No. 98-____

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.

Petition for Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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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* Rule 29.6.

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

> The State of Colorado, Bill Owens, Governor; 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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DECISIONS BELOW

The decision of the trial court is unpublished. App. at 30a. The first decision of the Colorado Court of Appeals is published. *See Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995); App. at 38a. This Court's Order, granting the Petition in *Hill v. Colorado*, No. 95-1905, vacating the first decision of the Colorado Court of Appeals, and remanding for further consideration is published. *See Hill v. Colorado*, 519 U.S. 1145 (1997) (Mem.); App. at 47a, 48a. The decision of the Colorado Court of Appeals on remand from this Court is published. *See Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997); App. at 51a. The decision of the Colorado Supreme Court is published. *See Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999); App. at 1a.

JURISDICTION

The Colorado Supreme Court issued its opinion affirming the judgment of the Colorado Court of Appeals on February 16, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution amends. I and XIV § 1; Colorado Revised Statutes § 18-9-122.

STATEMENT OF THE CASE

The Colorado Supreme Court upheld the constitutionality of a statute making it a criminal offense to distribute literature, display picket signs, or orally protest, counsel or educate, in public places, under the circumstances contemplated in the

statute. The court did so despite the statute's direct ban on speech on public streets and sidewalks in Colorado.

C.R.S. § 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health care facility who, without first obtaining permission to do so and while within eight feet of another person, passes a leaflet to, displays a sign to, or directs oral protests, counseling or education to that other person. App. at 65a.

A. Statement of Material Facts

Leila Jeanne Hill, Audrey Himmelmann and Everitt Simpson are "sidewalk counselors" – they offer abortion-bound women alternatives to abortion.[1] They inform passersby on public sidewalks about abortion and abortion alternatives orally, by sign displays, and by leafleting.[2] They make cards, leaflets, and pamphlets,[3] and distribute them near businesses where abortions are performed.[4] They make posters about abortion to display in public.[5] Petitioners have counseled or protested in various places around Colorado.[6]

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1. R. 4, 112-14, 148-49, 151-53. References herein are made to the record transmitted from the Jefferson County District Court to the Colorado Court of Appeals. Those references are indicated as "R.__."

2. R. 4, 112-14, 148-49, 151-53.

3. R. 4, 112-14, 148-49, 151-53.

4. R. 4, 112-14, 148-49, 151-53.

5. R. 4, 112-14, 148-49, 151-53.

6. R. 113, 149, 151-52.

In 1993, the Colorado General Assembly enacted C.R.S. § 18-9-122(3).[7] The statute requires a speaker, whenever he is within 100 feet of the entrance door to a medical facility, to obtain consent from any other person before approaching within eight feet of that person to hand a leaflet, display a sign, or engage in oral education, counseling or protest. App. at 65a. Absent the consent of the audience, speaking, displaying signs, or leafleting are all misdemeanor criminal offenses, as are speaking, displaying signs, or leafleting when consent has been denied. App. at 65a.[8]

Before C.R.S. § 18-9-122(3) was enacted, Petitioners spoke against human abortion on public sidewalks and ways within 100 feet of the entrance doors to abortion facilities.[9] They advised women near abortion businesses about alternatives to abortion. They spoke without fear of censorship,[10] or prosecution.[11]

When C.R.S. § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Simpson completely discontinued his expressive activities within 100

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7. The text of the Act is set out in the Appendix to the Petition at 64a-65a.

8. Class 3 misdemeanors in Colorado are punishable by fines of up to one hundred fifty dollars, and imprisonment of up to seven months. C.R.S. § 18-1-106.

