SUPREME COURT OF THE UNITED STATES

No. 93–880

JUDY MADSEN, ET AL., PETITIONERS *v.* WOMEN'S HEALTH CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 30, 1994]

JUSTICE STEVENS, concurring in part and dissenting in part.

The certiorari petition presented three questions, corresponding to petitioners' three major challenges to the trial court's injunction.[1] The Court correctly and unequivocally rejects petitioners' argument that the injunction is a “content-based restriction on free speech,” *ante*, at 6–8, as well as their challenge to the injunction on the basis that it applies to persons acting “in concert” with them. *Ante*, at 20–21. I therefore join Parts II and IV of the Court's opinion, which properly dispose of the first and third questions presented. I part company with the Court, however,

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[1]“QUESTIONS PRESENTED FOR REVIEW

“1. Whether a state court injunction placing a thirty-six-foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

“2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred-foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

“3. Whether a state court injunction prohibiting named demonstrators and those acting `in concert' from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association.” Pet. for Cert. i.

on its treatment of the second question presented, including its enunciation of the applicable standard of review.

I agree with the Court that a different standard governs First Amendment challenges to generally applicable legislation than the standard that measures such challenges to judicial remedies for proven wrongdoing. See *ante*, at 8–9. Unlike the Court, however, I believe that injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community, *ibid.*, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity.[2] Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

The standard governing injunctions has two obvious dimensions. On the one hand, the injunction should be no more burdensome than necessary to provide complete relief, *Califano* v. *Yamasaki,* 442 U. S. 682, 702 (1979). In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.

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[2]Contrary to JUSTICE SCALIA's assumption, see *post*, at 11, n. 1, the deprivation of liberty caused by an injunction is not a form of punishment. Moreover, there is nothing unusual about injunctive relief that includes some restriction on speech as a remedy for prior misconduct. *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 697–698 (1978).

On the other hand, even when an injunction impinges on constitutional rights, more than "a simple proscription against the precise conduct previously pursued" may be required; the remedy must include appropriate restraints on "future activities both to avoid a recurrence of the violation and to eliminate its consequences." *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 697–698 (1978). Moreover, "[t]he judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *Teachers* v. *Hudson,* 475 U. S. 292, 309–310, n. 22 (1986). As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature. See *United States* v. *Paradise,* 480 U. S. 149 (1987).

In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.

The second question presented by the certiorari petition asks whether the "consent requirement before speech is permitted" within a 300-foot buffer zone around the clinic unconstitutionally infringes on free speech.[3] Petitioners contend that these

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[3]See n. 1, *supra*. This question also encompasses the separate but related question whether the 300-foot buffer zone in residential areas is a reasonable time, place, and manner restriction, but incorrectly refers to that zone as containing a consent requirement. For the reasons stated in Part III–E of the Court's opinion, which I join, I agree that

restrictions create a "no speech" zone in which they cannot speak unless the listener indicates a positive interest in their speech. And, in Part III–D of its opinion, the Court seems to suggest that, even in a more narrowly defined zone, such a consent requirement is constitutionally impermissible. *Ante*, at 18–19. Petitioners' argument and the Court's conclusion, however, are based on a misreading of ¶(5) of the injunction.[4]

That paragraph does not purport to prohibit speech; it prohibits a species of conduct. Specifically, it prohibits petitioners "from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring" of petitioners. App. 59. The meaning of the term "physically approaching" is explained by the detailed prohibition that applies

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the findings do not justify such a broad ban on picketing. I also agree with the Court's rejection of petitioners' prior restraint challenge to the 300-foot zones. See *ante,* at 7–8, n. 2.

[4]The full text of ¶(5) reads as follows:

"At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. In the event of such invitation, the [petitioners] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as `sidewalk counseling', that person shall have the absolute right to leave or walk away and the [petitioners] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." App. 59.

when the patient refuses to converse with, or accept delivery of literature from, petitioners. Absent such consent, the petitioners "shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." *Ibid.* As long as petitioners do not physically approach patients in this manner, they remain free not only to communicate with the public but also to offer verbal or written advice on an individual basis to the clinic's patients through their "sidewalk counseling."

Petitioners' "counseling" of the clinic's patients is a form of expression analogous to labor picketing. It is a mixture of conduct and communication. "In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *NLRB* v. *Retail Store Employees,* 447 U. S. 607, 619 (1980) (STEVENS, J., concurring in part and concurring in result). As with picketing, the principal reason why handbills containing the same message are so much less effective than "counseling" is that "the former depend entirely on the persuasive force of the idea." *Ibid*. Just as it protects picketing, the First Amendment protects the speaker's right to offer "sidewalk counseling" to all passersby. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case. One may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers, *Cohen* v. *California,* 403 U. S. 15, 21–22 (1971). Nevertheless, that does not mean that he has an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services. Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 116 (1972).

