No. 98-1856

IN THE SUPREME COURT OF THE UNITED STATES

LEILA JEANNE HILL, *et al.*,
Petitioners

v.

STATE OF COLORADO, *et al.*,
Respondents

AMICI BRIEF OF THE CITY OF BOULDER AND THE CITY AND COUNTY OF DENVER IN SUPPORT OF RESPONDENTS

Filed December 13, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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INTEREST OF AMICI

The City and County of Denver, Colorado, and the City of Boulder, Colorado, each have numerous healthcare facilities, several of which have been the targets of sustained protest and demonstration activities. These demonstrations often make it difficult or impossible for patients to receive healthcare services. In response to this problem both Cities adopted an ordinance similar in content, and purpose, to the statute that is the subject of this litigation. The interests of residents of these Cities will be substantially and adversely affected by any decision that serves to weaken the protections afforded them by Colorado Revised Statute 18-9-122.[1]

SUMMARY OF ARGUMENT

This court directed the Colorado Court of Appeals to reconsider its decision affirming the validity of a statute adopted by the Colorado General Assembly, C.R.S. §18-9-122, in light of this court's decision in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). After completing its review, the Colorado Court of Appeals affirmed

[1] This brief is filed pursuant to Rule 37.4 on behalf of the City of Boulder by its City Attorney Joseph N. de Raimses and the City and County of Denver by its City Attorney Daniel E. Muse through Assistant City Attorney James C. Thomas (Counsel of Record). In accordance with this rule no consent to file the Amicus Brief was sought from the parties and no motion to file an Amicus Curie Brief was presented to the court.

the trial court's judgment upholding the provisions of the statute. After granting certiorari the Colorado Supreme Court likewise affirmed the decision holding that the statute was a content neutral time, place and manner restriction that was narrowly tailored to serve a significant government interest that left open ample alternative channels of communication.

The Colorado Supreme Court was correct in rejecting *Schenck* as the applicable standard for review because that case involved a judicially created injunction rather than a generally applicable statute. Injunctions deserve a higher standard of review because they present a higher risk of censorship and discriminatory application than do general ordinances or statutes.

The standard for reviewing a statute is set forth in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989). Specifically, the standard is that a regulation may impose reasonable restrictions on the time, place or manner of protected speech if the restrictions are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. The applicability of this standard was affirmed in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994).

The standard established in *Ward, supra* is only appropriate if the statute is content neutral, and this statute is. This statute serves purposes unrelated to the content of the

expressive conduct. It is clear that the legislation is to be generally applicable for the protection of the health and safety of citizens seeking to obtain healthcare services. Its intent is to address threatening conduct and obstructive behavior irrespective of the content of the speech, making this legislation content neutral.

This statute is narrowly tailored to serve a significant governmental interest. It imposes limited restrictions on speech activities that occur within 100 feet of the entrance to a healthcare facility. Within this 100 foot radius of the entrance to a healthcare facility, the statute prohibits an individual from (1) knowingly approaching another person within eight feet, (2) for the purpose of oral protest, counseling, education, leafleting, or displaying a sign to that person, (3) without that person's consent. The knowingly requirement eliminates the inadvertent or accidental violation of the statute that created problems for the *Schenck* injunction. This eight foot "bubble" of protection is substantially narrower then the fifteen foot and 36 foot areas imposed by *Scheck, supra* and *Madsen, supra*. This eight foot distance also permits protest activity occurring in conversational tones. In fact, there is evidence that a protest message is more likely to be received and accepted from a distance of eight feet then it would be if delivered from closer proximity.

The Colorado General Assembly heard extensive testimony from witnesses who described the substantial negative impact of protest activity on patients attempting to obtain healthcare services. After balancing the privacy interests of patients against the right to peacefully protest, the Colorado General Assembly adopted C.R.S. §18-9-122 in an effort to preserve the health and safety of Colorado citizens. The cases of *Schenck, supra* and *Madsen, supra* both recognize this as a legitimate governmental interest.

This statute is not a general ban on speech, but simply restricts the place and manner in which the speech activity can be conducted. A violation occurs only if a demonstrator knowingly approaches a target without their consent. The statute presents no other restrictions, therefore, it leaves open ample alternative avenues of communication.

