No. 98-1856

In the Supreme Court of the United States

LEILA JEANNE HILL, ET AL., PETITIONERS

v.

STATE OF COLORADO, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Colorado Revised Statute § 18-9-122(3) prohibits a person, within 100 feet from any entrance door to a health care facility, from "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area." The question presented is whether Section 18-9-122(3), on its face, violates the First Amendment.

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INTERESTS OF THE UNITED STATES

Colorado Revised Statute § 18-9-122(3) (1998) [hereinafter "subsection (3)"] prohibits a person, within 100 feet from any entrance door to a health care facility, from "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area." Petitioners argue that this limitation on approaching violates the First Amendment.

The Attorney General of the United States has primary responsibility for enforcing the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248. The Access Act prohibits, *inter alia*, the use or threat of force, or physical obstruction, to injure, intimidate, or interfere with any person because that

person is, or has been, obtaining or providing reproductive health services, or to intimidate them from doing so in the future. 18 U.S.C. 248(a)(1). The Access Act provides for criminal and civil enforcement by the Attorney General, as well as private civil enforcement. Injunctive relief is specified as a remedy available under that Act in civil actions brought by the Attorney General, 18 U.S.C. 248(c)(2)(B), and the injunctive relief obtained under the statute can include restrictions on the distance within which protesters may approach persons near a health care facility.[1] The principles that the Court articulates in this case could influence the scope of injunctive relief available under the Act. The United States therefore has a significant interest in the resolution of this case.

The United States also has a significant interest in seeing that adequate relief is available against those who impede access to medical clinics, as well as preserving the ability of citizens to exercise their First Amendment rights in a manner compatible with the rights of others.

STATEMENT

1. On April 19, 1993, Colorado enacted Colorado Revised Statute § 18-9-122. See J.A. 16-17; App., *infra*, 1a-2a. In subsection (1), the state legislature set forth its purpose:

> The general assembly recognizes that access to health care facilities for the purpose of obtaining

[1] See *United States* v. *Scott*, 187 F.3d 282 (2d Cir. 1999) (upholding injunction prohibiting an individual with a record of harassment and violation of court orders from demonstrating within 14 feet of a clinic or positioning himself within five feet of persons who have indicated unwillingness to receive literature or speech from him).

> medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. * * *

To implement this purpose, subsection (2) makes it a misdemeanor if a person "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility," and subsection (3) establishes the approach limitation at issue here, making it a misdemeanor to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility."

The House and Senate Judiciary Committees of the Colorado legislature devoted considerable attention, during the hearings that preceded enactment of subsection (3), to the question of balancing the need of patients for safe, unobstructed access to health care facilities against the right of others to engage in expressive conduct. J.A. 58-216. Evidence was introduced at the hearings demonstrating that on numerous occasions, conduct by protesters outside health care facilities providing abortion-related services included efforts to block access to the facility, as well as to harass and intimidate patients and staff. J.A. 63, 66-71, 105. The

legislature also learned that efforts to identify persons who committed physical assaults outside health care facilities were unsuccessful because it was not possible to identify the assailants in the large crowd of people present. J.A. 94. In addition, witnesses testified that the presence of escorts for patients was insufficient to permit safe access to health care facilities. J.A. 70.

Evidence before the state legislature also established that, out of 60,000 patients who obtained services at one of the health care facilities discussed, only seven percent were there to seek counseling or services related to abortions. Nevertheless, all patients were subjected to the same treatment by protesters. J.A. 62. A witness, speaking on behalf of persons with disabilities, also testified about protests related to issues other than abortion, which escalated beyond aggressive advocacy and led to assaults on two people with disabilities. J.A. 155. The witness testified that protesters who use such tactics create a particularly difficult situation for persons with physical disabilities who are seen as "easy to push around." *Ibid.*

Proponents of subsection (3) argued that it was a reasonable time, place, and manner restriction (J.A. 60, 114, 116, 123), noting that the eight-foot approach limitation is smaller than restrictions found in some other statutes and ordinances (J.A. 61, 116, 149). Opponents argued that while some protesters may engage in obstructive or intimidating conduct, the pro-life movement is largely engaged in peaceful advocacy (J.A. 73, 96, 179, 181), and merely tries to provide information about alternatives to abortion (J.A. 73, 168, 181).