9. R. 4, 112-14, 148-49, 151-53.

10. R. 4, 112-14, 148-49, 151-53.

11. R. 4, 112-14, 148-49, 151-53.

feet of abortion facility entrances.[12] Hill and Himmelmann changed their activities to avoid prosecution.[13] These changes have made their efforts more risky, more difficult, and less effective. They have found it impossible, at times, to remain on the sidewalk, keep at least eight feet away from others and continue to speak, display signs or otherwise protest or counsel.[14]

B. Statement on Preservation Below of Federal Questions

The federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below. Petitioners sued in the District Court of Jefferson County, Colorado. Therein, Petitioners asserted that C.R.S. § 18-9-122(3) violated several federal constitutional rights. Petitioners alleged that C.R.S. § 18-9-122(3) violated their constitutional rights to freedom of speech, press, peaceable assembly, due process of law, and equal protection of the laws. *See* Verified Complaint ¶¶ 1, 5(b), 5(d), 56-64, 65-68, 69-73, 74-77, 78-79, *Hill v. Thomas*, No. 93CV1984 (Jefferson County District Court, Colo.).

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

The trial court granted summary judgment for the Respondents. App. at 36a. The trial court put the issues before it this way: "It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment.

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12. R. 153.

13. R. 114, 149.

14. R. 113, 149, 153.

The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution." App. at 31a. The trial court held, "[t]here is no question that the Plaintiff's conduct implicates First Amendment rights[,]" App. at 31a-32a, and that "[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*. (discussing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

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 "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." App. at 49a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech." *Id*. The court also found significant that "[a]ll persons demonstrating are to comply with the statute." *Id*.

The trial court found that C.R.S. § 18-9-122(3) was narrowly tailored because it "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy." App. at 50a. The court also held that C.R.S. § 18-9-122(3) left open ample alternative channels of communication because it only operates within one hundred feet of the entrances to medical facilities and within eight feet of another person. *Id*.

The trial court also held that C.R.S. § 18-9-122(3) is not unconstitutionally overbroad because the statute was not so "sweeping in its scope as to deter both protected and unprotected speech." App. at 34a. Although its terms prohibit

any person from "knowingly approach[ing] another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," the trial court held that "the statute does not prohibit speech." App. at 35a. The trial court also concluded that the statute was not unconstitutionally vague and that it did not impose a prior restraint on expression. App. at 35a-36a.

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

The Colorado Court of Appeals affirmed. App. at 39a. The appeals court stated, "[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 concluded that C.R.S. § 18-9-122(3) was content-neutral because it did "not address only the speech of anti-abortion protestors" and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant." App. at 42a.

The appeals court found that the statute was "narrowly tailored" and "reasonably necessary to serve a significant government interest" in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." App. at 43a. The appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "speech can continue at a distance of eight feet or more." *Id*.

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

45a. The appeals court did not answer Petitioners' arguments that C.R.S. § 18-9-122(3) created a viewpoint-based restriction on free speech via its restriction on "oral protest" and the requirement of consent and that the statute was unconstitutionally overbroad.

Petitioners sought rehearing by the Colorado Court of Appeals but the request for rehearing was denied. App. at 60a. The Colorado Supreme Court denied review. App. at 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 allowed the petition, vacated the judgment of the Colorado Court of Appeals, and remanded the case for further consideration in light of the *Schenck* decision. *See Hill v. Colorado*, 519 U.S. 1145 (1997); App. at 47a (order allowing writ); App. at 48a (order vacating judgment below and remanding).

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 trial court's judgment. App. at 52a. The appeals court decided that *Schenck* did not govern this case because *Schenck* involved an injunction whereas the instant case challenges a statute. App. at 55a. Instead, the appeals court applied the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Applying the *Ward* rationale here, we conclude that the statute meets constitutional muster." App. at 56a. Thus, the appeals court held, for the second time, that section 18-9-122(3) did not violate petitioners' First Amendment rights. App. at 57a.

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

Petitioners again sought review in the Colorado Supreme Court, which granted the petition. App. at 58a-59a.[15] The Colorado Supreme Court affirmed. App. at 2a, 29a.

