SUPREME COURT OF THE UNITED STATES

No. 98–1856

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR., PETITIONERS *v.* COLORADO ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[June 28, 2000]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today concludes that a regulation requiring speakers on the public thoroughfares bordering medical facilities to speak from a distance of eight feet is "not a 'regulation of speech,'" but "a regulation of the places where some speech may occur," *ante*, at 14; and that a regulation directed to only certain categories of speech (protest, education, and counseling) is not "content-based." For these reasons, it says, the regulation is immune from the exacting scrutiny we apply to content-based suppression of speech in the public forum. The Court then determines that the regulation survives the less rigorous scrutiny afforded content-neutral time, place, and manner restrictions because it is narrowly tailored to serve a government interest– protection of citizens' "right to be let alone"– that has explicitly been disclaimed by the State, probably for the reason that, as a basis for suppressing peaceful private expression, it is patently incompatible with the guarantees of the First Amendment.

None of these remarkable conclusions should come as a surprise. What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification

machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 785 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part). Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.

I

Colorado's statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content-based. A speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent. Whether a speaker must obtain permission before approaching within eight feet– and whether he will be sent to prison for failing to do so– depends entirely on *what he intends to say* when he gets there. I have no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protesters, or union members seeking to "educate" the public about the reasons for their strike. "[I]t is," we would say, "the content of the speech that determines whether it is

within or without the statute's blunt prohibition," *Carey* v. *Brown*, 447 U. S. 455, 462 (1980). But the jurisprudence of this Court has a way of changing when abortion is involved.

The Court asserts that this statute is not content-based for purposes of our First Amendment analysis because it neither (1) discriminates among viewpoints nor (2) places restrictions on "any subject matter that may be discussed by a speaker." *Ante*, at 18. But we have never held that the universe of content-based regulations is limited to those two categories, and such a holding would be absurd. Imagine, for instance, special place-and-manner restrictions on all speech except that which "conveys a sense of contentment or happiness." This "happy speech" limitation would not be "viewpoint-based"– citizens would be able to express their joy in equal measure at either the rise or fall of the NASDAQ, at either the success or the failure of the Republican Party– and would not discriminate on the basis of subject matter, since gratification could be expressed about anything at all. Or consider a law restricting the writing or recitation of poetry– neither viewpoint-based nor limited to any particular subject matter. Surely this Court would consider such regulations to be "content-based" and deserving of the most exacting scrutiny[1]

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[1]The Court responds that statutes which restrict categories of speech– as opposed to subject matter or viewpoint– are constitutionally worrisome only if a "significant number of communications, raising the same problem that the statute was enacted to solve, . . . fall outside the statute's scope, while others fall inside." *Ante*, at 18–19. I am not sure that is correct, but let us assume, for the sake of argument, that it is. The Court then proceeds to assert that "'[t]he statutory phrases, 'oral protest, education, or counseling,' distinguish speech activities likely to" present the problem of "harassment, . . . nuisance, . . . persistent importuning, . . . following, . . . dogging, and . . . implied threat of physical touching," from "speech activities [such as my example of

"The vice of content-based legislation– what renders it deserving of the high standard of strict scrutiny– is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen*, *supra*, at 794 (opinion of SCALIA, J.) (emphasis omitted). A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk. When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion. The Court's confident assurance that the statute poses no special threat to First Amendment freedoms because it applies alike to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," *ante*, at 18, is a wonderful replication (except for its lack of sarcasm) of Anatole France's observation that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ." see J. Bartlett, Familiar Quotations 550 (16th ed. 1992). This Colorado law is no more targeted at used car salesmen, animal rights activists, fund raisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich. We know what the Colorado legislators, by their careful selection of content ("protest, education, and counseling"), were taking aim at, for they set it forth in the statute itself: the "right to protest or counsel *against* certain medical procedures" on the sidewalks and streets surrounding health care facilities.

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"happy speech"] that are most unlikely to have those consequences," *ibid*. Well. That may work for "oral protest"; but it is beyond imagining why "education" and "counseling" are especially *likely*, rather than especially *unlikely*, to involve such conduct. (Socrates *was* something of a *noodge*, but even he did not go *that* far.) *Unless*, of course, "education" and "counseling" are code words for efforts to dissuade women from abortion– in which event the statute would not be viewpoint neutral, which the Court concedes makes it invalid.

