

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JUDY MADSEN, ET AL., Petitioners v. WOMENS
HEALTH CENTER, INC. ET AL.

CASE NO: No. 93-880

PLACE: Washington, D.C.

DATE: Thursday, April 28, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JUDY MADSEN, ET AL., :

4 Petitioners :

5 v. : No. 93-880

6 WOMENS HEALTH CENTER, INC. :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Thursday, April 28, 1994

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 MATHEW D. STAVEN, ESQ., Orlando, Florida; on behalf of
16 the Petitioners.

17 TALBOT D'ALEMBERTE, ESQ., Tallahassee, Florida; on behalf
18 of the Respondents.

19 DREW S. DAYS, III, ESQ., Solicitor General, Department of
20 Justice, Washington, D.C.; on behalf of the United
21 States, as amicus curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-880, Judy Madsen v. Womens Health Care
5 Center.

6 ORAL ARGUMENT OF MATHEW D. STAVER

7 ON BEHALF OF THE PETITIONERS

8 MR. STAVER: Mr. Chief Justice and may it please
9 the Court:

10 Neither Judy Madsen, Ed Martin, nor Shirley
11 Hobbs surrender their constitutional rights to free speech
12 when they enter the speech free zone surrounding the Aware
13 Clinic. This case is about the right to peacefully
14 display a sign and distribute literature in a traditional
15 public forum. Petitioners do not seek to trespass or
16 blockade, nor are those portions of the injunction
17 challenged here today.

18 In a nonpublic forum, this Court noted that one
19 need not ponder the contents of a pamphlet or leaflet in
20 order to mechanically take it from someone's hand.
21 Despite this Court's holding, the injunction totally bans
22 literature distribution.

23 This Court recognized in Bray and in Casey that
24 men and women of good conscience have common and
25 respectable reasons for opposing abortion. Indeed,

1 abortion speech, or speech about abortion lies at the very
2 core of the First Amendment.

3 If the First Amendment really means that speech
4 must be uninhibited, robust, and wide open, the injunction
5 must be dissolved. The injunction violates petitioner's
6 right to free speech because it is both viewpoint-based
7 and a prior restraint, and because it lacks precision.

8 Viewpoint-based regulations like prior
9 restraints come to this Court with a heavy presumption
10 against their constitutional validity.

11 QUESTION: Why do you say it's viewpoint-based,
12 Mr. Staver?

13 MR. STAVER: Your Honor, Mr. Chief Justice, the
14 reason why it's viewpoint-based is, Judy Madsen is
15 restrained once she enters the 300-foot buffer zone. When
16 she enters that zone, she can only speak if the listener
17 favorably reacts to that speech. When she enters this
18 zone, the injunction states that she can only speak if
19 someone approaches her, extends a hand, or she can
20 continue to speak only if they show a positive interest in
21 what she has to say.

22 Also, the injunction is specifically addressing
23 Judy Madsen's speech, which in context is more than
24 activities which it restrains, but goes to speech. Judy
25 Madsen's speech at the abortion clinic is clearly on the

1 issue of abortion. Judy Madsen had not been to this
2 clinic prior to the entry of the injunction. Now when she
3 enters the speech-free zones --

4 QUESTION: Well, what about the application of
5 the 36-foot limit that just says you have to stay out of
6 that? Do you take the position that's content-based, or
7 viewpoint-based?

8 MR. STAVER: Yes, Justice O'Connor, we do.

9 QUESTION: Why?

10 MR. STAVER: The reason is, is that Judy Madsen
11 cannot ever enter that zone, whereas other individuals
12 expressing a contrary view can.

13 QUESTION: Well, but on your theory, every
14 injunction, whether it's in the labor context or any other
15 context, would be viewpoint-based, and I don't think we've
16 ever thought that injunctions of that type became content-
17 based just because they were focused on a named
18 individual, or a group of individuals.

19 MR. STAVER: Justice O'Connor, it wouldn't be
20 viewpoint-based on every injunction. This injunction, for
21 example, in sections (1) and (2) would clearly not be
22 viewpoint-based. Those restrain activities which we don't
23 challenge, but the injunction the way it was drafted and
24 the way --

25 QUESTION: No, but similarly, on the 36-foot

1 zone, I don't see what makes that content-based, or a
2 restriction that says you can't make noise within that
3 zone, or something of that sort.

4 MR. STAVER: Your Honor, on -- Justice O'Connor,
5 on page 24 of the respondent's brief, they specifically
6 address the types of images that would be impermissible
7 under this injunction. They state that the images that
8 would be impermissible are those that tend to traumatize.

9 Who makes that determination but the listener's
10 reaction to speech, and the listener's reaction to speech
11 could never be a content-neutral basis for regulating an
12 individual's --

13 QUESTION: I think you're really spreading this
14 content-based and viewpoint thing all over the First
15 Amendment area, rather than confining it. I mean, it seems
16 to me that answer is really a vagueness challenge, rather
17 than a viewpoint-base challenge.

18 MR. STAVER: Mr. Chief Justice, we raise the
19 vagueness challenge as well as a viewpoint-base challenge,
20 and I believe in this particular case, looking at
21 Justice -- or Judge McGregor, who drafted this injunction,
22 he clearly stated that it applies to a belief, not
23 specifically activities or individuals. It applies to
24 those beliefs that seem to be supportive of prolife.

25 QUESTION: Is any part of your challenge here

1 based on the fact that the injunction enjoined only those
2 who wanted to protest against abortion and not those for
3 it?

4 MR. STAVER: No, Mr. Chief Justice, that's not
5 the basis of the challenge.

6 The basis is that in the internal workings of
7 the injunction itself, it says that when someone enters
8 this zone -- for example, Judy Madsen -- she can only
9 speak if that individual listener shows a positive
10 interest in what she has to say. That listener,
11 therefore, is empowered with ex parte adjunctive authority
12 to censor her speech.

13 QUESTION: That's the 300-foot zone, Mr. Staver,
14 but what about the 36-foot zone, which is what Justice
15 O'Connor was asking about.

16 MR. STAVER: Justice Scalia, the 36-foot zone
17 would be the same way. The way Judge McGregor intended
18 and applied that 36 --

19 QUESTION: Well, she's not allowed within that
20 zone at all.

21 MR. STAVER: She can't ever go within that zone.

22 QUESTION: Okay, so that's -- you can't say that
23 that's content-based because she can only go in if the
24 people agree with her. She can't go in at all.

25 MR. STAVER: No, she can't go in at all.

1 QUESTION: So why is it content-based?

2 MR. STAVER: Because of -- the only reason she
3 can't go in has nothing to do with her activities but
4 solely because of her belief. Judge McGregor --

5 QUESTION: In that extent, every injunction
6 that -- if you enjoin a labor union where there's been
7 violence on the picket line you're only directing the
8 injunction against somebody that has a particular point of
9 view. Doesn't it always -- isn't it always content-based
10 where it's an injunction?

11 MR. STAVER: I believe, Justice Scalia.

12 QUESTION: Okay, but why did you say no before?

13 MR. STAVER: No, well, in the sections (1) and
14 (2) --

15 QUESTION: It seems to me you say yes, and
16 that's why we have to be especially careful with
17 injunctions.

18 MR. STAVER: Sections (3) through (9) would be
19 the content-based. Sections (1) and (2) I would say would
20 not be, because that simply restrains an activity and not
21 individual speech, which we are not challenging.

22 QUESTION: May I ask you a question that seems
23 to be the premise -- one of the premises of your argument
24 here about the 300-foot zone?

25 I understood you to say that within the 300-

1 foot zone your clients could not distribute a leaflet, or
2 offer them, and could not speak, but as I'm reading the
3 reference, and I'm on A-9 of the petition appendix, under
4 paragraph (5) on the 300-foot -- covering the 300-foot
5 zone, there's an injunction against physically approaching
6 any person seeking the services of the clinic, but I don't
7 see anything in there that prevents your clients from
8 standing there with a picket sign or with leaflets ready
9 for somebody who may want to take them, or even, so long
10 as it doesn't otherwise offend the noise proscription,
11 from saying, don't go in and get an abortion, or what-
12 not. It's just that they cannot go up to individuals and
13 importune them on an individual basis, isn't that true?

