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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Candle, Shirley Hobbs, Judy Madsen, et al. Appellants, v. WOMEN'S HEALTH CENTER, INC. AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC. Appellees.	CASE NO. 93-969 Appeal from Eighteenth Judicial Circuit Case No. 91-2811-CA-16-K

BRIEF OF AMICUS CURIAE AMERICAN FAMILY ASSOCIATION, INC.

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STATEMENT OF THE CASE

This is a brief of limited focus.[1] It does not address many of the compelling legal arguments raised by appellants in their opening brief. It focuses exclusively on the question whether the 36 foot and 300 foot "free zones" set forth in the Amended Permanent Injunction Order violate the First Amendment of the United States Constitution.

[1]Amicus Curiae is a not for profit corporation with a national office in Tupelo, Mississippi. The American Family Association Law Center participates in significant cases relating to First Amendment religious freedom and to the preservation of traditional moral values of American society. Amicus Curiae American Family Association, Inc. is not a party to this litigation.

STATEMENT OF FACTS

On April 8, 1993, the Circuit Court for the Eighteenth Judicial Circuit in and for Seminole County, Florida, entered an Amended Permanent Injunction Order (the "Injunction Order"). Specifically, the Injunction Order provides for a 36 foot free zone extending outward in all directions surrounding the private property of Aware Woman's Center for Choice, Inc. (the "Abortion Clinic"). The 36 foot free zone extends over a public sidewalk and a public highway known as Dixie Way. The Injunction Order purports to prohibit appellants from, among other things, peacefully congregating, picketing, patrolling, demonstrating or entering into this free zone. The Injunction Order also provides for a 300 foot free zone surrounding the Abortion Clinic.

The 36 and 300 foot free zones prohibit peaceful protected pro-life speech and expressive activity.

ARGUMENT

I.

THE INJUNCTION ORDER CREATES TWO "FIRST AMENDMENT FREE ZONES"

Paragraphs 3 and 5 of the Injunction Order purport to create two free zones, one 36 feet wide and one 300 feet wide, respectively.

In effect, paragraphs 3 and 5 of the Injunction Order create two "First Amendment Free Zones;" that is, zones where appellants, or others like them, are prohibited from peacefully exercising First Amendment rights.

Because the "First Amendment Free Zones" set forth in paragraphs 3 and 5 fail to distinguish between lawful and unlawful expressive activity, paragraphs 3 and 5 of the Injunction Order are unconstitutional. See, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

A. The "First Amendment Free Zones" Set Forth in Paragraphs 3 and 5 Enjoin Protected Expression

Appellants have a fundamental constitutional right to peacefully express their views on the vitally important public issue of abortion. They have a constitutional right to peacefully picket, distribute literature or verbally express themselves for purposes of protest, education, counseling, or praying. These peaceful activities operate at the core of the First Amendment. The United States Supreme Court has repeatedly "recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited,

robust and wide-open'." Boos v. Barry, 485 U.S. 312, 318 (1988). The Court has "consistently commented on the central importance of protecting speech on public issues" such as abortion. Boos, 485 U.S. at 318; see Cormick v. Myers, 461 U.S. 138, 145 (1983); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 926-27 (1982) (political speech lies "at the core of the First Amendment").

Paragraphs 3 and 5 of the Injunction Order interfere with Appellants' ability to peacefully demonstrate, picket, distribute literature, pray and counsel within the 36 and 300 foot "First Amendment Free Zones." Because paragraphs 3 and 5 enjoin both **lawful** and unlawful expressive conduct, paragraphs 3 and 5 are blatantly unconstitutional. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

B. The "First Amendment Free Zones" Set Forth in Paragraphs 3 and 5 of the Injunction Order Conflict with the Decision of the Supreme Court in NAACP v. Claiborne Hardware

In NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) the Supreme Court held that in the context of protected expressive activities, courts may "**restrain only unlawful conduct** and the persons responsible for conduct of that character." Id. at 924, n. 67 (emphasis added). The Abortion Clinic, by seeking and enforcing an injunction that also prohibits lawful expressive conduct within the two "First Amendment Free Zones" ignores Claiborne Hardware.

An understanding of the factual background of Claiborne Hardware is essential to appreciating the magnitude of the constitutional violation presented by paragraphs 3 and 5 of the Injunction Order.

