UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| VICKIE L. EDWARDS and KATHLEEN ROSE McCAULLEY, | Court of Appeals No. 95-56790 |
| Plaintiffs-Appellees, | Consolidated w/Court of Appeal Nos. 96-56262 and 96-56558 |
| vs. | |
| CITY OF SANTA BARBARA, | District Court No. CV-94-2243 RSWL |
| Defendant-Appellant. | |

On Appeal From the United States District Court
For the Central District of California
The Honorable Ronald S. W. Lew, Presiding

# BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN MEDICAL WOMEN'S ASSOCIATION, CENTER FOR REPRODUCTIVE LAW AND POLICY, THE FEMINIST MAJORITY FOUNDATION, LOS ANGELES NOW, INC., MEDICAL STUDENTS FOR CHOICE, NATIONAL ABORTION FEDERATION, NATIONAL CENTER FOR THE PRO-CHOICE MAJORITY, NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC., RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, SANTA BARBARA NOW, SANTA BARBARA WOMEN'S POLITICAL COMMITTEE, AND SOUTHERN CALIFORNIA RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE IN SUPPORT OF APPELLANT


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## INTERESTS OF AMICI

This brief *amici curiae* is filed with consent of the parties. Copies of correspondence reflecting this consent have been filed with the Clerk of the Court.

The interests of the *amici curiae* are set out in the appendix to this brief, beginning at A-1.

## INTRODUCTION

Every day throughout the nation, women seeking access to reproductive health services and providers of these services suffer intimidation, threats, obstruction, harassment, and even physical attacks by individuals seeking to prevent them from obtaining or providing these services. This confrontational and violent behavior frequently accomplishes its aim of deterring women from obtaining reproductive health services and exercising their constitutional right to reproductive choice. It also interferes with the ability of medical care providers to deliver these lawful services in an environment free from violence and harassment.

The obstructive and dangerous activities of over-zealous anti-choice activists outside California's reproductive health facilities have been extensively documented in recent court proceedings. For example, in *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 1013, 43 Cal. Rptr.

2d 88, 91, 898 P.2d 402, 405 (1995), *petition for cert. filed*, 65 U.S.L.W. 3070 (U.S. July 23, 1996) (No. 95-576), the Supreme Court of California recounted the anti-choice activity outside a Planned Parenthood clinic in Vallejo, California that "confronted and intimidated women seeking the clinic's services . . . interfered with or obstructed entrance to and exit from the clinic . . . [and] caused some of the women seeking medical services to become emotionally distraught."

In *Feminist Women's Health Ctr. v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (3d Dist.), *cert. denied*, 116 S. Ct. 514 (1995), a California appellate court found that anti-choice activists outside a reproductive health facility in Sacramento, California had "interfered with the sidewalk access to the clinic by means of physical obstruction as well as by the use of physical intimidation and harassment which served to constructively block access." 32 Cal. App. 4th at 1664, 39 Cal. Rptr. 2d at 200. Similarly, in *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991), a federal district court found that anti-choice activists outside a Planned Parenthood clinic in Daly City, California "unlawfully attempted to intimidate women into abandoning planned abortion, block[ed] entrance to [the] clinic, threaten[ed] staff members with bodily harm, [and] shov[ed] plastic replicas of fetuses into the faces and cars of clinic staff and patients." 765 F. Supp. at 619.

In *Planned Parenthood of Santa Barbara v. Aakhus*, 14 Cal. App. 4th 162, 167, 17 Cal. Rptr. 2d 510, 512 (2d Dist. 1993), *review denied*, 1993 Cal. LEXIS 3060 (Cal. June 3, 1993), a California Appellate Court granted an injunction based on similar confrontational conduct by anti-choice activists in Santa Barbara. This conduct included "chas[ing] and obstruct[ing] the movement of vehicles of clinic patrons entering and leaving [the clinic] parking lot," "forc[ing] anti-abortion literature and fetus dolls through the patrons' car windows," and videotaping patrons entering the clinic. 14 Cal. App. 4th at 167, 17 Cal. Rptr. 2d at 512. As shown below, the failure of the *Aakhus* injunction to ensure safe and effective access to reproductive health facilities contributed significantly to Santa Barbara's decision to enact the Ordinance at issue in this case.

Not only in California have anti-choice activists aggressively confronted and obstructed women seeking access to reproductive health care facilities. Court decisions nationwide have documented the pervasive harassment and intimidation of women attempting to exercise their constitutional right to reproductive choice and their corresponding freedom to obtain reproductive health services. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (clinic in Melbourne, Florida); *Pro-Choice Network v. Schenck*, 67 F.3d 377, 382-84 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996) (clinics in Western New York); *Portland Feminist*

*Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (clinic in Portland, Oregon).

Health care facilities providing reproductive health services, together with their patients and staff, have also been subjected to a national campaign of anti-choice terrorism involving threats and acts of physical violence. From 1977 through 1996, there were more than 385 acts of violence against reproductive health care providers across the country (including murder, attempted murder, kidnapping, assault & battery and stalking), more than 200 attempted or completed arsons, firebombings and bombings of abortion-related medical facilities, and more than 970 acts of physical invasion or vandalism of these facilities. National Abortion Federation, *Incidents of Violence & Disruption Against Abortion Providers, 1996*.

Local communities nationwide have adopted various approaches to balancing the rights of anti-choice activists to communicate their message with women's rights to reproductive choice and to obtain safe and effective access to reproductive health services. Many communities have chosen to enact local ordinances protecting clinics, patients and providers from intimidation and obstruction. In this case, after appropriate hearing and consideration of the history of obstructive and confrontational activity in front of a reproductive health clinic in Santa Barbara, *including experience with a state court injunction that did not provide adequate protection to women*

*seeking access to the clinic*, the Santa Barbara City Council passed Ordinance No. 4812 (May 1993), which added Chapter 9.99 to the Municipal Code of Santa Barbara (the "Ordinance").[1]

The Ordinance contains two provisions that regulate the time, place and manner of demonstration activity around health care facilities.[2] First, the Ordinance contains a "bubble zone" that requires demonstrators within 100 feet of a health care facility "to withdraw to a distance of . . . eight feet from any person who requests such withdrawal." Section 9.99.020. Second, the Ordinance contains a provision entitled "Access to Driveway Areas," which includes a general restriction against obstructing or impeding access to a facility entrance, as well as a specific prohibition of demonstration activity within eight feet of the driveway area of a covered facility. Section 9.99.030.