14 MR. STAVER: That's true in part, Justice
15 Souter, but outside of the 36-foot zone, for example, Judy
16 Madsen could not raise her voice to reach somebody within
17 the zone because that could be heard. She could not
18 display an image, for that could be seen.

19 QUESTION: But that is -- and I see what you're
20 getting at there. You've got a problem of images seen
21 inside, noise penetrating the clinic, but there is in
22 terms no limitation on speech which does not project
23 images inside, or rise to a level that would be heard
24 inside, within the 300-foot zone, isn't that true?

25 MR. STAVER: No, that's not true, Justice

1 Souter. Going on further, at the end of the injunction,
2 it speaks about the invited contact portion. It says that
3 that portion --

4 QUESTION: Where are you reading?

5 QUESTION: Where are you?

6 MR. STAVER: I'm reading right now on the Joint
7 Appendix, page 63, which is also reproduced in the
8 petition for writ of cert, but it's on the last page of
9 the injunction, just before the signature blocks. It
10 speaks about invited contact, and it begins with, ordered
11 and adjudged.

12 QUESTION: Is -- just so I don't flip back and
13 forth, is the same thing in the petition appendix?

14 MR. STAVER: Yes. It's reproduced in the
15 Petition for Writ of Certiorari, and it's also in the
16 Joint Appendix.

17 QUESTION: Okay.

18 MR. STAVER: In that section, Justice Souter, it
19 speaks about invited contact, and that invited contact
20 portion applies outside of the 36-foot zone. It calls it
21 the buffer zone. Section (3) is the only place within the
22 injunction that refers to a buffer zone, so the invited
23 contact applies outside of the zone, which would be in
24 that 300-foot zone.

25 It says that Judy Madsen would not be able to

1 speak if someone didn't have a positive interest in what
2 she had to say, nor could she distribute literature --

3 QUESTION: Well, can you quote the text that
4 you're relying on?

5 MR. STAVER: Yes.

6 QUESTION: What's the numbered paragraph in the
7 injunction?

8 MR. STAVER: On the petition for writ of cert,
9 Justice Souter, it is on page B-11.

10 QUESTION: B-11?

11 MR. STAVER: At the bottom, and it begins with,
12 ordered and adjudged. It's the second ordered and
13 adjudged on that page. It says, "At all times on all
14 days, respondents will have the right of invited contact
15 with persons protected hereby so long as it is outside the
16 clinic buffer zone," which is the 36-foot zone.

17 "'Invited contact' is defined as conduct by the
18 person sought to be contacted which affirmatively
19 indicates a desire to engage in conversation or to
20 receiver literature. Such affirmative indication may
21 include where the person sought to be contacted physically
22 approaches a respondent or where such person extends his
23 or her hand to receive literature, or speaks words
24 indicating a positive interest in what the respondent is
25 saying."

1 It goes on down --

2 QUESTION: Which implies that the respondent is
3 saying something, and clearly implies that the respondent
4 can be holding literature to distribute if somebody will
5 take it, and that was the only point that I was trying to
6 make.

7 MR. STAVER: Justice Souter, the next sentence
8 goes down and basically says such invited contact by a
9 person protected hereby as it relates to conduct --
10 contact at such person's residence is limited to conduct
11 transmitted by the resident to a respondent at a distance
12 from and at a time prior to the contact, so that --

13 QUESTION: That's --

14 QUESTION: Well, you may have a different issue

15 MR. STAVER: That's --

16 QUESTION: -- at the residence zone than you do
17 at the 300-foot zone around the clinic, but there's
18 nothing in there that indicates to me -- in fact, the
19 indication is to the contrary -- that you cannot speak so
20 long as you're not heard inside, or that you can't hold a
21 placard or a leaflet.

22 MR. STAVER: Justice Souter, I believe that when
23 Judy Madsen enters this 36-foot zone, she --

24 QUESTION: No, I'm talking about --

25 MR. STAVER: I'm sorry, the --

1 QUESTION: -- the 300-foot zone.

2 MR. STAVER: I'm sorry -- the 300-foot zone.
3 She could not approach an individual if they didn't show
4 some positive interest in her.

5 QUESTION: That's entirely correct. I mean, I
6 understand that, but they can be within the 300-foot zone,
7 speaking, I presume, at a normal voice level, holding
8 their placard, and offering leaflets in case somebody is
9 willing to come over and take one.

10 QUESTION: But they can't speak to anybody
11 unless spoken to.

12 MR. STAVER: That's exactly right. Prior
13 consent equals prior --

14 QUESTION: Well, they can't physically approach.

15 MR. STAVER: They can't -- but they couldn't
16 physically approach if they're simply there with
17 literature within the 300-foot zone.

18 QUESTION: Mr. Staver, you've several times
19 said, I believe, in connection with your responses. Was
20 there a time -- did you ever seek from the trial judge a
21 clarification or a modification?

22 I mean, you concede that the first injunction
23 was valid. Do you concede -- because you said you don't
24 challenge parts of this, that there was a violation of
25 that first injunction, so some remedy was in order.

1 So my first question is, did you propose, when
2 you got this injunction, any modifications to clarify the
3 vague portions, and second, having conceded violation of
4 the original injunction, what remedy would have been
5 within the First Amendment limits?

6 MR. STAVER: Justice Ginsbug, let me answer both
7 questions, and looking at the second one first, there is
8 no conceded violation of the first injunction.

9 On page 375 of the Joint Appendix, respondents
10 specifically stated that the contempt proceedings
11 regarding any violations of the 1992 had nothing to do
12 with Judy Madsen. On page 436, the judge said, I
13 understand that, and that's why Judy Madsen never
14 testified.

15 But going to the first -- the -- question
16 second, there were no requests specifically for
17 modification on the 1993. There was a request to dissolve
18 the temporary restraining order back in 1991 and 1992.
19 That was denied. Right after the entry of this '93
20 injunction was the only time that arrest occurred, and it
21 wasn't petitioners. It was those individuals penetrating
22 the zone.

23 QUESTION: Judy Madsen wasn't around, was she,
24 at the time the amended injunction was entered?

25 MR. STAVER: Yes, she was, Justice Scalia. She

1 was not at the clinic.

2 Her name -- the reason why she is here --

3 QUESTION: I thought you said that she had come
4 there -- she had not been a party who had violated any
5 prior injunction.

6 MR. STAVER: That's correct, Justice Scalia.

7 QUESTION: Had she been demonstrating after the
8 first injunction was entered?

9 MR. STAVER: Not at the Aware Clinic, Justice
10 Scalia. In fact, her name appeared --

11 QUESTION: Well then, how could she move for
12 modification of the amended injunction if it was entered
13 before she was even around the place?

14 MR. STAVER: I don't believe that she really
15 could, and I believe that it would have been futile to do
16 that, because Judge McGregor, a few days after this
17 injunction was entered, made all of the statements that
18 are before this court about how he interpreted this
19 injunction. He said it applied to anybody who seemed to
20 be supportive of prolife.

21 If you had notice of the injunction, penetrated
22 the zone, 36-foot zone, and were prolife, you were hauled
23 off to jail.

24 QUESTION: Is your position, then, that this
25 injunction may be valid as to some people, but it isn't as

1 to the particular complainants in this case?

2 MR. STAVER: Justice Ginsburg, it's certainly
3 not valid as it relates to the three petitioners. I don't
4 believe --

5 QUESTION: That's the limit of your argument,
6 just these three petitioners, and for the rest, the
7 injunction would stand? If you're saying that Judy Madsen
8 wasn't around, and the others weren't around, this
9 injunction shouldn't have touched them, then is the relief
10 you're seeking just to excise those three people from the
11 terms of the injunction?

