IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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REVEREND PAUL SCHENCK AND
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR PETITIONERS

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JAY ALAN SEKULOW*
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St., N.W.
Suite 304
Washington, D.C. 20007
(202) 337-2273

VINCENT P. MCCARTHY
JOSEPH P. SECOLA
MCCARTHY & SECOLA
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(860) 355-0923

KEITH A. FOURNIER
JOHN G. STEPANOVICH
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Drive
Virginia Beach, VA 23464
(804) 579-2489

THOMAS P. MONAGHAN
THE NEW HOPE LIFE CENTER, ACLJ-NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

**Counsel of Record*

*Attorneys for Petitioners*



PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208


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## QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), this Court rejected the "reasonable time, place and manner" analysis for injunctions and instead mandated the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected and non-speech activities. Against this background the first question presented is:

> Whether the *in banc* decision of the Second Circuit Court of Appeals erred in upholding a provision of an injunction which prohibits all speech within overlapping fifteen foot floating no-speech zones (which create fifteen-foot no-speech zones around the abortion facility entrances and driveways and all pedestrians and vehicles) on public sidewalks and streets outside abortion facilities as the most precise way to ensure access to the abortion facility and promote public health and safety in the context of overwhelmingly peaceful demonstrations and a lack of any finding that a less restrictive injunction could not accomplish the same goals.

2. Again, in the context of the *Madsen* and *Claiborne* decisions above, and particularly this Court's holding in *Madsen* that "no-approach" zones are unconstitutional restrictions on free speech:

> Whether the Second Circuit's *in banc* decision upholding the "cease and desist" provision in the injunction below, based as it is on the oiskike by a communicatee of the words being spoken by a communicator, is in conflict with this Court's decision in *Madsen* which held that the "no-approach" zone

burdened more speech than necessary and which reaffirmed the unconstitutionality of content-based restrictions on speech under the First Amendment to the United States Constitution.



## PARTIES

The names of both petitioners appear in the caption of this case. Neither of the petitioners is a corporation. *See* Rule 29.6.

The respondents are as follows: Pro-Choice Network of Western New York; Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul J. Davis, M.D.; Shalom Press, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group, P.C.; and Alexander Women's Group.

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

## STATEMENT OF THE CASE

### Facts

Respondents (plaintiffs below) consist of the Pro-Choice Network of Western New York, an organization "dedicated to maintaining . . . access to . . . abortion," Second Amended Complaint [2d Am'd Cplt.] ¶ 5 (JA 35), along with various abortion facilities and physicians who practice abortion, 2d Am'd Cplt. ¶¶ 6-13 (JA 35-36).

Petitioners Rev. Paul Schenck, a minister, and Dwight Saunders, an attorney, are two of the numerous individuals and organizations named as defendants in the present case.[2] 2d Am'd Cplt. ¶¶ 17, 20 (JA 38, 39). The defendants are all "opposed to abortion and dedicated to the pro-life movement." *Pro-Choice Network of Western New York v. Project Rescue Western New York* [*P.C. Network I*], 799 F. Supp. 1417, 1422 (W.D.N.Y. 1992) (footnote and internal quotation marks omitted). Respondents accused the defendants of engaging in "disruption of the operations of abortion . . . facilities." 2d Am'd Cplt. ¶¶ 14-65 (JA 37-53).

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2. At the time of the evidentiary hearings in this case, Rev. Paul Schenck had already served ten years as pastor of New Covenant Tabernacle, an Assemblies of God congregation in Tonawanda, New York, and was pursuing a doctoral degree in ministry. Dkt. 140, pp. 1843-44 (Tr. of 11/1/91). Dwight Saunders maintained a private legal practice in Williamsville, New York. JA 39.



The district court found that the defendants organize and participate in pro-life demonstrations[3] at abortion facilities throughout Western New York. 799 F. Supp. at 1423. The court expressly found that these demonstrations "are usually peaceful in nature," though there "often" are "emotionally charged encounters" between demonstrators, patients, and patient "escorts." *Id.*

The district court identified three different types of pro-life demonstrations: (1) physical blockades; (2) "constructive" blockades; and (3) "sidewalk counseling." *Id.*

With respect to the first category, defendants stipulated, prior to the preliminary injunction hearing, that the court could enjoin physical blockades. *Id.* at 1424 n.5. *See also* Pet. App. A-134 (text of stipulation). As the court found, "there have been no physical `blockades' since the [district c]ourt issued the TRO." 799 F. Supp. at 1424 n.5.

The district court used the second category--"constructive blockades"--as a label for "demonstrating and picketing" at abortion facilities. *Id.* at 1424. The court found that these demonstrations did *not* "physically block[] patient access to the clinics," *id.* The court found the purpose of these demonstrations to be "to prevent or dissuade patients from entering the clinic." *Id.* The court pejoratively described the demonstrators as creating a "gauntlet of harassment and intimidation in the hope that the patients will turn away before entering." *Id.* This "harassment and intimidation" apparently consisted of "demonstrators . . . congregat[ing]" near driveway entrances and parking lots, making "loud and disruptive noises,"

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3. The district court used the term "rescue" demonstrations to refer to all pro-life demonstrations. Because the term "rescue" more commonly refers to a pro-life "sit-in" or "blockade," this brief will avoid using this potentially confusing term.

and "chant[ing] persistently," *id.* "At times," the court added, demonstrators "yell" at people, "crowd around people," and "grab, push and shove" people. *Id.*

The third category of pro-life activity the district court found to have taken place was "sidewalk counseling." "Sidewalk counseling consists of proffering literature to women entering [abortion] facilities and trying to convince them not to undergo an abortion." *Id.* The court found that, "because of the highly emotional nature of the abortion issue," even peaceful counseling can become "a charged encounter" between counselors, patients, and "escorts." *Id.* at 1425.

The district court found that respondent Pro-Choice Network of Western New York "organizes some of its members to serve as escorts for [abortion] patients . . . ." *Id.* at 1421-22. These "escorts":

> become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients . . . . [T]he evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation.

*Id.* at 1425 n.6.

The court found that "the decision to undergo an abortion is . . . difficult and stressful" and that exposure to pro-life demonstrations can cause "additional stress and anxiety." *Id.* at 1427. The district court did *not* dispute that the "additional stress" experienced by women who encountered demonstrators resulted in large part from (1) the *message* of the demonstrators and sidewalk counselors; and (2) the misconduct of the pro-abortion "escorts."



Course of Proceedings

Respondents filed suit in the U.S. District Court for the Western District of New York on September 24, 1990, JA 1. Respondents sought immediate injunctive relief, alleging that defendants planned to conduct a "rescue" blockade, four days later, somewhere in western New York. JA 33-34, 59.

Respondents' complaint[4] listed seven causes of action, including one federal claim and six state-law claims. The federal claim alleged a violation of 42 U.S.C. § 1985(3). JA 33, 64.[5] The state claims alleged violation of, *inter alia*, New York Civil Rights Law and common law trespass. JA 65, 66.

The same day that respondents filed their complaint, the district court granted an order to show cause why a temporary restraining order (TRO) should not issue and setting a hearing on the TRO for September 26, 1990 (i.e., two days later). At that hearing the district court orally granted a TRO. JA 2. The next day, the court signed a written TRO. JA 1.

The TRO applied to all abortion facilities in the Western District of New York (which includes Buffalo and Rochester). The order enjoined a miscellany of misconduct, including

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4. By the time the district court issued the preliminary injunction which is the subject of this appeal, respondents had filed an Amended Complaint (dkt. 24) (JA 3), a Second Amended Complaint (dkt. 36) (JA 4), and a Third Amended Complaint (dkt. 72) (JA 8). These amendments did not alter the causes of action alleged. For ease of reference, this brief will cite to the Second Amended Complaint, which appears in the Joint Appendix (JA 31). *See also* Notation regarding Third Amended Complaint (JA 78).

5. The district court subsequently dismissed this claim. *See Pro-Choice Network of Western New York v. Project Rescue Western New York [P.C. Network II]*, 828 F. Supp. 1018 (W.D.N.Y. 1993) (Br. App. 1a).

trespass, blocking or obstructing access, physically abusing or tortiously harassing persons entering or leaving abortion facilities, and making excessive noise that disturbs patients or staff. JA 23. The TRO also enjoined defendants from

> (a) . . . demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed;
>
> (b) . . . Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

JA 23. This TRO remained in effect, first by extension and then by consent, pending the district court's ruling on respondents' motion for a preliminary injunction. JA 2 (dkt. 17), 3 (entry for 10/19/90; dkt. 34; dkt. 35).

