IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

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

# APPELLEES' BRIEF

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## INTRODUCTION

The Appellees were plaintiffs/petitioners below and they will be referred to as "Appellees" or the "Clinics." Reference to the singular -- "Clinic" -- refers to the Melbourne Aware Woman Clinic which is the particular subject of the Amended Permanent Injunction. That injunction will be referred to as the "Order."

The Appellants will be referred to as "Appellants." References to the Appendix to Appellants' Brief will be with the symbol "A-__." The Appendix to this brief will be referenced as "App.-__." The reference to the transcripts of testimony included in the appendix to this brief will be designated by the witness' name and the page of that witness' transcript on which the testimony referred to appears as, for example, "(Unterberger Tr.-5)" to indicate page 5 of Mr. Unterberger's testimony.

## STATEMENT OF THE CASE

This case was originally brought by Women's Health Care Clinics against the defendants, each of whom are engaged in activities intended to hamper the operation of the women's health clinics. After considering the plaintiffs' uncontradicted affidavits and the stipulation of some of the parties (A-64-66), the Court entered a preliminary injunction order and, later, on September 30, 1992, a permanent injunction (A-107). This order was appealed to this Court and is now pending as case number 92-02684.[1]

In March, 1993, the Clinics sought further relief alleging that the permanent injunction entered on September 30, 1992, was being violated and that increased activity of harassment and intimidation including, for instance, residential picketing, necessitated additional injunctive relief.

The plaintiffs' two motions, a motion for an order of contempt (App.-13) and a motion for modification of the permanent injunction (App.-19) were both brought on for hearing and the Court received testimony and exhibits, including videotape of the disrupting and harassing activities (App.- 65).

After viewing the videotape, taking testimony and receiving

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[1] A week after the Order was entered and before any appeal was taken, counsel for the Clinics sent suggestions for modification of the Order which have not, to date, been acted on (App.-79).

evidence in a three-day hearing, the Court announced it would grant the modification of the injunctive order and proceeded to draft the order from which this appeal is taken. At the time of the Court's announcement, the plaintiff Clinics offered not to press the contempt motion until the defendants had an opportunity to comply with the new, explicit order. The contempt motion is still before the trial court and has not been called for further hearing.

The Amended Permanent Injunction (herein referred to as "Order" was entered on April 8, 1993 (A-112-123 and App.-1).[2] This appeal was taken by the defendants without providing the Court with the transcript of any testimony or evidence from the trial court below.

Curiously, though the extensive Appendix filed by the Appellants does not include any material relating to the evidence on which the Amended Permanent Injunction ("Order") was based, it does include transcripts from post-Order, non-evidentiary preliminary hearings following the arrest of persons charged with violating the injunctive order. So far as this record reveals, none of the individual Appellants are involved in these criminal proceedings. No evidence was taken and the Appellee Clinics were not represented at those proceedings. The Appellees have moved to strike that portion of the Appellants' Appendix.

The Appellee Clinics have raised the question of whether this

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[2] A week after the Order was entered and before any appeal was taken, counsel for the Clinics sent suggestions for modification of the Order which have not, to date, been acted on (App.-79).

appeal can be maintained without a full transcript of the trial court proceedings through its motion to require a full record or, alternatively, dismissal of the appeal. That motion was denied by the Court.

This Court has also before it a joint motion and separately filed individual motions from both the Appellants and Appellees, who jointly seek an order certifying this case to the Florida Supreme Court. Those motions are still pending.

The Court has ordered an expedited briefing schedule.

## STATEMENT OF THE FACTS

The Appellants do not contest any of the trial judge's findings and, indeed, they have no basis for doing so since they have not put a single line of trial court testimony or a single exhibit before this Court.

As a result, the Appellants' statement of the facts is rather sparse. The Appellants not only avoid the facts established at the evidentiary hearings below (none of which are in the Appellants' Appendix) but also attempt to ignore the findings of the trial court Order. Although a full transcript of the hearings on which the trial judge based his Order is not before the Court, the exhibits and a substantial part of the testimony are available.[3]

First Two Injunctions.

As explained in the Appellants' brief, the Clinics sought and obtained a temporary injunction and, on September 30, 1992, a Permanent Injunction. The record supporting those orders consisted of uncontested affidavits and a stipulation joined by some of the Appellants. The affidavits indicated that the Appellants had blocked ingress and egress of the women's health clinics in Seminole and Brevard counties and directed harassing and threatening conduct toward the Clinic personnel (A-101-105). Several of the affidavits, filed many months before the tragic

[3] The Appellants excuse their failure to bring the full record to the Court by saying that they are seeking to invalidate the Order in a facially unconstitutional attack.

death of Dr. Gunn in Pensacola, revealed the fear that Clinic personnel had for their lives and safety (A-20, paragraph 5). The stipulation, entered by the Clinic and some of the Appellants[4] stated (A-64-66):

> 2. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs are active in an organization known as "Operation Rescue America", (hereinafter referred to as "Operation"). In other areas of the United States, this effort has been directed towards closing down abortion clinics throughout the country to save unborn children. Respondents' desire is to close down "abortion mills" by various means. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs well understand that peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties. They feel a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.
>
> 5. Ed Martin has stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area. Ed Martin has considered blocking access to clinics. However, Ed Martin, Judy Madsen and Shirley Hobbs have not actually physically blocked access to abortion clinics located in Brevard or Seminole County.
>
> 6. Respondents have passed out flyers in the Central Florida area stating their desire to close down abortion clinics in this area. One of the flyers states that the demonstrations will be held in the Central Florida area.

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[4] Operation Rescue America, Ed Martin, Judy Madsen, and Shirley Hobbs agreed to this stipulation. Counsel for the parties also filed a trial court memorandum boldly stating, "The only reason respondents would ever consider breaking the law against trespass in any manner would be totally nonviolent. (sic) Saving the lives of unborn children may take precedence over a simple trespass" (A-68).

7. Respondent Ed Martin has made statements that his desire is to close all abortion clinics in the Central Florida area. Ed Martin has stated to members of press that he would love to shut down all abortion clinics. Ed Martin has issued a press release which states that "the spirit of Wichita comes to Florida". The press release also contained information that the Ed Martin of Ocala announced an "Operation Rescue" for Central Florida; however, no such rescue has taken place.

The references to "the Spirit of Wichita" coming to Central Florida are references to the massive illegal activity by "rescue" operations which were directed toward women's health clinics in Wichita, Kansas. (See Affidavit of Patty Martin, A-22, paragraph 10.)

