OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PAUL SCHENCK AND DWIGHT SAUNDERS, Petitioners v. PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET. AL.

CASE NO: No. 95-1065

PLACE: Washington, D.C.

DATE: WEDNESDAY, OCTOBER 16, 1996

PAGES: 1-60

REVISED COPY

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -X

PAUL SCHENCK AND DWIGHT SAUNDERS,

Petitioners

v. : No. 95-1065

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, October 16, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05:00 a.m.

APPEARANCES:

JAY ALAN SEKULOW, ESQ., Washington, D.C.; on behalf of the Petitioners.

LUCINDA M. FINLEY, Buffalo, New York; on behalf of the Respondents.

WALTER DELLINGER, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 95-1065, Paul Schenck and Dwight Saunders v. Pro-Choice Network of Western New York.

Mr. Sekulow.

ORAL ARGUMENT OF JAY ALAN SEKULOW

ON BEHALF OF THE PETITIONERS

MR. SEKULOW: Mr. Chief Justice and may it please the Court:

Whatever one thinks of abortion, this Court in both Bray and Casey has recognized that there are common and respectable reasons for opposing it. We are not here challenging the prohibitions of the injunction which prohibit blockades, trespass, or obstruction of access. In the Western District of New York, the opposition to abortion with which we are concerned involves demonstrations such as picketing, leafleting, the holding of a sign, or a prayer vigil.

Under the one-size-fits-all injunction issued by the district court, the petitioners are prohibited from engaging in these form of demonstrations inside overlapping speech-free zones that float without geographic limitation.

The injunction also allows, to a very limited

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

extent, a form of demonstration that --

QUESTION: Mr. Sekulow --

MR. SEKULOW: Yes, Justice --

QUESTION: -- I think we can hear you quite well if you were to lower your voice a little.

MR. SEKULOW: Yes, Mr. Chief Justice.

The other provision of the injunction that we are challenging involves a sidewalk counseling allowance. It allows sidewalk counseling. However, that sidewalk counseling can be terminated based on facial gestures.

In other words, what we call and the lower courts recognized as a cease-and-desist provision. This provision of the injunction is implemented on verbal or nonverbal indications.

In fact, the injunction itself prohibits and allows for -- prohibits any person being approached. It's not just limited to women seeking the services of an abortion facility.

On page 183 of the petition appendix --

QUESTION: You'd be content if we modified that so only verbal indications would suffice?

MR. SEKULOW: No, Justice Scalia, we would not. That would be certainly a step in the right direction. The ACLU in their brief has acknowledged that --

QUESTION: And that's not really what you're

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

after here, is it?

MR. SEKULOW: That is not. We think that the no consent, and that's what this is, without consent, the speech stops, and that could be before a word is even uttered, and we think that provision of the injunction, like the no approach zone in Madsen, because it is dependent upon consent of the people speaking and the people that are listening, therefore it is unconstitutional, because without a doubt it burdens more speech than necessary to serve any of these purposes.

QUESTION: How does it stop? I mean, we're 15 feet apart now.

MR. SEKULOW: Yes.

QUESTION: Even without this microphone I think I can hear you perfectly well.

MR. SEKULOW: The Chief Justice certainly said that.

QUESTION: Yes. So what is the problem? I mean --

(Laughter.)

QUESTION: -- here we are, we're having a conversation, and we're 15 feet apart --

MR. SEKULOW: We're in the --

QUESTION: -- and the judge's decree allows everybody to go 15 feet apart, doesn't it?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SEKULOW: Justice Breyer, I think that in reality we're talking about, of course, in Buffalo city sidewalks and city streets, with sidewalk escorts trying to get people into the clinic.

It's the hustle and bustle of any metropolitan area, and to carry on intimate conversation, one-on-one communication with a desire to dissuade, to tell someone we really don't you -- want you to go into this particular abortion facility. That is intimate conversation.

Sure, you could be 15 feet away, but in that 15 feet, if you were to ask me, as a demonstrator, if I was the demonstrator, you wanted some information, under this injunction consensual speech is also prohibited, and that's where I think, if we look at the burdening-no-more-speech-than-necessary standard, why is it that 15 feet serves as a standard, especially --

QUESTION: Let me ask you --

MR. SEKULOW: Yes, Justice Stevens.

QUESTION: Would 5 feet be okay?

MR. SEKULOW: I don't think so in the particular situation here. If there is --

QUESTION: Two feet?

MR. SEKULOW: Two feet I think would approach what we would consider probably blocking, certainly crowding, and crowding is prohibited by section 1(c) of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the injunction and we're not challenging that, but crowding in the sense that if I were blocking your access.

One of the examples that we use, and I think it was one of the contempt proceedings -- it's found in the Joint Appendix on page -- beginning -- commencing on page 101, actually 102 going forward.

Bonnie Behn and Carla Rainero were engaged in sidewalk counseling. They were held in contempt. The court held them in contempt.

On page 107 of the Joint Appendix, in describing what exactly was taking place, and then going on to page 108, and I'll refer to page 108, Bonnie Behn and Carla Rainero walked alongside the young woman, her companions and the escorts, and continued talking to the young woman. They were engaged in a conversation.

Now, ultimately, the woman in that particular case that was seeking the abortion said, please stop talking. There's no finding of yelling, no finding of blockades, no finding of impeding access. She just said, stop talking.

The two individuals, Carla Rainero and Bonnie Behn, continued to communicate, and for that the court held them, the district court held them in contempt, because the injunction itself prohibits that type of speech on a public sidewalk in New York absent evidence of

yelling, absent evidence of blockades.

That information or that concern is handled by the injunction, as is the noise restrictions. We're not challenging those.

QUESTION: Yelling. Yelling. You would accept this injunction if it prevented you from raising your voice to anyone going into the clinic?

MR. SEKULOW: Oh, no, I don't think that is the prohibition that we're concerned with. The noise provision, Justice Scalia, excessively loud noise to be heard inside --

QUESTION: To be heard inside.

MR. SEKULOW: Yes.

QUESTION: But you wouldn't say that this injunction would be okay if it prevented the counselors from shouting at the --

MR. SEKULOW: No. I think that's robust speech, and this Court has talked about the need to protect robust speech in public forums. This is clearly a public forum. The fact that these sidewalks abut an abortion clinic does not mean that they become enclaves immune from the First Amendment.

QUESTION: Well, are you challenging the fixed 15-foot limit?

MR. SEKULOW: We are challenging that as well.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Justice O'Connor, the way that these zones work in operation, you have, as you acknowledge, the 15-foot fixed zone, which actually is really 45 feet, because as an individual approaches the clinic their bubble zone, their floating zone goes with them.

QUESTION: I'm not talking about the floating bubble, I'm talking about the fixed buffer zone provision.

MR. SEKULOW: The fixed buffer zone in and of itself, Justice O'Connor, we are challenging. Two reasons. Number 1, the Court here, before -- when it issued the temporary restraining order had a speech-restrictive provision initially.