Col. Rev. Stat. §18–9–122(1) (1999) (emphasis added).

The Court is unpersuasive in its attempt to equate the present restriction with content-neutral regulation of demonstrations and picketing– as one may immediately suspect from the opinion's wildly expansive definitions of demonstrations as "'public display[s] of sentiment for or against a person or cause,'" and of picketing as an effort "'to persuade or otherwise influence.'" *Ante*, at 16–17, quoting Webster's Third New International Dictionary 600, 1710 (1993). (On these terms, Nathan Hale was a demonstrator and Patrick Henry a picket.) When the government regulates "picketing," or "demonstrating," it restricts a particular manner of expression that is, as the author of today's opinion has several times explained, "'a mixture of conduct and communication.'" *Frisby* v. *Schultz*, 487 U. S. 474, 497 (1988) (STEVENS, J., dissenting), quoting *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 618–619 (1980) (STEVENS, J., concurring in part and concurring in result). The latter opinion quoted approvingly Justice Douglas's statement:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery Drivers* v. *Wohl*, 315 U. S. 769, 776–777 (1942) (concurring opinion).

As JUSTICE STEVENS went on to explain, "no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea." *Retail Store Employees*, *supra*, at 619. Today, of course, JUSTICE STEVENS gives us an opinion restricting

not only handbilling but even one-on-one conversation of a particular content. There comes a point– and the Court's opinion today passes it– at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself. The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips; and they cannot be avoided by regulating the act of extending one's arm to deliver a handbill, or peacefully approaching in order to speak. All of these acts can be regulated, to be sure; but not, on the basis of content, without satisfying the requirements of our strict-scrutiny First Amendment jurisprudence.

Even with regard to picketing, of course, we have applied strict scrutiny to content-based restrictions. See *Carey*, 447 U. S., at 461 (applying strict scrutiny to, and invalidating, an Illinois statute that made "permissibility of residential picketing . . . dependent solely on the nature of the message being conveyed"). As discussed above, the prohibition here *is* content-based: those who wish to speak for purposes other than protest, counsel, or education may do so at close range without the listener's consent, while those who wish to speak for other purposes may not. This bears no resemblance to a blanket prohibition of picketing– unless, of course, one uses the fanciful definition of picketing ("an effort to persuade or otherwise influence") newly discovered by today's opinion. As for the Court's appeal to the fact that we often "examine the content of a communication" to determine whether it "constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods," *ante*, at 16, the distinction is almost too obvious to bear mention: Speech of a certain content is constitutionally proscribable. The Court has not yet taken the step of consigning "protest, education, and counseling" to that category.

Finally, the Court is not correct in its assertion that the

restriction here is content-neutral because it is "*justified* without reference to the content of regulated speech," in the sense that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech." *Ante*, at 14–15 (emphasis added). That is not an accurate statement of our law. The Court makes too much of the statement in *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*, at 791, quoted *ante*, at 14. That is indeed "the *principal* inquiry"– suppression of uncongenial ideas is the worst offense against the First Amendment– but it is not the *only* inquiry. Even a law that has as its purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition. An ordinance directed at the suppression of noise (and therefore "justified without reference to the content of regulated speech") cannot be applied only to sound trucks delivering messages of "protest." Our very first use of the "justified by reference to content" language made clear that it is a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions. "Selective exclusions from a public forum" we said, "may not be based on content alone, *and* may not be justified by reference to content alone." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) (emphasis added).

But in any event, if one accepts the Court's description of the interest served by this regulation, it is clear that the regulation is *both* based on content *and* justified by reference to content. Constitutionally proscribable "secondary effects" of speech are directly addressed in subsection (2) of the statute, which makes it unlawful to obstruct, hinder, impede, or block access to a health care facility– a

prohibition broad enough to include all physical threats and all physically threatening approaches. The purpose of subsection (3), however (according to the Court), is to protect "[t]he unwilling listener's interest in avoiding unwanted communication," *ante*, at 11. On this analysis, Colorado has restricted certain categories of speech– protest, counseling, and education– out of an apparent belief that only speech with this content is sufficiently likely to be annoying or upsetting as to require consent before it may be engaged in at close range. It is reasonable enough to conclude that even the most gentle and peaceful close approach by a so-called "sidewalk counselor"– who wishes to "educate" the woman entering an abortion clinic about the nature of the procedure, to "counsel" against it and in favor of other alternatives, and perhaps even (though less likely if the approach is to be successful) to "protest" her taking of a human life– will often, indeed usually, have what might be termed the "secondary effect" of annoying or deeply upsetting the woman who is planning the abortion. *But that is not an effect which occurs "without reference to the content" of the speech*. This singling out of presumptively "unwelcome" communications fits precisely the description of prohibited regulation set forth in *Boos* v. *Barry*, 485 U. S. 312, 321 (1988): It "targets the *direct impact* of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Ibid.* (emphasis added).[2]

