

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LEILA JEANNE HILL, AUDREY HIMMELMANN, AND
EVERITT W. SIMPSON, JR., Petitioners v. COLORADO,
ET AL.

CASE NO: 98-1856

PLACE: Washington, D.C.

DATE: Wednesday, January 19, 2000

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Supreme Court U.S.

IN THE SUPREME COURT OF THE UNITED STATES

LEILA JEANNE HILL, AUDREY

HIMMELMANN, AND EVERITT W. :

SIMPSON, JR.,

Petitioners

v. : No. 98-1856

COLORADO, ET AL. :
1

Washington, D.C.

Wednesday, January 19, 2000

The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at
14 10:14 a.m.

APPEARANCES:

16 JAY A. SEKULOW, ESQ., Washington, D.C.; on behalf of the
17 Petitioners.

18 MICHAEL E. McLACHLAN, ESQ., Solicitor General, Denver,
19 Colorado: on behalf of the Respondents.

20 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the United States, as amicus curiae, supporting the
23 Respondents.

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PROCEEDINGS

(10:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 98-1856, Leila Jeanne Hill, et al. v. Colorado.

Mr. Sekulow.

ORAL ARGUMENT OF JAY A. SEKULOW

ON BEHALF OF THE PETITIONERS

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

The Colorado statute at issue here, 18-9-122, section 3, converts protected speech into a crime. The statute, which can be found at page 64a and 65a of the petition appendix, the last two pages, imposes an 8-foot floating bubble zone around every person who passes within a 100-foot radius of every entrance door to every health care facility in the State of Colorado. Within that floating bubble zone, the statute criminalizes a knowing approach made for the purposes of engaging in constitutionally protected speech unless prior consent is obtained.

21 The consent provision alone invalidates the
22 statute. It makes the peaceful distribution of a leaflet,
23 the display of a sign, and even specific oral
24 communications in a traditional public forum a crime if
25 prior consent is not obtained. The statute targets only

1 constitutionally protected speech. There is no core or
2 prescribable conduct which this statute reaches.

3 The bubble zone, with its consent provisions,
4 attaches to every person who comes within a 100-foot
5 radius of every health care facility in the State.

6 QUESTION: Mr. Sekulow, am I correct in
7 understanding that no speech, no words, are prohibited.

8 It's only distance. You can speak anything you want at an
9 8-foot distance.

10 MR. SEKULOW: Outside of the zone, there is no
11 restriction on speech. It's when you --

12 QUESTION: But even in the zone, as long as
13 you're 8 feet away, you can speak.

14 MR. SEKULOW: Yes, but there -- you have --
15 there are two different zones here. The 8-foot bubble
16 zone comes into existence when someone is within a 100-
17 foot area -- radius of a health care facility. The bubble
18 zone which floats attaches to every person who enters that
19 specific -- specific zone. So, you -- once you're within
20 the 8-foot of someone, if you do not ask for consent, you
21 do not -- you're not allowed to speak. It's a --

22 QUESTION: What is it -- what is it that -- I
23 mean, 8 feet. You're 16 feet away from me. 8 feet is
24 about the distance to Mrs. Underwood here. What -- what
25 is it that she can't tell me?

1 MR. SEKULOW: I think it's --

2 QUESTION: What -- what speech is it difficult
3 for anyone to make when you're about this 8 feet, say, the
4 distance between me and Justice Kennedy?

5 MR. SEKULOW: Justice Breyer, I think it's the
6 same issues that the Court dealt with in Schenck, the
7 distribution --

8 QUESTION: Well, in Schenck I suppose the
9 problem was that you couldn't -- you didn't know where the
10 bubble started. Somebody walking along the sidewalk --
11 you carried the bubble with you. They didn't know where
12 they're supposed to be. Now, there's none of that problem
13 here.

14 MR. SEKULOW: Well, I -- I think there is,
15 Justice Breyer. I think the -- the bubble zone floats.
16 There's no doubt about that. It attaches to everyone who
17 is within -- comes within the initial 100-foot area. That
18 bubble zone floats to -- unless you --

19 QUESTION: That wasn't -- I thought the problem
20 in the other case was that as the person walked along the
21 sidewalk, people who were just standing on the sidewalk
22 would have to get out of the way as the person carrying
23 the bubble moved along. But here anyone on the sidewalk
24 simply stops. There's no problem. They can come within 1
25 feet, but if the woman wants to avoid that person, the

1 person can't chase after her.

2 MR. SEKULOW: This --

3 QUESTION: Now, is -- am I right about that
4 factually?

5 MR. SEKULOW: I think that's incorrect, Justice
6 Breyer.

7 QUESTION: All right. What --

8 MR. SEKULOW: And here's the reason why. The
9 zone here does float. You are not allowed to enter that
10 8-foot zone unless there is prior consent.

11 QUESTION: I'm -- I'm sorry. I didn't -- I
12 wasn't clear. I didn't say it didn't float. I said that
13 a person standing on the sidewalk, as the woman
14 approaches, if the person stands still, the person doesn't
15 have to do anything even if the woman comes within 6
16 inches.

17 MR. SEKULOW: That's --

18 QUESTION: But if in fact the woman decides she
19 doesn't want to go close to that person and walks around
20 him, then he cannot chase her. Now, that's my
21 understanding of how it worked physically. Is that right?

22 MR. SEKULOW: That's correct. If you're
23 standing still and you're there first. In -- in that
24 regard, it operates -- the consent provision here operates
25 exactly as the consent provision in Madsen. In Madsen,

1 you could stand still. If you weren't there first, you
2 could stand still. It prohibited a physical approach,
3 which is exactly what this statute does here. This
4 statute actually combines the floating zone of Schenck
5 with the no-approach zone that the Court prohibited in
6 Madsen. So, if you're going to enter within 8-feet of a
7 person, if you're not there first -- in other words, if
8 you stand still, sure, you don't violate it, just like in
9 Madsen. But the consent provision alone in Madsen
10 invalidates the statute.

11 QUESTION: Well, that's not like in Madsen. In
12 Madsen, at least the Court assumed they would have had to
13 move out of the bubble. That's what I remember the Chief
14 Justice's opinion said, I think.

15 MR. SEKULOW: Actually, Justice Stevens, in
16 Madsen the -- the prohibition that was at issue in the
17 injunction prohibited a physical approach.

18 QUESTION: Well, didn't the Chief Justice's
19 opinion interpret it as requiring the stand-by to move?

20 MR. SEKULOW: Not in Madsen. In Schenck that
21 was the concern of the floating bubble zone.

22 QUESTION: Oh, okay.

23 MR. SEKULOW: And in that -- in that regard,
24 here the concern was that the zone floats in Schenck. It
25 does here. I mean, while the person moves, you have to

1 move with them unless you have consent. So, Justice
2 Breyer, it's the same.

3 QUESTION: Remind me -- my original question was
4 this, and it may just require reminding me of what these
5 other cases said.

6 But if I'm standing still and I -- people can
7 approach me, and then I'm about the distance I am from
8 Justice Kennedy.

9 MR. SEKULOW: Yes.

10 QUESTION: And there's a woman coming along.
11 What is it -- because she can walk around me -- that I
12 can't tell her?

13 MR. SEKULOW: I think --

14 QUESTION: This is a speech case. What's the
15 restriction on the speech?

16 MR. SEKULOW: The display of a leaflet, the
17 showing someone written material. In -- in Schenck we
18 talked about, Justice Breyer -- we talked about the
19 displaying of a Bible. In Schenck, this Court at page 377
20 stated -- and I'll -- I'll quote it exactly -- that the
21 concern of the floating bubble zone was that it prevented
22 defendants, except for two sidewalk counselors, while they
23 are tolerated within the targeted zone, from communicating
24 a message from a normal conversational distance or handing
25 a leaflet to people and --

1 QUESTION: What was the distance, Mr. Sekulow?
2 It was more than 8 feet.

3 MR. SEKULOW: That's correct. It was 15 feet
4 there. I don't think the difference between 15 feet and 8
5 feet would make the constitutionality any different. The
6 standard is still the same. You cannot display or hand
7 out a leaflet, say, to someone 8 feet away without, again,
8 asking for consent. It was in Schenck this Court said
9 that the leafleting and commenting on matters of public
10 concern are protected speech, especially on traditional
11 public forum.

12 QUESTION: But the -- but the distance must make
13 some difference, Mr. Sekulow. Perhaps the difference
14 between 8 feet and 15 doesn't, but if you got down to 3
15 feet, for example, it doesn't seem to me there's any
16 message you can't communicate at a distance of 3 feet.
17 The -- the distance requirement would impede you.

18 MR. SEKULOW: Well, interestingly in this
19 particular case, the statute does prohibit impeding,
20 blocking, or crowding, section 2, which is not challenged.
21 And I don't think, Mr. Chief Justice, that it's simply the
22 location being 2 feet. You could be 2 feet next to
23 someone, as I am with co-counsel, and -- and not cause any
24 impeding. You could be 1 -- about 5 feet in front of
25 somebody and block them. So, I don't think it's

1 necessarily just distance. It's location as well, and --
2 and this is distribution of literature.

