OA 8-31-93

IN THE SUPREME COURT OF FLORIDA
Case No. 81,905

OPERATION RESCUE, et al.,

Appellants,

v.

WOMEN'S HEALTH CENTER, INC., et al.,

Appellees.

On certification from the
Fifth District Court of Appeal

BRIEF OF OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY, AND BRUCE CADLE (RESPONDENTS IN CIRCUIT COURT, APPELLANTS IN DISTRICT COURT OF APPEAL)

Jay Alan Sekulow*
Walter M. Weber*
American Center for Law
and Justice
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

John Tanner, P.A.
Florida Bar No. 0106174
630 North Wild Olive Ave.
Suite A
Daytona Beach, FL 32118
(904) 255-0060

John Stepanovich*
American Center for Law
and Justice
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

Attorneys for Operation Rescue, Patrick Mahoney,
Randall Terry, and Bruce Cadle

*Not admitted in Florida

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case:

Constitutional Provisions:

Other Authorities:

IN THE SUPREME COURT OF FLORIDA
Case No. 81,905

OPERATION RESCUE, et al.,	)	
Appellants,	)	
v.	)	On certification from the Fifth District Court of Appeal
WOMEN'S HEALTH CENTER, INC., et al.,	)	
Appellees.	)	

INTRODUCTORY NOTE

This brief is filed on behalf of a separately represented group of parties (Operation Rescue, et al.) in the same litigation now before this Court. These parties, like the appellants before this court, were respondents in the circuit court. These parties filed a separate appeal (No. 93-01149 in the Fifth District Court of Appeal) and filed a separate motion for certification to this Court. (The court of appeal has not yet acted on that motion.) The decision of this Court in the present case will directly control the disposition of the case against these parties. Therefore, to protect their rights and interests as parties to the present litigation, these parties submit the present brief.

STATEMENT OF THE CASE

Operation Rescue, et al. adopt the statement of the case of the appellants.

STATEMENT OF THE FACTS

Operation Rescue, et al. adopt the statement of the facts of the appellants, except to note that Operation Rescue, et al. filed their own separate notice of appeal on May 7, 1993.

SUMMARY OF ARGUMENT

The injunction at issue in this appeal contains several provisions which conflict directly with the federal (and state) constitutional right to free speech.

First of all, these provisions impose unconstitutional prior restraints. Infra § I. Second, even apart from the doctrine of prior restraints, the restrictions on expressive activity are substantively unconstitutional. Infra § II.

Paragraph (3) bans "congregating, picketing, patrolling, demonstrating, or entering" within 36 feet of the property line of the Aware abortion business. This paragraph essentially abolishes the "public forum" status of streets and sidewalks swallowed up by this "buffer zone." The complete elimination of expressive activities from such public fora is flagrantly unconstitutional. Infra § I(A).

Paragraph (4) bans "images" and "sounds" that are "observable" to or "within earshot" of patients inside the Aware facility. In the context of an injunction restricting expressive activities in public places, such a provision is unconstitutional. First, the terms "observable," "images," "sounds," and "within earshot" are unconstitutionally vague because they provide no ascertainable standard for determining what is or is not a violation of the injunction. Second, a ban on visible images and audible sounds is unconstitutionally overbroad because it outlaws a wide range of protected free speech and is not narrowly tailored to further any significant government interest. Infra § II(B).

Paragraph (5) forbids merely "approaching" anyone seeking the services of Aware, within 300 feet of the Aware facility, unless the person approached "indicates a desire to communicate" by "approaching" or by "inquiry." This provision is unconstitutionally vague because reasonable people cannot know with any certainty: first, which persons are "seeking the services" of Aware; second, what constitutes "approaching" (as opposed,

for example, to "waiting," "addressing," "accompanying," or "passing"); and third, what suffices to "indicate a desire to communicate." Furthermore, this provision represents an overbroad ban on such classic expressive activity as handbilling and verbal suasion. The right to free speech cannot be conditioned upon an invitation from the relevant audience. Infra § II(C).