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[2] The Court's contention that the statute is content-neutral because it is not a "'regulation of speech'" but a "regulation of the places where some speech may occur," *ante*, at 14 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989)), is simply baffling. First, because the proposition that a restriction upon the places where speech may occur is not a restriction upon speech is both absurd and contradicted by innumerable cases. See, *e.g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994);

In sum, it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as "strict scrutiny," which requires that the restriction be narrowly tailored to serve a compelling state interest. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. ___, ___ (2000) (slip op., at 8); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). Since the Court does not even attempt to support the regulation under this standard, I shall discuss it only briefly. Suffice it to say that if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter. And if (as I shall discuss at greater length below) forbidding peaceful, nonthreatening, but uninvited speech from a distance closer than eight feet is a "narrowly tailored" means of preventing the obstruction of entrance to medical facilities (the governmental interest the State asserts) narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker. In the last analysis all of this does not matter, however, since as I proceed to discuss neither the restrictions upon oral communications nor those upon handbilling can withstand a proper application of even the less demanding scrutiny we

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Burson v. *Freeman*, 504 U. S. 191 (1992); *Frisby* v. *Schultz*, 487 U. S. 474 (1988); *Boos* v. *Barry*, 485 U. S. 312 (1988); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Carey v. Brown*, 447 U. S. 455 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972). And second, because the fact that a restriction is framed as a "regulation of the places where some speech may occur" has nothing whatever to do with whether the restriction is content-neutral– which is why *Boos* held to be content-based the ban on displaying, within 500 feet of foreign embassies, banners designed to "bring into public odium any foreign government.'" 485 U. S., at 316.

apply to truly content-neutral regulations of speech in a traditional public forum.

II

As the Court explains, under our precedents even a content-neutral, time, place, and manner restriction must be narrowly tailored to advance a significant state interest, and must leave open ample alternative means of communication. *Ward,* 491 U. S., at 802. It cannot be sustained if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id*., at 799.

This requires us to determine, first, what *is* the significant interest the State seeks to advance? Here there appears to be a bit of a disagreement between the State of Colorado (which should know) and the Court (which is eager to speculate). Colorado has identified in the text of the statute itself the interest it sought to advance: to ensure that the State's citizens may "obtain medical counseling and treatment in an unobstructed manner" by "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility." Colo. Rev. Stat. §18–9–122(1) (1999). In its brief here, the State repeatedly confirms the interest squarely identified in the statute under review. See, *e.g.,* Brief for Respondents 15 ("Each provision of the statute was chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement"); *id*., at 14 ("[T]his provision narrowly addresses the conduct shown to interfere with access through crowding and physical threats"). The Court nevertheless concludes that the Colorado provision is narrowly tailored to serve . . . *the State's interest in protecting its citizens' rights to be let alone from unwanted speech*.

Indeed, the situation is even more bizarre than that.

The interest that the Court makes the linchpin of its analysis was not only unasserted by the State; it is not only completely *different* from the interest that the statute specifically sets forth; it was explicitly *disclaimed* by the State in its brief before this Court, and characterized as a "straw interest" *petitioners* served up in the hope of discrediting the State's case. *Id.*, at 25, n. 19. We may thus add to the lengthening list of "firsts" generated by this Court's relentlessly proabortion jurisprudence, the first case in which, in order to sustain a statute, the Court has relied upon a governmental interest not only unasserted by the State, but positively repudiated.

I shall discuss below the obvious invalidity of this statute assuming, first (in Part A), the fictitious state interest that the Court has invented, and then (in Part B), the interest actually recited in the statute and asserted by counsel for Colorado.