12 MR. STAVER: No, Justice Ginsburg, it is not,
13 because that would not give full relief to Judy Madsen,
14 because she would be like Myrna Cheffer before the
15 Eleventh Circuit Court of Appeals. By simply penetrating
16 the 36-foot zone, she would be considered to act in
17 concert.

18 So we bring both an as-applied and a facial
19 challenge to the overbreadth of how the judge -- not
20 pursuant to Rule 65, but how the judge crafted and applied
21 the in-concert section. He clearly tried to restrain a
22 belief. He clearly tries to require prior consent before
23 even distributing pieces of literature, and prior consent
24 would be --

25 QUESTION: Let me --

1 MR. STAVER: -- a prior restraint.

2 QUESTION: -- just to be sure I understand your
3 position, are you arguing that as a matter of fact the
4 evidence doesn't show that she was in concert with those,
5 or are you arguing as a matter of law that if she didn't
6 have anything to do with the protests until after the
7 injunction was entered, she could not ever be held in
8 concert?

9 MR. STAVER: I believe, Justice Stevens, as a
10 matter of fact and law. As a matter of fact, she was not
11 in concert, and as a matter of law --

12 QUESTION: And is there a finding of fact to the
13 contrary?

14 MR. STAVER: That she was in concert?

15 QUESTION: Yes.

16 MR. STAVER: There is a finding of fact in the
17 1992 generically lumping all of the people together, but
18 in the 1993 injunction, Justice Stevens, there's no
19 finding --

20 QUESTION: Well, let me just take it one step at
21 a time, because it's hard to -- this is a complicated
22 case.

23 Is there, or is there not, a finding of fact
24 that Judy Madsen acted in concert with the people who were
25 enjoined?

1 MR. STAVER: Not in the 1993 injunction. It
2 never --

3 QUESTION: So that's not before us. But then
4 your legal position is that as a matter of law, if she
5 came in after the injunction was entered, she could never
6 be held in concert with the defendants?

7 MR. STAVER: No. She could be held in concert,
8 Justice Stevens, if she were really actively aiding and
9 abetting those named in the injunction, but that's not how
10 the judge intended to apply the in-concert. He commanded
11 that a traffic sign be erected that simply said, warning,
12 demonstrations and picketing in this area are limited by
13 court order.

14 QUESTION: Well, Judy Madsen has never been
15 found guilty of anything, has she?

16 MR. STAVER: She has in the 1993, but not guilty
17 as terms of criminal, no.

18 QUESTION: She was cited for contempt?

19 MR. STAVER: No, Mr. Chief Justice, she was
20 never cited for contempt, never arrested.

21 QUESTION: Well then, what sanctions have been
22 imposed on her by the trial court?

23 MR. STAVER: The 1993 injunction is the sanction
24 of not being able to speak.

25 QUESTION: Well, but has she been held to have

1 violated that?

2 MR. STAVER: No, she has not.

3 QUESTION: So we're not talking, then, about any
4 sanction that was imposed on her. You're saying that she
5 is subject to sanctions for conduct that she shouldn't be.

6 MR. STAVER: Exactly right, Mr. Chief Justice.

7 QUESTION: Well, in Broadrick v. Oklahoma, I
8 think we used some language about an in-concert statement
9 there, saying that we would cross that bridge when we came
10 to it, in effect.

11 MR. STAVER: Mr. Chief Justice, I think this
12 Court has come to it, because we don't have to speculate
13 as to how far the in-concert section goes. In fact, we
14 have an unusual record where we see the judge's comments
15 about how he applied it.

16 Secondly, we have the city police who were
17 enforcing the injunction asking the judge to clarify, and
18 that did come up, Justice Ginsburg, about the police
19 enforcers wanting to clarify whether that was proper to
20 arrest anybody who penetrated the zone. The judge denied
21 their motion to clarify, and that motion was opposed by
22 the clinic.

23 QUESTION: Mr. Staver, you said I believe in
24 your brief that you were attacking this injunction on its
25 face, and that's why the record didn't need to have in it

1 any more than it already had, so when you speak of the
2 internal operations of this, that seems to be inconsistent
3 with your insistence that you didn't need to put very much
4 in the record because you were attacking the injunction on
5 its face, which seems to say that these restrictions never
6 could be constitutional, no matter what the facts were.

7 MR. STAVER: Justice Ginsburg, we've argued to
8 the Florida supreme court and also to this court that it's
9 as applied to Judy Madsen factually and on its face as
10 well, and in fact the same evidence that's before this
11 Court was before the court of Florida, and the same
12 arguments were made, and we asked them to de novo review
13 this case.

14 The only pieces of testimony that were not
15 before the Florida supreme court was that of Arick, Doyle,
16 and Wymer, but respondents specifically stated that
17 testimony had nothing to do with petitioners.

18 This particular court, as well as the Florida
19 supreme court, had the testimony of April 12th, the record
20 and the comments by Judge McGregor, and all the testimony
21 that was before this particular court except for those
22 other three testimonies, so the record evidence, looking
23 at it de novo, does not show that the injunction was
24 constitutionally applied properly to the three
25 petitioners.

1 QUESTION: Well, Mr. Staver, is everything
2 you've said about petitioner Madsen equally true as to the
3 other named petitioners? None of them were found to have
4 violated the earlier injunction? None of them were active
5 at this particular clinic demonstrations?

6 MR. STAVER: That's correct, Justice O'Connor.
7 Let me explain that statement. Petitioner --

8 QUESTION: Your comments have all been directed
9 to petitioner Madsen, but I want to be clear about the
10 other named petitioners as well.

11 MR. STAVER: Yes. Petitioner Madsen nor Hobbs
12 testified, because there was no allegations against them.
13 Petitioner Martin did testify. There were two
14 allegations. However, there was never a finding of
15 contempt. There was only the motion -- there was only the
16 modification of the 1993 injunction. The 1993 injunction
17 never names any of petitioners or Rescue America by name.

18 In respect to petitioner Martin, the two
19 allegations against him were, 1) did he on one occasion
20 stand in front of a doctor's car and move after the doctor
21 honked the horn, and secondly, did he distribute a
22 brochure that was published prior to the 1992 injunction
23 after that injunction?

24 First, if he were there on this occasion, which
25 he denies, that wouldn't constitute blocking.

1 Secondly, if he did distribute the brochure,
2 which he denies, it doesn't incite anyone to illegal
3 activity. He specifically disclaimed blocking access to a
4 clinic --

5 QUESTION: What was the proceeding at which this
6 testimony was taken?

7 MR. STAVER: This was at a proceeding, Mr. Chief
8 Justice, for a motion to contempt, and a motion to modify.

9 QUESTION: At a motion to hold Martin in
10 contempt?

11 MR. STAVER: Yes, Mr. Chief Justice, a motion to
12 hold all the defendants named in the 1992 injunction in
13 contempt.

14 QUESTION: And Martin was one of them?

15 MR. STAVER: That's correct.

16 QUESTION: Mr. Staver, I must say, you have me
17 thoroughly confused. You say you're challenging this
18 injunction as applied to Judy Madsen, but you also say it
19 has not been applied to Judy Madsen. How can you
20 challenge it as applied when it hasn't been applied? I
21 don't understand.

22 MR. STAVER: What I mean by that, Justice
23 Scalia, is that she is presently restrained. She has not
24 been found in contempt, and so it's not applied in that
25 particular sense.

1 QUESTION: Well, you say she's restrained.
2 Maybe she's not. Do we know that she's -- how do we know
3 that she's restrained? You tell us that she's covered by
4 the in-concert. We don't know that she's covered by the
5 in-concert until someone says, Judy Madsen, you're covered
6 by the in-concert provision.

7 MR. STAVER: As far as the in-concert provision,
8 we don't know that for a fact, but we don't have to
9 speculate about the broad breadth of this in concert,
10 because we know that 2 days after this injunction all
11 these others were arrested for simply penetrating the
12 zone, who were not in concert.

