No. 98-1856

IN THE SUPREME COURT OF THE UNITED STATES

LEILA JEANNE HILL, *et al.*,
Petitioners

v.

STATE OF COLORADO, *et al.*,
Respondents

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Filed December 13, 1999

QUESTION PRESENTED

Amici will address the following question:

Whether a statute that makes it unlawful knowingly to approach closer than eight feet to an individual who is within 100 feet of the entrance to a health care facility, unless the individual consents to the approach, for the purpose of handbilling, displaying a sign, or engaging in oral protest, education, or counseling, is a reasonable restriction on the time, place, and manner of speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTE

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are national, private, voluntary, nonprofit organizations of physicians dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American College of Obstetricians and Gynecologists (ACOG) is the leading group of professionals providing health care to women; its more than 40,000 members represent over 90 percent of all obstetricians and gynecologists practicing in the United States. *Amicus* American Medical Association (AMA) was founded in 1847 to promote the science and art of medicine and the betterment of public health. The AMA's nearly 300,000 members practice in all fields of medical specialization.

Amici have a two-fold interest in this case. First, the Colorado statute at issue regulates conduct that has had a demonstrably deleterious effect on the health and welfare of patients at medical facilities. The conduct prohibited by this statute increases the risks associated with the provision of medical services to patients. Second, *amici* believe that health care providers have a fundamental right to be free from focused, intimidating and harassing picketing and other forms of coercive protest that include violence and threats of violence and which impede their ability to provide lawful health care services. See *e.g.*, App. 1a (policy statement of AMA House of Delegates opposing all acts of violence and intimidation against healthcare providers and medical facilities (including abortion clinics and family planning centers), and supporting the individual's right of access to such facilities). Because this case concerns the extent to which a state can regulate conduct that is fundamentally incompatible with the health and safety of patients and health care providers, *amici* wish to present their views.[1]

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been

(continued...)

BACKGROUND

Easily overlooked in the often heated ethical, moral, and legal debate surrounding abortion is the fact that it is an invasive medical procedure. When performed correctly by trained and experienced physicians, abortion is relatively safe. Nevertheless, an estimated 5,000 women "suffer a serious complication" from the procedure each year, and "the potential for complications is a major public health concern." Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985). Among the most serious complications are infection necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest and, in rare circumstances, death.[2]

[1](...continued)
lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

[2] Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 n.† (1977); Cates et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984). Some 240 deaths associated with legal, induced abortions were reported to the Centers for Disease Control and Prevention between 1972 and 1987. Lawson et al., *Abortion Mortality, United States, 1972 Through 1987*, 171 Am. J. Obstet. Gynec. 1365, 1367 (1994). The leading causes of abortion mortality are hemorrhage, anesthesia complications, infection and amniotic fluid embolus. *Id.*; Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 90 (1986).

In the United States, approximately 70 percent of all abortions are performed in stand-alone clinics,[3] such as the Planned Parenthood clinics and Boulder Women's Clinic where petitioners have protested. These clinics are licensed medical facilities, staffed by physicians and other trained medical personnel who, in addition to performing or assisting with the abortion procedure itself, administer general and local anesthesia before the operation and analgesics and other necessary medications after the operation. The medical staff also must recognize and respond to any of the major or minor complications that might arise during or after the procedure. In addition, almost all clinics provide other medical services, most typically contraceptive care to nonabortion patients, general gynecologic care, treatment for sexually transmitted diseases and general medical care.[4] Some of this care, such as performing pap smears to detect cervical cancer, is potentially life-saving. See J.A. 62.

In Colorado, as in other states, only a small percentage of patients who visit facilities where surgical abortions are performed are seeking abortion services. For example, in the 26 clinics it operates in Colorado, Planned Parenthood facilities see approximately 60,000 patients for family planning services each year. J.A. 62. Abortion patients comprise only about seven

[3] Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 Fam. Plan. Persp. 263 (1998).

[4] Henshaw, *supra* note 3, at 269. Many clinics also provide nongynecologic surgery, obstetric care, infertility counseling or treatment, HIV testing and female sterilization. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 247 (1991).

percent of that total. *Id.*[5] These Planned Parenthood clinics annually perform approximately 25,000 pregnancy tests and 55,000 pap smears. *Id.*

Notwithstanding the fact that most patients who visit these facilities seek services other than abortions, the facilities, many of their patients, and many of the persons who accompany them to office visits, are subjected to sometimes aggressive, sustained anti-abortion protests and demonstrations.[6] The "protestors are there all the time, shouting and screaming." J.A. 98. "They ignore the fact that many women who use these clinics are not there for abortions." *Id.* at 182. Indeed, a representative of Operation Rescue Colorado conceded that protestors have no means to discern whether a particular patient entering a clinic is seeking an abortion or other medical services. *Id.* at 75-76. Thus, women who visit clinics for non-abortion services often must run the same gauntlet of abuse and harassment as women seeking abortions. *Id.* at 65. "[The protesters] will shout at anybody coming in, male, female, it doesn't matter." *Id.* at 99. As a consequence, some women delay or forgo necessary medical examinations or treatment.[7]

Witnesses who testified during the legislative hearings that preceded the enactment of Colo. Rev. Stat. § 18-9-122 depicted numerous forms of confrontational, "in-your-face"

[5] Similarly, abortions account for less than one percent of the practice of Denver obstetrician and gynecologist, Dr. Charles H. Gartner. J.A. 217-18.