I think what this Court said in Madsen as it relates to the entire issue of was there a -- before a broader injunction is issued, is there a least restrictive or less restrictive injunction that just didn't do the job, and I don't think that's the facts here.

The reality is that the injunction had a speech restriction at the outset. Then the Court increased that speech restriction in the final -- the preliminary injunction.

QUESTION: Is it your position that there was no post-TRO conduct that justified the 15-foot limit?

MR. SEKULOW: That is our position, and I think the record in that sense shows it, because there would

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

have been six contempts, or actually seven contempt actions brought in an almost 18-month period, three of them involving cease and desist -- yes, Justice Ginsburg.

QUESTION: As I recall, Judge Meskill in the panel ruling did find that there had been violations after the issuance of the TRO, and if you would look at A-57 he refers to an incident on March 26, 1991, in which two men blocked the doorway to the clinic, and then another one on January 1, so Judge Meskill, whose position I think you are not challenging --

MR. SEKULOW: That's correct.

QUESTION: -- did find post-TRO conduct that violated the Court's order.

MR. SEKULOW: Yes, Justice Ginsburg, that's correct, and we've acknowledged, and they're in the Joint Appendix, there are also contempt actions that have been filed.

QUESTION: But you did say in your reply brief that the district judge found no defendants physically blocked access after the issuance of the TRO, and as I read Judge Meskill's opinion that's not so.

MR. SEKULOW: What it's talking about there in the particular page A-57, the way we understand the evidence was submitted at trial and the way we've seen the case was, this was not a mass blockade, and what we were

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

talking about in our reply brief, Justice Ginsburg, is, this is not a case involving mass blockades. There have been occasions where protesters have trespassed, and we believe --

QUESTION: But I wanted to inquire, what is the principle that limits the Court to the conduct post-TRO and pre-preliminary injunction, given the long history of discord, to use the mildest term, what is it that confines the district judge in thoughtfully drawing a preliminary injunction after trying to preserve the peace with a TRO, from crafting it in a sensible way in light of all of the past history? Why is he confined just to this post-TRO conduct?

MR. SEKULOW: I think that the Court should only be looking at this particular injunction in light of the facts that the district court have. Was the injunction that was issued, Justice Kennedy, then, the question that we would submit is, did it burden more speech than necessary, and the provisions that we're challenging -- we're not saying that it was inappropriate to say, as the court did -- it increased the -- under provision 1(c) from the TRO to the preliminary injunction, it did increase things such as no touching, no physical contact. We're not challenging that.

But there's nothing that justifies the speech-

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

free zones that float without any geographic limitation, and speech can be silenced on command.

Justice Scalia.

QUESTION: Was that 15-foot -- not the floating zone, but the 15-foot absolute, that was in the TRO originally. That wasn't added.

MR. SEKULOW: Actually, the --

QUESTION: Wasn't that in the original TRO as well?

MR. SEKULOW: Justice Scalia, actually it was the floating zone was in the TRO.

QUESTION: Ah.

MR. SEKULOW: And the fixed zone came afterwards, and I think that points to the nature of what took place here, so we have these automatic floating zones, if you will, without geographic limitation, and then a 15-foot zone is imposed, and we would --

QUESTION: What Meskill says on A-57, after noting that there were these two violations after the TRO, he says, however, the Supreme Court's First Amendment jurisprudence clearly requires more than two isolated incidents over the course of 1-1/2 years before a court may banish an entire protest demonstration from a given area, and that's your contention here.

MR. SEKULOW: And that is our contention, and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

also --

QUESTION: But Mr. Sekulow, I think you will agree that it is a standard in law regarding injunctions that if there is no incident following the TRO -- the TRO is a very temporary thing.

MR. SEKULOW: Right.

QUESTION: And if there is no violation of it, that shows the injunction is working, not that it should be stopped. I think your proposition is extraordinary, that if the very brief TRO is working, then the injunction must be stopped, rather than maintained.

MR. SEKULOW: But Justice Ginsburg, if it is working but infringes on free speech at the same time --

QUESTION: Well, then -- then there was something wrong with the TRO.

MR. SEKULOW: Well, precisely.

QUESTION: But the notion that I thought you were putting forward to us was that because there was compliance with the TRO there was no longer need for that restraint.

MR. SEKULOW: We have not challenged, nor are we here challenging the restrictions other than the two speech provisions, but the district court and the court of appeals acknowledge, and it's on A-8 of the petition appendix, that the demonstrations are mostly peaceful in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

nature.

Twelve judges of the Second Circuit Court of Appeals stated that in fact this was very different record than in Madsen. And in Madsen, this Court held that in fact the issue of a fixed zone was debatable. We think the debate should tip in favor of free speech here, especially since this Court in Madsen said that precision of regulation is required, couched in the narrowest possible terms.

QUESTION: We also said in Madsen, Mr. Sekulow, that some deference was due to the trial court's formulation of the thing.

MR. SEKULOW: Yes, and this Court, in looking at the -- in giving some deference to the trial court struck down the no-approach zone in Madsen and also declared that a portion of the 36-foot zone burdened more speech than necessary.

Mr. Chief Justice, I think that's precisely our point, that the pinpoint precision that this Court talked about in Madsen is absent here. This is a one -- this injunction applies to every single facility where abortions are performed in the Western District of New York, and it is one size fits all. They did not carve it to specific needs, and we think a floating zone is not justified anyways, and a cease-and-desist provision --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: May I ask on the floating zone --

MR. SEKULOW: Yes.

QUESTION: -- is it your position that a floating zone, no matter how carefully tailored, could never be justified as a remedy for repetitive speech? Say a person operated a fur store and some animal rights person wanted -- day after day walked -- followed the person going to business, repeating the same message over and over and over again, would the First Amendment permit or prohibit some kind of floating zone for -- to protect that person from just the repetition of the same message over and over again?

MR. SEKULOW: I think it would be prohibited by the First Amendment. I don't think we can say --

QUESTION: There's no -- floating zone is per se bad?

MR. SEKULOW: There are times, Justice Stevens, where floating zones have been adopted in domestic violence situations where -- of course, that's not involving speech.

QUESTION: No. I'm just talking --

MR. SEKULOW: Right.

QUESTION: -- about harassing only in the sense of one must listen to the same message over and over and over again, and you say you just have to -- you have to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

swallow that.

MR. SEKULOW: Well, I think on a public sidewalk or a public street we're going to hear messages we may not like, we may disagree with, but it can --

QUESTION: Yes, but I'm talking about the same message over and over and over --

MR. SEKULOW: By one person to the same person. Could that approach harassment? Maybe it could. However --

QUESTION: And then if one could do it, why is it different if, instead of one doing it 20 times, 20 different people do it in succession?

MR. SEKULOW: I don't think that necessarily that would be inappropriate.

QUESTION: Oh.

MR. SEKULOW: In the context of robust debate on a public issue like this, there is going to be a variety of speech. This injunction, though, which is interesting, prohibits a person from -- a demonstrator from approaching anyone.