An individual who utilizes the safeguards provided in this statute is protecting their own safety, they do not restrict the content or the delivery of the message to any other individual. There is no governmental action involved in a patient's refusal to allow a protestor to approach within eight feet of them, therefore, there is no censorship involved. This lack of governmental action also negates the petitioner's arguments concerning licensing schemes to accomplish censorship.

The statute uses plain, concise language to establish guidelines for conduct. It is clear what behavior is prohibited. The statute is entitled to a presumption of constitutionality and is not void for vagueness.

The Decision of the Colorado Supreme Court should be affirmed.

ARGUMENT

I. THE COLORADO SUPREME COURT WAS CORRECT IN ITS DECISION TO UPHOLD C.R.S. §18-9-122.

A. Introduction

This matter has previously been before this Court and was remanded to the Colorado Court of Appeals for reconsideration in light of this court's decision in *Schenck, supra.*

On remand, the Colorado Court of Appeals requested briefs from the parties relative to the impact of *Schenck, supra,* on C.R.S. §18-9-122. The Colorado Court of Appeals reviewed and considered the submissions and affirmed the trial court's judgment upholding the provisions of C.R.S. §18-9-122. In particular, the Colorado Court of Appeals found that "Schenck does not compel the conclusion that section 18-9-

122 violates the first amendment." *Hill v. City of Lakewood,* 949 P.2d 107 (Col. App. 1997). Pet. App. 57a.

After granting Certiorari, the Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals and stated in conclusion:

> Thus, we hold that section 18-9-122(3) is a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado healthcare facilities. It is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open alternative channels of communication. Accordingly we affirm the judgment of the Court of Appeals. *Hill v. Thomas,* 973 P. 2d 1246 (Colo. 1999). Pet. App. 29a.

It is this ruling that is presently before this court for review.

B. Standard for review.

In *Schenck, supra* an action was brought by several doctors and medical clinics in upstate New York seeking a preliminary injunction against anti-abortion protestors who were engaged in allegedly illegal activities intended to prevent individuals from obtaining abortions. An injunction was issued by the New York court and the protestors challenged the constitutionality of the injunction. The protestors alleged violations of their First Amendment Rights challenging a

"floating" fifteen foot buffer zone around people and vehicles entering and leaving the clinics, the "fixed" fifteen foot buffer around the clinic's doorways, driveways, parking lot entrances, and the "cease and desist" provisions of the injunction that forced anti-abortion protestors to retreat to fifteen feet from the targeted person.

In *Schenck* this Court upheld the "fixed buffer zones" around entrances to clinics, finding them necessary to ensure that people in vehicles trying to enter or exit the clinic property or clinic parking lots could do so. The *Schenck* decision struck down the "floating" buffer zones around people entering or leaving the clinics because they burdened more speech then was necessary to serve the relevant government interest. The Court found that the fifteen foot distance prohibited the protestors delivering their message in a normal conversational tone. Because the floating buffer zones were struck down, the Court did not address the constitutionality of the "cease and desist" provisions of the injunction.

The Colorado Supreme Court carefully considered the *Schenck* decision and, while recognizing factual similarities, concluded that the test applied in that case was not the appropriate standard by which to determine the constitutionality of the statute in question here. *Schenck* involved a preliminary injunction issued by a court against

specific parties in that action. The standard for review of content neutral injunctions adopted in *Schenck* is "whether the challenged provisions of the injunction burden no more speech than is necessary to serve a significant government interest." However the regulation presently before this court for consideration is subject to a different standard because it is a statute adopted by the General Assembly of the State of Colorado for general application to all citizens.

In *Madsen, supra,* this court made a distinction between the standards of review for a generally applicable statute and an injunctive order. *Madsen* held:

> There are obvious differences ..... between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interest. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. See *United States v. W. T. Grant Company,* 345 U.S. 629, 632-633, 97 L.Ed 1303, 73 S. Ct. 894 (1953). Injunctions also carry greater risk of censorship and discriminatory application than do general ordinances.