[6] *See* J.A. 59, 69, 100, 182, 218, 220, 222, 234.

[7] *See* J.A. 66 ("people often won't come on the days that they know we are doing abortions . . . because they don't want to be subjected to that"); *id.* at 219 (several patients indicated they would not return for pre-natal care because they did not want to endure harassment).

conduct by antiabortion protestors designed to harass, upset, intimidate, and obstruct clinic patients and staff. This behavior included yelling and screaming, J.A. 65-67, 69, 98, 154; the thrusting of graphic signs and placards into patients' faces, *id.* at 66, 69, 70, 154, into car windows and onto windshields, *id.* at 67, 99, 105-06; physical assaults, including pushing, shoving, biting, pinching and kicking, *id.* at 93-94, 158; verbal assaults, *id.* at 71, 183; attempts physically to pull patients out from within the midst of escorts attempting to protect them, *id.* at 158; the blocking of parking lot and building entrances, *id.* at 63, 93; storming clinic buildings, *id.* at 94; and vandalism, such as gluing shut clinic door locks and pouring butyric acid onto clinic floors. *Id.* at 63-64, 67.[8] One objective of these tactics is to "try to upset the patient as much as possible." *Id.* at 66.

This testimony is consistent with nationwide trends. A leading researcher on women's healthcare issues has reported that in recent years harassment of women and providers at abortion clinics has become more widespread and has involved more individual protestors. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 59

[8] The record is replete with other evidence of such conduct in the form of affidavits submitted to the district court. *See* J.A. 218 ("[D]emonstrators . . . would surround patients' cars after they parked, and aggressively approach patients, sometimes yelling at them and thrusting signs or literature in their faces"); *id.* at 222-23 ("demonstrators surrounded the car, slapped their signs against the windshield, and yelled at and taunted [escorts]"); *id.* at 223 (demonstrators "shoved signs in [a patient and her mother's] faces," would call patients, their family members and escorts "murderers," tell patients they are going to die, and taunt patients and their family members with inflammatory and abusive language, including racial epithets); *id.* at 224 ("Demonstrators jostled patients, screamed at them, and thrust signs and pamphlets in their faces").

(1995).[9] Fifty-five percent of nonhospital providers reported experiencing at least one form of harassment during 1992. *Id.* at 58. Of nonhospital facilities that performed 400 or more abortions in 1992, one-half reported picketing with physical contact or blocking of patients, 42 percent reported vandalism and 30 percent reported blockades. *Id.* at 58.

1. The Adverse Health And Safety Effects Of Protest Activities Outside Abortion Clinics.

The activities described above increase the medical risks associated with abortions and other procedures. By increasing patients' pre-surgical emotional stress, this conduct increases the difficulty and risk of administering medical treatment and places patients at greater risk of suffering serious complications.

For example, coping with the emotional complexities of an unwanted pregnancy is recognized to be a particularly

[9] Such conduct also has been described in numerous court decisions around the country. *See, e.g., Operation Rescue-National* v. *Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 550-51 (Tex. 1998) ("protestors were confrontational, coming within inches of patients' faces and shouting at them"); *Planned Parenthood Shasta-Diablo, Inc.* v. *Williams*, 898 P.2d 402, 404 (Cal. 1995), *cert. denied*, 520 U.S. 1133 (1997) (sidewalk counselors pressed literature and plastic replicas of fetuses on patients attempting to enter the clinic); *Pro-Choice Network* v. *Project Rescue*, 799 F. Supp. 1417, 1424-26 (W.D.N.Y. 1992) (if a woman passed a sidewalk counselor without changing her mind, she would then pass through a throng of protestors who harassed and screamed at her, and sometimes even assaulted her), *aff'd in part and rev'd in part on other grounds*, 67 F.3d 359 (2d Cir. 1994); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1346 (3rd Cir. 1989) (demonstrators pushed, shoved, and tugged on patients as they attempted to enter clinic); *Fargo Women's Health Org.* v. *Lambs of Christ*, 488 N.W.2d 401, 405 (N.D. 1992) (screaming protestors struck, pushed, and threatened escorts).

stressful life event.[10] In addition, many women approach abortion, like any other invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Landy, *supra* at 38.[11] Indeed, most adult patients have some degree of state anxiety (*i.e.*, relatively short-term anxiety of external origin) relating to anesthesia (Garfield, *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 61-62 (1974)), and even a minor surgical procedure can create "an important problem of emotional stress for many patients." Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 694 (1987).[12]

For patients already in a state of emotional vulnerability, protest activity at close range can "have a profound negative effect on the psychological and physiological health." J.A. 272-73. Warren M. Hern, M.D., M.P.H., Ph.D., a physician who maintains a private practice at the Boulder Abortion Clinic, observed that on the days protests took place at that facility patients experienced "considerably more stress," the level of which corresponded to the aggressiveness of the demonstrators.

[10] Adler et al., *Psychologic Factors in Abortion*, Am. Psychologist, Oct. 1992, at 1194, 1197; Landy, *Abortion Counseling--A New Component of Medical Care*, 13 Clin. Obstet. Gynec. 33, 36 (1986); Frankel-Fein, *Defense Style, Social Support Appraisal, Responses to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 4, 31 (1991); Polk-Walker, *Counseling Implications in a Client's Choice of Anethesia During a First or Repeat Abortion*, 28 Nursing F. 22 (1993).

[11] *See also* Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Brit. J. Clin. Psychol. 29, 37 (1982).

[12] This is especially true of teenagers, who lack experience with pelvic examinations and medical procedures generally. Landy, *supra* at 38.

Id. at 220, 273. Patients would come into his office shaking, tearful and in great distress from harassment and insults, and from the fact that the demonstrators approached them very closely. *Id.* Clinic staff would have to calm them down for some time, which often delayed their medical care. *Id.* On one occasion, a young adolescent girl was so emotionally traumatized by an especially hostile and abusive group of demonstrators that "she sank into what is best described as a clinically catatonic state in the clinic's front waiting room." *Id.* at 279.

Patients exposed to protestors experienced a "fight-or-flight" reaction, especially when the demonstrators approached closely. J.A. 220, 273. Evidence of such a reaction observed on patients included pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention. *Id.* at 220-21. Dr. Hern and his staff observed that "when the demonstrators are close to the patients, as when they are blocking the sidewalk for patients, the severity of these reactions increases manyfold." *Id.* at 275.

Dr. Hern's assessment is corroborated by evidence from other clinics where patients encountering similar protests have likewise suffered psychophysical stress and accompanying symptoms. See Cozzarelli & Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. Clin. Psychol. 404, 406, 421 (1994) (some women show obvious signs of psychological stress (including sweating, palpitations, anger, crying, or hyperventilation) after being subjected to anti-abortion demonstrators; the greater the personal contact women had with the anti-abortion demonstrators, the more upset they became); Hern, *Proxemics: The Application of Theory to*

Conflict Arising From Antiabortion Demonstrations, 12 Population & Env't 379, 380 (1991).[13]

The stress-related symptoms described above complicate an abortion and increase its risks. See J.A. 273. For example, urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation. *Id.* at 221, 273; Hern, *supra* at 380-81. Hyperventilation can lead to agitation and muscle spasms, making it more difficult for patients to remain still during medical treatment, and thus increasing the risks of complications such as perforating the uterus during the performance of an abortion. J.A. 221, 273-74. Hyperventilation also can lead to uncomfortable sensations, which can heighten anxiety, and lead to loss of consciousness if a vasovagal syndrome (a transient vascular and neurogenic reaction to emotional stress, and marked by pallor, nausea, sweating, and a rapid fall in blood pressure) occurs. Hern, *supra* at 380-81.

Studies of patients who have undergone abortions have shown that tension affects the degree of pain experienced and

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[13] *See also* Hern, *supra* at 382; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 758 (1994) (trial court found that protests "took their toll on the clinic's patients"); *Planned Parenthood Shasta-Diablo, Inc.*, 898 P.2d at 411 ("physical confrontations with protestors moments before receiving medical treatment, including surgical procedures, subjected patients to heightened stress and anxiety"); *Operation Rescue-National*, 975 S.W.2d at 551 ("patients would enter clinics visibly shaken, crying, and nervous"); *Pro-Choice Network*, 799 F. Supp. at 1427 (women targeted during demonstrations "usually enter the medical facilities visibly shaken and severely distressed").

the difficulty of the procedure itself.[14] This finding is consistent with other studies of stress and its effects on surgery patients.[15] "In general, high preoperative fear or stress is predictive of a variety of poorer outcomes, including greater pain, longer hospital stays, more postoperative complications, and poorer treatment compliance." Kiecolt-Glaser et al., *Psychological Influences on Surgical Recovery: Perspectives From Psychoneuroimmunology*, 53 Am. Psychol. 1209, 1214 (1998). If a patient becomes agitated before or during the procedure, "she could easily experience serious complications of the abortion that would be extremely unlikely under other circumstances." Hern, *supra* at 381.

Some of these complications stem from the use of anaesthesia.[16] Patients exhibiting signs of heightened anxiety often require higher levels of sedation. See *Operation Rescue-National* v. *National Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 551 (Tex. 1998). Increasing the level of sedation in turn increases the risk of the surgery.[17] Indeed, Dr. Hern stated in his affidavit that on several occasions a patient's anxiety-related symptoms were so great that it was necessary to delay surgery. J.A. 220. With such delay also comes increased risk of complications. See Cates, et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 268 (1977) ("*any* delay increases the risk of complications"); see also *Pro-Choice Network* v. *Project Rescue*, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992).

2. Protest Activities Directed At Clinic Staff.

Anti-abortion protestors target not only patients but also patient escorts, clinic employees, and volunteers. Their assaults have subjected all these persons to significant stress, placed them at a risk of experiencing mental health problems, and reduced the availability and quality of medical services.

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[14] Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) ("high levels of preoperative anxiety in abortion patients are associated with greater pain and discomfort during the abortion procedure, when compared with moderate levels of anxiety").

[15] Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Med. 275, 283 (1992).

[16] "[A] person's pre-operative emotional, cognitive and cardiovascular state influences the induction of anaesthesia, operative problems and short-term recovery. . . . High levels of heart rate and blood pressure immediately prior to the induction of anaesthesia is a clinically undesirable state which determines induction, operative and post-operative outcomes."

