#81905

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, JUDY MADSEN, SHIRLEY HOBBS, et. al.,

Respondents/Appellants

vs.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., et. al.,

Petitioners/Appellees

5DCA Case No. 93-00969

INITIAL BRIEF OF APPELLANTS

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PREFACE

The Respondents, Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Judy Madsen, and Shirley Hobbs, will be referred to as Appellants. The Petitioners, Women's Health Center, Inc. and Aware Woman Center for Choice, will be referred to as Appellees. The Amended Permanent Injunction dated April 8, 1993, under appeal herein will be referred to as the Order.

Citations to the Appendix will be designated as (App. Vol.).

STATEMENT OF THE CASE

This is an appeal from a final order entering an Amended Permanent Injunction against the Appellants, and those acting in concert with the Appellants, on April 8, 1993. (App. Vol. 1, 126)

This case challenges the constitutionality of the Amended Permanent Injunction (hereinafter referred to as the Order) entered in the Circuit Court for the 18th Judicial Circuit in and for Seminole County, Florida on April 8, 1993, with respect to peaceful picketing, demonstrating, congregating, patrolling, entering, and distributing of literature within the 36 foot or the 300 foot buffer zone, or on the public sidewalk, public streets, and public right of ways; and singing, chanting, whistling, or displaying images observable to the patients within the Aware Women's Center for Choice (hereinafter referred to as the Clinic), or other sounds within earshot of the patients within the Clinic. (App. Vol. 1, 115)

The Appellants desire to peacefully exercise their First Amendment right of Free Speech on the public sidewalk, public streets, and public right of ways within the 36 foot and 300 foot buffer zone as specified in the Order. The Appellants do not challenge a previous Order entered on September 30, 1992, in which certain restraints were placed upon picketing on the Clinic's private property. (App. Vol. 1, 107) However, because of the April 8, 1993, Order the Appellants are in eminent fear of arrest and prosecution for exercising their First Amendment freedoms in a peaceful manner. (App. Vol. 2, 18, 22, 24, 27, 32, 39, 42-44, 46,

49, 55, 56, 59 74, 77, 79, 81, 83, 90, 98, 101, 103, 108, 112, 118, 121, 123, 126, 129, 131, 132, 136, 139, 147)

The Order is being enforced against only those individuals who have a pro-life belief and message. (App. Vol. 2, 105, 116, 148) This appeal challenges the constitutionality of such unequal application and enforcement.

The constitutional challenges in this appeal are based upon a violation of the Respondents United States Constitutional and State of Florida Constitutional First Amendment rights of Free Speech, both as it applies to political and religious expression; Freedom of Religious Exercise; and Freedom of Assembly; and a violation of Equal Protection of the laws under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS

On October 21, 1991, the Petitioners/Appellees (hereinafter referred to as Appellees) filed in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida a Verified Petition for Injunction seeking a permanent injunction against the Respondents/Appellants (hereinafter referred to as Appellants). (App. Vol. 1, 1) Along with the Verified Petition for Injunction the Appellees filed Affidavits on behalf of Tammy Sobieski-Joy (App. Vol. 1, 13) and Patty Martin. (App. Vol. 1, 20)

On October 25, 1991, the Appellees filed a Verified Motion for Temporary Restraining Order (hereinafter referred to as TRO). (App. Vol. 1, 26) The court entered an order granting a TRO on October 25, 1991. (App. Vol. 1, 33) The TRO specifically provided that:

> 1. All respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner of by any means, are hereby enjoined and restrained from:
>
> a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;
>
> b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;
>
> c) attempting or directing others to take any of the actions described in paragraphs a) and b);
>
> 2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying

signs, singing, and praying, in a manner which does not violate a), b), and c) above;

3. The Respondent organizations and their officers, the Respondent individuals, and those working in concert with any Respondent, shall instruct all members of the Respondent organizations not to engage in or participate in any activities prohibited in Paragraphs a), b), and c) above;

4. Penalties will be imposed by this Court for violations of this Temporary Injunction by any of the Respondents, any officer, director, agent, representative of the Respondents, and any other persons known or unknown, acting on behalf of the Respondents, or in concert with them, in any manner or by any means. . . . (App. Vol. 1, 34)

On December 6, 1991, the Appellants filed a Motion to Dissolve the TRO. (App. Vol. 1, 37) The Appellees then filed a Motion for Permanent Injunction dated December 31, 1991. (App. Vol. 1, 40) The Appellees motion requested the court to permanently enjoin the Appellants from

a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

In support of their Motion for a Permanent Injunction the Appellees filed an Affidavit of Patricia Baird Windle on January 8, 1992. (App. Vol. 1, 44)

The Appellants filed an Answer to the Verified Petition for Injunction on January 15, 1992. (App. Vol. 1, 48) In their Answer the Appellants raised as an affirmative defense the Appellants

rights of Free Speech and Assembly under the United States Constitution.[1] (App. Vol. 1, 50-53) On January 27, 1992, the court denied the Appellants Motion to Dissolve the TRO. (App. Vol. 1, 55)

The court scheduled a pre-trial conference on March 18, 1992. (App. Vol. 1, 57) The pre-trial conference was scheduled for May 5, 1992 and the case docketed for the two week trial period beginning May 18, 1992. (App. Vol. 1, 57-59) Subsequently the pre-trial conference was continued until July 13, 1992. (App. Vol. 1, 60-61)

On July 13, 1992, the court entered an order requiring the parties to submit a stipulation of issues and facts and memorandum of law within 30 days. (App. Vol. 1, 55) The court indicated that it would base its ruling upon the factual stipulation, affidavits filed by the parties, and the memoranda of law. (App. Vol. 1, 55) The Stipulation of Facts along with memoranda of law was submitted by the parties. (App. Vol. 1, 64, 67). In support of their Motion for a Permanent Injunction the Appellees filed an Affidavit of Patricia Baird Windle on January 8, 1992. (App. Vol. 1, 46-47)

On September 30, 1992, the court entered an Order granting a Permanent Injunction against the Appellants. (App. Vol. 1, 107) The Order enjoined the Appellants from:

> a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and

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[1] The Appellants raised several other affirmative defenses. However, the issue of primary concern for the purposes of this appeal is the exercise of First Amendment rights, as well as other constitutional defenses.

surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

However, the Order also provided that "Nothing in [the] Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights." (App. Vol. 1, 111)

On March 31, 1993 through April 2, 1993 the court conducted an evidentiary trial on the Appellees Motion for Sanctions and Modification of the Permanent Injunction. (App. Vol. 1, 112) On April 8, 1993, following the evidentiary trial, the court entered an Amended Permanent Injunction. (App. Vol. 1, 112) Specifically the Amended Permanent Injunction enjoins, in pertinent part, the Appellants from:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) At all time on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. . . . It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (of the shoulder) on the south side of Dixie Way. . . .

