No. 98-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEILA JEANNE HILL, *et al.*,

Petitioners,

—v.—

STATE OF COLORADO, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF COLORADO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has vigorously defended the right to free speech on the public streets, and has appeared before this Court on numerous occasions in support of that principle, from *Hague v. CIO*, 307 U.S. 496 (1939), to *Buckley v. American Constitutional Law Foundation*, 525 U.S. __, 119 S.Ct. 636 (1999).

At the same time, the ACLU has long been committed to preserving a woman's right to reproductive choice. The ACLU has therefore participated in every major reproductive health care case decided by this Court over the past forty years, beginning with *Poe v. Ullman,* 367 U.S. 497 (1961), and extending through *Roe v. Wade,* 410 U.S. 113 (1973), and its progeny. We have also consistently argued in this context and in others that constitutional rights can quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation and harassment. Accordingly, the ACLU supported passage of the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. §248. Likewise, we agreed with this Court's view in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), that specific clinic protestors who had engaged in prior unlawful conduct could be subject to a narrowly crafted injunction imposing reasonable

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

time, place, and manner restrictions on their demonstration activity.

Based on this experience, the ACLU deeply believes that the volatile issue of abortion clinic protest must not be resolved by sacrificing either the right to reproductive choice or the right to engage in peaceful political protest. Rather, the burden in each case is to arrive at a solution that accommodates both rights, and that does so in a principled way that is consistent with our constitutional tradition. This case once again poses the question of how that should be done. Its proper resolution is thus a matter of substantial interest to the ACLU and its members.

STATEMENT OF THE CASE

In 1993, Colorado's General Assembly enacted a statute designed to regulate protest activity outside "health care facilities" within the state.[2] The critical provision now before the Court establishes an eight-foot floating buffer zone or bubble that surrounds people walking within one hundred feet of the entrance to a health care facility.[3] Anyone who "knowingly aproaches" closer than eight feet to someone within the designated area without consent is subject to both civil and criminal penalties if, but only if, the purpose of the person approaching is to hand out a leaflet, display a sign, or engage in "oral protest, education, or counseling." C.R.S. §18-9-122(3).

The Colorado Supreme Court has authoritatively construed this language to mean that "the statute is not violated if [protestors] stand still while inside the floating buffer zone," Pet.App. 21a, even if their static position on the street may occasionally bring them closer than eight feet to clinic patients and staff. Whether standing or moving, however, anyone who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility," §18-9-122(2), is subject to civil and criminal penalties under a second provision of the law, which was not challenged in this litigation.

The preamble to the statute makes clear that, in drawing these lines, the Colorado legislature was attempting to balance "the right to protest or counsel against certain medical procedures" against the "right to obtain medical counseling and treatment in an unobstructed manner." §18-9-122(1). As the preamble also makes clear, the legislature's overriding goal in seeking to achieve this balance was to "prevent[] the willful obstruction of a person's access to medical counseling and treatment at a health care facility." *Id.*

The statutory concern with "willful obstruction" reflected legislative testimony that the Colorado Supreme Court characterized as "compelling." Pet.App. 9a. One particular nurse practitioner whose testimony was cited by the majority below described how anti-abortion protestors "yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care . . ." *Id.* at 8a. Another witness testified how a mother and daughter were "immediately surrounded" by screaming protestorsas they tried to walk from their car to the clinic entrance. *Id.* at 9a.

[2] The full text of the statute, C.R.S. §18-9-122, is set forth at Pet.App. 64a-65a. Although this case has focused exclusively on abortion clinic protests, the actual scope of the statute is not so limited. Specifically, the term "health care facility" is broadly defined to include "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment . . ." §18-9-122(4).

[3] The statute explicitly states that it is intended to regulate protest activity "in the public way or sidewalk area." §18-9-122(3).