(continued...)

[16](...continued)
Abbott & Abbott, *Psychological and Cardiovascular Predictors of Anaesthesia Induction, Operative and Post-operative Complications in Minor Gynaecological Surgery*, 34 Brit. J. Clin. Psychol. 613, 621 (1995).

[17] *See* Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two- to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions and corrective major surgery); Lawson et al., *supra* at 1371 ("[T]he majority of the deaths [from legal abortions] in 1983 through 1987 were associated with general anaesthesia during the first trimester, a time usually associated with lowest overall risk."); Meyer, *supra* at 688 (noting that, in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anaesthesia, "[i]mportant factors are fear, anxiety and stress").

The testimony before the Colorado General Assembly included accounts of patient escorts being physically assaulted numerous times by protestors at medical facilities. J.A. 93-94. Protestors attempting to block patients' access to a clinic would surround escorts (who, in turn, were surrounding the patients and their family members). These protestors "would push, they'd shove. Sometimes, they'd lose control and they'd bite us and kick us and pinch us." *Id.* at 94. One escort testified that she was hit by men twice her size while trying to get 12 and 13-year-old patients into a clinic. *Id.* at 105. See also *id.* at 225 (escorts were "shoved and hit by demonstrators trying to reach the patients").

Workers were also subject to considerable verbal harassment and abuse. Screaming protestors called clinic staff "murderers," J.A. 153, 223, or "guards from Dachau," *id.* at 69, and threw placards in their faces. *Id.* at 70. On one occasion, as a nurse drove away from the clinic on her first day of work, a picketer leaned into her car and called her a "baby-killing bitch." *Id.* at 152.

The experience of clinic workers in Colorado is comparable to that reported in the literature. In a recently published study based on data collected in 1995, workers at abortion clinics in a Southeastern state reported considerable exposure to violence. Fitzpatrick & Wilson, *Exposure to Violence and Posttraumatic Stress Symptomatology Among Abortion Clinic Workers*, 12 J. Traumatic Stress 227 (1999). Over 90% of the workers reported that they were yelled at by protestors, over 50% were threatened and 18% were pushed or shoved. *Id.* at 235. Six percent reported being punched, slapped or kicked by protestors. *Id.* Nearly three times as many workers reported witnessing other workers being physically assaulted than being victims themselves. *Id.*

This extraordinary level of threats and violence against clinic workers continues a longstanding trend. For example, a 1988 study found that the "continued harassment of abortion providers and their patients is a problem that no other medical care providers encounter." Henshaw, *supra* note 4, at 252. Studies of clinic personnel have found that employee levels of distress are highly correlated with protest activities at the clinics, with the highest levels of distress typically being reported by those who work at clinics experiencing the most protest activities.[18] Indeed, even health care providers who have not suffered direct attacks experience heightened fear when other providers are attacked, and are thus primed to take seriously any implied or overt threats directed at them. Boyd at 57-58.

The present case graphically illustrates these effects. Exposure to protest activities resulted in clinic staff members and volunteers feeling threatened and intimidated, particularly when surrounded by demonstrators at close range. J.A. 229. One volunteer testified that serving as an escort "was a truly frightening experience . . . . We were sorely afraid for our physical safety." *Id.* at 90.

These adverse effects on health care providers also adversely affect patient welfare. See J.A. 236 ("acts of violence and threats of violence might be expected to create an atmosphere of uncertainty and fear that can potentially affect not only workers and their mental health status, but also the work being performed"); Henshaw, *supra* p. 5, at 58 (harassment affects the ability of facilities to offer services). In addition to driving experienced physicians out of the practice, harassment and intimidation discourage younger physicians

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[18] Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping With Antiabortion Harassment* 72 (1990) ("Boyd").

from entering the field, thereby reducing the availability of abortion services. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719, 721 (1992). Indeed, eleven percent of nonhospital providers have reported that physician shortages and other staffing problems reduce their ability to provide abortion services. Henshaw, *supra* p. 5, at 59.

SUMMARY OF ARGUMENT

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)). The Colorado statute challenged here is constitutional precisely because it provides petitioners and others ample opportunity to reach the minds and attention of willing listeners, yet also provides a narrow corridor of safe passage for unwilling, captive listeners.

The record before the Colorado General Assembly documents how persons seeking to enter or leave medical facilities in Colorado are regularly confronted with aggressive, harassing, and intimidating confrontations that threaten their health and safety. Because medical care can safely be provided only in licensed medical care facilities, persons seeking to receive or provide such care have no choice but to use the entrances to these facilities. They cannot avoid these assaults by walking away; they require the protection of the state.

Section 18-9-122(3) is a reasonable and narrow response to this serious problem of public health and safety. The only conduct it prohibits is a very close approach to an unwilling listener near the entrance to a medical facility. It

permits protesters to approach up to eight feet from any person, which is close enough to permit oral expression in normal conversational tones, to display signs or literature, and to capture the attention and mind of any interested person. By guaranteeing all persons a narrow path to enter and leave a medical facility without being surrounded, bullied, and harangued at very close range, the statute minimizes the adverse psychological and physiological impact, and consequent health risks, that such close and threatening conduct poses for those who seek to obtain and provide care at medical facilities.