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

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

(6) At all times, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. (App. Vol. 1, 114-118)

The Appellants filed a notice of appeal of the Amended Permanent Injunction on April 19, 1993. (App. Vol. 1, 124) On April 15, 1993, the court entered a Modification of the Amended Permanent Injunction. (App. Vol. 1, 125) The only provisions modified from the Amended Permanent Injunction enter April 8, 1993 concern the procedures for enforcement of the Amended Permanent Injunction by law enforcement personnel. (App. Vol. 1, 125)

On April 27, 1993, the Fifth District Court of Appeals entered an order granting the Appellants Motion to Expedite the Appeal. (App. Vol. 1, 127)

SUMMARY OF ARGUMENT

The Order violates the Appellants' First Amendment rights to Freedom of Speech because the Order completely bans religious and pro-life speech within a traditional public forum, is content-based, is not the least restrictive means to achieve any governmental interest, does not leave open ample alternative means of communication, and is unconstitutionally vague and overbroad.

Appellants are protected by the First Amendment right to free speech under the Florida and Federal constitutions. The Florida constitutional right to free speech is interpreted interchangeably with the First Amendment right to free speech under the United States Constitution. Appellants wish to exercise political and religious speech in the context of abortion. The Order has placed a flat ban on exercising this speech within a 36 foot and 300 foot buffer zone around this Clinic and around the private residences of agents associated with the Clinic. Within this 36 foot buffer zone is a public sidewalk and a public highway. No pro-life speech activity is permitted under the Order on this traditional public forum. As such, the Order is content based since it reaches only pro-life speech and not pro-choice speech. This flat ban of content-regulated speech is unconstitutional.

The Order is not narrowly tailored to achieve any governmental interest and certainly does not leave open ample alternative means of communication. The Order can not be based upon an alleged right to privacy to obtain an abortion under the Florida or Federal constitutions because such a right to privacy under the Federal

Constitution no longer utilizes a strict scrutiny standard, and under the Florida Constitution extends only to natural persons. Even if the right to privacy were a legitimate government interest, the Order is not narrowly tailored to achieve that interest. While the Permanent Injunction of September 30, 1992, which is not challenged in this Appeal, would be a narrow tailoring of a legitimate government interest assuming appropriate facts could substantiate the issuance of that Permanent Injunction, the Order of April 8, 1993, is far from narrow. The public sidewalk parallel to Dixie Way is the only public sidewalk in the vicinity, and a flat ban of speech on that traditional public forum leaves open no other alternative channels of communication. The pro-life speaker cannot walk on U.S. Highway 1 to speak and is flatly prohibited from being present on Dixie Way since it is within the 36 foot buffer zone. Extending this buffer zone to 300 feet around the clinic essentially acts as a flat ban leaving no other alternative means of communication.

Moreover, the Order violates the First Amendment right to free speech because it is vague and does not place the Appellants on proper notice as to what is permitted and what is not permitted. The Order speaks of "images observable to or [sounds] (within earshot of the patients inside the Clinic". A pro-life bumper sticker could be an image observable, and whistling could also be sound within earshot of the Clinic. This vague standard does not place the Appellants on appropriate notice as to what is prohibited. A pro-life speaker wearing a Choose Life t-shirt could

be subject to penalties of law for legitimately walking on Dixie Way or a public sidewalk. The 300 foot radius around the Clinic is also vague and the 300 foot radius around the agents private residence is likewise vague, since the pro-life speaker would not be able to determine (1) whether the person met on the public sidewalk was an agent of the Clinic, and (2) whether the agent was within 300 feet of the Clinic or the residence.

The Order also violates the Appellants First Amendment right to free speech because it is overbroad. The Order actually prohibits legitimate and peaceful free speech activities. The Order goes way beyond prohibition of violent protest or prohibiting people from trespassing on private property. While the Permanent Injunction of September 30, 1992 does not appear to be overbroad, the April 8, 1993 Order which is challenged here is clearly overbroad and therefore unconstitutional. Any pro-life speaker expressing any pro-life message by singing or wearing a t-shirt or a bumper sticker or even physically being present within the 36 foot buffer zone violates this Order. Thus, its sweeping prohibitions are unconstitutionally overbroad.

The Order also violates the Appellants First Amendment right to freedom of association by prohibiting any association among religious and pro-life speakers within a traditional public forum. Additionally the Order is unconstitutional in that it violates the Appellants right to equal protection by discriminating against a religious class and treating a religious class of persons differently from those who profess no religious pro-life view.

This unequal application of the laws is repugnant to the Constitution because it divides among a class of speakers, in this case religious pro-life speakers. The Order also violates the Appellants First Amendment rights to free exercise of religion within a traditional public forum. The Appellants assert violations of free exercise of religion, free speech rights, and equal protection of the laws. Thus, a compelling interest test should be used with a strict scrutiny standard, and in light of this standard, the Order must be stricken. The Order prohibits any religious person from singing, praying, distributing literature, or going door-to-door within the buffer zone around the Clinic or around their agents residence. Moreover, the Order is not a neutral law of general applicability since it singles out religious and pro-life speech, and as such, the Order violates the Constitution.

ARGUMENT

The Appellants speech is protected by the United States and Florida Constitutions.

> Freedom of Speech is guaranteed by the First Amendment to the United States Constitution and in Article, I, §4, of the Florida Constitution. . . . [T]he guarantee contained in the Florida Constitution is [not] any broader than that contained in the United States Constitution. . . . Florida courts tend to merge the two limitations to the point that federal and state cases are cited interchangeably. . . . The two are the same and will not [be treated] separately.

Florida Canners Ass'n v. State, Dept. of Citrus, 371 So. 2d 503, 517 (2d DCA 1979).

Accordingly, the question of a violation of the right of Free Speech under either the United States Constitution or the Florida Constitution is the same. "It is [also] undisputed that the command that no law shall be passed also means that no order shall be issued . . . in the name of the state which infringes on the liberty herein reserved to the people." *Lieberman v. Marshall*, 236 So. 2d 120, 127 (Fla. 1970).

The First Amendment Freedom of Speech clause protects the free flow of ideas in a democratic society. When a citizen exercises her freedom of speech, she is exercising a right that the Supreme Court has characterized as 'lying at the foundation of free government by free men.'" *Arlington County Republican Committee v. Arlington County*, 790 F. Supp. 618, 621 (E.D. Va. 1992) *quoting Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced

largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501, 508 (1991).

I.

THE ORDER VIOLATES THE APPELLANTS' FIRST AMENDMENT RIGHT TO FREE SPEECH BECAUSE THE ORDER COMPLETELY BANS RELIGIOUS AND PRO-LIFE SPEECH IN A TRADITIONAL PUBLIC FORUM, IS CONTENT BASED, IS NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE ANY GOVERNMENTAL INTEREST, DOES NOT LEAVE OPEN AMPLE ALTERNATIVE MEANS OF COMMUNICATION, IS UNCONSTITUTIONALLY VAGUE AND IS OVERBROAD.

A.

