Acounsel,@ Aeducation,@ and Aprotest,@ to include the universe of oral expression, *see* Resp. Br. 37.

facility in Colorado, requiring consent before approaching to speak to *any* person, whether a patient or a passerby, Respondents and the United States still contend that the statute is not overbroad. *See* Resp. Br. 35; U.S. Amicus Brief 35-36 n.3.[14] They are wrong.

14. The United States *asserts* that the statute is not overbroad but makes no independent, substantive argument to the point. *See* U.S. Br. 35-36 n.3.

In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), this Court described the overbreadth doctrine as including two different statutory defects. One defect is the consequence of legislative *overreaching* in pursuit of a core of regulable conduct. 467 U.S. at 964-65. The other category of defect, which is at issue here, is the problem of legislation that directly targets only constitutionally protected expression. 467 U.S. at 965-66.[15]

Respondents argue that an overbreadth challenge does not lie here because "Petitioners never identify a fundamentally mistaken premise for the statute." Resp. Br. 35. This is wrong as a matter of fact and law. First, as a matter of fact, the Colorado statute is based on a "fundamentally mistaken premise" — namely that Colorado may address the problem of criminal conduct by targeting constitutionally protected speech. Respondents' submission is also wrong as a matter of law. With or without a "fundamentally mistaken premise," Colorado cannot target only constitutionally protected expression.[16]

The statute's scope is broader than the zones at issue in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), and *Schenck*. Respondents acknowledge that the class of persons from whom a speaker must obtain consent is broadly drawn to include "all persons within this medical entrance zone." Resp. Br. 11. Nonetheless, Respondents claim that the statute's broad

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15. Even under a "substantial overbreadth" analysis, the statute fails scrutiny. *See Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574-75 (1987); Pet. Br. 22 n.14.

16. As in *City of Houston v. Hill*, 482 U.S. 451, 468 (1987), the statute "is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited." (Citation omitted).

categorization is Athe most effective, least intrusive means to accomplish the legislature=s public safety and health purposes.@ Resp. Br. 11. This Court=s precedents belie the claim.

In *Madsen*, 512 U.S. at 773, this Court struck down a consent-to-approach requirement, although it was limited to Madsen=s attempts to speak with persons seeking access to Aware Women=s Health Center. Similarly, *Schenck* struck down a floating bubble zone although the zone only enveloped those seeking to use or to provide the services of the protected facilities. *Schenck*, 519 U.S. at 367 n.3.

Respondents= effort to avoid content-discrimination exacerbates the overbreadth problem of the statute. As Respondents would have it, the statute is so all-encompassing that it regulates *all communications*. Resp. Br. 22. This attempt to rewrite the statute runs headlong into this Court=s analysis in *Madsen*:

> [I]t 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. Absent evidence that the protesters= conduct is independently proscribable (*i.e.*, Afighting words@ or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. . . . The >consent= requirement alone invalidates this provision: it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Madsen, 512 U.S. at 774 (citations and footnote omitted).

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

The statute imposes a prior restraint on protected expression by subjecting leafletting, sign displays, and oral protest, counsel and education, to the requirement of advance consent. *See* Pet. Br. 27-31. Respondents contend that conditioning the right to speak, to distribute leaflets, and to display signs on receipt of consent from private citizens does not result in a prior restraint on expression. The contention is wrong.

In fact, delegating authority to private persons to suppress protected speech, backed up by the criminal power of the state, aggravates the prior restraint problem. By authorizing private persons B unconstrained by any regulations or government guidance B to decide what speech can be uttered, Colorado *guarantees* the sort of arbitrariness in decision-making against which the prior restraint doctrine guards.