2. Petitioners are three individuals who demonstrate on sidewalks and roadways outside health care facilities where abortion counseling, services, and procedures are provided. Pet. App. 10a. Petitioners use various methods of communication to "educate, dissuade,

inform and advise individuals about abortion and abortion alternatives," including verbal communication, placards, leaflets, and other demonstrative devices. *Ibid.*

In October 1993, petitioners filed a complaint in state court seeking a declaratory judgment that subsection (3) violates their federal constitutional rights to freedom of speech, press, peaceable assembly, due process, and equal protection (J.A. 20-29) and seeking an injunction against enforcement of the statute by the State of Colorado and various state and local officials who were sued in their official capacities (collectively "the State"). Pet. App. 4a, 30a-31a. The trial court granted the State's motion for summary judgment, *id.* at 30a-37a, holding that subsection (3) is content-neutral and is a valid "time, place and manner" restriction, narrowly tailored to serve a significant government interest, *i.e.*, preventing the "abuses that impede ingress and egress to medical facilities," *id.* at 33a-34a. The trial court found that subsection (3) "leaves open ample alternative means of communication" because at the eight-foot distance petitioners' signs and leaflets can be seen, and speech can be heard. *Id.* at 34a. The trial court also held that the statute is not overbroad, vague, or an unlawful prior restraint. *Id.* at 34a-36a.

3. The Colorado Court of Appeals affirmed, likewise holding that subsection (3) is a content-neutral restriction narrowly tailored to serve a significant governmental interest, "namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities." Pet. App. 43a. The court emphasized that reasonable alternative means for communication remain available, because the eight-foot limitation on nonconsensual approaches does not prevent the intended audience from hearing the oral communication or seeing the posters and signs.

Ibid. The court also rejected petitioners' claims that the statute is vague and a prior restraint. *Id.* at 44a-45a. The Colorado Supreme Court denied discretionary review. *Id.* at 46a.

4. Petitioners sought review in this Court. While their petition for certiorari was pending, the Court decided *Schenck* v. *Pro-Choice Network*, 519 U.S. 357 (1997). In *Schenck*, the Court upheld, against First Amendment challenge, an injunction banning "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" to an abortion clinic (termed a "fixed buffer zone"), *id.* at 380-385,[2] but invalidated an injunction banning demonstrations "within fifteen feet of any person or vehicle seeking access to or leaving" a clinic (termed a "floating buffer zone"), *id.* at 377-380. The Court held that the fixed zone was necessary to ensure access by car and foot to the clinic entrances and parking lots, *id.* at 380, but the floating zone burdened more speech than was necessary and, because of the way it operated, made it difficult for a protester "who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction," *id.* at 378.

On February 24, 1997, this Court granted petitioners' petition for certiorari, vacated the Colorado Court of Appeals' judgment, and remanded the case for further consideration in light of *Schenck*. Pet. App. 47a-48a; 519 U.S. 1145 (1997).

5. a. On remand, the Colorado Court of Appeals again upheld subsection (3). Pet. App. 51a-57a. The court noted that *Schenck* "expressly declined to hold

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[2] The injunction permitted two sidewalk counselors to continue their activities on condition they would back off to a distance of 15 feet if the target of the counseling so requested. 519 U.S. at 367.

that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protestors." *Id.* at 55a. The court of appeals ruled that "the applicable analysis to assess the statute before us" (as opposed to the injunctions at issue in *Schenck* and in *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994)), "is that adopted in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989)." Pet. App. 55a.

Applying the *Ward* standard, the court of appeals ruled that subsection (3) is constitutional. It emphasized that the eight-foot limitation imposed on nonconsensual approaches was justified by the governmental interests (supported by evidence that was before the legislature) in ensuring access to medical care by all persons, not just those seeking abortion services, including "persons with disabilities who lack the physical ability to move through crowds." Pet. App. 56a. The court also found that ample alternative channels for communication other than leafletting were available within 100 feet of the entrance to health care facilities, including oral speech, placards, and other visual items. *Id.* at 57a. The court rejected petitioners' contention that it was too difficult to maintain the necessary distance from nonconsenting persons, emphasizing that the statute prohibits only nonconsensual approaches within eight feet that are made "knowingly," so that a prosecution could not be based on an inadvertent violation. *Ibid.*

b. The Colorado Supreme Court granted review, limited to the question whether subsection (3) is constitutional in light of *Schenck*. Pet. App. 58a-59a. The Court concluded that the statute at issue in this case should receive more deference than the injunction at issue in *Schenck*, *id.* at 19a; that the statute is content-

neutral and therefore properly analyzed under the *Ward* standard; *id.* at 21a-22a, and that it constitutes a reasonable restriction on the time, place, and manner of petitioners' speech, *id.* at 22a-28a.