In Claiborne Hardware, Charles Evers was sued for tortious interference with merchants' business relations. As here, injunctive relief was sought. Evers organized a black boycott of white merchants' businesses. Evers "sought to persuade others to join the boycott through pressure and the 'threat' of social ostracism." 458 U.S. at 910-11. He sought to "embarrass" others and "coerce them into action." Id.

The economic boycott urged and carried out by Evers and his followers involved "acts of physical force and violence" against customers of the boycotted businesses, "[i]ntimidation, threats, social ostracism, vilification, and traduction". . . the stationing of guards ('enforcers' 'deacons' or 'black hats') in the vicinity of white-owned businesses," all which resulted in "the volition of many blacks" being overcome by "sheer fear" as "they were forced and compelled against their personal will to withhold their trade and business intercourse from complainants." 458 U.S. at 894-95 (citation omitted) (emphasis added).

The "Black Hats" organized by the boycott leaders were "store watchers"; that is, "enforcers" of the boycott who "warned" prospective customers from patronizing boycotted stores, destroyed "goods purchased at boycotted stores," openly displayed "weapons" and "military discipline," denounced by name those who broke the boycott and subsequently engaged in violence against "the persons and property of boycott breakers." 458 U.S.at 897, n. 22.

Furthermore,

> Evers told his audience that they would be watched and that blacks who traded with white merchants

> would be answerable to him. According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black members of the Claiborne NAACP.

458 U.S. at 900 n.28 (first emphasis in original; subsequent emphasis added).

Moreover, "Evers stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night." Id. at 902. An "atmosphere of fear" prevailed among blacks from 1966 until 1970 because of the disciplined "applied by some members of the boycott. Id. at 904. Indeed, because some blacks ignored the boycott, in "two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged." Id.

Notwithstanding the "atmosphere of fear" that was created by the boycott organizers and the "discipline" they enforced, id., the United States Supreme Court reversed a state court order imposing damages and an injunction against numerous civil rights activists. The Supreme Court pointed out that the activists' behavior included both elements of criminality and elements of lawful behavior. Id. at 888. Justice Stevens, writing for the Court, emphasized the need to distinguish between lawful and unlawful activities before imposing remedial sanctions:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct

> occurs in the context of constitutionally protected activity, however, "**precision of regulation**" is demanded . . . . Specifically, **the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damage liability and on the persons who may be held accountable for those damages.**

Id. at 916-17 (emphasis added, citation omitted). The "importance of avoiding the imposition of punishment for constitutionally protected activity," id. at 934, required the Supreme Court to reverse the sweeping imposition of damages liability.

"For the same reasons," the Supreme Court continued, "the permanent injunction" imposed against the activists "must be dissolved." Id. at 924 n.67. The 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).

Because the "First Amendment Free Zones" set forth in paragraphs 3 and 5 of the Injunction Order fail to differentiate between legal and illegal expressive activity, they are unconstitutional on their face and as applied to Appellants' protected expression and expressive conduct. Paragraphs 3 and 5 must be stricken from the Injunction Order.

C. The "First Amendment Free Zones" are Not Saved From Constitutional Infirmity as Time, Place, or Manner Restrictions

The "First Amendment Free Zones" cannot be upheld as

reasonable time, place and manner restrictions.

1. Time, place and manner test does not apply to injunction

The United States Supreme Court has never permitted speech to be restricted, under a time, place and manner analysis, by injunctions that impose substantive restrictions on expressive activity. Rather, the Supreme Court has applied this test only to statutes, ordinances, and regulations. See, e.g., Cox v. Louisiana, 379 U.S. 559 (1965) (statute); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (regulations).[2]

There are several reasons, reflected in the decisions of the Supreme Court, for disfavoring the use of substantive injunctions