The Order Is An Unconstitutional Restriction On Free Speech Because It Completely Bans Religious And Pro-Life Speech In A Traditional Public Forum

The Order clearly violates the Appellants' First Amendment rights to free speech because it completely bans all religious and pro-life speech in a traditional public forum. A religious or pro-life speaker can never enter onto the public sidewalk for peaceful speech activities and is forever banned from being on a public highway known as Dixie Way in order to exercise constitutionally guaranteed free speech rights. This complete ban is clearly unconstitutional.

"To ascertain what limits, if any, may be placed on protected speech, [the United States Supreme Court has] often focused on the place of that speech, considering the nature of the forum the

speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2500 (1988).

See Heffron v. ISKCON, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981);[2] *United States v. Kokinda*, _____ U.S. _____, 110 S.Ct. 3115, 111 L.Ed. 2d 571 (1990). Indeed,

> [p]ublic places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principal that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

ISKCON v. Lee, 112 S.Ct. 2711, 2716, 2717 (1992) (Kennedy, J., concurring).

In determining the nature of the forum, the Supreme Court has consistently held that public streets and sidewalks "have immemorially been held in trust for the use of the public . . . . and are properly considered traditional public fora." *Frisby*, 108 S.Ct. at 2500. See also *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The premises in this instance involve a public sidewalk, public streets and right of way, which as stated above constitutes a traditional public forum.

"The purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from

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[2] In *Heffron* the Court examined prohibitions regarding the use of a public sidewalk and held, based on similar grounds, that the sidewalk was a traditional public forum the regulation of which was subject to strict scrutiny.

governmental interference." *ISKCON v. Lee*, 112 S.Ct. at 2717 (Kennedy, J., concurring). The Supreme Court has stated:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby, 108 S.Ct. at 2500 (*quoting Perry Education Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983).

Clearly the sidewalk and Dixie Way are traditional public forums. The Order states that "at all times on all days" pro-life and Christian speech is prohibited on this public sidewalk and on the paved highway. Religious and pro-life speech has been forever banned from these public right of ways. The Order prohibits any parade along Dixie Way, and it prohibits "congregating" on the public sidewalk. Thus, if two pro-life speakers wish to carry on a conversation on a public sidewalk, they would be in violation of the Order and subject to arrest. A pro-life or religious speaker strolling through the neighborhood would have to go around the area including the sidewalk and actually walk on the other side of Dixie Way and trespass on private property in order to avoid coming under the dictates of the injunction. Moreover, the Order gives anyone associated with the Clinic the autonomy, backed by force of law, to prohibit any pro-life or religious speech within 300 feet of the Clinic. Clearly, the Order has created a demilitarized speech zone and created a totalitarian regime in which no Christian or pro-life

speech is permissible. This flat ban on speech is abhorrent to the Constitution and should not be permitted in a free and democratic society.

B.

The Content-based Order Is Not The Least Restrictive Means to Achieve The State's Interest And Does Not Leave Open Ample Alternative Means Of Communication.

On its face and in its application the Order is clearly content based, touching only Christian and pro-life speech. Specifically, the Order prohibits "prayer" and prohibits any pro-life "image" or speech. Though the state may have an interest in protecting the Clinic in its private business operations, the means that the Order has chosen is certainly not the least restrictive means and clearly does not leave open ample alternative means of communication.

In *R.A.V. v. City of St. Paul*, _____ U.S. _____, 112 S.Ct. 2538 (1992)[3], the Court discussed the extent of the First Amendment right of free speech. "The First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *Id.* at 2542. "The First Amendment does not permit [government] to impose special

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[3] In addressing regulation of free speech and expression, it is important to note that *R.A.V.* did not rely on a forum based analysis.

prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, 112 S.Ct. at 2547.[4]

> *R.A.V.* continues the practice of distinguishing levels of First Amendment protections -- with speech on important social[, religious,] and political topics accorded the highest level of protection. . . . [But] the central holding of the case is that even the prescribable forms of expression [i.e., fighting words and obscenity] are certainly protected against wholesale content based restrictions. If prescribable speech is protected against content based regulation, [then religious and political expression], which receives a higher degree of First Amendment protection than prescribable speech, is also protected against content based regulation.

Citizens United For Free Speech II v. Long Beach Township Board of Commissioners, 1992 WL 240565 (D.N.J. 1992).

"If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster*, 112 S.Ct. at 509. *See also Cohen v. California*, 403 U.S. 15 (1971).[5] Abortion speech is political

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[4] It is important to note that *R.A.V.* specifically indicated that government, by its actions, cannot proscribe any forms of expression, even that which may have traditionally been considered fighting words. In *R.A.V.* the Court summarized First Amendment precedent within the context of Free Speech, concluding that the Court's precedent establishes that regulation of the words of speech or manner of expression is never constitutionally allowed. But rather, only the "secondary effects" of the manner of expression can be constitutionally regulated. Accordingly, the Appellants are not challenging regulation or proscription of any secondary effects of the Appellants expression such as violent, physically abusive, or harassing activity.

[5] *Cohen* involved the wearing of a shirt in a public forum with the words "Fuck the Draft". In overturning a criminal conviction based upon a breach of the peace for the wearing of the shirt the Court noted that the State acted as it did in order to protect the sensitive from otherwise unavoidable exposure to a crude form of protest. **"Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court**

speech and therefore should receive the highest protections under the First Amendment. "Indeed, abortion may be the political issue of the last twenty years." *Planned Parenthood Shasta-Diablo Inc., v. Williams*, 16 Cal. Rptr. 2d, 540, 549 (Cal. 1st DCA 1993).

To be content neutral, the actions would have to apply equally to all forms of speech. *See Goldcoast Publications v. Corrigan*, 798 F.Supp. 1558 (S.D. Fla. 1992). Though the government may enforce reasonable time, place, and manner restrictions, these restrictions must be content neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177 (1983). Content neutral regulations are those that are "justified without reference to the content of the regulated speech. "*Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 771 (1976).[6] Unlike the Atlanta City ordinance which restricted speech across the board regardless of its content, the Order in this instance applied only to "people that were demonstrating that were pro-life" (App. Vol. 2, 116, L.

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has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech." *Cohen*, 403 U.S. at 21.

[6] The Order in this case restricts a specific kind of speech and a specific kind of speaker, namely those speakers with a pro-life view. (App. Vol. 2, 105, 116, 148) Obviously those named in the Order are pro-life speakers, and the enforcement of the Order has been applied only to pro-life speakers. *Hirsh v. City of Atlanta*, 401 S.E. 2d 530 (Ga. 1991). The Atlanta City ordinance applied to all speakers regardless of their view.

16-18).[7] Treating one form of speech differently from another based upon the content of the message or the view point of the speaker establishes that the actions are not content neutral. *See R.A.V.*, 112 S.Ct. at 2538.