Paragraph (6) forbids "approaching, congregating, picketing, patrolling, demonstrating" within 300 feet of certain residences. This provision suffers from unconstitutional vagueness: first, the injunction does not specify whether the 300 foot zone extends from the center of the lot, the edge of the structure of the house, or the property line; second, it is impossible to determine just what activities are and are not permitted within the forbidden zone. Moreover, to the extent that the provision forbids residential canvassing, leafletting, and extended marching, it unconstitutionally forbids protected forms of expression in residential areas. Infra § II(D).

Finally, paragraph (9) forbids merely "encouraging" others to violate the injunction. The First Amendment tolerates no such limitation. Only speech which "incites" others to imminent unlawful action may be prohibited. (This injunction already prohibits such "inciting.") Infra § II(E).

Thus, this Court must overturn all of the foregoing provisions.

ARGUMENT

Speech that is popular or pleasant has little need for constitutional protection. City of Houston v. Hill, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free

speech, under the First Amendment to the United States Constitution,[1] is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. E.g, United States v. Eichman, 496 U.S. 310 (1990) (flag burning).

The injunction at issue devours the right to free speech in the vicinity of the Aware Woman Clinic and elsewhere. This Court must overturn the offending portions of the Amended Permanent Injunction, namely, paragraphs (3), (4), (5), (6), and (9).

I. THE SPEECH-RESTRICTIVE PORTIONS OF THE INJUNCTION IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT.

As a matter of legal and constitutional principle, the present case is simple and straightforward. The injunction at issue imposes invalid prior restraints on free speech.

A provision in an injunction which restricts a person's freedom of speech triggers the strictest standard of constitutional review: the doctrine of prior restraints. "Temporary restraining orders and permanent injunctions -- i.e., court orders that actually forbid speech activities -- are classic examples of prior restraints." Alexander v. United States, 61 U.S.L.W. 4796, 4797 (U.S. June 28, 1993) (citation omitted). "Prior restraints," unlike general criminal statutes, "forbid [a person] from engaging in any expressive activities in the future," id. (emphasis omitted). This "time-honored distinction between barring speech in the future and penalizing past speech . . . is critical to our First Amendment jurisprudence." Id. at 4798.

Thus, while statutes, ordinance, and regulations restricting speech trigger the traditional "time, place and manner" analysis, e.g., Grayned v. City of Rockford, 408 U.S.

---

[1]The Florida Constitution, Art. I, § 4, Fla. Const., provides no less protection for the right to free speech than does the U.S. Constitution. Florida Canners Ass'n v. State, Dep't of Citrus, 371 So. 2d 503, 517 (Fla. 2d DCA 1979), aff'd sub nom. Coca-Cola Co. v. State, Dep't of Citrus, 406 So. 2d 1079 (Fla. 1981), appeal dismissed, 456 U.S. 1002 (1982). In the interest of brevity, however, this brief will refer simply to the First Amendment.

104 (1972) (statute); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (regulations), injunctions trigger the much stricter doctrine of prior restraints, e.g., National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets, and display of materials); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (injunction against distribution of literature); Carroll v. President of Princess Anne, 393 U.S. 175 (1968) (court order restraining public rallies and meetings).

The U.S. Supreme Court has consistently "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments," Alexander, 61 U.S.L.W. at 4798 (citation omitted). Prior restraints are presumptively unconstitutional. Carroll, 393 U.S. at 181; Keefe, 402 U.S. at 419. In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain only unlawful conduct and persons responsible for conduct of that character." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 924 n.67 (1982) (emphasis added).[2] In short,

---

[2]In 8Claiborne Hardware, the U.S. Supreme Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. The Supreme Court reversed, pointing out that the activists' behavior included both "elements of criminality and elements of majesty." Id. at 888. Justice Stevens, writing for the Court, emphasized the need to separate out 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

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

Carroll v. President of Princess Anne, 393 U.S. 175, 183-84 (1968).[3]

It follows that those injunctive provisions which restrict peaceful, public expression in traditional public forum property trigger -- and violate -- the doctrine of prior restraints. Rather than limit itself to unlawful activities, such as blockading or assault, the injunction bans a broad range of peaceful expressive activity, including picketing, leafletting, and even mere conversation.

> restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916-17 (emphasis added and 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 Court continued, "the permanent injunction" imposed against the activists "must be dissolved." Id. at 924 n.67. The Supreme 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).

[3]Furthermore,

> An injunctive order should never be broader than necessary . . . [and] should be adequately particularized, especially where some activities may be permissible and proper. . . . Such an order should be confined within reasonable limitations and phrased in such language that it can with definiteness be complied with, and one against whom the order is directed should not be left in doubt as to what he is required to do.

DeRitis v. AHZ Corp., 444 So. 2d 93 (Fla. 4th DCA 1984) (editing marks and citations omitted).

If concerns about coercion, intimidation, and invasion of residential privacy are insufficient to justify a prior restraint, Keefe, and if even national security interests can fall short of justifying a prior restraint, New York Times, then the prior restraints in this case are plainly unconstitutional. "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

This Court must overturn paragraphs (3), (4), (5), (6), and (9) of the injunction.

II. THE INJUNCTIVE RESTRICTIONS ON EXPRESSIVE ACTIVITY FAIL EVEN THE MORE DEFERENTIAL TIME, PLACE AND MANNER STANDARD.

Because the speech-restrictive portions of the injunction constitute invalid prior restraints, there is no need further to analyze the substantive terms of the injunction. Nevertheless, the restrictions at issue also clearly fail to satisfy constitutional scrutiny even under the more deferential standards governing time, place, and manner regulations.

At the outset, it is important to recall that the availability of alternative locations or media for expression cannot salvage an otherwise unconstitutional restriction on speech. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). The fact that pro-life individuals may "remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection." Meyer v. Grant, 486 U.S. 414, 424 (1988). Like the law challenged in Meyer, the present injunction "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. . . . The First Amendment protects [speakers'] right not only to advocate

their cause but also to select what they believe to be the most effective means for so doing." Id.

A. The 36-foot "Buffer Zone" is Unconstitutional.

Paragraph (3) of the injunction, with very limited exceptions, bans all "congregating, picketing, patrolling, demonstrating, or entering" within a "buffer zone" extending outward for 36 feet from the property line of the Aware abortion business. This speech-free "buffer zone" unconstitutionally abolishes the right to free speech on traditional public forum property: public streets and sidewalks.

It is beyond dispute that public streets and sidewalks are "traditional public fora" for free speech. ISKCON v. Lee, 112 S. Ct. 2701, 2706 (1992); Frisby v. Schultz, 487 U.S. 474, 480-81 (1988); United States v. Grace, 461 U.S. 171, 177 (1983). Streets and sidewalks "occupy a special position in terms of First Amendment protection," Boos v. Barry, 485 U.S. 312, 318 (1988); any restriction of speech in such public fora "is subject to the highest scrutiny." ISKCON, 112 S. Ct. at 2705.

It follows that a flat ban on all speech in a public forum is flagrantly unconstitutional: "In these quintessential public fora, the government may not prohibit all communicative activity." Frisby, 487 U.S. at 481; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Accord Thornhill v. Alabama, 310 U.S. 88 (1940) (ban on picketing outside premises of business unconstitutional); Grace (ban on display of sign or banner on sidewalk outside Supreme Court unconstitutional); Zimmerman v. D.C.A. at Welleby, Inc., 505 So. 2d 1371 (Fla. 4th DCA 1987) (overturning injunction against peaceful picketing at sales office of condominium project); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) (refusing to enjoin picketing and sidewalk counseling within 500 feet of abortion business); Parkmed Co. v.

