NYCLU
NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Testimony of the New York Civil Liberties Union

before

The New York City Council

Committee on Civil Rights

regarding

Access to Reproductive Health Care Facilities Act (Int. No. 826)

November 18, 2008

My name is Ami Sanghvi and I am a Staff Attorney in the Reproductive Rights Project of the New York Civil Liberties Union ("NYCLU"). I would like to thank the Committee on Civil Rights for inviting the NYCLU today to provide testimony relating to the proposed Access to Reproductive Health Care Facilities Act ("Clinic Access Bill").

The NYCLU, the state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with seven state-wide offices and nearly 50,000 members. The NYCLU's mission is to defend and promote the fundamental principles, rights and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York. This includes the rights to privacy, personal autonomy, and equality that are the foundation of reproductive freedom, and the rights to free speech, assembly, and religious liberty embodied in the First Amendment. In light of our long history of vigorously defending and

balancing these sometimes competing constitutional concerns, the NYCLU is uniquely positioned to provide testimony on this bill.

The NYCLU believes that the right to decide whether to continue or terminate a pregnancy is fundamental to women's equality, dignity and personal autonomy. However, we also recognize that issues associated with reproductive health care are controversial. We value and encourage dialogue around those issues, and would contest any unlawful attempt to censor that dialogue. For that reason, the NYCLU has always carefully considered the impact of measures to protect access to reproductive health care facilities and have opposed measures that violate protected free speech rights. We believe that the Clinic Access Bill strikes the appropriate balance between free speech and the right to access reproductive health care.

Despite existing laws at the city, state and federal level which criminalize blocking clinic entrances, various problems have been reported with enforcement. The current city law states that an individual cannot block clinic access or follow or harass someone with the intent to prevent them from receiving reproductive health services. Because of the difficultly in proving intent, the law has rarely been enforced, leaving some reproductive health care facilities vulnerable. Additionally, although the existing laws allow clinics to obtain injunctions against individuals violating the boundaries of the law, small, independent clinics may lack the resources to pursue this option. Therefore, while there is a need to strengthen the existing City law, in order to provide meaningful protection, it is critical that both the Mayor's office and the Police Department focus on adequately training law enforcement and ensuring robust enforcement of the law.

The Clinic Access Bill strengthens the existing law in several key ways. First, it clarifies the law by removing the "intent" requirement and instead makes it unlawful to either

"knowingly" physically obstruct or block another person from entering or exiting the facility or to impede a person's access. Second, the Bill extends protection to driveways and parking lots of the reproductive health care facilities, which more effectively ensures access. Third, the Bill makes it easier for clinics to enforce the law against violators who interfere with their operations or damage their facilities by requiring a showing of interference, rather than the more difficult to interpret previous standard of significant disruption, with clinic operations. Finally, and importantly, the legislation makes it clearer that clinics and their staff, as well as individuals seeking services, may bring criminal as well as civil complaints. This may make enforcement possible in cases where patients may not wish to pursue charges themselves due to privacy concerns, and thus better protects doctors and clinic staff from unlawful violent or threatening behavior.

While it is critical for the government to safeguard access to clinics, it is also necessary to ensure that measures intended to do so do not impinge on protected First Amendment activity. In examining whether a particular measure withstands constitutional scrutiny, the first inquiry is whether a given measure implicates protected speech or expression.[1] Insofar as speech is implicated, a court will determine whether the measure applies "without reference to the content of the regulated speech."[2] If the measure is determined to be content-neutral and merely imposes time, place or manner restrictions, a court will examine whether the provision is narrowly

---

[1] The Supreme Court has rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Yet, the Court has also acknowledged that conduct may be "sufficiently imbued with elements of communication" to be within the scope of the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409-11 (1974).