In common with every prior restraint this Court has ever considered, the statute brings to bear the law enforcement mechanism of the State on the failure to obtain prior approval for constitutionally protected speech. Under the statute, failure to obtain consent before communicating is a criminal offense. This Court has never declared that the prior restraint doctrine would be inapplicable in circumstances such as those presented by the statute.[17]

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17. Petitioners take note of the brief amici curiae of the State of New York *et al*. No State, other than Colorado, has ever enacted a law remotely similar to the statute. The amici States argue for legislative *carte blanche*, leaving little doubt about the consequences of a decision by this Court sustaining the statute. Worse, the amici States would justify the statute=s direct regulation of speech by discussing the law enforcement value of statutes that target *conduct*.

Respondents claim that the statute cannot be a prior restraint in light of *Madsen* and *Schenck.* As Respondents would have it, *Madsen* and *Schenck* void the prior restraint doctrine whenever alternative channels of communication exist. Resp. Br. 36. Respondents are wrong.

In the first place, nothing in *Madsen* and *Schenck* purported to address the validity of prior restraints outside the context of injunctions regulating *conduct*. In *Madsen*, this Court found the prior restraint doctrine inapplicable to an injunction restricting conduct and only imposing *incidental* restrictions on expression. 512 U.S. at 763 n.2. In *Schenck*, 519 U.S. at 374 n.6, this Court reaffirmed that holding. From these two footnotes, Respondents craft the demise of the prior restraint doctrine. There would be no substance remaining to the doctrine if it applied only in the rare case where no Aalternative channels@ of communication exist.[18]

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18. So, for example, the availability of another theater would have compelled a different conclusion in *Southeastern Promotions, Ltd. v.*

C. The Statute Unconstitutionally Discriminates Based on Content and Viewpoint of Expression.

Conrad, 420 U.S. 546 (1975). And, the availability of home delivery and mail service would have led to the conclusion that it was not a prior restraint to grant unbridled discretion to the Mayor in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

The statute is content-based.[19] It only applies to oral Acounsel,@ Aprotest,@ or Aeducation.@ A prosecution under the statute would not succeed without evidence that the utterance consisted of such Acounsel,@ Aprotest,@ or Aeducation.@ An examination of the content of the communication is inevitable. Otherwise, deciding whether an oral utterance had crossed the line would be impossible. For example, if one deliberately approaches another on a sidewalk and asks that person to pray with him, that simple question arguably[20] is not Acounsel,@ Aprotest,@ or Aeducation.@ The only *legal* difference between such an invitation to pray or a simple request for directions to a nearby landmark, which may not be covered by the terms of the statute, and a statement criticizing abortion, is the content of the utterance, even though they are indistinguishable under the Constitution.

To cure this problem (and to counteract the vagueness of the statute), Respondents urge this Court to erase the express terms Acounsel,@ Aprotest,@ or Aeducation,@ and substitute in their place

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19. Respondents hint that Petitioners waived the content discrimination issue. *See* Resp. Br. 6 n.6 (and accompanying text). The waiver allegation was fully discussed and debunked at the certiorari stage. *See* Reply to Brief in Opposition 4-6. Petitioners sought review in the Colorado Supreme Court on the content discrimination issue, *see* Reply to Brief in Opposition 5 n.4 (listing Petitioners= proposed issues), and the Colorado Supreme Court specifically denied review as to the content discrimination issue, *see* Pet. App. 59a.

20. Petitioners= uncertainty on this point highlights the statute=s unconstitutional vagueness. Perhaps Respondents would conclude that prayers or questions are covered by the statute, *see* Resp. Br. 22 (Astatute applies to all communication@). Of course, that exacerbates the statute=s overbreadth problem.

the term Acommunication.@ Resp. Br. 18-24, 37. Such an approach only compounds the statute=s *overbreadth*, and fails to cure its other content-based defects.[21]

The statute also discriminates on the basis of content and viewpoint because it allows the ultimate determination of whether speech is free or criminal to turn on whether an individual consents. Often, that decision will be based on the content or viewpoint of the speech. Nothing in the statute precludes decisions from being made on those grounds.