13 QUESTION: Well, that seems to me not an as-
14 applied-to-Judy-Madsen point. That seems to me a facial
15 challenge.

16 MR. STAVER: That's exactly right. That's the
17 section that we're bringing as a facial challenge.

18 QUESTION: Your contention is you can't use the
19 terms, in-concert? I don't know how you can issue an
20 injunction that's effective unless it applies not just to
21 the people it's directed at but to anyone acting in
22 concert with them.

23 MR. STAVER: Justice Scalia, let me explain.
24 The "as applied" is as it relates to Judy Madsen in terms
25 of the 336-foot zone. The in-concert section is the only

1 thing that would be facially, so if you excise Judy Madsen
2 out, she would find herself in the same position as the
3 Myrna Cheffer in the Eleventh Circuit court of appeals
4 case, not being able to penetrate the zone.

5 But at any rate, this particular injunction
6 certainly restrains her speech by restricting her access
7 in this 300-foot zone.

8 QUESTION: You're saying that "in concert"
9 cannot be used in an injunction?

10 MR. STAVER: No, it certainly can, if it's used
11 properly according to this Court's decision in Chase. In
12 Chase, this Court looked at how an in-concert application
13 could be used, and that it should not be used to attempt
14 to restrain the entire world who simply receives notice of
15 an injunction, but it should be used if proof was shown
16 that someone was actively in concert, aiding and abetting.
17 How the judge applied this, though, was to restrain the
18 entire world.

19 QUESTION: How do we know that?

20 MR. STAVER: We know it from the April 12
21 transcript, where the judge brought individuals who simply
22 penetrated the zone.

23 On page 68 of the Joint Appendix, the judge --

24 QUESTION: We don't have those people in front
25 of us. It's just -- your argument is so confusing,

1 because we don't have people here that have been found in
2 contempt, so I don't know why we aren't just looking at
3 this facially.

4 MR. STAVER: Justice O'Connor, even aside from
5 the in-concert, that's not the basis of the argument. The
6 basis of the argument is that originally this injunction
7 should never have been applied against Judy Madsen. This
8 Court could not --

9 QUESTION: But there are parts of this
10 injunction that you say are okay. Maybe we should clarify
11 that by looking at the appendix.

12 You say you're not challenging every part of
13 this current injunction. Can you -- by pointing us to the
14 Joint Appendix, which parts are you saying you're not
15 challenging, are okay?

16 MR. STAVER: We would not challenge page 57,
17 sections (1) and (2). That section would prohibit
18 blocking access to the clinic.

19 QUESTION: Can you tell me where in the
20 petitioner -- the appendix --

21 MR. STAVER: That's Joint Appendix, Volume 1,
22 page 57, in the Joint Appendix. That's sections (1) and
23 (2), and that is a reiteration, actually, of the 1992
24 injunction verbatim.

25 QUESTION: So that's what you're saying -- you

1 are challenging this new injunction wholesale. The only
2 thing that you're saying is okay is what was repeated from
3 the first injunction.

4 MR. STAVER: Well, no, we would also not
5 challenge the jamming phone that is part of this
6 injunction. We don't believe that that would be a
7 constitutional right to call somebody's phone and jam up
8 their phones.

9 Section (4) is the sound limitation. We do
10 challenge parts of that. Parts of that section (4) on the
11 sound and images limitation specifically prohibits the use
12 of bullhorns. We would not challenge a clearly defined
13 volume restriction which would protect the interest of the
14 clinic as well as sections (1) and (2), but we do
15 challenge a prohibition on the making of any sound, or the
16 display of any image.

17 In this particular injunction, someone who would
18 be singing outside of the 36-foot zone, if that could be
19 heard within the clinic, would violate the injunction.

20 QUESTION: I -- it seems to me that section (4)
21 is limited to that, as far as sound goes -- other sounds
22 within earshot of the patients inside the clinic. I read
23 (4) as saying you only can't make such noise as would
24 penetrate the clinic. You don't contend that's
25 unreasonable, do you?

1 MR. STAVER: We wouldn't contend that that's
2 unreasonable, but this particular section speaks about the
3 time limitations that these restrictions apply. It says
4 it applies from 7:30 a.m. to noon, Mondays through
5 Saturdays, during surgical procedures and recovery
6 periods.

7 We don't know when surgical procedures or
8 recovery periods are, and it's not our interpretation,
9 it's respondents' as well, because on pages 79 or so of
10 the Joint Appendix, they specifically requested that that
11 term be specified so that they would know when the surgery
12 and recovery periods are.

13 QUESTION: So that's a vagueness challenge to
14 (4).

15 MR. STAVER: That's a vagueness challenge,
16 Justice Scalia.

17 QUESTION: But you don't contest that they can
18 prevent people from making so much noise that it annoys
19 patients at the clinic, inside the clinic.

20 MR. STAVER: No. We wouldn't contest that,
21 Justice Scalia. What we would contest, though, is the
22 limitation on sound. If it simply said you can't
23 intentionally shout to disturb this clinic, or to use
24 sound amplification devices, we would have no problem with
25 that kind of a reasonably defined --

1 QUESTION: So you don't have an objection --

2 MR. STAVER: -- broad restriction.

3 QUESTION: So you don't have an objection to the
4 injunction against using a bullhorn.

5 MR. STAVER: No, we would not, Justice Souter.

6 Mr. Chief Justice, I would like to reserve the
7 rest of my time for rebuttal.

8 QUESTION: Very well, Mr. Staver.

9 Mr. D'Alemberte.

10 ORAL ARGUMENT OF TALBOT D'ALEMBERTE

11 ON BEHALF OF THE RESPONDENTS

12 MR. D'ALEMBERTE: Mr. Chief Justice, may it
13 please the Court:

14 This cases arises in context of an extensive and
15 sustained campaign directed against the women's health
16 care clinic in Melbourne, Florida. This clinic provided a
17 variety of services, including abortion.

18 The campaign employed tactics which included the
19 blocking of access to the clinic and the creation of
20 rather chaotic conditions around the clinic.

21 QUESTION: What do you mean by the blocking of
22 access, Mr. D'Alemberte?

23 MR. D'ALEMBERTE: Your Honor, I think the
24 testimony showed --

25 QUESTION: Did they specifically stop cars from

1 going in?

2 MR. D'ALEMBERTE: Yes, sir, Your Honor, they
3 did, by conducting a closely ordered and slow-moving
4 parade --

5 QUESTION: They did not part when cars came up?

6 MR. D'ALEMBERTE: They -- they did not
7 immediately part.

8 What happened Your Honor, and you can see it on
9 the videotape which has been lodged with the Court --

10 QUESTION: I watched the videotape. It seemed
11 to me they parted when the cars came up.

12 MR. D'ALEMBERTE: They did, Your Honor. What
13 happened -- I think as you look at the videotape and
14 listen to the testimony of Ruth Arick, which accompanies
15 that videotape and explains it, it shows that the people
16 would begin to approach the car as the car moved off of
17 U.S. 1 on Dixie Way.

18 As the car then moved towards the clinic, it was
19 moving through crowds of people. The videotape showed one
20 of the days when there were not 400 demonstrators, as
21 there were at other days, but they showed some number, and
22 then what happened as they got to the clinic driveway.

23 People would slowly move out of the way, and
24 you'd see, I think in the videotape, people swarming
25 around the car, sometimes thrusting literature, attempting

1 to thrust literature into the car.

2 QUESTION: Is that unlawful?

3 MR. D'ALEMBERTE: Your Honor, it is in
4 context --

5 QUESTION: -- into the car?

6 MR. D'ALEMBERTE: It is in context of a health
7 care facility. It is not a violation of statutes, but it
8 is within the discretion of a trial judge to prohibit that
9 kind of conduct when the consequences of that conduct are
10 shown to impair women's health, and that's the testimony
11 in this case.