In fact, interestingly, this injunction does not limit its impact to women seeking the services of an abortion clinic, or physicians and staff. It applies to any person seeking access, and provision 1(c), the no approach zone, it's similar to the no-approach zone. It's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the cease-and-desist provision, says on its face -- I mean, it's very clear that a person or a group of persons can prohibit, or use the provision and prohibit speech. How does a group of persons do that? Is it one individual wants to hear a message, the other does not? What happens if --

QUESTION: Is that the way you would distinguish, if you would distinguish this situation from the application of some of the new stalker laws?

MR. SEKULOW: I think the stalker laws are different in that regard.

QUESTION: Because?

MR. SEKULOW: Because the persistence is not necessarily, Number 1, protected speech. There's a number of issues.

QUESTION: Well, let's assume that the stalker does have a message, and my guess is a lot of them do.

MR. SEKULOW: And at some point that crosses the line from speech to harassment. We've looked at that issue. Is there a way to prohibit one-on-one persistent speech on a public forum?

I have trouble with that, because I think it leads to a dangerous provision, but if there was harassment, you had -- we have the case in the Second Circuit involving Ms. Onassis, and there the court said

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that a zone was appropriate. But of course, there the court cut the zone.

I also think --

QUESTION: This injunction doesn't prohibit following, does it?

MR. SEKULOW: It does not.

QUESTION: It prohibits speaking.

MR. SEKULOW: That's correct. It is targeted directly at speech.

QUESTION: And you would feel differently about an injunction that prohibited following.

MR. SEKULOW: It's a different scenario. It's the purpose of the communication, but --

QUESTION: But I don't think this injunction prohibits the speech. It just requires the speaker to stay 15 feet away, which is prohibiting following.

MR. SEKULOW: No, I think not, Justice Stevens, with respect, for two reasons. Number 1 -- and I want to draw an analysis, if I could. In NAACP v. Claiborne Hardware, one of the most effective tools for the civil rights protestors was the stationing of sidewalk-based store watchers. They were sometimes called deacons, sometimes called black hats.

And the Court acknowledged -- this Court acknowledged that, as the lower courts found, that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

volition of many black citizens were just overcome by sheer fear because the presence of these black hats was so strong and it was intimidating, but the Court still said that that was protected speech, and the fact that here the speech is vigorous, and it's about an issue that is part of a debate, doesn't entitle it to less constitutional protection, or alternatively protecting platitude.

QUESTION: I still don't understand, what is the word, or the idea, or the expression that one could make if you're within a 15-foot radius that you couldn't communicate being the distance, a little bit less than the distance that we are now. Is there some word, or expression, or thought, or idea, or view that is only communicable when I'm closer to you than I am at this moment, and if so, what is it?

MR. SEKULOW: I think, Justice Breyer, all of the above. I think someone that is on the streets of New York that wants to talk to a woman who is about to engage in an abortion procedure, or for that matter a salesman who does business with this abortion facility, wants to communicate a message one-on-one, maybe wanting to share, as the records happen in this case, a Bible verse. It's hard to show someone a Bible 15 feet away.

QUESTION: But then they can go up and do that, can't they, unless the person affirmatively says that they

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

don't want that.

MR. SEKULOW: Actually, there's no demonstration allowed within the 15-foot zones at all. The only carve-out is the sidewalk counseling, which is the distribution of literature, according to the lower court, to dissuade someone from not having an abortion based on a particular statement, and then, of course, the cease-and-desist language comes in.

But if someone were simply holding a sign, or handing a religious tract, or simply trying to show a Bible to someone, they cannot do it, and in the decorum of this courtroom, it's quite easy for you and I to communicate.

QUESTION: Why couldn't the counselor show the person the Bible within the 15 -- if the person doesn't object.

MR. SEKULOW: Well, the counselor could.

QUESTION: Yes.

MR. SEKULOW: Unless, of course, somebody in that group says, get away.

QUESTION: You need more than two people to show the passage from the Bible?

MR. SEKULOW: Well, I don't think that's -- I don't think that's what I'm saying, Justice Stevens. What I'm saying is, the Bible itself may not be deemed a form

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

of demonstrating -- a form of sidewalk counseling.

QUESTION: But you're saying that because it's small print you have to be close for the person to be able to read it. Fifteen feet, you can't read the Bible, obviously.

MR. SEKULOW: I think it's more than print. I think it's the communication and the print. I think if someone wearing a button that makes a statement, a religious statement, or a sentiment, that person --

QUESTION: No, but you're responding to a question about what can't you do at 15 feet that you could do in less than 15 feet, and it seems to me your point is you've got something they couldn't read.

MR. SEKULOW: I have something they couldn't read, it's hard to shout over sidewalk counselors, the lower courts acknowledge that the sidewalk counselors, the escorts, rather, trying to get these women in the clinic create an increased atmosphere, it's noisy, and it's hard to communicate.

QUESTION: I understood from the record that the -- whatever you call them, the antiabortion people had people called sidewalk counselors --

MR. SEKULOW: Sidewalk counselors, yes, Justice.

QUESTION: -- and the clinics had people who were meant to counter the sidewalk counselors.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SEKULOW: Escorts.

QUESTION: Who would surround the person coming in and talk about everything and anything, make noise, which made it quite difficult to speak to that person from 15 feet.

MR. SEKULOW: Precisely, and in that nature would also inform these women about their rights under the injunction, would encourage them to engage in a communication to stop the communication, they would surround them -- this was not, as I said, courtroom decorum discussion. This is discussion on a street where there's people on both sides of the issue.

QUESTION: Mr. Sekulow, you had --

QUESTION: But would that solve the problem if the injunction only applied to unescorted persons?

MR. SEKULOW: I don't think so. I think that would be like --

QUESTION: So really you're not resting on the fact that they are escorts there.

MR. SEKULOW: My response was, Justice Stevens, that Justice Breyer and Justice Scalia were asking about the issue of communicating a message. It's difficult to communicate a message on a public sidewalk.

How does one hand someone a leaflet 15 feet away when this Court recognized that one need not ponder the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

contents of a leaflet to mechanically take it out of someone's hand. You can't take it unless you have an awfully long hand. You can't take it out of someone's hand --

QUESTION: Well, you can offer it, presumably, at the 15-foot boundary and say, here, I'd like you to take this to read it. The person can refuse, and if you were closer and offer a leaflet, the person can refuse.

MR. SEKULOW: But I think the point is, Justice O'Connor, that 15 feet away on a city street in Buffalo, New York, is not this courtroom, and I cannot just hand the leaflet, and I think I have the right --

QUESTION: I thought the injunction let you.

MR. SEKULOW: Excuse me?

QUESTION: I'm sorry. Doesn't the injunction allow someone to go right up next to the woman and say here, I'm 1 foot away, would you like to read this, I want to counsel you, and then the woman can say no.