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[2]Appellants challenge the Abortion Clinic to find one Supreme Court case that applies "time, place and manner" restrictions to substantive injunctions. Cases cited by appellees such as Feminist Women's Health Center v. Advocates for Life, 859 F.2d 681 (9th Cir. 1988) that apply time, place and manner analysis disregard the arguments of the Supreme Court that substantive injunctions should be avoided. See, infra, pages 10-12. Moreover, the fact that Feminist Women's Health Center upheld a free zone cannot be used against appellants' argument. The defendants in that case only challenged the "breadth" of the zone, not its constitutionality. 859 F.2d at 686. Also, the Supreme Court's decision in Frisby v. Schultz, 487 U.S. 474 (1988) offers no support for paragraphs 3 and 5. In Frisby, the Supreme Court upheld an ordinance (not an injunction) that banned targeted picketing in front of a residence. The ordinance was upheld because the target of such picketing was a home, "the last citadel of the tired, the weary, and the sick," and "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." 487 U.S. at 431-34. Indeed, the Court suggested that a residence used "as a place of business" might lead to a different result. Id. at 434. In this case, of course, there is no question that the Abortion Clinic is a business. Thus, to the extent that the "First Amendment Free Zones" prohibit peaceful First Amendment speech and expressive conduct from occurring around the Abortion Clinic, the "zones" are constitutionally defective.

against free speech. These considerations principally reflect the wisdom of preserving the distinction between the lawmaking role of elected bodies and the adjudicative role of courts.

First, a statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment.

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the alleged acts. E.g., Walker v. Birmingham, 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means of governance is repugnant to our system of republican democracy.

Third, the task of a court is to weigh a law, not to draft one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted. Courts refuse to rewrite unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place or manner decisions

assign to the judiciary the authority to replace [government officials] as the manager of [public forum property - here, parks]"); Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protestors....").

Fourth, judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council declines to enact a "Free Zone" requirement, a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to the courts. Cf. New York Times Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" in which courts may "make law...."); Id. at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization.... ").

2. Even assuming that time, place and manner analysis applies to injunctions, the "First Amendment Free Zones" are not "reasonable" as applied to appellants' expressive activity

As set forth above, time, place and manner analysis should not be applied to substantive injunctions, like the ones at issue here. Even if such an analysis did apply, the "First Amendment Free Zones" are not reasonable time, place, and manner regulations. The reasonableness of time, place, and manner restrictions depend, significantly, upon "[t]he nature of a place, the 'pattern of its normal activities'.... The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

In Grayned, a demonstrator in front of a high school was convicted of violating a city antipicketing ordinance that outlawed all demonstrations near schools in session, except peaceful labor picketing. The demonstrator was also convicted of violating a city anti-noise ordinance that prohibited disturbing a school session by wilfully making a noise or diversion while on adjacent public or private grounds. The demonstrator appealed his conviction to the United States Supreme Court, challenging the two ordinances as constitutionally invalid on their faces. The Supreme Court concluded that the antipicketing ordinance violated the 14th Amendment's Equal Protection Clause because on its face it singled out labor picketing for special treatment. The Court held that the anti-noise ordinance was not facially unconstitutional.

In reaching its decision on the anti-noise ordinance, the Court addressed the demonstrator's challenge that the anti-noise ordinance was unconstitutionally overbroad. The Court stated:

> A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.
>
> . . .
>
> The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.

408 U.S. at 114-115.

The Court stated that the anti-noise ordinance did not interfere with the demonstrator's right to picket because it only required the demonstrator to picket quietly. The Court recognized:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions.

Id. at 115 (quotations and citations omitted).

While acknowledging that **reasonable** time, place and manner restrictions may apply to a city **ordinance**, the Court cautioned that such restrictions could not be applied to censor the speaker's "message." Id. The Court also noted that subject to reasonable time, place and manner regulations, "peaceful demonstrations in public places are protected by the First Amendment." Id. at 116. The Court stated that the nature of a place and the pattern of its

normal activity dictated the reasonableness of a regulation. Id. at 116. Most importantly for the instant case, the Court noted that "a silent vigil" would most probably not interfere with a public library, whereas making a speech in the reading room of such a library almost certainly would. The Court added:

> Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] **cannot constitutionally be denied broadly . . . .**" Free expression "must not, in the guise of regulation, be abridged or denied."

Id. at 117.

The Court underscored that an ordinance that has an "impermissibly broad prophylactic" effect is unconstitutional because "[p]eaceful picketing which does not interfere with the ordinary functions of the school is permitted." Id. at 119.

Applying the detailed analysis of the Supreme Court in Grayned to the instant case, it becomes immediately clear that enforcement of the "First Amendment Free Zones" against Appellants' peaceful and quiet picketing, counseling, praying and demonstrating is patently unreasonable, and, therefore, unconstitutional.