The Colorado Supreme Court identified the state interest supporting C.R.S. § 18-9-122 as the "interest in preserving the health and safety of Colorado's citizens . . . as a means of assuring a citizen's access to medical 'counseling and treatment' at Colorado health care facilities." App. at 9a-10a. This interest was placed in opposition to the constitutional freedoms of speech, press, assembly as the Colorado Supreme Court subjected these expressive rights of the Petitioners to a balancing test. "Here, 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." App. at 14a (citations omitted). Ultimately, the Colorado Supreme Court concluded that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental

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15. The Colorado Supreme Court limited its review on certiorari to the following question:

> Whether the court of appeals erred in holding that section 18-9-122, 6 C.R.S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statute under *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

App. at 59a. The Colorado Supreme Court specifically denied review "AS TO ALL OTHER ISSUES." *Id.* (emphasis in original).

right, an individual's right to privacy . . . ." App. at 16a.

In the court's view, *Schenck v. Pro-Choice Network* was not dispositive because "*Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the Court" while "section 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 . . . ." App. at 16a. Instead, the Colorado Supreme Court decided that "the appropriate test to be applied in this case is found in *Ward v. Rock Against Racism,* 419 U.S. 781 (1989)." App. at 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. App. at 24a-29a. "In sum," the court concluded, the statute "represents 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.'" App. at 29a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The challenged statutory provision is functionally similar to the "consent to speak" provision struck down by this Court in *Madsen v. Women's Health Center, Inc.* 512 U.S. 743 (1994). Its operation is indistinguishable on any substantive basis from the zones, struck down in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which "floated" in the public forum. The decision below upholding the challenged

Colorado statute squarely conflicts with the decisions of this Court.

A. The Decision Below Conflicts with this Court's Decisions in *Schenck v. Pro-Choice Network of Western New York* and *Madsen v. Women's Health Center, Inc*.

The challenged statute creates speech-free zones that float in public forum properties and that burden would-be speakers with the duty of obtaining consent before communicating with the public. The court below concluded that such zones were constitutional. The judgment below clearly conflict with this Court's cases.

1. *The Floating Zones*

In *Schenck v. Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357 (1997), this Court struck down the portion of an injunction that created and enforced floating buffer zones near certain abortion businesses. *Id*. at 361. The floating zones were imposed as part of an injunction against anti-abortion activists who allegedly obstructed public passages, engaged in harassing conduct, and otherwise persistently disregarded New York criminal laws. *Id*. at 362-66.[16]

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16. In relevant part, the preliminary injunction provided:

"Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

"1. Enjoined and restrained in any manner or by any means from:

This Court explained the operation of the floating zones in *Schenck* as follows: "The floating buffer zones prevent defendants--except for two sidewalk counselors, while they are tolerated by the targeted individual--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." *Id*. at 377. This Court concluded that the imposition of these floating zones constituted a "broad prohibition, both because of the type of speech restricted and the nature of the location." The expressive activities affected by the injunction included "[l]eafleting and commenting on matters of public concern [which] are classic forms of speech that lie at the heart of the First Amendment . . . ." 519 U.S. at 377. The restrictions

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. . .

"(b) demonstrating . . . fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

"(c) . . . sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. . . ."

Id. at 376.

operated "in public areas" where speech "is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id*. (citation omitted).

Despite the "record of abusive conduct[,]" this Court concluded that, since the "broad speech prohibition 'float[ed]'" it was "unsustainable on th[e] record." *Id*. at 377.

Here, C.R.S. § 18-9-122(3) creates floating speech-free zones that restrict speech in the public forum. Yet, the Colorado Supreme Court upheld the constitutionality of just such zones.

2. *The Consent Requirement*

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down a substantially similar restriction on speech outside a Florida abortion business. The injunction in *Madsen* ordered protesters to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 512 U.S. at 773.

This Court decided that the restriction was overbroad: "it 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*. (emphasis in original). This Court held that, unless such a restriction is limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such a "provision cannot stand." *Id*.

C.R.S. § 18-9-122(3) is not limited to proscribable speech.