ARGUMENT

The Colorado statute is content-neutral. It advances not only significant but compelling state interests in protecting health and safety that lie at the core of the state's police powers. In so doing, it imposes only the most modest restriction on the place where petitioners can position themselves, and one that is entirely appropriate given the nature of a health care facility. It is thus a reasonable restriction on the place of speech.

A. The Statute Regulates The Place, Not The Content, Of Speech.

This Court has repeatedly made clear that the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 759, 763 (1994) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). In conducting that inquiry, the critical question is whether the government is attempting to "'regulate [speech] based on hostility--or favoritism--towards the underlying message expressed.'" *Id.* (alteration in original) (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 386 (1992)). In short, to assess content-

neutrality, the Court will "look to the government's purpose as the threshold consideration." *Id.*

There is no evidence that any "invidious content- or viewpoint-based purpose motivated" the Colorado legislature. *Id.* Rather, Colorado's evident purpose was to further its compelling interests in protecting the health and safety of its citizens. Pet. App. 25a-26a. This statute secures for all citizens a narrow pathway to the entrance of a medical facility, which they can travel without fear of being accosted by a protester, demonstrator, educator, or counselor. At the same time, the statute permits petitioners and others to surround their targets with signs, demonstrations, and armfuls of literature, and to speak or scream whatever they wish.

The statute thus applies equally to, and permits, every conceivable expression of viewpoint on any issue about which a "viewpoint" might be had, including those that would be deeply offensive and wounding to those hearing them. Neither petitioners nor their *amici* contend that this facially neutral statute promotes any concealed invidious motive. As the Court reasoned in *Madsen*, the fact that the statute may cover "people with a particular viewpoint does not render the [statute] content or viewpoint based." 512 U.S. at 763; see *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988). Its only impact is to regulate the place where such expression occurs.

Petitioners and their *amici* nevertheless assert that the statute is content-based. Their sole explanation is that "the content of oral speech must be taken into account in determining whether the statutory ban is violated." Pet. Br. 31.[19]

[19] *See* ACLU Br. 10-11 (application of statute "clearly turns on the content of what is being said"; "inescapable need to refer to content in applying (continued...)

That sweeping test is inconsistent, however, with the Court's repeated focus on the justification and purpose of the government's action, see *Madsen* and the cases cited therein, and was squarely rejected in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986). It is also unsupported by the cases on which petitioner and their *amici* rely. For example, petitioners recite the Court's statement that "'it is the content of the speech that determines whether it is within or without the statute's blunt prohibition.'" Pet. Br. 32 (quoting *Carey* v. *Brown*, 447 U.S. 455, 462 (1980)). But in context, it is plain that the Court in *Carey* was concerned about an ordinance that permitted speech on certain controversial issues but not others. *Carey* v. *Brown* involved an ordinance that "generally bar[red] picketing of residences or dwellings," but created an exemption for peaceful picketing "on one particular subject" -- labor disputes. 447 U.S. 455, 457, 461 (1980). The Court therefore found the ordinance comparable to the one it had invalidated in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972), because in each case the government had "'select[ed] which issues are worth discussing or debating in public facilities.'" *Carey*, 447 U.S. at 463 (quoting *Mosley*, 408 U.S. at 95-96). The Court thus did not find the ordinance invalid merely because of an "inescapable need to refer to content in applying it" (ACLU Br. 11) or because "the content of oral speech must be taken into account in determining whether the statutory ban is violated." Pet. Br. 31.

[19](...continued)
the Colorado statute"); AFL-CIO Br. 16 n.7 (relying on *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972)). We express no view on whether petitioners may properly raise the issue of content-neutrality in this Court; *cf.* Pet. App. 11a, 21a (petitioners did not argue content-neutrality issue before the Colorado Supreme Court).

Here, unlike the statutes in *Carey* or in *Mosley*, the Colorado statute does not select any issue for preferential (or disfavored) treatment. It treats all expression of any viewpoint on any issue uniformly. Indeed, the state contends that the language of the statute is broad enough to reach any oral expression, and that the Colorado Supreme Court may be held to have adopted that view. Under such a construction (which this Court also could adopt[20]), any argument that the statute embodies a content-based distinction evaporates.[21]

To the extent the statute draws any line, it is between expression of a view on any issue (which is covered) and incidental oral expression, such as a greeting or an inquiry as to time of day or for directions. Such a line does not select between issues, but rather carves out an exception for the sort of non-threatening, presumptively consented-to interactions that contain no substantive issue-related content whatsoever. Because that line reflects only the legislature's proper purpose to minimize the intrusion of the ordinance on speech, rather than any "invidious content- or viewpoint-based purpose" to promote or suppress one viewpoint or issue at the expense of another, the statute is content-neutral. *Madsen*, 512 U.S. at 763.

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[20] *See Frisby* v. *Schultz*, 487 U.S. 474, 482-83 (1988); *United States* v. *Grace*, 461 U.S. 171, 176 (1983).

[21] Such a construction would not result in an overly broad statute. Although the statutory reference to "oral protest, education, or counseling" would, on this construction, cover oral inquiries about the time of day or for directions, the statute would not operate in practice to prohibit or punish them. Such innocuous, unthreatening inquiries are presumptively ones to which any person would, and may be deemed to, consent.