MR. SEKULOW: The woman can say no, which we think the consent provision alone is the reason this provision of the injunction should be declared to burden more speech than necessary and therefore unconstitutional, but that's one --

QUESTION: Mr. Sekulow --

MR. SEKULOW: Yes, Justice Ginsburg.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Unlike a statute that's just regulating everybody, we do have an injunction that's supposed to be tailored to these circumstances, and you had no objection, I take it, to injunction against grabbing, pushing, shoving.

MR. SEKULOW: That is correct.

QUESTION: The district court did make a finding that the sidewalk counselors often crowded around the patients, and mustn't there be some kind of keep-your-distance rule to prevent the pushing, shoving, grabbing that had gone on before? There is a past history here that the judge was taking into account.

MR. SEKULOW: I think, though, the way to -- if someone pushes, if someone grabs, if someone crowds so that someone can't move forward, there's provisions of the injunction that cover that, and they should be prosecuted for contempt. I don't think to limit speech, including prohibiting demonstrations completely -- I mean, under --

QUESTION: No, but isn't the answer to that, Mr. Sekulow, that the closer they are, given the history, the more likely there are going to be incidents of pushing and shoving, and you can't as a practical matter, simply as a court, prosecute 100 contempts a day under these orders, so the idea, to have something -- you're making a practicality argument. I think the court is making a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

practicality argument.

The court is saying, let's have some kind of a zone which isn't going to cut off speech entirely, but which is going to reduce the probability that we are going to have a multiplicity of contempt actions every time somebody walks into an abortion clinic.

MR. SEKULOW: Justice Souter --

QUESTION: Isn't that the answer?

MR. SEKULOW: I don't think it is in this regard. The court tailored its injunction, or attempted to tailor its injunction to say no grabbing, no physical abuse. We're not challenging that, but this injunction itself says, no --

QUESTION: No, but don't you agree that the probability of grabbing is going to be greater the closer people are in these situations? Isn't that the point upon which the court's order rests, and isn't that point correct?

MR. SEKULOW: Well, they made that argument. That was one of the --

QUESTION: Isn't that point correct?

MR. SEKULOW: Public access was one of the concerns that the court raised.

QUESTION: Yes.

MR. SEKULOW: But I think --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: And that's -- I mean, the point is correct.

QUESTION: Well, do you think that the requirement of very precise tailoring is consistent with sort of a prophylactic provision like that?

MR. SEKULOW: I think no. It has to be tailored specifically to what's taking place, and I think that precision of regulation is the standard, and --

QUESTION: Mr. Sekulow, can you enter the 15-foot zone, crowd, and even grab, so long as you don't try to talk?

MR. SEKULOW: You know, that's interesting. It doesn't prohibit standing. It doesn't prohibit --

QUESTION: As long as you don't have a poster, and so long as you don't try to talk to the person, you can get within the 15 feet, grab, crowd, do --

MR. SEKULOW: Well, you know, it says that no demonstrator shall physically abuse, grab, or touch, but I mean --

QUESTION: But the 15-foot zone does not apply to someone who is not trying to communicate.

MR. SEKULOW: That's -- that is how I think this injunction can be read, and that's, I think, again --

QUESTION: Is there any evidence that the people who were grabbing and shoving before were tightlipped?

MR. SEKULOW: No, there isn't, but I think -- I think that --

(Laughter.)

QUESTION: The two go together, don't they?

MR. SEKULOW: I think not in this context. I think yes, they can go together in the sense, is there a need for an injunction of some type? The answer, yes. We're not challenging the issuance of the injunction.

However, does that mean that demonstrations, the holding of a sign, the wearing of a button within 15 foot, 15 feet of an individual, any person seeking access, is constitutional, and we think not. It has to burden more speech than necessary.

QUESTION: Mr. Sekulow, what was -- what is the meaning of something that the Government emphasizes in its brief, the provision that if the court concludes that some of the relief requested by the plaintiff should be granted, that the defendants will consent to the entry of an injunction against each and every one of them, and the Government tells us that the defendants thus stipulated below that any unlawful conduct found to have been performed by any of them could be attributed to all of them for purposes of the preliminary injunction. So that sounds like if you did have some people crowding, pushing, needing this kind of keep-your-distance rule, that that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

same rule could apply to all of the people.

MR. SEKULOW: There was a concession, Justice Ginsburg, in the district court regarding the nature of the evidence, and it simplified in a pretty real way, and a not necessarily beneficial one, it simplified the evidence that was presented. It does not change the nature of what's being challenged here, though.

We're not saying that an injunction should not be issued. We're not saying it applies to one person and not the other. We're saying that any demonstrator is prohibited from demonstrating within a 15-foot zone and a floating zone that goes without geographic limitation whatsoever. No geographic limitation of this zone. It just floats, and we think that burdens more speech than necessary, and --

QUESTION: Did you ask to have that clarified, because wasn't there a point where the district judge said, gee, that's not what I meant.

MR. SEKULOW: I found that -- we found that fascinating, too. The Court said, my gosh, it would be impractical. In fact, it says -- it goes further. He said, no one would know how to comply with the floating zone, but then he acknowledges it's floating, and the Second Circuit acknowledges it's floating, so maybe the judge at the district court level forgot what he meant, I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

don't know, but it burdens more speech than necessary because it does exactly what the judge was concerned about. How does one know when to back off?

QUESTION: Mr. Sekulow, was it suggested at any point in the proceedings that it was inappropriate or inadvisable for the district court to maintain pendant jurisdiction in this case?

MR. SEKULOW: Yes, it was. It was raised below, and it was rejected.

QUESTION: You don't raise that point here?

MR. SEKULOW: Well, I think we're beyond that point. I think that at this point -- we thought it was a valid issue. It's not part of the cert petition in that sense.

Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Sekulow.

Ms. Finley, we'll hear from you.

ORAL ARGUMENT OF LUCINDA M. FINLEY

ON BEHALF OF THE RESPONDENTS

MS. FINLEY: Thank you, Mr. Chief Justice, and may it please the Court:

I think we cannot lose sight of the record and the evidence in this case. We have here an unrelenting campaign by defendants of illegal and tortious harassment,

intimidation, obstruction, and trespass at health care facilities. We have to keep that in mind as well.

The activity that the district court found occurred repeatedly is antithetical to the need of surgical facilities and hospitals for quiet and calm. The idea of quiet zones and buffer zones around hospitals is a well established traditional principle in law, and all we're trying to do here is make sure such a zone pertains outside these surgical facilities.

QUESTION: By requiring people to speak from a distance of 15 feet --

MS. FINLEY: All -- sorry.

QUESTION: -- instead of coming up close, does that --

MS. FINLEY: The --

QUESTION: -- make the zone quieter or noisier?

MS. FINLEY: The preliminary injunction allows sidewalk counselors to come right up to people, which is far more accommodating of defendants' free speech rights than the buffer zone affirmed by this Court in Madsen and by the buffer zone around polling places affirmed by this Court in Burson v. Freeman. The injunction here gives far more leeway to defendants than buffer zones previously upheld by this Court, despite their record of dangerous, medically risky, intimidating and harassing activity.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

I think we need to focus on -- yes, from 15 feet away they can, in fact, communicate. As Justice Breyer pointed out, we are approximately 15 feet away now, and he --

QUESTION: Without any traffic and without any opposing escort.