It restricts peaceful, nonthreatening "oral protest," "education," "counseling," sign displays and leafleting. The lower courts declined to construe the statute otherwise. C.R.S. § 18-9-122(3) does not target precisely proscribable evils; the statute restricts *all* attempts to communicate with *any* person in those public places within the scope of the statute. The statute does not regulate *only* contact between speakers and patients or employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100 feet of the entrance door to a medical facility, is given the power to restrict whether anyone else may speak, leaflet, or display signs. This Court's decision in *Madsen* is dispositive in invalidating such "consent to speak" requirements; the court below failed to obey the teaching of *Madsen*.

In *Madsen*, this Court reaffirmed "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" 512 U.S. at 774 (citation omitted). This Court declared: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

Another section of the Colorado statute at issue directly prohibits obstructive conduct. *See* App. at 65a; C.R.S. § 18-9-122(2) (section prohibiting "knowingly obstruct[ing], detain[ing], hinder[ing], imped[ing], or block[ing] another person's entry to or exit from a health care facility"). The section challenged by Petitioners prohibits only speech. Even though C.R.S. § 18-9-122(3) "burdens more speech than is necessary to prevent intimidation and to ensure access" to

Colorado medical facilities, the court below found no constitutional infirmity in it. The decision below directly conflicts with this Court's decision in *Madsen* rejecting the imposition of a "consent to speak" requirement.

3. *Overbreadth*

In *Madsen*, this Court struck down the injunctive "bubble zone" because it restricted "*all* uninvited approaches . . . regardless of how peaceful the contact may be," 512 U.S. at 774, and it "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. In a word, the consent provision was overbroad. The court below, however, concluded here that C.R.S. § 18-9-122(3) was not overbroad, despite the functional similarities between the injunctive zones in *Madsen* and the speech-restrictive zones created by C.R.S. § 18-9-122(3).

B. The Decision Below Conflicts with this Court's Decisions Regarding the Standard of Review for Content- and Viewpoint-Based Restrictions on Speech.

1. *Content-based restrictions on speech*

This Court has long held that content-based legislative restrictions on speech in traditional public fora are subject to the strictest scrutiny. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760-61 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-85 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-18 (1991); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Boos*

v. Barry, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Carey v. Brown*, 447 U.S. 455, 460-63 (1980). In those decisions and others, this Court has explained that enactments are content-based when they embody direct restrictions on the content of speech *or* when they are crafted to allow restrictions on speech to be levied because of audience reactions to speech. C.R.S. § 18-9-122(3) is just such a statute.

In accord with this Court's decisions, the appropriate standard of review to have been applied to C.R.S. § 18-9-122(3) was the strict scrutiny applied routinely in cases of content-based governmental regulations of speech. C.R.S. § 18-9-122(3) burdens certain classes of oral utterance. It restricts oral *protest*, oral *education*, and oral *counseling*, and leaves unaffected other oral utterances. Consequently, the question of whether consent will be required to speak depends first on the content of the contemplated communication. If the words do not constitute protest, education, or counseling, consent is not needed. C.R.S. § 18-9-122(3) clearly targets only speech and expressive conduct, and its restrictions are plainly hinged on the content of speech.

Moreover, the statute subjects speech in public places to a requirement of consent. The statute does not prohibit citizen-censors from withholding their consent on the basis of their disagreement with, or disapproval of, the content of expression. Thus, the challenged statute is also content-based in this respect.

Nonetheless, the court below rejected this Court's repeated instruction to subject such a restriction to strict scrutiny. Instead, the court below analyzed C.R.S. § 18-9-122(3) under the more lenient standard of review for *content-neutral* regulations of time, place, or manner of expression. App. at 6a-

7a.

The choice of standards by the lower courts directly conflicts with this Court's decisions.

2. *Viewpoint-based restrictions on speech*

This Court has held that viewpoint-based restrictions on expression are unconstitutional, even in nonpublic fora. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-94 (1993) (citing cases). C.R.S. § 18-9-122(3) limits the right to speak in public places by imposing a requirement of consent to speak. The statute, however, does not cabin the discretion of citizen-censors who may withhold consent to would-be speakers based on disagreement with the viewpoints expressed. Nonetheless, the Colorado Supreme Court affirmed the constitutionality of the challenged statute.

