TESTIMONY OF

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RELATIVE TO

S. 1353: “An Act Relative to Public Safety”

BEFORE THE JOINT COMMITTEE ON PUBLIC SAFETY AND HOMELAND SECURITY

May 15, 2007

Good morning, Chairman Barrios, Chairman Costello and members of the Committee. I stand before you today in support of S.1353, "An Act Relative to Public Safety." If enacted, this legislation would provide additional protections to those who seek the services of reproductive health care facilities. Existing law mandates a six foot "floating buffer zone" around those entering and leaving such a facility, within an eighteen foot radius of the building. Though this provision is well-intended, its complexity and the vagueness of its language has rendered it ineffective in ensuring the rights of patients. Since the enactment of this law in 2000, despite frequent violations, there have been no successful prosecutions.

The strictly enforced thirty-five foot buffer area proposed by this legislation would achieve several important goals. First, it would serve the needs of law enforcement officials by dictating a clear line between legality and illegality that does not currently exist. A clear and precise declaration of the rights of patients and protesters alike will serve both parties well, and eliminate the ability of ill-intentioned individuals to take advantage of "gray areas" in existing law.

Not unlike the Commonwealth's law forbidding political campaigning within 150 feet of a polling place, this bill will provide individuals the opportunity to gain entry to a protected facility free from the threat of coercion and other intimidating conduct from demonstrators or others intent on inhibiting entry. As legislators, we are acutely aware of the tactics that some opponents of choice have used to prevent women from seeking medical assistance at clinics. We have witnessed and condemned the violence that occurs in these facilities, which includes assault, battery, and even murder.

Another goal realized by this legislation is the protection of a woman's privacy and her constitutional right to choose. That right is the law of the land and the law of this Commonwealth, and no woman should have to run a gauntlet of opponents to exercise it. Privacy is at a premium in these delicate situations, and giving a woman sufficient space to pass safely into a medical facility should be the minimum amount of protection we provide.

Furthermore, the presence of anti-choice protestors at a clinic, whose goal it is to confront women seeking abortions, suggests to the public that every woman entering said clinic is there to secure said procedure. The ability of demonstrators to confront women directly reinforces that

assumption in the arena of public opinion. Whatever a woman's reason for entering such a facility, she should not be subjected to the glare of protestors and demands of sidewalk "counselors."

The interests of members of the medical profession and their staffs are also of concern, and will be protected upon the passage of this important legislation. Reproductive health care facilities provide an expansive range of employment opportunities for physicians, nurses, x-ray technicians, secretaries, laboratory assistants, janitorial staff and the like. With demonstrators literally on the doorsteps on these facilities, patients and prospective employees alike will defect, causing a loss of revenue and imperiling the economic vitality of the clinic, as well as the health of its clients. The ability of health care professionals and their various assistants to provide quality services cannot be subjected to the undue interference and intimidation that result from protests and other demonstrations.

Opponents of this legislation urge that it is unconstitutional under the First Amendment to the United States Constitution as applied to individual states through the due process clause of the Fourteenth Amendment. That argument has no foundation in the applicable precedents of the United States Supreme Court. Indeed, on at least two occasions in recent years, the Supreme Court has upheld injunctive orders that impose buffer zones against anti-choice protesters at reproductive health care facilities. [See *Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997); and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).]

To critical points emerge from *Schenck* and *Madsen*, which have set Supreme Court precedents. In determining the legality of this bill, two crucial questions should be considered: 1. Is the law regulating speech content-neutral? 2. Is the law regulating speech contained in an injunctive order or in an act of the legislature? If the law regulating speech is content-neutral and if it is a product of legislative, rather than judicial, action, the Supreme Court has applied a different and more generous standard than if the law is content-based or imposed by a judge's order.

With respect to content-neutrality, the thirty-five foot buffer zone provision in this legislation is content-neutral. In both *Schenck* and *Madsen*, the Court found the imposition of a buffer zone to be a content-neutral regulation of speech even though it was directed at anti-choice demonstrators. Because the intent of the injunction was to protect women

seeking abortions from the harassment and intimidation of protestors, the establishment of the buffer zone was a result of the *conduct* of the demonstrators, not their speech or point of view.

As in *Schenck* and *Madsen*, the purpose of our proposed buffer zone is content-neutral. This legislation is designed to protect the interests of citizens seeking medical assistance at certain health care facilities. Its intent is to allow patients to enter clinics without obstruction or interference, not to suppress the speech of those who oppose the right to choose. This legislation is incidental to the anti-abortion message. As the Court stated in *Madsen*, "[T]he fact that the [law] cover[s] people with a particular viewpoint does not render [it] content or viewpoint based." *Id*.

In *Schenck* and *Madsen*, the United States Supreme Court articulated a different and more generous test of constitutionality for legislative enactments impinging upon speech than for judicial orders of the same nature. That is, if the legislature enacts a law imposing a buffer zone around medical facilities, the courts will give greater deference to legislative judgment than they would a judicially imposed buffer zone. In short, this bill will be measured constitutionally by a different yardstick that is more deferential to legislative will.

The grounds for this distinction are profound, and strike at the heart of inherent differences between legislative and judicial processes. A legislative measure is the cumulative product of the work of many, including those who conceive of and draft a bill, the legislative committee members who consider its implications, and the citizens that have their voices heard in public hearings. At every turn, a piece of legislation is subject to debate, whether in a public forum or on the floors of the House and Senate, and many hundreds, or even thousands, of citizens eventually contribute to its enactment.