12 QUESTION: The testimony is that -- well.

13 MR. D'ALEMBERTE: Yes, sir. The testimony is
14 quite clearly, from Dr. Snyder and from the nurses, and
15 from Ruth Arick, that the pulse rate, respiration rate,
16 all the vital signs were changed, that the procedures
17 became more dangerous to women, that sometimes people had
18 to be delayed or turned away, they required higher
19 sedation. There's a strong health care interest here
20 which is demonstrated by the facts in this record and
21 uncontradicted.

22 QUESTION: Mr. D'Alemberte, there was a case
23 that didn't come to this Court but was once very much in
24 the news, and it was the Skokie case, where the argument
25 was made that the people that would be subjected to this

1 demonstration, because of their peculiar condition, would
2 be certainly psychologically upset and even physically
3 sick. Do I take it from your argument that you disagree
4 with the lower court's disposition?

5 MR. D'ALEMBERTE: No, Your Honor. I think that
6 demonstrations and other circumstances that upset the
7 listener cannot be banned just because people are upset,
8 but we are now dealing with a facility that's a health
9 care facility. We would not tolerate this kind of conduct
10 around a hospital.

11 QUESTION: Whose testimony are you relying on?
12 How many items of testimony? Is it not the testimony of
13 one doctor?

14 MR. D'ALEMBERTE: Well --

15 QUESTION: One doctor at the abortion clinic,
16 correct?

17 MR. D'ALEMBERTE: One -- the doctor --
18 Dr. Snyder, yes, sir.

19 QUESTION: Right.

20 MR. D'ALEMBERTE: -- and --

21 QUESTION: Right, and what opposing testimony
22 would you have expected to be introduced?

23 MR. D'ALEMBERTE: Well, Your Honor, what I would
24 expect is that Dr. Snyder might be cross-examined in a way
25 to make that testimony unbelievable. It's clear from the

1 record that the trial judge who sat on this case found
2 Dr. Snyder's testimony quite credible, and that testimony
3 showed not only that people's vital signs were affected
4 and their health was affected but also it showed that
5 people turned away from the clinic.

6 QUESTION: So no -- any speech can be prohibited
7 if it affects people's vital signs, encourages them to be
8 upset and may place their health at risk, is that -- is
9 that --

10 MR. D'ALEMBERTE: Well, Your Honor, in context
11 of people who are coming to a health care facility -- and
12 we need to think of this as a hospital.

13 QUESTION: If I have a heart condition, can I
14 carry a sign on me which says, heart condition, do not
15 upset me --

16 (Laughter.)

17 QUESTION: -- and the court can issue an
18 injunction that people shall not approach me unless I
19 invite them to?

20 MR. D'ALEMBERTE: Well, Your Honor, I don't
21 think that courts could do that precisely, unless there
22 were someone -- they might issue an injunction not against
23 all the world, but if someone were coming around and
24 stalking you, as this Court found these people, the
25 defendants in this case were stalking the clinic

1 personnel, yes, I think the Court can --

2 QUESTION: What does stalking mean? Does it
3 mean walking after them?

4 MR. D'ALEMBERTE: Following closely, I think,
5 Your Honor.

6 QUESTION: Following closely and saying nasty
7 things to them?

8 MR. D'ALEMBERTE: Yes, sir.

9 QUESTION: Have you ever gone near a picket line
10 around a strike-bound plant?

11 MR. D'ALEMBERTE: Absolutely, Your Honor.

12 QUESTION: And been called a strike-breaker?

13 MR. D'ALEMBERTE: I don't think that's been said
14 to me, Your Honor, but --

15 QUESTION: You've heard other people --

16 (Laughter.)

17 QUESTION: All of these things are -- this is
18 wide, robust, wide-open debate you're talking about.

19 MR. D'ALEMBERTE: Exactly, Your Honor, but not
20 the kind of debate --

21 QUESTION: You can't be stalked by people who
22 want to say nasty things to you.

23 MR. D'ALEMBERTE: Precisely, but not the kind of
24 debate we have in a hospital zone. The reason we pass by
25 a hospital zone and we see that sign which says, quiet,

1 hospital zone, is because we expect that to be a tranquil
2 environment.

3 QUESTION: How about a building of doctor's
4 offices? Would the same thing apply there?

5 MR. D'ALEMBERTE: It might, depending on the
6 conditions, Your Honor. If people were going there for
7 treatment, and there were people crowding closely around
8 in a way that was frankly intended to upset, intended to
9 block -- one of the things that I think is missing from
10 the discussion so far, and certainly from counsel's
11 presentation, is the intention of these defendants. Not
12 of all the world, not of all prolife advocates, but of
13 these defendants, their intention, and announced intention
14 before the trial court, as stipulated, they intended to
15 block the clinics.

16 QUESTION: Well, just before you get into that,
17 would your heart-beat test apply to an abortion counseling
18 facility where there is just counseling of women? There
19 are no abortion procedures undertaken there. That's at
20 some other clinic.

21 MR. D'ALEMBERTE: It clearly would not be -- I
22 mean, again I'm not familiar with all the medical tests,
23 but it seems to me the value would not be quite so high,
24 because you'd not be providing treatment, and I think all
25 of us --

1 QUESTION: Was there a specific finding here
2 that it was because of the treatment --

3 MR. D'ALEMBERTE: No, sir --

4 QUESTION: -- that it was necessary to have this
5 injunction?

6 MR. D'ALEMBERTE: No, sir. The trial court
7 order cited to the doctor's testimony, and cited to the
8 doctor's testimony relating to the impact of these -- they
9 were not just demonstrations. The trial judge called this
10 area through which they had to pass a gauntlet, and if you
11 listen to the testimony and think about 400 people being
12 in this narrow residential street, and think about what
13 someone's going through when they're going to that
14 facility --

15 QUESTION: You talked about a gauntlet, and you
16 said they were swarming, they were thrusting --

17 MR. D'ALEMBERTE: Yes, sir.

18 QUESTION: I did not see this in the videotape.
19 I looked at the videotape, and it seemed to me to be a
20 rather orderly demonstration, given the emotions and the
21 philosophic differences between these people.

22 MR. D'ALEMBERTE: Well, Your Honor, the
23 videotape was not taken on the day in which the greatest
24 number of people were there, but if you will look at that
25 videotape, and while you look at it think not just about

1 the -- what we see there, but think about what's being
2 seen from inside that car as the patient is coming to the
3 clinic, perhaps apprehensive, as of all of us would be, in
4 going through any kind of medical procedure, and think
5 about what happens when somebody approaches your car,
6 somebody does indeed swarm around the car. At least I see
7 that in the videotape --

8 QUESTION: Mr. --

9 MR. D'ALEMBERTE: -- people thrusting
10 literature, attempting to thrust literature in the window,
11 sometimes people calling names of people who might have
12 some expectation of privacy coming to a medical facility.
13 I just don't think it's the kind of thing that we want to
14 permit going into a hospital facility --

15 QUESTION: Mr. --

16 MR. D'ALEMBERTE: -- going into a medical
17 facility.

18 QUESTION: Do you agree that the named
19 petitioners here were not found in contempt?

20 MR. D'ALEMBERTE: Your Honor, I do disagree with
21 that, and if I may --

22 QUESTION: You think they were found --

23 MR. D'ALEMBERTE: I'm sorry, I didn't listen to
24 your question closely enough. They were not, by name,
25 found in contempt. What they were found is the court

1 finding said that the respondents, and I think this is
2 finding A, and I'm reading from the appendix --

3 QUESTION: Where in the -- is it in the Joint --

4 MR. D'ALEMBERTE: It is in the Joint Appendix,
5 Your Honor, and I'm sorry, I was reading from the appendix
6 to the petition for certiorari.

7 QUESTION: Where is it in the petition for
8 certiorari?

9 MR. D'ALEMBERTE: It's in -- it's point A on B-
10 5, Your Honor.

11 QUESTION: B-5?

12 MR. D'ALEMBERTE: B-5, that the actions of the
13 respondents and those in concert with them in the street
14 and driveway approaches to the clinic of the plaintiffs
15 continue to impede and obstruct both staff and patients
16 from entering the clinic.

