

## **Amicus Curiae Briefs Civil Rights/Equal Rights**

### **Reproductive Health – Buffer Zones**

**Case:** *Pro-Choice Network of Western New York v. Schenck*

**Court:** United States Court of Appeals for the Second Circuit, 1995

**Amicus Brief:** NOW Legal Defense and Education Fund

**Case:** The Pro-Choice Network filed in District Court for an injunction against Schenck, as well as several organizations that created a blockade surrounding the plaintiffs' medical facilities, which the defendants used to harass patients and staff entering and exiting the building. The District Court issued the injunction, creating a 15-foot buffer zone that was stationary around the facility and floating around individuals and motor vehicles approaching the facility. Two "sidewalk" counselors could enter the buffer zone, with the counselors having to remove themselves from the buffer zone once anyone walking within the buffer zone refused such counseling. The Second Circuit struck down the injunction, but it then granted a rehearing en banc.

**Amicus Brief:** The brief focuses only on the "cease-and-desist" provision of the injunction, which requires all "sidewalk counselors" to cease and desist their counseling upon refusal of such counseling by an approached individual who is within the buffer zone. The brief argues that the speech restrictions on the place where such speech may take place must be looked at within the context of that place, where tension, anxiety, and stress can carry special medical risks. The brief also argues that because the cease-and-desist provision is triggered by an individual's refusal to be counseled further, it operates as a constitutional "notice remedy," whereby the listener gives notice that further communication is not desired. The speaker is still free to pursue other willing listeners. The brief further argues that the speech restriction protects a captive audience, for the individuals are held captive at the facility by medical circumstance. The speech is intended to frighten and scare away this captive audience. The brief argues that the captive audience doctrine, which has been used to protect individuals within their home, should be extended to other areas, specifically medical facilities, where individuals are attempting to exercise privacy rights. The brief explains that the minimal restriction on speech is necessary to serve the government's interest in protecting women's constitutional rights. The brief concludes by drawing analogies between injunctions against speech at clinics aimed at harassing prospective patients and restraining orders permitted by domestic violence statutes. Such restraining orders have been permitted even though they invade the free speech of the batterer because of the countervailing interest in protecting an individual's safety.

**CWEALF:** CWEALF joined the brief because of its belief that women should be free from harassment when attempting to exercise their reproductive choices. CWEALF believes that continual harassment has the effect of denying a woman her right to make her own reproductive choices.

**Holding:** The Court found that the injunction was content neutral, even though aimed at protestors who shared the same viewpoint. The Court held that there existed important

governmental interests of ensuring individuals' medical safety, public safety, and access to abortions. The Court also found that the restrictions did not burden more speech than was necessary in order to meet the governmental interests, for the women seeking access to the clinic were a "captive audience," in the sense that they were unable to walk away, and the provisions provided them with relief from duress while leaving the speakers with ample opportunity to speak to willing listeners. Note: Schenck appealed and the United States Supreme Court granted certiorari. See below.

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**Case:** *Schenck v. Pro-Choice Network of Western New York*

**Court:** United States Supreme Court, 1997

**Amicus Brief:** The Center for Reproductive Law and Policy

**Case:** The Pro-Choice Network filed in District Court for an injunction against Schenck, as well as several organizations that created a blockade surrounding the plaintiffs' medical facilities, which the defendants used to harass patients and staff entering and exiting the building. The District Court issued the injunction, creating a 15-foot buffer zone that was stationary around the facility and floating around individuals and motor vehicles approaching the facility. Two "sidewalk" counselors could enter the buffer zone, with the counselors having to remove themselves from the buffer zone once anyone walking within the buffer zone refused such counseling. The Second Circuit upheld the provisions on appeal (see above).

**Amicus Brief:** The brief focuses on the floating buffer zone and cease-and-desist provisions of the injunction. The brief argues that such provisions are constitutional because the women seeking access to the clinics are captive audiences who have a privacy right to make their own reproductive choices. The injunction protects a captive audience from serious harm, allows them to exercise their constitutional right to reproductive choice, without precluding many forms of communication. The constitutionality is also supported by analogous decisions in the contexts of domestic violence and sexual harassment. In these settings, courts have protected unwilling listener's privacy rights by limiting harassing and intimidating speech and activities that cause harm to the recipients.

**CWEALF:** CWEALF joined the brief because of its belief that women should be free from harassment when attempting to exercise their reproductive choices. CWEALF believes that continual harassment has the effect of denying a woman her right to make her own reproductive choices.