The court found that subsection (3) furthers the significant government interest in ensuring access to health care facilities to obtain medical counseling and treatment which, the legislative record established, was being hampered by "harassing, confrontational, and violent conduct." Pet. App. 26a. The court also found that the statute is narrowly drawn to further that interest, distinguishing the restriction in *Schenck* on several grounds. First, the requirement of a "knowing[] approach"—including both a mens rea requirement ("knowingly") and an actus reus requirement ("approach")—eliminates the risk that protesters could violate the restriction inadvertently, or even by deliberately standing still while an individual approaches the protester. *Id.* at 24a-25a. The court explained:

> If one of the petitioners is standing still within the fixed buffer zone, and an individual walks toward him or her, the petitioner need not change his or her physical positioning to maintain eight feet of distance and thus avoid violating the statute, even if the approaching individual comes within less than eight feet of the petitioner. In other words, so long as the petitioner remains still, he or she cannot commit the actus reus of approaching, even though he or she may well have the requisite mens rea of "knowingly." Thus, in any scenario, petitioners are free to attempt to speak with whomever they wish and they will not violate the statute, so long as the mens rea and actus reus do not coincide. * * * Therefore, any risk of an inadvertent violation

> involving an "innocent" passer-by is, at most, de minimus.

Ibid.; see also *id.* at 28a.

Second, the eight-foot limitation on approaches established by the Colorado statute is small enough to allow protesters to communicate across that distance in normal conversational tones, unlike the fifteen-foot buffer zone in *Schenck*. Pet. App. 28a. The Colorado Supreme Court therefore did not believe that, "even under the *Schenck* test, [subsection] (3) burdens more speech than is necessary." *Ibid.*

Finally, the Colorado Supreme Court held, subsection (3) allows ample alternate means of communication. Pet. App. 26a-28a. The court emphasized that "[p]etitioners, indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion." *Id.* at 26a-27a. "On its face, there is nothing that prohibits protesters from being seen and heard by those accessing health care facilities as well as passers-by." *Ibid.*

SUMMARY OF ARGUMENT

Subsection (3) of Colorado Revised Statutes § 18-9-122 limits to eight feet the distance within which a person can knowingly approach another person who is within 100 feet of a health care facility, without that latter person's consent. The statute is intended to ensure safe, unobstructed access to health care facilities in the State. It is aimed at prohibiting the crowding, harassing, coercive, and threatening conduct in close proximity to patients which the legislative record demonstrated often accompanies communication in front of health care facilities and impedes safe, unobstructed access to them. Subsection (3) does not create a floating buffer zone or a speech-free zone. Petitioners remain free to engage in communicative conduct, such as

oral persuasion, leafletting, and sign displays, within arms' length of persons entering and leaving a health care facility (as well as passers-by), while standing on the public way leading to health care facilities. What petitioners cannot do within 100 feet of the entrance to a health care facility is knowingly approach a person closer than eight feet without the person's consent.

Subsection (3) is a valid, content-neutral regulation of the time, place, and manner of speech. The fact that it applies to approaches for the purpose of engaging in oral protest, education, or counseling does not render it content-based. The limitation applies irrespective of the subject or the viewpoint. The statute also is not content-based merely because it leaves unregulated a small category of everyday communications or because it allows a person to deny consent for a speaker to approach within eight feet.

The statute furthers the government's significant, indeed compelling, interest in ensuring its citizens the freedom to seek lawful medical services by providing for safe, unobstructed access to health care facilities, without burdening more speech than necessary. The statute is narrowly tailored to address the problem of expressive conduct that threatens safe access to health care facilities, because the statute merely imposes a limitation on approaches to persons who do not want to be in close physical proximity to protesters. That tailored approach is particularly appropriate here where the majority of such persons are seeking medical services and frequently are vulnerable because of an illness, and may not be able to choose a different health care provider because of limitations imposed by insurance or accessibility. The statute leaves open ample alternative means of communication. The eight-foot limitation on approaches does not prevent communication at closer range if the protestor is stationary

and the distance is closed by the listener. And, even at eight feet, speech can be readily heard and placards clearly seen.

Even if subsection (3) is analyzed as a content-based limitation, it survives constitutional scrutiny in light of the compelling government interest at stake and the narrowly tailored nature of the limitation on approaches.

ARGUMENT

COLORADO REVISED STATUTE § 18-9-122(3) IS NOT FACIALLY INVALID UNDER THE FIRST AMENDMENT

A. Subsection (3) Is A Reasonable Regulation Of The Time, Place, And Manner Of Speech Rather Than Its Content

1. Subsection (3)'s prohibition on an approach at a distance closer than eight feet, within 100 feet of the entrance to a health care facility, regulates the conduct of speakers and not their message. There is no message that petitioners are prevented from communicating to people entering, leaving, or passing by a health care facility. Nor does the statute create a speech-free zone around persons who enter, leave, or pass by a health care facility, like the zone disapproved by this Court in *Schenck*.