Pro-life Counseling, Inc., 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (overturning injunctive restrictions on demonstrating in public areas outside abortion business); Hirsh v. City of Atlanta, 261 Ga. 22, ___, 401 S.E.2d 530, 533 (First Amendment requires construing injunction to permit up to twenty demonstrators within 50 feet of property line of abortion business), cert. denied, 111 S. Ct. 2836, 112 S. Ct. 75 (1991); Jackson v. City of Markham, 773 F. Supp. 105 (N.D. Ill. 1991) (granting preliminary injunction to protect right to picket on sidewalk outside roller rink); Thomason v. Jernigan, 770 F. Supp. 1195 (E.D. Mich. 1991) (unconstitutional to "vacate" public right of way in order to exclude pro-life individuals). See also Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 558-61 (5th Cir. 1988) (overturning ban on more than two pickets within 50 feet of any other picketers); United Food and Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 430-32 (8th Cir. 1988) (same); Davis v. Francois, 395 F.2d 730 (5th Cir. 1968) (ban on more than two picketers at a building "patently unconstitutional").[4]

---

[4]Three anomalous decisions in the context of abortion protests depart from this clearly established rule against flat bans on speech in public fora. The supreme court of Washington, in a sharply divided ruling, upheld an injunction barring pro-life demonstrations on the street and sidewalk in front of an abortion business. Bering v. SHARE, 106 Wash. 2d 212, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987). In so doing, the Bering majority violated the governing constitutional principles, as demonstrated in the careful and thorough dissenting opinions. See 106 Wash. 2d at 248-54, 721 P.2d at 939-42 (Dore, J, dissenting); id. at 257-60, 721 P.2d at 943-45 (Andersen, J., joined by Goodloe, J., dissenting).

A California appeals court, while questioning the precedential value of Bering, nevertheless upheld a similar sidewalk ban on the basis of a broad state constitutional right to privacy. Planned Parenthood Shasta-Diablo, Inc. v. Williams, 12 Cal. App. 4th 1817, 16 Cal. Rptr. 2d 540 (1993). The state supreme court has granted discretionary review of the decision. See Williams v. Planned Parenthood Shasta-Diablo, Inc., Civ. No. SO31721 (Cal. review granted May 13, 1993). Furthermore, the appeals court decision is clearly wrong. State constitutional rights may be expansive, PruneYard Shopping Center v. Robins, 447 U.S. 76, 81 (1980), but not at the expense of competing federal constitutional rights, id., such as the right to free speech. Indeed, the logic of Shasta-Diablo would permit a state to abridge any federal constitutional liberty simply by

The Supreme Court of Texas earlier this year overturned an indistinguishable injunctive ban on pro-life demonstrations within 100 feet of abortion businesses. Ex parte Tucci, ___ S.W.2d ___ (Tex. June 30, 1993) (Nos. D-2809, D-2819 to 2824). This Court should be no less solicitous of free speech.

Accordingly, this Court should overturn paragraph (3) as an elementary constitutional violation.

B. The Ban on "Observable Images" and Audible Sounds is Unconstitutional.

Paragraph (4) of the injunction forbids, from 7:30 am to noon, Mondays through Saturdays, any "sounds or images observable to or within earshot of the patients inside the Clinic." This provision cuts a vague and overbroad swath through the freedom of speech.

1. Vagueness

First of all, this prohibition is unconstitutionally vague.

The U.S. Supreme Court has long held that a law which forbids an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). As the Court explained,

---

enshrining a countervailing right in the state constitution. The federal Supremacy Clause forbids this. U.S. Const. art. VI, cl. 2.

Finally, an appellate court in New Jersey upheld an injunction banishing pro-life demonstrators from the sidewalk in front of an abortion business. Horizon Health Center v. Felicissimo, 263 N.J. Super. 200, 622 A.2d 891 (App. Div. 1993). The state supreme court has granted review of this decision (see No. 36,728 (N.J. July 15, 1993) which, like Bering and Shasta-Diablo, conflicts directly with numerous other precedents and is wrong.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes and editing marks omitted). Accord Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

Paragraph (4) plainly offends these constitutional norms.

a. "Images observable"

The ban on "images observable to . . . the patients inside" the Aware facility raises a host of major questions of interpretation:

> (a) Does "observable" mean simply "visible," so that everything in sight is forbidden? Or does "observable" simply mean something large enough -- or close enough -- to be distinguished in detail? If the latter, how large -- or close -- is enough? How clear must the observation be?
>
> (b) Does "observable to . . . the patients" mean in view from a place where patients normally are? sometimes go? could go?
>
> (c) Does "observable" mean by the person of average visual acuity? by most persons? by any person, near-sighted or far-sighted?
>
> (d) Does the term "images" mean pictures on posters? Does it include words on signs? Symbolic gestures such as kneeling? Can a person be an "image"? When?