Injunctions carry this greater risk of censorship and discriminatory application because they impose specific restrictions on the behavior of specifically identified individuals. These issues and concerns are not present when the regulation is a generally applicable statute adopted by a

legislative body to further the well-being of the general public. There is no specific group or individual regulated by a statute, and there is no specific occurrence that is the focus of the statute

Madsen, supra at 764, held that content neutral generally applicable statutes should be evaluated under the standards set forth in *Ward v. Rock Against Racism, supra.* This standard is that a regulation may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

C. The statute is content neutral.

The process of evaluating the validity of any regulation of speech activity requires one to evaluate the content neutrality of the regulation. The *Madsen* decision, *supra,* made reference to the detailed analysis of public forums and their standards for review contained in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 406 U.S. 37 (1983). The Perry case held:

> ...for the state to enforce a content based exclusion, it must show that its regulation is necessary to serve a compelling state interest

> and that it is narrowly drawn to achieve that end. *Carry v. Brown,* 447 U.S. 455, 461 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Counsel of Greenberg Civic Association Assns.*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535-536 (1980); *Grayned v. City of Rockford,* 408 U.S. 115 (1972); *Campwell v. Connecticut,* 310 U.S. 296 (1940); *Schneider v. State,* 308 U.S. 147 (1939). (Emphases added)

To determine which of these tests apply to C.R.S. 18-9-122(3) one must first determine whether or not this statute is content neutral. Petitioners and Amici argue that the statute's application is content based. Pet. Brf. at 31-32. The Colorado Supreme Court observed that the Petitioners had not raised the issue of content neutrality in their appeal. Pet. App. 21a.[2] Irrespective of the perceived waiver of this issue, the Colorado Supreme Court considered the content neutrality of the statute when it upheld its validity.

[2] Having waived the issue in the Colorado Supreme Court makes it inappropriate for petitioners to raise the issue for consideration by this court.

The controlling consideration in determining content neutrality is the government's purpose in adopting the regulation. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Ward v. Rock Against Racism, supra.*

Colorado Revised Statute section 18-9-122 is entitled: ***Preventing passage to and from a healthcare facility – engaging in prohibited activities near facility.*** The most relevant sections for our review are 18-9-122 (1), (2), (3), and(4). These sections provide:

> (1) The general assembly recognizes that access to healthcare facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; 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 healthcare 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 healthcare facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a healthcare facility.

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

(4) For the purposes of this section, "healthcare facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.[3]

A review of these sections of the statute demonstrates that it is generally applicable irrespective of the content of speech. The title and body of this statute clearly demonstrate that it is directed at the threatening conduct and obstructive behavior that restricts access to healthcare facilities. The statute contains a broad definition of healthcare facility to

[3] The entire text of the statute is contained in Pet. App. 6a-7a.

further assure that it is content neutral. This statute does not serve as a bar to communication and makes no consideration of what the message might be.

The petitioners have taken the inconsistent position that the statute is a content based regulation that prohibits their anti-abortion message, while at the same time alleging that the statute would prohibit "an evangelist distributing gospel tracts, a pizzeria employee distributing discount coupons, or a nurse distributing flyers to explain a strike for improved working conditions, ..." Pet. Brf. page 9.

The Colorado General Assembly made no effort to control the content of the speech protected and regulated by the statute. The Colorado Supreme Court was correct in its determination that the statute is a content neutral regulation, and that the standard for review was that contained in *Ward v. Rock Against Racism, supra.*

D. The statute is narrowly tailored to serve a significant governmental interest.

The statute makes it clear that its purpose is to protect a person's right to obtain medical counseling and treatment. In its attempt to further the privacy interests of individuals seeking medical treatment, the Colorado General Assembly carefully balanced this privacy interest against its impact on

free speech. JA 60 and 114. The Colorado Supreme Court in deciding this matter issued an opinion that defines and limits the application of the statute. Pet. App. 24a-25a.

The statute that has been challenged by Petitioners has no impact on any speech activities that occur outside of 100 feet from the "entrance door to a healthcare facility." Within this 100 foot area only a limited amount of specifically described activity is prohibited. Within 100 feet of the entrance of a healthcare facility this statute prohibits an individual from (1) knowingly approaching another person within eight feet, (2) for the purpose of oral protest, counseling, education, leafleting, or displaying a sign to that person, (3) without that person's consent.

This statute restricts only "knowing" acts, thereby, incorporating the well established *mens rea* requirement of "knowingly". This term is readily understandable and is defined in this same title of the Colorado Statutes.[4] Unlike the concerns raised in *Schenck* an individual cannot mistakenly or inadvertently violate this statute. Neither these petitioners nor

[4] **18-1-501. Definitions.** (6) "Knowingly" or "willfully". All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

any other protestors at a clinic can violate this statute by inadvertently backing up and coming within eight feet of an another individual, or by standing still while an individual passes within eight feet of them.