**Holding:** The Court upheld the stationary fifteen-foot buffer zone around the clinic entrances because no more speech than necessary was restricted in order to meet the governmental interests in preserving public safety, medical safety, and access to abortion. However, the Court struck down the floating buffer zone, holding that it restricted more speech than was necessary. By preventing all speakers, with the exception of two, from entering a given area, the restriction was too broad. Because the Court struck down the floating buffer zone provision, it did not address the cease-and-desist provision.

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**Case:** *United States and Connecticut v. Scott*

**Court:** The United States Court of Appeals for the Second Circuit, 1999

**Amicus Brief:** Connecticut Women's Education and Legal Fund

**Case:** This case first arose from allegations that the defendant, Scott, violated provisions of FACE (Freedom of Access to Clinic Entrances Act). Scott's original defense was that Congress had exceeded its power under the Commerce Clause in enacting FACE. The District Court held that Congress's enactment of FACE was a constitutional exercise of its authority to control those activities that substantially affect interstate commerce. According to the District Court, Congress, after finding that women seeking abortions may travel between states to do so, thus affecting interstate commerce, found that this interstate activity was significantly hindered or affected by those individuals who blockade access to clinics. Congress further found that this occurred on a national level. The District Court held, therefore, that Congress's enactment of FACE was rationally related to its goal of regulating access to clinics. Once the District Court found FACE constitutional, it issued an injunction against Scott that created a stationary fourteen foot buffer zone around the clinic's entrance and a floating five foot buffer zone around any individual or motor vehicle in the vicinity of the clinic once the individual had indicated that s/he did not wish to communicate with Scott. The District Court found Scott in violation of the injunction and, therefore, expanded the injunction to include a twenty-eight foot stationary buffer zone around the clinic's entrance and a floating buffer zone of eight feet around any individual or motor vehicle within the clinic's vicinity after the individual has expressed a desire to cease communications with Scott. Scott appealed to the Second Circuit, claiming the eight-foot floating buffer zone unduly restricted his First Amendment freedom of speech for it made communication virtually impossible.

**Amicus Brief:** The brief argues that Supreme Court precedent supports the issuing of an injunction separating protestors from individuals seeking access to clinics when a history of abusive conduct supports the finding that such a restriction is necessary for the government to advance its interests in protecting the public safety and preserving access to reproductive health facilities. The brief argues that since the floating buffer does not go into affect until Scott is signaled that his counsel is unwanted, Scott's First Amendment right to communicate with a willing listener is not infringed. In fact, Scott still has the ability to speak his message; he is simply prohibited from coercing an unwilling listener with pervasive and daunting conduct. The brief further argues that the expansion of the original injunction was justified because of Scott's violation of the original injunction, and this previous violation illustrates the Court's care in fashioning an injunction that is no more restrictive of speech than is necessary to advance the government's interests.

**CWEALF:** CWEALF authored the brief because of its belief in the importance of safeguarding a woman's ability to make her own reproductive choices, free of harassment and violence.

**Holding:** The Second Circuit affirmed the District Court's decision, finding that, in light of the record of abusive conduct, the District Court fashioned the injunction so that it was no more restrictive of speech than was necessary to advance the government's interests.

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**Case:** *Hill v. State of Colorado*

**Court:** United States Supreme Court, 2000

**Amicus Brief:** National Abortion and Reproductive Rights Action League

**Case:** Petitioners filed suit, requesting injunctive relief against the State's enforcement of a statute which made it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The face of the law did not prohibit the content of any speech, only the manner in which the view was conveyed, though petitioners claimed that its application was viewpoint-biased and, therefore, in violation of their First Amendment freedom of speech rights. The trial court granted summary judgment in favor of the State, holding that the statute was a valid time, place, and manner restriction on speech that was content-neutral. This decision was affirmed by the Colorado Court of Appeals. The Colorado Supreme Court denied certiorari.

**Amicus Brief:** The brief argues that the law restricts conduct, not speech, and therefore implicates no free speech rights. In the alternative the brief argues that the law is a valid time, place, and manner restriction on speech. The restrictions do not silence the speech; they only regulate the proximity from which they message may be conveyed. The underlying purposes of the law are the State's legitimate interests in preserving the psychological and physical safety of individuals and their unfettered access to health care. In pursuing this purpose, the statute limits no more speech than is necessary to protect the State's interest and, therefore, it is narrowly tailored to that interest. Furthermore, ample alternatives are left open to the speakers to use in conveying their message, whatever the content.