### A. Proceedings Below

In April 1994, two anti-abortion "sidewalk counselors" brought a facial challenge to the constitutionality of the Ordinance in the United States District Court for the Central District of California. Although the district court originally declined to issue a preliminary injunction, the court

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1 A copy of the Ordinance is included in the Appendix hereto, at A-8.

2 The Ordinance also regulates the time, place, and manner of demonstrations around places of worship. The *amici* do not express any opinion regarding this component of the Ordinance.

subsequently granted plaintiffs' renewed motion for a preliminary injunction and enjoined enforcement of the Ordinance. *Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D. Cal. 1995) ("*Edwards I*").

The district court first addressed Section 9.99.030 ("Access to Driveway Areas"). Splitting this section into two components, the court held that the eight-foot buffer around the entrance to driveway areas (the so-called "Driveway Provision") was unconstitutionally overbroad because it purportedly prohibits *all* expressive activity within the buffer, and therefore burdens "more speech than is necessary in order to serve the identified governmental interest of ensuring free ingress to and egress from the clinic." *Edwards I*, 883 F. Supp. at 1388. In this regard, the court noted its belief that "the final sentence in §9.99.030, not challenged here, appears to serve the governmental interest of securing safe and unimpeded access to clinics and churches without triggering the same overbreadth problems." *Id.* at 1390, n. 14.[3]

The district court also invalidated the bubble zone provision, finding it similar to the 300-foot no-approach zone struck down in *Madsen*. *See Edwards I*, 883 F. Supp. at 1391-93.

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[3] The final sentence of § 9.99.030 provides: "No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

On appeal, this Court vacated the district court's decision and remanded for reconsideration in light of *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), which upheld an ordinance nearly identical to the "bubble zone" provision struck down by the district court in *Edwards I*. *Edwards v. City of Santa Barbara*, 70 F.3d 1277, *reported in full at* 1995 U.S. App. LEXIS 5315 (9th Cir. 1995).

Upon remand, the district court upheld the "bubble zone" provision in light of this Court's decision in *Sabelko*, but declined to disturb its earlier determination invalidating the Driveway Provision. *Edwards v. City of Santa Barbara*, No. CV 94-2243, slip op. (C.D. Cal. July 13, 1996) ("*Edwards II*"). In this appeal, the City challenges the portions of the district court's orders enjoining enforcement of the Driveway Provision. Plaintiffs have not cross-appealed, and thus the "bubble zone" is not at issue here.

### B. Summary of Argument

In striking down the Driveway Provision of the Santa Barbara Ordinance, the district court violated well-settled constitutional principles, and set a dangerous precedent that improperly hinders the ability of legislatures to enact reasonable and necessary ordinances to ensure safe and effective access to reproductive health facilities. Among other errors, the district court:

1. effectively employed a stricter level of scrutiny than is appropriate for evaluating the constitutionality of content-neutral ordinances;

2. failed to recognize or appreciate the full range of significant government interests served by the Ordinance generally and the Driveway Provision in particular; and

3. improperly limited its analysis to the conduct proscribed within the Driveway buffer, without regard to (a) the size of the buffer; (b) the ability to demonstrate effectively outside the eight-foot buffer; and (c) alternative means of communicating with people within the buffer.

Under principles the Supreme Court enumerated in *Madsen*, and which this Court applied in *Sabelko*, the Driveway Provision is a content-neutral time, place and manner restriction that is narrowly tailored to serve significant government interests. Specifically, the eight-foot buffer established by the Driveway Provision serves four significant interests of Santa Barbara; it:

1. ensures safe and effective access to health care facilities by providing a clear, objective, and easily-enforced zone of protection around driveway entrances;

2. ensures the free flow of traffic by preventing people from congregating around driveway entrances;

3. furthers Santa Barbara's interests in public safety and the privacy of its citizens by eliminating the "gauntlet of harassment and intimidation," *Schenck*, 67 F.3d at 383, that confronts women seeking access to reproductive health services around the entrances to facilities providing these services; and

4. prevents direct confrontations that may lead to violence by physically separating demonstrators from persons entering the driveway areas of health care facilities.

The Driveway Provision also preserves ample alternative channels of communication for demonstrators to express their views. The Driveway Provision places no restrictions whatsoever on communication outside the eight-foot buffer, even that which is directed at persons within the buffer. And once the visitor enters the driveway buffer, "communication is not prohibited or interrupted, but simply distanced to eight feet." *Sabelko*, 68 F.3d at 1173. Demonstrators outside the buffer can continue to communicate with people in the eight-foot driveway buffer by speaking to them, or by displaying signs, banners, placards or pictures.

As shown in Part III, below, the eight-foot buffer established by the Driveway Provision is less restrictive than regulations that have been employed and upheld elsewhere to ensure safe and effective access to reproductive health facilities. Indeed, in *Madsen*, the Supreme Court upheld a far wider buffer of 36 feet under the more stringent standard applicable to injunctions. 114 S. Ct. at 2526.

As the Driveway Provision is a narrowly-tailored restriction on the time, place and manner of speech that serves significant government interests and permits ample alternative channels of communication around health care facilities, this Court should hold Santa Barbara's chosen response to the confrontational demonstration activity surrounding its health care facilities constitutional.

The *amici curiae* respectfully request reversal.

## ARGUMENT

### I. CONTENT-NEUTRAL TIME, PLACE, AND MANNER ORDINANCES MUST BE "NARROWLY TAILORED" TO SERVE SIGNIFICANT GOVERNMENT INTERESTS AND PRESERVE AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION; THEY NEED NOT BE THE LEAST RESTRICTIVE MEANS OF REGULATION

It is well-settled that content-neutral ordinances regulating the time, place and manner of speech are constitutional so long as they are "narrowly tailored to serve a significant government interest." *Madsen*, 114 S. Ct. at 2524 (citation omitted). *See also Sabelko*, 68 F.3d at 1172. By contrast, court-ordered injunctions regulating speech-related activity are judged under a stricter standard. *See Madsen*, 114 S. Ct. at 2525. As shown below, the district court erred in judging the Santa Barbara Ordinance according to the stricter standard applicable to injunctions.

In *Madsen*, the Supreme Court reaffirmed that the constitutionality of a "content-neutral, generally applicable statute" is "assessed under the standard set forth in *Ward v. Rock Against Racism*, [491 U.S. 781 (1989)] . . . and similar cases." 114 S. Ct. at 2524. Under *Ward*, "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes

a substantial government interest that would be achieved less effectively absent the regulation,'" and does not "regulate expression in such a manner that a *substantial portion* of the burden on speech does not serve to advance its goals." 491 U.S. at 799 (citation omitted) (emphasis added). The regulation must also "leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), cited by *Madsen*, 114 S. Ct. at 2524.