Because the "First Amendment Free Zones" prohibit constitutionally protected expression, they are overbroad. Because Appellants' expressive conduct occurs on a public sidewalk, which has been from time immemorial especially set aside for discussion of public issues, Hague v. C.I.O., 307 U.S. 496, 515 (1939), enforcement of the "First Amendment Free Zones" against appellants' peaceful expression and expressive conduct is unconstitutional.

Appellants' peaceful demonstrating, picketing, distributing literature, counseling and praying on a public sidewalk to express their pro-life views may not be suppressed by the Abortion Clinic's enforcement of the "impermissibly broad prophylactic" "First Amendment Free Zones."

Consequently, paragraphs 3 and 5 should be deleted from the Injunction Order.

3. "First Amendment Free Zones" that impose restrictions on otherwise lawful expressive activity in public places conflict with the doctrine of prior restraint

Enforcement by the Abortion Clinic of the "First Amendment Free Zones" set forth in paragraphs 3 and 5 of the Injunction Order against Appellants' peaceful expression constitutes an unconstitutional prior restraint. See, e.g., Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

Appellants' peaceful expression is protected by the First Amendment. Appellants openly make the public aware of their opposition to plaintiff's performance of human abortions. The performance of human abortions was -- and is -- offensive to Appellants, as the views and beliefs of Appellants are, no doubt, offensive to Appellees. "But so long as the means are peaceful, the communication need not meet [the defendants'] standards of acceptability." Keefe, 402 U.S. at 419.

The Abortion Clinic has no right to be free from public criticism of its human abortion business. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In addition,

"[a]ny prior restraint on expression" carries with it a "'heavy presumption' against its constitutional validity." Keefe, 402 U.S. at 419. Therefore, enforcement of the "First Amendment Free Zones" against Appellants' peaceful expression and expressive conduct constitutes an unconstitutional prior restraint on speech.

II.

PROTECTED EXPRESSION AND EXPRESSIVE CONDUCT ARE NOT UNLAWFUL MERELY BECAUSE SOME PEOPLE FEEL "INTIMIDATED," "COERCED" OR "ANGRY"

The Abortion Clinic cannot avoid the clear command of NAACP v. Claiborne Hardware Co., supra, by merely characterizing Appellants' peaceful expression and expressive conduct as "intimidating," "coercive," or "upsetting." "Vehement, caustic and sometimes unpleasantly sharp" speech is protected by the Constitution. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). As the Supreme Court has recognized, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases". NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). Accord, American Booksellers Association v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) (speech that does not cause immediate injury may not be penalized).

The fact that Appellants' pro-life speech is heard inside the Abortion Clinic does not remove its from the protection of the First Amendment. Moreover, the fact that the Abortion Clinic staff, its clients and their companions hear the content of Appellants' pro-life speech and feel "intimidated," "coerced" or

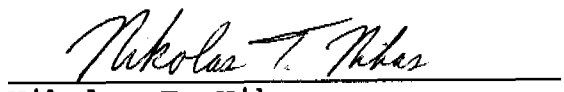
"angry" does not remove such speech from the sweep of the Constitution.

Appellants understand that the expression of their beliefs -- that what goes on in the Abortion Clinic is a grave moral evil -- may very well prick one's conscience, cause one to feel guilt, doubt, anguish, even intimidation - but it is guilt, anguish and intimidation born of moral persuasion and the power of speech, and such persuasive speech is constitutionally protected. Neither Appellants', nor any other pro-lifer's, First Amendment rights to express pro-life views can be curtailed or limited because some persons are timid or reluctant to hear expressions of pro-life views on the issue of abortion even if such pro-life speech tends "to **intimidate, harass or disturb** patients or potential patients" of the abortion clinic. NOW v. O.R., 726 F.Supp. 1438, 1497 (E.D.Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), reversed on other grounds, sub nom, Bray v. Alexandria Women's Health Clinic, __ U.S. ____, 122 L.Ed.2d 34 (1993) (emphasis added). See, also Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (The claim that protestor's expressions were intended "**to exercise a coercive impact**" does not remove them from the reach of the First Amendment) (emphasis added); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("Accordingly, a function of free speech. . . is to **invite dispute.** It may indeed best serve its high purpose when it induces a **condition of unrest, creates dissatisfaction** with conditions as they are, or even **stirs people to anger. Speech is often provocative and challenging.")** (emphasis added).

CONCLUSION

For the foregoing reasons, the Amicus Curiae support Appellants in this matter.

Respectfully submitted,

Dated: May 21, 1993 By 

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