At the same time, it is apparent from even the excerpted legislative record contained in the opinion below that at least some of legislative testimony was addressed to the content of the protestors' message as much as it was to the manner in which that message was delivered. For example, the Colorado Supreme Court quotes one legislative witness who stated, in part: "[The protestors] are flashing their bloody fetus signs. They are yelling, 'you are killing your baby.'" *Id.*

Petitioners, who describe themselves as "sidewalk counselors," brought suit soon after the statute went into effect complaining that its eight-foot floating buffer violated their First Amendment right to engage in peaceful protest on the public streets. Their request for declaratory and injunctive relief was initially denied by the Colorado courts.[4] This Court then granted *certiorari* and remanded the case for further consideration in light of the intervening decision in *Schenck*, 519 U.S. 357. On remand, the eight-foot floating buffer was again upheld by the Colorado courts.

First, the Colorado Supreme Court emphasized that this case involves review of a statute, not an injunction. Second, it relied on language in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994), for the proposition that content-neutral statutes regulating speech are entitled to a more deferential review than content-neutral injunctions regulating speech. Third, applying intermediate scrutiny, it ruled that the Colorado law represents a narrowly tailored response to the state's significant interest in safeguarding health that leaves protestors with ample alternative channels for communication. *See* Pet.App. 1a-29a.

[4] The trial court's 1994 decision granting the state's motion for summary judgment, Pet.App. 30a-37a, was upheld by the Colorado Court of Appeals, *id.* at 38a-45a. The Colorado Supreme Court denied discretionary review in the first round of appeals. *Id.* at 46a.

SUMMARY OF ARGUMENT

As this Court has repeatedly held, the public streets are a "quintessential public forum for expressive activity." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also United States v. Grace*, 461 U.S. 171, 177 (1983). Indeed, long before the public forum doctrine even developed as an analytic tool in First Amendment cases, this Court famously observed that public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515.

Thus, this Court has always reacted with skepticism to restrictions on speech that require the speaker to seek prior permission from the audience in a public forum where anyone who does not want to hear the speaker's message is free to walk away. *See Cohen v. California*, 403 U.S. 15, 21 (1971)("we are often 'captives' outside the sanctuary of the home and subject to free speech"), quoting *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970). Similarly, this Court has made clear in the so-called "heckler's veto" cases that the hostile reaction of the crowd is generally not a constitutionally adequate reason to silence the speaker in a public forum. *E.g., Edwards v. South Carolina*, 372 U.S. 229 (1963).

Those cases provide an instructive but not exact analogy to the present controversy. The state's interest in this case is not in acquiescing to the hostile reaction of clinic patients and staff, either because the state shares the ideological views of the clinic patients and staff or because it fears the clinic patients and staff will erupt into violence when confronted with an unwanted message. Rather, the state's asserted interest, at least as expressed in the preamble to the

challenged statute, is to preserve the health and safety of women seeking medical treatment in a "health care facility."

That interest is undoubtedly a significant one. But the legitimacy of the state's interest cannot and does not justify whatever means the state may choose to enforce that interest. When First Amendment rights are at stake, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). For that reason, the Court in *Madsen* struck down a portion of the injunction that barred the named defendants and those acting in concert with them from approaching any clinic patient within a three hundred-foot radius of the clinic entrance without permission. Although recognizing the state's interest in protecting patients who were being "stalked" or "shadowed," the Court concluded that the injunction as written was needlessly overbroad. 512 U.S. at 773-74. Likewise, in *Schenck*, the Court ruled that a fifteen-foot floating buffer could not be sustained as part of the injunction in that case. 519 U.S. at 377-80.

To be sure, there are differences between the floating buffer in this case and the floating buffers in *Schenck* and *Madsen*. The floating buffer in *Madsen* extended three hundred feet from the clinic entrance; here, it extends only one hundred feet. Similarly, the floating buffer in *Schenck* created a fifteen-foot bubble around anyone entering or leaving the clinic; here, the bubble is only eight feet wide. The Colorado statute also contains a scienter requirement -- *i.e.*, it only applies to protestors who "knowingly approach" clinic patients and staff -- that helps to ameliorate the problem of uncertain boundaries that so troubled the *Schenck* Court. *See also Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). Thus here, unlike *Schenck*, protestors who stand still while delivering their message cannot be forced to back off whenever anyone within eight feet objects to their presence.