**CWEALF:** CWEALF joined the brief because of its belief in the importance of safeguarding a woman's ability to make her own reproductive choices, free of harassment and violence.

**Holding:** The Court found that the statute, which was adopted in order to preserve the safety of individuals and their access to healthcare, was content neutral for it was not adopted in response to the State's disagreement with any message conveyed. The Court held that the statute was a valid time, place, and manner restriction for it was narrowly tailored to substantial governmental interests and left open ample alternatives.

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**Case:** *People of the State of New York v. Operation Rescue National*

**Court:** United States Court of Appeals for the Second Circuit, 2001

**Amicus Brief:** Summit Women's Center, Inc

**Case:** This suit arose from the facts of *Schenck v. Pro-Choice Network* (see above). After *Schenck* was decided, and in anticipation of a large-scale protest, the plaintiffs (which include the State of New York, and several health care providers) sought a preliminary injunction against protestors from the District Court. The plaintiffs alleged violations of FACE (Freedom of Access to Clinic Entrances Act) as well as claims of nuisance and trespass. The District Court issued a preliminary injunction that included a stationary fifteen-foot buffer zone around all doorways,

driveways, and walkways of clinics, increased these buffer zones at two specific facilities, eliminated the previous “sidewalk counselor” exception (see *Schenck*), and banned the use of sound amplification devices. The defendants, two individual protestors, appealed, claiming the injunction violated their First Amendment right to freedom of speech.

**Amicus Brief:** The brief argues that trial courts should be given deference and leeway when fashioning injunctions for they have the most comprehensive information about a given situation. This is extremely important in light of the significant governmental interests of protecting the safety, both physical and psychological, of health care patients and preserving access to reproductive health care facilities.

**CWEALF:** CWEALF joined the brief because of its commitment to preserving women’s access to all reproductive choices. CWEALF believes that unfettered access can only be secured when those who threaten the choices are restrained from thrusting their views onto unwilling listeners.

**Holding:** The Second Circuit found the record insufficient to sustain the injunction against one of the protestors but found it sufficient to sustain the injunction against the other protestor. Reviewing the constitutionality of the injunction as a content-neutral time, place, and manner restriction, the Second Circuit found that the provision eliminating “sidewalk counselors” was narrowly tailored to serve the significant governmental interests of ensuring public safety and order, protecting access to reproductive health facilities, and safeguarding private property as well and the physical and psychological health of patients. The Court, however, found that the expanded buffer zones and the flat ban on sound amplification equipment restricted more speech than was necessary in order to advance the government’s interests.

**Case:** *McGuire v. Reilly*

**Court:** United States Court of Appeals for the First Circuit, 2001

**Amicus Brief:** Connecticut Women’s Education and Legal Fund

**Case:** Protestors filed suit in District Court claiming that a Massachusetts law creating a floating 6-foot buffer zone around individuals and motor vehicles as they tried to enter a reproductive health care facility violated the protestors’ First Amendment freedom of speech and freedom of association and their Fourteenth Amendment right to equal protection and due process of law. The District Court struck down the law, holding that the law was viewpoint-biased for it permitted clinic employees and/or agents to enter the buffer zone.

**Amicus Brief:** The brief argues that the law restricts the conduct or proximity of the protestors, not their speech or their ability to convey their message. In the alternative, the brief argues that any regulations on speech are content neutral for they are not prohibiting any particular view, but rather the manner in which that view is expressed or the place from which it may be expressed. The exception for agents and employees is not exception for their speech but rather an exception for their employment-related conduct. The brief argues that this time, place, and manner restriction on speech, if it is indeed speech and not conduct that is being regulated, is necessary to protect the physical and psychological well being of both patients and providers. By placing only a small floating buffer around those entering the clinic, the State has narrowly tailored the

regulation so that only a minimal amount of speech is burdened in the State's efforts to reach its legitimate ends.

**CWEALF:** CWEALF co-authored the brief because of its belief that only by providing for the security of individuals attempting to access reproductive health care facilities can those individuals truly remain free to make reproductive choices. When women are blockaded from exercising their reproductive choices, the choices cease to exist.

**HOLDING:** The First Circuit found this case analogous to *Hill v. Colorado* (see above) despite the exceptions for clinic agents and employees. Even though the law may have burdened the speech of abortion protestors more than it burdened the speech of other individuals, this was not the underlying purpose of the Act. The State's underlying legitimate interest in public safety, personal security, and access to medical facilities made the law a constitutional time, place, and manner restriction on speech that was viewpoint neutral.