Escalated Activity After Permanent Injunction.

The Appellants never sought to obey the injunction. They continued and even escalated their activity, particularly the activity directed toward the Aware Women Clinic in Melbourne ("Clinic"), the only women's health care clinic in Brevard.

Aware Women Clinic became the special target for attack by anti-abortionist activists following the opening of a special training school sponsored by Operation Rescue. IMPACT (Institute of Mobilized Prophetic Activated Christian Training) Teams, styled as the "most aggressive plan ORN has ever undertaken" was designed to train new leaders, "who not only understand the battle, but are equipped to win it" (App.-52).

Recruits from around the country were presented with a

comprehensive curriculum for conflict, taught how to use license tag numbers to obtain names and home addresses of clinic personnel and patients, how to access public records to obtain other personal data about everyone associated with abortion clinics. The point of the detective work is to stalk and siege clinic personnel: picket their homes, contact their neighbors, confront them at the clinic and at places such as hotels and brand them as "murderers."

The IMPACT team utilized "sidewalk counselors" to push their message and while others simultaneously slowed traffic coming into a clinic, other picketers assisted by strolling leisurely across driveways and entrances. The Clinic in Melbourne became the practice field and its patients and staff, the guinea pigs for the IMPACT trainees.

This heightened activity created additional problems for local law enforcement and became the responsibility of Melbourne Police Capt. Gary Allgeyer,[5] the second person in charge of the Melbourne Police Department (Allgeyer Tr.-128). He testified that, as the person directly charged with law enforcement activities at the Clinic, he became aware of the IMPACT team efforts which targeted the Clinic in Melbourne, beginning in January, 1993 (Allgeyer Tr.-136).

Capt. Allgeyer talked directly with Bruce Cadle who he knew to be involved with Operation Goliath and who represented himself as a leader of Operation Rescue (Allgeyer Tr.-136). Mr. Cadle talked

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[5] Capt. Allgeyer's testimony appears in the Appendix to this brief.

about how the IMPACT team was being taught to file lawsuits for civil rights violations against the police (Allgeyer Tr.-138) and about how the Clinic at Melbourne had been targeted for a "rescue." Mr. Cadle offered to cooperate with Capt. Allgeyer if it could be agreed in advance that the anti-abortion activists could released on their own recognizance when they were arrested (Allgeyer Tr.-138, 139). Capt. Allgeyer refused.

Bruce Cadle told Capt. Allgeyer that:

> ... their main intention of being up there on any day ... is to buy time as to keep the people that want to visit the clinic away. And, the more time they can keep them from entering that building or the parking lot to be a client of the clinic, the more babies they can save. (Allgeyer Tr.-139.)

As to the "rescue" he threatened, Mr. Cadle said that "a rescue would be a full fledged entry on the property and a blockading of the doors" (Allgeyer Tr.-139). In this, the Operation Rescue's Cadle had a view similar to the definition given by Rescue American's Ed Martin who published in a flyer:

> The most misunderstood aspect of baby-saving in front of the clinic is the actual rescue. The term "rescue" refers to blocking access to the entrance of abortion clinics. In this manner, we are putting our bodies between the abortionist and his intended victim, the preborn child.
>
> While we are in place ... this buys time for sidewalk counselors to talk with birthmothers. In most cases, the clinic is shut for the day and many appointments do not reschedule. (Plaintiffs; Exhibit 7, App.-68.)

As these "rescue" operations continued their work and the training of the IMPACT team went forward, Capt. Allgeyer had

definite worries about the escalation of activity (Allgeyer Tr.-136) and the threat to safety, a topic he discussed with Operation Rescue's leader, Bruce Cadle, to no avail (Allgeyer Tr.-153, 154, 206). He warned Cadle not to block traffic and yet the activity continued (Allgeyer Tr.-154, 155). Capt. Allgeyer expressed his special concern for the activities of "sidewalk counselors" who approached cars trying to get into the clinic (Allgeyer Tr.-155, 156).

Capt. Allgeyer repeatedly expressed his concern with the size and temper of the crowds at the Clinic (Allgeyer Tr.-148, 150, 151, 155, 157, 161, 173) and indicated that enforcement of an injunction against organizations hindering ingress and egress to the Clinic would help him in doing his job (Allgeyer Tr.-190).

Videotapes were introduced into evidence showing the Appellants blocking ingress and egress to the Clinic by standing in front of cars attempting to enter, walking very slowly in the entrance area, even by pushing baby carriages in the entrance area. The video shows that the Appellants and people working with them (notably, the "IMPACT Team" members) sought to crowd around the vehicles to press literature through windows of moving cars, and shout at the people entering the Clinic, creating a chaotic and hazardous situation (App.-65).

The new tactics of the Appellants[6] also included residential

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[6] Note that the new tactics referred to are those involving the defendants Bruce Cadle, Operation Rescue, and Operation Goliath. Operation Rescue America and its leaders and adherents were not directly involved in the IMPACT Team activities, but the newsletters of Operation Rescue America promoted these activities.

picketing, passing out "wanted posters" to neighbors, harassing a Clinic physician at a Melbourne motel where he was staying, and placing large crowds of people into the street outside the Clinic to block traffic.

These activities were harmful to the Clinic. A doctor quit providing services to the Clinic, staff members were harassed and some quit. Dr. Snydle, a physician serving the Clinic, testified that he had been the subject of a "wanted" poster, the target of a confrontation with activists at a Melbourne motel where he was staying which delayed him from getting to the Clinic (Snydle Tr.-59-61) and made him fear for his personal safety (Snydle Tr.-65). He also received a letter from an IMPACT team member which he regarded as a threat (Snydle Tr.-72, 73, Plaintiffs' Exhibit 2, App.-59).

Dr. Frank Snydle stopped working at the Clinic because of his "[a]anxiety, fear, concern" over the activities of the appellants and their colleagues (Snydle Tr.-82, 85).

Patients were harmed. Women who came for health care, including surgery, had higher blood pressure and were upset by the harassing activities which created so much chaos around the Clinic. This resulted in increased risk for the patients.

Dr. Frank Snydle had worked as a physician with the Clinic and he was familiar with the Appellants and their activities including their conduct in trying to stop cars, including his car, from entering the Clinic (Snydle Tr.-30, 31). Dr. Snydle had treated patients who came through this gauntlet of protestors accosting

cars and he found the patients to be anxious and some had "physical manifestations of hypertension, cardio arrhythmia ... rapid heart beat" (Snydle Tr.-31). Dr. Snydle remembered at least one occasion on which he had to turn away a patient because of symptoms of anxiety due to the activities of the anti-abortion activists (Snydle Tr.-35, 37). For other patients, Dr. Snydle had to use a higher level of sedation which increased the risk of surgery (Snydle Tr.-38). Dr. Snydle has also seen patients turned away from the driveway of the Clinic by the actions of the protestors and he testified that a delayed procedure becomes a more risky one (Snydle Tr.-39).