Respondents characterize the statute as accommodating the desire of medical patients, staff, and family to avoid unwelcome messages in close proximity. *See, e.g.*, Resp. Br. 8 (describing the statute as a restriction on Anose-to-nose harangues of an unwilling listener@). Of course, listeners are likely to reject communicative efforts precisely because they include unwelcome messages. Accordingly, A[t]he [statute] is justified *only* by reference to the content of speech.@ *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis in original; citation omitted). This conclusion reflects the fact that A[t]he emotive impact of speech on its audience is not a >secondary effect=@

21. This Court cannot do as Respondents request. It is beyond this Court=s power to bind Colorado courts to its construction of Colorado=s statute. *See, e.g., Spector Motor Service v. McLaughlin*, 323 U.S. 101, 104 (1944).

sufficient to justify a content-based restriction on protected speech. *Id*. The statute unconstitutionally subordinates the right to freedom of expression to a right to be free from speech that is unwelcome or annoying. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking ordinance because its Aviolation may entirely depend upon whether or not a policeman is annoyed@).

D. This Court Has Rejected Respondents= AHealth Care@ and ARight to be Left Alone@ Exceptions to the First Amendment.

1. Respondents= Ahealth care@ exception

This Court has rejected Respondents= proposed Ahealth care@ exception to the First Amendment. Resp. Br. 1-3; ACOG Amici Br. 6-11; Brief Amici Curiae of National Abortion and Reproductive Rights Action League 13-26. In *Madsen* and *Schenck*, this Court swept aside consent to approach and floating bubble zone provisions allegedly justified by the exact health care concerns proffered by Respondents. No different result is justified here.

The Ahealth care exception@ argument goes as follows: Controversial, unwelcome, and upsetting speech causes stress, even severe stress. Stress is bad for health, particularly for the health of those undergoing medical procedures or suffering from medical conditions. Therefore, controversial speech can be restricted.

Obviously, the argument proves too much; its success would open a Pandora=s Box of speech restrictions. A protest-free world would be Asafer@ in many ways. Pickets outside factories elevate stress for employees who cross the picket line and then, agitated because of their exposure to disapproving strikers, handle heavy machinery at grave risk to life and limb. Strikes

outside airport terminals impair the mental concentration of air traffic controllers and pilots, with potentially devastating consequences. Colorful signs distract passing drivers, causing accidents. Large assemblies risk riots or trampling, especially when the topic is a matter of passionate debate.

Furthermore, no logical or constitutional constraint justifies the conclusion that health concerns would be limited only to site-based protests. Being falsely portrayed in a widely distributed publication as a drunk in the pulpit and a partaker in illicit relations with his mother caused Reverend Jerry Falwell severe emotional distress. *Falwell v. Flynt*, 797 F.2d 1270, 1276-77 (4th Cir. 1986), *rev'd on other grounds sub nom. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Seeing her name in an article discussing a rape caused the victim to suffer significant emotional distress. *The Florida Star v. B.J.F.* 491 U.S. 524, 528 (1989). The written vitriol of editorialists, the damning summations of theater critics, and other contentious speech may aggravate heart conditions and nervous disorders in the targets of such caustic criticisms.

These considerations cannot mean that speech that disturbs others to the extent of jeopardizing health thereby loses constitutional protection. The framers of the First Amendment rejected the "health" of the straitjacket for the "hazardous freedom" guaranteed by the First Amendment. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969).

2. The Aright to be left alone@ exception

Respondents concede that the statute is not justified by reliance on the right to be left alone on public sidewalks. Resp. Br. 25. Instead, Respondents contend, the Colorado Supreme Court described the State=s Acompelling@ interest in preserving safe access to health care. *Id*. Respondents and the court below ignore, however, the fact that the statute does not regulate *conduct* that prevents access, nor does it even classify all approaches as obstructive; it only targets protected speech.

E. The Statute Does Not Survive Scrutiny as a Regulation of Time, Place and Manner of Speech.

Even if it were analyzed as a content-neutral enactment, the statute does not survive constitutional scrutiny. Pet. Br. 37-45. Chief among the statute=s defects are its broad scope and lack of tailoring. Indeed, Respondents urged this Court to give the statute an even broader reading. *See* Resp. Br. 22 (arguing for Aimplicit conclusion that the statute applies to all communication@).