3 QUESTION: It's not just impeding. It's also
4 intimidating. It's also threatening. I -- I suppose you
5 would acknowledge that -- what about 2 inches? I mean,
6 you know, going nose to nose to someone, thrusting your -
7 - your head right in their face. Certainly that could be
8 prohibited. That's intimidating behavior.

9 MR. SEKULOW: Well, Justice Scalia, this Court
10 has recognized that when it comes to public debate, that
11 it can be robust. I think if someone is 2 inches away
12 from somebody and they're blocking access, they should be
13 violating section 2.

14 QUESTION: No. They're just 2 inches away and
15 not blocking access. They just come up and thrust their
16 -- their face right in front of me, just like this.

17 MR. SEKULOW: I don't -- first -- first of all,
18 this would not -- that action would not violate the
19 statute because this statute, section 3, does not prohibit
20 simply an approach. It is an approach with speech, and
21 it's the speech that is the violation. The way the
22 statute works -- and again, it's on page 64a and 65a of
23 the petition appendix in its entirety -- it states that no
24 person shall knowingly approach another person within 8
25 feet for the purpose -- unless there's consent, for the

1 purpose of displaying a leaflet, displaying signs, handing
2 out a leaflet, or for engaging in specific oral
3 communications, oral protest, education --

4 QUESTION: Have you -- I don't think you've
5 answered the question. Supposing it said 1 foot. Would
6 that be bad too?

7 MR. SEKULOW: I -- I think it suffers from the
8 same constitutional problem. I -- I don't think it's --

9 QUESTION: It would be the same, okay.

10 MR. SEKULOW: Justice Stevens, I don't think
11 it's simply the location because you could be 6 inches
12 away from someone and not be blocking them at all. You
13 could be 3 feet and block somebody.

14 QUESTION: How about an eighth of an inch? An
15 eighth of an inch?

16 MR. SEKULOW: Justice Scalia, I -- I wouldn't
17 even want to give you the eighth of the inch.

18 QUESTION: Really, your client holds some very
19 unreasonable territory.

20 MR. SEKULOW: I -- I don't -- I don't think so
21 because this is -- this is speech on a public forum, and
22 if you're blocking somebody, that -- that's a different
23 story.

24 QUESTION: But speech on a public forum, the
25 traditional concept is, you know, there's somebody on a

1 soapbox and a bunch of people gathered around them, not
2 that you're one on one with someone an eighth of an inch
3 away.

4 MR. SEKULOW: I -- I think leafleting, Mr. Chief
5 Justice, does require close contact. When someone
6 distributes a leaflet, usually it's with a hand extended
7 which if you were, by the way, 8 feet away from this
8 particular person you were approaching, you'd violate that
9 bubble with -- with --

10 QUESTION: Well, in Abrams against United
11 States, they threw them out of a second story window --
12 the leaflets.

13 MR. SEKULOW: Yes, and I -- I take it, when it
14 landed on the streets, it would be -- have been protected
15 speech at that point.

16 (Laughter.)

17 QUESTION: Would you acknowledge, Mr. Sekulow -
18 - would you -- no, I gather you would not acknowledge that
19 it would be reasonable to have such a law which limited
20 the bubble to a distance which is inherently intimidating.
21 You just -- you just don't acknowledge that there's any
22 distance at which you can talk to somebody which is
23 inherently intimidating.

24 MR. SEKULOW: I think that the danger in that
25 is, because it's so specific on facts and circumstances,

1 in the context of a statute like this, that if the concern
2 that's being addressed is access or blocking, the way to
3 handle it -- the State of Colorado did it -- and that is
4 section 2. A person commits a class 3 misdemeanor. It's
5 the same offense. 7 months in jail. If you obstruct,
6 detain, hinder, or impede. I would take it if you're an
7 eighth away --

8 QUESTION: I'm not obstructing, detaining,
9 hindering. I'm just intimidating. I'm just -- I'm just
10 intimidating.

11 What if I -- my nose touched your nose? Oh,
12 that would be okay even though I'm --

13 MR. SEKULOW: No. It probably would be an
14 assault at that point.

15 QUESTION: What makes that okay?

16 MR. SEKULOW: But under the statute --

17 QUESTION: What makes that okay?

18 MR. SEKULOW: Because of speech activity. This
19 -- and interestingly, under your example, if you came up
20 to someone or a protestor came up to someone and engaged
21 in very intimidating facial expressions and made very
22 intimidating gestures, they don't violate this statute,
23 but the petitioner here, Jeannie Hill, if she goes and
24 approaches someone to hand them a leaflet or to engage in
25 quiet conversation, a counseling, she violates the

1 statute. So, the intimidating conduct does not violate
2 the statute. The petitioner handing out a leaflet --

3 QUESTION: Well, but you -- you certainly can
4 convey anything you want to convey orally from a distance
5 of 8 feet. It's just not difficult. You can speak in a
6 normal conversational tone and be heard fully. And to
7 distribute a leaflet, it doesn't matter if you're 6 inches
8 away or 8 feet away, the person receiving it, in order to
9 receive it, has to accept it.

10 MR. SEKULOW: That's correct.

11 QUESTION: And so, this isn't some unusual
12 provision.

13 MR. SEKULOW: But I -- I think, Justice --

14 QUESTION: You don't -- you don't say that a
15 person must accept the leaflet.

16 MR. SEKULOW: No. They have absolutely -- they
17 do not have an obligation to accept it.

18 QUESTION: No.

19 MR. SEKULOW: But I think what -- Your Honor,
20 Justice O'Connor, what you wrote in Kokinda -- and that is
21 people that live in metropolitan areas know that one need
22 not ponder the contents of a leaflet to mechanically take
23 it out of someone's hand or, for that matter, to reject
24 it, but it's that mechanical taking out of someone's hand.
25 Traditional leafleting on public sidewalks, is the kind of

1 situation where someone is out there approaching people.
2 People will come up and take it. 8 feet away is the same
3 prohibition as a restriction on speech.

4 QUESTION: Well, if the person to whom it's
5 offered wants to take it under this statute, they can and
6 will. I mean, it's just --

7 MR. SEKULOW: And the same --

8 QUESTION: And it would be the same if it were 1
9 foot or 8 feet.

10 MR. SEKULOW: And it -- the same argument could
11 have been and was made in Schenck, and this Court said
12 there 15 feet was still a problem because the zone floats.
13 And it does, Justice Breyer --

14 QUESTION: Mr. Sekulow, on -- on that, I
15 understood you to answer Justice Breyer's question by
16 saying that the stationary speaker, so-called, could not
17 even station -- in a stationary position offer leaflets
18 without violating the statute. Did I understand you
19 correctly?

20 MR. SEKULOW: If you're standing still and
21 you're in -- within that 8-foot zone before someone else
22 is, you --

23 QUESTION: I'm standing still and somebody --

24 MR. SEKULOW: Approaches you?

25 QUESTION: -- gets within 8 feet.

1 MR. SEKULOW: It's -- that's correct. That's
2 not a problem. It's exactly the situation --

3 QUESTION: So, I can say to that person, will
4 you take a leaflet, or just hold the leaflet out. No
5 problem.

6 MR. SEKULOW: If you're there first.

7 QUESTION: Pardon me?

8 MR. SEKULOW: If you're there first.

9 QUESTION: If you're there first and you're
10 stationary --

11 MR. SEKULOW: Absolutely.

12 QUESTION: -- you can do that.

13 MR. SEKULOW: That operates exactly, Justice
14 Souter, as the no-approach zone in Madsen.

15 QUESTION: Now, why then being that -- if that's
16 the case, what's exactly the problem? I'm not just saying
17 another case. I'm trying to understand what the problem
18 is.

19 I'm standing here. I plunk myself down on the
20 sidewalk in front of the abortion clinic. Anyone who's
21 walking into that abortion clinic has to pass me, and I
22 simply hold out the leaflet. Now, if a woman wants the
23 leaflet, she'll take it, but if she walks around me, now
24 she doesn't want it. So, what's the problem if I can
25 stand still, hand it out just like this, and she'd have to

1 walk around in order to avoid taking it, but she's free to
2 walk around under this statute? What's the problem?

3 MR. SEKULOW: The problem is the assumption,
4 Justice Breyer, that you're operating under is that you
5 got there first, and if you got there first, you -- and
6 you stand still and someone approaches you and you're not
7 blocking them -- of course, the -- the dichotomy of all
8 this is, if you're standing still, you may well be
9 blocking. Generally protest activities, distribution of
10 literature, speech, in the robust debate, people are
11 moving, but if you're standing still and you're there
12 first, it's not a violation.

13 But in Madsen, this Court dealt with exactly the
14 same situation. It was a no-approach zone, no physical
15 approaches. If you were there first, if you were standing
16 still, it wasn't a violation. And the Court in Madsen
17 said that the consent provision alone invalidated the
18 provision of the injunction in Madsen.

19 The same should apply here, especially since you
20 have the combination of the floating zone in Schenck. It
21 does float. If you're not there first, Justice Breyer, it
22 does float and it floats. You have to stay unless you
23 have obtained consent. You have to maintain that 8-foot
24 distance. And I think showing someone a Bible verse, the
25 display of a sign, all of that type of activity which is

1 more intimate in its communication --

2 QUESTION: How practically? I mean, it's not as
3 if this were a parade, you know, of people marching
4 double-file to get into the clinic where the question of
5 whether you got there first might be very important. I
6 mean, certainly there are times when no one is coming to
7 the clinic. There a person has a perfect opportunity to
8 get there first.

9 MR. SEKULOW: That's right, if they got there
10 before the event opened. But this statute, which is not
11 limited to abortion facilities, which has the floating
12 bubble zone, applies to everyone in that 100-foot zone.
13 It's not just --

14 QUESTION: Mr. Sekulow --

15 MR. SEKULOW: Yes.

16 QUESTION: May -- may I just ask kind of a
17 general question? And I think it was the Heffron case,
18 the Court made a reference to the importance of getting
19 access to the willing listener and the willing recipient.
20 Now, I think you'd probably agree that this ordinance
21 doesn't really restrict your ability to communicate with a
22 woman who wants to receive your message. It really does
23 pose some limit on the leafleting to a woman who
24 presumably doesn't want the leaflet.

25 MR. SEKULOW: Well, to anyone who doesn't want

1 the leaflet. It's not limited to people --

2 QUESTION: Well, I understand that.

3 MR. SEKULOW: -- seeking access to or egress
4 from the clinic.

5 QUESTION: So -- so, you -- you have -- it's --
6 there's kind of a dilemma, it seems to me. You either
7 have to assume that the -- that you have a right to make
8 the unwilling listener take the leaflet, which doesn't
9 seem it would work in the real world --

10 MR. SEKULOW: You don't have the -- you -- you
11 can't require someone to take a leaflet, but I think
12 Heffron is a good example of this.

13 QUESTION: But -- but you do have a
14 constitutional right to give her an opportunity if she's a
15 willing recipient, either the doctor or the -- to have
16 that. And doesn't she have that -- assuming it's a
17 willing person interested in the -- in the leaflet?

18 MR. SEKULOW: If there's -- consent is given,
19 there's no violation of the statute. It's the requirement
20 of consent, we think, which caused the problem.

21 In Heffron, which was interesting, of course,
22 the Court said it was not a traditional public forum. The
23 sidewalks in front of these medical health care
24 facilities, which could even be an ophthalmologist's
25 office, the way the statute is written, has a provision in

1 there that -- it's very specific. If you enter that 8-
2 foot zone, you have to obtain consent. In Heffron, the
3 Court found it not to be a traditional public forum and
4 said that --

5 QUESTION: But see, what I'm trying to suggest
6 is that you have to be a willing listener if you're in the
7 8-foot zone. And it seems to me if you're not a willing
8 listener, you're not going to take the leaflet anyway.

9 MR. SEKULOW: It's -- it's not simply
10 leafleting. I think it's the -- also the oral
11 communication.

12 QUESTION: Well, I'm just concentrating on the
13 leafleting now because, it seems to me, that's your
14 strongest argument.

15 MR. SEKULOW: Well, the -- the way the
16 leafleting works is usually, in a -- in a leafleting
17 situation, people are close, closer than 8 feet. They're
18 not asking may I -- you know, this statute turns every
19 literature distribution into a solicitation because you
20 have to ask consent before you approach.

21 And interestingly, in Heffron the Court stated
22 that, while finding it not to be a public forum, that in
23 fact they did allow one-on-one, face-to-face
24 communications to go on throughout the State fair without
25 any restrictions. That's absolutely --

1 QUESTION: Mr. Sekulow?

2 MR. SEKULOW: Yes.

3 QUESTION: In Madsen, we said that an injunction
4 would be judged by a more stringent standard than a
5 statute, and here, of course, we -- we have a statute, not
6 an injunction.

7 MR. SEKULOW: That's correct.

8 QUESTION: Yet, you frequently refer to Madsen
9 as if the things were interchangeable.

10 MR. SEKULOW: Well, in this context. Number
11 one, our position is that this is a content-based
12 prohibition on speech. So, it would be a higher standard
13 than the Madsen standard. It would be strict scrutiny
14 because of the specific limitations on oral communications
15 that constitute protest, education, or counsel.

16 And also this Court in Madsen --

17 QUESTION: Why don't you talk about that one?
18 You've been just talking about your point that the mere -
19 - the mere consent requirement invalidates it. You also
20 contend that this is a -- a content-based restriction.
21 How is that so?

22 MR. SEKULOW: Absolutely. The prohibition here
23 as -- specifically on its -- the face of the statute,
24 section 3, requires consent if you're going to engage in
25 specific oral communication: protest, education, or

1 counsel. A prosecutor who's bringing a criminal
2 accusation for a violation of section 3 would have to
3 establish through the presentation of evidence what
4 exactly was said to determine if, in fact, it constitutes
5 protest, education, or counsel.

6 QUESTION: Can you -- can you tell me? Suppose
7 someone wanted to encourage a -- a patient to get a
8 particular procedure. Would that be barred by the
9 statute?

10 MR. SEKULOW: That -- that's interesting. We -
11 - we have thought about that, and if it constitutes a form
12 of protest, education, or counsel, it would.

13 QUESTION: It's -- it's not protest. It's --
14 it's --

15 MR. SEKULOW: Encouragement?

16 QUESTION: -- encouraging the person.

17 MR. SEKULOW: Oh, it -- I think that that would
18 not, but I think the State, if they were making an
19 accusation, would probably say -- they would argue that it
20 may constitute a form a counseling, offering of guidance,
21 the way they -- they've drafted this.

22 But what is interesting here in that exact type
23 of scenario, if a news reporter -- say there was a protest
24 going on at a particular health care facility, and a news
25 reporter entered the 100-foot radius and then was going to

1 approach someone, did not ask for consent, and asked a
2 general question.

3 QUESTION: How do you feel?

4 MR. SEKULOW: How do you feel? What do you
5 think about health care in America today? Probably not
6 counsel, education, or protest.

7 If that same news reporter were to approach a
8 person again without consent and say something like
9 Congress was considering changes to the health care laws
10 in the United States allowing for private lawsuits against
11 HMO carriers. What do you think? That's education and
12 that would be a violation of the statute.

13 QUESTION: Well, but which is it? I mean, I
14 grant you it's -- you may not have a good answer to this
15 because I have a hard time with the cases on this one.
16 But it seems to me if they -- if the State tries to write
17 a -- one that covers more than just abortion clinics and
18 tries to go beyond just as you've said -- you said, well,
19 this is terrible. It -- it gets innocent things like what
20 time is it. But then if they try to be more narrow, you
21 say, well, it's too -- it's too -- it's too -- it's
22 narrow. I mean, either they didn't narrowly tailor it --

23

24 MR. SEKULOW: Which I think they did not.

25 QUESTION: -- or -- or if they do narrowly

1 tailor it, it's content discrimination.

2 MR. SEKULOW: And -- and --

3 QUESTION: So -- so, whenever the State would
4 try to regulate anything, they'd fall into the one or the
5 other.

6 MR. SEKULOW: Justice Breyer, I don't think so.
7 The State has argued that they're in the proverbial catch
8 22. They've drafted a statute that we argue is overbroad
9 and one that is content-based.

10 QUESTION: Do you know of any precedent which
11 defines narrow tailoring by whether or not it's content-
12 based?

13 MR. SEKULOW: I -- I think looking at it, no
14 because the most realistic narrow tailoring case that fits
15 this the Court found it to be content-neutral, which was
16 United States v. Grace. There's never been a statute,
17 though, written like this.

18 QUESTION: Mr. Sekulow, I was reading your brief
19 closely and trying to envision the statute that would be
20 constitutional. The Chief has reminded you that the Court
21 has held that the statute, which is passed when it -- we
22 don't know who the particular people are, requires less
23 rigid review. So, reading -- reading your brief, I had
24 the impression that no statute, other than the one that
25 bars obstruction, would do in your judgment, that you

1 could not have a -- a statute like Madsen or Schenck had
2 an injunction. You simply couldn't.

3 MR. SEKULOW: I think that's -- that's a correct
4 position. That's the position we're asserting. And the
5 reason, Justice Ginsburg, that that's our position is that
6 this is speech on a public sidewalk, and it does apply.
7 It's a statute. And I think the difficulty is -- and far
8 be it for me to draft Colorado's statute --

9 QUESTION: Wait. Go -- go back for a second
10 because certainly you would agree that you can write
11 legislation in terms of categories like advertising or
12 lawyer solicitation, counseling. I mean, those aren't all
13 unconstitutional, are they?