First, what is prohibited within eight feet of a targeted listener is not speech, but only a "knowing[] approach." If the distance between speaker and audience is closed by the listener and not by the speaker, there can be no violation of the statute. Thus, petitioners may station themselves on the public way or sidewalk leading to a health care facility, including near the entrance, in a location that must be passed by anyone entering or leaving the facility, and there petitioners may engage in any manner of communication

directed toward those entering, leaving, or passing by the facility—including speaking, leafletting, and sign displays—even if they are only a few feet from such persons.

Second, if protesters are not successful in stationing themselves closer than eight feet to their audience without making a prohibited approach, the eight-foot limitation on approaches created by the statute is sufficiently modest to permit protesters to deliver their message in normal conversational tones, and to display signs and posters that can easily be seen and read. See *Madsen*, 512 U.S. at 770 (demonstrators could "still be seen and heard" at a distance of 10 to 12 feet). The only thing petitioners may not do is pursue within striking distance of their audience. Eight feet is close enough to deliver a message, but not close enough to obstruct access or to deliver a blow.

Thus, it is not true, as petitioners' amici claim (American Federation of Labor and Congress of Industrial Organization (AFL-CIO) Br. 7), that the statute "entirely precludes normal handbilling and leafletting." What it precludes is an unconsented approach at a distance of less than eight feet. For example, some persons entering or leaving the facility may seek to maximize the physical distance between themselves and petitioners. In that circumstance, the limitation on approaching prohibits protesters from following or pursuing the person at a distance closer than eight feet. More generally, the limitation prohibits protesters from closing the distance between themselves and others, including in some instances, in a targeted manner that can easily resemble an assault or quickly lead to obstructive behavior.

In *Schenck* the Court expressly reserved the possibility that government interests could "justify some sort of zone of separation between individuals entering

the clinics and protesters, measured by the distance between the two." 519 U.S. at 377. Colorado has carefully avoided the deficiencies this Court identified in *Schenck* as fatal to the zone created in that case. First, unlike in *Schenck*, what is prohibited here is not speech but an "approach," and, therefore, there is no zone that "floats" with the listener in a way that lets him or her push a speaker into the street or into violation of the law by walking near the speaker. And second, the eight-foot limitation on approaches created here, unlike the 15-foot zone struck down in *Schenck*, is narrowly tailored to the purpose of preventing assaults, intimidation, and obstruction without unduly burdening speech.

2. a. Subsection (3)'s limitation on the distance within which a person can approach for the purpose of certain specified types of expressive conduct does not depend on the content of that expression. With respect to the display of signs or the passing of a leaflet or handbill, the content-neutrality of the statute cannot fairly be disputed. See Pet. Br. 9 (noting that eight-foot limit on nonconsensual approaches within 100 feet of health care clinic applies to pizzeria employee distributing coupons, nurse distributing flyer about working conditions, and evangelist distributing religious tracts). Thus, it is clear that the constitutionality of those limitations under the First Amendment is properly decided by determining whether they are reasonable time, place, or manner restrictions. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790-791 (1989).[3]

Petitioners claim (Br. 32, 34) that when the limitation is applied to unconsented oral protest, education, or

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[3] There appears to be no dispute that the public way and sidewalk areas covered by subsection (3) are areas that the Court has traditionally treated as a public forum.

counseling, it becomes content-based and, thus, subject to a higher level of constitutional scrutiny. That is incorrect. To begin with, subsection (3)'s limitation on approaches is not based on the subject matter or viewpoint of the communication. It applies to persons who knowingly approach for the purpose of protesting, educating, or counseling about animal testing, labor issues, religion, politics, or any other subject. And it applies to persons who approach for the purpose of protesting, educating, or counseling about any side of any issue. Indeed, subsection (3) applies not only to protesters, but also to escorts at a health care facility who, like all others, cannot, within 100 feet of the door of a facility, knowingly approach within eight feet of someone for the purpose of protesting, educating, or counseling, unless they obtain the consent of that person. Thus, the conduct limitation here is far different from the viewpoint and subject-matter distinctions at issue in cases such as *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-385 (1992), and the restrictions placed on speech because of listeners' reactions in cases such as *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 868 (1997); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133-135 (1992); and *Boos* v. *Barry*, 485 U.S. 312, 321 (1988).

The history of subsection (3) confirms that it prohibits a person from knowingly approaching within eight feet of another person irrespective of whether the person is an opponent or proponent of abortion rights, animal rights, Medicaid regulations, or labor issues. A witness before the Colorado legislature, speaking on behalf of persons with disabilities, testified about instances in which animal rights activists and anti-

Medicaid protesters engaged in assaultive, obstructive, and intimidating conduct that impeded the access of those with disabilities to medical facilities. J.A. 107-108. The legislator who proposed what became subsection (3) expressly referred to that testimony in describing the "overall purpose of this Bill, which is not directed solely toward [any] type[] of clinic[], but, rather, towards the right of any patient to seek the medical treatment they need." J.A. 113. Thus, there is no evidence that the State "adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.[4]

Rather than being aimed at any particular speech content, subsection (3) is aimed at the conduct that the legislative record demonstrated often accompanies communication in front of health care facilities and impedes safe, unobstructed access to them. That conduct includes crowding, harassing, threatening, and coercive conduct in close proximity to patients.