As the district court found, defendants "complied with the TRO by holding a peaceful demonstration, rather than a `blockade,' on September 28, 1990." *P.C. Network I*, 799 F. Supp. at 1422.

At a hearing on October 4, 1990, the district court gave a "clarification" of the scope of the TRO. JA 27. In response to concerns expressed about the applicability of the order to clergy preaching against abortion in church, the court stated that the TRO "is directed to activities at the sites chosen for



demonstration." JA 29.

On October 22, 1990, respondents moved for contempt sanctions against defendants Bonnie Behn and Carla Rainero for allegedly violating the TRO on one date. JA 3 (dkt. 29, 30); *see* JA 103. On December 6 and 14, 1990, respondents moved for civil contempt sanctions against defendant Nancy Walker for allegedly violating the TRO on three separate dates. JA 4 (dkt. 40, 41, 44, 45); *see* JA 80. On March 26, 1991, respondents moved for civil contempt sanctions against petitioner Rev. Paul Schenck, nonparty Rev. Robert Schenck, and defendant Project Rescue Western New York, for allegedly violating the TRO on one date. JA 8 (dkt. 74); *see* JA 122-23.

For purposes of the preliminary injunction, the defendants offered to stipulate to the entry of an injunction barring them from blocking or obstructing access or trespassing. Defendants' Stipulations (Pet. App. A-134).

From February 1991 through January 1992, the district court held evidentiary hearings on both the propriety of a preliminary injunction and the merits of various civil contempt charges. JA 4-16. Based upon the evidence presented at these hearings, the district court granted a preliminary injunction on February 14, 1992. JA 16 (dkt. 126); Pet. App. A-138.

The district court acknowledged the well-established requirements for granting a preliminary injunction. *P.C. Network I*, 799 F. Supp. 1428. With regard to the necessity of showing a likelihood of success on the merits, the court held that respondents had made the requisite showing on three of their claims. First, the district court ruled that respondents were likely to prevail on their federal claim under 42 U.S.C. §

1985(3).[6] 799 F. Supp. at 1429-31. Second, the district court ruled that "[h]aving demonstrated a likelihood of success on the merits of their federal § 1985(3) claim, [respondents] have also, by definition, demonstrated a likelihood of success of their claim under [the state antidiscrimination statute,] § 40-c." 799 F. Supp. at 1431. Third, the district court held that respondents were likely to prevail on their state trespass claim. *Id.* at 1431-32. Given these holdings, the district court declined to address "whether a preliminary injunction should be granted based on [respondents'] other state law claims." *Id.* at 1432 n.11.

The preliminary injunction, like the TRO, applied to all abortion facilities in the Western District of New York. Pet. App. A-183. The injunction renewed the prohibition on trespassing, blocking or obstructing access, physically abusing patients or staff of abortion facilities, and making excessive noise. Pet. App. A-183 to A-184. In place of the TRO's ban on "tortiously harassing," the preliminary injunction forbade "grabbing, touching, pushing, shoving or crowding" persons coming or going at abortion facilities. Pet. App. A-184. The injunction also enjoined defendants from:

> (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

6. This Court subsequently rejected the application of this same statute in a similar case. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In light of *Bray*, the district court later dismissed respondents' § 1985(3) claim. Br. App. 1a.



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

Pet. App. A-183 to A-184. The district court did not attribute any special significance to the arbitrary fifteen-foot distance the court selected for its injunctive zones.

Petitioners appealed from the preliminary injunction. JA 17 (dkt. 136).

The district court subsequently ruled on the contempt motions heard prior to the issuance of the preliminary injunction. The court granted the motion in part as to defendant Nancy Walker, JA 79 (dkt. 238), granted the motion as to defendants Bonnie Behn and Carla Rainero, JA 102 (dkt. 241), and granted the motion as to petitioner Paul Schenck, nonparty Rev. Robert Schenck, and Project Rescue Western New York, JA 121 (dkt. 250).[7] The court found that for one

7. On January 3, 1992, after the hearings on the preliminary injunction and the contempt motions had concluded, respondents filed another motion for civil contempt, this time accusing petitioner Rev. Paul Schenck and nonparty Rev. Daren Drzymala of violating the TRO. JA 15 (dkt. 124). The district court did not hold hearings on this motion

incident Walker was guilty of trespass (entering a parking lot), harassment (following a group of three women closely and loudly admonishing them that "Abortion is murder, you'll go to hell, we can help you, don't go in there"), failing to cease and desist counseling (when asked to leave them alone) and entering the fifteen-foot fixed zone (following the women to within some four feet of an entrance). The court found that for another incident Walker was guilty of harassment (following two women closely while "importun[ing]" them loudly), failing to cease and desist counseling (when asked to leave them alone), and entering the fifteen-foot fixed zone (by following the women to the entrance). JA 83-87, 95-96. The court found that for one incident Behn and Rainero were guilty of failing to cease and desist counseling a woman and her two male companions when the woman asked them to leave her alone. JA 106-09, 116-17. The court found that the Revs. Paul and Robert Schenck were guilty of trespassing (by entering the alcove portion of a building entrance), blocking (by standing briefly at that entrance, although the court did not find that the Schencks intended to block anyone or that anyone was trying to enter), and "encouraging . . . aiding, [and] abetting" each other to violate the TRO. The court also found Rev. Paul Schenck guilty for incidents that same day of trespass (reentering the alcove), blocking vehicular access (by standing too close to a car while counseling the occupants), and failing to cease and desist counseling a young couple (after the woman "held up her hand to signal" Rev. Schenck to cease and her companion ultimately "threatened to strike Schenck"). JA 126-33, 143-44. The court held each contemnor liable for a $10,000 "civil" sanction plus attorney fees and costs. J.A. 101, 119, 149.

until after issuance of the preliminary injunction. *See* JA 18-19.



The alleged contemnors all appealed their contempt judgments.[8]

Petitioners' temporarily withdrew their appeal of preliminary injunction, by stipulation, pending this Court's decision in a case reviewing the use of 42 U.S.C. § 1985(3) against pro-life activists. After that decision issued, *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), petitioners reactivated their appeal. The parties then stipulated to the temporary withdrawal of the appeal pending the Second Circuit's ruling in the contempt appeals of Walker, Behn, and Rainero.

Meanwhile, the district court, in light of this Court's *Bray* decision, dismissed respondents' claim under 42 U.S.C. § 1985(3). *P.C. Network II*, 828 F. Supp. 1018 (Br. App. 1a). The district court declined, however, to relinquish pendent jurisdiction over the respondents' state law claims, and likewise declined to vacate the preliminary injunction. *Id.*

Petitioners then simultaneously appealed from the district court's refusal to vacate the preliminary injunction and reactivated their appeal from the original order granting the preliminary injunction.

A panel of the Second Circuit heard both of petitioners' appeals together on March 24, 1994. JA 20. While the appeals were under submission, this Court decided *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). After receiving letter briefs addressing *Madsen*, *see* JA 21, the panel issued its opinion

8. None of these appeals have yet been decided on the merits. The Second Circuit dismissed the appeals of Walker, Behn, and Rainero, holding that a party may not appeal an interlocutory judgment of civil contempt. *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (Pet. App. A-116). The appeals of Paul and Robert Schenck were settled and dismissed by stipulation.

on September 6, 1994. *Pro-Choice Network of Western New York v. Schenck* [*P.C. Network III*], 67 F.3d 359 (2d Cir. 1994) (Pet. App. A-79).

The Second Circuit panel unanimously upheld the district court's refusal to vacate the preliminary injunction and upheld the bulk of the injunctive provisions. By a divided vote, the panel overturned as unconstitutional the 15-foot speech-free zones and the cease-and-desist requirement for sidewalk counselors. Senior Circuit Judge Oakes dissented from the panel's decision to reverse these portions of the injunction.

Respondents sought and obtained a 10-day extension of time to file a petition for rehearing. When that extended period elapsed and respondents had still filed no petition, the mandate of the court of appeals issued.[9] Respondents then filed an untimely petition for rehearing with suggestion for rehearing *in banc*. Respondents moved for leave to file out of time and to recall the mandate. The Second Circuit granted the motion and recalled the mandate. *See* JA 21.

The Second Circuit granted rehearing *in banc* limited to the two portions of the injunction which the panel had held unconstitutional. JA 150. Whereas the district court had, in the interim, modified the injunction to comply with the panel's ruling, Chief Judge Jon Newman ordered that the original preliminary injunction be reinstated. JA 152.[10]

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9. The issuance of the mandate raises the question whether the Second Circuit lacked jurisdiction to act further in the appeal.

10. Judge Newman's extraordinary *sua sponte* order refers to the mandate as having issued "inadvertently." This is false. The clerk of the Second Circuit properly issued the mandate when respondents failed to file a timely petition for rehearing. Fed. R. App. P. 41(a).