During this time, there was a great deal of additional harassing activity directed toward the Clinic including a December, 1992 attack with super glue to freeze the locks and butyric acid to cause a nauseous smell (Allgeyer Tr.-134, 135). In February, 1993, there was a sustained campaign to tie up the Clinic's telephone lines.

The Trial Court's Findings.

After the evidence was received, the Court announced its intention to grant the Clinic's motion to modify the permanent injunction and to frame a very specific order. The Amended Permanent Injunction ("Order") was entered on April 8, 1993 just before a planned mass demonstration over Easter weekend. This Order contained extensive findings based on the three-day evidentiary hearing.

The Court found that the defendants had not complied with the earlier injunctive order:

> That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioner's facility known as the Aware Women Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. (Finding A of Order, beginning at A-112.)

The Court's finding described the specific nature of the interference to ingress and egress, a finding based on extensive testimony and videotape of the defendants' activities:

> The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. (Finding A.)

The Court also traced the consequences of this activity, consequences which are quite graphically shown on the videotape introduced into evidence:

> As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way. (Finding A.)

The findings also detailed the way the demonstrators

approached the vehicles trying to enter the Clinic:

> As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot. (Finding E.)

The demonstrators, which the Court found "would vary from a handful to a crowd of four hundred" (Finding B) would appear with a frequency "from once a week to three times a week with the largest gatherings usually on Saturdays" (Finding B). The Court described these gatherings:

> Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist. (Finding C.)

The Court's findings also described the physical location of the Clinic both in words and by attaching a map to the Order (A-123). The Court made a particular finding about the fences which protected the Clinic's privacy and the tactics of the protestors who employed ladders to intrude on that privacy:

> The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting

> at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!". (Finding F.)

The Court also made specific findings about the practice of residential picketing, including the targeting of the children of Clinic personnel:

> On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometime the "home alone", minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer." (Finding G.)

The Appellants were not content to hound Clinic personnel at their homes but, the Court found, sought out a Clinic doctor at a motel:

> On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer". The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour. (Finding H.)

This pattern of harassment directed toward Clinic personnel was quite intense in the vicinity of the Clinic. The Court found:

> The same staff physician testified that on one

> occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer" - "We don't want you here in Melbourne." (Finding I.)

This pattern of intimidation was carried out even on the highway:

> On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic. (Finding J.)

Of course it was not just Clinic personnel but also the patients who were harassed by the demonstrators who crowded the street and the entranceway to the Clinic:

> This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated

therewith. (Finding I.)

The harassment of the patients, like that of the Clinic personnel, was not limited to the vicinity of the Clinic. The Court found:

> That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension. (Finding K(3).)

The Court also found:

> That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents. (Finding K(1).)

In addition to the direct physical intrusion the Clinic suffered through, the trespasses, the super glue attacks and the nauseous acids sprayed into the Clinic, there were attempts to disable the Clinic's phone communications, for, as the Court found:

> That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise. (Finding K(2).)

The Order.

Based on those extensive findings which in turn were based on extensive evidence, Judge Robert McGregor entered the Order which is before this Court. That Order did several things challenged by

the Appellants.[7] The principal attacks by the Appellants appear to be on five aspects of the Order: 1) the 36 foot setback line for demonstrators opposing the Clinic operation, 2) the 300 foot area protecting people entering the Clinic from harassment, 3) the restriction on excessive sound around this medical facility, 4) the prohibition against residential picketing within 300 feet of the home of Clinic personnel, and 5) the restriction on images seen from within the Clinic. Each of these elements needs to be understood in the context of the facts:

1) The sidewalk and the thirty-six foot separation of anti-Clinic protestors: The Appellants repeatedly refer to the sidewalk along Dixie Way making it seem almost a sacred place. Their claims that this is the "only" sidewalk along Dixie Way are pressed over and over again. The Appellants never point out that this sidewalk is a relatively short paved area which does <u>not</u> extend the length of Dixie Way but, rather, is formed by the paved area of the entrances to the two Clinic private parking areas and a connecting thirty-seven foot sidewalk, four feet wide. (See map appended to Order, A-123.) All of the other paved area is the actual entrance to the two Clinic parking lots. To the East and West of the entrances, the North side of Dixie Way is just like the South side

[7] The Order contains elements not challenged by the appellants such as the order to law enforcement to place a phone trap on the Clinic's phones so that the phone numbers from which "jamming" of the Clinic's phones could be established.

of Dixie Way with an unpaved right of way.[8]

Judge McGregor's Order sought resolution of the problems the Appellants created by their activity designed to hamper the Clinic and by their continued blocking of access to the Clinic, activity which persisted despite the first two injunctive orders.

The Appellants, who sought to close the Clinic, had used the demonstrations on the North side of the street (where the entrances were located) to impede access to the Clinic and harass and threaten its personnel and its patients. Since the sidewalk connecting the two Clinic parking lots was the route established for the Clinic workers' access to the Clinic (and obviously designed only for that purpose), and since activists located in this short sidewalk area would be very close to the entrances of the two parking areas, the Judge's Order merely locates the protestors across a narrow residential area road where they can be easily heard and seen.

2) The 300 foot restriction on approaching people seeking access to the Clinic must also be understood in context of the facts. The record shows that the people who come to the Clinic come in vehicles and there is no record of Clinic personnel or patients arriving on foot. This portion of the Order prohibits the Appellants from continuing the harassing and dangerous practice of approaching moving cars by stepping into the roadway or slowly

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[8] To the West of the main Clinic entrance, there is a fifteen foot paved extension of the driveway. Note that this ends at the Clinic property line and does <u>not</u> extend West along Dixie Way.

moving from the path of vehicles so that they are forced to slow down or stop. Under the injunctive Order, the Appellants may still pass out literature, but they may not crowd around vehicles or otherwise stop vehicles to do so. If vehicles do stop to request literature, the Order does not prohibit the Appellants from passing it out and even the activist Raymond Unterberger agreed that this was an available alternative (Unterberger Tr.-25).

