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 SOUTER, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

I join the opinion of the Court and add this further word. The key to determining whether Colo. Rev. Stat. §18–9–122(3) (1999), makes a content-based distinction between varieties of speech lies in understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. ___, ___ (2000) (slip op., at 7); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972). Thus the government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991), or particular viewpoints within a given subject matter, *Carey* v. *Brown*, 447 U. S. 455, 461–463 (1980) (citing *Chicago, supra*, at 95–96); cf. *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 601–602 (1998) (SOUTER, J., dissenting).

Concern about employing the power of the State to suppress discussion of a subject or a point of view is not,

however, raised in the same way when a law addresses not the content of speech but the circumstances of its delivery. The right to express unpopular views does not necessarily immunize a speaker from liability for resorting to otherwise impermissible behavior meant to shock members of the speaker's audience, see *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968) (burning draft card), or to guarantee their attention, see *Kovacs* v. *Cooper*, 336 U. S. 77, 86–88 (1949) (sound trucks); *Frisby* v. *Schultz*, 487 U. S. 474, 484–485 (1988) (residential picketing); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981) (soliciting). Unless regulation limited to the details of a speaker's delivery results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) ("'Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984))); 491 U. S., at 797 ("'[O]ur cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech'" (quoting *United States* v. *Albertini*, 472 U. S. 675, 689 (1985))).

It is important to recognize that the validity of punishing some expressive conduct, and the permissibility of a time, place, or manner restriction, does not depend on

showing that the particular behavior or mode of delivery has no association with a particular subject or opinion. Draft card burners disapprove of the draft, see *United States* v. *O'Brien*, *supra*, at 370, and abortion protesters believe abortion is morally wrong, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 758 (1994). There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term. The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech, see *Ward*, *supra*, at 791 ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys"), and not because of offensive behavior identified with its delivery.

Since this point is as elementary as anything in traditional speech doctrine, it would only be natural to suppose that today's disagreement between the Court and the dissenting Justices must turn on unusual difficulty in evaluating the facts of this case. But it does not. The facts overwhelmingly demonstrate the validity of subsection (3) as a content-neutral regulation imposed solely to regulate the manner in which speakers may conduct themselves within 100 feet of the entrance of a health care facility.

No one disputes the substantiality of the government's interest in protecting people already tense or distressed in anticipation of medical attention (whether an abortion or some other procedure) from the unwanted intrusion of close personal importunity by strangers. The issues dividing the Court, then, go to the content neutrality of the

regulation, its fit with the interest to be served by it, and the availability of other means of expressing the desired message (however offensive it may be even without physically close communication).

Each of these issues is addressed principally by the fact that subsection (3) simply does not forbid the statement of any position on any subject. It does not declare any view as unfit for expression within the 100-foot zone or beyond it. What it forbids, and all it forbids, is approaching another person closer than eight feet (absent permission) to deliver the message. Anyone (let him be called protester, counselor, or educator) may take a stationary position within the regulated area and address any message to any person within sight or hearing. The stationary protester may be quiet and ingratiating, or loud and offensive; the law does not touch him, even though in some ways it could. See *Madsen, supra,* at 768–771 (1994) (injunction may bar protesters from 36 foot zone around entrances to clinic and parking lot).

This is not to say that enforcement of the approach restriction will have no effect on speech; of course it will make some difference. The effect of speech is a product of ideas and circumstances, and time, place, and manner are circumstances. The question is simply whether the ostensible reason for regulating the circumstances is really something about the ideas. Here, the evidence indicates that the ostensible reason is the true reason. The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close. So, the intended recipient can stay far enough away to prevent the whispered argument, mitigate some of the physical shock of the shouted denunciation, and avoid the unwanted handbill. But the content of the message will

survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence the implausibility of any claim that an anti-abortion message, not the behavior of protesters, is what is being singled out.

The matter of proper tailoring to limit no more speech than necessary to vindicate the public interest deserves a few specific comments, some on matters raised by JUSTICE KENNEDY's dissent. Subsection (3) could possibly be applied to speakers unlike the present petitioners, who might not know that the entrance to the facility was within 100 feet, or who might try to engage people within 100 feet of a health facility other than a physician's office or hospital, or people having no business with the facility. These objections do not, however, weigh very heavily on a facial challenge like this. The specter of liability on the part of those who importune while oblivious of the facility is laid to rest by the requirement that a defendant act "knowingly." See Colo. Rev. Stat. §18–1–503(4) (1999) (culpable mental state requirement deemed to apply to each element of offense, absent clear contrary intent). While it is true that subsection (3) was not enacted to protect dental patients, I cannot say it goes beyond the State's interest to do so; someone facing an hour with a drill in his tooth may reasonably be protected from the intrusive behavior of strangers who are otherwise free to speak. While some mere passersby may be protected needlessly, I am skeptical about the number of health care facilities with substantial pedestrian traffic within 100 feet of their doors but unrelated to the business conducted inside. Hence, I fail to see danger of the substantial overbreadth required to be shown before a statute is struck down out of concern for the speech rights of those not before the Court. Cf. *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 964–965 (1984); *Houston* v. *Hill*, 482 U. S. 451, 458 (1987).

As for the claim of vagueness, at first blush there is

something objectionable. Those who do not choose to remain stationary may not approach within eight feet with a purpose, among others, of "engaging in oral protest, education, or counseling." Colo. Rev. Stat. §18–9–122(3) (1999). While that formula excludes liability for enquiring about the time or the bus schedule within eight feet, "education" does not convey much else by way of limitation. But that is not fatal here. What is significant is not that the word fails to limit clearly, but that it pretty clearly fails to limit very much at all. It succeeds in naturally covering any likely address by one person approaching another on a street or parking lot outside a building entrance (aside from common social greetings, protests, or requests for assistance). Someone planning to spread a message by accosting strangers is likely to understand the statute's application to "education." And just because the coverage is so obviously broad, the discretion given to the police in deciding whether to charge an offense seems no greater than the prosecutorial discretion inherent in any generally applicable criminal statute. Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"); *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U. S., at 794.

Although petitioners have not argued that the "floating bubble" feature of the 8-foot zone around a pedestrian is itself a failure of narrow tailoring, I would note the contrast between the operation of subsection (3) and that of the comparable portion of the injunction struck down in *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377–379 (1997), where we observed that the difficulty of administering a floating bubble zone threatened to

burden more speech than necessary. In *Schenck*, the floating bubble was larger (15 feet) and was associated with near-absolute prohibitions on speech. *Ibid.* Since subsection (3) prohibits only 8-foot approaches, however, with the stationary speaker free to speak, the risk is less. Whether floating bubble zones are so inherently difficult to administer that only fixed, no-speech zones (or prohibitions on ambulatory counseling within a fixed zone) should pass muster is an issue neither before us nor well suited to consideration on a facial challenge, cf. *Ward*, 491 U. S., at 794 ("Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority").