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Recent Developments: Madsen v. Women's Health Center: Injunction Establishing a 36-Foot Buffer Zone on a Public Street from Which Demonstrators Are Excluded Does Not Violate the First Amendment

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Madsen v. Women's Health Center:

INJUNCTION ESTABLISHING A 36-FOOT BUFFER ZONE ON A PUBLIC STREET FROM WHICH DEMONSTRATORS ARE EXCLUDED DOES NOT VIOLATE THE FIRST AMENDMENT.

The United States Supreme Court in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), held that an injunction establishing a 36-foot buffer zone on a public street from which demonstrators are excluded does not violate the First Amendment. In so holding, the Court reaffirmed the principle that content-neutral injunctions restricting speech pass constitutional muster if they serve a significant government interest and burden no more speech than necessary.

In September, 1992, a Florida state court permanently enjoined anti-abortion activist Petitioners from blocking ingress and egress at Respondents' abortion clinic via an adjacent street, and from physically abusing persons entering or leaving the clinic. Six months later, the court broadened the injunction, finding: 1) access to the clinic was still being impeded; 2) the noise was adversely affecting patients inside the clinic; 3) the protests were discouraging patients from approaching or entering the clinic; and 4) clinic staff members were being subjected to protests at their homes. The provisions of the amended injunction excluded Petitioners, and all those acting "in concert with" them, from a 36-foot buffer zone encompassing the clinic driveway and entrance, and private property to the north and west of the clinic. The amended injunction also prohibited noisemaking (i.e., chanting, shouting, bullhorns, etc.) within earshot of patients within the clinic, or the display of "images observable" to patients within the clinic, during surgical procedures. It further restricted protestors from approaching patients and potential patients without their consent, within 300 feet of the clinic. In addition, the injunction created a 300-foot buffer zone around the residences of clinic staff in which demonstrations or noisemaking were prohibited.

Petitioners appealed to the Supreme Court of Florida, which rejected their argument that the amended injunction violated the First Amendment, and upheld the injunction. The Court of Appeals of the Eleventh Circuit heard a separate challenge to the same injunction shortly before the Supreme Court of Florida, and struck it down. The United States Supreme Court granted certiorari to resolve the conflict.

The Court began its analysis by addressing Petitioners' argument that the injunction was content-based because it restricted only the viewpoint of anti-abortion protestors. *Id.* at 2523. In rejecting this argument, the Court reasoned that such a finding would "classify virtually every injunction as content or viewpoint based." *Id.* The Court found that although the injunction applied only to individuals professing an anti-abortion viewpoint, it was not dispositive of a "viewpoint-based" restriction. *Id.* at 2523-24. The Court identified the principal inquiry in determining con-

tent-neutrality as whether the regulation is "without reference to the content of the regulated speech." *Id.* at 2523 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Court held that the injunction's restrictions were not directed at the content of Petitioners' message, and it was therefore content-neutral. *Id.* at 2524.

The Court proceeded to determine what standard of review should apply. It rejected the strict scrutiny standard, which requires a restriction to be "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Id.* at 2523-24 (quoting *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983)). Because the injunction was content-neutral, the Court reasoned that strict scrutiny, under *Perry*, was inappropriate. *Id.*

The Court similarly rejected the reasonable time, place, and manner test as formulated in *Ward v. Rock Against Racism*, and similar cases, reasoning that it applies to generally applicable content-neutral statutes, rather than to injunctions. *Id.* at 2524. The Court distinguished injunctions from statutes, noting that injunctions are imposed upon those who have already violated, or threatened to violate, the law; whereas statutes apply to the general public. *Id.* Additionally, the Court reasoned that injunctions carry a greater threat of censorship or discriminatory application than legislation and, therefore, require greater scrutiny. *Id.* Hence, the Court determined that the reasonable time, place, and manner test, as typically applied to content-neutral statutes, was not "sufficiently rigorous" in evaluating a content-neutral injunction. *Id.* at 2525.

The Court subsequently held that the governing standard of review is whether the provisions of the injunction "burden no more speech than is necessary to serve a significant government interest." *Id.* (citations omitted). Thus, if the injunction was found to burden no more speech than necessary to meet the states objectives, it would pass constitutional muster. The Court then affirmed that the significant government interests noted by Florida's Supreme Court, such as protecting a woman's right to seek lawful medical services, ensuring the public safety and order, promoting the free flow of traffic, and protecting the property rights of all citizens, were sufficient to "justify an appropriately tailored injunction to protect them." *Id.* at 2526.

