#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

REPLY BRIEF OF APPELLANTS

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PREFACE

In this Reply Brief of Appellants, 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 court should note, however, that use of the designation "Appellants" in no way suggests the Respondents are connected or acting in concert with one another. 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 Appellants' Initial Brief Appendix will be designated as (IB. App. Vol.). Citations to Appellants' Reply Brief Appendix will be designated as (RB. App.). Citations to the Appellees' Answer Brief will be designated (AB.). Citations to the Appellees' Appendix will be designated (AA.). Citations to witness transcripts will be designated (Unterberger Tr.).

ARGUMENT

I.

THE ORDER VIOLATES THE APPELLANTS' FIRST AMENDMENT RIGHT TO FREE SPEECH BECAUSE THE ORDER FAILS TO DISTINGUISH BETWEEN LAWFUL AND UNLAWFUL SPEECH OR ACTIVITY, IT IMPINGES THE APPELLANTS' RIGHT TO FREEDOM OF ASSOCIATION, IS CONTENT BASED, IS VAGUE AND OVERBROAD CREATING UNCERTAIN APPLICATION AND ENFORCEMENT, AND COMPLETELY BANS PRO-LIFE SPEECH IN A TRADITIONAL PUBLIC FORUM.

A.

The Order Is Unconstitutional Because It Fails To Distinguish Between Lawful And Unlawful Speech Or Activity.

Appellants have a constitutional right to peacefully picket, pray, distribute literature and verbally express their beliefs. Such speech is rooted "at the core of the First Amendment." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 926-27 (1982). The Untied States Supreme Court has consistently "recognized the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open'." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963).

Appellees claim the Order merely restrains speech when joined with unlawful conduct. (AB. 33). On the face of the Order it is clear that lawful conduct *and* protected speech are also prohibited. The Order proscribes peaceful demonstrations and speech "or other sounds or images observable to or within earshot of the patients inside the Clinic." (IB. App. Vol. 1, 119). Thus, if a pro-life demonstrator can be seen or heard inside the clinic, regardless of where the demonstrator is located or what type of activity and

speech is taking place, the pro-life person is subject to immediate arrest without notice. In *Claiborne Hardware*, the Supreme Court held that in the context of protected speech or activities, the courts may "restrain **only unlawful conduct** and the persons responsible for conduct of that character." 458 U.S. at 924, n. 67 (emphasis added).

The facts in *Claiborne Hardware* are quite similar to the case before this court. In March 1966, several hundred black persons implemented a boycott of white merchants following racial abuses in Claiborne County, Mississippi. The business merchants sued for injunctive relief against the demonstrators and Charles Evers, a leader of the movement, who "sought to persuade others to join the boycott through pressure and the 'threat' of social ostracism." *Id.* at 909-10. Mr. Evers and other active members of the boycott furthered their cause by seeking to "embarrass" non-participants and "coerce them into action" and conformity. *Id.* at 910.

Additionally, the lower court found that some defendants, acting for all others, became involved in "acts of physical force and violence" against potential customers and used "[i]ntimidation, threats, social ostracism, vilification, and traduction" . . . to achieve their desired results. *Id.* at 894. "Enforcers" known as "black hats" were stationed in the vicinity of the white-owned businesses to record the names of the boycott violators and those violators were later disclosed in a pamphlet entitled *Black Times* which was published by the organization. *Id.* at 904-05. "In two cases, shots were fired at a house; in a third, a brick was thrown

through a windshield; . . . and a group of young blacks apparently pulled down the overalls of an elderly brick mason known as 'Preacher White' and spanked him for not observing the boycott." *Id.* at 904-05.

Momentum was added to the boycott following the assassination of Dr. Martin Luther King, Jr. on April 4, 1968 and "[t]ension in the community neared a breaking point" on April 18, 1969 after the shooting of a local black man. *Id.* at 901-02. Mr. Evers was quoted as saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902. Nevertheless, coinciding with the escalation in activities was the continuous "uniformly peaceful and orderly" picketing of the white-owned businesses which often involved small children and occurred "primarily on weekends." *Id.* at 903.

The Mississippi Supreme Court upheld the permanent injunction entered below which:

> permanently enjoined [the demonstrators] from stationing 'store watchers' at the [merchants'] business premises; from 'persuading' any person to withhold his patronage from [the merchants]; from 'using demeaning and obscene language to or about any person' . . . ; [and] from 'picketing or patrolling' the premises of any of the [merchants]. . . .

Id. at 893.