3) The restriction on noise level at the medical facility is a common sense restriction which will not be violated if the Appellants' desire is solely to communicate their message at a public forum. Under the Order, the noise may not be so great as to intrude into the medical facility.

4) The 300 foot prohibition on targeted residential picketing merely provides a zone of privacy close to the homes of Clinic personnel but does not prohibit all residential picketing.

5) The restriction on images seen from within the Clinic is a restriction on the Appellants' activities of placing ladders beside the Clinic fences and holding signs up above the fences. Nothing in the Order prohibits the Appellants from carrying signs, wearing T-shirts or displaying bumper stickers in the area directly across the street, the rest of Melbourne or anywhere else.

## SUMMARY OF ARGUMENT

The Order entered by the trial judge after three days of testimony and evidence (including videotapes) was necessary to protect the Clinic, its personnel and its patients. The Order is a reasonable time, place and manner direction which is content neutral, is narrowly tailored to serve significant government interests and leaves abundant alternative channels of communication. This Order is not overbroad or vague but, rather, is quite precisely tailored to remedy the evil the Appellants have created not by their speech, but by their conduct. (Part I.)

The Order does not intrude into Appellants' rights to equal protection or rights of free assembly and the Appellants' contention that the Order infringes on their rights to freely exercise their religion is untenable. To the contrary, the Appellants have viewed their religion as the only value to be respected and have maintained that it gives them license to break laws and intrude on the rights of others. The injunctive Order protects the Clinic and its patients from the intimidating and harassing conduct of the zealots but preserves their legitimate rights of free expression.

## ARGUMENT

### I.

### THE TIME, PLACE AND MANNER INJUNCTION PROTECTING THE MEDICAL SERVICE CLINIC IS VALID.

#### A. The Order Must be Measured Against Three Part Test Appropriate for Time, Place and Manner Restrictions.

There is agreement between the parties on the legal standards to be applied to this case. The Clinics agree that public sidewalks and rights of way are traditional public fora (A-15) and that any restriction on speech in a public forum must meet the rule of Frisby v. Schultz, 487 U.S. 474 (1988) and Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

The Appellants' brief states the correct standard (see page 15) but ignores the substantial case law which has applied this standard in cases substantially similar to the case before the Court -- cases involving women's health care clinics, anti-abortion activists and even, in some of these cases, some of the very parties in this case. See, Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 686 (9th Cir. 1988) (injunction vindicates significant governmental interest in protecting ability of clinic to provide medical services free from interferences that endanger health and safety of patients); Hirsh v. Atlanta, 261 Ga. 22, 401 S.E. 2d 530, 533, cert. denied, 112 S. Ct. 75 (1991) (state has significant interest in protecting health and welfare of its citizens and their right to obtain medical

services); O.B.G.Y.N Ass'ns v. Birthright of Brooklyn and Queens, Inc., 64 A. D. 2d 894, 895, 407 N.Y.S. 2d 903 (1978) (injunction against protestors furthers substantial governmental interest in the "health or safety of any patient of the medical clinic"); Bering v. SHARE, 106 Wash. 2d 212, 721 P. 2d 918, 926-27 (1986) (en banc), cert. dismissed, 479 U.S. 1060 (1987); Planned Parenthood of Monmouth County, Inc. v. Cannizzaro, 204 N.J. Super. 531, 499 A.2d 535, 540 (1985), aff'd, 217 N.J. Super. 623, 526 A.2d 741 (1987); Medlin v. Palmer, 874 F.2d 1085, 1091 (5th Cir. 1989) (regulation prohibiting use of amplifiers within 150 feet of stores, residences and medical facilities served governmental interest in "protecting patients of hospitals and clinics from the unwarranted intrusion...[of] 'pro-life' activists"); Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 550 N.E.2e 1361, 1367, 1370 (1990) (even temporary delay in obtaining abortion could lead to a complete denial of that right, and thus cause irreparable harm).

As the United States Supreme Court has said, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). The Order under review does not prohibit speech, as Appellants argue, but, instead, provides reasonable time, place and manner restrictions appropriate to the facts of this case. Under the rule to which both parties agree, even a public forum may be subject to

time, place and manner restrictions

(1) which are content-neutral,

(2) are narrowly tailored to serve a significant government interest, and

(3) leave ample alternative channels of communication.

Perry, Frisby, supra. Each of these tests are analyzed in the following points.

B. The Order is Content Neutral.

The injunction challenged in this case is not issued to regulate the content of the appellants' speech and they are free to say whatever they like. Nothing in the Order limits the subject of the Appellants' speech nor does it regulate the substance of their message. The Order does regulate time, place and manner:

(1) Time. The Order is more restrictive on noise during certain times, that is, when there are surgical procedures being performed at the Clinic.

(2) Place. The Order sets a place limitation on the Appellants. They may not be in the Clinic driveways or in the short (37 foot) strip which connects the Clinic's two parking lots.[9] They may not conduct residential picketing within 300 feet

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[9] Mr. Unterberger, one of the Appellants' witnesses and a traffic engineer, agreed that the activists blocked the roadway and that the small sidewalk area beside the Clinic would not accommodate the large number of people (200 to 400 people) who turned out for some of the demonstrations and that people would spill over onto the street (Unterberger Tr.-27, 28).

He also testified that it "would be helpful" to have a "clear place to walk" on the South side of the street (Unterberger

of the homes of Clinic personnel nor approach people within 300 feet of the Clinic who are traveling to the Clinic unless they indicate an interest in communicating with the Appellants.

(3) Manner. The Order does not allow the Appellants to communicate in the vicinity of the medical facility by bull horn or by extremely loud shouting and singing of such a volume that it carries past the outer walls of the Clinic property, the Clinic structure walls and into the Clinic itself.

This Order is very much like other orders approved by appellate courts in context of anti-abortion activists and their attacks on Clinics. (See cases collected sub-point A, pages 23,24.)

Under the case law, these time, place and manner restrictions are all appropriate. Under appropriate circumstances, speech may be conducted only at certain distances from the area targeted by speech. This example has been upheld recently in a case dealing with speech which is clearly at the core of the First Amendment -- pure political speech in an election, Burson v. Freeman, ____ U.S.

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Tr.-29). The Order, of course, provides this clarity.