14 MR. SEKULOW: Well, the way Colorado has drafted
15 it, I think it is.

16 QUESTION: No, no. But I mean, to talk about a
17 category called advertising is okay, isn't it? Our cases
18 are filled with that.

19 MR. SEKULOW: Commercial speech would --

20 QUESTION: That isn't content-based because
21 you --

22 MR. SEKULOW: That's --

23 QUESTION: -- treat advertising differently from
24 -- all right. So --

25 MR. SEKULOW: Although it does bring up an

1 interesting scenario here, Justice Breyer, and that is the
2 way that this statute works -- let's say someone talking
3 about advertising, to take your example. If someone was
4 handing out discount pizza coupons on a public sidewalk in
5 front -- front of Denver General Hospital and failed to
6 ask for consent before they approached someone to
7 distribute them the free discount coupon, they violate
8 this statute. That's how broad the statute is written.
9 It prohibits --

10 QUESTION: Well, you -- you argue -- my
11 colleagues admitted you argue, on one hand, the statute is
12 too broad and, on the other hand, it's too narrow. I
13 mean, that's like the old arguments we used to get here
14 about the Establishment Clause. If -- if a -- if the
15 State tried to regulate the expenditure of funds for
16 parochial schools, then it was said to be too much
17 entangled, and there -- under that line of thinking, there
18 was nothing the State could do.

19 Are you saying, in effect, that the State can't
20 draft a statute, any kind of a statute, to cover what it
21 conceives to be this problem here?

22 MR. SEKULOW: No, I think the State can. And -
23 - and, Mr. Chief Justice --

24 QUESTION: Well -- go ahead.

25 MR. SEKULOW: What I would -- what I would have

1 drafted if I was the -- the State here --

2 QUESTION: You were the State.

3 MR. SEKULOW: Yes, but I'm not.

4 (Laughter.)

5 MR. SEKULOW: Is a statute that --

6 QUESTION: That's why you should use the
7 subjunctive.

8 (Laughter.)

9 MR. SEKULOW: Yes.

10 And in the -- in the -- in this particular case,
11 the State's concerns, the asserted interests here are to
12 prevent intimidation, crowding, and threatening conduct.
13 This statute does not do that. They need to draft a
14 statute that targets the precise concerns --

15 QUESTION: They have that statute.

16 QUESTION: They have --

17 MR. SEKULOW: Section 2.

18 QUESTION: Yes, and I asked you before and you,
19 I thought, were quite candid in saying that's all they can
20 do.

21 MR. SEKULOW: I think that's --

22 QUESTION: -- section 2 and there's no other
23 statute that would satisfy your test.

24 MR. SEKULOW: I think that -- that --

25 QUESTION: It could not go beyond that.

1 MR. SEKULOW: -- because section 2 would satisfy
2 my test, Justice Ginsburg.

3 QUESTION: Yes, but I asked you if there was any
4 statute that tried to replicate --

5 MR. SEKULOW: What they've done here.

6 QUESTION: -- or controls the injunctions that
7 we have permitted --

8 MR. SEKULOW: I don't think so, and let me
9 clarify my position and the reason why. I don't think so
10 because in Madsen and in Schenck, despite the somewhat
11 more rigorous standard that was given there -- in Madsen
12 and in Schenck, the concern over leafleting and uninvited
13 approaches, even if they're peaceful being prohibited --
14 the Madsen concern -- the Schenck concern about literature
15 distribution, both of those cases dealt with -- the Court
16 relied on Boos v. Barry in -- in Madsen and Boos v. Barry
17 and United States v. Grace in Schenck -- were both
18 statutory cases. Those were not injunction cases, and it
19 was the concern of literature distribution and -- and one-
20 on-one advocacy that was the concern.

21 QUESTION: But as I remember Boos at least, that
22 was a one viewpoint. You couldn't picket against the
23 embassy, but you could -- no -- there was no prohibition
24 on doing something they were of. And here, the statute is
25 written in neutral terms. It says you can't counsel about

1 either side.

2 MR. SEKULOW: And this Court --

3 QUESTION: You can't educate about either side.

4 MR. SEKULOW: Justice Ginsburg, the -- this
5 Court in Madsen and Schenck, in dealing with the issues,
6 said that the injunctions were content-neutral and --

7 QUESTION: Well, this -- this statute makes me
8 think, in a way, of the City of Renton case where the
9 concern was the secondary effects of the conduct. It was
10 First Amendment activity, the adult theater.

11 MR. SEKULOW: I --

12 QUESTION: But there were secondary effects
13 being addressed, and maybe --

14 MR. SEKULOW: Justice --

15 QUESTION: -- that's the situation here, that
16 the -- the State doesn't care on which side of the message
17 it is, but is concerned about the secondary effects of
18 intimidation -- intimidating conduct near a medical
19 facility.

20 MR. SEKULOW: If that's -- based on your
21 question and -- and comment, Justice O'Connor, they need
22 to draft a statute that prohibits intimidation, crowding,
23 or violence which I think -- or threatening conduct, which
24 I think they did in section 2.

25 QUESTION: But we --

1 MR. SEKULOW: This isn't --

2 QUESTION: -- we take the case, I think, on the

3 assumption that Colorado has tried to do that and cannot

4 enforce it if there are crowds. The problem here is

5 crowds. And so, what they want to do is to have a -- a

6 zone where we know who is coming up to push or pinch or

7 shove, and that's all they're trying to do. Is that a --

8 is that a fair assessment of what the purpose of the

9 statute was? Maybe they failed, maybe they -- maybe they

10 succeeded.

11 MR. SEKULOW: I think they set the purpose out

12 of the statute in section 1, which states that the General

13 Assembly recognizes access to health care facilities for

14 the purposes of obtaining medical counsel and treatment

15 that's imperative for citizens, that the exercise of a

16 person's right to protest or counsel against certain

17 medical procedures must be balanced against another

18 person's right to obtain medical counseling. To me that

19 points very closely to content-based --

20 QUESTION: Mr. Sekulow, can I ask -- I'm really

21 seeking information here on your position. I thought

22 there was some tension between your quoting the engaging

23 in oral protest, education, or counseling as being

24 content-based and not viewpoint-neutral on the one hand

25 and saying that those words would cover the delivery of a

1 pizza solicitation.

2 MR. SEKULOW: The pizza solicitation would be
3 the distribution of literature prohibition which applies
4 to all literature distribution.

5 QUESTION: I see. That is not -- that is not
6 content-based --

7 MR. SEKULOW: We -- we think it's content-based
8 from the standpoint that it provides an opportunity for -
9 - because of the prior consent requirement, to allow for
10 content-based determinations. But the distribution of
11 literature prohibition is because of the prohibition of
12 literature.

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

15 QUESTION: Very well, Mr. Sekulow.

16 Mr. McLachlan, we'll hear from you.

17 ORAL ARGUMENT OF MICHAEL E. McLACHLAN

18 ON BEHALF OF THE RESPONDENTS

19 MR. McLACHLAN: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 The Colorado legislature acted to protect sick,
22 disabled, and vulnerable people on their way to and from
23 its hospitals and doctor's offices. And it designed the
24 statute to keep our --

25 QUESTION: Excuse me. Just sick, disabled, or

1 vulnerable people? Is that -- is the only --

2 MR. McLACHLAN: That's what I said, Your Honor.

3 QUESTION: It only protects those people?

4 MR. McLACHLAN: No. The statute was designed to
5 protect medical patients who are often sick, disabled, and
6 who are vulnerable --

7 QUESTION: But it doesn't cover just medical
8 patients. How many -- what -- what percentage of the
9 people going in and out of -- of these facilities do you
10 think are sick -- what was it -- sick, vulnerable and --
11 and whatnot?

12 MR. McLACHLAN: No, Your Honor --

13 QUESTION: I mean, that's a very small
14 percentage of the -- of the universe covered by this
15 thing, isn't it?

16 MR. McLACHLAN: Your Honor, the -- the statute
17 covers all persons within 100 feet of a medical facility,
18 and a great percentage of those people are -- are either
19 treating individuals who are sick and vulnerable and
20 disabled or persons who are seeking treatment from
21 these --

22 QUESTION: Well, in -- in that respect, how does
23 this statute work? Suppose there's a seven-story building
24 and on the sixth floor there are doctors' offices. On --
25 on the -- all of the other floors, there are other

1 businesses. I take it this statute operates with respect
2 to anyone who engages in the prohibited activity outside
3 the main entrance to the building?

4 MR. McLACHLAN: The statute operates to the
5 extent that it is covered, public sidewalk or a public
6 way. And so if there's a 20-story building --

7 QUESTION: So, if --

8 MR. McLACHLAN: -- a story of any type, it would
9 be the entrance to the building which contained the
10 medical facility --

11 QUESTION: So --

12 MR. McLACHLAN: -- and the public right-of-way.

13 QUESTION: So, with respect to all of the
14 businesses in those buildings, the press, lawyers,
15 business people, people engaged in manufacturing that
16 might affect the environment, this statute happens to
17 apply just because there's a doctor's office there. Isn't,
18 that right?