[2] *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (upholding an injunction establishing a fixed buffer zone around clinic entrances and driveways) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). *See also Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (upholding a content-neutral injunction establishing 15-foot fixed buffer zones outside of reproductive health care facilities on grounds that it was an appropriately tailored method to secure unimpeded access to clinics and forwarded significant governmental interests of ensuring public safety and order, promoting free flow of traffic, protecting property rights, and protecting woman's freedom to seek pregnancy-related services).

tailored to serve a significant government interest, and whether it leaves open "ample alternative channels of communication."[3] We believe that this proposal satisfies this test on all counts.

First, on its face, the primary concern of the provision is conduct, rather than protected speech: it prohibits damaging clinic facilities, physically blocking or impeding access, or engaging in conduct that places another person in reasonable fear of harm.[4] To the degree that the Bill is said to prohibit conduct that has expressive value, such as a peaceful sit-in that "block[s] the premises of a reproductive health care facility, so as to impede access to or from the facility", the provisions still do not run afoul of the Supreme Court's established test regarding First Amendment protections for 'symbolic speech.'[5] Additionally, there is nothing in the proposed Bill that regulates the content of speech or expression. An individual is free to express his or herself, regardless of their views on abortion or reproductive health care, as long

---

[3] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *accord Ward*, 491 U.S. at 791; *Madsen*, 512 U.S. at 790; *Schenck*, 519 U.S. at 369 – 70.

[4] Some of the Clinic Access Bill provisions are similar to the federal Freedom of Access to Clinic Entrances ("FACE") Act and hence primarily proscribe conduct that does not receive First Amendment protection. *See New York ex rel. Spitzer v. Cain*, 273 F.3d 184, n.4 196 (2d Cir. 2001) (noting in determining validity of an injunction granted pursuant to federal FACE provisions that acts of force, threats of force or physical obstruction is behavior can be enjoined pursuant to FACE without offending the First Amendment); *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997) (finding that the federal FACE Act did not violate the First Amendment by either prohibiting conduct that by force or physical obstruction injures, interferes with, or intimidates the provider or recipient of reproductive health care or even by prohibiting speech that amounts to a threat of force that obstructs, injures, intimidates, or interferes with the provider or recipient of health care); *U.S. v. Weslin*, 964 F. Supp. 83, 87 (W.D.N.Y 1997) (finding that the FACE Act "proscribes only a limited number of activities–force, threats, and physical obstruction– none of which are protected by the First Amendment"); *Terry v. Reno*, 101 F.3d 1412, 1418 – 19 (D.C.Cir. 1996) (noting that FACE Act did not violate the First Amendment because the Supreme Court has previously ruled that the government can constitutionally punish all three types of conduct – use of force, threat of force, and physical obstruction) (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (physical assault "is not by any stretch of the imagination" protected conduct); *Madsen*, 512 U.S. 753, 773 (threats are proscribable under First Amendment); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (government may punish physical obstruction that makes passage impossible or unreasonably dangerous)).

[5] The government may regulate 'symbolic speech' if the legislation "further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien*, 391 U.S. at 376 – 77; *see also Scheck*, 519 U.S. at 376 (recognizing the governmental interests of ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services); *Terry v. Reno*, 101 F.3d 1412 at 1419 (finding federal FACE constitutional even if conduct with expressive value is affected because the statute furthers several important government interests including "ensuring access to lawful health services and protecting the constitutional right of women seeking abortions and other pregnancy-related treatment.").

as it is within the confines of the law. To be clear, the proposed legislation does not prohibit prayer vigils, sidewalk counseling, or even leafleting, either within the 15 foot zone or elsewhere.