After a new round of briefing and oral arguments, the *in banc* Second Circuit issued its decision upholding the preliminary injunction in full, with one minor modification. *Pro-Choice Network of Western New York v. Schenck* [*P.C. Network IV*], 67 F.3d 377 (2d Cir. 1995) (*in banc*) (Pet. App. A-1).

The fifteen judges sitting for the Second Circuit's *in banc* ruling produced five separate opinions. Nine judges signed onto the lead opinion of Judge Oakes. Ten judges signed onto an opinion Judge Winter wrote "concurring in the result." Two judges (who were among those signing onto the Winter opinion) joined onto another opinion, by Judge Jacobs, concurring in the result. In addition, the two members of the original panel majority each wrote dissenting opinions.

The Second Circuit upheld the preliminary injunction as written, with one modification. The preliminary injunction had required sidewalk counselors to "cease and desist" from such counseling "if anyone or any group of persons who is sought to be counseled *wants* to not have counseling, *wants* to leave, or walk away," Pet. App. A-184 (emphasis added). Viewed literally, this provision required sidewalk counselors to read the mind (or heart) of the person counseled in order to know whether to "cease and desist." The district court, however, had stated that the "cease and desist" provision applied whenever the person spoken to "indicates, either verbally or nonverbally, that they do not wish to be counseled . . . ." *P.C. Network I*, 799 F. Supp. at 1434. The Second Circuit ruled that requiring persons being counseled to "indicate," verbally or nonverbally, their unwillingness to be counseled, "accords a common sense meaning to the provision and makes clear at what point counseling must cease." 67 F.3d at 391. The Second Circuit therefore "direct[ed] the district court on remand to so modify the language of the injunction." *Id.*

## SUMMARY OF ARGUMENT

The decision of the *in banc* Second Circuit, upholding the preliminary injunction at issue here, strikes at the heart of the public forum doctrine of the First Amendment. Never in the history of American jurisprudence has this Court upheld an injunction prohibiting peaceful, non-threatening speech on public sidewalks outside a business facility in the absence of a showing that access to the facility is obstructed. "[W]hat was done by [petitioners] – the picketing, the leafletting, the voicing of protest – was done in the finest tradition of the First Amendment, hardly justifying so sweeping an abridgement of free speech." 67 F.3d at 399 (Meskill, J., dissenting). Yet the court below upheld drastic restrictions on such expressive activity in traditional public fora outside all abortion facilities in the Western District of New York.

The Second Circuit justified these sweeping restrictions as necessary to protect the right of "[t]he timid . . . to go about their business," *id.* at 396 (Winter opinion). The court opined that

> targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to protests.

*Id.* Whether in a public forum or a nonpublic forum, *id.* At 397, expressive activity, the court below held, must yield to injunctive restraint, even if "no one is physically injured, traffic moves, and private property is not invaded," *id.* This "unprecedented and unwarranted incursion on freedom of speech," *id.* at 410 (Altimari, J., dissenting), essentially creates a new "right" – the right "not to be hassled in public."

The preliminary injunction (1) forbids petitioners from



"demonstrating" within fifteen feet of any entrance or driveway of any abortion facility ("fixed buffer zones"); (2) forbids petitioners from "demonstrating" within fifteen feet of "any person or vehicle" coming to or going from any abortion facility (the "floating bubble zones"); (3) allows no more than two people to enter these various zones in order to engage in "sidewalk counseling consisting of a conversation of a nonthreatening nature," except that if "anyone or any group of persons" counseled "indicates, either verbally or non-verbally, that they do not wish to be counseled," the counselors must "cease and desist from such counseling" and thereafter abide by the fifteen-foot zones ("cease and desist" provision).

Injunctive restrictions on expressive activity face rigorous scrutiny. The prior restraint doctrine renders many such injunctions presumptively unconstitutional. *E.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Even injunctions which do not trigger the prior restraint doctrine face heightened constitutional review. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Under either standard, the restrictions challenged here are unconstitutional.

First, the "floating bubbles," "fixed buffers," and "cease and desist" restrictions all fail for want of a countervailing private interest, i.e., a supporting cause of action. The district court predicated its injunction upon a finding that respondents were likely to prevail on three of their claims. The district court has dismissed the first of these claims (brought under 42 U.S.C. § 1985(3)), on the merits, in light of a subsequent decision of this Court (*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)). The district court's ruling on the second claim (brought under a state antidiscrimination statute) rested, "by definition," on the court's holding regarding the first claim, and so falls with it. The third cause of action is state trespass, which cannot

justify restrictions on *nontrespassory* expressive activity. In short, the challenged injunctive restrictions on expressive activity in public forum property no longer have any legal legs on which to stand. The First Amendment forbids – under *any* test – a restriction on speech which is not appropriately tailored to further some countervailing interest. In this case, respondents have no competing claim (on which they are likely to prevail) even to place in the balance, much to override petitioners' rights; hence, these injunctive restrictions are unconstitutional.

The "cease and desist" provision independently violates the First Amendment. First, by cutting off even peaceful communication and subjecting speech in a public forum to the consent of the audience, the "cease and desist" provision is indistinguishable from the "no approach" zone this Court overturned in *Madsen*, 114 S. Ct. at 2529. Even apart from the square holding of *Madsen*, the "cease and desist" provision founders upon several important First Amendment doctrines. This restriction imposes an impermissible "audience veto," *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and subjects speech to an unconstitutional, wholly arbitrary licensing scheme, *e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). This restriction is also unconstitutionally vague, requiring petitioners on pain of hefty contempt sanctions to decipher "verbal or nonverbal indications" that a person or group of persons might not want to be counseled. The "captive audience doctrine" cannot save this restriction because the injunction operates in a public forum where the audience is free to leave.

The "fixed buffer zones" and "floating bubble zones" are factually unjustifiable. The record in this case contains neither a *Madsen*-esque history of persistent obstruction (as a majority



of the Second Circuit agreed, 67 F.3d at 397 (Winter, J., concurring–ten judges), 399 (Meskill, J., dissenting–two judges)) nor a failure of an initially narrower injunction. Indeed, the court imposed floating bubble zones in the initial TRO, i.e., as a *first* resort. These invisible speech-free zones prohibit far more speech than necessary, banning even peaceful picketing, leafletting, and verbal communications. The prohibition of "demonstrating" in these zones is also unconstitutionally vague.

The "fixed bubble zones" reveal a gross lack of tailoring. This arbitrary, one-size-fits-all restriction applies to many different facilities regardless of their varying physical characteristics.

The "floating bubble zones" effectively ban all demonstrating as they waft along streets and sidewalks, forcing demonstrators to scurry and dodge–or stay home. Moreover, the floating zones are vague with regard to where they apply (i.e., how far from an abortion business) and to whom (a "person . . . seeking access to or leaving [abortion] facilities," but not to anyone else) and gravely chilling in that it is impossible to gauge fifteen-foot distances precisely, especially when both the floating bubble and the "demonstrator" are moving.

## ARGUMENT

### I. INTRODUCTION

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The allegation has been made that judges and even Supreme

Court Justices deciding cases in the abortion context have "worked a major distortion in . . . constitutional jurisprudence," and that "no legal rule or doctrine is safe from ad hoc nullification" in such litigation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'CONNOR, J., joined by REHNQUIST, J., dissenting); *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2535 (1994) (SCALIA, J., joined by KENNEDY and THOMAS, JJ., dissenting). The notion of impartial adjudication – the core of any judicial system – obviously requires the rejection of this pernicious "abortion distortion factor."[11]

"Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." *Roe v. Wade*, 410 U.S. 113, 116 (1973). *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 124 (1992) ("In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First . . . Amendment[] are violated . . ."). Accordingly, this Court must address the present petition independent of the national controversy out of which it arises.

Four of the Second Circuit judges below expressly opined that abortion had distorted that court's analysis of the appeal. 67 F.3d at 398 (Jacobs, J., joined by Mahoney, J., concurring) (charging lead opinion with being "message specific"); *id.* at 404 (Meskill, J., joined by Altimari, J., dissenting) ("Once again, we see the abortion ad hoc nullification machine at work"). It is therefore particularly important for this Court forcefully to reject the notion that *Roe v. Wade*, 410 U.S. 113 (1973), somehow created an exception to the First Amendment. There

11. The severity of the temptation to sacrifice neutral principles in abortion cases was starkly illustrated in the court below by the appearance of the U.S. Department of Justice and the national ACLU as amici in support of restrictions on speech in public places.



are not different First Amendment rules for abortion protesters on the one hand, and news reporters, civil rights demonstrators, and so forth, on the other. Free speech is not the exclusive prerogative of those embracing politically favored causes or fashionable points of view.