In this instance State officials have enforced the Order on the basis of the content of the message of the speech. pro-life picketers and demonstrators protesting the Clinic have been arrested for violating the Order, while pro-choice picketers and demonstrators, engaging in identical activity, have not been arrested.[8] The sole criteria used to enforce the Order is whether the person within the 36 foot or 300 foot buffer zone shares a pro-life belief. A pro-choice individual could stand side by side to a pro-life person resulting in the arrest of the person who believes in pro-life but not touching the person who believes in pro choice. Such a distinction made on the basis of the content of the speech or expression, clearly evinces content-based

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[7] See transcript of record for the hearing of April 12, 1993, in which Judge Robert B. McGregor, the Judge who entered the Order, stated that the Order applies only to those with a pro-life view, and all those with a pro-life view are automatically considered to be acted in concert with those named in the Order and are therefore subject to its dictates. (App. Vol. 2, 105, 107, 116, 148)

[8] In proceedings in state court the circuit court judge has also indicated that the intent of the Order was to prohibit picketing and demonstrations by all persons who identified themselves as having pro-life beliefs. The circuit court judge also stated that those having pro-choice beliefs were free to be on the public sidewalk and right of way without being in violation of the Order. (App. Vol. 2, 104, L. 20 - 105, L. 18)

restrictions on Free Speech which are presumptively invalid. *See R.A.V.*, 112 S.Ct. at 2542.[9]

"The danger of censorship presented by content-based [action], requires that that weapon be employed only where it is necessary to serve the asserted compelling interest." *R.A.V.* 112 S.Ct. at 2549 *citing Leathers v. Medlock*, _____ U.S. _____, 111 S.Ct. 1438, 1444, 113 L.Ed. 2d 494, 59 U.S.L.W. 4281 (1992); *Burson v. Freeman*, _____ U.S. _____, 112 S.Ct. 1846, 1852, 119 L.Ed. 2d 5, 60 U.S.L.W. 4393 (1992) (emphasis and internal quotes omitted).

Stressing its disdain for content-based prohibition, the United States Supreme Court has said:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open. [*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963)]

Police Department v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972);[10]

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[9] *R.A.V.* recognizes some limited instances in which content-based restrictions of "prescribable speech" (i.e., fighting words) may be valid, such as when the restriction is related to a secondary effect of the speech so that the regulation is justified without reference to the content of the speech. *R.A.V.*, 112 S.Ct. at 2546. However, religious and political speech is not "prescribable" as defined in *R.A.V.* and the presumption of invalidity is accorded great deference since political and religious speech is entitled to the utmost constitutional protection. *See Citizens*, 1992 WL 240565, 8 (D.N.J. 1992).

[10] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S.Ct. at 508.

The Supreme Court has clearly stated that "a content-based restriction on political speech in a public forum...must be subjected to the most exacting scrutiny". *Boos v. Barry*, 485 U.S. 312, 321 (1988). The right to political expression lies at the "core" of the First Amendment. *Meyer v. Grant*, 486 U.S. 414-420 (1988). Indeed, pro-life advocates must "be permitted to articulate their belief that abortion should not be permitted because it involves the taking of human life." *Planned Parenthood Shasta-Diablo Inc.*, 16 Cal Rptr. at 549. The Order provides that an individual cannot stand on a public sidewalk or right of way while peacefully carrying a sign and wearing a shirt on which a message is inscribed. Nor, in accordance with the Order, can an individual peacefully distribute literature on a public sidewalk, public street, or public right of way. The practical effect of the Order results in the total exclusion of the peaceful distribution of literature and the freedom of expression within 300 feet of the Clinic. Such an outright ban is unconstitutional. *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568, 86 L.Ed. 2d 500 (1987); *Frisby*, 108 S.Ct. at 2501; *State v. Nelson*, 553 So. 2d 195 (Fla. 5th DCA 1989).[11]

Content-based regulations of speech constitute "censorship in a most odious form" and violates the First Amendment. *Cox v. Louisiana*, 379 U.S. 536, 581, 85 S.Ct. 453, 13 L.Ed. 2d 471 (1965) (Black, J. concurring). Education is the proper and preferable alternative to censorship. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

[11] The Supreme Court in *Jews for Jesus* struck down a complete ban of all First Amendment activities within the Los Angeles International Airport utilizing a non-public forum reasonableness standard. If such a flat ban on First Amendment activities is

The Order enacts a sweeping ban on the public sidewalks, public streets, and public right of ways of political and religious speech that is pro-life. No such ban exists on speech that is pro-choice. Whether any particular speech is banned by the Order depends upon its content. Such a differential treatment and denial of access to a traditional public forum based upon the content of the message is unconstitutional. *See City of Cincinnati v. Discovery Network, Inc.*, _____ U.S. _____, 113 S.Ct. 1505 (1993).

In *Discovery Network* the Supreme Court struck down an ordinance which prohibited the placement of newsracks distributing commercial handbills but not newspapers. "There [were] no secondary effects attributable to [the commercial handbills] newsracks that distinguish[ed] them from the newsracks permitted on public sidewalks." *Discovery Network*, ____ U.S. _____, 113 S.Ct. at 1516. Therefore, such denial of access and differentiation was an unconstitutional violation of the First Amendment. To prohibit violent protest and restrict protesters from trespassing on private property is one thing, but to prohibit peaceful picketing is quite another. The original Permanent Injunction entered by Judge Hall on September 30, 1992, prohibited the former (App. Vol. 1, @@), whereas the Amended Permanent Injunction entered by Judge McGregor on April 8, 1993 prohibits the latter. (App. Vol. 1, @@; App. Vol. 2) If supported by the facts, the former is reasonable, the latter

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unconstitutional under a reasonable and standard, clearly such a flat ban would be unconstitutional under a traditional public forum and strict scrutiny standard.

is not. Accordingly, the Order violates the Appellants First Amendment rights.

Having already addressed the initial inquiry as to whether the Order and its enforcement is content-based, the next question becomes whether it is narrowly drawn to serve a compelling state interest. This necessarily involves a balancing of the states asserted compelling interest[12] against the Appellants' First Amendment rights.

In balancing the right of Free Speech against other individual rights the United States Supreme Court has noted that there is a "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, _____ U.S. _____, 112 S.Ct. at 1859 (Kennedy, J., concurring). Specifically this "narrow area" has been applied in cases involving content-neutral restrictions or limitations on Free Speech. *See Rowan v. United States Post Office Department*, 397 U.S. 728 (1970); *Ward v. Rock Against Racism*, 491 U.S. 781 (1969); *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952); *Kovacs v. Cooper*, 336 U.S. 921 (1949); *Coca-Cola Food Division v. State, Dept. of Citrus*, 406

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[12] The interests asserted in the Order are the right of privacy interest of the Appellees, the interests of the Appellees in conducting their business in a manner that is free from obstruction, and the interest in ensuring that individuals receive unimpeded medical care and treatment. However, it must be noted that the Appellees are all business entities and therefore the constitutional right of privacy is not implicated. *See Parnell v. St. Johns County*, 603 So.2d 56 (Fla. 5th DCA 1992) (Right of privacy extends only to natural persons). Accordingly, there is no competing constitutional right against which the Appellants right of Free Speech is being asked to yield.