A

It is not without reason that Colorado claimed that, in attributing to this statute the false purpose of protecting citizens' right to be let alone, petitioners were seeking to discredit it. Just three Terms ago, in upholding an injunction against antiabortion activities, the Court refused to rely on any supposed "'right of the people approaching and entering the facilities to be left alone.'" *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 383 (1997). It expressed "doubt" that this "right . . . accurately reflects our First Amendment jurisprudence." *Ibid.* Finding itself in something of a jam (the State here has passed a regulation that is obviously not narrowly tailored to advance any *other* interest) the Court today neatly repackages the repudiated "right" as an "interest" the State may decide to protect, *ante*, at 11, n. 24, and then places it onto the scales opposite the right to free speech in a traditional public forum.

To support the legitimacy of its self-invented state interest, the Court relies upon a bon mot in a 1928 dissent (which we evidently overlooked in *Schenck*). It characterizes the "unwilling listener's interest in avoiding unwanted communication" as an "aspect of the broader 'right to be let alone'" Justice Brandeis coined in his dissent in *Olmstead* v. *United States*, 277 U. S. 438, 478. The amusing feature is that even this slim reed contradicts rather than supports the Court's position. The right to be let alone that Justice Brandeis identified was a right the Constitution "conferred, *as against the government*"; it was *that* right, not some generalized "common-law right" or "interest" to be free from hearing the unwanted opinions of one's fellow citizens, which he called the "most comprehensive" and "most valued by civilized men." *Ibid*. (emphasis added). To the extent that there can be gleaned from our cases a "right to be let alone" in the sense that Justice Brandeis intended, it is the right of the *speaker* in the public forum to be free from government interference of the sort Colorado has imposed here.

In any event, the Court's attempt to disguise the "right to be let alone" as a "governmental interest in protecting the right to be let alone" is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights (which the Court demotes to the status of First Amendment "interests," *ante*, at 9.) We have consistently held that "the Constitution does not *permit* the government to decide which types of otherwise protected speech are sufficiently offensive to require protection *for the unwilling listener or viewer*." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210 (1975) (emphasis added). And as recently as in *Schenck*, the Court reiterated that "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the

freedoms protected by the First Amendment." 519 U. S., at 383 (internal quotation marks omitted).

The Court nonetheless purports to derive from our cases a principle limiting the protection the Constitution affords the speaker's right to direct "offensive messages" at "unwilling" audiences in the public forum. *Ante*, at 10. There is no such principle. We have upheld limitations on a speaker's exercise of his right to speak on the public streets *when that speech intrudes into the privacy of the home*. *Frisby*, 487 U. S., at 483, upheld a content-neutral municipal ordinance prohibiting picketing outside a residence or dwelling. The ordinance, we concluded, was justified by, and narrowly tailored to advance, the government's interest in the "protection of residential privacy." *Id*., at 484. Our opinion rested upon the "unique nature of the home"; "the home," we said, "is different." *Ibid*. The reasoning of the case plainly assumed the *nonexistence* of the right– common law or otherwise– that the Court relies on today, the right to be free from unwanted speech when on the public streets and sidewalks. The home, we noted, was "'the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits.'" *Ibid*. (quoting *Carey*, 447 U. S., at 471). The limitation on a speaker's right to bombard the home with unwanted messages which we approved in *Frisby*– and in *Rowan* v. *Post Office Dept*., 397 U. S. 728 (1970), upon which the Court also relies– was predicated on the fact that "'we are often "captives" *outside* the sanctuary of the home and subject to objectionable speech.'" *Frisby*, *supra*, at 484 (quoting *Rowan*, *supra*,, at 738) (emphasis added). As the universally understood state of First Amendment law is described in a leading treatise: "Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which in-

creasingly attend urban life." L. Tribe, American Constitutional Law §12–19, p. 948 (2d ed. 1988). The Court today elevates the abortion clinic to the status of the home.[3]

There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents. The labor movement, in particular, has good cause for alarm in the Court's extensive reliance upon *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), an opinion in which the Court held that the Clayton Act's prohibition of injunctions against lawful and peaceful labor picketing did not forbid the injunction in that particular case. The First Amendment was not at issue, and was not so much as mentioned in the opinion, so the case is scant authority for the point the Court wishes to make. The case is also irrelevant because it was "clear from the evidence that from the outset, violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening." *Id.*, at 200. No such finding was made, or could be made, here. More importantly, however, as far as our future labor cases are