Additionally, the statute requires the element of "approaching" for there to be criminal culpability. As pointed out by the narrowing interpretation of the Colorado Supreme Court, a petitioner who is standing still within the 100 foot zone does not need to change his or her position to avoid coming within the eight foot distance of an individual who is approaching them. If the *mens rea* requirement of "knowingly" and the *actus reus* requirement of "approaches" do not coincide there is no violation. Pet. App. 24a.

The eight foot restriction imposed by this statute is more narrowly tailored than the 15 foot restriction involved in *Schenck, supra* or the 36 foot zone considered in *Madsen, supra*. These restrictions were struck in part because they eliminated the demonstrators ability to speak to their targets in conversational tones. This problem does not exist with the statute's legislated 8 foot zone. In fact, there is evidence in the record that a protestors message is more readily received better if it is delivered from a distance of 8 feet than if it is delivered from closer proximity. Affidavit of Dr. Marianne LaFrance, JA 228 and 287.

The language of the statute makes it clear that its purpose is to protect the health of Colorado citizens by insuring their access to medical care. This is consistent with the government's responsibility to protect the health, safety and welfare of its citizens.

During the hearings conducted by the Colorado General Assembly in considering the adoption of this statute, compelling testimony was offered on a number of issues. A nurse who works at a clinic which provides abortions as well as other healthcare services testified that abortion protestors yell, thrust signs in faces, and generally try to upset the patients as much as possible, making it much more difficult to provide care in an already scary situation. She testified of people following along the sidewalk to get as close to cars as possible and that they continue yelling at patients up until the time they get into the clinic. JA 66-67.

Another witness testified that she was a volunteer at a healthcare facility that provided abortions among other healthcare services. In the course of her volunteer services she would escort patients into and out of the clinic. She testified that all during this process the protestors would yell and scream. The protestors also flashed signs that contained images of a bloody fetus and would yell you are killing a baby. The demonstrators shouted that the escorts were guards from Dachau, making reference to World War II Nazi

concentration and extermination camps utilized to commit crimes against humanity. She testified that the protestors would talk about fetuses and babies being dismembered, arms, and legs being torn off. The same witness told of derogatory racial comments. A young black women came for services and protestors called her "Mammy."

The same witness offered testimony about another patient at that same clinic who approached the clinic and was immediately surrounded by protestors who were yelling and screaming at her. When the witness finally reached this young woman, she found her in tears. After the patient and her mother were in the clinic, the mother looked at the witness and said "I can't believe this happens in this country. My daughter was raped." JA 69-71.

Another witness testified about the protestors behavior during demonstrations that the protestors referred to as rescues. The witness testified that the protestor's first action was always to block the entrance to the driveway of the clinic. This forced the patients to park on the street and make their way through the mass of demonstrators. The so-called escorts for the clinic would attempt to assist the patients in their efforts to enter the clinic. The demonstrators would try to stop their access and surround them. Demonstrators would push and shove the patients and escorts. Sometimes the demonstrators would lose their tempers and they would kick

and bite the patients and escorts. Demonstrators would try to physically pull the patient out from within the midst of the escorts. Some of the protestors were arrested for trespassing when they refused to leave the property of the clinic. The witness also testified that they had as much trouble getting the patients out of the clinic after treatment as they did getting them into the clinic. JA 158-159.

There was also testimony that this obstructive behavior by protestors was not limited to abortion clinics. A witness representing the Colorado Coalition of Persons With Disabilities testified in support of the bill and gave examples of other protests. He testified about a patient in Pittsburgh who was dying of hepatitis and received a baboon liver to save his life. As a result of this surgical procedure he became the target of animal rights activists. This witness also testified about an incident in Florida where a person with a disability became the target of anti-Medicaid protestors who ultimately assaulted him and knocked him out of his wheelchair. JA 107 -108.

The Colorado Supreme Court considered the testimony presented in the committee hearings of the General Assembly, and, in fact, quoted some of the testimony referred to herein. Ultimately, the Colorado Supreme Court concluded:

> With such a legislative history, it is obvious, and Petitioners do not refute, that the General Assembly's actions were motivated by its interest in preserving the health and safety of Colorado citizens. In particular, the General Assembly enacted section 18-9-122 as a means of assuring a citizens access to medical "counseling and treatment at Colorado healthcare facilities." Pet. App. 9a and 10a.