So. 2d 1079 (Fla. 1981); *S.H.B. v. State*, 355 So. 2d 1176 (Fla. 1977). This yielding of the First Amendment to other competing rights becomes even more narrow when confronted with restrictions on political speech and expression. "A content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny." *Boos*, 485 U.S. 312 (1988). *See also Meyer*, 486 U.S. 414 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1975). "There is no question that the limitation here restricts core political speech. Indeed, abortion may be the political issue of the last 20 years." *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 16 Cal. Rptr. at 549. In specifically addressing "the First Amendment rights of protestors to advocate a right-to-life position [versus] the privacy interests of women who seek abortions while being insulated from the protestors advocacy", *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989), the Fifth Circuit Court of Appeals noted that "the Supreme Court's First Amendment jurisprudence tilts the scale assessing threatened harm decisively in favor of the protestors." *Id.* at 795.[13] "The First Amendment retains a primacy in our jurisprudence because it represents the foundation of a democracy -- informed public discourse." *Id.* at 796.

Even the exercise of Free Speech involving commercial speech, which historically has received substantially less protection than

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[13] In *McMillan* the court refused to grant an injunction that would have banned peaceful, albeit loud, protesting or demonstrations within 500 feet of the clinic finding that such an injunction would be an unconstitutional violation of the First Amendment right of free speech.

"pure speech" (i.e., political, religious, or social speech), has not been required to yield to privacy interests asserted by the government. In *State v. Nelson*, the Fifth District Court of Appeal for Florida struck down a county beach code which banned the solicitation and canvassing by any person, other than a licensed concessionaire, for the sale or rental of merchandise, services, goods, or property of any kind on the beach. "The complete suppression . . . of commercial speech . . . is more extensive than necessary to further any alleged governmental interest in promoting the public welfare by protecting the privacy . . . of members of the public who are on the beach." *State v. Nelson*, 553 So. 2d at 196. If commercial speech is not required to yield to any asserted privacy interests, then, a priori, the suppression of political or religious speech, in this instance, is more extensive than necessary to further any alleged governmental interest in privacy.

The Appellees will argue that the significant government interest is a woman's right to privacy to obtain an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). However, the United States Supreme Court in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), abandoned the strict scrutiny test in the abortion context unless the regulation on abortion imposed "an undue burden" on a woman's ability to obtain an abortion. *Id.* at 2818, 2821. The Appellees argue that Florida's Right to Privacy provision in Art. 1, §23 of the Florida Constitution in the context of abortion is greater than the protection provided by the Federal Constitution. *In re: T.W.*, 551 So. 2d 1186 (Fla. 1989). However, the Order is on behalf of the

Clinic, and as such, the Clinic does not have a constitutional right to privacy under the Federal or the Florida constitutions. *Parnell v. St. Johns County*, 603 So. 2d 56 (Fla. 5th DCA 1992). Even if the Florida Right to Privacy protection did extend to the Appellee, or provided a background for the governmental interest in issuing the injunction, the Order clearly is not the narrowest means to achieve that governmental interest. The narrowest means to achieve such a governmental interest might be found in the September 30, 1992, Permanent Injunction, but the April 8, 1993, Order, which is being challenged here, can in no way be construed narrowly. As such, the Order violates the First Amendment.

The state may place reasonable time, place and manner restrictions on expression, if such restrictions are content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *See Perry*, 460 U.S. at 45.

The Order provides that individuals are restricted:

> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way . . . within thirty-six (36) feet of the property line of the Clinic;
>
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic;
>
> (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the

> event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone;
>
> (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners . . . .

Insofar as the Order is not content neutral and totally bans the distribution of literature and the free expression of ideas on public sidewalks and right of ways, it violates the First Amendment, for it is neither a reasonable time, place or manner restriction, nor is it narrowly drawn to serve a significant government interest. Even assuming that the Order is content neutral and is not a total ban, it still is not a reasonable time, place, and manner restriction, narrowly tailored to serve a significant government interest, and leaving open ample alternative channels of communication. For example, the public sidewalk parallel to Dixie Way is the only public sidewalk in the vicinity of the Clinic. A flat ban on pro-life speech on that public sidewalk means that pro-life speech has no other alternative channel for communication. It is unreasonable to require pro-life speech to be conducted on U.S. Hwy. 1 in front of the Clinic. Speech on Dixie Way beside the clinic is completely banned. No sidewalks parallel U.S. Hwy. 1. Surrounding the Clinic is private property which would require trespass. Thus, a complete ban of First Amendment activities on the public sidewalk beside the Clinic leaves open no other alternative channels and therefore is

unconstitutional no matter how strong the alleged governmental interest may be.

The Order is offensive to the Constitution because it totally bans a particular type of speech. The First Amendment was meant to permit disputatious speech, speech that "may start an argument or cause a disturbance". *Tinker v. Desmoines Independent Community School District*, 393 U.S. 503, 508 (1969). The Supreme Court has stated that "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Id.* at 513. The First Amendment which declares that states may not abridge the right to free speech "means what it says." *Id.*

Just as the Supreme Court in *Tinker* stated that students do not shed their constitutional rights to freedom of speech at the schoolhouse gates, the Appellants do not shed their constitutional rights to freedom of speech once they enter the 300 foot buffer zone around this Clinic. It is totally unreasonable to require the Appellants to silence their speech once they come within a full football field length from this Clinic or from a private residence of any Clinic agent. Within this 36 foot and 300 foot buffer zone, the Constitution has been abrogated and the First Amendment has been buried. This approach is clearly not the least restrictive means to accomplish any governmental interest. The least restrictive means would be to prohibit people from entering onto

the private property of the Clinic, entering onto the private parking lot of the Clinic, restricting assault on patients or Clinic workers, but to go beyond that and to restrict peaceful free speech is clearly not the least restrictive means. It should be pointed out that if the April 8, 1993 Order is ruled to be unconstitutional, the original Permanent Injunction of September 30, 1992 remains in effect and that, assuming the facts support the issuance of the Permanent Injunction, would be the least restrictive mean to achieve the asserted governmental interest and would protect the Clinic in the operation of its private business. Unlike the City of Atlanta ordinance, which left open alternative channels of communication by permitting twenty demonstrators in the vicinity of the abortion clinic, the Order in this case prohibits all pro-life speech within a traditional public forum. *Cf. Hirsh v. City of Atlanta*, 401 S.E. 2d. 530, 533 (Ga. 1991). If the Appellants cannot exercise their constitutional rights to free speech on the public sidewalk or public right of ways, then they cannot exercise these rights at all. There are no other ample alternative means.

Must a pro-life visitor who is traveling down Dixie Way wearing a Choose-Life t-shirt actually disrobe for fear of representing an image observable to the Clinic? Can a pro-lifer who sees a dog darting in front of her on Dixie Way honk her horn without fear of being arrested? Must a pro-lifer stop singing "Glory, Glory, Hallelujah" when taking a morning exercise walk on

the public sidewalk or highway?[14] Must a pro-lifer stop whistling a tune to her favorite song when she sits in her car on Dixie Way waiting for the traffic to clear on U.S. Highway 1? These questions are real, and the answers to these questions may result in a criminal record and jail time. Moreover the pro-life speaker must be able to determine where the 300 foot barrier begins, whether the person on the public sidewalk 100 yards away from the Clinic is "seeking the services" of the Clinic, whether that person wishes to speak or not to speak. The answers to these three questions will mean either the ability to speak or a quick trip to the jail. This is clearly not the least restrictive means to accomplish any alleged interest of the government and it clearly does not leave open ample alternative means unless of course the government assumes that the pro-life speaker could rent a blimp and carry her message over the city of Melbourne. This Order is ludicrous and flatly unconstitutional.