By contrast, injunctions are governed by a stricter standard, which inquires "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 114 S. Ct. at 2525. *See also Sabelko*, 68 F.3d at 1172.

A more lenient standard applies to ordinances because they represent the product of the legislative process. *Madsen*, 114 S. Ct. at 2524. As rules that apply to all citizens equally and prospectively, rather than specific responses to the conduct of identified defendants, generally-applicable content-neutral ordinances also protect against discriminatory application of the laws. The Supreme Court has recognized that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S.

106, 112, 69 S. Ct. 463, 466-67, 93 L. Ed. 533 (1949), cited by *Madsen*, 114 S. Ct. at 2524.

There are practical reasons as well for applying a more lenient standard to ordinances. Whereas a judge crafts an injunction to respond to a specific legal violation that has already occurred, legislatures adopt ordinances prospectively, without knowledge of the precise circumstances of a particular violation. *See Madsen*, 114 S. Ct. at 2524. Ordinances thus cannot be as precisely tailored as injunctions. Similarly, the type of highly-developed and focused factual record developed at a trial or evidentiary hearing to support the issuance of an injunction is not usually available to a legislature drafting an ordinance.[4]

Notwithstanding citations to *Ward* (*Edwards I*, 883 F. Supp. at 1387-88), the district court decisions manifest the application of a more stringent standard than the Supreme Court has held appropriate for judging the constitutionality of content-neutral ordinances.[5] *See Madsen*, 114 S.Ct. at 2524. Neither *Edwards I* nor *Edwards II* analyzes whether the Driveway Provision "promotes a substantial government interest that would

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[4] Of course, the Santa Barbara City Council did engage in thorough legislative fact finding before enacting the Ordinance. *See infra* at 17-21.

[5] In *Edwards II* (slip. op. at 8-10), the district court adopted the findings and holding of *Edwards I* regarding the Driveway Provision without engaging in its own analysis. Accordingly, *Edwards II* replicates the errors contained in *Edwards I*, which are properly before the Court on this appeal.

be achieved less effectively absent the regulation," as required by *Ward*, 491 U.S. at 799. Nor does either opinion analyze the impact of the eight-foot buffer on the overall ability of individuals to communicate their message in the area surrounding the clinic, as would be necessary to determine whether the Ordinance runs afoul of *Ward*'s requirement that regulation not be "*substantially* broader than necessary to achieve the government's interest" *Id.* at 800 (emphasis added).

Instead, the first opinion below repeatedly focuses on whether there is *any* conduct proscribed by the provision that it believes is not strictly necessary to promote the government's objectives.[6] Illustrative of the court's confusion is its formulation of the governing legal standard:

> In resolving this issue, this Court must determine whether the Ordinance burdens *more speech than is necessary* in order to serve the identified governmental interest of ensuring free ingress to and egress from the clinic.

*Edwards I*, 883 F. Supp. at 1388 (emphasis added).[7] This is the standard governing injunctions, not content-neutral ordinances.

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[6] *See*, e.*g.*, *Edwards I*, 883 F. Supp. at 1389 (criticizing Ordinance for banning handbilling and wearing of symbolic clothing within the eight-foot buffer); and at 1390 n. 13 (offering as example of overbreadth the citation of a demonstrator for distributing literature within the eight-foot zone).

[7] *See also Edwards I*, 883 F. Supp. at 1389 ("The Driveway Provision effectively creates a First Amendment 'free zone' in which no one may engage in expressive activity of any kind . . . . Such a blanket ban necessarily prohibits *more expressive conduct that is necessary* to achieve the purpose of the Ordinance") (emphasis added).

Application of this stricter standard, along with other errors discussed herein, led to the court's mistaken conclusion that the Driveway Provision was unconstitutional because it "criminalizes expressive activity *qua* expressive activity, without relating such expression to its effect on impeding access to the clinic." *See Edwards I*, 883 F. Supp. at 1390, adopted by *Edwards II*, at 9.

As shown below, under the legal standards governing generally applicable content-neutral ordinances, the Driveway Provision of the Santa Barbara Ordinance is a constitutional regulation of the time, place, and manner of demonstration activity outside health care facilities in Santa Barbara.

## II. THE "DRIVEWAY PROVISION" OF THE SANTA BARBARA ORDINANCE IS A CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATION THAT IS NARROWLY TAILORED TO SERVE SIGNIFICANT GOVERNMENT INTERESTS

The legislative history demonstrates that Santa Barbara enacted the Ordinance to promote a number of significant government interests, including: (1) preserving a woman's right to reproductive choice through safe and effective access to health care facilities; (2) ensuring public safety and the free flow of traffic; and (3) protecting the physical and psychological well-being of women seeking reproductive health services. *See Madsen*, 114 S. Ct. at 2526.

In finding the Driveway Provision unconstitutional, the district court failed to consider the full range of interests it serves. Evaluated under the proper standard and in light of all

its important objectives, the Driveway Provision is a content-neutral ordinance that is narrowly tailored to serve significant government interests, and is thus constitutional.

### A. The Driveway Provision Is Content-Neutral

In its original decision, the district court found the Driveway Provision to be content-neutral on its face, although it reserved judgment on whether the alleged selective enforcement of the provision rendered it content-based in application. *Edwards I*, 883 F. Supp. at 1384-87. On remand, the district court reached this reserved issue and held that there was no evidence of selective enforcement on the basis of the content of the speaker's message. *Edwards II*, at 11-12. Plaintiffs have not cross-appealed; accordingly, there is no question of the content neutrality of the Driveway Provision.[8]

### B. The Driveway Provision Is Narrowly Tailored to Serve Significant Government Interests

The Santa Barbara City Council passed the Ordinance in the wake of a state court injunction that had failed to ensure

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[8] In any case, the Ordinance is clearly content neutral. *See Madsen*, 114 S. Ct. at 2523-24 (finding an injunction against demonstrations around an abortion clinic to be content-neutral); *Sabelko*, 68 F.3d at 1172 (finding ordinance regulating similar scope of "demonstration activity" as the instant Ordinance to be content-neutral); *Hill v. City of Lakewood*, 911 P.2d 670, 673 (Colo. Ct. App. 1995) (same), *cert. denied*, 1996 Colo. LEXIS 136 (Colo. Feb. 26, 1996), *petition for cert. filed*, 65 U.S.L.W. 3008-09 (U.S. May 24, 1996) (No. 95-1905).

safe and effective access to reproductive health services. The Ordinance as a whole, and the Driveway Provision in particular, are narrowly tailored to guarantee this access, to protect women seeking and medical staff providing reproductive health services, and to serve Santa Barbara's interests in ensuring public order and the free flow of traffic.