Respondents have failed to show any clear fit between the stated purpose of the Colorado General Assembly in enacting C.R.S. ' 18-9-122 and the means adopted by the Assembly in the challenged subsection. C.R.S. ' 18-9-122(1) states that the purpose of the statute is preventing obstruction of access to health care facilities. The challenged statute, however, does not address or prohibit obstruction of access to health care facilities.

As Respondents construe it, the statute prohibits all approaches undertaken with the purpose to communicate. This Court rejected just such an unconfined requirement of consent to approach others in *Madsen*. There, this Court described the difficulty of Respondents= task: A[I]t 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 ensure access to the clinic.@ 512 U.S. at 774 (emphasis added).[22] Moreover, the reasonable time, place, and manner Astandard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government=s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.@ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

The statute is a broad regulation of speech in a traditional public forum, rather than a narrowly tailored response to obstructive conduct. Respondents reply that the statute Abarely affects traditional leafletting,@ Resp. Br. 34, an assertion quite contrary to the facts, the record, and the conclusions of the court below. The Colorado Supreme Court concluded that Aleafletting is deterred under the statute.@ Pet. App. 27a. *See also id*. at 56a-57a. In *Schenck*, this Court found a similar restriction on leafletting to impose a troubling burden on speech:

> The floating buffer zones prevent defendants . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech

22. Thus, even though the injunctive restriction in *Madsen* only affected approaches to those seeking the services of a clinic, this Court concluded that it burdened more speech than necessary. 512 U.S. at 774.

> that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

519 U.S. at 377.

To justify the broadly drawn regulation, Respondents assert an interest in preventing willful obstructions of access to health care facilities. Respondents point to the particular problems of crowding and harassing conduct. *See supra* at 5. The statute, however, applies to *all* speech, and not just speech accompanied by obstructive conduct or crowding. Respondents= conclusion that the statute is the archetype of narrow tailoring is, therefore, wrong.[23] This statute regulates Aexpression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.@ *Ward*, 491 U.S. at 799.

The statute does not target threatening conduct. Indeed, the statute permits one to approach another in a threatening manner if speech does not accompany the approach. Nor does the statute merely target unprotected expression, such as fighting words or threats that are independently proscribable and may interfere with access. *The only purpose that the statute appears*

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23. Respondents assert that statutes pose lesser risks of censorship or discrimination than injunctions. Resp. Br. 15. If so, it is true because injunctions, by their nature, allow the state to target specific actors. Just as true, however, and directly relevant here, is the countervailing principle that statutes pose greater risks of overbreadth and of chilling because statutes, by their nature, apply broadly to all citizens, not just malefactors.

to serve is to insulate others from opinions and views with which they disagree. This conclusion is consistent with the Colorado Supreme Court=s assertion that it was balancing the right to freedom of expression against the right of privacy. Pet. App. 13a-16a.

In the end, however, Respondents expressly disclaim any reliance on the right to be left alone on public sidewalks and streets, Resp. Br. 25.[24] This Court=s precedents leave Respondents with no choice. In *Schenck*, this Court seriously doubted that Athe right of the people approaching and entering the facilities to be left alone . . . accurately reflects our First Amendment jurisprudence in this area@ and expressly noted that *Madsen* Asustained 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.@ *See* 519 U.S. at 383 (internal quotation marks omitted).

CONCLUSION

For the reasons stated above and in Petitioners= opening brief, this Court should hold that Colorado Revised Statutes ' 18-9-122(3) is unconstitutional, the judgment below should be reversed, and the matter remanded with instructions to enter judgment for Petitioners.

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24. That concession leaves Respondents without any interest to justify this section of C.R.S. ' 18-9-122. Although Respondents invoke the interest in securing access to health care facilities to justify the challenged statute, that interest is fully served by C.R.S. ' 18-9-122(2).

Respectfully submitted,

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

December 30, 1999.