C.

The Order Violates The Appellants First Amendment Right of Free Speech Because It Is Vague

Since this Order extremely burdens the Appellants' rights of free speech and subjects them to criminal prosecution and jail time, compliance with the Order should be absolutely crystal clear

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[14] All of the individuals who made their initial appearance before Judge McGregor on April 12, 1993 were arrested for either walking, entering, praying, or singing within the 36 foot buffer zone. No arrests were on account of violent activity. (App. Vol. 2, 18, 22, 24, 27, 32, 39, 42-44, 46, 49, 55, 56, 59 74, 77, 79, 81, 83, 90, 98, 101, 103, 108, 112, 118, 121, 123, 126, 129, 131, 132, 136, 139, 147)

so as to place the Appellants and others on ample notice of the parameters of this Order. However, this Order is vague and does not give sufficient notice or guideline in view of its stinging penalties. Indeed

> It is a basic principle . . . that an enactment is void for vagueness if its prohibitions are not clearly defined. 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 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 . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. A third, but related, [important value offended by vague enactments] is where a vague [enactment] abuts upon sensitive areas of basic First Amendment freedoms. [In such a situation, vague enactments operate to] inhibit the exercise of those freedoms.

Grayned v. City of Rockford, 408 U.S. 104, 117, 92 S.Ct. 2294, 2304, 33 L.Ed. 2d 222 (1972).

A statute or injunction is considered unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Supreme Court has stated that the vagueness doctrine is to ensure that "all be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, (1939). The prohibition against overly vague laws protects citizens from having to voluntarily curtail their First Amendment activities because of fear that those activities could be characterized as illegal activities due to an

unconstitutionally vague statute or injunction. *Grayned*, 408 U.S. at 104.

In this instance the Order fails to provide explicit standards by which one can determine "images observable to or [sounds] within earshot of the patients inside the Clinic." This undefined standard delegates policy determinations, specifically as to what is meant by the phrase "observable images" and when is a sound "within earshot" to those responsible for enforcing the Order. For instance, is the Order violated if an image could be, but is not actually, seen? Is the Order violated if a sound could be, but is not actually, within ear shot? Is enforcement of the Order dependent upon unique perceptive and sensory characteristics of each individual patient?[15] This *Ese Est Per Cipi*[16] standard renders an individual desiring to exercise First Amendment rights incapable of knowing what is prohibited conduct. The term "earshot" is unscientific and will vary from one person to the next. Indeed, one person could claim that he or she heard someone whistling or praying when someone else may argue that the noise was not audible. The term "earshot" is not an objective standard such as a decibel level. This is extremely important because what this

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[15] The record in the lower court indicates that in fact those arrested for violating the Order were identified to law enforcement officials by Clinic employees and staff members as being in violation of the Order. Individuals who were pro-choice were identified by the Clinic employees and staff members as not being in violation of the Order. (App. Vol. 2, 124, 134)

[16] *Ese Est Per Cipi* - To be is to be perceived, is rationalistic metaphysics, where reality is dependent upon the subjective awareness of each individual's perception.

means is that a factual determination and a dispute by a Judge removed from the situation will have to determine whether the Clinic personnel could actually hear what was said, and if the Judge determines that the audible voice was heard by the Clinic personnel, then the pro-life speaker is subject to jail. Thus, jail time is dependent upon someone's subjective hearing capability and a subjective determination as to who is telling the truth and who is not. Moreover, a pro-life bumper sticker could be considered an image observable to the Clinic, and thus anyone driving on Dixie Way with such a sticker would violate the injunction. A pro-life t-shirt is also such an image.

The Order also states that between the hours of 7:30 a.m. through noon on Mondays through Saturdays, certain prohibitions are in place and further "during surgical procedures and recovery periods" certain prohibits regarding singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within the earshot of the patients inside the Clinic are prohibited. How is the pro-life speaker supposed to know the times during which "surgical procedures and recovery periods" are taking place? This is not a trivial matter, because the determination of this point could result in prosecution.

Moreover, the Order requires that the pro-life or religious speaker carry a measuring tape to determine the 300 foot distance from the Clinic. Is the 300 feet from the center of the Clinic property, or does the 300 foot radius extend from the edge of the

Clinic property, or does it extend from the edge of the 36 foot buffer zone outside of the Clinic property? The answer to this question can mean jail time. The same question can be asked for the 300 foot radius around the Clinic agents' home, which will encompass another public sidewalk and another public highway. Clearly residential picketing when done properly is protected by the First Amendment according to the United States Supreme Court. *Frisby*, 487 U.S. at 474[17]. Moreover, how is one to know that the person living in your own neighborhood is a "employee, staff member, owner, or 'agent' of the Clinic". Is an agent an advertising agent, and is a staff member a volunteer who is associated with the National Organization for Women or Planned Parenthood? Moreover, what is considered "sidewalk counseling"? May someone within the 300 foot buffer zone pray, discuss Christian or pro-life issues, counsel someone pertaining to marital problems, or encourage someone who happens to be associated with the Clinic. Unless every single person seeking access to the Clinic or in some tangential way associated with the Clinic wears a badge stating "Associated With Aware Woman Clinic", the pro-life speaker runs the jeopardy of jail time if she chooses to speak within a full football field length of this Clinic. To subject legitimate free speech rights to criminal penalty and contempt of court based upon such a vague Order is reprehensible and clearly unconstitutional.

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[17] In *Frisby* the Court carved out for the unwilling listener a residential privacy exception allowing some limitation on First Amendment Free Speech. However, the Court acknowledged the constitutionality of residential picketing as warranting Free Speech protections.

Reliance on the subjective enforcement of the Order by those responsible for such enforcement, renders the Order vague and unconstitutional.

The Order prohibits the distribution of literature or even speaking with any individual who has business with the Clinic within the 300 foot buffer zone surrounding the Clinic. Yet there is no standard by which to determine if an individual who is 100 hundred yards away from the Clinic has business with the Clinic. The Order, because of its lack of standards, effectively prohibits any individual with a pro-life belief from approaching any one who is 100 yards away from the Clinic or risk arrest and prosecution. Such a lack of standards is clearly unreasonable and unconstitutionally vague.

D.