MS. FINLEY: He refers to the hustle and bustle of streets. In fact, the record shows most of the time when people are trying to get in it's about 7:00 in the morning, and there isn't much traffic on the streets at 7:00 in the morning. The record also shows that the greatest amount of noise being created is by the defendants themselves. If occasionally other people lose their cool and shout back, that's to be expected and understood in this kind of volatile situation.

The district court found that it's the persistent face-to-face harangue by the defendants that often triggers other people into starting to yell back. It's the defendants' conduct who initiates all of this noise and cacophony outside of surgical facilities, and that is what the district court found.

QUESTION: Well, Ms. Finley, are you suggesting that there's some special rule for abortion clinics that wouldn't apply in other cases where people are being perhaps harassed or counseled or argued with?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. FINLEY: No, not at all, of course --

QUESTION: Certainly Madsen doesn't say that.

MS. FINLEY: No, it does not.

QUESTION: Then why do you keep stressing the quiet zone outside the abortion --

MS. FINLEY: Because Madsen did recognize that the governmental interest ensuring -- in ensuring safe conditions for health care is a compelling interest, and I think we must keep in mind that that interest is very present in this case.

So I think there are a different calculus of governmental interests that are involved when protest is occurring outside hospitals and surgical facilities, as this Court recognized in the labor cases, NLRB v. Baptist Hospital and Beth Israel Hospital, so sometimes what might be a no more burdensome provision than necessary at a hospital, it may be different from what is no more burdensome than necessary at another sort of facility that doesn't have the same need for people being able to get in without being in stressed-out hysterics.

QUESTION: Did Madsen suggest that there has to be some underlying violation of statutory or common law to support a preliminary injunction burdening speech?

MS. FINLEY: Well, of course, to get a preliminary injunction anyone has to show a likelihood of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

success on the merits of some valid cause of action. That's --

QUESTION: Okay, and what is it here that you rely on?

MS. FINLEY: Our causes of action -- well, the district court found that in addition to the Federal civil rights claim that the --

QUESTION: I thought that claim under section 1985(3) was dismissed here.

MS. FINLEY: Dismissed, and subsequently the complaint was amended and it was reasserted, but the district court also found that the State law causes of action for trespass, which under New York law broadly protects people's use and enjoyment of their property rights, and the causes of action under New York State law for harassing people for exercising their right --

QUESTION: Could there be trespass on a public street or sidewalk, or would that just apply to the property of the clinic?

MS. FINLEY: In -- under New York law, trespass is not simply the physical invasion of a line-demarcated private property. It also includes interference with the fair and unfettered use and quiet enjoyment of your property.

We also have State law claims in the case for

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

intentional interference with business relations, infliction of emotional distress. Our State law causes of action are virtually identical to the State law causes of action involved in Madsen. But this issue of whether the State law claims in this case still warrant relief has never been raised by the petitioners in the lower court, which I think is the forum that should first be given the chance to look at the remaining causes of action in light of the evidence.

QUESTION: Did Madsen state that the consent requirement alone invalidated the no-approach provision in that case?

MS. FINLEY: That is, I believe, an accurate quotation from Madsen, yes, Justice --

QUESTION: So are you asking that we ignore that here?

MS. FINLEY: No. We do not have a no-approach-without-consent provision in this injunction. The cease-and-desist provision is substantially different. The cease-and-desist provision specifically allows all uninvited approaches without consent. It specifically allows the very thing the Madsen no approach zone did not allow. There's a substantial difference under First Amendment law between not letting someone try to go up to somebody versus saying you have to respect that other

person's right to refuse you.

This Court has repeatedly emphasized that the right to refuse a messenger, and the right to make your own choices about what you do and do not listen to --

QUESTION: But the reason -- the reason we struck down the uninvited approach provision in Madsen is as follows, quoting from Boos v. Barry: As a general matter, we have indicated that in public debate our own citizens must tolerate insulting and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.

Now, if you apply that same statement to -- to what -- unwanted speech just as we applied it to uninvited speech, it seems to me you get the same result.

MS. FINLEY: Nobody under this injunction, Your Honor, is protected from any speech at all. They're just protected from the forced physical proximity of an intimidating person with medical evidence that that forced physical proximity elevates health risks. Everyone here is going to have to encounter the message whether they want to or not.

QUESTION: Medical evidence that the forced physical --

MS. FINLEY: Yes.

QUESTION: -- proximity -- where is that?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. FINLEY: Dr. Hoagland's testimony, which is extensively recounted --

QUESTION: He did studies on forced physical proximity, and it's --

MS. FINLEY: Dr. Hoagland was certified as an expert in both behavioral medicine and social impact theory, and social impact theory is, in fact, the study of how invasions of personal space create physical stress reactions, and the adverse effect of such reactions on medical care. That was her precise area of expertise, and she testified about that at great length.

QUESTION: So we have experts like that now in any case where we're talking about this sort of thing?

MS. FINLEY: I -- it may be advisable for people to put on medical testimony.

QUESTION: What was she a specialist in, social impact theory?

MS. FINLEY: Behav -- it's an established area of social science.

QUESTION: Would you name it again?

MS. FINLEY: It's called social impact theory, a scholar named Edward Hall developed it in the fifties, and there's been an extensive body of research in the fields of psychology, medicine, and anthropology that have further studied it. It's the idea, the basic idea that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

there is a zone of personal space, and it varies according to the nature of the encounter.

For example, the appropriate zone of personal space here for this sort of encounter is about 15 feet.

QUESTION: But I thought we had to -- the Court had to find some violation of statutory or common law to justify a preliminary injunction.

MS. FINLEY: And it did. It found a likelihood of success on the merits.

QUESTION: So I don't know what this argument does to bolster that. I mean, it's not a theory of a violation of law.

MS. FINLEY: No. I think the relevance as I was responding to Justice Scalia's question, which I understood to be is there -- what is the problem with having somebody force their physical proximity on you, so I was highlighting that particularly when people are going in for medical care, that is a -- it escalates the health risks, which is a factor, of course, for injunctive relief.

QUESTION: But you say the preliminary injunction could be based solely on testimony of an expert --

MS. FINLEY: Oh -- oh, no -- oh, I --

QUESTION: -- on this social theory?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. FINLEY: I'm sorry, Your Honor, if you understood me to say that.

QUESTION: I did.

MS. FINLEY: Certainly I misspoke if I did. No, that is not my position. My position is that to get a preliminary injunction you have to show likelihood of success on the merits of a valid cause of action, irreparable injury, no adequate remedy at law, which the district court found that we in fact did, amply.

QUESTION: Do I understand, Ms. Finley, that that is still something that's open to inspection by the district judge? We did start out with a 1985(3) claim that the district judge erroneously thought was solid. Then he said, but there are these State claims that can be substituted for it, and the Second Circuit refused -- did not deal with that.

MS. FINLEY: Absolutely yes, Your Honor, it is very much open to the district court. This is a preliminary injunction. Everything is open to the district court.