These distinctions do make some difference. But, they do not resolve the fundamental flaw of the Colorado statute. Like the invalidated provisions in *Schenck* and *Madsen*, it makes even traditional First Amendment advocacy on the public streets a matter of grace rather than right. In the final analysis, therefore, this case is controlled by the parallel holdings in *Schenck* and *Madsen*. Contrary to the opinion of the court below, the fact that *Schenck* and *Madsen* involved review of an injunction rather than a statute is not enough to save the Colorado law for at least three reasons.

First, unlike the comparable provisions in *Schenck* and *Madsen*, the floating buffer zone created by the Colorado law cannot be described as content-neutral. On this issue, the fact that Colorado proceeded by statute rather than by injunction works against the state rather than in its favor. In both *Schenck* and *Madsen*, this Court emphasized that the challenged injunctions were directed against particular defendants because of their prior misconduct and did not depend in any way on the content of their future speech. Here, by contrast, the floating buffer is generally applicable to everyone who seeks to engage in "oral protest, education or counseling," regardless of whether they have previously engaged in past misconduct. Conversely, the floating buffer can be penetrated with impunity by someone who is merely seeking directions to the closest bus stop, for example. Especially when read in conjunction with the statute's general ban on obstructing or hindering entry to or exit from an abortion clinic, the conclusion seems inescapable that the focus on "oral protest, education or counseling" distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content-based and trigger strict scrutiny, a standard that no one has argued this statute can meet.

Second, even if Colorado's floating buffer is described as content-neutral, the lower court placed far too much weight on the difference between injunctions and statutes. It is, of course, true that *Madsen* holds that a content-neutral injunction can burden no more speech than necessary to accomplish a significant government interest while a content-neutral statute cannot burden substantially more speech than necessary. Whether this two-tiered standard of review ultimately makes sense is itself an important question that has already generated a great deal of commentary both inside and outside the Court. However, it is not dispositive in this case. Intermediate scrutiny under the First Amendment was never intended to be a toothless standard. And, in applying intermediate scrutiny, one cannot answer the question of whether the state has burdened substantially more speech than necessary without also examining the legitimate scope of the state's regulatory interest.

Only by asking what the state is trying to accomplish can one understand whether the state has gone too far. The standard of review inevitably affects that inquiry but it does not resolve it. As *Madsen* itself illustrates, a thirty-six foot buffer zone may be an appropriate injunctive response to the misbehavior of particular defendants at a specified site. But it does not follow that a statutory buffer zone of thirty-six feet is therefore automatically valid even though it would be assessed on the basis of a lower standard of review. Regardless of which standard is invoked, a court cannot avoid the essential task of weighing the relationship between means and end. Moreover, in undertaking that task, a reviewing court must consider the possibility that a statutorily imposed buffer burdens substantially more speech than necessary precisely because its proscriptions apply to individuals who may never have engaged in prior unlawful behavior. The court below failed to grasp this critical point and, accordingly, misapplied the intermediate scrutiny standard.

Third, the Colorado law cannot survive intermediate scrutiny if properly applied. There is no doubt that the state has a significant government interest in ensuring that women (and men) have unimpeded access to health care facilities. Indeed, the ACLU has vigorously advocated in favor of that interest on numerous occasions in both the legislative and judicial arenas. The portion of Colorado's law ensuring unimpeded access to health care facilities, however, has not been challenged in this case. The floating buffer obviously has some relationship to the same underlying interest. But, it also goes further by penalizing advocacy within eight feet that does not threaten to impede or obstruct persons entering or leaving the clinic, including the simple act of handing out a leaflet.

Colorado undoubtedly felt that a prophylactic rule -- which is what the floating buffer represents -- would be easier to enforce and thus provide an added layer of protection against those who might abuse their First Amendment rights. As this Court has repeatedly admonished, however, "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. at 458. What was true in *Madsen* is therefore equally true here: the fact that some protestors might cross the line from protected advocacy to unprotected harassment and intimidation does not "justify a prohibition on *all* uninvited approaches . . . ." 512 U.S. at 774 (emphasis in original).