B. The Statute Serves Compelling Government Interests.

A content-neutral statute, such as the Colorado statute challenged here, must serve a significant governmental interest. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989); *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992). The Colorado statute easily satisfies this test. It serves two broad interests, each of which is fundamental to the state's exercise of its historic police power.

First, the statute serves the state's interest in protecting the health of its citizens by ensuring them reasonable access to health care facilities. The Colorado General Assembly identified this interest in the first section of the statute (see Colo. Rev. Stat. § 18-9-122(1)), and the Colorado Supreme Court relied upon it in upholding the statute. Pet. App. 26a. The compelling need for protective regulation at the entrances to health care facilities was dramatically set forth in testimony before the General Assembly; that testimony, in turn, is fully consistent with evidence, reports, and findings from researchers and proceedings nationwide of the significant threat to public health posed by demonstrations, protests, and counseling at close range to patients near the entrance to medical facilities. See pages 6-11, *supra*. For example, such activities deter patients from entering the facilities and delay treatment; discourage staff from continuing to work at the facilities; and traumatize those patients who do enter the building, all of which serves to increase the risks of adverse outcomes from the treatment. *Id.*

Second, the statute promotes the state's interest in protecting the safety of its citizens. The record before the Colorado General Assembly was replete with testimony about "hostile, and sometimes violent confrontations" near the

entrances to health care facilities. Pet. App. 6a. The testimony described incidents of physical assaults, intimidation, and threats that made patients fear for their physical safety, and that occurred in the midst of such a crush of demonstrators that identifying particular perpetrators was difficult. *E.g.*, J.A. 93-95, 159, 218-30. It is a basic function of state government to respond to a pattern of conduct that threatens the personal safety of its citizens.

Petitioners concede that these are significant government interests. See Pet. Br. 35; Pet. App. 25a-26a; see also ACLU Br. 9 ("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"). Even though the legal point is conceded, these interests ought not be glossed over, for they are not only significant, but compelling.

The state's interest in regulating speech that threatens health and safety near the entrances of medical facilities is compelling because individuals are not free to walk away from that speech. Those entrance areas are choke points. Sidewalk counselors and other demonstrators know that individuals seeking to obtain or provide medical care must use them; it precisely for this reason that they target these areas for their abusive activity. The targeted individuals cannot avoid the documented adverse medical consequences and invasion of medical privacy by going elsewhere, nor can they avoid the sense of fear or terror of a potential physical assault when sidewalk counselors and others are free to accost, surround, harangue, and scream at them at close range as they attempt to enter a medical facility.

An individual seeking to receive or provide medical attention is thus a classic captive audience. This Court has made clear that states have an overriding interest in regulating

offensive or coercive speech imposed upon a captive audience. In *Lehman* v. *City of Shaker Heights*, for example, the Court upheld a *content-based* ban on political advertising in the public transit system because:

> "[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). In such situations, "[the] legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp. v. Utah*, 285 U.S. [105,] 110 [(1932)].

418 U.S. 298, 302 (1974). See also *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside . . . the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."). Moreover, unlike the captive audience on the streetcar, an individual seeking medical care, particularly medical care relating to reproductive matters, has important interests in privacy and anonymity,[22] and is "practically helpless to escape th[e] interference with his [or her] privacy" (*Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)) that results from conduct such as that in which petitioners seek to

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[22] *Cf. Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986) (invalidating reporting requirements because they "raise[d] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy"); *Bellotti* v. *Baird*, 443 U.S. 622, 655 (1979) ("[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (Stevens, J., concurring in judgment).

engage.[23] In numerous cases, the Court has upheld bans on speech, including picketing targeted at a person's home, the use of sound trucks in residential neighborhoods, and indecent language over the radio waves, because the means of communication and the content of the speech itself invaded substantial privacy interests in an inescapable and intolerably intrusive manner. See *Frisby*, 487 U.S. at 484-85; *Kovacs*, 336 U.S. at 86-87; *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Rowan*, 397 U.S. at 738. The state's interest is particularly compelling here, therefore, because it seeks to protect individual interests in privacy and anonymity, as well as health and safety, in a context in which individuals, absent state intervention, are unable acting alone to protect those interests.

C. The Statute Is Reasonably Tailored To Protect The State Interests At Stake And Leaves Open Ample Alternative Channels Of Communication.

Finally, the Court must examine "the fit between the [objectives of the statute] and the restrictions it imposes on speech . . . ." *Madsen*, 512 U.S. at 765. The test for a content-neutral restriction on the time, place, and manner of speech is well-established. Such a statute must be reasonably tailored to serve a significant governmental interest, and must leave open ample alternative channels of communication. *Ward*, 491 U.S. at 796; *Burson*, 504 U.S. at 197.

Petitioners and their *amici* quarrel with this Court's holding in *Madsen* that "a somewhat more stringent application

[23] This is particularly true in the case of abortion, which is not a widely offered procedure. Henshaw, *supra* note 4, at 252. Indeed, nearly ten percent of women who obtain abortions must travel more than 100 miles to do so. *Id.*

of general First Amendment principles" applies to review of an injunction as opposed to "a generally applicable ordinance." 512 U.S. at 764-65. But they offer no arguments in support of their disagreement that were not considered, and rejected, by the Court in *Madsen*. Compare Pet. Br. 26-27 n.18 and ACLU Br. 8 with *Madsen*, 512 U.S. at 764-67.