The Colorado legislature had a substantial basis to conclude that expressive conduct near the State's health care facilities often leads precipitously to obstructive and assaultive conduct. Several persons who escorted patients from their cars into reproductive health care facilities testified before the legislature that protesters surrounded vehicles and patients from the time they entered the parking lot until the entrance of health care facilities in order to prevent patients' access to the facilities. J.A. 70-71, 98-99, 105. One escort testified about her experiences before the enactment of

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[4] Indeed, that subsection (3) was not enacted to regulate disfavored speech is confirmed by the fact that it does not protect any patient, doctor, or passer-by from hearing and seeing any protester's message, however offensive to them, and at most keeps the speaker eight feet from the listener.

a Denver ordinance that placed an eight-foot buffer between protesters and patients:

> Being an escort at that time was truly a frightening experience. We weren't afraid of signs, we weren't afraid of pamphlets, we weren't afraid of words. We were afraid of being physically assaulted, which we were numerous times. We were sorely afraid for our physical safety.

J.A. 93. Another escort testified that she had "been hit by men twice [her] size" while trying to escort patients into a health care facility. J.A. 105.

b. Petitioners are understandably vague about the nature of the alleged content discrimination about which they complain. They note only (Pet. Br. 32 n.23) that the greeting "good morning," or the recitation of a few lines of literature, would not be subject to the statute. Petitioners' amici similarly emphasize (American Civil Liberties Union (ACLU) Br. 10; AFL-CIO Br. 8) that subsection (3) allows a person to approach another person within eight feet to ask for directions or for the time, regardless of whether they are within 100 feet of the entrance to a health care facility. Admittedly, such fleeting, ordinary communications do not appear to constitute the sort of "protest, education, or counseling" that is the subject of the statute. But those trivial exceptions do not render subsection (3) the sort of content-based statute to which this Court has ordinarily applied strict scrutiny.

The statute does not except such communications because of some legislative preference for their content. It is simply that such everyday communications are much less likely than protest, education, or counseling to implicate the concerns that prompted the Colorado legislature to act. Such communications are generally random and fleeting and rarely, if ever, are accompa-

nied by the sort of obstruction, hounding, or other coercive conduct that reasonably could be perceived as threatening. Moreover, that the statute merely leaves unregulated a small category of everyday communications does not render it content-based. The limitation in this case is as content-neutral as was the provision at issue in *United States* v. *Grace*, 461 U.S. 171 (1983), where the Court considered a statutory ban, on the grounds of the Supreme Court, on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* at 176. The Court interpreted the statute to apply to signs, picketing, and leaflets. *Ibid.* And, although that statute technically was not oblivious to content because it banned the specified expressive conduct only if it was "designed or adapted to bring into public notice [a] party, organization, or movement," the Court concluded that it encompassed "almost any" sign or leaflet carrying a communication, *ibid.*, and treated the ban as a "facially content-neutral" prohibition, *id.* at 181 n.10, that was properly analyzed under the time, place, and manner standard. *Id.* at 181-184.[5]

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[5] Amici AFL-CIO suggests (Br. 8), without citing any support in state law, that the approach limitation of subsection (3) ordinarily would not apply to the solicitation of funds for a charity, the promotion of free samples of a commercial product, or the conduct of a survey. Whether or not that is so, those are different "types of expressive conduct" and the Court has not viewed prohibitions that distinguish among such types of speech as raising content discrimination issues. See *Grace*, 461 U.S. at 181 n.10 (prohibition on certain communicative displays held to be content-neutral despite fact that it did not purport to prohibit oral expression); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-649 (1981) (restriction only on distribution and sale of written materials and solicitation of funds held to be content-neutral because it applied evenhandedly to all who engaged in that type of expressive conduct).

c. Petitioners (Br. 33) and their amici (ACLU Br. 12) are incorrect when they argue that, because the statute allows a person to determine if a protester may approach within eight feet of the person by deciding whether to give consent to an approach, it is content-based. The Court rejected the same argument in *Schenck*. In *Schenck*, 519 U.S. at 384, the Court upheld a portion of the injunction that applied to the two protesters who were allowed to remain in the 15-foot fixed buffer zone around the clinic, and required them to cease and desist and to back away 15 feet whenever a targeted person indicated that he or she did not want the counseling they offered. The Court rejected the contention that the provision was content-based even though "it allows a clinic patient to terminate a protester's right to speak based on, among other reasons, the patient's disagreement with the message being conveyed." *Ibid.*