C. The Decision Below Conflicts with this Court's Decisions on Prior Restraints of Speech.

An obligation to get permission from others before displaying a sign, passing a leaflet, or engaging in oral protest, education or counseling, is a prior restraint on free expression. C.R.S. § 18-9-122(3) is such a restraint. The statute fails constitutional scrutiny as such because it conveys unbridled discretion to those from whom a speaker must obtain consent to speak, because it imposes no time limits on the decision-maker, and because it provides none of the familiar, constitutional safeguards required by the Constitution in a system of prior restraint.

1. *Unbridled discretion*

This Court has said, "speakers need not obtain a license to speak." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988). Regarding prior restraints, this Court has said, "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).[17] The right to be free from such previous restraints on expression is so important, this Court has said, that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151.

C.R.S. § 18-9-122(3) completely omits such standards. Instead, it deputizes the audience of any speech within 100 feet of medical facilities as censor with unbridled and unreviewable discretion. That the censor is a private party and not a government official is no more relevant here, *contra* App. at 45a, 52a, than it would be in a statute that subjected speech in public parks to the consent of other park-goers or subjected the showing of films in a theater to a private review board. The specter of such censorship inevitably induces *self*-censorship in

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17. The problem of unbridled discretion in a scheme of prior restraints has been unambiguously expounded in an extended line of this Court's decisions. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth*; *Secretary of State v. Jos. H. Munson Co.*, 467 U.S. 947 (1984).

speakers who seek to communicate in traditional public forum properties. *Lakewood*, 486 U.S. at 757.

2. *No time limits for decision-making*

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court reiterated the rule that "the failure to place limitations on the time within which a censorship board decisionmaker must make a determination . . . is a species of unbridled discretion." *Id*. at 223 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). In *Riley*, this Court struck down a speech licensing scheme that failed to impose such time limitations. The lack of a time limitation was unconstitutional because, in such circumstances, "delay compel[led] silence." *Riley*, 487 U.S. at 802.

C.R.S. § 18-9-122(3) likewise does not set any limit on the time within which private citizens must act on requests for permission. Obviously, the time to address or hand a leaflet to a person en route to a building is fleeting. Here, as in *Riley*, delay in responding to an application for permission to speak compels silence.

3. *No procedural safeguards*

In *Freedman*, 380 U.S. at 58-60, this Court identified three procedural safeguards necessary to "obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards included burdening the censor with proving that the suppressed film was unprotected, *id*., requiring the censor to obtain a judicial determination of whether the suppressed film constituted protected expression, *id*., and limiting the denial of a license to "the shortest fixed period compatible with sound judicial resolution," *id*. at 59.

C.R.S. § 18-9-122(3) omits each of the procedural safeguards

identified in *Freedman* as essential in a system of prior restraints on speech to avoid facial constitutional invalidation.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS OF APPEALS AND A STATE COURT OF LAST RESORT.

A. Conflict with the United States Court of Appeals for the Ninth Circuit

On remand from this Court, the United States Court of Appeals for the Ninth Circuit struck down a similar "floating bubble zone" scheme imposed by an ordinance[18] of the City of

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18. The Phoenix Ordinance provided:

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy-related services.

C. For purposes of this section, distance shall be measured from that

Phoenix, Arizona. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), *on remand from Sabelko v. City of Phoenix*, 519 U.S. 1144 (1997) (mem.). The Ninth Circuit reached its conclusion in light of this Court's decision in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The Ninth Circuit stated: "floating buffer zones prevent leafleting and communication at a normal conversational distance, both 'classic forms of speech that lie at the heart of the First Amendment.'" *Sabelko*, 120 F.3d at 165 (citation omitted). The Ninth Circuit noted that, in *Schenck*, a "lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited." 120 F.3d at 165. The Ninth Circuit concluded, "[b]ecause other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones burdened more speech than was necessary." *Id.*, at 165.