The Second Circuit instructed petitioners and the panel 2 years ago that they should take these arguments to the district court where they belong, and they never have.

QUESTION: So the viability of this whole case

under State law has yet to be fully tested in the district court, and it hasn't been touched by the court of appeals.

MS. FINLEY: That is correct, Your Honor.

QUESTION: But the district judge did make a preliminary finding that you had under New York law a probability of success on the merits.

MS. FINLEY: That is correct, Your Honor, yes.

QUESTION: But even -- regarding -- you're not contending that the provisions of the injunction do not have to be designed to prevent a violation of the law, as opposed to prevent the kind of emotional upset that your expert testimony related to. You still acknowledge that the provisions of the injunction must be ordinated to preventing a violation of law.

MS. FINLEY: Yes, of course. The expert testimony documented elevated physical medical risk, which is substantially greater than mere emotional upset.

I want to move a moment --

QUESTION: I don't understand that. Does that have anything to do with whether State law is being violated?

MS. FINLEY: No, Your Honor. No. No. Well, it may. We've never yet tested in the district court the State law claims for tortious harassment, for example, and whether someone is being put under medically dangerous

physical stress may be highly relevant to whether you've made out a claim for harassment. That issue has never yet been tested in the district court.

Also, the amount of stress caused, and distress, may be highly relevant to whether we've made out a claim under our State law cause of action for intentional infliction of emotional distress.

In this context of antiabortion protest, there are State law-based decisions finding that conduct very similar to what defendants here do constitutes intentional infliction of emotional distress.

QUESTION: I would say that persons who walk through a picket line in order to work despite a strike face extreme stress. Have we ever in the labor area recognized that stressed individuals is ground for enjoining picketing and labor protest activities?

MS. FINLEY: In the labor context, many courts have established buffer zones to keep the picketers out of the face of people, particularly when they're picketing at hospitals.

QUESTION: But this is an order to prevent violence, et cetera.

MS. FINLEY: Violence and intimidation.

QUESTION: Those cases do not talk about stress to the individual. That's somewhat antithetical to very,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

very essential First Amendment values.

MS. FINLEY: Well, I think that when people are going in for surgery, and there's medical evidence that to safely perform the surgery the stress needs to be reduced, not elevated, that is a governmental interest that is present in this context that is only present in labor contexts when people are picketing at hospitals or nursing homes, and --

QUESTION: And I submit to you that anybody who walks through a picket line at any facility in order to take a job during the pendency of a strike is subjected to great emotional stress, and our cases have never recognized that as a ground for injunction.

MS. FINLEY: Well, Madsen recognized that the elevated medical risks are a governmental interest that needs to be weighed in assessing whether the restrictions on speech are no more burdensome than necessary to protect that governmental interest in ensuring safe conditions for health care.

QUESTION: But only in the context of keeping the noise down outside the hospital which could be heard inside. We studiously avoided using that as a basis for validating any of the restrictions imposed outside the facility which could not -- with respect to speech that could not be heard inside. Isn't that what we did in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Madsen?

MS. FINLEY: Well, I'm sure Your Honors know better what you did in Madsen than I do.

QUESTION: Oh, I doubt it.

(Laughter.)

MS. FINLEY: That discussion was -- yes, Your Honor, that discussion was linked to the noise provision, but the same interest pertains when people are having others screaming in their face.

QUESTION: Well, what about a situation such as Justice Kennedy posits, where you walk through a picket line to go to work, and you've got a very important assignment that day, and you feel you're subjected to a great deal of stress, you're not going to be able to do that work. Now, is that kind of a separate governmental interest that has to be taken into consideration, too?

MS. FINLEY: Whether the protest conduct disrupts the safe and normal functioning of the place is a basic governmental interest that this Court has recognized many times in Grayned v. Rockford on, so I think yes, whether --

QUESTION: Ms. Finley, why do you lay such stress on this point, when I thought the major reason for the injunction and for its provisions was that there was a history of grabbing, pushing, shoving, and the district

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

judge thought that it was reasonable to have a keep-your-distance rule to make sure that the pushing, grabbing, and shoving didn't go on again? I did not regard whatever you call that expert as central to your case, and perhaps you ought to clarify whether it is an extra, or whether it's pivotal.

MS. FINLEY: No, I would agree, Your Honor, with your point that the defendant's persistent, proven conduct of crowding, grabbing, punching, sometimes knocking people down is what necessitates some kind of a clear zone in this case.

I also want to emphasize this idea of floating --

QUESTION: It's not enough that the zone be reasonable, though. You use the language, necessitates. It isn't enough that it be reasonable to establish --

MS. FINLEY: No. In Madsen --

QUESTION: -- such a zone. The zone must be no more than is necessary.

MS. FINLEY: That's right, and here the 15-feet, the length of a car, is necessary to ensure that a car can safely drive down the road.

QUESTION: Well, it's 15 feet on all sides.

MS. FINLEY: All sides of --

QUESTION: Of the person, I take it, or the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

vehicle.

MS. FINLEY: Yes. It would be like a circle around, yes.

QUESTION: All right, and so if you have two people, that amounts to a 60-foot exclusion zone, I take it.

MS. FINLEY: No. Two people are walking side by side --

QUESTION: No. I have two people walking 15 feet away from each other.

MS. FINLEY: But at all points sidewalk counselors can always come right up.

QUESTION: I'm talking about the extent of the zone. It can be 60 feet if two people are walking 15 feet away from each other, each being protected by the bubble.

MS. FINLEY: I think I would say it could be 30 feet but not 60, 15 in this direction and 15 -- that's 30.

QUESTION: At the outer extremities it would be 60. There's a 60-foot slot.

MS. FINLEY: It could possibly be, although --

QUESTION: Fifteen -- well, it's not -- it's mathematical. It's 15 feet to the left, 15 feet to the right, 15 feet each between, that's 60, right?

MS. FINLEY: The reason I said possibly is there's no evidence in the record of that problem ever

happening.

QUESTION: Do we need evidence to add 15 X 4?

(Laughter.)

MS. FINLEY: No, Your Honor, we don't need a mathematical expert.

But this -- the point you're raising --

QUESTION: Of course, we don't have to limit it to two. They could have four each, 15 feet apart.

(Laughter.)

QUESTION: It would take care of a four-lane highway. I don't know why Justice Kennedy limits it to two.

MS. FINLEY: I think you're alluding to the notion of the floating bubble, and I want to remind this Court that judges under a Federal statute, 18 U.S.C. 1507, have what amounts to a floating bubble around any building or residence you use or occupy. People can't go near --

QUESTION: Yes, but the building doesn't float.

(Laughter.)

MS. FINLEY: But judges move from building to building, and it says building or residence used or occupied by judges, so you are protected from people demonstrating near your courthouse, your home, an office you may use off-premises --

QUESTION: Yes, but I have to get -- On the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

hypothesis you're raising, I have to get to the courthouse or to the house, or whatnot, before the zone appears.