The only provision of the bill that arguably directly affects protected speech and expression is the prohibition against "following or harassing" a person within 15 feet of the facilities' premises. The term "harass" has been interpreted by New York courts narrowly[6], so as not to implicate protected speech. We believe that this language will continue to be understood according to previous state law interpretations, and thus will not conflict with the First Amendment.[7] To the extent that application of the law might implicate speech, this provision of

---

[6] Harassment provisions in New York State law have consistently been interpreted narrowly and required a showing of intent to harass, annoy, or alarm another person by certain actions. *See e.g.Lewis v. Robinson*, 838 N.Y.S.2d 238 (3d Dept. 2007) (finding that despite a grandmother's reckless disregard for children's emotional welfare, her disparaging comments regarding the father and her exposing the children to violent movies and behavior, an order of protection was not warranted absent a showing of intent to harass the children). Although the law was amended in 1992, *see* N.Y. Penal Law §§ 240.25; 240.26 (McKinney 2008), the subdivisions in the new second degree harassment statute are similar to provisions of the predecessor statute and hence judicial interpretations of the previous statute remain instructive.

[7] N.Y. Penal Law § 240.26 provides in relevant part:

> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person, (1) he or she strikes, shoves, kicks or otherwise subjects such other person to physical contact or attempts or threatens to do the same; or (2) he or she follows a person in or about a public place or places; or (3) he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

N.Y. Penal Law § 240.26 (McKinney 2008). The crux of the first subdivision is the element of actual, attempted, or threatened physical contact or assaultive conduct. *See People v. Bartkow*, 96 N.Y.2d 770 (2001). The Court of Appeals has required "genuine threats of physical harm" along with the requisite mens rea rather than isolated threats interpreted as only "crude outbursts." *See People v. Dietze*, 550 N.Y.S.2d 595, 598 – 99 (1989) (interpreting the predecessor statute). The interpretations of the second subdivision rely heavily on the element of intent to harass, annoy, or alarm, and hence a violation of this section would require more than simply following someone to communicate a message. *See e.g. People v. Mulausky*, 485 N.Y.S.2d 925 (N.Y.C. Ct. 1985) (interpreting the predecessor statute) (finding that defendant's actions of inviting three women walking on the street to accompany him home, while it was annoying, was not criminal because it did not demonstrate defendant's intention to harass, annoy, or alarm the women). Finally, the third subdivision is a catchall provision but requires a "course of conduct" that is not met by evidence of one isolated incident. *See People v. Sirlin*, 2003 WL 22849772 *3 (N.Y. Just. Ct. 2003) (finding that a conviction for harassment in the second-degree could not be supported on facts where the defendant shouted at his neighbor, using obscenities and making threats on a single occasion); *People v. Hogan*, 664 N.Y.S.2d 204 (N.Y.C. Crim. Ct. 1997) (finding that the isolated incidents of defendants yelling and cursing at victims was insufficient to justify a conviction of harassment in the second-degree) *aff'd by* 698 N.Y.S.2d 388 (1998). Moreover, the third subdivision requires that no legitimate purpose is served, and hence would not apply to

the proposed bill is merely a "time, place, or manner" restriction that makes the limits of the existing law clearer and thus allowing for greater ability to protest freely without fear of violation. Moreover while the First Amendment protects speakers, it contemplates a regime in which the targets of speech have an opportunity to avert their eyes or simply walk away. Speakers are not entitled to turn listeners into captive audiences.[8] Thus, while a protestor should be free to approach an individual to convey a message, such a protestor has no inherent right to follow the listener down the street and subject her to a constant harangue after she asks to be left alone. Hence, while protestors have the right to distribute flyers within the 15 foot zone, they do not have a protected First Amendment interest in following and harassing an unwilling person within the 15 foot zone.

Finally, the bill is narrowly tailored to protect a significant government interest. The Supreme Court has recognized important government interests at issue in protecting women and health care staff from violent or threatening behavior.[9] In upholding provisions of injunctions issued on behalf of reproductive health care facilities, the Court has found important governmental interests in ensuring public safety and order; promoting free flow of traffic on streets and sidewalks, protecting property rights and protecting women's freedom to seek pregnancy-related services.[10] Therefore, when the government takes actions to advance these

---

protected protest activity, which is clearly a "legitimate purpose" under the First Amendment. *See Hogan*, 664 N.Y.S.2d at 207 – 08 (noting that even vulgar speech is protected under the state and federal guarantees of free expression unless it presents a clear and present danger of serious substantive evil) (citing *Dietze*, 550 N.Y.S.2d at 597); *see also People v. Valerio*, 468 N.Y.S.2d 100 (1983) (finding that defendant's actions of picketing a union headquarters from across the street and pointing to a union official and in a loud voice calling him corrupt did not constitute harassment under predecessor statute).