The Supreme Court of Mississippi based the injunction on the theory that the "petitioners had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895. The court reasoned that "[i]f any of these factors--force, violence, or threats--is present, then the entire boycott is illegal regardless

of whether it is primary, secondary, economical, political, social or other." *Id.* at 895.

The United States Supreme Court reversed the Mississippi court and dissolved the injunction reasoning that every element of the boycott was "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907. Justice Stevens, writing for the court, emphasized that "precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916. The Court declared that the injunction "must be dissolved" or "modified to restrain **only unlawful conduct** and the persons responsible for conduct of that character." *Id.* at 927. n. 67 (emphasis added).

Similarly, the Order before this court is blatantly unconstitutional because peaceful picketing and speech are prohibited. On its face the Order fails to distinguish between lawful and unlawful speech or activity because it proscribes the display of "images observable to" persons inside the clinic. In application, the Order destroys any pro-life person's First Amendment right to peacefully picket within view of the clinic. As stated in *Claiborne Hardware*, some individuals did more than assemble peacefully, but "[o]ther elements of the [demonstration] . . . also involved activities ordinarily safeguarded by the First Amendment." *Id.* at 909. The Order sub justice is facially unconstitutional because it fails to distinguish between lawful and unlawful speech or activity and it thereby infringes upon the

Appellants' constitutionally protected rights of peaceful picketing and free speech and expression.

B.

The Order Violates The Appellants' First Amendment Right To Freedom Of Association And Is Clearly Content-based.

"The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 294 (1981). In emphasizing the importance of free association to guarantee the right to be heard, Justice Harlan wrote:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). As in *Claiborne Hardware*, the Appellees claim the Order is required to protect various state interests which were jeopardized by the Appellants escalated activity at the clinic (AB. 7). However, as the Court stated in *Claiborne Hardware*, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.* at 908. The Supreme Court stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real

danger that legitimate political expression or association would be impaired'." *Scales v. United States*, 367 U.S. 203, 229 (1961).

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court unanimously held that "peaceful assembly for lawful discussion cannot be made a crime." *Id.* at 365. Appellees claim that the "Appellants never sought to obey the [September 30, 1992] injunction" (AB. 7) and continued in unlawful activity such as attempting to block ingress and egress to the clinic (AB. 9-10);[1] pushing literature into the windows of passing cars (AB. 10);[2] picketing residences of clinic personnel (AB. 11);[3] and inciting fear through threat and intimidation while quoting the statement, "I pray that God strikes you dead now!" (AB. 11-12, 15)[4]. However,

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[1] Appellees base this claim on the assertion that unnamed "Appellants" who were acting "in concert" with the named Appellants violated the September 30, 1992 injunction.

[2] As discussed *infra* at page 15, the least drastic means to restrict this activity is enforcement of the traffic regulations related to literature distribution into moving vehicles.

[3] In *Frisby v. Schultz*, 487 U.S. 474 (1988), 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 protection. Appellees reliance on *Duval County School Board v. Florida Public Employees Relations Commission*, 363 So. 2d 30 (Fla. 1st DCA 1978), is misplaced because *Frisby* effectively overruled *Duval County*. Additionally, Appellees reliance on *Northeast Woman's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991), is also meritless because the Order sub justice vaguely prohibits "approaching . . . the residence . . . of any 'owners or agents' of the clinic" creating a restriction on a pro-life person's ability to walk through any and all residential neighborhoods without fear of violating to Order.

[4] In *Watts v. United States*, 394 U.S. 705 (1969), the petitioner was convicted of willfully making a threat to take the life of the President. He stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at

Appellees go on to stipulate that "Ed Martin, Judy Madsen, and Shirley Hobbs have not actually physically blocked access to abortion clinics located in Brevard or Seminole County." (AB. 6). Moreover, the September 30, 1992 injunction did not proscribe distribution of literature into moving vehicles or residential picketing.

The Appellees true failing is that they impute the conduct of individuals acting alone to the "Appellants" as a whole. The Answer Brief routinely designates anyone performing an act which is perceived as associated with pro-life belief as an "Appellant" in the appeal. They also confuse and misconstrue the association of individual Appellants with other organizations.[5] From this misinterpretation, the Appellees launch into accusations of events performed by unnamed and unknown individuals and attribute all such occurrences to the "Appellants" in this appeal. In actuality, Appellees' Appendix reveals that the lower court had considerable difficulty determining the actors and their relation to one another or any other association. (Cadle Tr. 273-280, *passim*).