MS. FINLEY: Yes, and it --

QUESTION: It doesn't come out to meet me.

MS. FINLEY: No, and if there were a record that protestors started impeding your paths as you tried to go to work or to home, I submit someone could easily get an injunction to keep a clear zone --

QUESTION: But wouldn't the --

MS. FINLEY: -- around you so you could get to work.

QUESTION: But wouldn't there be a difference, and isn't this the difficulty in this case, that if there were simply a 15-foot zone around one person, that's fairly easy to administer and to police, but when you've got multiple, intersecting 15-foot zones around a lot of people who may even be subject to argument as even covered by the zone, you've got something which is far more difficult to administer.

And I was suggesting a moment ago that -- when Mr. Sekulow was arguing that there was a kind of a practicality consideration in having a zone at all, but there's another practicality argument, and that is when the zones are moving and intersecting like this, it may be difficult to enforce with reliable evidence, with reliable

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

proof.

And isn't that a good argument for saying, don't have floating zones, have fixed zones. Realize that things are going to be unpleasant outside the fixed zones, they're going to be less unpleasant inside, but everybody will know where the line is, and the First Amendment isn't going to suffer from the uncertainty. Isn't that a fair argument?

MS. FINLEY: I think it is, Your Honor, and just if I may conclude the point -- I see the red light is on -- that a lot of the problems you're alluding to are precisely because the district judge here gave the defendants more leeway than the fixed zone in Madsen. He allowed them on the same side of the sidewalk, which creates the need to have a clear zone around people. If you push them across the street, as you affirmed in Madsen, a lot of these problems would not arise, and this --

QUESTION: Thank you, Ms. Finley.

MS. FINLEY: Thank you.

QUESTION: General Dellinger, we'll hear from you.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GENERAL DELLINGER: Thank you, Mr. Chief Justice, and may it please the Court:

In light of the questions about the practicality of how this injunction works, it might be useful to look at this case from the vantage point of the trial judge in February of 1992. At that point, he had had several days of hearings on the preliminary injunction and weeks of testimony on the contempt proceedings against Paul and Robert Schenck and others who violated the temporary restraining order.

One of his findings, and they're set out at pages 79 to 149 of the Joint Appendix, one of his findings was that these named defendants had deliberately engaged in a technique of physically crowding in an intimidating and obstructing manner.

What's a trial judge supposed to do in the face of that kind of finding? If he were to issue an injunction precisely in those terms ordering the defendants to cease crowding in an intimidating and obstructing manner, what problems would that cause for a police officer who is at the scene, trying to understand how to enforce that?

QUESTION: Well, one of the things he's supposed to do is read the First Amendment, I take it, and what he's doing here is, he's prohibiting certain conduct based

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

on speech, and that means that the injunction must be precisely tailored. It's not just to eliminate harassment.

GENERAL DELLINGER: I'm --

QUESTION: This injunction goes much further than that, and if you want to defend it as saying that everything here is necessary to avoid the touching, grabbing aspect, that's one thing, but the harassment rationale as I see it goes much further. It protects people against repeated, very annoying, very stressful expression of views by those who differ with them --

GENERAL DELLINGER: Justice Kennedy, I --

QUESTION: -- and that's a very difficult First Amendment case.

GENERAL DELLINGER: I believe that it is not difficult because the trial judge did tailor this to burden no more speech than necessary by making it clear that this message, or messages could continue to be conveyed. There's no speech that is silenced by this injunction.

I think the judge understood that the message that someone is about to commit a deeply immoral act is disturbing and upsetting, but that's the price of the First Amendment. One of our citizens has a constitutional right to convey that message to another, but in this case

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

to avoid a different kind of problem, not the message, but two aspects of the crowding that are not related to the message are at issue here.

QUESTION: In --

GENERAL DELLINGER: Justice Breyer, if you wish -- well, in further response to Justice Kennedy, one of those issues is the sheer effect of the crowding itself, that is, the use of what were called constructive blockades by having 4, 6, 10 people literally crowd around a patient as she attempted to approach the clinic, and to use that in an intimidating way.

The second --

QUESTION: I don't under -- why is that a constructive blockade? I -- a blockade means preventing somebody from entering. Were these people preventing anyone from entering?

GENERAL DELLINGER: It was a construct --

QUESTION: They were just annoying the person --

GENERAL DELLINGER: No.

QUESTION: -- and that's why it was a constructive blockade.

GENERAL DELLINGER: Well, they were not physically barring the people from entering, but --

QUESTION: Well then, it's not a blockade --

GENERAL DELLINGER: Then it's not a blockade.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: -- constructive or otherwise, it seems to me.

GENERAL DELLINGER: The term, constructive blockade I think came from those who were engaged in them, Justice Scalia, because the use of 4, 6, or 10 people to crowd around an individual and to use that effect -- we had testimony, or the plaintiffs had testimony in this case of one of the women who said she felt like she was in the middle of a lynch mob.

That is intended to dissuade people from continuing to go, not by appealing to her conscience or her shame or her medical self-interest, but to dissuade her because of running this gauntlet, and if that prevents people --

QUESTION: I see. Are you going to apply that to labor picketing, too?

QUESTION: And Claiborne Hardware case, where the Court -- this Court struck down a speech-restrictive injunction because the violence that accompanied it was episodic and isolated.

GENERAL DELLINGER: Here, Justice O'Connor --

QUESTION: How do you distinguish that?

GENERAL DELLINGER: Here I think it is --

QUESTION: And it effectively prevented people from entering a restaurant, or what have you.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GENERAL DELLINGER: I think the difference is that in this case the -- first of all, there was a record -- the contempt proceedings are probably the most accessible place -- that this was constant and ongoing, and this was an attempt that this was a medical facility, its --

QUESTION: But I thought there were something like five episodes over 18 months.

GENERAL DELLINGER: Those were the ones, I think, that were raised in the contempt proceedings. The actual controversy itself, the actual proceedings were continuous and, of course, they were under, as several justices noted, under a TRO, so that, you know, ideally they're -- they -- there shouldn't have been any.

What the judge did in this case, faced with this situation and trying to give some kind of guidance that would be useful to the parties, to the police, is to set what Justice Ginsburg called a keep-your-distance rule. Basically --

QUESTION: In answer to Justice Kennedy and Justice O'Connor, and I wonder, I'm just asking this, is it relevant to consider this is not labor picketing or civil rights picketing because the people by and large are pregnant women who are undergoing a serious medical procedure. You haven't brought that up, and I wonder the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

extent to which that is constitutionally relevant. I would think it might be.

GENERAL DELLINGER: I do think it is relevant in precisely this way. The Court's decisions, like Grayned v. City of Rockford, about a public school, NLRB v. Baptist Hospital, cases like that, note that the Government interest is sometimes dependent upon the nature of the activities that are to occur.

You don't need social science -- you don't need social science evidence to reach the conclusion that having to go through this kind of obstructive and intimidating crowding is not good for people who are on their way to see the doctor.