ARGUMENT

I. COLORADO'S FLOATING BUFFER ZONE IS, AT LEAST IN PART, A CONTENT-BASED RESTRICTION ON SPEECH

In order to apply intermediate scrutiny and thus distinguish this case from *Schenck* and *Madsen*, both of which struck down floating buffer zones, the Colorado Supreme Court was first obliged to hold that Colorado's floating

buffer is content-neutral. Unfortunately, that first step was also a misstep.

To begin with, the language of the statute expressly distinguishes between lawful and unlawful conduct based on the content of speech. A statute that created an eight-foot bubble around clinic patients and staff that could not be invaded without consent by any person for any purpose within one hundred feet of the clinic entrance would be content-neutral, even though it would undoubtedly be subject to other constitutional attacks. *See* Point III, *infra*. That is not the statute that Colorado has enacted, however. Instead, the penalty provisions of Colorado's law are only triggered if a person "knowingly approaches" for one of three prohibited purposes: (1) passing a leaflet or handbill; (2) displaying a sign; (3) engaging in "oral protest, education or counseling." Pet.App. 65a.

Even if the first two purposes could be described as content-neutral, the ban on "oral protest, education or counseling" within eight feet clearly turns on the content of what is being said. The Colorado Supreme Court's assertion that "the statutory language makes no reference to the content of the speech," *id.* at 22a, is both inexplicable and plainly wrong.[5] It is only by evaluating the content of speech that a factfinder can determine, for example, whether a labor picketer has entered the eight-foot floating buffer to ask for the time or urge support for a hospital strike. The same is true for an animal rights activist who might "knowingly approach" research staff at a health care facility to protest animal experimentation or to engage a neighborhood acquaintance in social conversation.

[5] The opinion below also asserts that petitioners waived any claim that the statute is content-based. *Amicus* has no views on the merits of that dispute other than to note that petitioners contend otherwise. Pet. Reply Br. at 4.

Although the Colorado statute is not written in terms of a specific subject, like abortion, the limit it places on protest, education and counseling outside a health care facility undeniably describes a "category of speech," *Boos v. Barry*, 485 U.S. 312, 319 (1988). Furthermore, it is a "category of speech" that has clear subject matter consequences in the context of this statute, as described above.

The inescapable need to refer to content in applying the Colorado statute distinguishes this case from *Schenck* and *Madsen*. In both *Schenck* and *Madsen*, the injunctions had nothing directly to do with the content of speech and everything to do with the past misbehavior of the defendants. Correspondingly, the defendants in *Schenck* and *Madsen* did not expose themselves to sanctions because of what they said but only because of what they did.

As this Court explained in *Madsen*:

> [The trial court] imposed restrictions on [defendants] incidental to their antiabortion message because they repeatedly violated the court's original order. That [defendants] all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

512 U.S. at 763 (emphasis in original).

The same cannot be said of Colorado's law. Because Colorado chose to proceed by statute, the law's coverage is not confined to those who have previously misbehaved. And because Colorado chose to make the eight-foot bubble impenetrable without consent only to those who engage in "oral protest, education or counseling," it is impossible to say that the challenged provision was enacted "without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In reaching this conclusion, we have no reason to doubt Colorado's good faith or its genuine concern with the physical well-being of clinic patients and staff. As the Colorado Supreme Court pointed out, *see* p.3, *supra*, the legislative record contains disturbing accounts of harassment and intimidation by some antiabortion protestors. Those activities, however, are already illegal under Colorado law.[6] In addition, an unchallenged portion of this statute creates new criminal penalties for anyone who obstructs, hinders, or impedes movement into or out of a health care facility. Pet. App. 65a.[7]

Under these circumstances, there are two plausible explanations for the eight-foot floating buffer. One is that it simplifies enforcement by relieving the state of the burden of proving obstruction or hindrance. The constitutional difficulties with this prophylactic approach in a First Amendment context will be discussed more fully below. *See* Point III, *infra*. The other possibility is that the state is trying to shield clinic patients and staff from having to confront at close range the protestors' message and the anxiety it may

[6] *See, e.g.*, C.R.S. §18-9-111 (making it a crime to follow a person in or about a public place "with intent to harass, annoy or alarm").