## II. THE CHALLENGED INJUNCTIVE PROVISIONS RESTRICT CLASSIC FREE SPEECH IN PUBLIC FORA.

The fixed and floating 15-foot speech-free zones and the "cease-and-desist" provision restrict classic forms of peaceful expression in public fora, namely, picketing and sidewalk counseling.

Picketing consists of the carrying of placards or banners while standing or walking in a particular location. Picketing represents both a public witness directed to all passersby and a reproach to those patronizing or performing the work of the picketed facility. A picketer's activity expresses many different messages, including: the testimony of one's mere willingness to stand up in public; the calling of attention to a given facility engaged in some controversial practice; and, the visual broadcasting of a particular message displayed on a sign or banner. "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern." *Carlson v. California*, 310 U.S. 106, 112-13 (1940). *Accord United States v. Grace*, 461 U.S. 171 (1983); *Boos v. Barry*, 485 U.S. 312 (1988).

Sidewalk counseling consists of personal communication with pregnant women, their companions, or passersby, typically by conversation or by the distribution of written literature. *Cf.* 799 F. Supp. at 1424. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*,

115 S. Ct. 1511, 1519 (1995) (and cases cited). *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell v. Griffin*, 303 U.S. 444 (1938). The sidewalk counselor seeks not so much to broadcast a message to the world as to touch the mind, heart, and conscience of particular individuals. The goal of the sidewalk counselor is to offer information and assistance to help a woman carry her baby to term.[12] The sidewalk counselor may also offer a final appeal to the conscience of those struggling with their own ambivalence over the distressing decision to abort an unborn child.[13] Such verbal persuasion and protest rest at the very heart of the right to free speech. *City of Houston v. Hill*, 482 U.S. 451 (1987); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views," *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 798 (1985); for this reason, "the most effective, fundamental, and perhaps economical avenue of political discourse [is] direct one-on-one communication." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

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12. Dkt. 88a, pp. 1255-56, 1265-67, 1271-72 (Tr. of 3/26/91) (witness Karen Prior).

13. Respondent Morris Wortman, M.D., testified as follows:

Q. Have you ever had a woman come in for a scheduled abortion who seemed uncertain or ambivalent about it? A. Every week. Every day.

Q. It's a regular occurrence then, I take it? A. Absolutely.

Q. It's daily? A. Daily.

Dkt. 92, p. 930 (Tr. of 3/20/91). Some women change their minds after talking with sidewalk counselors. *E.g.*, dkt. 88a, pp. 1272 (Tr. of 3/26/91). One such woman testified in this case. Dkt. 91, pp. 1825-51 (Tr. of 4/1/91).



Ideally, picketers and sidewalk counselors will practice perfect charity with all persons, firm resolution in their dedication to principle, and unflinching patience in the face of hostility to their message. Nevertheless, some picketers and counselors will occasionally fail to say just the right thing in just the right way. Some may even utter what seem to be "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of their hearers. *Cf. New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This does not distinguish pro-life activists from adherents to any other cause. Nor does this consideration place picketing and sidewalk counseling outside abortion facilities beyond the bounds of quintessential First Amendment activity. "The right extends to the aggressive and disputatious as well as to the meek and acquiescent." *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). While rhetoricians may debate the relative merits of verbal "honey" and "vinegar," the freedom of speech depends upon no judgment as to the wisdom, prudence, or polity of given communications. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Indeed, this Court has repeatedly recognized constitutional protection even for such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminiello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *United States v. Eichman*, 496 U.S. 318-19 (1990). *Accord Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2529 (1994) ("insulting, and even outrageous, speech").

In the present case, petitioners' expressive activity takes place on public sidewalks and streets, "the archetype of a traditional public forum." *Forsyth County*, 505 U.S. at 130 (internal

quotation marks and citation omitted). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Boos*, 485 U.S. at 318; *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). "At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." *ISKCON v. Lee*, 505 U.S. 672, 696 (1992) (KENNEDY, J., joined in pertinent part by Blackmun, STEVENS, and SOUTER, JJ., concurring in judgment). Therefore, "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny." *Id.* at 678 (majority opinion of REHNQUIST, C.J., joined by White, O'CONNOR, SCALIA, and THOMAS, JJ.).

In sum, the preliminary injunction at issue here "operates at the core of the First Amendment," *Frisby v. Schultz*, 487 U.S. 474, 479 (1988), by imposing restrictions on classic forms of speech in traditional public fora.

## III. INJUNCTIVE RESTRICTIONS ON SPEECH TRIGGER A HEIGHTENED CONSTITUTIONAL STANDARD OF REVIEW.

In the present case, an even higher level of scrutiny applies because the restrictions at issue come in the form of an injunction. *Madsen*, 114 S. Ct. at 2524-26.

### A. Speech-Restrictive Injunctions Trigger Either the Prior Restraint Doctrine or the Heightened Scrutiny of *Madsen*.

Some injunctions qualify as prior restraints. *Id.* at 2524 n.2. ("Prior restraints do often take the form of injunctions") (citations omitted). Indeed, this Court has typically reviewed injunctive restrictions on expressive activities as presumptively unconstitutional prior restraints. *E.g.*, *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets, and display of materials); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings).



Even when a particular an injunction does not constitute a prior restraint, injunctive restrictions on expressive activity violate the right to free speech unless, at a minimum, the restrictions "burden no more speech than necessary to serve a significant government interest." *Madsen*, 114 S. Ct. at 2525. The *Madsen* Court explained further, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968):

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

*Carroll*, 393 U.S. at 183-84. *See Madsen*, 114 S. Ct. at 2526.[14]

In the present case, the speech-restrictive portions of the preliminary injunction are subject to the traditional rule of prior restraints, rather than the exceptional *Madsen* category of content-neutral injunctions which restrict speech only "incidentally," in a limited manner, in response to prior unlawful conduct. *Madsen*, 114 S. Ct. at 2524 n.2. In particular, the "cease and desist" provision imposes a licensing scheme on

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14. *Carroll* was a prior restraint case. 393 U.S. at 181. By simultaneously invoking *Carroll* while claiming not to apply prior restraint analysis, the *Madsen* opinion is internally inconsistent.

speech – a classic prior restraint – regardless of whether the injunction as a whole fits inside or outside of the *Madsen* exception to the prior restraint doctrine. *Infra* § V(C).

But regardless of whether the correct standard of review here is prior restraint analysis or *Madsen* scrutiny, the injunctive restrictions at issue are unconstitutional.

B. The Speech-Restrictive Injunctive Provisions Here Fail the Prior Restraint Test.

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419 (and cases cited). "Respondent[s] thus carr[y] a heavy burden of showing justification for the imposition of such a restraint." *Id.* "In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Respondents have failed to carry this heavy burden.

The speech of pro-life picketers and sidewalk counselors can entail a broad variety of expressions – everything from silent witness, to polite offers of information, to urgent entreaties, to pointed criticisms, to emotional exclamations. Such speech, however characterized, cannot be relegated wholesale to the forbidden categories of obscenity or "fighting words." On the contrary, pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine can justify the injunctive restrictions at



issue.

Moreover, this case presents no extraordinary, overriding need to suppress speech. In *Keefe*, this Court held that a private citizen's allegations of coercion, intimidation, and invasion of residential privacy were insufficient to justify a prior restraint. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court found that a private citizen's competing constitutional right to a fair trial under the Sixth Amendment was insufficient to justify a prior restraint. In *New York Times v. United States*, 403 U.S. 713 (1971), this Court held that even national security interests fell short of justifying a prior restraint. *A fortiori*, the prior restraint in this case – which seeks only to prevent alleged "harassment" – is plainly unconstitutional.

In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain *only unlawful conduct* and persons responsible for conduct of that character." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (emphasis added).[15] In short,

An order issued in the area of First Amendment rights

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15. In *Claiborne Hardware*, this Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court held that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-17 (citation omitted). "For the same reasons," this Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. This Court declared that the lower court, on remand, "may wish to vacate the entire injunction" if the facts indicated that the order was "no longer necessary"; at a minimum, however, "the injunction *must* be modified to restrain *only unlawful conduct* and the persons responsible for conduct of that character," *id.* (emphasis added).

> must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

*Carroll*, 393 U.S. at 183-84. It follows that injunctive provisions which restrict peaceful, public expression in traditional public forum property violate the doctrine of prior restraints. Rather than limit itself to unlawful activities, such as blockading or trespass, the injunction in this case bans a broad range of peaceful expressive activity, including picketing, leafletting, and even mere conversation.