QUESTION: Is there -- well, that's it, on their way to see the doctor. Surely it's not the case that every woman who's going in there is going in to have an abortion. I assume they must visit the clinic at least once beforehand.

GENERAL DELLINGER: There are different --

QUESTION: And maybe once afterwards.

GENERAL DELLINGER: That is correct.

QUESTION: So probably less than half of the women who are going in, just to speak of the women who are going in -- does this injunction apply only to women going in?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GENERAL DELLINGER: No. It applies to all of those, including staff members, who --

QUESTION: Who go in, so even if you take just the women, probably less than half of them are going in to have --

GENERAL DELLINGER: That is --

QUESTION: -- a medical procedure --

GENERAL DELLINGER: Well --

QUESTION: -- at that time.

GENERAL DELLINGER: Yes. At least there are probably less than half of them are going in. Some may be being treated for cervical cancer, or for a number of --

QUESTION: So would the same reasoning apply simply to a group of, a building where doctors had offices but no surgical procedures were performed? Would the same stress analysis apply?

GENERAL DELLINGER: It would apply, Chief Justice Rehnquist, but with, I think, significantly less force than it does in those facilities where stress applies.

Basically these -- what the judge came up with, here, while protecting the ability to convey this message, was a simple set of rules. If you read -- if you read the preliminary injunction at pages 183 and --

QUESTION: Mr. Dellinger, may I interrupt you --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GENERAL DELLINGER: Yes.

QUESTION: -- because I think you're going on to another point, and I just want to raise another point along Justice Breyer's lines. Is your argument that when the State is -- or when the court is enforcing, let's say, a trespassing law, in determining what would be an appropriate injunction to enforce that star to preclude threatened violations, it may take into consideration the activities of the victims, and if the activity of the victim may be to obtain medical treatment, then high blood pressure can be taken into account. Is that basically your argument?

GENERAL DELLINGER: Yes, that is certainly part of a calculation here.

QUESTION: So labor picketing in the context of air traffic controllers would be a different case?

GENERAL DELLINGER: I think --

QUESTION: Because you don't want to upset air traffic controllers.

(Laughter.)

GENERAL DELLINGER: It is -- it is not at all clear that there would be any prohibition in the First Amendment or elsewhere on the use of close physical proximity and an intimidating and obstructing manner whether you're dealing with judges coming to work or air

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

traffic controllers.

I mean, I think what you want to look at the cases and be careful about, as this judge was, is that you do not want to predicate an injunction on the fact that the message would be upsetting to the air traffic controllers or the judge. The message is something we have to tolerate.

QUESTION: General Dellinger, what is careful about 15 feet of any personal vehicle seeking access to or leaving? One point that was made is, there's no definition of when access begins or when leaving ends, so this could go on and on and on. There's no stopping point and there's no starting point.

GENERAL DELLINGER: Justice O'Connor, at page 29 of the Joint Appendix the judge -- I'm sorry. I'm sorry, Justice Ginsburg -- at page 8 -- 29 of the Joint Appendix the judge notes precisely that this is limited to activities that are at the sites, not anywhere you may go in doing it, and it is limited as well by the fact that it simply says, stop crowding these patients and let them walk away. It doesn't --

QUESTION: Thank you, General Dellinger.

GENERAL DELLINGER: Thank you.

QUESTION: Mr. Sekulow, you have 3 minutes remaining.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

REBUTTAL ARGUMENT OF JAY ALAN SEKULOW

ON BEHALF OF THE PETITIONERS

MR. SEKULOW: Thank you, Mr. Chief Justice.

Actually, what General Dellinger was referring to on page 29 says that the scope of the injunction and these injunction floating zones do float without geographic limitation. It says that they are structured to protect the rights of all party and directed to the activities at the site chosen for demonstration. Anyplace these individuals are demonstrating is the site chosen for demonstration.

As I understand the Government's argument and the respondents', there is now a medical exception to the First Amendment. This Court in Madsen dealt with evidence that came to the same conclusions regarding increased stress. Despite that increased stress, the no-approach zone was still deemed to burden more speech than necessary.

If the owner of Claiborne Hardware had a heart condition, would he now say, get these protesters away from the front of my store because I've got a heart condition that's going to be aggravated when I go in there, and I think the answer has to be no to that, that -- the owner of a fur store is aggravated because there's animal rights protesters out there picketing. I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

think these are the types of things which is part of our free debate.

QUESTION: Sticks and stones will break my bones but words can never hurt me. That's the First Amendment.

MR. SEKULOW: That's certainly our position of it, and that is exactly correct, and those verbs might be aggressive advocacy, and I think it's also important --

QUESTION: And your point is they've never used sticks or stones.

MR. SEKULOW: Not these clients.

QUESTION: No.

MR. SEKULOW: But they do use words, but it's interesting, those words under this injunction, if they were directed at, say, a Xerox salesman who was doing business with the abortion facility and a demonstrator were to try to approach him and say, please don't do business with this facility because they're engaged in a practice that we personally find abhorrent. That Xerox salesman -- not just the woman seeking abortion -- that Xerox salesman has the advantage of this injunction.

On page 183, it says it applies to any person seeking access.

QUESTION: But if in fact, coming right next to a person, right in their face, screaming at them and so forth, does physically hurt them, then it's like a stick

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

or stone.

MR. SEKULOW: Well, I think that's actually prohibited by the injunction that we're not challenging, screaming in someone's face to the point where --

QUESTION: And if pressing around them and so forth hurts them as they're going into a medical procedure, then it's like a stick or stone.

MR. SEKULOW: And I think that's why section 1(c), Justice Breyer, prohibits crowding, and we're not challenging that.

But this injunction on the cease-and-desist provision on paragraph 1(c) says that it can be imposed by any person or any group of persons, so a group of persons are entering the abortion facility, the woman seeking the abortion wants to get the information, wants to talk to the sidewalk counselor, but the companion says no. Under this injunction, under section (c), 1(c), the cease-and-desist provision is implicated. That's the way it's drafted. That burdens more speech than necessary.

The citation, and it's consistent in the briefs, we think it just misses the mark, and that is the Beth Israel Hospital v. NRLB did not say you can't distribute literature inside a hospital. It said that -- which by the way, of course, as this Court knows, NLRB was not a First Amendment case, but it overturned a prohibition on

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

leafleting and solicitation in the cafeteria and in the lunchroom in a private hospital where patients did gather on occasion, so --

QUESTION: Mr. Sekulow, was there any followup to the colloquy with the district judge, who seemed to recognize that there was some ambiguity in this 15 -- what has been referred to here as the bubble zone within 15 feet of persons or vehicles seeking access to, or leaving the facilities -- you've called our attention to that colloquy where the judge said, gosh, I didn't mean that.

MR. SEKULOW: Your Honor, I was referring to the reply brief, the attachment at appendix A-3.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sekulow.

The case is submitted.

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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:

PAUL SCHENCK AND DWIGHT SAUNDERS V PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET. AL.

CASE NO: 95-1065

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

BY Ann Marie Fedigo

(REPORTER)