Similarly, in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), a religious group had argued that a restriction was content-based because it limited the distribution and sale of written material and charitable solicitations at a state fair to a booth and, thus it required that they "await expressions of interest from fair patrons" before engaging in the specified expressive conduct. *Id.* at 649 n.12. The Court rejected the claim that the restriction was content-based simply because it "prefer[red] listener-initiated exchanges to those originating with the speaker." *Ibid.* The Court reasoned that that aspect of the restriction was "inherent in the determination to confine [such expressive conduct] to fixed locations," it applied alike to all such expressive conduct, and thus did not "invalidate the [restriction] as a reasonable time, place, and manner regulation." *Ibid.*

Petitioners' similar argument should fare no better here. The Colorado statute leaves petitioners free to communicate their message at a distance of eight feet, or closer if no knowing approach is involved.

3. The constitutionality of a statutory content-neutral time, place, or manner restriction is assessed under the standard set forth in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), and similar cases. *Madsen*, 512 U.S. at 764. A content-neutral restriction on speech is consistent with the First Amendment if it furthers a legitimate, content-neutral governmental interest, is narrowly drawn to accomplish that interest, and leaves open ample alternatives for communication. *Ward*, 491 U.S. at 797-799 (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). Put another way, such a statute is constitutional if it does not burden "substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

a. Subsection (3) meets that test. It furthers Colorado's significant, indeed compelling, interest in ensuring its citizens the freedom to seek lawful medical or counseling services by providing for their safe access to health care facilities, which the state legislature described as "imperative." Pet. App. 64a. The State undoubtedly has a substantial interest in protecting persons in need of medical care from invasive, unwanted physical approaches. Cf. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624 (1995) (upholding against First Amendment challenge state bar rule that prohibited personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives within 30 days of an accident or disaster); *National Labor Relations Bd.* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783 n.12, 784 (1979) (approving no-solicitation rule not only in patient-care areas of hospital, but also in more

common areas where patients, families, and doctors are frequently present, "often during times of crisis," and noting "the importance of maintaining a peaceful and relaxed atmosphere within hospitals"). Subsection (3) was enacted against a background of "widespread, violent confrontations" (Pet. App. 6a), and furthers the State's interest in ensuring public safety and order and promoting the free flow of traffic on public streets and sidewalks. The combination of those interests fully justifies an appropriately tailored statute. Cf. *Schenck*, 519 U.S. at 376 (injunction provisions justified by governmental interest in ensuring public safety and order, including concern about "the fights that threatened to (and sometimes did) develop," and in promoting the free flow of traffic at such locations); see also *Madsen*, 512 U.S. at 767–768.

b. (*i*) Subsection (3) is narrowly drawn to accomplish the governmental interests at stake. It is tailored to address the particular problem that was before the Colorado legislature—overly close, harassing, and coercive conduct that threatened the safe, unimpeded access to health care facilities. Evidence before the state legislature demonstrated that less restrictive alternatives had not been successful in achieving that goal. Medical staff personnel who escorted patients to clinics in the presence of protesters testified that their presence did not prevent obstructive, intimidating, and assaultive activity. J.A. 67, 69-71, 93-94, 98-99, 105-106, 108-109. Also, the state legislature had before it evidence that a local city ordinance that relied on an eight-foot limitation had been shown to provide the space necessary to ensure unimpeded access to a health care facility. J.A. 71, 154. The evidence indicated that enforcement of assault laws was hampered by the inability to identify assailants in the large crowd of people present, see J.A. 94. Cf. *Schenck*, 519 U.S. at

382 (noting that "a prophylactic measure was even more appropriate" because defendants' harassment of police "hampered the ability of the police to respond quickly to a problem"); see also *Burson* v. *Freeman*, 504 U.S. 191, 206-207 (1992) (plurality opinion) (noting that other means of prohibiting intimidation at polls were not adequate because acts of interference at polls would go undetected since law enforcement officers are generally barred from the vicinity to avoid appearance of coercion in election process).

As explained above (pp. 11-13), subsection (3) imposes a limitation on approaches, not a prohibition on all speech within a particular zone. Petitioners remain free to station themselves along the public way leading to a health care facility and communicate their message in any manner within arms' length of all those who pass. Thus, the limitation of subsection (3) applies principally where the target of the speech does not want to be in close physical proximity to protesters. Even then, the limitation is tailored so that the person who does not consent to the approach is able to avoid only the physical proximity of the speaker, not speech which he or she can both see and hear at eight feet.