17 QUESTION: Well, in any event, there's no
18 finding by name of these three.

19 MR. D'ALEMBERTE: By name.

20 QUESTION: Do we then have, in your view, just a
21 facial challenge here? Is that what we have to address?

22 MR. D'ALEMBERTE: I believe that's correct, Your
23 Honor, indeed. That was --

24 QUESTION: All right, and if we have that,
25 address, if you would, for a few minutes in your argument

1 what standard we employ to test the validity of an
2 injunction like this.

3 MR. D'ALEMBERTE: Yes.

4 QUESTION: I'm not aware of any case where we've
5 applied time, place, and manner tests to injunctions. May
6 we should, but I don't know that we ever have, and I'm not
7 sure what the test is.

8 Some amici have said it must be a stricter test
9 than the ordinary time, place, and manner. How do we test
10 out the provisions in front of us on a facial challenge?

11 MR. D'ALEMBERTE: Your Honor, in introduction I
12 think I can find only one opinion. It was, I think,
13 Justice Stevens in *Hirsh v. City of Atlanta* mentioned that
14 time, place, and manner should apply to injunctions as
15 well.

16 Well, I think there should be no different test,
17 in a way. The suggestion of amici, as I understand it, is
18 that injunctions should be looked at more closely for some
19 reason. The point made earlier, I believe, by Justice
20 Ginsburg was that an injunction, unlike a statute, can be
21 easily amended. It can be modified. If we're dealing
22 with some kind of special circumstance the courts are free
23 to hear those special circumstances.

24 QUESTION: A statute applies to everybody,
25 Mr. D'Alemberte. When a legislature says nobody shall

1 annoy people going into hospitals, a 36-foot quiet zone
2 around a hospital, nobody, no matter what their cause,
3 shall be in there. It's even-handed.

4 MR. D'ALEMBERTE: Yes, sir.

5 QUESTION: An injunction applies to one group
6 and says, this group shall not be within 36 feet of a
7 hospital. You don't see any difference between those two
8 situations?

9 MR. D'ALEMBERTE: Yes, sir, Your Honor, and I
10 see an important difference, and the difference, I think,
11 favors the injunction, and the difference is that now you
12 do not say to all the world you may not enter this zone.
13 You say it only to the people who have said, in open
14 court, that they are going to block the clinic.

15 Please understand that that's the undertaking of
16 these petitioners, and indeed, of all the defendants in
17 the trial court, that their intention was to block the
18 clinic. They said it in a stipulation before the court,
19 before the 1992 injunction was entered. These people have
20 vowed their purpose to block access to the clinic.
21 They've said on the record that they --

22 QUESTION: Mr. D'Alemberte --

23 MR. D'ALEMBERTE: -- do not believe that
24 criminal law ought to prevent them from blocking the
25 clinic.

1 QUESTION: They have conceded that section (2)
2 of the injunction, which prevents them from in any manner
3 obstructing or interfering with access to the clinic is
4 okay.

5 MR. D'ALEMBERTE: Well --

6 QUESTION: That's not contested.

7 MR. D'ALEMBERTE: Well, Your Honor, on the
8 record -- and it's not in the Joint Appendix. For some
9 reason it got left out -- at pages 64 and 65, the
10 stipulation was that Ed Martin, Judy Madsen, and Shirley
11 Hobbs well understand that peacefully blocking access to
12 facilities might constitute a trespass.

13 They feel a violation of such a criminal statute
14 is justified by their belief that protection of the unborn
15 may merit breaking the criminal trespass laws.

16 Now, what they've said, they've announced that
17 the spirit of Wichita is coming to Central Florida.
18 They've announced that they intend to close down abortion
19 clinics, and they have said that they will conduct
20 activity, and that they do not have to follow the law,
21 that their -- it's in the stipulation, Your Honor.

22 QUESTION: Section (2) is in the injunction,
23 too. It says, you do that, you're going to go to jail.

24 MR. D'ALEMBERTE: Well, Your Honor --

25 QUESTION: That's all right. They don't object

1 to that.

2 MR. D'ALEMBERTE: Section (2) they did object to
3 up to the point where the Fifth District Court of Appeals
4 in Florida affirmed it in December of last year.

5 QUESTION: They've gotten wiser. They don't
6 object to it now.

7 MR. D'ALEMBERTE: Well, this can be an
8 educational process --

9 (Laughter.)

10 MR. D'ALEMBERTE: -- and yet we know --

11 QUESTION: Mr. D'Alemberte --

12 MR. D'ALEMBERTE: -- that prior to the 1993
13 injunction the clinic was still be harassed, and indeed,
14 the harassment was escalating, and we do know that.

15 QUESTION: -- I'd like to go back to this point
16 about the difference between the statute and injunction,
17 and call your attention specifically to the point that was
18 made in one of the many amici briefs in this case. This
19 was the one on behalf of the CIO -- AFL-CIO, and it was
20 that a statute of general application has little danger of
21 censoring one set of ideas or speakers but not others,
22 where an injunction by its very nature homes in on a
23 particular group of speakers, so there can be a suspicion.
24 You gave the example of quiet around hospitals, but that's
25 not what this regulation is. It's quiet around this

1 particular clinic, directed to a particular group of
2 speakers.

3 MR. D'ALEMBERTE: It is, Your Honor, and to
4 illustrate the point, if these particular defendants, who
5 have a record of harassing intimidation, doing a large
6 range of activities to block the clinic and to upset
7 clinic personnel, to try to drive people away, if these
8 defendants were actually to walk across the street
9 carrying a prochoice sign, they would be prohibited.

10 It's these defendants, because of what their
11 avowed purpose has been of closing down the clinic. They
12 have been enjoined, and they have not been enjoined as a
13 way of trying to eliminate speech from this area. It's --

14 QUESTION: You say a prochoice speaker would be
15 subject to the injunction?

16 MR. D'ALEMBERTE: If these defendants were to
17 carry prochoice signs, they would be subject to an
18 injunction. Conversely, if a prolife person not acting in
19 concert with these defendants were to be in that zone,
20 they would not be prohibited, unless they were operating
21 in concert with these defendants, and so it's not a matter
22 of what's being said, it's what these people have done.

23 QUESTION: So these defendants were enjoined
24 from making any sort of speech of any kind, whether
25 prolife or prochoice?

1 MR. D'ALEMBERTE: In the 36-foot zone, because
2 they had used that zone, the court found, to block access,
3 and those findings were --

4 QUESTION: And you consider that content-
5 neutral, just as a -- it's -- an injunction against a
6 labor union is content-neutral because it also prevents
7 the labor union from saying, don't join the union, right,
8 so it's not --

9 (Laughter.)

10 MR. D'ALEMBERTE: Yes, sir.

11 QUESTION: Well, I --

12 QUESTION: Mr. D'Alemberte --

13 MR. D'ALEMBERTE: It's simply, they're not
14 allowed in the area, Your Honor, and the reason they're
15 not allowed in the area, because they've avowed their
16 purpose to close down the clinic, and they took activity
17 to do it.

18 QUESTION: With respect, Mr. D'Alemberte, de
19 facto, any injunction against a labor union or against
20 this group is content-directed, de facto it is. You may
21 say in theory the union can come out for the employer, but
22 that's not --

23 MR. D'ALEMBERTE: But Your Honor -- Your
24 Honor --

25 QUESTION: -- what it's all about. You know

1 what kind of speech you're stopping.

2 MR. D'ALEMBERTE: Except, Your Honor, there's a
3 difference here. The difference here is that these rescue
4 organizations do not represent all of the prolife
5 movement. They represent a small fraction of it, and they
6 represent a fraction of it that's dedicated to shutting
7 down the clinics, and one that avowedly says they will
8 violate the law to do it.

9 Now, if someone shows up who is not associated
10 with them, but is a prolife speaker, they're not subject
11 to the injunction, and so it's not their speech, but it's
12 their conduct --

13 QUESTION: Well, they take their chance --

14 MR. D'ALEMBERTE: -- and it's conduct which they
15 said --

16 QUESTION: They take their chance at being
17 considered in concert. I mean, if you walk up -- you
18 know, a policeman say, he looks to me like he's in -- have
19 ever heard of chilling effect?