[8] *See Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding a ban on political advertising on city buses); *accord* Brief Amicus Curiae of the American Civil Liberties Union, New York Civil Liberties Union, *et al.* in support of Respondents filed in *Schenck v. Pro Choice Network of Western New York* (No. 95-1065) (Supreme Court Of the United States, October Term 1995).

[9] *See* cases cited *supra* note 2.

[10] *Madsen*, 512 U.S. at 767 – 768; *Schenck*, 519 U.S. at 375.

interests, such as through the proposed legislation at issue here, the main inquiry is whether the solution is sufficiently narrowly tailored and leaves open "ample alternative channels of communication."[11]

In answering this question, courts have looked closely at the level and nature of protest activity as it applied to the particular facility or locations at issue.[12] Where clinic access laws or injunctions have been upheld, it has been on an evidentiary record of protestors blocking access to facility entrances, and in many cases, failure of adequate law enforcement response.[13] Conversely, where the record did not reflect such problems, or where the measure was broader than necessary to address what problems did exist, such measures have been struck down in whole or in part.[14]

It is our understanding that certain New York City clinics have faced protest activity that has at times crossed the line between protected speech and violence or obstruction. However, such problems are not City-wide, as they were in the past or as they currently are in other parts of the country. In light of this factual situation, creation of a City-wide, blanket buffer zone prohibiting protest activity would have been inappropriate, as it would sweep more broadly than necessary to address the problems that exist.

The Clinic Access Bill does not take this approach, but rather, leaves open ample opportunities for protesters to express their views. The Bill focuses on conduct rather than

---

[11] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45; *accord Ward*, 491 U.S. at 791; *Madsen*, 512 U.S. at 790; *Schenck*, 519 U.S. at 369 – 70.

[12] *See e.g. U.S. v. Scott*, 187 F.3d 282 (2d Cir. 1999) (upholding a floating buffer zone provision in an injunction because the zone of separation was smaller than the buffer zone provision struck down in *Schenck*, and the record of abusive conduct justified the restriction on speech).

[13] *See Hill v. Colorado*, 530 U.S. 703, 710 (2000); *Schenck*, 519 U.S. at 377 – 84; *Madsen*, 512 U.S. at 769 – 70; *Scott*, 187 F.3d at 288 – 89.

[14] *See Schenck*, 519 U.S. at 377 (striking down a 15 foot "floating" buffer zone around a person or vehicle entering or leaving the clinic on the basis of an insufficient record to support the restriction); *Madsen*, 512 U.S. at 771, 774 – 775 (striking down an injunction imposing a 300 foot "no approach" zone around the clinic and around clinic staff's residences as well as a 36 foot buffer zone on private property because the record did not support such provisions).

speech. Peaceful protest activity is permitted anywhere. Where a situation at a particular facility would warrant broader injunctive relief, the law permits that clinic to initiate civil proceedings to obtain an appropriately tailored injunction. The Clinic Access Bill thus successfully creates a solution that is narrowly tailored to resolve the problems that exist on the ground with access to New York City clinics.

In conclusion, it is the opinion and testimony of the NYCLU that the Bill will improve the City's ability to safeguard women's access to reproductive health care services and to protect the health care providers who deliver that vital care. It also adequately balances this important goal with the rights of individuals to engage in peaceful protest. It is thus a welcome step forward in fulfilling the City's mission to protect access to health care services, while respecting the diversity of views of all of the people of the City of New York.