19 MR. McLACHLAN: No. Yes, because there's
20 entrance to a medical facility.

21 QUESTION: It seems to me that that's -- that
22 that's whimsical and imprecise and inconsistent with our
23 speech precedents.

24 MR. McLACHLAN: Your Honor, it was -- it's
25 narrowly designed to affect only the 100 feet within a

1 medical facility or a hospital.

2 QUESTION: But we've just discussed the
3 hypothetical in which it is not.

4 MR. McLACHLAN: Well, if a doctor's office is
5 contained within a -- a private building, the statute
6 would not be operative because it doesn't involve a public
7 way or a public sidewalk. The statute requires --

8 QUESTION: I -- I -- my hypothesis is a private
9 building that has an entry off a public sidewalk --

10 MR. McLACHLAN: That's --

11 QUESTION: -- which I assume most buildings do.

12 MR. McLACHLAN: That's correct, Your Honor.

13 That would operate in those circumstances to the extent
14 that it involves 100 foot of the entrance and a public
15 sidewalk, and also I don't think, as -- as ordinary
16 course, Your Honor, that we would have a situation where
17 persons would be protesting within the building.

18 QUESTION: Sorry. I didn't -- I didn't pick
19 this up in the briefs. So, what is the definition of a
20 medical facility? If you have the -- the Russell Building
21 which is 20 floors high, and on floor 18 there's a doctor,
22 and on all the other floors it's a lawyer, is the whole
23 Russell Building a medical facility under this statute? I
24 mean, if that -- if that's the problem with this, I'm
25 surprised that I didn't pick it up in the brief.

1 MR. McLACHLAN: The statute uses the term,
2 Justice Breyer, health care facility, and it states that a
3 health care facility means any entity that is licensed,
4 certified, or otherwise authorized or permitted by law to
5 administer medical treatment in the State.

6 QUESTION: So, I guess that -- that floor 18 or
7 -- has office number 1806 is the medical facility. Is the
8 whole building a medical facility?

9 MR. McLACHLAN: No, Your Honor, it would not be.
10 It's only as to the entrance of that medical facility.

11 QUESTION: Right.

12 QUESTION: The crucial provision is the entrance
13 -- is the entrance provision. How does that read? To
14 what does the 100-foot restriction apply?

15 MR. McLACHLAN: The provision states --

16 QUESTION: Within 100 feet of what?

17 MR. McLACHLAN: Within 100 feet of a medical --
18 of the entrance to a medical facility.

19 QUESTION: Of the entrance to a medical
20 facility. Now, do you consider that to be the entrance to
21 the building and not the entrance to the -- to the office
22 in which the -- in -- in a large building the facility is
23 contained?

24 MR. McLACHLAN: Your Honor, the statute only
25 operates within 100 -- of a medical -- 100 feet of a --

1 entrance to a medical facility and on a public sidewalk.

2 QUESTION: Now, Mr. -- Mr. McLachlan, in section
3 2 on page 65a, it uses the term health care facility. You
4 said medical facility. Is that the word used somewhere
5 else, or is that just a synonym for health care facility?

6 MR. McLACHLAN: I believe they're synonymous,
7 Your Honor. And I -- I read the narrow statutory
8 definition of health care facility which is in the
9 statute.

10 QUESTION: Where -- where you reading from?

11 MR. McLACHLAN: I was -- Your Honor, the best
12 location of the statute is appendix to the Solicitor
13 General's brief where the entire statute is set out
14 verbatim on pages --

15 QUESTION: Is -- am I -- where -- where does
16 this issue that Justice Kennedy just raised fit in this
17 case, that the reason that it's too broad is it would
18 cover offices that are located within some large, downtown
19 office building that don't have doctors in it? Now, has
20 that suddenly -- what's your -- what's -- what's the
21 reaction to that issue in the context of --

22 MR. McLACHLAN: Your Honor, it's narrowly drawn
23 because the statute only operates in conjunction with
24 entrance to a medical facility and a public side-way or
25 walkway. So, if there's a public --

1 QUESTION: I don't want to distract the Court on
2 an issue that wasn't briefed, but it seems to me that this
3 is troublesome and I would read the statute -- and I
4 thought -- and I think that's your answer, that it applies
5 to anybody on the -- on the sidewalk of that building.

6 But the point -- the reason I brought it up at
7 the point that I did was it indicates that your opening
8 statement, which is that this is for the -- for the
9 vulnerable and the sick, is not a ground on which we can
10 sustain a statute. The -- the statute -- there's nothing
11 in the record that says there's a high percentage of these
12 people that -- that are on these sidewalks fit that
13 category. I think you would have to make a different
14 argument to sustain the statute.

15 MR. McLACHLAN: Your Honor, the statute is
16 predicated upon a finding by the Colorado legislature that
17 it is imperative to protect access to health care
18 facilities and that the relationship between that -- that
19 location and a public sidewalk is the object of the -- of
20 the regulation. Those two operating together --

21 QUESTION: But --

22 MR. McLACHLAN: -- are the circumstances in
23 which it would apply.

24 QUESTION: -- Mr. McLachlan, now as I recall in
25 Madsen, it was a free-standing clinic. You know, we had

1 diagrams and so forth, and the -- the clinic was the only
2 operation in -- in the building. In Justice Kennedy's
3 hypothesis, you're really -- you're curtailing a lot of
4 other activity that would otherwise take place that may be
5 not at all related to the health care facility.

6 MR. McLACHLAN: Well, Your Honor, again because
7 the statute only operates as to a public sidewalk or -- or
8 way -- public way, I think, as a practical matter, the
9 statute operates outside the facility within -- within
10 a --

11 QUESTION: But that's -- that's the whole point.
12 There are all kinds of people with all kinds of views and
13 all kinds of messages and all kinds of purposes on a
14 public sidewalk.

15 MR. McLACHLAN: That's correct, Your Honor.

16 QUESTION: Well, Mr. -- Mr. McLachlan, I thought
17 a moment ago your answer to the 18-story building
18 hypothesis was that the medical facility was the office up
19 on -- whatever it was -- the 16th floor. It was not the
20 whole building.

21 MR. McLACHLAN: That's correct, Your Honor.

22 QUESTION: All right. Now --

23 MR. McLACHLAN: But the entrance is located in
24 conjunction with the public sidewalk and the public way.

25 QUESTION: So that if there is one doctor's

1 office on the 16th floor, the whole sidewalk and entrance
2 is subject to this regulation by the statute as if the
3 entire building were filled with doctors' offices?

4 MR. McLACHLAN: No, not as if, Your Honor. It
5 -- it would constitute an entrance to the health care
6 facility if the building contained --

7 QUESTION: No, but you're saying that if there's
8 a doctor's office on any floor of the skyscraper, that the
9 entrance and the sidewalk is subject to regulation under
10 the statute.

11 MR. McLACHLAN: That's correct, Your Honor.

12 QUESTION: Mr. McLachlan, if there's a --

13 QUESTION: May I ask if any Colorado judge or
14 anybody in the legislature ever discussed this
15 hypothetical?

16 MR. McLACHLAN: No, Your Honor.

17 QUESTION: And it's not for you to say. It's
18 for the Colorado Supreme Court to answer that
19 hypothetical, and they have not, have they?

20 MR. McLACHLAN: That's correct, Your Honor.
21 That hypothetical has not been discussed by the
22 legislature nor has it been discussed by the court.

23 QUESTION: But if -- if you're talking about a
24 statute that abridges freedom of speech or is alleged to,
25 it -- it can't be vague. I mean, we've -- you've got to

1 be able to tell from reading the statute just where it
2 applies. Now, you've given -- given an interpretation and
3 we've often accepted the statement of the State solicitor
4 general in the absence of any decision from -- from a
5 Colorado court on the subject.

6 MR. McLACHLAN: Thank you, Your Honor.

7 QUESTION: Is that the case that you want us to
8 do, that we -- we now accept as the -- to turn this case
9 on your interpretation of a matter that hasn't come up
10 before I gather, and that you're saying officially in your
11 role as a representative of the State that it does apply
12 to an 18-story office building on the -- on the sidewalk
13 where there's nobody but one doctor up on the 18th floor
14 and stops everybody else from speaking about anything?

15 MR. McLACHLAN: I'm not -- I'm not asking the -
16 - the Court to accept my interpretation. I'm simply
17 pointing out that the Colorado Supreme Court has not
18 looked at this issue, but the Colorado Supreme Court has
19 reviewed the statute otherwise and has upheld it.

20 QUESTION: Well, has the statute ever been
21 applied --

22 QUESTION: You don't -- you don't want us to
23 accept the opposite interpretation either, do you? Do --
24 are you willing to say that it does not apply to the --
25 to the entrance of a facility where there's a doctor's

1 office on the 16th floor?