The Order Violates The Appellants First Amendment Right of Free Speech Because It Is Overbroad

A "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. [The] cases make clear that in assessing the reasonableness of a regulation, [the court] must weigh heavily the fact that communication is involved. . . . Access to the streets, sidewalks, parks, and other similar public places . . . for the purposes of exercising First Amendment rights cannot constitutionally be denied broadly." *Grayned*, 92 S.Ct. at 2304. The Order is overbroad if in its reach it prohibits constitutionally protected conduct. *See Id.* at 2302. The

Order prohibits the carrying of a sign, the wearing of a shirt on which a message is inscribed, the distribution of literature, and talking in a normal tone and level of voice on a public sidewalk and right of way. It also prohibits a car driving down U.S. Highway 1[18], since the prohibition extends in a radius of approximately 300 feet around the Clinic.[19] The noise prohibition restricts loud noises within the 36 foot "buffer zone" around the Clinic, which necessarily and explicitly includes United States Highway 1. A car with a loud muffler, assuming it can be heard by patients within the Clinic, violates the Order. So too, the Order prohibits individuals who have pro-life beliefs and own private property located within the 300 foot radius surrounding the Clinic from wearing any clothing on their property displaying any type of pro-life message that could be seen from within the Clinic, from posting any type of sign on their private premises, and from parking a car on their private premises which has a pro-life bumper sticker which may be visible from the Clinic. The Order also prohibits any car from driving by the Clinic with a pro-life bumper sticker affixed to the car since that could be construed as an image observable within the Clinic. It also prohibits the honking

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[18] United States Highway 1 is approximately 75 to 100 feet in front of the clinic and is actually only 12 feet from the Clinic's property line.

[19] This amounts to approximately a 400,000 square foot area. Practically the Order prohibits the exercise of First Amendment Free Speech rights by anyone with a pro-life belief in an area extending out from each side of the clinic the approximate equivalent size and dimensions of the Houston Astrodome or the New Orleans Superdome.

of any horn on U.S. Highway 1 or Dixie Way because that could be a sound "within earshot" of the patients inside the Clinic. This Order is so overbroad that it prohibits peaceful residential picketing which has clearly been recognized as First Amendment protected speech by the United States Supreme Court. *Frisby*, 487 U.S. at 474. All of the above expressive activities are clearly Constitutionally protected. *See R.A.V.*, 112 S.Ct. 2538. Such broad restrictions eviscerate any ample opportunity for alternative communication.

Not only does the Order create this 300 foot prohibited speech barrier around the Clinic, but the same barrier is created around each private residence of every employee, staff member or "agent" of the Clinic. By its terms, then an individual who has a pro-life belief could not live next door to an employee or staff member of the Clinic and wear any clothing while on their property displaying any type of pro-life message that could be seen from within the agents residence, from posting any type of sign on their private premises, and from parking a car on their private premises which has a pro-life bumper sticker which may be visible from the agents' residence. Likewise, an individual could not drive down the street or within the local neighborhood of an employee or staff member of the Clinic while passively espousing the pro-life position. Such sweeping prohibitions are clearly unconstitutionally overbroad.

Under the Order, a person wearing a t-shirt with the phrase "Choose Life" who takes an afternoon stroll and crosses the public sidewalk could meet the wrath of the Order and face prosecution.

A person walking on the other side of U. S. Highway 1, or 100 yards away from the Clinic would have to keep silent in order to avoid prosecution. Such a person could not wear a t-shirt, carry a picket sign, discuss pro-life beliefs with another individual, distribute pro-life literature, wheel a baby stroller down the sidewalk with a pro-life emblem attached thereto, drive a car with a pro-life bumper sticker, whistle, sing, or pray if the content of the prayer dealt with pro-life issues. What the Order has done is institute a 300 foot silence zone. Passing through this vicinity is like passing through hospital areas with "Quiet Zone" signs, only the quiet zone would actually be changed to "Silence Zone", punishable by the wrath of the court if the silence is broken. Clearly, this Order is patently and fundamentally unconstitutional on its face.

The application of this Order pursuant to the transcript of Judge McGregor addressing those who were arrested under the Order applies to <u>anyone</u> who has a pro-life <u>belief</u>. The Order is therefore overbroad because it does not confine itself to those actively acting in concert with those named in the Order but touches anyone who has any pro-life viewpoint whether or not they know of the Order's existence and whether or not they have heard of anybody named in the Order. Clearly this Order is excessively overbroad and consequently unconstitutional.

II.

THE ORDER VIOLATES THE APPELLANTS FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION BY PROHIBITING ANY ASSOCIATION AMONG RELIGIOUS AND PRO-LIFE PERSONS WITHIN A TRADITIONAL PUBLIC FORUM.

The freedom to associate is a constitutionally protected freedom, and this Order prohibits any "congregating" by pro-life or religious speakers within a traditional public forum. This Order clearly violates associational freedoms of the Appellants.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972).

> It should be obvious that the exclusion of any person or group - all-Negro, all-Oriental, or all-white - from public facilities infringes upon the freedom of the individual to associate as he chooses. . . . The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. . . . The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.

Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

The freedom of association demands that any denial of access to public facilities withstand close scrutiny and be carefully circumscribed. *See Gilmore*, 417 U.S. at 575; *Healy*, 408 U.S. at 181. In this instance, the Order denies a particular group of

individuals[20] access to a public forum because of mere membership in that group. The denial is based upon membership in the group irrespective of whether any particular individual's actions are violent, physically abusive, or harassing. The Order blatantly prohibits congregating within a traditional public forum and prohibits association of pro-life and religious speakers. The Supreme Court of the United States has already stated that an "individual's freedom to speak, to worship, and to petition the government for the redresses of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609 (1983). Such denial constitutes an unconstitutional abridgement of the First Amendment guarantee of Freedom of Association. *See Gilmore*, 417 U.S. at 575.

III.

THE ORDER IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE APPELLANTS RIGHT TO EQUAL PROTECTION BY DISCRIMINATING AGAINST A RELIGIOUS CLASS AND TREATING A RELIGIOUS CLASS OF PERSONS DIFFERENTLY THAN THOSE WHO PROFESS NO CHRISTIAN PRO-LIFE VIEW

The Fourteenth Amendment to the United States Constitution forbids states from denying to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. 14, §1.* In

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[20] The group of individuals is those individuals holding a similar pro-life belief or religious view. The Order prohibits prayer. Even more specifically, a particular group is composed of those individuals with membership in either of the entities (i.e., Operation Rescue) named in the Order.

order to show a violation of the Equal Protection clause an individual must show government action which either deprives a person of a fundamental right or classifies along suspect lines like race or religion. *See Burlington Northern R. Co. v. Ford*, 112 S.Ct. 2184 (1992); *Bass v. City of Albany*, 968 F.2d 1067 (11th Cir. 1992). The Order, in this instance, clearly deprives the Appellants of fundamental rights guaranteed by the First Amendment.[21] In addition, however, the Order clearly classifies individuals along religious lines[22] and then restricts the exercise of Constitutional First Amendment rights based on such classification. The Order does this in that it affects only those individuals with a pro-life or religious view.[23] However, even apart from the pro-life view, the Order specifically prohibits prayer on a public sidewalk, public street, or public right of way. This is certainly class based invidious discrimination based upon religion which violates the Equal Protection clause.

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[21] This point has already been addressed in the Appellants Brief and will not be reiterated here.