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706. The Court reversed the conviction and agreed that "the statement, taken in context, was 'a kind of very crude offensive method of stating a political opposition to the President'." *Id.* at 708.

[5] The Appellees mistakenly associate the "Appellants" as working "in concert" with Operation Rescue, Operation Rescue National, IMPACT, Rescue America, Operation Rescue America National, and Operation Goliath. Although the Appellees claim the Appellants' are associated with "Operation Rescue," and frequently cite to that organization, no evidence was presented linking the Appellants to that group in any way.

The Appellees appear to base their allegations on the Order's proscription of activities by those "acting in concert" with the Appellants. However, such a designation begs for the conclusion that the Order is content-based. In fact, Judge McGregor, in applying the Order, stated that when he issued the Order he intended it to **only prohibit pro-life speech.** (IB. App. Vol. 2, 116). At the same proceeding he further stated:

> Mr. Lacy, I understand that those on the other side of the issue were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.

(IB. App. Vol. 2, 105).

Such a content-based Order is clearly unconstitutional on its face because it creates unlawful class distinctions[6] and then prevents that class from exercising their right to associate or peacefully express their political views. As the Chief Justice stated in *Citizens Against Rent Control*, "There are, of course, some activities, legal if engaged by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U.S. at 296. "[T]he Court has consistently disapproved governmental sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185-86 (1972).

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

Appellees also maintain that other events perpetrated by "Appellants" provides justification for broader restraint. However,

> [f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Claiborne Hardware, 458 U.S. at 920. They cite to the death of Dr. Gunn in Pensacola,[7] the recording of license plate numbers,[8] the publishing of "wanted posters"[9] and the supergluing of a lock in particular. (AB. 5-6, 8, 11, 12). As noted in *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941), the right of free speech cannot be denied by drawing from a "rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

The Order clearly prohibits the association and free expression of pro-life, but not pro-choice, demonstrators. The Order is content-based and imputes the unlawful acts of other

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[7] In *Claiborne Hardware* the Court held that, "[T]he fact that the boycott 'intensified' following the shootings of Martin Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the [demonstrators]) figured prominently in the boycott's success." 458 U.S. at 922-23.

[8] This lawful activity is strikingly similar to the events which occurred in *Claiborne Hardware* where the Court held that, "[t]here is nothing unlawful in standing outside a store and recording names." 458 U.S. at 925.

[9] In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court reversed a state appellate court's holding that an injunction against distribution of leaflets near an individual's home was "coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection." *Id.* at 418. The Chief Justice explained that "[t]his Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment." *Id.* at 419.

unnamed and unknown individuals upon the "Appellants" and all others acting "in concert." As the Court stated in *Noto v. United States*, intent to act unlawfully

> must be judged 'according to the strictest law,' for 'otherwise there is danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. 290, 299-300 (1961).

Although Appellees attempt to associate the Appellants with numerous unlawful acts and actors,[10] their stipulation clearly reveals their agreement that Appellants Ed Martin, Judy Madsen and Shirley Hobbs have not blocked access to the clinic.[11] Appellees cite no evidence that these three named Appellants violated the prior September 30, 1992 injunction. Rather, they repeatedly claim that the "Appellants" (apparently referring to one or another of the named organizations or some unknown individual acting "in concert") committed some unlawful or onerous act. (AB. *passim*).[12]

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[10] Appellees appear intent on characterizing the IMPACT teams as a collection of radical, violent gangs roaming the counties seeking opportunities to inflict harm and incite fear in others. (AB. 7-11). Even if this were true, it is improper to affiliate Appelants Martin, Madsen and Hobbs in this activity when Appellees admit they never violated any laws. (AB. 6).

[11] Additionally, even if these Appellants had violated a court's order, such actions could not be attributed to other unnamed "Appellants" supposedly acting "in concert." *See Noto and Claiborne Hardware, supra.*

[12] If Appellees continue to assert the Order addresses those acting "in concert," this court should perceive that the Order is indeed content-based and therefore unconstitutional on its face.

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, 611 (1983). Such denial constitutes an unconstitutional abridgement of the First Amendment guarantee of Freedom of Association. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

C.

The Order Is Unconstitutionally Vague And Overbroad Creating Uncertain Application And Enforcement.

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).

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 is extremely important because a violation of the Order is now subjectively determined by clinic personnel. Thus, jail time is dependent upon someone's subjective ability to see and hear from within the clinic. Moreover, the innocent act of wearing a pro-life t-shirt

places an individual in the unenviable position of incarceration.[13] Reliance on the subjective interpretation of the Order by those responsible for such enforcement renders the Order vague and unconstitutional.