2 MR. McLACHLAN: I think it does apply in
3 conjunction --

4 QUESTION: You think it does.

5 MR. McLACHLAN: If it's -- if it's in connection
6 with a public way and a public sidewalk.

7 QUESTION: You think it does, and although
8 you're not willing -- you're not willing to say
9 authoritatively that it does?

10 MR. McLACHLAN: No. Excuse me, Your Honor. I
11 -- I didn't mean to use the word in a haphazard fashion.
12 I -- there's no question in the position of the State of
13 Colorado --

14 QUESTION: That it does.

15 MR. McLACHLAN: -- that it applies to the
16 entrance of a health care facility in connection with a
17 public sidewalk or a public way.

18 QUESTION: And that is so even if the health
19 care facility on the 18th floor is more than 100 feet away
20 from the sidewalk.

21 QUESTION: Vertically.

22 QUESTION: Yes.

23 MR. McLACHLAN: That's correct, Your Honor,
24 because the focus of the statute is with 100 feet of the
25 entrance.

1 QUESTION: Has the statute ever been applied in
2 the fashion you -- you maintain it would apply? Has there
3 ever been a prosecution --

4 MR. McLACHLAN: No, Your Honor. As we point out
5 in our brief --

6 QUESTION: The answer is no.

7 MR. McLACHLAN: -- there has never been a
8 prosecution under the statute. The statute --

9 QUESTION: For anybody.

10 MR. McLACHLAN: -- has never been enjoined.

11 There's never been a civil complaint for damages, nor has
12 there been a criminal complaint filed pursuant to the
13 statute.

14 QUESTION: But even in the case --

15 QUESTION: There's probably never been an
16 abortion protest outside the Empire State Building either.

17 MR. McLACHLAN: That's correct, Your Honor. We
18 don't also have the Empire State Building in Colorado.

19 (Laughter.)

20 QUESTION: Is -- excuse me. Is this statute
21 just addressed to abortion protests? Is -- is that --

22 MR. McLACHLAN: To the contrary, Your Honor. It
23 covers all --

24 QUESTION: I didn't think it was.

25 MR. McLACHLAN: -- all conduct of the subject

1 matter of the statute which occurs within 100 feet of a
2 health care facility.

3 QUESTION: It would be bad if it was addressed
4 just to abortion protests, wouldn't it?

5 MR. McLACHLAN: Absolutely, Your Honor. It
6 would violate content neutrality.

7 QUESTION: So -- so it applies to labor
8 picketing?

9 MR. McLACHLAN: It would apply to labor
10 picketing under the circumstances present in this case if
11 you were within 100 --

12 QUESTION: So, a labor organization has a
13 different rule if it's in front of a health facility than
14 it's -- if it's in front of a manufacturing plant.

15 MR. McLACHLAN: That's correct, Your Honor.

16 QUESTION: That's -- is that content-based?

17 MR. McLACHLAN: No, Your Honor, it's not because
18 again the purpose of the statute and the scope of the
19 statute is to govern all -- all forms of --

20 QUESTION: But I suppose the NLRB, if it turned
21 out to be a labor problem, could preempt any effect of
22 Colorado's State law in respect to the labor unions,
23 couldn't it?

24 MR. McLACHLAN: That -- that may well be the
25 result, Justice Breyer, that the operation of the Federal

1 law would -- would affect the statute that way.

2 QUESTION: What --

3 QUESTION: Except in the labor law, we said
4 there are different rules apply to medical facilities than
5 apply to other facilities.

6 MR. McLACHLAN: That's correct, Your Honor. In
7 -- and in those cases, the Court recognized that the --
8 that the patients are entitled to consideration under --
9 under the rule and that in this particular case our
10 statute is also designed to protect the patients.

11 QUESTION: I'm curious. You know, I'm sure
12 there -- there has been violence in -- in some abortion
13 protests. Are you aware that there's been more violence
14 in that context than in labor picketing, for example? I
15 mean, the number -- the number of people killed or the
16 number of people intimidated in in labor protests
17 annually. Do you think it's --

18 MR. McLACHLAN: I'm not aware of that, Your
19 Honor. I am aware that --

20 QUESTION: I'm just wondering why -- you know,
21 why this is a -- a great -- this particular area is of --
22 is of great concern to the -- I don't know. People going
23 into supermarkets that are being picketed -- are they --
24 are they any less -- what -- vulnerable and -- I forgot
25 what your other adjectives were. It's curious that this

1 need to protect the innocent and vulnerable from -- from
2 being approached is -- is felt only in this one -- one
3 area.

4 MR. McLACHLAN: Your Honor, the Colorado
5 legislature, in its review of the statute, first of all,
6 we've never employed the term innocent. We've simply
7 determined that they are ill, that they are vulnerable,
8 and that they are, as medical patients, entitled to
9 consideration under the statute.

10 QUESTION: I just wonder whether the statute is
11 -- is, you know, although facially applicable to anybody
12 who -- who approaches this kind of facility, I think -- I
13 think we know what it's aimed at, which is abortion
14 protests. And I just wonder what justification there is
15 for singling them out as being particularly intimidating
16 as opposed to, let's say, labor picketing.

17 MR. McLACHLAN: Your Honor, what the statute
18 singles out and what the statute focuses upon is the
19 approach in a -- in a circumstance which can arise and
20 become, as this Court recognized in -- in the Schenck
21 case, a constructive obstruction.

22 QUESTION: In other words --

23 QUESTION: You could -- you could at least apply
24 this rationale that you're defending here -- you
25 acknowledge that it could be applied to labor picketing.

1 If -- if you had a similar finding by the legislature that
2 labor picketing can be intimidating, you could require all
3 labor pickets to -- within 100 feet of whatever they're
4 picketing, to stay 8 feet away from people.

5 MR. McLACHLAN: I think the reason this has a
6 different under -- under-support than labor picketing is
7 because it focuses solely on people within 100 feet of a
8 health care facility.

9 QUESTION: No. I understand, but --

10 MR. McLACHLAN: And that these people are
11 entitled to special protection as found by our
12 legislature.

13 QUESTION: And it would apply to labor people
14 who were trying to educate the public about a labor union
15 matter, people who were objecting to the facility charging
16 too much money, people who were objecting to the
17 facility's use of animals in experimenting. They would
18 all come under the same rules.

19 MR. McLACHLAN: That is correct, Your Honor.

20 That is correct. It -- it would apply --

21 QUESTION: What --

22 MR. McLACHLAN: It applies to both sides or all
23 the multiple sides of the debate because it is a content-
24 neutral statute.

25 QUESTION: Would you tell us what this portion

1 of the statute accomplishes that subsection 2 does not?

2 MR. McLACHLAN: Subsection 2 only deals with, in
3 our -- in our view, physical contact between persons
4 and --

5 QUESTION: Well, it -- it deals with knowingly
6 obstructing, detaining, impeding, and so forth. Now, it's
7 -- it's hard for me to know what this covers that that
8 wouldn't also cover.

9 MR. McLACHLAN: What this covers by the
10 establishment of the 8-foot zone of separation is it
11 allows a normal conversation to occur. It is a speech
12 inducing, it's a speech allowing, it's a speech
13 endorsement, and that is -- that is what this statute
14 allows that the other statute doesn't address.

15 QUESTION: But --

16 MR. McLACHLAN: The other section just deals
17 with physical -- physical contact and -- and physical
18 obstruction without -- without regard to the proximity
19 between the -- the willing listener and -- and the
20 demonstrator.

21 QUESTION: We don't ordinarily think that to --
22 to be able to speak you have to have State authorization
23 or permission to speak. The -- the view is almost to the
24 contrary that you can speak unless there's valid
25 prohibition against speech.

1 MR. McLACHLAN: That's correct, Your Honor, and
2 I think it's important for us to point out again in front
3 of this Court that from 8 feet away all forms of
4 expression, irrespective of their content, are -- are
5 encouraged, allowed, and permitted under the statute --

6 QUESTION: Well, you -- you could say that from
7 -- from 100 feet if you use a -- you know, a bullhorn, but
8 -- but you can't -- what the -- what these abortion
9 protestors, which is what this is directed at, generally
10 do is -- is -- like to say, you know, my dear, have you
11 really considered the consequences? Are you going to
12 shout this? My dear, have you really considered? It's a
13 totally different -- it's a totally different enterprise
14 when you do it from 8 feet away. You can't really
15 seriously say that there's no difference between
16 approaching someone quietly, confidentially and speaking
17 in -- in that kind of a manner and shouting whatever you
18 want to do from 8 feet away. You -- you really assert
19 that there's no difference?

20 MR. McLACHLAN: Your Honor, 8 feet is a normal
21 conversational tone.

22 QUESTION: It is?

23 MR. McLACHLAN: Yes, it is, Your Honor. In
24 fact, in this courtroom --

25 QUESTION: My goodness, I -- I rarely stand 8

1 feet away from somebody that I'm talking to. I don't
2 stand an eighth of an inch, and -- and if that's what the
3 distance was, I -- I'd have no problem here. But 8 feet?