[7] Interestingly, the provisions of C.R.S. §18-9-122(2) are not limited by the one hundred-foot boundary that applies to the floating buffer zone.

cause. For patients, in particular, that anxiety may have real world consequences, such as heightened blood pressure, that can complicate the medical treatment they are hoping to obtain. Still, it is impossible to avoid the hard choices that the Constitution requires by mislabeling Colorado's law as content-neutral. As Justice O'Connor said in *Boos*, 485 U.S. at 312, and as this Court recently reiterated in *Reno v. ACLU*, 521 U.S. 844, 868 (1997), a listener's reaction to the content of speech is a "primary" rather than a "secondary effect." *Compare Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

Content-based restrictions on speech in a public forum are subject to "the most exacting scrutiny." *Boos*, 485 U.S. at 321. For present purposes, it is sufficient to note that neither the state nor the lower courts in this case have even claimed that the statute could survive such scrutiny. This Court's decisions in *Schenck* and *Madsen* plainly indicate otherwise.

II. THE DECISION BELOW MISAPPLIES THE DISTINCTION BETWEEN INJUNCTIONS AND STATUTES ARTICULATED IN *MADSEN*

Twice within the past five years, this Court has been asked to consider the constitutionality of floating buffer zones that restricted protest activity outside abortion clinics. Both times, the Court invalidated the challenged provision. According to the Colorado Supreme Court, those cases are distinguishable because they involved court-ordered injunctions rather than statutes. While that distinction has been a factor in this Court's analysis, it does not support the different result reached by the court below.

In *Schenck*, this Court struck down a fifteen-foot floating buffer zone that surrounded people entering or leaving plaintiffs' health care facilities. 519 U.S. at 377-80. The

one exception was for two "sidewalk counselors" who were allowed inside the fifteen-foot bubble but even they were required to "cease and desist" if the person they were targeting objected. Writing for the majority, Chief Justice Rehnquist concluded that the imprecise boundaries of the floating buffer in *Schenck* made it constitutionally invalid. "[I]t would be quite difficult," he wrote, "for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction." *Id.* at 378 (footnote omitted).[8]

In *Madsen*, the Court also struck down a floating buffer zone that enjoined defendants from approaching any clinic patient within three hundred feet of the clinic entrance without that person's consent. 512 U.S. at 773-74. If anything, the *Madsen* injunction was even less precise than the *Schenck* injunction. Not only did it float -- moving as the patient moved -- but it failed to inform defendants of how close they could be to a patient within the three hundred-foot area without violating the proscription against "physically approaching." *Id.* at 760. Nevertheless, the *Madsen* Court did not rest its holding on vagueness grounds. Instead, the Court broadly declared that "[t]he 'consent' requirement alone invalidates this provision." *Id.* at 774.

The Colorado Supreme Court decision does not even mention this aspect of *Madsen*, although it would seem to bear directly on the constitutionality of the challenged provision in this case, which also contains a consent requirement for even peaceful advocacy in a public forum. Rather, the Colorado Supreme Court focused exclusively on the floating buffer in *Schenck*, perhaps because it was hearing the case on remand from this Court "for further consideration in light of *Schenck*." Pet.App. 48a.

The court below began its discussion of *Schenck* with an acknowledgement of the "factual similarities" between that case and this one. Pet.App. 18a.[9] However, it quickly dismissed the significance of those similarities by noting that content-neutral injunctions and content-neutral statutes are subject to different standards of review after *Madsen*. Relying on that difference, the Colorado Supreme Court then applied what it regarded as the more lenient standard of review applicable to legislative enactments to uphold the floating buffer in this case.