20 MR. D'ALEMBERTE: Your Honor, I concede that
21 there's a possibility of some chilling effect. You have
22 to make the judgments.

23 But let me make certain that the Court
24 understands that the judgments being represented earlier,
25 being made by the court -- that is, the trial judge -- I

1 hope that full transcript is read in context of the fact
2 that these people who were charged with violation of the
3 injunction were at a preliminary hearing.

4 They were not under oath, not under cross-
5 examination, and a number of their representations of the
6 facts are now being incorporated into this argument.
7 That's not really what the trial judge intended by this
8 order and I think it's clear.

9 QUESTION: Mr. D'Alemberte, may I ask you just
10 some factual background that would relate to the 300-foot
11 zone around the house?

12 If we were to follow the suggestion of the AFL-
13 CIO and apply something like the Carroll standard, at the
14 very least we would require that before there was a
15 restriction, an injunction restricting speech, there would
16 have to have been demonstration that an injunction
17 relating to action only had been inadequate. Was there
18 any prior injunction with respect to activities at the
19 residences of the clients?

20 MR. D'ALEMBERTE: There was not, Your Honor.

21 QUESTION: Is there anything in the record about
22 what happened at the residences, other than the incident
23 about the individuals going to the nurse's house when the
24 children were at home?

25 MR. D'ALEMBERTE: Yes, there was, Your Honor. A

1 portion of the videotape shows a demonstration that I
2 believe one of the clinic personnel and was commented on
3 by Ruth Arick, a witness, and I believe that there was
4 also a nurse -- well, Nurse Pam Doyle. There were several
5 instances of that.

6 QUESTION: Was there any indication that any
7 conduct at the residences which were subject to this 300-
8 foot injunction was unlawful? Was there any allegation of
9 an unlawful act committed?

10 MR. D'ALEMBERTE: Of -- in the sense of
11 violating the statute, no, Your Honor.

12 QUESTION: Any statute, or any injunction.

13 MR. D'ALEMBERTE: No, Your Honor.

14 QUESTION: So there'd been nothing except lawful
15 but annoying actions?

16 MR. D'ALEMBERTE: Not in the record. There --
17 one of these may have been in a municipality where there
18 was an antiresidential picketing statute -- ordinance, but
19 I don't think it's in the record, Your Honor.

20 Let me make the final point, and that is that
21 the protesters now, after this injunction, may stand with
22 their toes against the pavement, and they can be as close
23 to the targets of their speech -- indeed, the targets of
24 the speech of the people coming into the clinic, as the
25 width of that road, and since all people, according to

1 this record, come to this clinic by car, they can be
2 within a few feet of anyone who is attempting to come to
3 the car.

4 They can hold up their signs, they can voice
5 their slogans, and they can shout so long as it's not so
6 loud that people can be heard inside the clinic. They can
7 stand just as close today as they could prior to this
8 injunctive -- injunction of 1993. They cannot stand on
9 the north side of this narrow residential street, but they
10 can stand on the south side.

11 Thank you.

12 QUESTION: Thank you, Mr. D'Alemberte.

13 General Days, we'll hear from you.

14 ORAL ARGUMENT OF DREW S. DAYS, III

15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 GENERAL DAYS: Mr. Chief Justice and may it
18 please the Court:

19 In contrast to a statute or ordinance, a court
20 order properly addresses the particular conduct that is
21 before the Court and is properly confined to addressing
22 that conduct. Consequently, we think the question before
23 the Court presented here is whether the 1993 amended
24 permanent injunction properly addressed the particular
25 conduct before that court, and properly confined itself to

1 addressing that conduct within constitutional limits.

2 This is a situation where Judge McGregor found
3 that the 1992 injunction was inadequate to protect the
4 interests of persons associated with the clinic, and that
5 was not -- that was an injunction that was not challenged.

6 I think the record also shows some reluctance on
7 the part of the judge to modify that injunction, but once
8 he did, it was because he had heard 3 days of evidence in
9 that regard.

10 The constitutional limits with respect to
11 injunctions, we would submit, are those imposed by this
12 Court with respect to reasonable time, place, and manner.

13 QUESTION: Do you have a case in which a
14 challenged injunction was judged by the time, place, and
15 manner standard?

16 GENERAL DAYS: We do not have any additional
17 case to the one that Mr. D'Alemberte cited, the Hirsh v.
18 City of Atlanta.

19 QUESTION: Yes, which wasn't a case, really, but
20 was --

21 GENERAL DAYS: Well, that's correct.

22 QUESTION: -- the opinions of separate justices.

23 GENERAL DAYS: Well, Your Honor, I suppose
24 that's one of the reasons why we're here --

25 (Laughter.)

1 GENERAL DAYS: -- because we think that's what
2 the Court should be doing in this respect.

3 QUESTION: Specifically, why not the Carroll
4 standard?

5 GENERAL DAYS: Why not the Carroll standard?
6 Because I think that first of all it depends on what part
7 of the 1993 injunction you're addressing. You were
8 talking about the residential picketing provision.

9 But I think to pick up on something that my
10 colleague said, we're talking about not just a medical
11 facility, we're talking about conditions where
12 interference with the ability of women to get to the
13 clinic and get the services that the clinic provides would
14 cause them irreparable harm.

15 This is not a provision that would apply across
16 the board to medical facilities, although I think it is
17 true that medical facilities are not factories, mines, or
18 assembly plants, as one of the members of the court said,
19 but no, I think a court looking at the situation has the
20 power to enjoin certain behavior that poses a threat to
21 people in violation of rights that are protected under
22 State or Federal law, and that's what the judge did in
23 this case.

24 QUESTION: Do you think there are any special
25 dangers that attend the use of injunctions to prohibit

1 this conduct that do not attend the enactment of a
2 criminal statute?

3 GENERAL DAYS: I wouldn't -- Justice Kennedy, I
4 wouldn't call them special dangers. I think that it's
5 simply that the mode of analysis, the evidence that the
6 court would look at with respect to the constitutionality
7 of a statute that imposed time, place, or manner
8 restrictions would be different from the type of evidence
9 that the court would look at in dealing with an
10 injunction.

11 QUESTION: The punishment would be different,
12 too, wouldn't it? Punishment for contempt can be a good
13 deal more summary than a criminal indictment and trial.

14 GENERAL DAYS: That is true, but I think it's
15 also the case that an injunction has more flexibility.
16 That is, the court can look at the situation and make
17 modifications to the extent that they overreach --

18 QUESTION: But isn't that just the point?

19 GENERAL DAYS: -- with respect to the particular
20 problem.

21 QUESTION: It has flexibility because it can be
22 applied to some parties and not to others, and isn't
23 that -- I use the word "danger" -- a significant concern
24 where free speech is at issue?

25 GENERAL DAYS: It's certainly a matter of

1 concern, but I think that unless the Court is going to
2 prohibit courts from issuing injunctions under
3 circumstances like these, there has to be some ability of
4 the courts to address problems like those presented in
5 this particular case.

6 QUESTION: Yes, there has to be an ability, but
7 doesn't that ability to have to be accompanied by a
8 special solicitude for free speech rights because certain
9 persons are being singled out, which is not the case of a
10 statute, and I don't see anything in your argument where
11 you've acknowledged that.

12 GENERAL DAYS: Well, first of all, Justice
13 Kennedy, I think it is possible for even statutes to deal
14 with particular problems that may fall more heavily on one
15 group than another, but once again, what the court would
16 do is try to determine whether the legislative body that
17 enacted the statute or ordinance was responding to an
18 actual evil. That would be the analysis.

19 But it seems to me that applying the Fair
20 Education Association time, place, or manner approach is
21 perfectly suitable and sufficient for situations of this
22 kind.