Next, the Court turned its attention toward evaluating the challenged portions of the injunction. The Court upheld the 36-foot buffer zone around the clinic entrance and driveway, finding that it "burdened no more speech than necessary" to accomplish the government's goal of providing ingress to and egress from the clinic. *Id.* at 2526-27. The Court noted its deference to the trial court's determination that such a buffer zone was necessary in light of the first injunction's failure to accomplish this goal. *Id.* at 2527.

The Court then evaluated the 36-foot buffer zone as applied to the private property north and west of the clinic. This provision was found to be unconstitutional because it "burden[ed] more speech than [was] necessary" to protect access to the clinic. *Id.* at 2528. The Court found no evidence that protestors standing in these areas blocked access to the clinic in any way. *Id.*

The Court upheld the injunction's prohibition on noisemaking "within earshot" of the clinic, reasoning that it "burden[ed] no more speech than necessary to ensure the health . . . of the patients at the clinic," particularly during periods of scheduled "surgical procedures". *Id.* However, the Court struck down the "images observable" provision, stressing that such a "broad prohibition" burdened more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families that had allegedly been displayed on some signs. *Id.* at 2528-29. In justifying its decision, the Court noted that patients and staff within the clinic could more easily "pull [the] curtains" than "stop up [their] ears." *Id.* at 2529.

In striking down the injunction's prohibition on unconsented approaches of persons seeking the clinic's services, the Court found that such a provision is unconstitutional

absent "fighting words" or threats, and that the First Amendment requires us to tolerate insulting or even "outrageous" speech. *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)). Further, the Court opined that the "consent" requirement alone invalidated the provision because it burdened more speech than necessary to achieve the stipulated goals of preventing intimidation and ensuring access to the clinic. *Id.*

The last provision addressed regarded the 300-foot buffer zone around the residences of clinic staff. *Id.* at 2529-30. The Court struck down the provision, finding that it constituted a broad ban on "general marching [or walking] through residential neighborhoods." *Id.* at 2530. Thus, the broad ban on such picketing burdened more speech than was necessary to protect the staff's residences. *Id.*

Finally, the Supreme Court refused to entertain Petitioners' argument that the injunction was invalid "as applied" to non-parties, concluding that Petitioners' lacked standing, as named parties, to make such an argument. *Id.* Similarly, the Court rejected their contention that the injunction was susceptible to an "overbreadth" challenge, finding that the "in concert with" "phrase itself does not prohibit any conduct" of third parties. *Id.* (citing *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

Justice Stevens concurred in the opinion, but dissented in part, arguing that injunctions should be judged by a "more lenient standard [of review] than legislation", because they are imposed upon persons who have "engaged in unlawful conduct". *Id.* at 2531. Thus, he argued that more leeway should be given to injunctions, remedying the unlawful conduct of some, than to generally applicable statutes containing identical proscriptions. *Id.* at 2532.

Justice Scalia, with whom Justice Kennedy and Justice Thomas joined, concurred in the judgment in part and dissented in part. *Id.* at 2534. Justice Scalia argued that the Court's decision departs completely from its past jurisprudence, accusing the majority of creating "brand-new for this abortion-related case, an additional standard of constitutional review." *Id.* at 2537-38. In sum, Justice Scalia argued that both "precedent and policy" demand that strict scrutiny be applied to any "speech-restricting" injunctions, "even content-neutral ones." *Id.* at 2541. In his view, "speech-restricting" injunctions may not attack "content as content", but they easily lend themselves to the "suppression of particular ideas" and groups. *Id.* at 2538. For this reason, and because injunctions are issued by individual judges rather than legislatures, Justice Scalia asserted that an injunction restricting speech is just as deserving of strict scrutiny as is content-based legislation. *Id.*

In *Madsen v. Women's Health Center*, the Supreme Court has explicitly denoted the proper standard for reviewing the constitutionality of content-neutral injunctions. This standard of "heightened review", lying somewhere between strict scrutiny and the reasonable time, place, and manner standard, may provide greater opportunity for portions of such injunctions to be upheld. However, it will simultaneously require such injunctions to "burden no more speech than necessary" to achieve their goals. With its decision, the Supreme Court attempts to strike a balance between the rights of those wishing to utilize abortion clinics and the rights of those attempting to protest their very existence. The Court appears willing to tolerate a certain degree of infringement upon the free speech of protestors in exchange for protection of the legal rights of others.

- *Victoria M. Rife*