It is undisputed, of course, that *Madsen* created a two-tier standard of review under which even content-neutral injunctions can only be sustained if they burden no more speech than necessary to achieve a significant government

[8] The ACLU submitted an *amicus* brief in *Schenck* urging the Court to affirm the fifteen-foot fixed buffer zone based on the record developed in that case. Brief of the American Civil Liberties Union, *et al.*, in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065. The brief did not address the floating buffer zone except to note that it had been remanded by the Second Circuit to the district court for a further elaboration of its precise contours. *Id.* at 23 n.20.

[9] As previously noted, the Colorado Supreme Court also identified important dissimilarities between the floating buffer in *Schenck* and the floating buffer in this case. Most significantly, the court stressed that the addition of a scienter requirement in the Colorado law substantially diminishes the vagueness and enforceability concerns that figured so prominently in *Schenck*. Pet.App. 27a-28a. *See also Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). We agree that the "knowingly approach" language in the Colorado law makes this statute easier to enforce and understand. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). For example, it means that protestors who have stationed themselves on the sidewalk do not have to constantly move as new people enter or leave the targeted facility. *Compare Schenck*, 519 U.S. at 378. Vagueness, however, is not the only concern, as *Madsen* makes clear. Even unambiguous statutes can be substantially overbroad. *See, e.g., Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

interest, while content-neutral statutes can be sustained so long as they do not burden substantially more speech than necessary to achieve a significant government interest. 512 U.S. at 764-68. But, contrary to the approach adopted below, the standard for evaluating statutory restraints on speech was never intended to be toothless. The question of whether a statute burdens more speech than necessary cannot be answered in a vacuum; it inevitably turns on the nature of the interest the state is seeking to promote. And, while the state is entitled to deference in defining those interests, courts cannot avoid the responsibility (even under intermediate scrutiny) of deciding whether the state has chosen a constitutionally appropriate means of achieving its stated ends.

The Colorado Supreme Court failed to conduct that inquiry in any meaningful way. The essential core of its holding that Colorado's floating buffer does not burden substantially more speech than necessary is contained in the following passage:

> Petitioners contend that section 18-9-122(3) is not narrow because, although the General Assembly declared its intent to curtail threatening conduct, it only prohibits protected speech. We disagree. The plain language of the statute indicates that it regulates speech and the conduct of "passing a leaflet or handbill," and displaying a sign.

Pet.App. 24a.

It is not at all clear what this passage signifies. The fact that the statute regulates expressive activities like passing a leaflet or displaying a sign says nothing about whether the statute burdens substantially more speech than necessary to accomplish its declared goals. The fact that passing a

leaflet and displaying a sign combine elements of speech and conduct in a single activity says nothing about whether this statute is narrowly tailored "to curtail threatening conduct." And the fact that the statute may not "only prohibit[] protected speech" says nothing about whether it prohibits too much protected speech. In short, what is entirely missing is any discussion of how the statute's ends and means relate to one another.

The most plausible explanation for this curious omission is the unspoken assumption that the fit between means and ends is somehow less important when reviewing a statutory restraint on speech. Nothing in *Madsen* supports that conclusion. Indeed, the fallacy becomes most apparent if one thinks about the thirty-six foot fixed buffer zone in *Madsen*. That fixed buffer was upheld even under the more stringent injunction standard because the record demonstrated that it was no broader than necessary to restrain particular defendants who had engaged in documented misconduct at a particular geographic site. It simply does not follow, however, that any thirty-six foot buffer zone enacted by statute is now constitutionally invulnerable because it will be subject to less stringent review. To the contrary, it is entirely possible that a statutory buffer zone of even less than thirty-six feet could be struck down as a violation of the First Amendment depending upon the reasons for its enactment and its impact on speech. *Madsen*, 512 U.S. at 778 (Stevens, J., concurring in part and dissenting in part). Different questions may need to be asked when reviewing a statute rather than an injunction, but the articulation of a lower standard merely starts the discussion; it does not end it, as the Colorado Supreme Court erroneously assumed.