Therefore the speech-restrictive portions of the preliminary injunction, i.e., the floating bubble and fixed buffer zones and the "cease and desist" requirement, are unconstitutional prior restraints on speech.

### C. *Madsen* Establishes Demanding Constitutional Analysis for Speech-Restrictive Injunctions.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court recognized a limited exception to the prior restraint doctrine.

In *Madsen*, this Court confronted a "36-foot buffer zone around the clinic entrances and driveway," 114 S. Ct. at 2530. This Court upheld the zone in part and struck it down in part. *Id.* Insofar as this Court upheld the 36-foot zone, its ruling reflected the highly unusual factual circumstances at the abortion facility in Melbourne, Florida:

- the *Madsen* defendants had "repeatedly" interfered with the physical access of patients and staff, *id.* at 2526;
- the physical layout of the area produced "narrow confines" for traffic, *id.* at 2527;



- a previous, narrower injunction failed to protect access, *id.* at 2527-28.

Especially important to this Court in *Madsen* was the factual finding, which the *Madsen* defendants did not properly challenge on appeal, that the "presence" of protesters "standing, marching, and demonstrating" near the entrance "interfered with ingress and egress," *id.* at 2527-28. As a matter of *fact*, therefore, allowing the *Madsen* defendants to remain on the adjacent sidewalk was "not a viable option," *id.* at 2527.

By simultaneously striking down the 36-foot zone as applied to adjacent private property, this Court in *Madsen* established important outer limits to the use of "buffer zones": "Absent evidence that [defendants] . . . have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, [a] buffer zone fails to serve the significant government interests" at stake. *Id.* at 2528.

The *in banc* Second Circuit in the present case rejected two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure. These factors are *not* mere incidental features of *Madsen*; rather, they represent essential constitutional predicates.

*Madsen* holds that speech-restrictive *injunctions* trigger a stricter standard of review than speech-restrictive *ordinances*. 114 S. Ct. at 2524-26. Yet *Madsen* upheld a ban on even peaceful demonstrating on an entire sidewalk. *Id.* at 2526-28. An ordinance or statute imposing such a ban would clearly violate

a vast array of this Court's precedents,[16] precedents which *Madsen* did not purport to overrule. Hence, the *Madsen* decision *must* depend upon the rather extraordinary factual circumstances this Court is entified. Otherwise, it would follow from *Madsen* that courts could issue speech-restrictive injunctions virtually upon demand.[17] Furthermore, whereas *Madsen* sets a stricter standard for injunctions than for ordinances and statutes, if *Madsen* is not limited to the unusual facts of that case, it would follow *a fortiori* that ordinances or statutes imposing speech-free zones would pass constitutional muster.[18]

Misreading *Madsen* would distort that ruling into a large-scale amputation of this Court's First Amendment jurisprudence, as

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16. *E.g. Thornhill v. Alabama*, 310 U.S. 88 (1940) (ban on picketing outside premises of business unconstitutional); *United States v. Grace*, 461 U.S. 171 (1983) (ban on display of sign or banner on sidewalk outside Supreme Court unconstitutional). "In these quintessential public fora, the government may not prohibit all communicative activity." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

17. Some lower courts have done precisely this. *E.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88 (1995) (upholding, after remand in light of *Madsen*, injunction banishing all picketing and sidewalk counseling from the sidewalk adjacent to an abortion business even where access was not an issue), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576).

18. Regrettably, lower courts have misread *Madsen* in precisely this manner. *E.g., Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *cert. denied*, No. 95SC283 (Colo. Feb. 26, 1996), *petitions for cert. filed sub nom. Hill v. Colorado*, 64 U.S.L.W. __ (U.S. May ___, 1996) (No. 95-___); *Saladino v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 5, 1996) (No. 95-1415).



reflected in the decision below. By contrast, taking *Madsen* at its word, and in the context of the body of this Court's precedents, the proper constitutional review of an injunction entails the following searching analysis:

1. Have the plaintiffs satisfied the requirements for equitable relief in general, i.e., shown irreparable harm and a likelihood of success of the merits upon one or more claims? *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Madsen*, 114 S. Ct. at 2524 n.3.

2. Is the injunctive remedy tailored to the particular causes of action for which the plaintiffs have shown a likelihood of success? *Madsen*, 114 S. Ct. at 2523 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public").

3. Is the injunction limited to those defendants who threaten the irreparable harm in question? *Id.* at 2524 n.3; *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 924 n.67; *Rizzo v. Goode*, 423 U.S. 362, 375 (1976); *Memphis v. Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8 (1978).

4. Is the injunction sufficiently definite to satisfy Rule 65(d)? *See* Rule 65(d), Fed. R. Civ. P. ("Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail . . . the act or acts sought to be restrained").

If the injunction restricts only conduct, not speech, and the answer to all of the preceding questions is affirmative, the analysis ends here and the injunction is upheld. If the injunction imposes restrictions on expressive activity, however, the analysis proceeds with the following:

5. Does the injunction fall within the *Madsen* exception to the prior restraint doctrine (i.e., the order only restricts speech

*indirectly*, only restricts expressive activity *because of prior unlawful conduct*, and only imposes *content-neutral* restrictions)? *Madsen*, 114 S. Ct. at 2524 n.2.

6. Do the restrictions on expressive activity represent a "last resort," rather than a "first resort," because a narrower injunction has failed? *Id.* at 2527-28.

7. Have the enjoined parties engaged in pervasive unlawful conduct making restrictions on expressive activity the only viable option? *Id.*

8. Are there overriding government interests (in addition to the necessary private interests) that support the government action entailed in a court's imposition of the particular restrictions at issue? *Id.* at 2525-26.

9. Are the terms of the injunction narrowly tailored to both the private interests and the government interests so as to further these interests while burden burdening no more speech than necessary? *Id.* at 2523, 2525.

10. Are the terms of the injunction sufficiently clear to avoid unconstitutional vagueness? *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Again, if the answers to all of these inquiries is affirmative, the analysis ends and the injunction is upheld. If, on the contrary, the answer to any of the foregoing questions is negative, the injunction violates the First Amendment and the offending terms must be modified or deleted.

By no means does *Madsen* grant courts *carte blanche* authority to create injunctive "floating speech-free zones" and other restrictions on speech at every demonstration site. On the contrary, only application of the thorough analysis set forth above comports with both *Madsen* and the entirety of this Court's previous decisions and affords the respect due the



freedom of speech in this nation. As demonstrated below, the speech-free zones and the "cease-and-desist" provision fail to satisfy this governing standard.

## IV. THE FIFTEEN-FOOT ZONES AND THE CEASE-AND-DESIST PROVISION FAIL FIRST AMENDMENT SCRUTINY FOR WANT OF A SUPPORTING INTEREST.

The preliminary injunctive restrictions at issue must fail for want of underlying private interests.

To obtain a preliminary injunction, a plaintiff must demonstrate, *inter alia*, a likelihood of success on the merits of one or more underlying claims. *E.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). These underlying claims then supply the "legs" on which the injunction must "stand" in the face of First Amendment scrutiny. *Madsen*, 114 S. Ct. at 2523 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public"), 2525 ("injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs") (internal quotation marks and citation omitted), 2526 (injunction must be written in "the narrowest terms that will accomplish the pin-pointed objective") (internal quotation marks and citation omitted).

In the present case, the district court initially held that respondents were likely to prevail on three of their claims: (1) the federal "deprivation" claim under 42 U.S.C. § 1985(3); (2) a state statutory antidiscrimination claim analogous to § 1985(3); and, (3) a state trespass claim. 799 F. Supp. at 1429-32.

This Court subsequently rejected the legal underpinnings of respondents' § 1985(3) claim. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In the wake of *Bray*, the district court in the present case dismissed respondents' §

1985(3) claim, thereby removing that cause of action as a possible supporting basis for the injunction. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F. Supp. 1018 (W.D.N.Y. 1993) (Br. App. 1a).

The district court's ruling that respondents were likely to prevail on their state antidiscrimination claim rested squarely upon the court's ruling regarding § 1985(3). *See* 799 F. Supp. at 1431 (success on state claim follows "by definition" from success on § 1985(3) claim). Thus, the district court's holding regarding this claim topples "by definition" with the § 1985(3) claim.

The only other claim for which the district court held respondents likely to prevail was respondents' state trespass claim. Thus, that claim provides the sole equitable and constitutional basis for the current preliminary injunction.