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[3] I do not disagree with the Court that "our cases have repeatedly recognized the interests of unwilling listeners" in locations, such as public conveyances, where "'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,'" *ante*, at 13 (quoting *Erzoznick* v. *City of Jacksonville*, 422 U. S. 205 (1975)). But we have never made the absurd suggestion that a pedestrian is a "captive" of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly by. *Erzoznick* itself, of course, *invalidated* a prohibition on the showing of films containing nudity on screens visible from the street, noting that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Id.*, at 210–211 (quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971).

concerned: If a "right to be free" from "persistence, importunity, following and dogging," *id.*, at 204, short of actual intimidation was part of our infant First Amendment law in 1921, I am shocked to think that it is there today. The Court's assertion that "[n]one of our decisions has minimized the enduring importance of 'the right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined," *ante*, at 12, is belied by the fact that this passage from *American Steel Foundries* has never– not once– found its way into any of the many First Amendment cases this Court has decided since 1921. We will have cause to regret today's injection of this irrelevant anachronism into the mainstream of our First Amendment jurisprudence.

Of course even if one accepted the *American Steel Foundries* dictum as an accurate expression of First Amendment law, the statute here is plainly not narrowly tailored to protect the interest that dictum describes. Preserving the "right to be free" from "persistent importunity, following and dogging" does not remotely require imposing upon all speakers who wish to protest, educate, or counsel a duty to request permission to approach closer than eight feet. The only way the narrow-tailoring objection can be eliminated is to posit a state-created, First-Amendment-trumping "right to be let alone" as broad and undefined as Brandeis's *Olmstead* dictum, which may well (why not, if the Court wishes it?) embrace a right not to be spoken to without permission from a distance closer than eight feet. Nothing stands in the way of *that* solution to the narrow-tailoring problem– except, of course, its utter absurdity, which is no obstacle in abortion cases.

B

I turn now to the real state interest at issue here– the one set forth in the statute and asserted in Colorado's brief: the preservation of unimpeded access to health care

facilities. We need look no further than subsection (2) of the statute to see what a provision would look like that is narrowly tailored to serve *that* interest. Under the terms of that subsection, any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility" is subject to criminal and civil liability. It is possible, I suppose, that subsection (2) of the Colorado statute will leave unrestricted some expressive activity that, if engaged in from within eight feet, may be sufficiently harassing as to have the effect of impeding access to health care facilities. In subsection (3), however, the State of Colorado has prohibited a vast amount of speech that cannot possibly be thought to correspond to that evil.

To begin with, the 8-foot buffer zone attaches to *every* person on the public way or sidewalk within 100 feet of the entrance of a medical facility, regardless of whether that person is seeking to enter or exit the facility. In fact, the State acknowledged at oral argument that the buffer zone would attach to any person within 100 feet of the entrance door of a skyscraper in which a single doctor occupied an office on the 18th floor. Tr. of Oral Arg. 41. And even with respect to those who *are* seeking to enter or exit the facilities, the statute does not protect them only from speech that is so intimidating or threatening as to impede access. Rather, it covers *all* unconsented-to approaches for the purpose of oral protest, education, or counseling (including those made for the purpose of the most peaceful appeals) and, perhaps even more significantly, *every* approach made for the purposes of leafletting or handbilling, which we have never considered, standing alone, obstructive or unduly intrusive. The sweep of this prohibition is breathtaking.

The Court makes no attempt to justify on the facts this blatant violation of the narrow-tailoring principle. Instead, it flirts with the creation of yet a new constitutional

"first" designed for abortion cases: "[W]hen," it says, "a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Ante*, at 21. The implication is that the availability of alternative means of communication permits the imposition of the speech restriction upon more individuals, or more types of communication, than narrow tailoring would otherwise demand. The Court assures us that "we have emphasized" this proposition "on more than one occasion," *ibid.* The only citation the Court provides, however, says no such thing. *Ward* v. *Rock Against Racism*, 491 U. S., at 798, quoted *ante*, at 21, n. 32, says only that narrow tailoring is not synonymous with "least restrictive alternative." It does not at all suggest— and to my knowledge no other case does either— that narrow tailoring can be relaxed when there are other speech alternatives.