More generally, the issue of whether a lower standard of review should be applied to statutory restraints on speech is an interesting and important one that may need to be reexamined in a future case. As the majority pointed out in

Madsen, the general applicability of a content-neutral statute offers some assurance that it is not targeted against disfavored groups. 512 U.S. at 764. On the other hand, even facially neutral statutes may be discriminatorily applied, and experience shows that the facially neutral language of a statute may nonetheless mask a discriminatory intent. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Likewise, while it is true that someone accused of violating an injunction is subject to contempt proceedings rather than the full due process safeguards of a criminal trial, *see Walker v. Birmingham*, 388 U.S. 307 (1967), it is also true that a judge issuing an injunction is bound by due process constraints that do not apply to the political process. Finally, the reach of an injunction is generally limited to past violations of the law, while a statute that does impose restraints on speech reaches "the community at large," *Teachers v. Hudson*, 475 U.S. 292, 309-10 n.22 (1986), and thus its burdens are more widespread.

These competing considerations create a complex calculus but it is not one that needs to be unraveled here. Measured against its stated objectives, Colorado's floating buffer cannot survive even intermediate scrutiny.

III. COLORADO'S FLOATING BUFFER BURDENS SUBSTANTIALLY MORE SPEECH THAN NECESSARY AND THUS CANNOT SURVIVE EVEN INTERMEDIATE SCRUTINY

To survive intermediate scrutiny under this Court's current test, a statute regulating speech must be content-neutral, it must be narrowly tailored to advance a significant government interest, and it must leave open ample alternative avenues of communication. *See, e.g., Clark v. Community for Creative Non-Violence* (*CCNV*), 468 U.S. 288, 293 (1984).

As noted above, we do not believe that the challenged provision in this case is, in fact, content-neutral. Even assuming the statute is content-neutral, however, it is plainly not narrowly tailored. Accordingly, it is unnecessary to decide whether petitioners have been left with other, adequate opportunities for expression.

The narrow tailoring requirement of intermediate scrutiny does not require the state to pursue its goals through the least restrictive alternative. On the other hand, a statute that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored. *Ward v. Rock Against Racism*, 491 U.S. at 799.

In this case, the state's purposes are openly declared in the preamble to the statute. It states, in its entirety:

> The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of [Colorado]; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

Pet.App. 64a-65a.

Subsection (2) of the statute, which has not been challenged in this litigation, is directly responsive to those concerns. Under its terms, any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility" is subject to criminal prosecution. *Id.* at 65a.

By contrast, the floating buffer zone created by subsection (3) of the statute makes no reference to physical obstruction. Nor can it easily be construed as limited to physical obstruction without making its coverage completely redundant of the preceding section in violation of the traditional rules of statutory interpretation. *Gustaffson v. Alloyd Co.*, 513 U.S. 561, 574 (1995).[10]

As written, therefore, the floating buffer zone prohibits even peaceful protest activity within the designated area -- whether that activity takes the form of leafletting or oral advocacy -- unless the subject of that advocacy first grants her consent. Of course, an eight-foot buffer zone is not the same as a total ban. Patients and staff approaching the

[10] In contrast to Colorado's consent requirement, some floating buffers have incorporated a "cease and desist" provision that requires the protestor to back off once the listener expresses an unambiguous desire to be left alone. As Chief Justice Rehnquist observed in *Schenck*, there is no general right "to be left alone" on a public street. 519 U.S. at 383. Unlike a consent requirement, however, a cease and desist provision can far more easily be interpreted as the functional equivalent of a harassment statute and thereby designed to ensure what Justice Harlan assumed as a predicate for the Court's First Amendment holding in *Cohen v. California*, 403 U.S. 15 -- namely, the ability to walk away from unwelcome speech in a public forum. *See* ACLU *amicus* brief in *Schenck*, n.8, *supra*, at 25-29. On the other hand, as *Schenck* recognized, 519 U.S. at 378, a cease and desist provision may increase the risk that one listener can effectively veto face-to-face communication with others inside the same floating bubble.

clinic entrance can still see protest signs and hear protest messages from eight feet away. Moreover, a protestor who stands still may wind up closer than eight feet to clinic patients and staff. But the fact that an eight-foot buffer zone falls short of a total ban does not mean that its impact on speech can or should be regarded as constitutionally negligible.