The "physically approaching" prohibition entered by

the trial court is no broader than the protection necessary to provide relief for the violations it found. The trial judge entered this portion of the injunction only after concluding that the injunction was necessary to protect the clinic's patients and staff from "uninvited contacts, shadowing and stalking" by petitioners. App. 56. The protection is especially appropriate for the clinic patients given that the trial judge found that petitioners' prior conduct caused higher levels of "anxiety and hypertension" in the patients, increasing the risks associated with the procedures that the patients seek.[5] Whatever the proper limits on a court's power to restrict a speaker's ability to physically approach or follow an unwilling listener, surely the First Amendment does not prevent a trial court from imposing such a restriction given the unchallenged findings in this case.

The Florida Supreme Court correctly concluded:

> "While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the

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[5]Specifically, in his findings of fact, the trial court noted that:

"This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such proceedings." *Id.,* at 54.

> captive ear of the unwilling and disabled." *Operation Rescue* v. *Womens Health Center, Inc.,* 626 So. 2d 664, 675 (1993).

I thus conclude that, under the circumstances of this case, the prohibition against "physically approaching" in the 300-foot zone around the clinic withstands petitioners' First Amendment challenge. I therefore dissent from Part III–D.

Because I have joined Parts I, II, III–E, and IV of the Court's opinion and have dissented as to Part III–D after concluding that the 300-foot zone around the clinic is a reasonable time, place, and manner restriction, no further discussion is necessary. See n. 1, *supra*. The Court, however, proceeds to address challenges to the injunction that, although arguably raised by petitioners' briefs, are not properly before the Court.

After correctly rejecting the content-based challenge to the 36-foot buffer zone raised by the first question in the certiorari petition, the Court nevertheless decides to modify the portion of that zone that it believes does not protect ingress to the clinic. Petitioners, however, presented only a content-based challenge to the 36-foot zone; they did not present a time, place, and manner challenge. See n. 1, *supra*. They challenged only the 300-foot zones on this ground. *Ibid.* The scope of the 36-foot zone is thus not properly before us.[6] *Izumi Seimitsu*

[6]Indeed, it is unclear whether these challenges were presented to the Florida Supreme Court. In their appeal to that Court, petitioners did not even file the transcript of the evidentiary hearings, contending that the "sole question presented by this appeal is a question of law." See Appellants' Motion in Response to Appellees' Motion to Require Full Transcript and Record of Proceedings in

Kogyo Kabushiki Kaisha v. *U. S. Phillips Corp.,* 510 U. S. ___ (1993) *(per curiam).*[7]

The same is true of the noise restrictions and the "images observable" provision of ¶(4).[8] That paragraph does not refer to the 36-foot or the 300-foot buffer zones, nor does it relate to the constitutionality of the "in concert" provision. As such, although I am inclined to agree with the Court's

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No. 93–00969 (Dist. Ct. App. Fla.), p. 2. Because petitioners argued that the entire decree was invalid as a matter of law, without making any contention that particular provisions should be modified, it appears there was no argument in that Court about the size or the shape of the buffer zones.

Even if the question were properly presented here, I fully agree with the Florida Supreme Court's refusal to quibble over a few feet one way or the other when the parties have not directed their arguments at a narrow factual issue of this kind. *Operation Rescue* v. *Womens Health Center, Inc.,* 626 So. 2d 664, 673 (1993). Moreover, respect for the highest court of the State strongly counsels against this sort of error correction in this Court.

[7]Even assuming that a time, place, and manner challenge to the 36-foot zone is fairly included within the first question presented, petitioners' brief challenges the *entire* 36-foot zone as overbroad and seeks to have it invalidated in its entirety. Nowhere in their briefs do they argue that the portion of the zone on the north and west sides of the clinic should be struck down in the event the Court upholds the restrictions on the front and east. As such, we do not have the benefit of respondents' arguments why those portions, if considered severally from the other portions of the zone, should be upheld. Moreover, the existence in the record of facts found by the trial court respecting petitioners' conduct—independent of petitioners' obstruction of ingress and egress—that support the entire 36–foot zone makes the Court's micromanagement of the injunction particularly

resolution respecting the noise and images restrictions, I believe the Court should refrain from deciding their constitutionality because they are not challenged by the questions on which certiorari was granted.

For the reasons stated, I concur in Parts I, II, III–E, and IV of the Court's opinion, and respectfully dissent from the remaining portions.

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inappropriate. See, *e.g.*, App. 53 ("The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic"); *id.*, at 54 ("[T]he doctor was followed as he left the clinic by a person associated with the [petitioners] who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle"); *id.*, at 54–55 (noting that "a physician similarly employed was killed by an antiabortionist at a clinic in North Florida").

[8]Paragraph (4) provides in full:

"During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic." *Id.,* at 59.