Moreover, their arguments overlook the fact that while *Madsen* posited a statute that merely promoted "particular societal interests," *id.* at 764, the statute at issue here promotes interests that lie "at the core of the State's police power." *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976). The exercise of police power to protect public health and safety has historically been a matter for state concern, *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985), and consequently the "'States traditionally have had great latitude under their police powers to legislate so as to protect the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985)). Thus, a state should be permitted significant latitude to impose time, place, and manner restrictions that further its core interests.

In any event, the statute here is so narrowly tailored, and leaves open so many channels of communication, that it would pass muster even under far stricter scrutiny than is appropriate to this content-neutral exercise of police power. Despite their best efforts, petitioners and their *amici* fail to identify any significant limitation on expressive activity that flows from the statute they challenge. Their case is grounded only in rhetoric and in repeated invocations of First Amendment formalisms, not in real threats to freedom of speech.

The statute has so many speech-preserving limitations that they are difficult to summarize in a single sentence. But in general, the only activity the statute prevents petitioners from conducting is knowingly approaching closer than eight feet to someone who is within 100 feet of the entrance to a medical facility. Even that modest place-restriction is not absolute. Petitioners can *be* closer than eight feet so long as they are standing or sitting still; moreover, petitioners can even knowingly *approach* closer than eight feet, so long as their target consents and, beyond 100 feet from the entrance to the healthcare facility, no restrictions apply at all.

The statute thus permits petitioners and others to be close enough to speak to their targeted audience in normal conversational tones, if they so choose, or to scream and yell (and be understood to be screaming and yelling), if they prefer. It also permits them to display posters at close range that can easily be seen by the target audience. And it permits them to display and make available handbills within two or three steps of any passerby, and to approach and hand them to any person who signals that he or she wants them. These not only are "ample alternative channels of communication," but also they represent virtually every conceivable non-coercive channel of communication that petitioners could use outside a medical facility.

What is foreclosed? Petitioners dramatically claim that "*all handbilling* within one hundred feet of the entrance doors to every Colorado health care facility would be banned under the statute." Pet. Br. 43 (emphasis in original). That is not so. It may be that the statute "precludes handbilling in its normal sense" by forbidding unconsented approaches (AFL-CIO Br. 7), but the consequent intrusion on First Amendment values, if any, is very slight. The First Amendment gives no one the right to place a handbill in someone else's hand. *Kovacs*, 336 U.S. at

87 (passer-by "may be offered a pamphlet in the street but cannot be made to take it.").

The only question with respect to handbilling, therefore, is whether it is unconstitutional, near the entrance to a medical facility, to make mobile handbillers stay eight feet away from unwilling recipients of handbills. It plainly is not. Indeed, the Court has upheld a far more restrictive place-regulation, which prevented any distribution of "'printed or written material'" at a fairgrounds except from a "'duly licensed location.'" *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 643 (1981) (quoting Minnesota State Fair Rule 6.05). Moreover, the Court upheld that more restrictive ban on handbilling because it furthered the state's interest in avoiding "widespread disorder at the fairgrounds"; that interest, while significant, is far less compelling than the documented need to protect health and safety immediately outside of medical facilities that led the Colorado General Assembly to enact this statute.

The Colorado statute is also far more narrowly tailored than the 300-foot no-approach zone struck down in *Madsen*. See Pet. Br. 26. Far from banning any undefined "approaches" within a broad 300-foot area in front of an entrance, the Colorado statute permits approaches up to eight feet from any person, and thereby allows the kind of "peaceful" contact that the broad and ambiguous *Madsen* injunction foreclosed. *Madsen*, 512 U.S. at 774. Indeed, the Colorado statute allows much closer approaches than the "cease and desist" provision upheld in *Schenk* v. *Pro-Choice Network of Western New York*, which required protesters to withdraw to a distance of 15 feet from those who did not consent to their approach. 519 U.S. 357, 384 & n.12 (1997). Similarly, because a protester can comply with the Colorado statute simply by standing still, and because the statute has a scienter requirement that prohibits

only knowing approaches, the statute's narrow 8- foot buffer is also far more clearly defined and easy to comply with than the vague 15-foot buffer that was "quite difficult for a protester" to "know how" to comply with, and that was therefore struck down in *Schenk*. *Id.* at 378.

The modest limitation on handbilling imposed by the statute is thus fully consistent with, and more narrow than, other limitations that the Court has previously upheld. And apart from that limitation, neither petitioners nor their *amici* identify any other specific impact on their ability to speak. The Court will search their briefs in vain for any concrete description of the significant, unnecessary restrictions on speech that they claim the statute imposes. The reality is that anything that they wish to say to someone immediately outside the entrance to a health care facility can be said as easily from eight feet away as from one, and any sign that they wish to display can be seen as easily from eight feet as from one. Indeed, the record suggests that petitioners' messages are more effective when delivered at an even greater distance.[24] The Colorado statute thus grants all persons ample "opportunity to win [the] attention" of those near clinic entrances and to "reach the minds of willing listeners" with words, signs, and even handbills. *Kovacs*, 336 U.S. at 87. The Constitution requires no more.