Raymond Unterberger cooperated with the Operation Rescue IMPACT team (Unterberger Tr.-4) and is part of their mailing network (Unterberger Tr.-7). He has participated in activities at the Clinic including shouting ("I have called out [to the abortionist] that God will hold him accountable for the blood that is shed in that place that day"), and in transporting a ladder to the Clinic so that the activists could "see over the back fence" and holding up signs, sometimes while shouting (Unterberger Tr.-14, 15). He has also engaged in residential picketing of Clinic personnel in company with the IMPACT team (Unterberger Tr.-8, 9) which included going up to the door of the residence and passing out flyers to neighbors and carrying signs identifying the Clinic employees as "baby killers" (Unterberger Tr.-12).

___ , 112 S.Ct. 1846 (1992). Burson upheld a Tennessee statute which prohibited solicitation of votes and display of campaign materials within 100 feet of entrances to polling place. The noise level of free expression may also be regulated under time, place and manner principles, Ward v. Rock Against Racism, ___ U.S. ___, 109 S.Ct. 2746,2754 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others," and "[g]overnment regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'") Accord: Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989) (city ordinance forbidding bull horns within 150 feet of clinics upheld.)

As the Washington Supreme Court held in a context quite similar to this case, Bering v. SHARE, 721 F.2d 918, 925 (Wash. 1986):

> Although only anti-abortion pickets are bound by the geographic restriction of picketing to Stevens Avenue [well away from the entrance to the Clinic building], that in itself cannot be viewed as content regulation. The trial court imposed the place restriction in order to regulate the conduct of a particular group of persons before the court ....

Similarly, in the present case, the Clinic faced continued harassment even after the trial judge had enjoined the Appellants from interfering with ingress and egress (see Finding number A, A-112) and the practical solution, crafted by the judge in a narrow and precise manner, was to move the Appellants a few feet directly

across the street and away from the Clinic entrance, without affecting the content of their speech.

In an Oregon case arising over demonstrations at a clinic, a federal judge entered an injunction, upheld by the Ninth Circuit, which enjoined the defendants from demonstrating within twelve and one-half feet on either side of the entrance area to the clinic, and from "producing noise by any other means which substantially interferes with the provision of medical services within the center, including counseling...." In Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, (9th Cir. 1988), the Court upheld this order stating:

> The preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press.... Rather, it focuses exclusively on the location and manner of expression. It protects the Clinic from loudness and physical intimidation, not from content of speech.

859 F.2d at 686.

C. The Order is Narrowly Tailored and Serves Significant Government Interests.

The question of "tailoring" is, of course, connected with the specific facts of the case and we do not get injunctions "off the rack" ready made for all situations. Orders appropriate to protect a clinic in a multi-story office building in downtown Portland, Oregon may or may not fit the situation of a single story clinic located in Melbourne, Florida in a residential area with its own

parking facilities. The Appellants have placed themselves in an awkward posture by attempting a facially unconstitutional attack on a time, place and manner order without any reference to the evidence or even to the Court's findings. They do not present the Court with any facts on which to judge the quality of the tailoring.

The Order was entered after evidence showed that the Appellants continued to interfere with ingress and egress at the Clinic (Finding A, A-112) and to engage in other activities designed to drive away Clinic physicians and personnel and upset the Clinic's patients. The practical effect of the Order was to move the Appellants away from the entranceway of the Clinic and the area immediately adjacent to the Clinic parking area and place them directly across the street. It prevents the Appellants from organizing a mass demonstration which takes over the street, thereby blockading the Clinic.

As the Ninth Circuit said in its Portland Feminist Women's Health Center decision, supra,

> The free zone is tailored to address threats, intimidation, and assault of clinic personnel and clients that impede the safe provision of medical care.

859 F.2d at 686.

The other provisions of the Order are similarly tailored to assure that the Appellants, whose activities are designed to close the Clinic, are not allowed to hide their harassing conduct behind a free speech mask.

The "tailoring" test includes, as with any tailoring, measuring the government interests which are involved and assuring that they are significant. Frisby, Perry, supra.

In this case, there are numerous interests protected. Since the conduct of the Appellants blocked ingress and egress to the Clinic, intimidated and harassed Clinic personnel and patients and threatened the continued operation of the Clinic, the interest of the pregnant woman's right of choice leads the list of interests. This right is protected under the United States Constitution, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35, L.Ed.2d 147 (1973) and by the specific guarantee of the Constitution of Florida which protects a citizen's right to be "let alone," Article I, Section 23, Constitution of Florida. In re T. W., 551 So.2d 1186 (Fla. 1989) recognized that the right of a woman in the early stages of pregnancy to choose an abortion is protected under Florida's constitutional right of privacy.

Women's health care clinics serve the women who need medical services, including pregnancy testing and counseling and, where a woman chooses to have an abortion, provide low cost surgical services. The Clinic in Melbourne is the only clinic in Brevard County and its continued operation is important. If the constitutional right of choice is to have any meaning, at least for poor women who can not easily travel to other areas or pay for more expensive hospital procedures, the service of clinics is important.

There is, then, a government interest in maintaining these

clinics which are lawful, licensed government regulated businesses.[10] The Clinic is entitled to the same protection from excessive noise and disorderly behavior that any other medical facility is entitled.

One way to put the argument into focus is to think about other types of business operations. If the banks of this state were subject to harassing and intimidating activity, to blocking of their entranceways and the systematic stalking of their employees, if bank presidents were being subjected to residential picketing, if bank customers were being tracked down by their license tag numbers and being sent mailings discouraging them from doing business with the banks, we would have little difficulty in concluding that the bank should be protected by injunctive orders.

The interests protected when the law protects a business like a bank or a developer[11] are not nearly so important as those

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[10] The Appellants try to build an argument out of the fact that the Clinic is a business but, since the Appellants' organizations are also businesses, supported by funds derived from their crusades against women's right of choice, it is hard to see where this argument takes the Appellants.

[11] The record leaves no doubt that Appellants sought to close down the Clinic and other clinics offering abortion services to women. There is also no doubt that their activities of harassment directed at the Clinic, its staff, the physicians and the patients has damaged the Clinic. Indeed, most of the literature circulated by the Appellants makes a point of their success in hampering the operation of Clinics. (Plaintiffs' Exhibit 4, App.-63; Plaintiffs' Exhibit 7, App.-68; Plaintiffs' Exhibit 8, App.-69.)

These facts alone, separated from the weighty interests of health care and the interests of patients, would support injunction relief in Florida. In Zimmerman v. D.C.A. at Welleby, Ore., 505 So.2d 1371 (Fla. 4th DCA 1987), the Court upheld an injunction granted against condominium occupants who were engaged

involved at a medical facility such as a hospital or a woman's health clinic where medical services, including surgery, are performed.