[22] The specific religious classification is directed at those individuals who hold to a religious pro-life view. It specifically prohibits sidewalk counseling, singing, and would also prohibit prayer.

[23] It is the Appellants position that while the speech implicated in the Order constitutes political speech, an element of the speech and expression is derived from sincerely held religious beliefs. Therefore, any restriction imposed solely on those beliefs necessarily involves a classification based on religion.

IV.

THE ORDER VIOLATES THE APPELLANTS FIRST AMENDMENT RIGHT OF FREE EXERCISE OF RELIGION BY PROHIBITING ANY RELIGIOUS ACTIVITIES SUCH AS PRAYING WITHIN A TRADITIONAL PUBLIC FORUM THAT IS OPEN TO OTHER AVENUES OF EXPRESSION

The Order is so broad in that it prohibits singing, chanting, whistling, sounds, or images observable to or within earshot of the patients inside the Clinic and sidewalk counseling, and thus places a significant burden upon the Appellants free exercise of religion by prohibiting any religious activities such as saying a prayer within a traditional public forum. The Order essentially creates a "Religion Off Limits" zone around the Clinic or around the residential homes of those tangentially associated with the Clinic. Consequently, it violates the Appellants' First Amendment free exercise of religion.

A.

The Order Violates The Appellants Sincerely Held Religious Belief To Freely Exercise Their Religion By Prohibiting Prayer Within A Traditional Public Forum And Infringes On The Appellants Rights of Free Speech and To Equal Protection Under The Laws.

The Appellants clearly believe that abortion is wrong and this belief stems in part from a sincerely held religious belief that human life is sacred and that abortion takes a human life, resulting in the murder of an unborn child. Whether these beliefs are central to the Appellants' religious beliefs is irrelevant. According to the Supreme Court, it is "no more appropriate for Judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest test' to the free exercise field,

than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." *Employment Division v. Smith*, _____, U.S. _____, 110 S.Ct. 1595, 1604 (1990).

Clearly, this Order is so overbroad that it would prohibit any praying within 300 feet of this clinic if someone tangentially associated with the Clinic were able to hear the prayer while walking on a public sidewalk or public right of way. The Order would prohibit distribution of free religious material within this 300 foot buffer zone. The Order would also prohibit whistling or singing religious songs, and it would prohibit prayer on a public sidewalk. The religious beliefs of the Appellants have been severed and declared off limits within this buffer zone.

In addition to the Appellants free exercise of religion, the Appellants also assert violations of free speech and equal protection. Pursuant to the analysis in *Smith*, combining a free exercise of religion right along with some other federally recognized right such as free speech brings the standard of protection to its highest level. *Id* at 1601. Thus, the whole line of cases involving free exercise of religion are applicable in this case.

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) (unemployment benefits);

Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707 (1981) (unemployment benefits);

Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs);

Wisconsin v. Yoder, 406 U.S. 205, (1972) (invalidating compulsory school attendance laws as applied to Amish (a) parents who refused on religious grounds to send their children to school); *Sherbert v. Verner*, 375 U.S. 398 (1963) (unemployment benefits); *Follett v. McCormick*, 321 U.S. 573 (1944) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statue challenged by religious objectors); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (directing the education of children).

Clearly combining the free exercise of religion with free speech and equal protection violation results in a compelling interest test and a strict scrutiny standard with which this Order cannot meet and therefore it must be declared unconstitutional.

B.

The Order Violates The Appellants Free Exercise Of Religion In That The Injunction Is Not A Neutral Law Of General Applicability And Is Not Supported By A Compelling Governmental Interest.

In order to pass constitutional scrutiny, the Order must be a neutral law of general applicability. The Order is far from neutral. The Order does not prohibit pro-choice speech within the 36 foot or 300 foot buffer zone. It only prohibits pro-life or religious speech within that same buffer zone. In fact, those who have been arrested have all been religious or pro-life. No pro-choice speaker has been arrested. Indeed, a pro-choice speaker can stand side by side to a pro-life speaker while the pro-life speaker is arrested but the pro-choice speaker is untouched by the Order. The Order seeks and singles out religious and pro-life speech and punishes that speech while permitting pro-choice speech to thrive. Consequently, under the Supreme Court analysis in *Smith*, it cannot be considered a neutral law of general applicability and thus a compelling interest test must be applied.

According to the Supreme Court, if the compelling interest test is to be applied at all, it "must be applied across the board, to all actions thought to be religiously commanded." *Smith*, 110 S. Ct. at 1605. Moreover, if the compelling interest test "really means what it says . . . many laws will not meet the test." *Id*. In other words, once the compelling interest test is applied, most laws will fall in the face of that test. Clearly the Order falls in the face of a compelling interest test because it cannot meet the standards of such a test. It clearly and unequivocally burdens the Appellants' free exercise of religion, and there is no compelling interest that the government can dream to have such a commanding and overbroad and restrictive Order. Certainly there

are other ways to protect the Clinic's interest rather than legitimately restricting free exercise of religion within a 400,000 square foot area, which area is replicated throughout the City of Melbourne once the Clinic "agents" move to the residential properties. The migrating of these 300 foot buffer zones throughout the city of Melbourne means that a Jehovah's Witness or any other religious speaker would be prohibited from walking to the door of a Clinic "agent" for solicitation purposes, to conduct religious surveys, or to hand out gospel tracts. Civil and criminal penalties for exercising legitimate religious beliefs are absurd. Indeed, this Order regulates beliefs and not actions. A religious speaker is regulated simply because of that belief whenever that belief enters within the sacred zone regardless of the speaker's actions. Such an Order cannot stand in a free and democratic society.

CONCLUSION

The Order is an unconstitutional violation of the Appellants First Amendment rights to free speech because it completely bans religious and pro-life speech in a traditional public forum. The Order is content based and is certainly not the least restrictive means to achieve any governmental interest. The Order leaves no other available alternative means of communication, is vague, and is overbroad.

By prohibiting congregating on a public sidewalk, the Order violates the Appellants freedom of association. By reaching only religious and pro-life speech, the Order also violates equal protection. Finally, the Order violates the Appellants right to freely exercise a religious belief by prohibiting any religious activities within a traditional public forum. The Order is therefore patently unconstitutional.

Dated this 4th day of May, 1993.

Respectfully Submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished this 4th day of May, 1993 by U.S. Mail to: Talbot D'Albemberte, 215 S. Monroe St., Suite 601, Tallahassee, Fl 32301; Kathy Patrick, 1100 Louisiana, Suite 3400, Houston, Tx 77002, Jerri Blair, 351 W. Alfred St., Tavares, Fl 32778; Christopher Weiss, Two S. Orange Ave., Orlando, Fl 32802; Bruce Cadle, 701 Andrew St., N.E., Palm Bay, Fl 32905; Patrick Mahoney, 1345 N.E. Fourth Court at 613 Second Street, N.E., Washington, D.C. 20002; Randall Terry, RR 2, Box 196, Harpursville, NY 13787-9536.

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* Liberty Counsel is a non-profit religious civil liberties education and legal defense organization and is not a party to this action.