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[24] Research has shown that cognitive performance is decreased during a "personal space invasion," i.e., "when an encroacher violates the norms of interpersonal distance by approaching too closely where the subject does not expect or desire to interact with the potential invader." J.A. 286-87 (citing Worchel et al. (1976 & 1979)). In a study comparing persuasive, verbal communication at distances of two feet, six feet and fifteen feet, fifteen feet was found to be the "optimal distance for changing someone's attitude." *Id.* at 287 (citing Albert & Dabbs (1970)). "At closer distances, the participants seemed distracted by the presence of the persuader because they felt unduly pressured." *Id.*

Rather than point out concrete restrictions, petitioners and *amici* offer abstract complaints about overbreadth. First, petitioners note that the statute is not limited to those entering or leaving a health care facility, but extends to "every human being within 100 feet of the entrance to any health care facility in Colorado." Pet. Br. 40. While that is true, there is also no evidence that it is significant. The number of affected people is likely to be small (because few who are not seeking to enter or leave the facility are likely to come near the entrance during a demonstration), and petitioners are free to approach those who do once they pass further than 100 feet from the entrance (which they will do since these are individuals who, by hypothesis, are not seeking to enter the facility).

Second, petitioners and *amici* note that the statute applies to all protesters, regardless of whether they previously have been found guilty of violating the law or whether their actual up-close solicitations would be perceived by a patient to be intimidating or hostile or would serve to impede their access to the facility. Pet. Br. 41 n.33; ACLU Br. 22; AFL-CIO Br. 10-11. Such scope, however, is inherent in any effort to address a threat to public health and safety through legislation rather than injunction. Moreover, the record contains ample evidence to support the state's concern that, however well-intentioned petitioners or others may believe themselves to be, their zealousness in wishing to intercept their targets near clinic entrances, and their dogged persistence in providing unwanted counseling at the closest possible range without physically blocking a person's progress toward the door, creates a distinct and significant threat to public health and safety.[25]

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[25] *Cf. American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921) ("the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view

(continued...)

Finally, petitioners and their *amici* argue that section 18-9-122(3) is superfluous because the statute "already deals with obstruction in another section." ACLU Br. 22; see Pet. Br. 42 (citing Colo. Rev. Stat. § 18-9-122(2), which outlaws conduct by a person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility."). But the two provisions do not overlap; they are complementary and mutually reinforcing. As another of petitioner's *amici* points out, "there is nothing intrinsically obstructive in the leafletting, handbilling, sign display, and oral protest modes of communication at less than eight feet from the intended addressee." AFL-CIO Br. 13. The record before the Colorado General Assembly shows that such modes of communication, at less than eight feet from the intended addressee, have tended to intimidate, harass, and upset persons attempting to enter or leave health care facilities, and it is clear that such conduct adversely affects patient health and the ability of health care professionals to treat patients. See pages 6-11, *supra*. The record also reflects the Assembly's concern that attempts to enforce a law more narrowly limited to only those non-obstructive approaches that had the effect of intimidating or harassing an individual would be difficult to enforce given the swirling crowds that result when groups of protesters generally are permitted closely to approach unwilling, captive listeners. See J.A. 117, 124-25.

[25](...continued)
to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all this the person sought to be influenced has a right to be free . . . .").

At bottom, petitioners' and their *amici*'s concerns about improper tailoring are unpersuasive because they fail to take seriously (or for the most part even to discuss) the state's exceptional interest in ensuring citizens safe passage into and out of every health care facility. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); see *id.* at 120 (noisy demonstration incompatible with school activities); *Frisby*, 487 U.S. at 480-81 (focused picketing incompatible with tranquility of private residence); *United States* v. *Kokinda*, 497 U.S. 720, 732 (1990) (solicitation incompatible with business of post office); *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966) (demonstration incompatible with jail grounds); *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (picketing incompatible with administration of justice at courthouse).

Conduct that interferes with the safe and effective provision of medical services is fundamentally incompatible with the nature and function of a medical facility. Indeed, *amici* submit that the nature of a medical facility raises public health and safety concerns that match or exceed the interests implicated in the public school, post office, jail, courthouse, or public bus settings.[26] See *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781-85 (1979); see *id.* at 791 (Burger, C.J., concurring in judgment) ("I would think no 'evidence' is needed to establish the proposition that the primary mission of every

[26] That the activities in question are conducted in the traditional public forum of a sidewalk is not dispositive. This Court has upheld restrictions on expressive conduct on sidewalks that is incompatible with the normal activity of a particular place adjacent to the sidewalk. *See Frisby*, 487 U.S. at 480-81; *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972).

hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated."); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (government has a compelling interest in seeing that any medical procedure is performed under circumstances that insure maximum safety for the patient); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment); *Dallas County Hosp. Dist.* v. *Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052, 1052-55 (1982) (Rehnquist, C.J., dissenting from denial of certiorari). The statute here, which is aimed directly at promoting patient welfare and reducing medical risk, and which only narrowly restricts the place where protesters can stand to express themselves and in no other way limits their ability to attract the attention of listeners, is a reasonable and measured response to a serious public health problem. It should therefore be upheld as constitutional.

CONCLUSION

For the reasons stated above, the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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