The Order only prohibits pro-life or religious speech within the buffer zone and does not prohibit pro-choice speech. Determining who represents the pro-life or pro-choice view has proved to be difficult in application. In fact, the City of Melbourne is so confused as to the Order's lawful application that it has requested the court to clarify its enforcement.[14] Moreover, the Appellees have also requested the Order be modified which indicates they agree the Order is unconstitutionally vague and overbroad. (AA. 79-84).[15]

D.

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

In the traditional public forum analysis, "access to the streets, sidewalks, parks, and other similar public places . . .

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[13] The clinic personnel now determine those violating the Order along with the police officer's subjective perception as to who is pro-life and who is pro-choice. (IB. App. Vol. 2, 134-35 and 148).

[14] The City filed a Motion To Intervene And To Clarify Amended Permanent Injunction stating in relevant part: "The City requests the Court's guidance as to whether the City is required to make further determination concerning whether person's are 'acting in concert or participation' with the Respondents." (RB. App. 1).

[15] Appellees seek to strike Appelants' Appendix Vol. II, but they in turn try to enter non-record material in the form of a letter dated April 15, 1993 proposing modifications to the Order thereby admitting the Order is unconstitutionally vague.

for the purposes of exercising First Amendment rights cannot constitutionally be denied broadly." *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972). The Appellees agree that public sidewalks and rights of way are traditional public fora. (AB. 22). However, they somehow conclude that the sidewalk at the clinic was specifically designed and built for the exclusive use of the clinic. (AB. 19). From this point Appellees rely on various cases which allow restrictions on speech, but fail to distinguish that these cases either relate to non-traditional public forums or are factually dissimilar. None of the cases cited by Appellees involve an injunctive order of such sweeping magnitude as the one before this court. Appellees also fail to distinguish cited cases which allow volume restrictions in certain circumstances without addressing the Order's overbroad prohibition on "images observable" within the clinic.

Indeed, this Order regulates beliefs and not actions. A pro-life speaker is regulated simply because of that belief whenever that belief enters within the sacred zone. As applied by Judge McGregor, if an individual is "mistakenly" arrested under the Order, the person could "go to the prosecutor and say you've got a big mistake here, this fellow is on the other side of the issue . . . ." (IB. App. Vol. 2, 149).

Though the Appellees claim the Order is a reasonable time, place and manner restriction, not one United States Supreme Court case has upheld time, place and manner restrictions for substantive injunctive orders. "We do not believe . . . that . . . the time,

place or manner decisions assign[ed] to the judiciary [give] the authority to replace [government officials] as the manager of [public forum property]." *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 299 (1984).[16] All such restrictions on constitutionally protected rights should pass through the legislative process to avoid violation of protected speech and activity.[17]

Finally, Appellees state that the Appellants' First Amendment rights are protected by restricting them to the south side of Dixie Way and cite to testimony from Mr. Unterberger. (AB. 33). However, Mr. Unterberger actually stated that the area on the south side of Dixie Way was not conducive to peaceful picketing because a sidewalk is not available (Unterberger Tr. 26) and the slope of the south side tended to dangerously migrate persons toward the street. (Unterberger Tr. 33).

Appellees also cite to Mr. Unterberger for support that public safety is jeopardized by the congestion caused by the picketing and distribution of literature. (AB. 31). Appellees fail to point out that both pro-life and pro-choice picketers are moving about the area near the clinic. (Unterberger Tr. 30-31). The government can protect this interest by the less drastic means of enforcing the traffic laws which regulate pedestrian and vehicle interaction

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[16] *See Gregory v. Chicago*, 394 U.S. 111 (1969); and *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[17] In the case before this court, Judge McGregor both entered the Order and later applied it to numerous persons who were charged with "acting in concert" with the named Appellants.

(Allgeyer Tr. 178) without affecting the demonstrators' First Amendment rights. In sum, the Order is not content-neutral and does not apply the least drastic means available and is therefore patently unconstitutional.

CONCLUSION

The Order is an unconstitutional violation of the Appellants' First Amendment right to free speech because it fails to distinguish between lawful and unlawful speech or activity and is content-based. By prohibiting congregating on a public sidewalk, the Order violates the Appelants' freedom of association in a traditional public forum. Though Appelants Martin, Madsen and Hobbs have performed no illegal activity, the Order nevertheless prohibits their speech and it is therefore unconstitutional and should be dissolved.

Dated this 28th day of May, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellants has been furnished this 28th 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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