The narrowly drawn limitation of subsection (3) is wholly consistent with the recognition by this Court in certain situations that the First Amendment does not provide an unlimited right to force speech upon unwilling listeners who take steps to avoid the speech. The Court has long recognized that there is no right to make a passer-by take a leaflet. See *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion); *Schneider* v. *New Jersey*, 308 U.S. 147, 160 (1939) (protesters could not "insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet"); *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810

(1984) (passer-by may accept or reject written material offered to him). That recognition is particularly important here, where the State was prompted to act by evidence that citizens were being denied the ability to turn away or avoid unwanted speech because of the accompanying coercive and threatening conduct. Moreover, the intended audience consists in large part of persons seeking medical care or counseling who, in many instances, are ill or in a physically weakened condition and may not be able to choose a different health care provider because of limitations imposed by insurance or accessibility. The statute is narrowly drafted to shield them not from the message proffered by protesters—the speech—but from a close physical approach that would be threatening, intimidating, or otherwise physically harmful. Cf. *Frisby* v. *Schultz*, 487 U.S. 474, 484-485 (1988) (recognizing the government's interest in protecting people from unwanted speech in their homes where they are captive and cannot avoid speech they do not want to hear); *Rowan* v. *Post Office Dep't*, 397 U.S. 728, 738 (1970) (same).

(*ii*) The eight-foot limitation on nonconsensual approaches within 100 feet of the entrance to a health care facility is substantially less restrictive than the 36-foot buffer zone on public property around clinic entrances upheld in *Madsen* in which all "congregating, picketing, patrolling, [and] demonstrating" was banned. 512 U.S. at 768-770. Subsection (3) is also more narrowly tailored than the 15-foot buffer zone around clinic entrances, which permitted only two protesters therein and which was upheld in *Schenck*. 519 U.S. at 380-381 & n.11. Moreover, the record underlying enactment of subsection (3) is similar to the evidence on which this Court relied in *Schenck* to uphold the ban on all demonstrations (except for two counselors subject to a cease-and-desist requirement) within 15 feet of en-

trances to medical facilities. The Court emphasized (*id.* at 381-382) that

> the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, non-obstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars.

In light of the evidence before the Colorado legislature of threatening conduct that escalated to assaults, the legislature was entitled to conclude that, if approaching protesters were not kept a short distance from those who take steps to avoid the protesters, such assaultive or threatening behavior would recur.

Petitioners attempt (Br. 37) to equate subsection (3) to the 300-foot injunction provision struck down in *Madsen* which restricted demonstrators from approaching any person seeking services at the clinic unless that person indicated a desire to communicate. Subsection (3) is different from that injunction provision in several significant respects. First, the limitation on approaches ensures that the speech will still be heard by the intended audience because the approacher can remain within a eight-foot distance from which his or her speech can be heard and any displayed sign or placard seen. Thus, patients and passers-by still must tolerate any speech they believe to be "insulting, and even outrageous." See *Madsen*, 512 U.S. at 774. Second, the consent provision applies only to approaches that are knowing. Third, the limitation here specifies the prohibited distance of approach, curing the uncertainty present in *Madsen*. Fourth, the eight-foot

limitation on nonconsensual approaches applies only within 100 feet of a health care facility, one-third of the distance in *Madsen*.

(*iii*) Petitioners (Br. 25-26, 43-44) and their amici (AFL-CIO Br. 7; ACLU Br. 21) argue that subsection (3) cannot pass constitutional muster because the eight-foot limitation on nonconsensual approaches prohibits "normal handbilling and leafletting." But, as explained above (pp. 11-12), traditional leafletting is only minimally affected by the statute. The statute does not restrict a leafletter from stationing himself in one location and handing out leaflets to persons walking by that location. It merely limits a leafletter situated within 100 feet of the entrance to a health care facility from knowingly approaching within eight feet of a person who declines to pass closely by or to give consent for a closer approach. Within the 100-foot area, leaflets can be seen and offered in non-obstructive, non-violent, ways, including by persons standing on the public way itself. When the limit on approaches applies, if a protester shows the leaflet to a person at eight-feet and the person wants the leaflet, it takes only a step or two from either person for the leaflet to be handed over.

The Court has held that a much broader restriction on the distribution of leaflets is permissible as a time, place, and manner restriction. In *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a state agency rule that made it a misdemeanor to, *inter alia*, distribute any printed or written material at a state fair from any location other than a stationary booth. The Colorado statute's limitation on nonconsensual approaches within eight feet of another person for purposes of distributing leaflets is far less of a restriction than the limitation in *Heffron*.