Applying *Schenck*, the Ninth Circuit determined:

> The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal

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> part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

Sabelko v. City of Phoenix, 120 F.3d 161, 163 (9th Cir. 1997).

> conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 165.

The Phoenix Ordinance could be upheld as narrowly tailored, the *Sabelko* court only said, "'if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.'" 120 F.3d at 165 (citations omitted). In this respect, "a Phoenix demonstrator would encounter difficulty in knowing how to remain compliant. This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits." *Id*. Consequently, the *Sabelko* court concluded, "the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny." *Id*.[19]

To the contrary, the Colorado Supreme Court here concluded that C.R.S. § 18-9-122(3) was narrowly tailored.

If anything, the Colorado statute is more obviously unconstitutional than the Phoenix ordinance invalidated in *Sabelko*. The Phoenix zones only became operative when "invoked," *Sabelko*, 120 F.3d at 163, but the Colorado zones are automatic, C.R.S. § 18-9-122(3). In other words, within 100 feet of a Phoenix medical facility, a speaker could approach

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19. The *Sabelko* court had no occasion to decide whether the Ordinance left open ample alternative channels of communication because it had concluded the Ordinance was not sufficiently narrowly tailored.

within 8 feet of another for purposes of handing a leaflet, engaging in oral advocacy, or displaying signs at least until the audience expressed a veto on the speech. In Colorado, however, within 100 feet of the entrance door to a podiatrist's office, a speaker dare not approach within 8 feet of another for the same expressive purposes, without *first* obtaining consent from the audience. The Ninth Circuit rejected the legislative imposition of floating bubble zones in traditional public fora. The court below affirmed the legislative creation of such zones, in reasoning directly in conflict with the decision of the Ninth Circuit.[20]

B. Conflict with the United States Court of Appeals for the Eighth Circuit

The decision below directly conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, the Eighth Circuit affirmed a district court decision holding unconstitutional a Nebraska statute that provided,

> [a] person commits the offense of unlawful picketing if . . . he interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work . . . by . . . persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such

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20. After *Sabelko*, and in light of that decision and this Court's decision in *Schenck*, the United States Court of Appeals for the Ninth Circuit affirmed the grant of injunctive relief against a similar floating bubble zone ordinance imposed and enforced by the City of Santa Barbara, California. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998), *cert. denied*, 119 S. Ct. ____ (1999).

purpose.

Neb. Rev. Stat. § 28-1317(1)(a) (1985) (quoted at 857 F.2d at 426). The Nebraska statute enforced a presumption that unwelcome words are unprotected. The court of appeals rebuffed that concept: "[t]hat the speech is unwelcome does not deprive it of protection." 857 F.2d at 432 (citations omitted).

Under the Nebraska statute, no consent to speak was required before communications were initiated, *see* Neb. Rev. Stat. § 28-1317(1)(a) (1985). C.R.S. § 18-9-122(3) does not even contain that extremely minimal limitation: the statute prohibits not only persistent communication, but also mere initiation of communication without consent. The decision sustaining the constitutionality of C.R.S. § 18-9-122(3) cannot be reconciled with the judgment of the Eighth Circuit in *IBP*.[21]

C. Conflict with the North Dakota Supreme Court

The decision below directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ,* 488 N.W.2d 401, 411

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21. The decision below — affirming the constitutionality of a statute that "makes a crime out of what under the Constitution cannot be a crime" and that is "aimed directly at activity protected by the Constitution," *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) — is also inconsistent with a decision of the United States Court of Appeals for the Fourth Circuit in *NOW v. OR*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In *NOW*, the Fourth Circuit affirmed a district court's order *refusing* to "broaden the scope" of an injunction "to include activities that tend to 'intimidate, harass or disturb patients or potential patients' because to do so would risk enjoining activities clearly protected by the First Amendment." 914 F.2d at 586.