### 1. Santa Barbara Has Significant Interests That Are Served By The Ordinance

As has happened in many communities seeking to ensure that reproductive health services are available to its citizens, confrontational and harassing tactics by individuals and organizations have jeopardized access to these services in Santa Barbara. In the context of an injunction proceeding that predated the Ordinance, a California appellate court described this conduct:

> Beginning in 1989, appellants [Operation Rescue of Southern California and several named individuals] engaged in confrontational conduct at respondent's [Planned Parenthood's] Santa Barbara clinic. They chased and obstructed the movement of vehicles of clinic patrons entering and leaving respondent's parking lot, and attempted to force anti-abortion literature and fetus dolls through the patrons' car windows. Appellants also chased, insulted and threatened, and photographed and videotaped respondent's patrons as they entered respondent's premises. They also entered respondent's building to convey their feelings to persons inside.

*Planned Parenthood of Santa Barbara* v. *Aakhus*, 14 Cal. App. 4th 162, 167, 17 Cal. Rptr. 2d 510, 512 (2d Dist. 1993). Based on this obstructive and harassing behavior, Planned Parenthood of

Santa Barbara sought and obtained a state court injunction prohibiting specific demonstrators from "impeding or obstructing access" to the clinic. *Id.*

The record before the Santa Barbara City Council (and subsequently before the district court) indicated that the state court injunction had failed to eliminate the disruption of clinic activities, and the harmful effects of intrusive personal intimidation on the physical and psychological well-being of women seeking access to reproductive health services. One letter to the Council stated that despite the injunction:

> . . . protesters on the side-walk outside the clinic have become increasingly intrusive in their behavior towards clients entering and leaving the parking lot. They approach entering cars, causing them to slow down, often impeding traffic and creating a hazardous situation; they accost pedestrian clients in an intimidating manner and sometimes have followed them for several blocks as they leave the clinic; they endanger privacy by taking pictures of clients and their cars with cameras and video recorders.

CR 16 at p. 72.[9]

Santa Barbara's experience with confrontational and obstructive demonstrations outside reproductive health facilities is consistent with that of many other communities nationwide that seek to ensure that lawful reproductive health services remain

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[9] All exhibits referred to in this submission are included in the City's excerpts from the record. "CR" refers to the clerk's record number. The page number refers to the bates number assigned by the clerk.

available to their citizens.[10] The Second Circuit's *en banc* decision in *Schenck* describes some of the tactics that anti-choice activists have employed elsewhere in the country.[11] One such tactic involves "constructive 'blockades,' in which demonstrators protest and picket in a loud and disruptive manner outside the medical facilities and harass patients and staff entering and exiting the facilities . . .

> The constructive blockades have the same goal as the physical blockades -- preventing utilization of the clinics. Instead of physically blocking patient access to the clinics, Project Rescue constructively blockades the clinics by forcing patients and staff to run a gauntlet of harassment and intimidation.
>
> At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities

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[10] The legislative history of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248 (1996), illustrates the concern of the United States Congress with the rise in confrontational and violent activity obstructing access to reproductive health facilities. As House Report No. 103-306 concludes, "A nationwide campaign of blockades, invasions, vandalism, threats and other violence is barring access to facilities that provide reproductive health services . . . This dramatically escalating violence is endangering the lives and well being of patients, providers, and their respective families . . . [C]ertain factions within the pro-life movement have turned increasingly to violent means to stop clinics from operating, to prevent patients from gaining access to clinics, and to prevent doctors and other professionals from providing reproductive health care." H.R. Rep. No. 103-306, *reprinted in* 1994 U.S.C.C.A.N. Vol. 4, p. 703.

[11] In *Schenck*, as in this case, a prior court order prohibiting "obstructing access to" reproductive health facilities proved ineffective in ensuring safe and effective access to the health care they provided. *See Schenck*, 68 F.3d at 382 n. 18.

> in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. . .
>
> This harassment and intimidation causes stress and sometimes even physical injury to the patients and medical staff, and generally disrupts the atmosphere necessary for rendering safe and efficacious health care.

*Id.*, 67 F.3d at 383, quoting *Pro-Choice Network v. Project Rescue Western New York*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992).

In a finding of particular relevance to the Driveway Provision at issue here, the Second Circuit noted in *Schenck*, *id.*, that "[i]n implementing the constructive blockades, Project Rescue also targets vehicles entering the driveways of the medical facilities":

> Demonstrators frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities. The presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves.

Referencing the reports of obstruction and harassment outside health care facilities in Santa Barbara, and noting that "[s]uch demonstrations have occurred and are occurring across the United States . . ." (CR 16, at p. 92), the preliminary report to the Santa Barbara City Council Ordinance Committee opined that "[s]uch conduct may create stress in providers of health care, patients or potential patients and frightens them into leaving

the area and abandoning their health care appointments which has a potential for delaying necessary medical care." CR 16, at p. 92.

The preliminary report further stated, based on an extensive reading file of psychological and medical literature (of which the City has asked this Court to take judicial notice), that:

> Persons attempting to obtain access to health care services may need particular protection from intrusive and harassing activities because they are in fact a captive audience who have no realistic alternatives to avoid the conduct directed at them, because they need to access the health care facilities and the surround[ing] areas to obtain medical services. Such persons are often physically or emotionally stressed and vulnerable and sometimes acutely ill which can exacerbate the effects of conduct or speech directed at them. Such activity tends to undermine a person's right to privacy and interfere with a person's right to seek health care and legitimate medical treatment.

*Id.* at p. 3 (CR 16, at p. 93).

The "whereas" clauses of the Santa Barbara Ordinance confirm that the City was concerned with preventing the type of constructive blockades reported in *Schenck*, as well as other obstructive and harassing activities that interfere with safe and effective access to health care facilities. The Council emphasized that:

> [P]rovision of and access to health care services and to places of worship are critically and uniquely important to the public health, safety and welfare so that persons desiring to provide or needing access to such services should not be hampered, impeded, harassed or intimidated from providing or obtaining those services; [and]

> [P]ersons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them.
> . . .

Ordinance, Section 9.99. *Id.*[12]

The record and findings thus indicate that the City was concerned with and motivated by many of the same government interests found significant in *Madsen* and *Sabelko*: (1) preservation of "a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy" by ensuring safe and effective access to health care facilities, *Madsen*, 114 S. Ct. at 2526-27; *Sabelko*, 68 F.3d at 1172; (2) the State's "strong interest in ensuring the public safety and order [and] in promoting the free flow of traffic on public streets and sidewalks . . ." *Id.*; and (3) the State's interest in protecting the "physical and psychological well-being of a patient held 'captive' by medical circumstance." *Sabelko*, 68 F.3d at 1172; *Madsen*, 114 S. Ct. at 2527.