4 MR. McLACHLAN: I understand, Your Honor, but
5 everybody that you communicate with is a willing listener.

6 (Laughter.)

7 QUESTION: Oh, I -- I think not.

8 QUESTION: Don't be so sure.

9 (Laughter.)

10 MR. McLACHLAN: But if I may, Your Honor --

11 QUESTION: Don't be too sure.

12 (Laughter.)

13 QUESTION: Don't be too sure.

14 (Laughter.)

15 MR. McLACHLAN: Yes, ma'am.

16 But if I may, Your Honor, 8 feet is the precise
17 distance -- on an earlier occasion, we were permitted by
18 the Marshal to measure the distances in this courtroom and
19 8 feet is the distance from this podium to the edge of the
20 Court where the Chief Justice sits.

21 QUESTION: Why isn't this a content-based
22 statute if what it does is foreclose discussion of all the
23 issues Justice Ginsburg was mentioning with relation to
24 the health -- health care system?

25 MR. McLACHLAN: I'm sorry, Your Honor.

1 QUESTION: Why isn't this content-based because
2 it has -- imposes a special burden on people who want to
3 discuss issues, all of the ones Justice Ginsburg raised
4 and more, HMO cost, et cetera, with reference to the
5 health system?

6 MR. McLACHLAN: It's not content-based because
7 it allows -- it takes no side on the debate. It -- it
8 simply designates a --

9 QUESTION: It forecloses all debate on that
10 subject.

11 MR. McLACHLAN: All -- all debates on the -- no
12 subject.

13 QUESTION: Well, on the subject of health care.
14 That's the whole justification for the statute or how the
15 health care facilities are being operated.

16 MR. McLACHLAN: Again, within the 100 -- 100-
17 foot from an entrance of a facility, it allows completely
18 for both uninhibited debate on all topics and it allows it
19 if the listener wants --

20 QUESTION: You're saying the statute is not
21 content-based if it forecloses discussions on both sides
22 of -- of a particular subject.

23 MR. McLACHLAN: It doesn't foreclose
24 discussions, Your Honor.

25 QUESTION: That's not my definition of

1 content --

2 MR. McLACHLAN: All discussions can occur from 8
3 feet, and if the -- if the listener is willing to allow a
4 -- a person to approach -- and again, one of the reasons
5 for the 8 feet is a very common sense thing.

6 QUESTION: This would cover a protest over the
7 death penalty as well as something to do with health care,
8 wouldn't it? Would this statute apply to somebody who
9 wants to speak about the death penalty?

10 MR. McLACHLAN: If it -- yes, yes, it would.

11 QUESTION: So, I mean, not only point of view,
12 but also a wide range of subject matter can be spoken in
13 -- in this kind of activity.

14 MR. McLACHLAN: That's correct, Your Honor, if
15 it meets the statutory definition, oral protest,
16 education, or --

17 QUESTION: If you're interested in health care
18 issues, do you go to a health care facility or to the zoo?

19 MR. McLACHLAN: I think probably you would go to
20 your insurance carrier, if you have one, or you would go
21 to your doctor and you would want to make sure that you
22 would have access to your doctor because the Colorado
23 legislature has provided that you will have that access
24 through the operation of the statute.

25 QUESTION: Why -- why wouldn't it suffice for

1 the concerns of the State here to -- to prohibit any
2 intimidating approach by speech or otherwise? I mean,
3 what the State has prohibited here is speech. It's the
4 only thing that is prohibited is speech, not intimidation,
5 not approaching. Why wouldn't prohibiting an intimidating
6 approach suffice?

7 MR. McLACHLAN: Again, Your Honor, it's our
8 position that there is no prohibition. There is simply a
9 minimal restriction, a minimal burden with inside of the 8
10 feet.

11 QUESTION: Thank you, Mr. McLachlan.

12 Ms. Underwood, we'll hear from you.

13 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

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

15 SUPPORTING THE RESPONDENTS

16 MS. UNDERWOOD: Thank you. Mr. Chief Justice,
17 and may it please the Court:

18 Under this statute, petitioners are free to say
19 and to show anything they want to people near a health
20 care facility. They can shout or they can talk in normal
21 tones. They can offer literature and hold up signs and
22 pictures that can be seen by their target audience. They
23 can station themselves where the patients will have to
24 pass by much closer than 8 feet. They just can't move
25 toward the target without consent once the distance

1 between them is 8 feet or less.

2 QUESTION: Ms. Underwood --

3 QUESTION: If -- if that is so reasonable, I
4 assume it -- it could apply -- could be applied to normal
5 labor picketing at any facility. I mean, it's so
6 reasonable. You can say whatever you want. You can --
7 you think it would be constitutional applied to normal
8 labor picketing?

9 MS. UNDERWOOD: No, not a general -- not -- not
10 a general statute like --

11 QUESTION: Why not?

12 MS. UNDERWOOD: Well, Colorado was responding to
13 a particular need. If the same need existed, which is --

14 QUESTION: Well, there's violence in -- you --
15 you unaware that there -- that there have occurred
16 instances of violence and intimidation in labor picketing?

17 MS. UNDERWOOD: Well, the Court has --

18 QUESTION: We can make the same finding they
19 have here and say all -- all picketing -- you know, we
20 apply it generally to all -- all commercial
21 establishments.

22 MS. UNDERWOOD: Colorado hasn't made that
23 finding that -- I don't think that finding would be
24 supported. And we do expect -- we have a tradition of
25 people being of rather more robust activity --

1 QUESTION: So, there is some problem about --
2 about not letting somebody come closer than 8 feet.
3 You're not --

4 MS. UNDERWOOD: There is a First Amendment
5 issue. I don't think there's a problem with this statute.

6 QUESTION: Not a real --

7 QUESTION: So, you're saying, Ms. Underwood,
8 that -- you know, supposing Colorado on the basis of
9 things that happened out there in the early 20th century
10 -- read Moyer against Peabody if you want to find out
11 about it. And there is violence in labor picketing.
12 We're going to impose this same regulation. You say that
13 would be judged by a different standard, or that it would
14 -- that it would fail, whereas this would succeed? That's
15 a very strange position.

16 MS. UNDERWOOD: No. No. What I meant to say
17 was that if -- if exactly the same findings and exactly
18 the same need were found, then the same statute would be
19 upheld. But it --

20 QUESTION: Well, it might or might -- wouldn't
21 it be for the labor board in the labor case -- the
22 constitutional issue has to presuppose that the labor
23 board made findings like Colorado and then, as a labor law
24 matter, laid it down. And the question would be is that
25 unconstitutional if the labor board did it. Is that

1 right?

2 MS. UNDERWOOD: That's right.

3 QUESTION: Well, why -- why do you say that's
4 right in this very peripheral discussion? I mean, let's
5 suppose Colorado passes a statute affecting labor
6 picketing this same way and it is simply challenged on a
7 First Amendment basis. The labor board doesn't even get
8 into it. I take it that the answer you gave to my
9 question is -- is the correct one.

10 MS. UNDERWOOD: If Colorado made findings that
11 -- that there was a problem of violence and intimidation
12 that arose out of one-to-one close -- close approaches of
13 the sort here and that was not capable of being dealt with
14 in any other way, as Colorado had tried to do here and
15 that a statute like this was the least restrictive or at
16 least the -- was the most appropriate way of dealing with
17 the problem, then such a statute would be upheld. There
18 is no such finding and there is --

19 QUESTION: Is it necessary that there be
20 hearings and findings in order to sustain a statute like
21 this?

22 MS. UNDERWOOD: It is necessary that the
23 judgment be supported. This Court reviews the judgments
24 of legislatures with some deference when a factual matter
25 is concerned and hearings and findings are helpful, but

1 the Court has never prescribed a particular method for --
2 for --

3 QUESTION: But is there -- there is Federal
4 legislation, is there not?

5 MS. UNDERWOOD: Yes.

6 QUESTION: A Federal Freedom of Access to Clinic
7 Entrances Act?

8 MS. UNDERWOOD: Yes, there is.

9 QUESTION: And how does that differ from this?
10 And was that factored into the hearings and the findings,
11 the effect of that Federal act?

12 MS. UNDERWOOD: Well, this statute was passed
13 before the Federal Access to Clinics Act was passed, about
14 a year before. Under the Federal Access to Clinics Act,
15 an injunction can issue and, in at least one case that
16 we've called to the Court's attention, has issued, that
17 imposes a similar sort of restriction. There are
18 differences, obviously, between the way injunctions are
19 judged and the way statutes are judged, but that some
20 evidence that under the Federal statute it has been found
21 necessary by courts, pursuant to the statute, to impose a
22 no-approach -- a small no-approach zone in order to
23 protect against intimidation and -- and threats.

24 This is not the floating bubble of Schenck or
25 the no-approach rule of Madsen for several reasons. As -

1 - as has been noted, the target can't create a violation
2 here. The distance in question is 8 feet rather than 15.

3 In Madsen, while there was a no-approach rule
4 that the Court rejected, there was in the same case a 36-
5 foot absolute ban which covered most of the approach to
6 the -- to the facility that the Court -- that the Court
7 upheld.

8 The matter -- there was a discussion about
9 whether this is content-based. This Court has found many
10 similar bans to be content-neutral. I understand there's
11 an argument that there is some speech that's covered and
12 some not. But the Court in Grace held that the ban on
13 displays was content-neutral; in Heffron, that the ban on
14 demonstrating -- that the ban on distributing written
15 materials was content-neutral. And in fact, in Schenck
16 and Madsen, it found that those injunctions were content-
17 neutral.

18 QUESTION: Excuse me. In the two cases you
19 mentioned, did those bans refer to the content of the
20 speech as this one does? It's only that speech that
21 educates, that counsels, and so forth.

22 MS. UNDERWOOD: The ban in Grace around the
23 Supreme Court is on flags and devices that call attention
24 to an organization, a movement, or -- there clearly --
25 there's a communicative requirement there that's quite

1 similar to this. Presumably a work of art on a flag would
2 not qualify.

3 And the bans in -- in Schenck and Madsen, the
4 ones that were upheld, as well as the ones that were
5 struck down, were on demonstrating, which again is -- is
6 essentially what this language captures.

7 And on the question whether we can look behind
8 the -- the words to its purpose, Justice Scalia, you spoke
9 about the purpose of this. First of all, the clear
10 purpose of the Colorado legislature was to reduce the risk
11 of violence and intimidation at health care facilities,
12 not just at reproductive health care facilities and not
13 just from those with one particular viewpoint. While it's
14 true that the anti-abortion protests generated much of the
15 activity that led to the statute, the legislature was
16 clearly aware of and concerned about both reciprocal
17 violence by pro-abortion protestors --

18 QUESTION: If there were a sudden interest in
19 the automobile industry, could Colorado have these speech
20 regulatory zones around every auto dealership?

21 MS. UNDERWOOD: This isn't a -- first, if
22 exactly the same findings were made, obviously, it seems
23 to me --

24 QUESTION: You don't like that term speech
25 regulatory zone? That's what this is.

1 MS. UNDERWOOD: No. It's an approach regulatory
2 zone, and I'd like to take issue with this --

3 QUESTION: But what about the hypothetical?
4 Approach regulatory zone?

5 MS. UNDERWOOD: Yes. What this statute
6 prohibits is moving in on somebody. It doesn't --

7 QUESTION: It's not an approach -- you can
8 approach as close as you like so long as you don't speak.

9 MS. UNDERWOOD: No, that's not right. You have
10 the purpose --

11 QUESTION: It's only the person who approaches
12 to speak or to -- or to hand a leaflet --

13 MS. UNDERWOOD: With -- with that --

14 QUESTION: -- who is prohibited.

15 MS. UNDERWOOD: With that purpose. Actually I'd
16 like to just on the words of the statute -- what has to
17 happen is an approach. The -- the advocacy aspect of the
18 statute is the purpose. You don't have to get as --

19 QUESTION: Approach with the intention of.

20 MS. UNDERWOOD: With the intent. You can
21 approach without intent --

22 QUESTION: Right. With the intention of
23 speaking.

24 MS. UNDERWOOD: -- without getting to the point
25 of speaking.

1 QUESTION: Or you could do this just for auto
2 dealerships --

3 MS. UNDERWOOD: If there were --

4 QUESTION: -- or law offices. How about
5 lawyers? Any law office? No.

6 MS. UNDERWOOD: If there were a problem --

7 QUESTION: And what I'm -- what I'm trying to
8 find out is if this isn't a basis to say that this is
9 content-controlled and not content -- that obviously
10 underlies the question. That's what I'd like you to
11 address.

12 MS. UNDERWOOD: No, it's not content control.
13 It is facility protective. There is a problem at health
14 care facilities, a problem of intimidation and violence,
15 that Colorado --

16 QUESTION: Because of the message that goes on
17 there.

18 MS. UNDERWOOD: No. Actually with respect to a
19 great many messages, although there's one that perhaps is
20 more common than others. There is a problem. The
21 legislature is not required to act with respect to
22 problems that don't exist.

23 And if you're hypothesizing a world in which
24 people are intimidating people from buying cars by coming
25 up close to them in their face and -- and showing them

1 pictures of automobile accidents, then perhaps Colorado
2 would want to do something and could do something like
3 what it did here, which is to permit them to show those
4 pictures and to permit them to give those messages, but to
5 require them not to move in on somebody closer than 8
6 feet.

7 QUESTION: Ms. Underwood, what about -- what
8 about the consent requirement? Now, you know, we -- we
9 allow people to prevent unwelcome speech in their homes.
10 You can cancel, you know -- require mail not to be
11 delivered. You can have a city ordinance saying I don't
12 want any -- you need consent before hawkers can come to
13 the door. But in the public forum outside in the street,
14 can -- can we have a law that -- that enables people to -
15 - to turn off unwelcome speech?

16 MS. UNDERWOOD: Not to turn off unwelcome -- may
17 I answer, Mr. Chief Justice?

18 Not to turn off unwelcome speech. To repel
19 unwanted close approaches. This is about a close approach
20 and not about speech at all.

21 QUESTION: Thank you, Ms. Underwood.

22 Mr. Sekulow, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF JAY A. SEKULOW

24 ON BEHALF OF THE PETITIONERS

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

1 With regard to the Free Access to Clinic
2 Entrances Act, Justice O'Connor, it specifically exempts
3 First Amendment activities.

4 With regard to reliance on United States v.
5 Grace, on page 176 of this Court's opinion -- I'm quoting
6 -- we also accept the Government's contention not
7 contested by appellees about the content of the speech.
8 We are contesting that here.

9 QUESTION: Mr. Sekulow --

10 MR. SEKULOW: Yes.

11 QUESTION: -- am I wrong in thinking that there
12 -- there's legislation that establishes quiet zones around
13 hospitals, around schools, which would be much more
14 restrictive than what's involved here, based on the
15 character of the facility? Is that not so?

16 MR. SEKULOW: You often see signs even that say
17 quiet zones. I think the difference is here a silent
18 approach without any words to distribute a leaflet
19 requires consent.

20 QUESTION: Well, is it --

21 MR. SEKULOW: And it's not a quiet zone here
22 that they're talking about. There's nothing -- no
23 prohibition here that says you can't talk loud.

24 QUESTION: But -- but given the fact that there
25 is a history of women in a very vulnerable, emotionally

1 charged state, in a difficult physical condition, and
2 given the fact that using words like you can't harass and
3 you can't -- whatever those words are in section 2 -- are
4 very hard to interpret, could you say that having 8 feet
5 as the limit between my fist and your face, so to speak,
6 helps the First Amendment? It makes clear what you can do
7 and what you can't do --

8 MR. SEKULOW: No.

9 QUESTION: -- rather than every time getting
10 into an argument about what constitutes harassment.

11 MR. SEKULOW: Justice Breyer, this case -- this
12 particular statute is a criminal statute. It requires
13 precision of regulation. An 8-foot prohibition here
14 requiring consent we believe violates the First Amendment.
15 There is not a First Amendment health care exception. I
16 am sure --

17 QUESTION: That's my very point. Why isn't it
18 more precise to say 8 feet than to say in each case we'll
19 -- we'll litigate whether my waving my arm or something
20 like that did or did not constitute harassment?

21 MR. SEKULOW: I think for the exact same reason
22 that this Court in Madsen and in Schenck rejected the
23 health care exception to the First Amendment.

24 I think it points to the situation in NAACP v.
25 Clayborne Hardware. I'm sure the -- the gentleman that

1 ran Clayborne Hardware would have rather not had those
2 protestors out in front of his stores. And maybe he had a
3 heart condition, and if he did, I don't think you can
4 carry a sign that says I've got a heart condition, don't
5 approach you.

6 QUESTION: But, Mr. Sekulow, isn't there
7 something different about a hospital, I mean, wholly apart
8 from the question of abortion clinics? Haven't there been
9 restrictions on speech activity around schools? I mean,
10 mostly the problem was not that they -- you couldn't have
11 the restriction, but you couldn't favor one speaker.

12 MR. SEKULOW: But this Court has also said in
13 those same contexts -- Mr. Chief Justice, my time is
14 expired. Would the Court like me to respond?

15 QUESTION: Briefly.

16 MR. SEKULOW: The difference is there the
17 question was was the conduct going to aggravate what was
18 going on inside, and because the courts there gave a
19 narrowing construction that only when it -- it violates
20 what's going on inside or causes a problem, that there
21 would be a violation. That's not the case here.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Sekulow.

25 The case is submitted.

(Whereupon, at 11:14 a.m., the case in the
above-entitled matter was submitted.)

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JR., Petitioners v. COLORADO, ET AL.

CASE NO: 98-1856

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BY: Dona M. May
(REPORTER)