The preliminary injunction already enjoins all trespassing at abortion facilities. Pet. App. A-183. Plainly, a trespass claim cannot also support restrictions on *nontrespassory* activity, such as "speech-free zones" or a "cease and desist" order in public forum property. Absent an underlying foundation in the lawsuit, these speech-restrictive terms of the injunction become totally gratuitous and, hence, violative of the First Amendment under *any* standard of review.[19]

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19. The district court already acknowledged that "if plaintiffs file an amended complaint setting forth a [new] § 1985(3) claim, the Court will likely be required to hold a supplemental hearing to reevaluate plaintiffs' ability, after *Bray*, to establish, by a preponderance of the evidence, their likelihood of success on [that claim] . . . ." 828 F. Supp. at 1026. The district court perceived no immediate need to undertake this task, however, because the court had grounded the preliminary injunction not only on § 1985(3) but also on two state-law claims. *Id.* at 1026 n.4. This ignores the possibility that "even though the District Court had jurisdiction over state-law claims, judgment on those claims alone cannot support the injunction that was entered." *Bray*, 506 U.S. at 285. As noted in the text, the probability of respondents' success on one of these claims (antidiscrimination) rested solely on their failed § 1985(3) claim. And the other state-law claim – trespass – cannot support restrictions against *nontrespassory* expressive activity.



The Second Circuit declined to address the question whether the injunctive restrictions failed for want of corresponding underlying causes of action. 67 F.3d at 367 (panel); 67 F.3d at 386 (*in banc*). The court reasoned that this was a question of state law, and, because petitioners had not yet raised the state law issue in the district court, that court should be the first to address it. *Id.*

The approach of the Second Circuit is fundamentally flawed. The want of underlying meritorious claims supporting restrictions on speech *is itself a factor in the constitutional review.* First Amendment analysis requires assessment of the countervailing interests; if there simply are *no bases* upon which to rest the challenged injunctive restrictions on speech, those restrictions must fall. *Cf. Madsen*, 114 S. Ct. at 2523, 2525; *Texas v. Johnson*, 491 U.S. 397, 403-04 (1989) (when assessing whether an asserted interest justifies a restriction on speech, one "possibility is that the . . . asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture").[20]

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20. Even if the lack of underlying causes of action were purely a question of state law, the Second Circuit ought to have reached the issue. This Court has long counseled that courts should "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it," *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 501 (1985) (internal quotation marks and citations omitted). By overlooking the threshold lack of a supporting cause of action and proceeding to the constitutional merits, the Second Circuit turned the established adjudicative order upside down.

An injunctive restriction cannot be *necessary* where the party seeking the relief is not likely to prevail on any claim pertinent to that restriction. The restrictions on nontrepassory expressive activity at issue here are unconstitutional for want of corresponding private interests.

## V. THE CEASE-AND-DESIST PROVISION VIOLATES THE FIRST AMENDMENT.

### A. The *Madsen* Decision Compels the Invalidation of the "Cease and Desist" Provision.

In *Madsen*, this Court struck down as unconstitutional an injunctive provision virtually identical to the "cease and desist" provision at issue here. *Madsen* was eminently correct in so ruling, and there is no reason to reach a different result here.

The "no approach" restriction in *Madsen* enjoined the *Madsen* defendants:

> At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as sidewalk counseling, that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle,

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The nonconstitutional aspects of this error, namely, the absence of an essential element of equitable relief, is plain and evident on the record. Hence, the Court has the discretion to decide the case on this basis as well. *See* Rule 24.1(a).



> surround, harass, threaten, or physically or verbally abuse those individuals who choose not to communicate with them.

114 S. Ct. at 2532 n.3 (quoted in opinion of STEVENS, J., concurring and dissenting). This injunctive provision applied to *all* communications, however peaceful. Further, this restriction made the speakers' right to communicate dependent upon the consent of the audience. This Court held that these features doomed the *Madsen* "no approach" provision:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

*Id.* at 2529 (internal quotation marks, citation, and footnote omitted; emphasis in original).

The "cease and desist" provision in the instant case is likewise unconstitutional, and for the same reasons, among others. This provision outlaws *all* "disinvited" communications, "regardless of how peaceful." The "cease and desist" provision, like the "no approach" zone in *Madsen*, creates an "audience veto" by

imposing a "consent requirement" upon the speech and handbilling of sidewalk counselors.

These obvious similarities should suffice to dispose of this provision. Yet some lower courts – like the Second Circuit in this case – have refused to follow *Madsen* on this very point, claiming instead to have found some purported basis for distinguishing *Madsen*.[21] Such efforts to nullify *Madsen*'s clear holding are specious.

The Oakes opinion below emphasized a difference in the way the "no approach" zone in *Madsen* worked. In *Madsen*, sidewalk counselors could not approach *unless invited*, whereas in the present case sidewalk counselors can approach *until disinvited*. 67 F.3d at 390. This distinction is irrelevant.

First, this distinction does not touch upon the rationale *Madsen* gave for its holding. The no invitation/disinvitation distinction does not alter the crucial fact that the ban applies to *all* communication, however peaceful. Nor does this distinction alter the reality that in both cases, the speakers' freedom to communicate rests at the mercy – the consent – of the audience.

Second, the distinction between denial of consent and revocation of consent is legally insubstantial. This Court rejected any supposed difference of this kind long ago:

> To say that he who is free to *withhold* at will the privilege of publication exercises a power of censorship prohibited by the Constitution, but that he who has unrestricted

21. *E.g., Saballo v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 5, 1996) (No. 95-1415); *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *cert. denied*, No. 95SC593 (Colo. Feb. 26, 1996), *petition for cert. filed sub nom. Hill v. Colorado*, 64 U.S.L.W. ___ (U.S. May ___, 1996) (No. 95-___).



> power to *withdraw* the privilege does not, would be to ignore history and deny the teachings of experience, as well as to perpetuate the evils at which the First Amendment was aimed.

*Jones v. City of Opelika*, 316 U.S. 584 (1942) (emphasis added) (Stone, C.J., dissenting), *adopted on rehearing as opinion of the Court, Jones v. City of Opelika*, 319 U.S. 103 (1943) (per curiam). This Court rejected the argument that it made any difference whether permission was *withheld* or *revoked*, declaring that the freedom of speech "cannot rightly be defeated by so transparent a subterfuge," 316 U.S. at 601.[22]

Third, the difference between withholding consent and withdrawing consent is of little practical significance in the context of this case. The individual whom a sidewalk counselor approaches can cut off the counselor's communication before it begins, apparently with a mere word or gesture. The goading of hostile abortion escorts or the "poisoning of the well" toward sidewalk counselors by abortion business representatives could easily make this scenario the norm. Thus, the first or second word out of the sidewalk counselor's mouth may constitute contempt of the injunction.

The "cease and desist" provision, whether formulated to depend on *withholding* of consent or on *revocation* of consent,

22. In *Jones*, it was a governmental agent who had the "unrestrained and unreviewable discretion," *id.* at 600, to revoke permission to speak. That the present case involves the consent of a private actor makes no difference. Here, as in *Madsen*, it is the government that *enforces* the private actor's "veto" by contempt of court. Thus, while a private party's exclamation "Shut up!" itself implicates no First Amendment concerns, when a federal judge stands behind that exclamation with governmental enforcement powers, that governmental action must undergo constitutional scrutiny.

plainly runs afoul of *Madsen*'s square holding.

B. The "Cease and Desist" Provision Imposes an "Audience Veto."

This Court has long condemned "audience veto" provisions. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob") (footnote and citations omitted). "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., joined by Blackmun, O'CONNOR, and STEVENS, JJ., concurring in the judgment). "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991) (internal quotation marks and citations omitted). *Accord Madsen*, 114 S. Ct. at 2529 (overturning injunctive ban on display of "images observable inside abortion facility; "[t]he only plausible reason a patient would be bothered . . . would be if the patient found the expression contained in such images disagreeable").

In *Simon & Schuster*, this Court went so far as to disclaim any legitimacy for a state "interest in limiting whatever anguish [crime] victims may suffer from reliving their victimization." 502 U.S. at 118. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that the First Amendment shielded Jehovah's Witnesses who accosted passersby and then attacked their religious beliefs. The desire to insulate abortion patrons from efforts to dissuade them cannot qualify as a legitimate justification for an audience veto provision. "The First Amendment inevitably requires people to put up with annoyance and uninvited



persuasion." *ISKCON v. Lee*, 505 U.S. 672, 712 n.* (1992) (SOUTER, J., joined by Blackmun and STEVENS, JJ., concurring and dissenting). "While a [sidewalk counselor] can be insistent, a pedestrian on the street . . . can simply walk away or walk on." *Id.* at 713. As this Court has squarely held, "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster*, 502 U.S. at 118 (internal quotation marks and citations omitted).

The district court in this case already enjoined obstructive conduct, physically abusing, grabbing, touching, pushing, shoving, or crowding persons coming or going at abortion facilities. Pet. App. A-183 to A-184. By going further and subjecting peaceful communication in public fora to the veto power of the passing auditor or viewer, the district court improperly sliced into the First Amendment.