23 I don't agree with the AFL-CIO that there has to
24 be something you might call a time, place, manner plus
25 test. I simply think that, given this type of situation,

1 the court can look at the evidence.

2 QUESTION: Mr. Days, we're not dealing with an
3 abstract question now. We have -- don't we have a long
4 history in this country of enjoining labor unions, of
5 enjoining all kinds of political protesters, students in
6 the sixties, civil rights marchers? Doesn't that caution
7 particular care in dealing with injunctions, rather than a
8 lighter brand of review than one we would apply to a
9 statute?

10 GENERAL DAYS: I'm not suggesting a lighter
11 brand. I'm simply suggesting that the same approach
12 that's used with respect to statutes ought to be adopted
13 by this Court, but the evidence that is considered is
14 different, but I don't think that is any reason to think
15 that there has to be a heavier test under these
16 circumstances.

17 What this particular case establishes is that
18 the conduct is the purpose -- is the objective of the
19 injunction. It's not directed at content of the
20 petitioner's speech, but rather to conduct that the trial
21 court found --

22 QUESTION: Excuse me.

23 GENERAL DAYS: Yes.

24 QUESTION: The -- what should I say? What
25 prompts the injunction is conduct, but what the injunction

1 is directed to is not only conduct but attempted speech,
2 and I assume that, you know, in some cases that can be
3 justified if there's been a history of violence on the
4 picket line, you can simply say okay, we've given you guys
5 a chance. You had a prior injunction, you ignored it. No
6 picket line. You just can't be trusted.

7 But you know, it isn't the conduct that's being
8 enjoined any more, it's speech that's being enjoined
9 because of prior conduct. Now, do you acknowledge that
10 that's what's involved here?

11 GENERAL DAYS: Well, certainly the
12 restriction --

13 QUESTION: Or do you think the speech itself is
14 unlawful?

15 GENERAL DAYS: No, the speech of course is not
16 unlawful. That's not our assertion. Of course,
17 controlling the conduct, enjoining the conduct will have
18 some impact on speech, but it is in response to the fact
19 that people in the position, in this case close to the
20 clinic, intimidated, harassed, interfered with people who
21 were seeking the services of the clinic, or were providing
22 those services, and that was sufficient in the view of the
23 court to justify the injunction.

24 QUESTION: What do you mean by intimidated or
25 harassed? Do you mean, seeking to give them leaflets?

1 GENERAL DAYS: No, I'm not talking about that.

2 QUESTION: Calling them names?

3 GENERAL DAYS: I'm not talking about that.

4 I think, Justice Scalia, this record shows, for
5 example, that there were ladders placed up against the
6 fences of the clinic, signs were put down inside these
7 privacy fences so that the patients could see it in the
8 areas where surgery was being conducted, or they were
9 recovering.

10 Some of those signs had the names of the
11 partners of women who were going through those surgical
12 procedures. Those were not simply informational efforts
13 on the part of the protesters. Those were designed to
14 interfere with the processes of the clinic.

15 QUESTION: Well, just as calling names is
16 designed to hurt. Calling President Nixon, to speak of
17 recent events, a murderer as happened in demonstrations
18 when the Vietnam War was in progress is designed to hurt.
19 Does that make it unlawful?

20 GENERAL DAYS: It does not make it unlawful.

21 I --

22 QUESTION: May I ask --

23 GENERAL DAYS: -- Justice Ginsburg raised the
24 Skokie issue -- excuse me.

25 QUESTION: -- are you saying that it would be

1 constitutionally protected conduct to follow someone
2 around day after day after day, calling him a murderer and
3 a baby killer and so forth, just -- everywhere he went, a
4 person could follow him and keep repeating the same
5 message over and over? Would that be constitutionally
6 protected?

7 GENERAL DAYS: I think, given those facts, that
8 might approach to the point of being an assault, creating
9 a fear for that person of some type of physical attack.
10 Under those circumstances, I think courts could intervene.

11 Indeed, under Florida law, there is a stalking
12 statute which is simply not following people around, it's
13 putting them in fear of some other harm to their person.

14 QUESTION: But are you in effect saying there
15 does have to be at least a predicate threat of illegal
16 conduct?

17 GENERAL DAYS: I'm not saying that. I think
18 that there, in this case was illegal --

19 QUESTION: So -- well, the only reason I ask, in
20 your answer to Justice Stevens, when you said that that
21 might raise the -- might rise to the level of an assault
22 or a threat of harm, I thought you were saying those would
23 in fact be criminal offenses and they would be the
24 predicate for the injunction in that case.

25 GENERAL DAYS: May I finish?

1 QUESTION: Yes.

2 QUESTION: That is not what you meant?

3 QUESTION: You may answer the question.

4 GENERAL DAYS: That there could be a predicate
5 for criminal action.

6 QUESTION: But that they are not a necessary
7 predicate.

8 GENERAL DAYS: That's correct.

9 QUESTION: Thank you, General Days.

10 GENERAL DAYS: Thank you.

11 QUESTION: Mr. Staver, you have 3 minutes
12 remaining.

13 REBUTTAL ARGUMENT OF MATHEW D. STAVER

14 ON BEHALF OF THE PETITIONERS

15 MR. STAVER: An injunction, de facto, is
16 content-based. The Carroll standard is the applicable
17 standard. To apply the time, place, and manner standard
18 would result in the overruling of more than 60 years of
19 this Court's precedent, beginning in 1931 with Near.

20 The standard applicable to this case is that an
21 injunction touching on free speech is a prior restraint
22 which carries a heavy presumption against constitutional
23 validity and which must be precisely tailored to the exact
24 needs of the case.

25 That standard is totally inapposite to a time,

1 place, and manner standard precisely because it focuses on
2 someone's speech, in this case petitioner's prior to her
3 or them being able to speak their speech. It criminalizes
4 their side of the debate.

5 This particular case is certainly coming to this
6 Court with a heavy presumption against constitutional
7 validity. It is a touchstone of First Amendment
8 regulation to be very precise, not overkill. This
9 injunction is overkill. As in Claiborne Hardware, that
10 injunction was overkill. As in Near, that injunction was
11 a prior restraint.

12 This injunction, instead of using a surgeon's
13 scalpel, cuts with a butcher's knife. This injunction
14 restrains Judy Madsen's speech from being able to
15 distribute a piece of literature which is not offensive or
16 distressing to anyone forever, within the 36-foot zone.
17 Judy Madsen can never lawfully be present on a public
18 sidewalk, public highway, or right-of-way, period, under
19 this injunction. Judy Madsen must censor her speech when
20 she goes within the 36-foot zone.

21 Despite page 375 of the Joint Appendix, where
22 respondent specifically said, Judy Madsen had never been a
23 target of the contempt proceedings, yet she's still a part
24 of this injunction. The clinic and the court below
25 impermissibly lumped her protected speech with some other

1 unknown --

2 QUESTION: Are you arguing that if she had been
3 the president of Operation Rescue and said, I believe in
4 everything they're doing and I want to help them as much
5 as I can, there'd be a different result?

6 MR. STAVER: If she were, Justice Stevens,
7 condoning and orchestrating this?

8 QUESTION: Yes.

9 MR. STAVER: She was not a target of the
10 contempt in any respect.

11 QUESTION: But I'm asking you, if she were, if
12 she said, I agree with everything they do, I want to help
13 them as much as I can, would she then lose her -- the
14 rights you're describing?

15 MR. STAVER: No, Justice Stevens.

16 QUESTION: Then I don't really understand what
17 difference it makes if you've got Judy Madsen rather than
18 the president of the organization.

19 MR. STAVER: I believe on page 920 of this
20 Court's decision in Claiborne Hardware, it says that to
21 restrain those illegal activities for individuals, not
22 simply because they're members of a group. Judy Madsen
23 did no illegal activity.

24 Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Staver,

1 the case is submitted.

2 (Whereupon, at 11:02 a.m., the case in the
3 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JUDY MADSEN, ET AL., Petitioners v. WOMENS HEALTH CENTER, INC. ET AL.

CASE NO.:93-880

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)

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