The right to engage in "interactive communication" on the public streets about political issues lies at the "core" of the First Amendment, *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Such interaction is undeniably complicated when the state insists that a speaker and listener stay a certain distance apart. At an even more basic level, it is impossible to hand a leaflet to someone who is standing eight feet away.

We realize that the concept of "interactive communication" may seem strained in this context since it ordinarily presumes a willing speaker and a willing listener. The protections of the First Amendment, however, are not limited to speech between like-minded people. *See Thornhill v. Alabama*, 310 U.S. 88 (1940)(protecting labor picketers). If the message is unwelcome, as it often will be outside abortion clinics, the constitutionally appropriate response in a public forum is for the listener to walk away -- with adequate protection against being obstructed or hindered, as subsection (2) of the Colorado statute provides -- and not to enlist the power of the state to silence the speaker. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Cohen v. California*, 403 U.S. at 21.

We appreciate the state's understandable concern, based on numerous incidents that have occurred outside abortion clinics around the country, that some protestors may cross the line from peaceful advocacy to physical obstruction and potentially other forms of unlawful behavior if permitted to

approach clinic patients and staff without their consent. The floating buffer zone, however, represents both an under- and over-inclusive response to that problem.

First, §18-9-122 already deals with obstruction in another section. Second, the floating buffer zone does not actually prevent a protestor from getting much closer than eight feet to a patient or staff member so long as the protestor is not moving or does not engage in any of the expressive activities described in the statute. Third, and most significantly, the First Amendment does not permit the state to restrict the free speech rights of *all* protestors because *some* protestors may take advantage of the situation to violate the law. *Madsen*, 512 U.S. at 774.

The unconstitutional breadth of Colorado's floating buffer is clear when the statute is compared to other time, place, and manner restrictions that this Court has considered. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." The same cannot be said of Colorado's floating buffer, which far more closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil without prohibiting expressive activity," or adopting a "prophylactic rule." *Vincent*, 466 U.S. at 810.

Similarly, in *United States v. Grace*, 461 U.S. 171, the Court refused to uphold a statutory ban on certain expressive activity on the Supreme Court grounds. In rejecting the government's defense of the statute as a time, place, or manner regulation, Justice White explained that the statute was constitutionally invalid because it had "an insufficient

nexus with any of the public interests that may be thought to undergird [it]." *Id.* at 181. Like Colorado's floating buffer, the purpose of the challenged statute in *Grace* was to protect the security of the Supreme Court building and the safety of its personnel. The legitimacy of that interest was never questioned. Nevertheless, the Court noted that "[t]here is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id.* at 182. Colorado's statute suffers from precisely the same flaw by converting even nonthreatening comments and silent leafletting on the public streets into a criminal offense.

Finally, the holdings in *Ward* and *CCNV* also assume a fit between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that New York City employees operate any sound amplification equipment used for bandshell concerts in Central Park was upheld because it directly advanced the city's interest in controlling noise levels in midtown Manhattan. 491 U.S. at 800. Likewise, in *CCNV*, a federal regulation that barred political protestors from sleeping in Lafayette Park was upheld because, in the Court's view, it "narrowly focuse[d] on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

The underlying theme in all these cases is that a state must craft its statutes narrowly when regulating speech, and the interests it seeks to advance must be unrelated to the suppression of expression. *See United States v. O'Brien*, 391 U.S. 367 (1968). Colorado has identified its interest as access to health care facilities for patients and staff. Unfortunately, the floating buffer is not narrowly tailored to promote that interest. Instead, it focuses directly on expressive

activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained, even under intermediate scrutiny.

CONCLUSION

For the reasons stated herein, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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