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12 Other "whereas" clauses reflect the city's findings that people providing or seeking to obtain health care services are a "'captive audience' . . . especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity," which may also "pose health risks, interfere with medical treatment, diagnosis or recovery or cause persons to delay or forego medical treatment."

The "whereas" findings of the Santa Barbara Ordinance are very similar to the "whereas" findings of the Phoenix ordinance upheld in *Sabelko*, 68 F.3d at 1170 n.1.

### 2. The Driveway Provision Is Narrowly Tailored To Serve Santa Barbara's Significant Interests

The Driveway Provision sets up an eight-foot buffer on either side of driveway entrances to health care facilities. Within this buffer, the Santa Barbara City Council has prohibited all demonstration activity, which is defined in clear, objective, content-neutral and easily-understood terms to include "all expressive and symbolic conduct," except that incidental to people passing through the buffer to "traverse a driveway area."[13]

This eight-foot buffer around driveway areas is narrowly tailored to serve each of Santa Barbara's significant objectives (though it need serve only a single significant government interest to pass constitutional muster)[14]:

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[13] The district court recognized the latter limitation as necessary to effect the provision in 9.99.030 permitting people freely to traverse the driveway area. *See Edwards I*, 883 F. Supp. at 1389-90. The City apparently agrees with this construction of the Ordinance.

As the district court found in *Edwards II*, at 9, the definition of "demonstration activity" in the Santa Barbara Ordinance is substantially the same as that in the Phoenix ordinance this Court upheld in *Sabelko*. *See* 68 F.3d at 1171 n. 2.

[14] *See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 n.13 (1981) (Declining to consider second and third interests advanced by the State to justify a time, place, and manner restriction because the State's first interest was sufficient to support the regulation).

First, the buffer serves the City's interest in ensuring physical access to health care facilities by establishing a clear, objective, and easily-enforced standard that obviates the need for police officers to make difficult and discretionary judgments as to what conduct is prohibited. The presence of a clear and objectively-defined zone helps to prevent the obstruction that concerned the City of Santa Barbara. *See supra*, Part II.B.1. *Madsen*, 114 S. Ct. at 2527 ("The 36-foot buffer zone protecting the entrances to the clinic . . . is a means of protecting unfettered ingress to and egress from the clinic.").

Second, the Driveway Provision serves the City's interest in preserving public order and ensuring the free flow of traffic. The Santa Barbara City Council Ordinance Committee discussed the "traffic problems and hazards" that have resulted from demonstration activity around the driveway entrances to health care facilities. (CR 16, at p. 92). Such traffic problems were obvious and visible to the lay observer:

> Before the Ordinance took effect, I observed cars backed up on Garden Street as a result of demonstration activity in and around our driveway. If demonstrators lined up immediately next to the driveway, one could not see over and behind them to see what traffic was coming down or up Garden. Often, cars are parked on Garden near the driveway. If demonstrators were lined up along the driveway or crowding the car, one had to creep out into the street to get beyond them and see the street. This would become a special problem when the driver and passenger(s) were upset or trying to get away from demonstrators.

Declaration of Margaret A. Connell, Director of Public Affairs for Planned Parenthood of Santa Barbara, Ventura and San Luis Obispo Counties, ¶ 13, CR 16, at p. 47. The establishment of an eight-foot buffer around driveway areas is a narrowly-tailored means of ensuring the free flow of traffic, and preventing potentially serious car accidents, around health care facilities. *Cf. Madsen*, 114 S. Ct. at 2527 (noting that the 36-foot buffer zone ensures that individuals "do not block traffic").

Third, the eight-foot buffer around driveway entrances furthers the City's interest in protecting the "physical and psychological well-being of a patient held 'captive' by medical circumstance." *Sabelko*, 68 F.3d at 1172. By reducing obstruction of facility entrances and "in your face" tactics such as videotaping and invasion of one's personal space, the buffer reduces stress on, and the accompanying physical and psychological risks to, clinic patients.[15] A woman seeking access to the driveway area of a health care facility should not have to hazard a "gauntlet of harassment and intimidation,"

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[15] The harassment and intimidation of over-zealous anti-choice activists can have serious health consequences to women seeking access to reproductive health services. Such behavior can cause women to delay access to abortions or needed medical care, which increases the risks of such procedures. Confrontational behavior outside health care facilities also causes stress and anxiety, which increases the risks of performing medical procedures. *See Schenck*, 67 F.3d at 383-84 & 389-90, *citing Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1427 & 1433-34 (W.D.N.Y. 1992). *See also* Linn *et al.*, "Effects of Psychophysical Stress on Surgical Outcome," 50 Psychosomatic Medicine 230-244 (1988).

*Schenck*, 67 F.3d at 383 -- an inherently threatening situation in light of the well-known history of anti-choice harassment and violence outside reproductive health clinics nationwide -- in order to exercise her constitutional right to reproductive choice.[16] The eight-foot buffer is an entirely reasonable way of protecting patients and providers from these risks while simultaneously preserving the opportunity of individuals to communicate their message. *See* Section II.C, below.

Finally, the eight-foot buffer zone around driveway entrances reduces the risk of confrontations that may lead to physical violence by establishing a minimal buffer between demonstrators and persons seeking access to health care facilities. In many cases, anti-choice sentiment has led to violence against providers of and women seeking access to reproductive health services.[17] Indeed, as the Second Circuit

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16 Numerous cases have found that confrontational and obstructive activists have intruded on the privacy interests (the 'right to be left alone') of the 'captive audience' of women seeking access to reproductive health services, and the medical staff who provide them. *See generally Schenck*, 67 F.3d at 392; *Pro-Choice Network*, 799 F. Supp. at 1435-37; *City of Fargo v. Brennan*, 543 N.W.2d 240, 244-45 (N.D. 1996); *Bering v. Share*, 106 Wash. 2d 212, 227-230, 721 P.2d 918, 927-29 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987). *Cf. Frye v. District 1199, Health Care and Social Serv. Union*, 996 F.2d 141, 145 (6th Cir. 1993) (considering "special characteristics of health care institutions" in limiting picketing outside rural nursing home). *See also* Strauss, "Redefining the Captive Audience Doctrine," 19 Hastings Const. L. Q. 85, 108-11 (1991).