These endless questions are not purely academic. The pro-life individual who guesses wrong faces arrest,[5] prosecution and possible conviction for contempt of court.

b. "Sounds within earshot"

The ban on "sounds . . . within earshot of the patients inside" the Aware facility likewise establishes an extremely murky standard:

> (a) Does the term "sounds" include only communications intended to address the abortion issue? Does the term include all communications whatsoever, including greeting a friend? telling a pedestrian that she dropped something? warning children not to cross in traffic? calling directions to a trucker who stops and asks for assistance? Does the term "sounds" include all noises, whether communicative or not, including sneezing, coughing, the crying of a child?
>
> (b) Does "within earshot" mean able to be heard distinctly? barely noticed? noticeable even if not actually noticed?
>
> (c) Under what conditions must the sound be "within earshot"? When traffic is passing? When traffic is still? When the windows in the Aware facility are open? closed? When the air conditioner is operating?
>
> (d) Does "within earshot" refer to the patient of average hearing ability? Most patients? Any patient?

Again, these and other unanswered questions are not purely theoretical. Pro-life individuals face a genuine dilemma: either forego speech by assuming that the terms of

---

[5]The injunction explicitly authorizes law enforcement authorities to arrest "those persons who appear to be in willful and intentional disobedience" of any part of the injunction. Amended Permanent Injunction at 9, ¶ (b). This fact aggravates the unconstitutionality of the vague and overbroad provisions of the injunction. Broad, ill-defined restrictions give "officials alone the power to decide in the first instance whether a given activity [is unlawful]." Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987). "Such a law that confers on police a virtually unrestrained power to arrest and charge persons with a violation . . . is unconstitutional because the opportunity for abuse, especially where the [restriction] has received a virtually open-ended interpretation, is self-evident." Id. (editing marks and citations omitted). Accord City of Houston v. Hill, 482 U.S. 451, 465 n.15 (1987) (and cases cited).

the injunction have a broad and therefore highly speech-restrictive interpretation, or else proceed at peril of arrest and contempt.

Paragraph (4) provides no ascertainable standards for either pro-life persons, agents of Aware, or police to distinguish between forbidden and permitted activity. The result is an unconstitutionally vague restriction.

2. Insufficiently narrow tailoring

Furthermore, paragraph (4) is not "narrowly tailored" to further the relevant governmental interests.

A restriction is unconstitutional under the First Amendment when that law "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. Alabama, 310 U.S. 88, 97 (1940). Such an "overbroad"[6] law "directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 965 n.13 (1984). An overbroad law flies in the face of established constitutional doctrine: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

Paragraph (4) reflects none of the necessary narrow tailoring. The ban on "observable images," for example, is grossly overbroad. This provision outlaws the

---

[6]The term "overbreadth" has two distinct meanings in constitutional law. Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 965 n.13 (1984). In this brief, the term "overbroad" represents shorthand for a law which restricts expressive activity and is not "narrowly tailored." See id.

universe of visible expressive activity. As in Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987), "no conceivable government interest would justify such an absolute prohibition on speech," id. at 575.

The ban on "sounds" is likewise fatally flawed. Certainly, restrictions on excessive noise are permissible. Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989). But the present injunction targets, not excessive noise, but mere "sounds." Such activities as "singing, chanting, whistling," and the like, Amended Perm. Injunc. at 7, ¶ 4, are classic forms of protected expression. E.g., Edwards v. South Carolina, 372 U.S. 229 (1963) (singing, clapping); Gregory v. City of Chicago, 394 U.S. 111 (1969) (chanting, singing); Ward (music, including rock music).

A law is "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485 (citation omitted). By contrast, a law is overbroad -- not narrowly tailored -- when "there is no core of easily identifiable and constitutionally proscribable conduct that the [law] prohibits." Secretary of State, 467 U.S. at 965-66. The constitutional "flaw" in such a restriction "is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise," id. at 966, i.e., by targeting lawful, protected activity instead of specific abuses.