Additionally, there is a strong public interest in public safety. See, e.g. Heffron v. Int'l. Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (government's interest in public safety and order is sufficient to justify restricting distribution of religious literature to an assigned location). The activities of the Appellants, which were designed to hamper access to the Clinic were extremely dangerous. As the court below found, the anti-abortion activists' conduct involved crowding the street where traffic was moving to and from the Clinic, having pedestrians move very slowly in front of moving traffic (sometimes with baby strollers), approaching moving cars and attempting to stuff literature into the windows, standing very close to moving vehicles and shouting and taunting drivers through rolled-up car windows. As the videotape evidence and extensive testimony demonstrates, these practices were not consistent with public safety.

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 88 L.Ed.2d 222 (1972) held that an anti-noise ordinance enforced

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in a campaign against a developer, a campaign the condominium dwellers defended "as efforts to convince (the developer) to make necessary repairs," 505 So.2d 1372. The lower court order, much broader than the Order under review here, prohibited the activities and, on appeal, the Fourth District Court of Appeal affirmed the injunction (except for its apparently total prohibition on picketing) based on the adverse impact on the developer's business. Accord: DeRitis v. AHZ Corporation, 444 So.2d 93 (Fla. 4th DCA 1984).

outside of a school was valid because the noise interfered with the central purpose of the school. As the Third Circuit stated in Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991), the "nature and pattern of normal activities of an institution or organization dictate what is a reasonable time, place, and manner restriction. "The Court continued, in words equally applicable here:

> Given that the avowed purpose of the defendants is to prevent the Center from functioning, their conduct is "basically incompatible with the normal activity of [this] particular place," Grayned, 408 U.S. at 116, 92 S.Ct. at 2308.

939 F.2d at 64. Under the inunction in McMonagle, like the present case, "[t]he defendants may at all times engage in expressive activity near the Center," and they can make noise "as long as they cannot be heard inside the Clinic at the times designated ...." 939 F.2d at 64. The McMonagle Court held that the order, much like the order in this case, was "narrowly tailored to serve its legitimate purposes," 939 F.2d at 64.

The narrow tailoring of the Order addresses the important interests identified and is valid under the principles laid down in numerous cases which are not even mentioned by the Appellant much less distinguished by them. (See Point I.A., supra.)

D. There are Abundant Alternatives for Appellants' Expression.

The Appellants have attempted to mischaracterize the Order as a total prohibition of free expression but this is hyperbole.

The Order restricts the Appellants expression only from places

where they have joined speech with conduct and intruded into the rights of others, including constitutionally protected privacy rights, and from the manner of speech which hampers the operation of a medical facility.

The Order also provides an area for the anti-abortion activists' free expression in the immediate vicinity of the Clinic. Raymond Unterberger, who testified for the Appellants, was submitted by them as an expert witness on traffic engineering and the Clinics did not object to his being qualified as an expert. When he was shown Exhibit 9 (App.-73), the area directly across from the Clinic (where the Order directs the Appellants to conduct their activities), he said that he had kneeled and prayed in this area (before the Order) and that the street was "only about twenty feet wide," (Unterberger Tr.-19, emphasis added). He testified that he had been arrested in this very area after crossing a police barricade.[12] But this place where he was arrested, the place directly across the street from the Clinic, the area shown in Exhibit 9, was the place he wanted to kneel and pray (Unterberger Tr.-21). This place, which meant so much to Mr. Unterberger that he disobeyed a police order and submitted to arrest rather than leave it, is in the area adjacent to the Clinic where Judge McGregor provides for the activists. (See map, A-123.) Mr. Unterberger, the traffic engineer, even agreed that a precise court order which allowed him to be in that area would secure his rights.

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[12] He did not follow police officers' instructions. He said, "America is not a police state." (Unterberger Tr.-20.)

"That would be fine," he said (Unterberger Tr.-22). Mr. Unterberger also agreed that anyone who wanted to receive the anti-abortion literature could enter the empty lot across the street used as the parking lot of the activists (Unterberger Tr.-25).[13]

The Appellants' arguments are based on a wildly erroneous reading of the trial court's Order. The Court will get some sense of this by noting that the Appellants' brief never references the evidence heard by the trial judge nor even to the lengthy specific findings made in the Order.

The most frequent assertion made by the Appellants is that they are not allowed on sidewalks or the public right-of-way. If the Court will look to the drawing which accompanies the court's Order (A-123) and review the testimony of the witnesses, including that of Captain Allgeyer of the Melbourne Police Department, it will understand that the references in the Appellants' brief to the sidewalk is to a small sidewalk which does not go the full length of Dixie Way. It is only 37 feet long and serves only to connect the two parking lots which serve the Clinic. The parking lot to the West is one used by the Clinic employees and the sidewalk connects that parking lot with the Clinic entrance and the other parking lot used by the Clinic patients. This sidewalk is therefore in the immediate vicinity of the Clinic and other than this short stretch of pavement, the right of way along Dixie Way

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[13] The sidewalk beside the Clinic only goes from one of the Clinic parking lots to the other and when that sidewalk was used, the activists put a steady stream of people along that driveway (Unterberger Tr.-26).

does not have a sidewalk.

After hearing extensive testimony, watching a videotape and coming to understand the nature of the harassing and intimidating activities of the Appellants which were blocking ingress and egress to the Clinic, the trial judge decided that the activists could be seen and heard equally well from across the street where they had access to public right of way. This area is only 36 feet away from the Clinic and all traffic entering and leaving the Clinic can see and hear demonstrators in that area. Of course, the Order does not bar the Appellants from all public fora and the Appellants are allowed on the public right of way along Dixie Way, U.S. 1 and the rest of Melbourne.

By moving the Appellants' demonstrations across Dixie Way and away from the area that serves as the entrance to the Clinic, the Appellants are given their full right of free speech but are prevented from conducting harassing and intimidating activities which have included, as the evidence shows, blocking of the Clinic entrance.

The Appellants are free to speak, pray, pass out literature and voice whatever message they are moved to voice in that area. Those messages can include signs, T-shirts and pictures. The Appellants' suggestion that the "practical effect" of the Order is to totally exclude "peaceful distribution of literature and the freedom of expression within 300 feet of the Clinic" (Appellants' brief-22) is simply wrong. The "practical effect" of this Order is that excessive noise directed towards the medical facility and its

surgical unit is eliminated, that ingress and egress to the facility is secured and that the public safety is enhanced. Protestors seeking to close the Clinic may not now step into the street to stop moving cars, wheel baby carriages in front of vehicles or push unwanted literature into the windows of moving cars. They can now speak, but they cannot carry out their full activist agenda of "rescue."