17 As found in the House Report on FACE: "The activities to which [FACE] responds take many forms including blockades (continued...)

observed in *Schenck*, even ostensibly 'non-violent' techniques such as "sidewalk counseling" may lead to violence:

> In addition to constructively blockading the medical facilities, Project Rescue engages in a form of advocacy known as 'sidewalk counseling.' Demonstrators approach patients entering the clinics, offer them anti-abortion literature, and try to convince them not to have an abortion. While Project Rescue contends that this sidewalk counseling is done in a peaceful manner, the demonstrators often become angry and frustrated when patients persist in entering the clinics:
>
> The 'counselors' then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. . .

67 F.3d at 383, citing *Project Rescue*, 799 F. Supp. at 1425. By physically separating demonstrators from persons entering the driveway areas of health care facilities, the Driveway Provision prevents direct confrontations that may lead to violence.

In finding the Driveway Provision overbroad, the district court in both *Edwards I* and *Edwards II* focused entirely

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[17](...continued)
and invasions of clinics; violence and threats of violence against providers and their families; and vandalism and destruction of property at facilities . . . [including] one murder. In addition, over 6,000 clinic blockades and other disruptions have been reported" between 1977 and 1993. H.R. Rep. No. 103-306, *reprinted in* 1994 U.S.C.C.A.N. Vol. 4, pp. 703-4. Reproductive health care providers were the victims of four additional murders in 1994. In two separate incidents in Florida and Massachusetts, Dr. John Bayard Britton, escort James H. Barrett, and clinic employees Shannon Lowney and Lee Ann Nichols were shot to death by anti-choice extremists. *See Two Life Terms for Killer at Abortion Clinic*, N.Y. Times, Dec. 3, 1994, at A9; *Timeline: Key Events in the Clinic Shootings*, Boston Herald, Mar. 19, 1996, at 3.

on the narrow question of physical access, and utterly ignored the City's concerns with regulating traffic, ensuring public safety and order, and protecting the physical and psychological well-being of persons seeking and providing reproductive health services.[18] Indeed, even as to the one interest the district court did acknowledge -- physical access -- the court erred in failing to credit the important contribution that an objective and easily-enforceable buffer zone makes to ensuring access to health care facilities. *See above*, at 23. This Court recognized such a contribution in *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988), which specifically found that the provision of a district court injunction establishing a 25-foot buffer zone around the entrance to a clinic was not "cumulative" of another provision that prohibited "obstructing the free and direct passage of any person in or out" of the clinic. *Id.* at 684-86.

While it may have been possible to draft an ordinance that reaches a narrower range of protected expression than the Driveway Provision, a generally-applicable content-neutral ordinance need not be the least restrictive regulation possible, so long as the ordinance advances significant government interests that would be served less effectively absent the

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[18] Even after this Court explicitly recognized in *Sabelko* that the "captive" audience doctrine is applicable to women seeking access to reproductive health services, the district court on remand failed to examine whether the Driveway Provision serves to protect this "captive" audience.

ordinance. *Ward*, 491 U.S. at 798. The Driveway Provision clearly does so.[19]

The "bubble zone" promotes many of the same interests served by the Driveway Provision; but standing alone, it is insufficient to preserve safe and effective access to health care facilities. The "bubble zone" affords a person seeking access to health care facilities some protection from stalking and "in your face" confrontational tactics. Yet it only attaches once an individual affirmatively invokes its protection, which some individuals may decline to do, or may be unaware they have the right to do. Thus, it may do little to prevent congregating around driveway entrances, with the attendant risks to clinic access, the free flow of traffic, public safety, and the physical and psychological well-being of providers and patients.

The Driveway Provision satisfies both prongs of *Ward's* "narrowly-tailored" test. The above discussion amply demonstrates that the Driveway Provision "promotes a substantial government interest that would be achieved less effectively

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[19] Were the Driveway Provision to exempt some types of activity, such as handbilling or silent demonstration, from the conduct prohibited within the eight-foot buffer, individuals could still congregate around the driveway entrances to health care facilities, thus impairing the effectiveness of the Ordinance in regulating the free flow of traffic. Similarly, such an exception would vitiate the clear and easily enforced 'bright line' set up by Santa Barbara to protect access to the clinic, inviting difficult and discretionary judgments regarding what conduct violates the Ordinance.

absent the regulation." *Ward*, 491 U.S. at 799. And, as shown below, the Driveway Provision is not "substantially broader than necessary to achieve the government's interest" (*id.* at 800) because it preserves ample alternative channels of communication for persons seeking to demonstrate around health care facilities.

### c. The Driveway Provision Preserves Ample Alternative Channels of Communication for Persons Seeking to Demonstrate Around Health Care Facilities

In finding the Driveway Provision unconstitutionally overbroad, the district court focused entirely on the conduct proscribed within the Driveway buffer, without regard to (a) the size of the buffer, (b) the ability to demonstrate effectively outside the eight-foot buffer; and (c) the ability of demonstrators to communicate with people inside the buffer at a distance of no more than eight feet. This was plain error. Demonstrators have ample alternative routes for communicating their message; the Driveway Provision therefore is not "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

The Driveway Provision preserves ample alternative channels of communication for individuals around health care facilities. It places no restrictions whatsoever on communication outside the eight-foot buffer. This affords "sidewalk counselors" and others significant opportunity to approach persons seeking access to the clinic at close proximity

outside the very modest buffer. Once the visitor enters the driveway buffer, "communication is not prohibited or interrupted, but simply distanced to eight feet." *Sabelko*, 68 F.3d at 1173. Individuals may continue to communicate with the visitor by voice, and as in *Sabelko*, by "signs, placards, or pictures."[20] *Id.* For this reason, the district court clearly erred in finding that the Driveway Provision prohibited all expression directed at individuals within the driveway buffer.

The scope of conduct regulated by the Driveway Provision is similar to that restricted by the "bubble zone" upheld in *Sabelko*. The Driveway Provision restricts expressive activity within eight feet of driveway areas; the "bubble zone" upheld in *Sabelko* provides a similar size zone of protection (with a similar definition of proscribed activity within the

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[20] Numerous courts have found that communication is possible at distances of eight feet and more. *See, e.g., Madsen*, 114 S. Ct. at 2527; *Sabelko*, 68 F.3d at 1173; *Schenck*, 67 F.3d at 389 & 91 (Majority), and at 398 (Winter, J., Concurring); *Hill*, 911 P.2d at 674.