Paragraph (4) targets sound which is audible, not excessive. As a means to suppress excessive and disruptive noise, the means the trial court employed are "too imprecise, so that in all its applications the [injunction] creates an unnecessary risk of chilling free speech," id. at 968.

This Court should overturn paragraph (4) as unconstitutionally vague and overbroad.

C. The Ban on "Physically Approaching" Other Persons is Unconstitutional

Paragraph (5) of the injunction forbids, within 300 feet of Aware, "physically approaching any person seeking the services of the [Aware facility] unless such person indicates a desire to communicate by approaching or by inquiry of the respondents." This restriction suffers from unconstitutional vagueness and overbreadth.

1. Vagueness

As set forth above, supra § II(A), vague prohibitions are unconstitutional. Paragraph (5) is seriously vague in several respects.

First of all, the enjoined individuals cannot know with any confidence who is a "person seeking the services" of Aware. There is no sure-fire difference in appearance between such a person and any other person using the public streets and sidewalks. While the injunction permits pro-life demonstrators to distribute fliers to passersby who are not seeking services from Aware, these demonstrators risk arrest and contempt charges whenever they hazard a guess as to whether a given person fits that description.

Secondly, the enjoined individuals cannot know what is meant by "physically approaching." Does that including standing still while the other person approaches -- the one heading to Aware? Is any movement toward such a person forbidden, or is movement only forbidden when the pro-life person comes close? How close? Does leaning forward count as "approaching"? extending a hand holding literature? Does "approaching" include walking past other people? While carrying a sign? May pro-life individuals accompany someone by approaching them outside the 300 foot zone and then walking alongside into the zone?

Thirdly, what does it mean for a person seeking the services of Aware to "indicate a desire to communicate by approaching"? As discussed above, the term "approaching"

is undefined and subject to multiple interpretation. Beyond that, does "approaching" suffice per se, or must the potential patron approach in a certain way which "indicates a desire to communicate"? What is that way?

Again, it is important to recognize that these are not mere theoretical speculations. The answers to these questions determine whether or not a given person faces arrest and sanctions for contempt of court.

2. Insufficiently narrow tailoring

Furthermore, paragraph (5) strikes directly at free speech in public places. The distribution of leaflets on public ways is, of course, a form of free speech protected under the First Amendment. United States v. Grace, 461 U.S. 171 (1983); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Lovell v. Griffin, 303 U.S. 444 (1938). Pure verbal expression in public places, whether for purposes of protest, education, counseling, proselytization, or solicitation, is also protected under the First Amendment. ISKCON v. Lee, 112 S. Ct. 2701, 2705 (1992); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Cantwell v. Connecticut, 310 U.S. 296 (1940).

There is no legitimate interest in banning such activity. The distribution of literature involves only the most insignificant intrusion upon others: "One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand," United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality). Hence, "a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it." Ward v. Rock Against Racism, 492 U.S. at 799 n.7. Such a ban "suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise." Id. (citation omitted). The same logic obviously applies as well to purely verbal expression.

Yet paragraph (5) outlaws these forms of personal communication, on public ways within 300 feet of the Aware facility, unless the potential recipient of the communication initiates the exchange.

The whole point of the freedom of speech in public places is that one need not obtain permission to express one's thoughts. "That the speech is unwelcome does not deprive it of protection." United Food and Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 432 (8th Cir. 1988) (and cases cited). The distribution of literature, the display of a sign, the solicitation of support, the verbal confrontation of another all involve the speaker seeking the attention of an audience regardless of whether the audience be agreeable, indifferent, or even hostile. To force the speaker to remain silent until invited to speak would be to viscerate the First Amendment.

The Supreme Court has clearly and repeatedly held that even hostile audience reactions cannot justify the suppression of speech. E.g., Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2404 (1992) (and cases cited). Certainly, then, the mere absence of positive reactions (such as an "indication" of a "desire" to listen) cannot possibly justify the imposition of a ban on communication. See United Food, 857 F.2d at 425 n.4, 435 (overturning ban on "persisting in talking to or communicating in any manner with" a person or persons "against his, her or their will" in order to persuade that person or persons to quit or refrain from seeking certain employment: "as written this clause plainly runs afoul of the First Amendment").