Once the Order is understood, the Court will reject the claim that it imposes a "sweeping ban on the public sidewalks, public streets and public rights of way" (Appellants' brief-23). Rather, the Order provides specific public areas where the Pro-Life forces may effectively demonstrate, areas only a few paces from the entrance to the Clinic, but sets that location at a place where traffic will not be restricted and public safety not be threatened. The Order does not "prohibit peaceful picketing" (Appellants' brief-23). It allows peaceful picketing at a public forum but at a place and manner which does not physically interfere with the Clinic operation.

The Appellants' brief also asserts that the Order "totally bans the distribution of literature and free expression of ideas on public sidewalks and rights of way" (Appellants' brief-28), but this is flatly untrue. There is no general barrier of the Appellants or their literature from the sidewalks and rights of way but merely a restriction on that small area immediately next to the Clinic -- a restriction that was based on extensive testimony, including videotape evidence, showing that Appellants initiated

their harassing and intimidating activities from that area.

Also on page 28 of the Appellants' brief, they assert that "[s]peech on Dixie Way beside the Clinic is completely banned," but this, again, is not true. The Appellants are free to demonstrate across the street and beside the Clinic. Abundant alternatives of free expression are available. Nor is it true that the Order "totally bans a particular type of speech" (Appellants' brief-29). The Order merely says that the demonstrators will move a few feet directly across the street.

The Order does not "silence" the Appellants within the 300 foot buffer zone nor require them to "shed their constitutional rights to freedom of speech" (Appellants' brief-29). They are free to speak but not free to engage in conduct which is harassing.

The Appellants also assert that they are prohibited from approaching people who may enter the Clinic. When the facts of this case are considered, facts which were not put forward by the Appellants nor even included in the Appellants' Appendix or record, it will be clear that the people who come to the Clinic come by car. Cars seeking access to the Clinic turn off of U.S. 1 and enter Dixie Way, turning into the Clinic entrance. If the Appellants are now experiencing a problem in approaching a moving car, it is because the testimony, including testimony from their own expert traffic witness, demonstrated that safety considerations are involved and that close approaches to moving vehicles hindered ingress and egress to the Clinic.

Some of the Appellants' distortions are at least imaginative.

The Pro-Life speaker is free, of course, to "rent a blimp and carry their message over the City of Melbourne." (Appellants' brief-31.) Indeed, she is equally free to communicate a message peacefully in any number of ways both plain and fancy. She may even choose to deliver a message in the vicinity of the Clinic, say, right across a narrow street.[14]

The Appellants' hypothetical relating to residential picketing are also very fanciful but do not address the actual Order. The Order permits peaceful residential picketing but not picketing so close to the target of the picketing as to crowd or intimidate the Clinic personnel or intrude into their residential privacy. The Appellants' intentions to the contrary are not correct, (Appellants' brief-38). The Order does not prevent a Pro-Life neighbor to a Clinic worker from wearing clothing displaying a pro-life message or from parking a car with a bumper sticker, (Appellants' brief-38).

The prohibition on residential picketing within 300 feet of the house of Clinic personnel is a valid restriction on activities directed at the traditionally protected private domain of citizens. In Duval County School Board v. Florida Public Employees Relations Commission, 363 So.2d 30, 34 (Fla. 1st DCA 1978), the Court upheld an order barring residential picketing by a labor organization and said:

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[14] The Order does not prevent "speaking in a normal tone and level of voice" nor does it enjoin a car from driving down U.S. 1 with a "loud muffler." (Appellants' brief-37.)

> [t]he picketing of a private residence presents a particularly unique situation because such conduct infringes on the occupants' right to privacy. The well worn phrase, a man's home is his castle, has not lost its vitality.

363 So.2d at 34.

The Court quoted from the famous statement of Justice Black in Gregory v. Chicago, 394 U.S. 111, 89 S.Ct.946, 22 L.Ed.2d 134 (1969):

> Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he please, wherever he please, and whenever he please, our customs and our habits of conduct ... would all be wiped out .... And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have their doors thrown open to all .... I believe that our Constitution ... did not create a government with such monumental weakness. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women and children with fears of the unknown.

363 So.2d at 34.

The McMonagle case, impra, also dealt with residential picketing and an injunctive order which provided a 2500 foot area around residences (a restriction eight times as great as that in the present case), 939 F.2d at 65. Relying on principles announced in Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), the Court affirmed the ban on residential picketing but

limited its application to 500 feet within the residences, again more than the 300 feet ban entered by the Court below.

E. The Order is Neither Vague Nor Overbroad.

The Appellants Points I.C. and I.D. argue that the Order is vague and overbroad (Appellants' brief-31-39). Their argument relies on a collection of cases which generally state the principles governing First Amendment analysis but they do not address any of the cases which deal with their analysis in a context remotely comparable to the present case.

There is, of course, a great deal of case law which is quite directly on point. In Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988), Pro-Life demonstrators challenged an injunctive order which prohibited them from (1) "shouting, screaming, chanting, or yelling" and (2) "from producing noise by any other means which substantially interferes with the provision of medical services with the Center ...." 859 F.2d at 684. The Court addressed the question of vagueness and held that the injunction would be upheld by combining the language of the two paragraphs to prohibit "shouting, screaming, chanting, yelling, or producing noise by any other means, in a volume that substantially interferes with the provision of medical services within the Center, including counseling." 859 F.2d at 687. This is remarkably close to language employed by Judge McGregor in this case.

In their challenge to the Portland injunction, the Pro-Life

forces also challenged the "free zone"[15] which allowed access to the Clinic and held that the injunction was not overbroad but, rather, "narrowly tailored to vindicate the interest in protecting medical care." 859 F.2d at 686.

Another case dealing with an anti-abortion activist's challenge of an injunction on grounds of vagueness is Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989). In that case, they challenged an ordinance which prohibited bull horns within 150 feet of clinics and asserted that the ordinance was "hopelessly vague" because it failed to define certain terms and state the starting point for the 150 foot distance, 874 F.2d at 1090, 1091. The Court rejected the vagueness charge, citing Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("so long as we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language'"). The Court held that, since "the terms of the ordinance are not so indefinite that men of common intelligence must necessarily guess at its meaning ... ," the ordinance was not subject to attack for vagueness.

Vagueness was also raised in Northeast Women's Center, Inc. v. Mcmonagle, 939 F.2d 57 (3d Cir. 1991) and the Court held that,

> [w]hile language is often an imprecise medium, the terms of this injunction are sufficiently specific to be understood by the defendants and to put them on fair notice as to what they may and may not do.