The burdens this law imposes upon the right to speak are substantial, despite an attempt to minimize them that is not even embarrassed to make the suggestion that they might actually "assist . . . the speakers' efforts to communicate their messages," *ante*, at 22. (Compare this with the Court's statement in a nonabortion case, joined by the author of today's opinion: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 790–791 (1988).) The Court displays a willful ignorance of the type and nature of communication affected by the statute's restrictions. It seriously asserts, for example, that the 8-foot zone allows a speaker to communicate at a "normal conversational distance," *ante*, at 22. I have certainly held conversations at a distance of eight feet seated in the quiet of my chambers, but I have never walked along the public sidewalk— and have not seen

others do so– "conversing" at an 8-foot remove. The suggestion is absurd. So is the suggestion that the opponents of abortion can take comfort in the fact that the statute "places no limitation on the number of speakers or the noise level, including the use of amplification equipment," *ante*, at 21. That is good enough, I suppose, for "protesting"; but the Court must know that most of the "counseling" and "educating" likely to take place outside a health care facility cannot be done at a distance and at a high-decibel level. The availability of a powerful amplification system will be of little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?" The Court would have us believe that this can be done effectively– yea, perhaps even *more* effectively– by shouting through a bullhorn at a distance of eight feet.

The Court seems prepared, if only for a moment, see *ante*, at 22–23, to take seriously the magnitude of the burden the statute imposes on simple handbilling and leafletting. That concern is fleeting, however, since it is promptly assuaged by the realization that a leafletter may, without violating the statute, stand "near the path" of oncoming pedestrians and make his "proffe[r] . . . , which the pedestrians can easily accept," *ante*, at 22–23. It does not take a veteran labor organizer to recognize– although surely any would, see Brief for American Federation of Labor and Congress of Industrial Organization as

Amicus Curiae 7–8– that leafletting will be rendered utterly ineffectual by a requirement that the leafletter obtain from each subject permission to approach, or else man a stationary post (one that does not obstruct access to the facility, lest he violate subsection (2) of statute) and wait for passersby voluntarily to approach an outstretched hand. That simply is not how it is done, and the Court knows it– or should. A leafletter, whether he is working on behalf of Operation Rescue, Local 109, or Bubba's Bar-B-Que, stakes out the best piece of real estate he can, and then walks a few steps toward individuals passing in his vicinity, extending his arm and making it *as easy as possible* for the passerby, whose natural inclination is generally not to seek out such distributions, to simply accept the offering. Few pedestrians are likely to give their "consent" to the approach of a handbiller (indeed, by the time he requested it they would likely have passed by), and even fewer are likely to walk over in order to pick up a leaflet. In the abortion context, therefore, ordinary handbilling, which we have in other contexts recognized to be a "classic for[m] of speech that lie[s] at the heart of the First Amendment," *Schenck*, 519 U. S., at 377, will in its most effective locations be rendered futile, the Court's implausible assertions to the contrary notwithstanding.

The Colorado provision differs in one fundamental respect from the "content-neutral" time, place, and manner restrictions the Court has previously upheld. Each of them rested upon a necessary connection between the regulated expression and the evil the challenged regulation sought to eliminate. So, for instance, in *Ward* v. *Rock Against Racism*, the Court approved the city's control over sound amplification because every occasion of amplified sound presented the evil of excessive noise and distortion disturbing the areas surrounding the public forum. The regulation we upheld in *Ward*, rather than "bann[ing] all concerts, or even all rock concerts, . . . instead focus[ed] on

the source of the evils the city seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." 491 U. S., at 799, n. 7. In *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 808 (1984), the Court approved a prohibition on signs attached to utility poles which "did no more than eliminate the exact source of the evil it sought to remedy." In *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 652 (1981), the Court upheld a regulation prohibiting the sale or distribution on the state fairgrounds of any merchandise, including printed or written material, except from a fixed location, because that precisely served the State's interest in "avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds."