(N.D. 1992).

In *Lambs of Christ*, the North Dakota Supreme Court struck down the provision of an injunction that prohibited "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.'" 488 N.W.2d at 407 n.1 (setting out provisions of injunction). Regarding the prohibitions on speaking and on distributing literature after a person expresses a wish not to receive it, the North Dakota Supreme Court held that "'speaking' to staff and patients cannot be constitutionally enjoined," *id*. at 411, and that "distributing literature is protected communicative activity" for which a complete ban would be inappropriate under the First Amendment, *id*.

In Colorado, however, leafleting, showing a sign or "speaking" *to anyone* who does not consent to be spoken to subjects a person to criminal prosecution, at least when such "speech" constitutes "oral protest, education or counseling" under the circumstances set forth in C.R.S. § 18-9-122(3). The decision below cannot be reconciled with the decision of the North Dakota Supreme Court in *Lambs of Christ*.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

C.R.S. § 18-9-122(3) preconditions free speech, free press and peaceable assembly on a requirement of consent from passersby. The statute directly restricts activities entitled to substantial constitutional protection. While purporting to serve the State's interest in securing access to medical facilities, the

statute does not regulate obstructive activities, trespass, assaults or the use of threatening language. Instead, the statute is crafted in a way that reveals the State's true interest: suppressing free speech. C.R.S. § 18-9-122(3) prohibits speech, without a close fit between such expressive activities and the asserted interest of Colorado in insuring free access to medical facilities.

Colorado has codified a principle—audience veto power—which other communities might well wish to duplicate. For example, in Illinois, the residents of the Village of Skokie would have been able to prevent uniformed neo-Nazis from marching down that Village's streets. *Cf. National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). In Cummings, Georgia, if those city residents who lined the street to protest against it had been deputized to decide the question, that city would never have played host to the largest civil rights demonstration in the South since the 1960s. *Cf. Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992). And in Colorado, the State could cripple the initiative process by banning circulators from approaching qualified voters absent advance consent. *Cf. Meyer v. Grant*, 486 U.S. 414 (1988).

Colorado has not been alone in its use of speech-free "bubble zone" to restrict freedom of speech in the public forum. Since Colorado's enactment of C.R.S. § 18-9-122(3), the City of Phoenix, Arizona, enacted a similar provision under its city ordinances. That ordinance, however, has been declared unconstitutional and its enforcement has been enjoined. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). The City of Santa Barbara, California, adopted a similar restriction. It, too, has been declared unconstitutional. *See Edwards v. City*

of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998). These legislative enactments all disregard this Court's direct holding in *Madsen* on the unconstitutionality of "requirement of consent" provisions and this Court's direct holding in *Schenck* on the unconstitutionality of floating speech-free zones.

C.R.S. § 18-9-122(3) is a model for legislative enshrinement of the audience veto. It works incalculable injury to the rights of freedom of speech, freedom of the press, and freedom of assembly. The decision below, accepting and affirming government enforcement of private citizens' rights to veto expressive activities in public places, is inconsistent with the First and Fourteenth Amendments.

Just as troubling is the facile manner by which the Colorado Supreme Court has distorted this Court's decisions *Madsen* and in *Schenck* into a license to subject a facially overbroad, content-based, viewpoint-discriminatory statute to the very modest standard of review applicable to content-neutral, reasonable regulations of time, place and manner. This Court did not hold, in either *Madsen* or *Schenck*, that the consent requirement or the floating zones — which were unconstitutional even when limited to the context of an injunction against adjudged malefactors — would be constitutional if imposed by statute upon the general populace. The decisions below, however, assume just such a distorted approach to determination of the constitutional questions presented here.

CONCLUSION

The decisions below directly conflict with this Court's precedents, with decisions of the Eighth and Ninth Circuit Courts of Appeals, and with a decision of the North Dakota

Supreme Court. Moreover, the decision below distorts the jurisprudence governing the rights to freedom of speech, press, peaceable assembly, due process, and equal protection.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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