Injunctive decrees, unlike legislative mandates, are time and place specific. They are offered as a result of specific events occurring at specific sites and involving specific persons or groups. Such decrees are products of disputes between parties, and the presentation of evidence is limited to the claims alleged and the defenses asserted during pleadings. Participation in the judicial process is restricted to the parties appearing before the court, and unlike legislative proceedings, the general public is not invited to participate.

The resultant injunctive decree reflects the judgment of one person—the trial judge. After all, claims for injunctive relief are tried without juries. A judicial officer may be overwhelmed by the events of the day, and influenced by daily news reports of tumultuous protests at the facility which is the subject of the litigation. The calm deliberation that may ordinarily accompany the judicial judgment may give way to the understandable urge to end disturbances. For this reason, the Supreme Court has observed that injunctive decrees "carry greater risks of censorship and discriminatory application than do general [legislative enactments]." *Madsen*, 512 U.S. 764.

In light of these considerations, the Supreme Court has applied a less stringent test to determine the constitutionality of content-neutral legislative enactments, which may regulate the time, place and manner for the exercise of speech. We may concede that "reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression, but are nevertheless valid." *Clark v. Community for Creative Non-Violence*, 468 U.S. 228, 294 (1984). If they are content-neutral, such legislative regulations will be upheld if they are "narrowly tailored to serve a significant governmental interest and… they leave open ample alternative channels for communication and information." *Id*. 293. [See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)]. In sharp contrast, the Court has applied a more "stringent test" to determine the constitutionality of content-neutral injunctive decrees. *Madsen*, 512 U.S. 765. In such cases, such as *Schenck* and *Madsen*, the test is whether the "challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id*.

"An Act Relative to Public Safety" imposes a reasonable "place" restriction, which is "narrowly tailored" to advance "significant" interests of government. This testimony earlier identified six governmental interests, any one of which qualifies as "significant" under the Supreme Court's test. Additionally, the thirty-five foot buffer zone is narrowly tailored to serve these interests, leaving plenty of room for protestors to demonstrate within the sight of persons utilizing health care facilities. This legislation clearly satisfies this test, as it employs means—the thirty-five foot buffer zone—that are not "substantially broader than necessary to achieve the government's interest." *Rock Against Racism*, 491 U.S. 800. The measure is valid regardless of whether such interest could be "served by some less speech-restrictive alternative," *Id*., which is a component of the more demanding

constitutional test for judicially imposed injunctive decrees impacting speech.

Furthermore, protestors at health care facilities have at their disposal a variety of other modes of communicating their message to the public, among them news media, advertisements, hand billing and rallies. Indeed, under the auspices of this legislation, demonstrators are fully within their rights to hold signs in the vicinity of protected facilities, provided that they remain thirty-five feet from them. Surely, this bill allows protestors "ample alternative channels" to communicate their message.

Thus, it is of little surprise that the Supreme Court, applying the more lenient test for legislative enactments, has upheld numerous statutes that impose reasonable time, place, or manner restrictions on the exercise of free speech. For example, the Court has sustained statutes that impose a 100 foot buffer zone around polling places to prevent political campaigning on election days, *Burson v. Freeman*, 504 U.S. 191 (1992); a 500 foot buffer zone around foreign embassies to prevent demonstrations of three or more persons that "threaten the security or peace of the embassy," *Boos v. Barry*, 485 U.S. 312, 330 (1998); and an unspecified buffer zone around schools to prevent protestors from disturbing the educational process. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Peace, quiet and good order are as important to the function of health care facilities as they are at polling places, foreign embassies and educational institutions.

The Supreme Court's decision in *Burson*, which sustained a 100 foot buffer zone around polling places, is a most compelling example, fully applicable to the legislation in question, of the power of a state legislature to enact buffer zone laws in the face of free speech objections. In *Burson*, the Court upheld the 100 foot buffer zone around polling places, despite the fact that the restriction was content-based, and not content neutral, as is the case with the legislation in question today. Indeed, the comparable Massachusetts statute, M.G.L. Ch. 54, § 65 (1999), imposes a 150 foot buffer zone. Under this statute, an individual exercising their right to vote is entitled to walk the last 150 feet into the polling place undisturbed, and free to contemplate in peace his or her electoral decision. First Amendment rights are abridged in this case for 150 feet. No one may approach or speak to the voter for the purpose of soliciting his or her vote or distributing campaign materials.

Is not the woman seeking medical advice and assistance at a reproductive health care facility entitled to at least the same protection as the average voter? I, and others who have co-sponsored this legislation, am certain that she is. According to Chief Justice William Rehnquist, “The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.” *Madsen*, 512 U.S. 772-773.

In closing, I urge the Committee to resist the notion that this legislation is a pro- or anti-choice bill, or that it is intended to silence protestors. This is a public safety measure that accommodates the constitutional rights of both patient and protestor. The bill is aimed at conduct, not speech. It is important to remember that a verbal assault—words which place the targeted person in fear of imminent harm or offensive bodily contact—is a completed crime, not protected speech. I urge the Committee to report this legislation favorably to the General Court.