Petitioners would have us conclude that a Colorado citizen's right to healthcare is secondary to petitioners right to demonstrate[5]. This court has made it clear that the exercise of First Amendment activity is not without restriction. The case presently before the court has similarities to the focused picketing considerations in *Frisbee v. Schultz*, 487 U.S. 474 (1988). A patient trying to enter a healthcare facility during a public demonstration is a captive audience for the message presented by the demonstrators. The patient may be presented with no alternative than to run the gauntlet of the demonstration if they are to receive healthcare services. If an individual were going to a restaurant, a convenience store, or a gasoline filling station, they may choose to select one of several other locations for these products rather than go to the

[5] Petitioner Hill in her testimony to the Colorado General Assembly testified "can anyone show me the law in Colorado that says anyone has a right to unrestricted healthcare, especially when it is at the expense of other people's freedom?" JA 160.

site of the demonstration. These options are not available for a patient who is receiving treatment or services from a doctor or healthcare facility at a specific location. If that facility is being picketed the patient must encounter the demonstration or forego the healthcare services.

The captive audience aspects of this case make the logic of *Frisbee v. Schultz, supra* applicable here. In *Frisbee* this court held "Because the picketing prohibited by the Brookfield Ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the state has a substantial and justifiable interest in banning it." There is evidence that this protest activity has substantial negative impact on patients that encounter these demonstrations. Affidavit of Dr. Warren Hern, JA 219 - 222. This court has long recognized that citizens are not required to be subjected to or accept the message of demonstrators. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939); and *Kovacs v. Cooper*, 336 U.S. 77 at 86-87 (1949).

The Colorado Supreme Court's decision that this statute furthers a significant government interest is also supported by *Madsen, supra*. In *Madsen* this court supported the Florida Supreme Court's determination that the state has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy. *Madsen* also supports the conclusion that targeted

picketing of the home threatens the psychological well-being of the captive resident, and that targeted picketing of the hospital or clinic threatens not only the psychological, but also the physical, well-being of a patient held captive by medical circumstances. *Madsen* at 767 and 768; see also *Schenck, supra* at 376 (holding that unimpeded access to clinics is a significant governmental interest). All of these interests are supported by the statute adopted by The Colorado General Assembly and upheld by the Colorado Supreme Court.

E. The statute is a reasonable time, place or manner restriction that leaves ample alternative channels of communication.

There are two final questions left in the determination of whether this statute satisfies the constitutional standards set forth in *Ward, supra.* They are: (1) Is the statute a time, place or manner restriction? (2) Does it leave open ample alternative channels of communication?

The Court, in a long line of decisions, has recognized the government's authority to impose reasonable (and content-neutral) restrictions on the time, place or manner of protected speech activities:

> [T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are

> narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'

Ward, supra, at 791; *See also, Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *United States v. Grace,* 461 U.S. 171, 177 (1983); *Perry, supra,* at 45; *Heffron International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 648 (1981).

The requirement that the regulation be "narrowly tailored" does not mean that the regulation must employ the "least restrictive means" that will vindicate the significant governmental interest. The Court stated in *Ward*:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Ward, supra, at 2757-59.

This statute in question is not an absolute ban on speech activity, and there are no restrictions that relate to time. The statute does impose limited place and manner restrictions.

C.R.S. 18-9-122(3) places no restriction on speech activity that occurs outside of a radius of 100 feet from the entrance to a healthcare facility. Within the 100 foot radius the statute provides what has become known as an eight foot "bubble" of protection. This statute provides that no persons shall "knowingly approach" within this eight foot bubble without the consent of the protected person. The Colorado Supreme Court has applied a narrowing construction to this provision to mean that no protestor that accidentally or unintentionally enters within this eight foot zone can be found in violation of the statute. Pet. App. 24a, 25a. This statute contains minimal restrictions on the place and manner of speech. Reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid. *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789 (1984); *Heffron, supra*; *Kovacs* v. *Cooper, supra.*

Finally, we turn to the issue of "ample alternative channels for communication." This statute imposes limited restrictions on communication. Petitioners and everyone else can protest, educate, pray, chant, lecture, persuade, carry signs, and distribute literature on any subject that they choose. The prohibition included in the statute is to knowingly approach within eight feet of an individual who is within 100 feet of a healthcare facility entrance without that individual's

consent. Under the provisions of this statute a protestor may remain still and engage in his protest activities without fear of being in violation of the statute. In *Schenck*, to avoid violating the injunction, the protestors were required to maintain a separation of fifteen feet at all times. The requirement to withdraw and avoid contact is not present in the Colorado statute. To be in violation of the statute one must take the affirmative action of knowingly approaching within the eight foot buffer zone without consent.