C. The "Cease and Desist" Provision Imposes an Unconstitutional Licensing Scheme on Speech.

This Court has repeatedly condemned laws which subject expressive activity in public places to the unbridled discretion of a licensor. *E.g., Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Lovell v. Griffin*, 303 U.S. 444 (1938). Such laws impose an impermissible prior restraint on speech. *Forsyth County*, 505 U.S. at 130. Yet the "cease and desist" provision does precisely that: the injunction confers wholly discretionary authority upon staff and clients of abortion businesses, backed by the federal contempt power, to expel any unwanted speakers from a circle fifteen feet in radius. This "consent" scheme stifles any speech that "may strike at

prejudice and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Furthermore, "the mere existence of the licensor's unfettered discretion . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133 (footnote omitted). In the same way, the First Amendment prohibits the government from deputizing private citizens as unbridled censors of speech in public fora. Government "may not empower its licensing officials [– here, `anyone or any group of persons,' Pet. App. A-184 –] to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions . . . ." *Shuttlesworth*, 394 U.S. 147, 153 (1969).

D. The "Cease and Desist" Provision is Unconstitutionally Vague.

As modified by the *in banc* Second Circuit, the "cease and desist" provision operates whenever "anyone or any group of persons" being counseled, Pet. App. A-184, "indicates, either verbally or non-verbally, that they do not wish to be counseled," 67 F.3d at 391. This restriction is hopelessly vague.

How does a "group of persons" indicate something? If a woman continues to listen while her companion or an escort yells "Back off!" may the counselors speak to the woman? *See* 67 F.3d at 391 n.5 (declining to decide this). More practically, what counts as a "verbal and nonverbal indication" of a desire not to be counseled? Respondents' counsel thought the obligation triggered "by gestures, facial expressions, *a companion saying no*," dkt. 65, at 1322 (Tr. of 2/14/91)



(emphasis added), by saying "leave me alone or words to that effect, or *gestures which could be interpreted to comport with the word leave me alone*," *id.* at 1323 (emphasis added), by "a shaking of a head or walking away," dkt. 88b, at 1336 (Tr. of 3/26/91), or by "any type of speech or body act which would indicate" a desire not to be counseled, *id.* at 1337. Does merely continuing to walk to or from the abortion facility count as wanting "to leave, or walk away," and therefore qualify as a nonverbal "indication" that the counselor must cease and desist? The preliminary injunction seems to contemplate this. Pet. App. A-184. The district court interpreted a wave of the hand, and merely holding up a hand, as sufficient when holding petitioner Rev. Schenck in contempt for failure to cease and desist. JA 133. What about grunts, skeptical looks, or the failure to make eye contact? The range of ambiguous nonverbal human signals is limitless. What if the person counseled is willing to hear out one counselor but not another? According to the district court, a rejection of one counselor "is applicable to all `sidewalk counselors.'" JA 117.

This Court has warned, in the free speech context, of the "possibility of abuse where convictions . . . frequently turn on the resolution of a direct conflict of testimony as to who said what." *City of Houston v. Hill*, 482 U.S. 451, 454 n.2 (1987) (internal quotation marks and citation omitted). In the present case, the injunction multiplies the problem by requiring proof of who *meant* what by a limitless variety of verbal or nonverbal signals. The cease and desist provision literally makes a charade of the freedom of speech.

E. The Captive Audience Doctrine is Inapplicable.

The Second Circuit sought to justify the "cease and desist" provision under the "captive audience" doctrine. 67 F.3d at 392. Such faulty reasoning threatens the First Amendment. The

captive audience doctrine does not apply to auditors and viewers who are free to come and go in a public forum.

The captive audience doctrine does not strip constitutional protection from all unwelcome speech. On the contrary:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from public dialogue . . . . we have at the same time consistently stressed that we are often "captives" outside the sanctuary of the home and subject to objectionable speech.

*Cohen v. California*, 403 U.S. 15, 21 (1971) (internal quotation marks and citations omitted). Thus, this doctrine applies "only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (citations and footnotes omitted). "These situations are different from the traditional settings [i.e., public fora] where First Amendment values inalterably prevail." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality). "Nothing in the Constitution compels us to *listen* to or *view* any unwanted communication, whatever its merit," *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970); nevertheless, the Constitution does not permit a disgruntled auditor or viewer to "silence dissidents simply as a matter of personal predilections," *Cohen*, 403 U.S. at 21.

People are regularly "captives" of whatever expressive activity happens to take place where they are obligated to be. The witness, party, or attorney who must attend a court hearing, *cf. Cohen v. California*, 403 U.S. 15 (1971); *United States v. Grace*, 461 U.S. 171 (1983), the student who must go to school, *cf. Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969); *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the citizen with business at a government building, *cf. Edwards v. South Carolina*, 372 U.S. 229 (1963), and most definitely the employee desiring to keep his job in a particular store, *cf. Thornhill v. Alabama*, 310 U.S. 88 (1940); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) – each of these has no choice but to attend the place in question. But the "captive audience" doctrine does not abrogate the First Amendment in these places, as the above-cited cases illustrate.



As the original panel majority below explained, "Although the prospective counselee need not *listen* to the counselor, she does not have the right to stop the counselor's communication, absent any evidence that the communication is independently proscribable," 67 F.3d at 371 (citing *Madsen*) (emphasis in original). "[H]owever insistent the sidewalk counselor may be, the counselee on the public street or sidewalk can escape the unwanted message simply by continuing to walk towards and entering the clinic." *P.C. Network IV*, 67 F.3d at 406 (Meskill, J., dissenting). As *Madsen* forcefully reiterated, "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." 114 S. Ct. at 2529 (internal quotation marks and citations omitted).

Thus, while protection of a person "captive" in his own home might justify an ordinance banning picketing confined to the front of that home, *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988), concern for shielding even a resident cannot justify bans on leafletting on residential streets, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971), or marching past that same house, *Gregory v. City of Chicago*, 394 U.S. 111 (1969). And while concern for "the patient held 'captive' by medical

circumstance," *Madsen*, 114 S. Ct. at 2526, may justify restrictions on noise audible to that patient sitting *inside a facility*, *id.* at 2528, no such concern can justify barring speakers from approaching and addressing that very same patient *on a public way*, *id.* at 2529.

Sidewalk counseling can be (and generally is) completely peaceful. Indeed, in this case the "cease and desist" provision only applies to "conversation of a nonthreatening nature," Pet. App. A-184, because only such counseling is permitted within the fifteen-foot zones, *id.* Thus, the "cease and desist" provision operates exclusively to subject *peaceful conversation* to an audience veto. As Judge Altimari pointed out below, this represents "an unprecedented and unwarranted incursion on freedom of speech." 67 F.3d at 410 (dissent).

## VI. THE FIXED AND FLOATING BUBBLE ZONES VIOLATE THE FIRST AMENDMENT.

The preliminary injunction constructs invisible fifteen-foot speech-free zones which prohibit "demonstrating" within fifteen feet of any "doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" of any abortion facilities in the Western District of New York as well as within fifteen feet of "any person or vehicle seeking access to or leaving" any abortion facility in the Western District of New York ("floating bubble zones"). Pet. App. A-183. These speech-free zones violate the First Amendment.

As discussed above, *Madsen* held that a *fixed* buffer zone could be a valid remedial measure if the factual circumstances were so extreme as to warrant such relief. *Madsen* did *not* approve of "floating" bubble zones; on the contrary, this Court invalidated a similar "no approach" restriction that effectively created floating bubble zones around patients within 300 feet of an abortion facility. 114 S. Ct. at 2529. *Supra* § V(A). In any



event, the speech-free zones at issue here do not pass muster under the stringent *Madsen* standard.

First, no extraordinary record of pervasive lawlessness exists in this case. The district court found that the demonstrations were "usually peaceful in nature," 799 F. Supp. at 1423, and that even the so-called "constructive blockades" were *not* "physically blocking patient access," *id.* at 1424; *see also id.* at 1424 n.5. A clear majority of the *in banc* Second Circuit forthrightly agreed that this case does not present the record of lawlessness that this Court faced in *Madsen*. 67 F.3d at 396 (Winter opinion – ten judges), 400-01 (Meskill dissent – two judges). But instead of reversing the zones on this basis, the Second Circuit dismissed the need for supporting facts: "an extensive record of coercion or obstruction is not required" to justify speech-free zones, the court held. *Id.* at 396 (Winter opinion). With a stroke of the pen, the Second Circuit thereby severed the *Madsen* result from its exceptional factual moorings, distorting that decision into a *carte blanche* authority for erecting buffer zones to protect "[t]he timid" from the "chilling effect" of demonstrations. 67 F.3d at 396 (Winter opinion). This is, of course, the First Amendment turned upside down. "If absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free speech' would consist of platitudes. That kind of speech does not need constitutional protection." *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987) (editing marks, quotation marks, and citation omitted).