In sum, paragraph (5) cuts off protected speech in public places by means of a vague and overbroad ban on the mere "approaching" of another person. This Court must overturn paragraph (5).

D. The Ban on Residential Demonstrations is Unconstitutional.

Paragraph (6) of the injunction forbids "approaching, congregating, picketing, patrolling, [and] demonstrating . . . within three-hundred (300) feet of the residence of any of [Aware's] employees, staff, owners, or agents . . . ." This restriction is impermissibly vague and exceeds constitutional limits upon the regulation of residential demonstrations.

1. Vagueness

As set forth earlier, supra § II(A), vague prohibitions are unconstitutional. Paragraph (6) is seriously vague in its scope.

First of all, is the 300-foot zone within which the injunction applies measured from the center of the residential lot? from the house itself? or from the property line? The injunction does not say.

Secondly, just what activities are forbidden? Does "approaching" include all physical presence? If so, then are the terms "congregating, picketing, patrolling, demonstrating" mere surplusage? If not, then what does "approaching" mean? And what is "demonstrating"? Does this provision forbid door-to-door leafletting or canvassing? Marching around the block? Driving by? Driving by slowly, with bumper stickers on the car?

2. Insufficiently narrow tailoring

If paragraph (6) in fact bans literature distribution, door-to-door canvassing, and marching around the block (or farther), it conflicts directly with Supreme Court decisions upholding constitutional protection for precisely such activities. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (residential leafletting); Martin v. Struthers, 319 U.S. 141 (1943) (door-to-door literature distribution); Village of

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (door-to-door solicitation); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religious advocacy door-to-door and on residential ways); Gregory v. City of Chicago, 394 U.S. 111 (1969) (marching around residential block).

True, the Supreme Court has held that an ordinance may ban "focused picketing taking place solely in front of a particular residence," Frisby v. Schultz, 487 U.S. 474, 483 (1988); but the present injunction goes far beyond Frisby.[7] The Frisby Court explicitly distinguished handbilling, solicitation, and marching as "fundamentally different" from single-residence picketing. Id. at 484. Yet the court below used catch-all terms like "approaching" and "demonstrating" without making any allowance for these fundamental constitutional distinctions.

To the extent that the injunction bans physical congregation in front of a particular home -- "posting at a particular place," as the Frisby Court defined the prohibited activity, id. at 482 -- the injunction purports to follow Frisby.[8] But to the

---

[7]Scholarly commentators agree that the Frisby decision permits only a ban on picketers who gather immediately in front of a single residence. See Note, Residential Picketing: Balancing Freedom of Expression and the Right to Privacy, 54 Mo. L. Rev. 209, 219 (1989); Casenote, Frisby v. Schultz: Where Do the Picketers Go Now? "We'll Just Have to Wait and See." 11 Geo. Mason L. Rev. 227, 242 (1989) ("protestors could march up and down in [the abortionist's] neighborhood . . . , but they could not stand in front of the house"); Note, Constitutional Law -- Freedom of Speech -- Ban on Picketing in Front of Individual Residence Does Not Violate First Amendment, Frisby v. Schultz, 108 S. Ct. 2495 (1988), 11 U. Ark. Little Rock L.J. 691, 711 (1988-89).

[8]This does not, however, resolve the problems of prior restraint or vagueness. Nor is it at all clear by what authority a court may substitute itself for municipal governments which, under Frisby, have the option of enacting -- or not enacting -- Frisby-type ordinances. On the contrary, a court "should not, and does not, undertake the essentially legislative task of specifying which of the legitimate municipal interests in regulating [expressive activity such as] solicitations are to be included in [local restrictions], nor how such [restrictions] might be drafted." C.C.B. v. State, 458 So. 2d 47, 50 (Fla. 1st DCA 1984). As the Supreme Court of Texas ruled in overturning an injunction against

extent that the injunction outlaws ambulatory leafletting and canvassing, or extended marching, the injunction departs from Frisby and conflicts directly with protected First Amendment activity. Cf. Valenzuela v. Aquino, __ S.W.2d __, __ (Tex. May 5, 1993) (No. D-0740) (overturning injunction against picketing within 400 feet of center of plaintiffs' residential lot for failure of underlying causes of action; residential picketing "is not unlawful per se") (footnote omitted).