Indeed, according to Professor Warren M. Hern of the University of Colorado, research indicates "that 8 feet is not only [sufficient] in terms of communicating a verbal message; [research results] would probably recommend [that specific distance]. At distances of about 3 yards, there is greater influence, more openness, greater communication, and more comprehension of the message than at close interpersonal distance. Close interpersonal distance tends to create an arousal context within which the content of the message may not be heard." "Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations," 12 Population and Environment: A Journal of Interdisciplinary Studies 379, 385 (1991) (brackets in original).

zone) for visitors traveling through the access area. While the "bubble zone" does not apply automatically, and thus affords individuals an opportunity to approach visitors before the protection is invoked (and then only at the visitor's option), this does not provide a meaningful basis on which to distinguish the Driveway Provision. Just as the "bubble zone" upheld in *Sabelko* permits individuals within a 100-foot radius of a health care facility to approach a visitor before the bubble is invoked, so too the Driveway Provision affords ample opportunity to approach visitors in the 100-foot radius of a health care facility before they reach the eight-foot buffer.[21]

The district court's analogy of this case to *Board of Airport Comm's v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987), illustrates the clear error in the court's approach of ignoring the size of the buffer established by the Driveway Provision. *See Edwards I*, 883 F. Supp. at 1389. *Board of Airport Comm's* involved a regulation that declared an *entire airport terminal* off-limits to all "First Amendment activities." 482 U.S. at 570. This is a far far cry from

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[21] While serving some of the same significant government interests, the two provisions are complementary, rather than duplicative. The "bubble zone" affords a person seeking access to health care facilities some protection from stalking and "in your face" confrontational tactics, while still permitting an initial approach by demonstrators within the access area. The Driveway Provision establishes a buffer around driveway entrances, thereby preserving clear and unobstructed access to health care facilities.

regulating expressive activity within the eight-foot zone established by the Driveway Provision.[22]

For the reasons stated above, the Driveway Provision is a narrowly tailored regulation that serves significant government interests and preserves ample alternative channels for expression and demonstration around health care facilities.

## III. THE EIGHT-FOOT BUFFER ESTABLISHED BY THE DRIVEWAY PROVISION IS CONSISTENT WITH, OR LESS RESTRICTIVE THAN, REGULATIONS THAT HAVE BEEN EMPLOYED ELSEWHERE TO ENSURE SAFE AND EFFECTIVE ACCESS TO REPRODUCTIVE HEALTH FACILITIES

The eight-foot buffer that the Santa Barbara City Council has chosen to place around driveway areas of health care facilities is consistent with, and in many cases less restrictive than, regulations and judicial decisions throughout the country that have sought to balance the rights of women seeking access to reproductive health services with those of demonstrators seeking to express their views.

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[22] Similarly inapposite is *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir.), *cert. denied*, 510 U.S. 915 (1993) cited in *Edwards I*, 883 F. Supp. at 1389. In *Gerritsen*, the City banned all handbilling within two of the most popular sections of El Pueblo de Los Angeles State Historic Park, visited by approximately two million people a year. 994 F.2d at 572-73. This is obviously a far broader area than the eight-foot zone regulated by the Driveway Provision. The City in *Gerritsen* also lacked any significant justification for the complete ban on handbilling within those areas.

### A. Courts Nationwide Have Upheld Injunctions Imposing Buffer Zones of Much Greater Size than the Zone at Issue Here

Even under the heightened standard of review *Madsen* held applicable to injunctions, courts have upheld injunctions imposing buffers far larger than the eight-foot buffer established by the Driveway Provision. If injunctions imposing broader buffers are upheld under a stricter standard, the Driveway Provision is certainly a reasonable time, place and manner restriction.

In *Madsen*, the Supreme Court upheld an injunction that "prohibited petitioners from 'congregating, picketing, patrolling, demonstrating or entering' any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic." 114 S. Ct. at 2526. The *Madsen* injunction prohibits the same scope of conduct within its 36-foot zone as Santa Barbara's Driveway Provision proscribes within its eight-foot zone.[23]

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[23] That the 36-foot buffer in *Madsen* was imposed only after an earlier injunction had proven ineffective has no bearing on the application of this precedent. As a California appellate court recently observed in upholding an injunction establishing a twenty-foot "speech-free zone" around a clinic in Sacramento, "[n]othing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite" to such a buffer. *Feminist Women's Health Ctr.*, 32 Cal. App. 4th at 1644, 39 Cal. Rptr. 2d at 200-201. Moreover, whatever the prior history of regulation in *Madsen*, the fact remains that the district court in *Madsen* found a 36-foot buffer reasonable and necessary to protect access to health care facilities in that community, which (continued...)

In *Portland Feminist Women's Health Ctr.*, this Court upheld an injunction prohibiting demonstration activity, *including the distribution of literature* in a "'free zone' that extends twelve-and-a-half feet to the right and the left of the front door [of a clinic] and from the door front to the curb." 859 F.2d at 686. The court found that the "free zone is tailored to address threats, intimidation, and assault of clinic personnel and clients that impede the safe provision of medical care. While the court could possibly achieve its goal with a narrower free zone, we decline to entertain quibbling over a few feet." *Id.*

Likewise, in *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 626 (N.D. Cal. 1991), a federal district court enjoined Operation Rescue and named individuals from "[d]emonstrating, picketing, distributing literature, or counseling within twenty-five (25) feet of any entrance" to the Planned Parenthood Clinic in Daly City, California.

In two post-*Madsen* cases, appellate courts in California have upheld injunctions that are significantly broader than the Ordinance at issue here. In *Planned Parenthood Shasta-Diablo, Inc.*

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[23](...continued)
determination was upheld by the Supreme Court. 114 S. Ct. at 2526-27. In any event, a narrower state court injunction *did* precede the Ordinance in Santa Barbara, and proved ineffective in serving the community's legitimate interests in ensuring safe and effective access to its health care facilities. *See above*, at 16-17.

*v. Williams*, 10 Cal. 4th 1009, 1013, 43 Cal. Rptr. 2d 88, 91, 898 P.2d 402, 405 (1995), *petition for cert. filed*, 65 U.S.L.W. 3070 (U.S. July 23, 1996) (No. 95-576) the Supreme Court of California upheld an injunction that restricted all picketing, demonstration or counseling activity to the public sidewalk across the street from the clinic in Vallejo, California. 898 P.2d at 405. The effect of this restriction was to prevent the enjoined parties from demonstrating within a sixty-foot zone of the clinic. *Id.* at 412. Similarly, in *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (3d Dist.), *cert. denied*, 116 S. Ct. 514, 133 L. Ed. 2d 423 (1995), a California appellate court upheld an injunction prohibiting "any activity within a 'speech free zone' defined as a rectangle extending from the front of the medical building to three feet short of the curb . . . and twenty feet on either side of the front door . . . ." 32 Cal. App. 4th at 1656, 39 Cal. Rptr. 2d at 195.[24]

### B. Judicial Decisions Upholding Ordinances Similar To Santa Barbara's Confirm Its Constitutionality

The Driveway Provision is an ordinance, rather than an injunction, but this only reinforces the obvious

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[24] *Accord State v. Baumann*, 191 Wis. 2d 825, 532 N.W.2d 144, *reported in full at* 1995 Wisc. App. LEXIS 261 (Ct. App. 1995) (unpublished opinion; see Wis. Rule App. Proc. 809.23(i)(b)(5)) (upholding injunction prohibiting the enjoined parties from "congregating, demonstrating, counseling or engaging in any other protest activity within twenty-five (25) feet of doorways, entrances, exits, parking lots, parking lot entrances, driveways and driveway entrances" of Milwaukee medical clinics).

constitutionality of the Driveway Provision. If more speech-restrictive regulations are upheld under the stricter standard applicable to injunctions, then the modest eight-foot buffer established by the Driveway Provision is certainly constitutional.