(*iv*) When determining whether a statute is narrowly tailored, the Court does not "sift[] through all the available or imagined alternative means" of regulation, but instead finds that requirement satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 797-799 The determination by the Colorado legislature that an eight-foot distance was the appropriate limitation to ensure safe, unobstructed access to state health care facilities satisfies that standard and should be accorded deference. In *Burson*, 504 U.S. at 381, the Court deferred to the determination of a state legislature that had enacted a restriction on all campaigning speech within 100 feet of polling places. The Court specifically rejected the state supreme court's decision that 25 feet would suffice, as opposed to the 100 feet imposed by the legislature, holding that the legislature did not make an unconstitutional choice in forcing its citizens to walk an additional 75 feet. See also *Schenck*, 519 U.S. at 377 (although "one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access," the Court "defer[red] to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear"); *Madsen*, 512 U.S. at 769-770 ("some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review").

Contrary to the arguments of petitioners (Br. 42-43) and their amici (ACLU Br. 20), Colorado should not be limited to ensuring access to clinics only through enforcement of its statutes prohibiting obstruction, violence, or harassment. As this Court noted in *Schenck*, 519 U.S. at 381-382, it has rejected that notion in cases such as *Burson*: "Intimidation and interference laws

fall short of serving a State's compelling interests because they deal with only the most blatant and specific attempts to impede elections." 504 U.S. at 206-207 (internal quotation marks omitted). Colorado determined that its laws prohibiting obstruction and harassment were insufficient to protect the interest in ensuring access to medical care. That finding is reasonable and supported by the legislative record. See p. 20, *supra*.

c. The Colorado statute leaves open ample alternative means of communication. Indeed, subsection (3) does not ban any speech, protests, demonstrations, placards, or signs from any sidewalks or other areas. Petitioners can communicate any message they want to all persons entering or exiting a health care facility or passing by. Petitioners are able to protest, educate, counsel, or engage in any other expressive conduct on the public way or sidewalk outside a health care facility, within arms' length of persons entering and leaving, while standing in one place. Only when a person denies consent for petitioners to approach him or her within eight feet does the eight-foot approach limitation apply. And, even at a distance of eight feet, speech can easily be heard and placards clearly seen. See *Madsen*, 512 U.S. at 770 (where demonstrators allowed to get within only ten to 12 feet of their intended audience, demonstrators could "still be seen and heard").

B. Even If Subsection (3) Is Analyzed As A Content-Based Limitation, It Survives Constitutional Scrutiny

As demonstrated above, subsection (3) is not content-based, but even if it were, it would survive constitutional scrutiny. A content-based restriction on speech is valid if it is necessary to serve a compelling state interest and is narrowly tailored to serve that end.

Burson v. *Freeman*, 504 U.S. 191 (1992); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Subsection (3) withstands the test.

As discussed above, subsection (3) furthers a compelling state interest in ensuring the safe access of its citizens to health care facilities so that they can obtain medical care and counseling. That interest is of paramount importance because safe access is central to the health and well-being of the State's citizens. Subsection (3) also furthers the necessarily-included state interest in safe access of a particular group of persons to a particular type of health care, *i.e.*, "protecting a woman's freedom to seek pregnancy-related services." *Schenck*, 519 U.S. at 376.

The statute accomplishes those objectives without burdening any more speech than necessary. The Colorado statute is narrowly tailored to serve the compelling state interests at stake. In *Burson* v. *Freeman*, this Court upheld a plainly content-based ban on campaigning (including the display or distribution of written campaign materials) within 100 feet of election polls as justified by the governmental interests in preventing voter intimidation and fraud. 504 U.S. at 211 (plurality opinion); *id.* at 216 (opinion of Scalia, J., concurring in the judgment). That ban was far broader than the restriction at issue here, which only limits to eight feet the distance within which a person can approach another person, without consent, for purposes of communication within 100 feet of the entrance to a health care facility. Unlike the 100-foot campaigning-free zone imposed in *Burson*, the eight-foot distance imposed here does not create any speech-free zone and, even where the limitation on approaches applies, it still

permits the communication to be heard and seen by the intended audience.[6]

CONCLUSION

The judgment of the Supreme Court of Colorado should be affirmed.

Respectfully submitted.

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[6] The Court should reject petitioners' contention (Br. 27-31) that the statute is a prior restraint because it "subjects * * * speech to the permission of a person deputized by the state," *id.* at 27-28, and petitioners' argument (Br. 45-50) that subsection (3) is unconstitutionally vague, for reasons similar to those on which it relied in *Madsen*, 512 U.S. at 763-764 n.2 (prior restraint); *id.* at 775-776 (vagueness), and *Schenck*, 519 U.S. at 374 n.6 (prior restraint), *id.* at 383 (vagueness). Petitioners also argue (Br. 22-27) that subsection (3) is unconstitutionally "overbroad," in the sense that it is "a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Br. 24 n.17. For the reasons discussed above, subsection (3) is not such a statute.

APPENDIX

Section 18-9-122 of the Colorado Revised Statutes provides:

18-9-122. Preventing passage to and from a health care facility - engaging in prohibited activities near facility. (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.