E. The Ban on "Encouraging" Others to Commit Prohibited Acts is Unconstitutional.

Finally, paragraph (9) of the injunction forbids enjoined individuals from "encouraging . . . other persons to commit any of the prohibited acts listed herein." This provision is an elementary violation of the right to free speech.

It is well settled that the mere advocacy of unlawful conduct is within the scope of the First Amendment. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam); Noto v. United States, 367 U.S. 290, 297-98 (1961); Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (per curiam). Government may only forbid speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." NAACP v. Claiborne Hardware, 458 U.S. at 928.

---

picketing within 400 feet of the center of the lot of an abortionist's residence, residential picketing "is not unlawful per se," and therefore no "final relief, including a permanent injunction, can be granted in a contested case without a determination of legal liability," i.e., without identifying and enjoining specific abuses, as opposed to picketing per se. Valenzuela v. Aquino, __ S.W.2d __, __ (Tex. May 5, 1993) (No. D-0740). See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 924 n.67 (1982) (injunction entered in context of expressive activity may "restrain only unlawful conduct and the persons responsible for conduct of that character").

The present injunction already forbids, in the same paragraph (9), speech "inciting" violations of its terms. By adding the word "encouraging,"[9] the court strayed well beyond the limitations set forth in Brandenburg, Noto, Hess, and NAACP.

In this nation, government cannot punish dissenters simply because they "encourage" others to challenge the authority of the ruling officials, whether legislators or judges. This Court must overturn the ban on "encouraging" violations of the injunction.

CONCLUSION

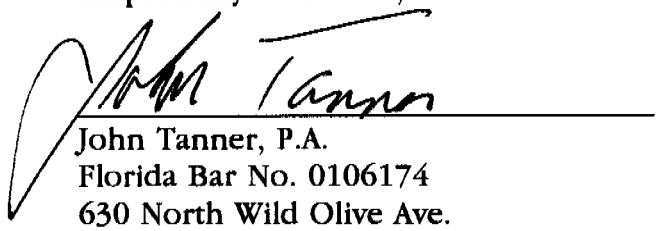
"Speech is often provocative and challenging. But it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." City of Houston v. Hill, 482 U.S. 451, 461 (1987) (editing marks and citation omitted). The struggle over abortion -- pro and con -- may involve tactics that irritate, provoke, disturb, and test the patience of many. But "if absolute assurance of tranquility is required, we may as well forget about free speech." Id. at 462 n.11 (editing marks and citation omitted).

This Court must overturn paragraphs (3), (4), (5), (6), and (9) of the amended permanent injunction.

---

[9]The extreme vagueness of the term "encouraging" presents an additional, independent reason for striking it down. See supra § II(A).

Respectfully submitted,



John Tanner, P.A.
Florida Bar No. 0106174
630 North Wild Olive Ave.
Suite A
Daytona Beach, FL 32118
(904) 255-0060

Jay Alan Sekulow*
Walter M. Weber*
American Center for Law
and Justice
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

John Stepanovich*
American Center for Law
and Justice
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

Attorneys for Operation Rescue, Patrick Mahoney,
Randall Terry and Bruce Cadle

*Not admitted in Florida

August 2, 1993.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Talbot D'Alemberte, Esquire, 215 South Monroe Street, First Florida Bank Building, Suite 601, Tallahassee, Florida 32301; Christopher J. Weiss, Esquire, Post Office Box 633, Orlando, Florida 32802-0633; Jerri Blair, Esquire, Post Office Box 130, Tavares, Florida 32778; Kathy Patrick, Esquire, 1100 Louisiana, Suite 3400, Houston, Texas 77002; Mathew D. Staver, Esquire 1900 Summit Tower Boulevard, Suite 540, Orlando, FL 32810, this 2nd day of August, 1993.

JOHN W. TANNER, P.A.
Florida Bar No. 0106174
630 North Wild Olive Avenue
Daytona Beach, Florida 32118
(904)255-0060