The use of ordinances to address problems of access to reproductive health facilities has gained momentum in recent years as cities and states nationwide determine what additional protection their local facilities require beyond the federal protection extended by the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994).[25] Local clinic access ordinances like Santa Barbara's Driveway Provision complement the protection afforded by FACE by providing a preventive layer of

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[25] FACE provides federal criminal and civil penalties against anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .

*See generally, American Life League (ALL) v. Reno*, 47 F.3d 642 (4th Cir.) (upholding constitutionality of FACE), *cert. denied*, 116 S. Ct. 55 (1995); *United States v. Dinwiddie* 76 F.3d 913 (8th Cir. 1996), *petition for cert. filed*, No. 96-5615 (U.S. Aug. 6, 1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 1996 U.S. LEXIS 4624 (Oct. 7, 1996); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995).

protection for health care facilities that is tailored to local needs and conditions and that provides clear guidance to local law enforcement officials. By establishing a minimal buffer between demonstrators and persons seeking access to health care facilities, clinic access ordinances reduce the risk that confrontational demonstrations will lead to physical violence and other violations of FACE.

Many communities have already adopted ordinances that contain one or more of the protections established by the Santa Barbara Ordinance challenged here, and other communities are in the process of considering them. *See, e.g.*, Pensacola City Code § 8-1-18 (prohibiting everyone except law enforcement officials and those seeking access to the clinic from entering eight-foot zone around the property of abortion clinics);[26] Phoenix City Code 23-10.1 (establishing eight-foot cease-and-desist bubble zone within 100 foot access area); Colorado Revised Statutes Section 18-9-122(3) (eight-foot bubble zone requiring consent to approach those within 100 foot access area).

With the exception of the district court in this case, courts have consistently upheld clinic access ordinances. *See,*

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[26] A copy of the Pensacola ordinance is included in the Appendix hereto, at A-11. As the Pensacola zone extends to *all* property of abortion clinics, rather than just the driveway areas, the Pensacola ordinance is substantially broader than the Driveway Provision at issue here. The Pensacola ordinance does, however, exempt "paved sidewalks intended for pedestrian use."

e.g., *Sabelko*, 68 F.3d at 1169 (upholding Phoenix ordinance); *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995) (upholding Colorado ordinance), *cert. denied*, 1996 Colo. LEXIS 136 (Colo. Feb. 26, 1996), *petition for cert. filed*, 65 U.S.L.W. 3008-09 (U.S. May 24, 1996) (No. 95-1905); *Conroy v. City of Pensacola*, No. 95-257-CA-01, slip op. (Cir. Ct. Escambia Co., Fla. Apr. 11, 1995) (copy included in Appendix, at A-15) (upholding Pensacola ordinance). *See also Fischer v. City of St. Paul*, 894 F. Supp. 1318 (D. Minn. 1995) (upholding a decision by police to erect a fence around a St. Paul clinic, its parking lot and the public sidewalk in front of the clinic in anticipation of demonstrations by Operation Rescue).[27]

Indeed, the very Ordinance at issue here was upheld in its entirety by the Superior Court of California on consolidated appeals from a conviction and an acquittal under the Santa Barbara Ordinance. *See People v. Czekaj*, slip op. (Sup. Ct.

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[27] *Cf. Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). In *Burson*, the Supreme Court upheld a Tennessee law that banned the solicitation of votes and the display or distribution of campaign posters, signs or other campaign materials within 100 feet of the entrance to a polling place. This restriction was upheld despite the fact that it was found to be content-based, and thus held to a far stricter standard of scrutiny than the content-neutral Ordinance at issue here.

If Tennessee's interest in fair elections permits it to pass a content-based law prohibiting passive demonstration within 100 feet of polling places, then surely Santa Barbara's interest in providing safe and effective access to health care facilities permits it to pass a content-neutral ordinance banning demonstration activity within eight feet of the driveway entrances to such facilities.

Santa Barbara Co., App. Dep't, Jan. 6, 1995), *appeal denied*, 2d Crim. No. B090057, slip. op. (Cal. App. 2d Dep't Feb. 7, 1995), *cert. denied*, 116 S. Ct. 53 (1995) (copies of these opinions are included in the Appendix at A-20).

Santa Barbara's particular choices as to the type and size of the zone necessary to ensure safe and effective access to its local health care facilities are entitled to deference. *See Ward*, 491 U.S. at 800. The reasonableness of Santa Barbara's choices is confirmed by numerous court decisions upholding regulations and injunctions, which are designed to protect the same governmental interests at stake here, and which in many cases are far broader than the narrow eight-foot buffer established by the Driveway Provision.

## CONCLUSION

The eight-foot buffer established by the Driveway Provision is a very modest time, place, and manner restriction on expressive activities around health care facilities that is narrowly tailored to serve significant government interests. Among other things, the Driveway Provision helps to ensure safe and effective access to health care facilities in Santa Barbara and to preserve public safety and the free flow of traffic around the entrances to these facilities.

The Driveway Provision clearly preserves ample alternative channels of communication around health care

facilities. It places no restrictions on approaches by individuals outside the eight-foot buffer around driveway areas. And within the eight-foot buffer, it does not eliminate communication, but merely distances it to eight feet -- close enough to permit the continuation of oral conversations, and to permit communication through the display of signs, banners, placards or pictures.

The Driveway Provision is consistent with, and in many respects less restrictive than, regulations that have been upheld in analogous circumstances. Indeed, in *Madsen*, the Supreme Court upheld a far wider buffer of 36 feet under the more stringent standard applicable to injunctions. 114 S. Ct. at 2526.

For the reasons stated above, the district court's judgment should be reversed and the Driveway Provision held constitutional.

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