In contrast to the laws approved in those cases, the law before us here enacts a broad prophylactic restriction which does not "respon[d] precisely to the substantive problem which legitimately concern[ed]" the State, *Vincent*, *supra*, at 810– namely (the only problem asserted by Colorado), the obstruction of access to health facilities. Such prophylactic restrictions in the First Amendment context– even when they are content-neutral– are not permissible. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). In *United States* v. *Grace*, 461 U. S. 171 (1983), we declined to uphold a ban on certain expressive activity on the sidewalks surrounding the Supreme Court. The purpose of the restriction was the perfectly valid interest in security, just as the purpose of the restriction here is the perfectly valid interest in unobstructed access; and there, as here, the restriction furthered that interest– but it furthered it with insufficient precision and hence at exces-

sive cost to the freedom of speech. There was, we said, "an insufficient nexus" between security and all the expressive activity that was banned, *id.*, at 181– just as here there is an insufficient nexus between the assurance of access and forbidding unconsented communications within eight feet.[4]

Compare with these venerable and consistent descriptions of our First Amendment law the defenses that the Court makes to the contention that the present statute is overbroad. (To be sure, the Court is assuming its own invented state interest– protection of the "right to be let alone"– rather than the interest that the statute describes, but even so the statements are extraordinary.) "The fact," the Court says, "that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Ante,* at 26. That is true enough ordinarily, but it is *not* true with respect to restraints upon speech, which is what the doctrine of overbreadth is all about. (Of course it is also not true, thanks to one of the other proabortion "firsts" announced by the current Court, with respect to restrictions upon abortion, which– as our decision in *Stenberg* v. *Carhart, post,* p. ___, exemplifies– has been raised to First

[4] The Court's suggestion, *ante,* at 25, that the restrictions imposed by the Colorado ban are unobjectionable because they "interfer[e] far less with a speaker's ability to communicate," than did the regulations involved in *Frisby* and *Heffron,* and in cases requiring "silence" outside of a hospital (by which I presume the Court means *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994)), misses the point of narrow-tailoring analysis. We do not compare restrictions on speech to some Platonic ideal of speech restrictiveness, or to each other. Rather, our First Amendment doctrine requires us to consider whether the regulation in question burdens substantially more speech than necessary to achieve *the particular interest* the government has identified and asserted. *Ward,* 491 U. S., at 799. In each of the instances the Court cites, we concluded that the challenged regulation contained the precision that our cases require and that Colorado's statute (which the Court itself calls "prophylactic," *ante,* at 24–25) manifestly lacks.

Amendment status, even as speech opposing abortion has been demoted from First Amendment status.) Again, the Court says that the overbreadth doctrine is not applicable because this law simply "does not 'ban' any signs, literature, or oral statements," but "merely regulates the places where communications may occur." *Ante*, at 27. I know of no precedent for the proposition that time, place, and manner restrictions are not subject to the doctrine of overbreadth. Our decision in *Grace*, *supra*, demonstrates the contrary: Restriction of speech on the sidewalks around the Supreme Court was invalidated because it went further than the needs of security justified. Surely New York City cannot require a parade permit and a security bond for any individual who carries a sign on the sidewalks of Fifth Avenue.

The Court can derive no support for its approval of Colorado's overbroad prophylactic measure from our decision in *Schenck*. To be sure, there we rejected the argument that the court injunction on demonstrating within a fixed buffer zone around clinic entrances was unconstitutional because it banned even "'peaceful nonobstructive demonstrations.'" 519 U. S., at 381. The Court upheld the injunction, however, only because the "District Court was entitled to conclude," "[b]ased on defendants' past conduct" and "the record in [that] case," that the specific defendants involved would, if permitted within the buffer zone, "continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars." *Id.*, at 382. It is one thing to assume, as in *Schenck*, that a prophylactic injunction is necessary when the specific targets of that measure have demonstrated an inability or unwillingness to engage in protected speech activity without also engaging in *conduct* that the Constitution clearly does not protect. It is something else to assume

that *all* those who wish to speak outside health care facilities across the State will similarly abuse their rights if permitted to exercise them. The First Amendment stands as a bar to exactly this type of prophylactic legislation. I cannot improve upon the Court's conclusion in *Madsen* that "it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protestors' speech is independently proscribable (*i.e.*, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." 512 U. S., at 774 (citation omitted).