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[15] The activists were enjoined from "demonstrating or distributing literature on the Foster Road sidewalk" (in an area from twelve and one half feet from either side of the Clinic door to the curb).

> Indeed, the specific measures to which McMonagle objects -- the 500 foot limit, the one table within that limit, etc. -- provide the very specificity necessary for us to sustain an injunction against the charge of vagueness.

939 F.2d at 64. The last sentence in the passage above applies, of course, to this case and points to a remarkable irony. In this appeal, the appellants repeatedly refer to the appropriateness of the September 30, 1992 injunctive order (see Appellants' brief-1, 30)[16] but this earlier order was not nearly so precise as the bright line Order entered in 1993. The earlier order enjoined blocking ingress and egress to the Clinic but extensive evidence (including videotapes) demonstrated that the Appellants were violating that injunction. (See Finding A, A-112.) The new Order is, by contrast, quite explicit in directing that the Appellants' activities be away from the Clinic area thus allowing free expression but preventing harassing and blockading conduct.

## II.
## THE ORDER DOES NOT DEPRIVE THE APPELLANTS OF EQUAL PROTECTION, INTRUDE INTO FREE ASSOCIATION, NOR INFRINGE ON THEIR RIGHT TO FREELY EXERCISE THEIR RELIGION.

The Appellants' argument submits to the Court questions of free association (Appellants' Point II) equal protection (Appellants' Point III) and free exercise of religion (Appellants' Point IV). Each of these is addressed below.

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[16] The Appellants do not directly dismiss their appeal from that earlier order, however, their endorsement of that order in this appeal may constitute an abandonment of the earlier appeal.

A. The Appellants are Treated Equally Before the Law and the Order Merely Requires Them to Obey the Law and Respect the Rights of Others.

In a little less than a page and a half (Appellants' brief-41, 42), the Appellants raise an equal protection claim, asserting the argument that the Order classifies persons based on religion. This is simply not true. The Order does not address the religion of the speaker nor the speech content of the Appellants.

The Order does require that the Appellants, who have been shown to have acted to interfere with the Clinic, be subject to reasonable time, place and manner restrictions on their activity. Inherent in all time, place, and manner restrictions, however, is a recognition that there are times, places, and manners in which speech will not occur. That does not make such restrictions unconstitutional -- under the First or the Fourteenth Amendments. As the Supreme Court has observed, "That the limitations ... may reduce to some degree the potential audience of Respondents' speech is of no consequence, for there has been no showing that the remaining avenues of communications are inadequate." Ward v. Rock Against Racism, 109 S.Ct. 2746, 2749 (1989). Thus, Appellants' argument for lesser restrictions are inapposite because, as the Supreme Court has held, an appellate court may not interpose its own judgment for that of the trial court about whether a lesser restriction might be feasible. Id. at 2757-58, n.6. That is particularly true when, as here, no factual record is before the Court to support such an inquiry. Thus, nothing advanced by the Appellants under the banner of equal protection changes the First

Amendment analysis already addressed.

B. The Appellants May Freely Associate.

The Appellants' Point II (also a page and a half) presents an argument under free association principles of the First Amendment. The Appellants never explain how the Order they attack intrudes in any way on their right to associate and the authority they collect, all generic, simply does not apply to the facts of this case.

C. There is no Intrusion into the Appellants' Right to Freely Exercise Their Religion Except to the Extent that the Exercise of that "Belief" Infringes on the Rights of Others.

The Appellants' brief (pages 43-47) asserts that the Order interferes with their First Amendment right to freely exercise their religion but they never favor the Court with any indication of how the Order intrudes into this area. They do assert, incorrectly, that the Order prohibits "whistling or singing religious songs, and it would prohibit public prayer on a public sidewalk" (Appellants' brief-44).

Of course, the Appellants are not barred from all sidewalks but only from the small strip of paved area which connects the Clinic's two parking areas. The Appellants remain free to engage in all their First Amendment rights including free speech and free exercise of religion, but they are not authorized to do them in the area of the Clinic entrance or so close to the Clinic traffic areas as to impede access to the Clinic or harass people attempting to enter.

The analysis of this case is not changed by the Appellants'

attempt to argue it from the perspective of free exercise since the Court scrutiny of any restrictions on free speech is the same as that for free exercise. Indeed, numerous courts have held that the exercise of religion may be subject to reasonable time, place, and manner restrictions. See, e.g. Int'l. Society for Krishna Consciousness, Inc. v. Lee, 60 U.S.L.W. 4749 (June 1992) (upholding total ban on religious speech, in the form of solicitation, in airport terminals) and Lee v. Int'l Society for Krishna Consciousness, Inc., 60 U.S.L.W. 4761 (June 1992) (O'Connor, J. concurring) (emphasizing that while a total ban on religious leafletting would be unconstitutional, reasonable time, place, and manner restrictions on such speech would be). Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (distribution of religious literature at State Fair can permissibly be restricted to an assigned location).

Simply stated, Appellants' assertion that religious speech is accorded a "preferred" status under the First Amendment is wrong. Religious speech, like any speech, may be restricted when such restrictions are neutral, reasonable, and necessary to serve an important governmental interest. See, Perry, supra.

Significantly, the Appellants do not contend and can not contend that they are free to communicate their religious beliefs at all times, all places and all manner. They concede this (Appellants' brief-46), claiming only that the Order must pass a neutrality test and as it has been illustrated earlier, this Order is content neutral.

In raising the free speech issue, the Appellants may be confused by their own rhetoric. They have repeatedly taken the position that they will not follow "man's law" when they deem it in conflict with "God's law." Indeed, their literature is replete with messages calling on the believers to close the Clinic, whatever that may mean for them personally, even if it means facing jail. These mock heroic passages neglected to account for any consideration for the rights of others even where those rights are recognized by the courts. In re T.W., 551 So.2d 1186 (Fla. 1989). The Appellants are free to exercise their religion up to the point where their conduct interferes with the rights of others.

## CONCLUSION

The Order is valid. It is supported by the extensive evidence. It should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to Mathew D. Staver and Jeffery T. Kipi, 1900 Summit Tower Boulevard, Suite 540, Orlando, FL 32810-5919 and via hand delivery/mail to John Tanner and Jay A. Sekulow, 630 North Wild Olive Avenue, Suite A, Daytona Beach, FL 32118 this 19th day of May, 1993.

Talbot D'Alemberte

TALBOT D'ALEMBERTE