II. C.R.S. 18-9-122 DOES NOT CREATE A PRIOR RESTRAINT ON SPEECH.

Petitioners have alleged that section 18-9-122(3) is a prior restraint on speech. Petitioners allege the result of the statute is that no speech is permissible unless permission is granted. Pet. Brf. 27 They also argue that the consent provisions of the statute make the beneficiaries of the statute agents of the state in censoring speech. Pet. Brf. 27 and 28.

In fact, the statute does not ban speech, it merely gives individuals entering into and exiting from healthcare facilities a minimal protection from becoming the captive audience of demonstrators. The only protest activity that is limited is the knowing approach another person when consent to do so is denied. The demonstrator is still free to deliver the message

by the means they have chosen without approaching that individual.

Petitioners extend this argument to claim that a patient's decision not to consent to a demonstrator's intrusion into their eight foot bubble of protection constitutes state action and a licensing scheme of censorship. Petitioners quote *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) for the proposition "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." While this may be true, the statute under consideration is not a prior restraint and this presumption does not come into effect. The flaw in petitioners' argument is that there is no state action involved in an individual denying consent to a protestor to approach within eight feet. This is simply an individual taking action they believe necessary to preserve their own health and safety.

Petitioners make reference to *Evans v. Newton*, 382 U.S. 296, 299 (1966) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 and other cases for the proposition that individuals or groups endowed with powers or functions of the government become agencies or instrumentality's of the and subject to its constitutional limitations. A review of *Evans, supra* at 299 also states "Yet generalizations do not decide concrete cases. Only by sifting facts and weighing circumstance... can we determine whether the reach of the

Fourteenth Amendment extends to a particular case". *Burton v. Williamton Parking Authority*, 365 U.S. 715 (1961) omitted from body of quote.

The cases cited by petitioners to support their censorship argument present substantially different situations than the one before this court. The cited cases deal with some action taken by the government, or done on its behalf, and resulting impact on the public in general. Petitioners equate the invocation of personal rights by individuals in denying them consent to approach with governmental action. Clearly this is flawed logic.

If a protestor was on private property and refused to leave when asked to do so by the property owner they would be subject to arrest for trespassing. The property owner may invoke his personal right to protect his property. Similarly this statute enables an individual within one hundred feet of a health care facility to exercise his personal right to allow someone to approach them, or to prohibit that action. This statute does not give them control over any speech activity as it relates to any other location or any other person. This is not government action or censorship.

The balance of petitioners' arguments concerning licensing speech and lack of procedural safeguards are also based upon the flawed premise that an individuals utilizing the protection of the eight foot buffer zone provided in the statute

constitutes state action. For the reasons described above none of these arguments are valid and should be disregarded by this court.

III. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

The Petitioners have made a facial challenge to the statute as being unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. The United State Constitution requires adequate notice of unlawful acts, it does not require the language of a legislative enactment to be mathematically precise. *Miller v. California*, 413 U.S. 15, 28 (1973); *Grayned v. City of Rockford, supra*, 104 and 110. The Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 7-8 (1947). Legislation is entitled to a presumption of constitutionality. *Parker v. Levy,* 417 U.S. 733, 757 (1974); *United States v. National Dairy Corp.*, 379 U.S. 29, 32-33 (1963).

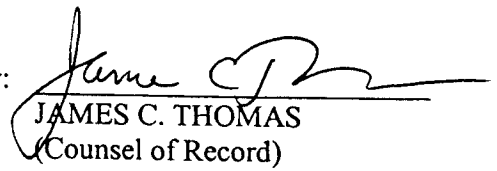
The statute adopts words and phrases used in normal conversation that are readily understood by the public. It is

concise in its statement of what behavior is permitted and what behavior is prohibited. In addition to this, the Colorado Supreme Court in its ruling has defined and limited the scope of the application of this statute. When the appropriate standards for vagueness are applied to this statute it clearly survives this vagueness challenge.

IV. CONCLUSION.

The judgment of the Colorado Supreme Court, upholding the statute as a valid time, place and manner restriction designed to assure safety and order for citizens entering and leaving healthcare facilities, should be affirmed.

Respectfully submitted this 10th day of December, 1999.

By: 

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