The foregoing discussion of overbreadth was written before the Court, in responding to JUSTICE KENNEDY, abandoned any pretense at compliance with that doctrine, and acknowledged– indeed, boasted– that the statute it approves "takes a prophylactic approach," *ante*, at 24, and adopts "[a] bright-line prophylactic rule," *ante*, at 25.[5] I scarcely know how to respond to such an unabashed repudiation of our First Amendment doctrine. Prophylaxis is the antithesis of narrow tailoring, as the previously quoted passage from *Button* makes clear ("Broad prophylactic rules in the area of free expression are suspect. . . . Preci-

[5] Of course the Court greatly understates the scope of the prophylaxis, saying that "the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior," *ante*, at 24–25. But the statute prevents the "physically harassing" act of (shudder!) approaching within closer than eight feet not only when it is directed against pregnant women, but also (just to be safe) when it is directed against 300-pound, male, and unpregnant truck drivers– surely a distinction that is not "difficult to make accurately," *ante*, at 25.

sion of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U. S., at 438.) If the Court were going to make this concession, it could simply have dispensed with its earlier (unpersuasive) attempt to show that the statute *was* narrowly tailored. So one can add to the casualties of our whatever-it-takes proabortion jurisprudence the First Amendment doctrine of narrow tailoring and overbreadth. R. I. P.

* * *

Before it effectively threw in the towel on the narrow-tailoring point, the Court asserted the importance of taking into account "'the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.'" *Ante*, at 23 (quoting *Madsen*, *supra*, at 772). A proper regard for the "place" involved in this case should result in, if anything, a commitment by this Court to adhere to and rigorously enforce our speech-protective standards. The public forum involved here– the public spaces outside of health care facilities– has become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion. The possibility of limiting abortion by legislative means– even abortion of a live-and-kicking child that is almost entirely out of the womb– has been rendered impossible by our decisions from *Roe* v. *Wade*, 410 U. S. 113 (1973), to *Stenberg* v. *Carhart*, *post*, p. ___. For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur, is outside the entrances to abortion facilities. By upholding these restrictions on speech in this place the Court ratifies the State's attempt to make even that task an impossible one.

Those whose concern is for the physical safety and security of clinic patients, workers, and doctors should take no comfort from today's decision. Individuals or groups intent on bullying or frightening women out of an abortion, or doctors out of performing that procedure, will not be deterred by Colorado's statute; bullhorns and screaming from eight feet away will serve their purposes well. But those who would accomplish their moral and religious objectives by peaceful and civil means, by trying to persuade individual women of the rightness of their cause, will be deterred; and that is not a good thing in a democracy. This Court once recognized, as the Framers surely did, that the freedom to speak and persuade is inseparable from, and antecedent to, the survival of self-government. The Court today rotates that essential safety valve on our democracy one-half turn to the right, and no one who seeks safe access to health care facilities in Colorado or elsewhere should feel that her security has by this decision been enhanced.

It is interesting to compare the present decision, which *upholds* an utterly bizarre proabortion "request to approach" provision of Colorado law, with *Stenberg*, *post*, p. ___, also announced today, which *strikes down* a live-birth abortion prohibition adopted by 30 States and twice passed by both Houses of Congress (though vetoed both times by the President). The present case disregards the State's own assertion of the purpose of its proabortion law, and posits instead a purpose that the Court believes will be more likely to render the law *constitutional*. *Stenberg* rejects the State's assertion of the very meaning of its antiabortion law, and declares instead a meaning that will render the law *un*constitutional. The present case *rejects* overbreadth challenges to a proabortion law that regulates speech, on grounds that have no support in our prior jurisprudence and that instead amount to a total repudiation of the doctrine of overbreadth. *Stenberg applies* over-

breadth analysis to an antiabortion law that has nothing to do with speech, even though until eight years ago overbreadth was unquestionably the exclusive preserve of the First Amendment. See *Stenberg, post,* at ___ (THOMAS, J., dissenting); *Janklow* v. *Planned Parenthood, Sioux Falls Clinic,* 517 U. S. 1174, 1177–1181 (1996) (SCALIA, J., dissenting from denial of cert.); *Ada* v. *Guam Soc. of Obstetricians & Gynecologists,* 506 U. S. 1011, 1013 (1992) (SCALIA, J., dissenting from denial of cert.).

Does the deck seem stacked? You bet. As I have suggested throughout this opinion, today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years. See, *e.g.*, *Madsen* v. *Women's Health Center, Inc.,* 512 U. S. 753 (1994); *Schenck* v. *Pro-Choice Network of Western N. Y.,* 519 U. S. 357 (1997); *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U. S. 747 (1986). Today's distortions, however, are particularly blatant. Restrictive views of the First Amendment that have been in dissent since the 1930's suddenly find themselves in the majority. "Uninhibited, robust, and wide open" debate is replaced by the power of the state to protect an unheard-of "right to be let alone" on the public streets. I dissent.