Second, the district court imposed speech-free zones as a *first* resort, not as a response to the failure of a narrower injunction. *Compare Madsen*, 114 S. Ct. at 2527-28. The TRO imposed floating bubble zones just days after respondents filed suit. JA 23. There was no initial effort to secure access with a less restrictive, speech-protective injunction. The district court then

added the fixed buffer zones in the preliminary injunction without identifying any need for this expanded restriction.

Third, the speech-free zones prohibit far more speech than necessary. In *Madsen*, this Court ruled that speech-restrictive injunctions trigger a stricter standard of review that the "time, place, and manner" analysis governing ordinances and statutes of general applicability. 114 S. Ct. at 2524-26. Logically, then, an injunctive restriction that fails the "narrow tailoring" requirement of time, place, and manner analysis, *id.* at 2524, *ipso facto* violates the "more stringent" *Madsen* requirement, *id.*, that the injunction "burden no more speech than necessary," *id.* at 2525. A statute or ordinance "is narrowly tailored if it targets and eliminates no more than the exact source of the `evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted). Consequently, an anti-speech injunction must be at least as tightly focused in its proscriptions.

The fixed and floating fifteen-foot speech-free zones at issue here reflect no such narrow tailoring. These zones do not "aim specifically at evils within the allowable areas of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). "Without interfering with normal . . . activities, daytime picketing and handbilling on public grounds . . . can effectively publicize" the speakers' message. *Grayned*, 408 U.S. at 118-19. Yet the zones prohibit even "such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest." 67 F.3d at 401 (Meskill, J., dissenting). Such a broad ban is not "*necessary* for the maintenance of peace and tranquility on the public sidewalks surrounding the building,"



*United States v. Grace*, 461 U.S. 171, 182 (1983) (emphasis added); hence, these restrictions violate *Madsen*'s narrow tailoring requirement. Other parts of the preliminary injunction already prohibit all trespassing, obstructive conduct, and disruptive noise, Pet. App. A-183 to A-184; all that the speech-free zones add are a ban on peaceful, nonobstructive demonstrations on public sidewalks or rights of way. Governmental restrictions on expressive activity "can find constitutional justification only by dealing with the abuse [of rights]. The rights themselves must not be curtailed." *DeJonge v. Oregon*, 299 U.S. 352, 364 (1931).

Fourth, the ban on "demonstrating" in the fixed and floating speech-free zones is unconstitutionally vague. Petitioners cannot know with any certainty what the term "demonstrating" includes. The dissent to the Second Circuit's *in banc* decision described this term as including "the entire universe of expressive activity," 67 F.3d at 401, and the majority opinions did not question this interpretation. If this view is correct, the buffer and bubble zones are truly "First Amendment free zones," *cf. Board of Airport Comm'rs v. Jews for Jesus, Inc.* 482 U.S. 569, 574 (1987). On the other hand, if "demonstrating" includes some subset of the universe of expression, then the contours of this term are vague.

Some activities clearly constitute demonstrating, *e.g.*, picketing or holding a rally. The district court construed sidewalk counseling - leafletting and conversation - to be a "form of demonstrating," Pet. App. A-183. Respondents interpret demonstrating to include scolding abortion staff for their work. Pet. App. A-208 (exhibit to contempt request). What about a silent vigil? Wearing a pro-life tee-shirt or button? Praying the rosary? These are not abstract hypothetical questions--individuals engaging in "demonstrating" have to stay

fifteen feet from facility entrances and cease their "demonstrating" whenever someone coming from or going to the facility (i.e., radiating a floating bubble), passes within fifteen feet. As with the other speech-restrictive portions of the preliminary injunction, the result is that the exercise of free speech becomes analogous to walking through a mine field. If the goal is to crush pro-life expression at abortion facilities, one could hardly devise a better means.

The fixed and floating speech-free zones suffer from additional constitutional defects specific to their respective prohibitions.

For their part, the fixed buffer zones reflect no consideration whatsoever of geographical features. *Compare Madsen*, 114 S. Ct. at 2527 (noting importance of specific physical setting). These fifteen-foot zones represent an arbitrary, one-size-fits-all approach to at least a half dozen different abortion facilities. JA 35-36. Rather than tailor an order to a particular location,[23] as in *Madsen*, the district court issued a blanket "solution" for the entire Western District of New York. Pet. App. A-183. If *this* order is constitutional, site analysis becomes a farce and fifteen-foot "no demonstration" zones become standard fare at *all* picketed facilities.

The floating zones, meanwhile, are tantamount to a total ban on picketing and leafletting anywhere in the vicinity of an abortion facility. A person walking down a sidewalk en route to or leaving an abortion facility "emanates" a "zone of silence"

23. The facilities here present a variety of physical layouts. The Buffalo Gyn Womenservices facility at 1241 Main Street, for example, shares a building with, *inter alia*, a post office. Dkt. 81 at 189 (Tr. 3/7/91). The Erie Medical Center on 50 High Street, meanwhile, occupies the fifth floor of a multi-tenant facility which also houses, *inter alia*, a restaurant and a pharmacy. *Id.* at 237-38.



extending fifteen feet in radius. In the face of this "bubble zone . . . which amorphously wafts along immuring any individual coming or going from the clinic," 67 F.3d at 410 (Altimari, J., dissenting), picketers, leafletters, and anyone else who could be characterized as "demonstrating" must flee from approaching pedestrians on pain of contempt. In effect, a floating bubble zone bulldozes all pro-life speech off the sidewalks.[24] If a hapless picketer trying to stay fifteen feet ahead of one pedestrian should encounter another coming in the opposite direction, the picketer is trapped without any escape route from contempt. If a placard-carrying individual should fail to pay close attention in all directions, a "speech-free bulldozer" may run him over before he has time to conceal his sign. The only truly safe way to dodge these "rolling blackouts" on speech is to stay home.

The floating bubble zones are also unconstitutionally vague, even aside from the vagueness of the term "demonstrating" addressed above. There is simply no way petitioners can know with any degree of certainty who is a mere passerby (i.e., who carries no zone) and who is a "person . . . seeking access to or leaving [abortion] facilities" (i.e., who carries a fifteen-foot zone). Nor can petitioners know where the floating zones do and do not apply. The district court "clarified" the geographical scope of the TRO by stating that the injunction "is directed to activities *at* the sites chosen for demonstrations," JA 29 (emphasis added), but that is no clarification at all: *wherever* a person is "demonstrating" will be by definition the site that

24. It is of course rare that a sidewalk will be more than fifteen feet wide. Even in the case of such a hypothetically capacious promenade, those maneuvering their "speech-free bulldozer bubbles" down the path could still crush out pro-life speech by simply walking down the center of even a thirty-foot wide sidewalk.

person has chosen for a demonstration. The *in banc* Second Circuit refused to remedy this vagueness:

> We do not address the issue . . . of how far from a clinic a floating buffer zone may reach to protect a person "seeking access to or leaving" the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase "seeking access to or leaving."

67 F.3d at 389 n.4. Obviously, the absence of clear geographical boundaries to the injunction puts petitioners to the untenable choice of either risking unpredictable contempt judgments or ceasing to exercise free speech. *Grayned*, 269 U.S. at 108-09.

The mobile fifteen-foot zones powerfully chill speech. Petitioners are not state-of-the-art robots outfitted with optical devices that can precisely and instantaneously calculate a fifteen foot distance while moving. Whereas a spatial misjudgment brings with it a $10,000 penalty (or more), Pet. App. A-185, plus attorney fees, Pet. App. A-186, demonstrators are forced to maintain a still greater distance to avoid contempt.

In sum, the fixed and floating speech-free zones impose deeply chilling and flagrantly unconstitutional restrictions on free speech.

## CONCLUSION

This Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
American Center for Law
& Justice
1000 Thos. Jefferson St. N.W.
Suite 304
Washington, DC 20007
(202) 337-2273

KEITH A. FOURNIER
JOHN G. STEPANOVICH
American Center for Law
& Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(804) 579-2489

VINCENT P. MCCARTHY
JOSEPH P. SECOLA
McCarthy & Secola
P.O. Box 1108
8 South Main St.
New Milford, CT 06776
(860) 355-0923

THOMAS P. MONAGHAN
The New Hope Life Center,
ACLJ-New Hope
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

* *Counsel of Record*

*Attorneys for Petitioners*

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