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SUPERIOR COURT OF THE STATE OF WASHINGTON
SPOKANE COUNTY

PLANNED PARENTHOOD OF GREATER WASHINGTON AND NORTHERN IDAHO,

Plaintiff,

v.

COVENANT CHURCH & COVENANT CHRISTIAN SCHOOL; KEN PETERS; REPRESENTATIVE MATTHEW SHEA; CLAY ROY; GABRIEL BLOMGREN; AND SETH HABERMAN,

Defendants.

NO. 20-2-01703-32

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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I. INTRODUCTION

The State of Washington protects its residents' access to health care services and facilities. *See* RCW 9A.50.020 (The Interference with Health Care Facilities or Providers Act of 1993) (the 1993 Act). At the same time, Washington also protects residents' First Amendment freedoms to gather, worship, and protest in public forums.

The Attorney General has a strong interest in ensuring that all of these rights are protected and enforced in Washington. For this reason, the Attorney General's Office submits this amicus brief to provide its perspective on the purpose of RCW 9A.50.020; the critical role of courts and law enforcement to enforce that law; and the proper method of analysis to determine which enforcement measures appropriately balance these rights.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Planned Parenthood of Greater Washington and Northern Idaho (Planned Parenthood) is a health center in Spokane that provides health care services to members of the Spokane community. On June 23, 2020, Planned Parenthood filed a Complaint for Injunctive Relief and Damages, and on August 28, 2020, filed a Motion for Preliminary Injunction, seeking enforcement of RCW 9A.50.020 and seeking to enjoin Defendants from protesting on the right of way in front of the Planned Parenthood facility, and having protests relocated to an area across the street or an area at least thirty-five feet from the wall of Planned Parenthood.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General is the legal adviser to the State of Washington. RCW 43.10.030. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195, 199 (1978).

The Attorney General has an interest in protecting the public interest, including the right of all Washingtonians to seek or obtain health care free from unlawful disturbance, obstruction, or threat. *See* RCW 9A.50.005 ("[S]eeking or obtaining health care is fundamental to public

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health and safety.") The Attorney General also has a strong interest in ensuring that Washingtonians are able to exercise their constitutionally protected rights to gather, worship, and protest in public. U.S. Const. amend. I. In instances where these rights may overlap, such as the matter at hand, the Attorney General has a strong interest in ensuring the correct interpretation of state laws. *See City of Seattle v. McKenna*, 172 Wn.2d 551, 562, 259 P.3d 1087, 1092 (2011) (Attorney General's "powers and duties include "discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern") (internal quotation marks omitted). Because this case concerns multiple crucial interests that are, at times, in tension, the Attorney General offers this brief to assist the Court in considering whether injunctive relief may balance the statutory and constitutional rights of the parties.

IV. ISSUE ADDRESSED BY AMICUS

How the Court should apply the Interference with Health Care Facilities or Providers Act of 1993, codified at RCW 9A.50, which provides that it is unlawful for any person or group to "willfully or recklessly disrupt the normal functioning" of a health care facility by creating noise that "unreasonably disturbs the peace" within the clinic, to prohibit actions that disrupt the functioning of healthcare facilities while respecting First amendment rights.

V. LEGAL ARGUMENT

The Legislature enacted the 1993 Act to ensure patients' access to health care facilities, including to seek abortion-related health care given the increasing presence of protestors. In recognition of First Amendment rights to free speech, the 1993 Act set forth reasonable time, place, and manner restrictions to protect a significant government interest—access to health care. Specifically, it prohibited any person from "willfully or recklessly disrupt[ing] the normal functioning" of a health care facility. RCW 9A.50.020. In considering Plaintiff's motion for a preliminary injunction, the Court should consider this health care context and craft content-neutral relief that is narrowly tailored to the significant government interest and recognizes the ample alternative forums available for speech.

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A. The Legislature Enacted RCW 9A.50.020 to Empower Courts to Protect Patients' Access to Health Care Facilities

The Washington State Legislature enacted the Interference with Health Care Facilities or Providers Act of 1993 to provide broad protections to health care access for all Washingtonians. Under the 1993 Act, it is unlawful for any person or group to "willfully or recklessly disrupt the normal functioning" of a health care facility by:

1. Physically obstructing or impeding the free passage of a person seeking to enter or depart from the facility;
2. Making noise that unreasonably disturbs the peace within the facility;
3. Trespassing on the facility or common areas of real property upon which the facility is located;
4. Telephoning the facility repeatedly; or
5. Threatening to inflict injury on the owners, agents, patients, employees or property owners.

RCW 9A.50.020.

To ensure that these measures are enforced, the 1993 Act specifically empowers courts to intervene where access to health care is threatened. *See* RCW 9A.50.040(2) ("The superior courts of this state shall have authority to grant temporary, preliminary, and permanent injunctive relief to enjoin violations of this chapter."). The Act also directs law enforcement to enforce the provisions of those injunctions. *Id*. ("The state and its political subdivisions shall cooperate in the enforcement of court injunctions that seek to protect against acts prohibited by this chapter.")

The history behind RCW 9A.50.020 clearly indicates that the Legislature intended to protect patients' access to health care where that access was impeded by protests. *See* H.B. Rep. on H.B. 1338, at 1, 53rd Leg., Reg. Sess. (Wash. 1993) (providing the following "Background" for the law: "In recent years, contentious and sometimes long-running demonstrations have been conducted… at facilities that perform abortions."). The House Bill Report explained that these demonstrations sometimes "led to physical confrontations" between protesters and patients, and that the demonstrations "have sometimes seriously threatened the health of patients." *Id* at 2.

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The 1993 Act's history also clearly shows that the Legislature understood that the law's restrictions (i.e., prohibiting demonstrators from making noise that "unreasonably disturbs the peace") implicated Washingtonians' First Amendment freedoms to gather, worship, and protest in public forums. *Id*. (assuring that "[t]he bill will not prevent peaceful demonstrations."). The Legislature pointed to *Bering v. SHARE*, 106 Wn.2d 212, 721 P.2d 918 (1986)—in which the Washington Supreme Court upheld an injunction that prohibited protesters from picketing outside an abortion-providing facility, threatening or intimidating anyone entering or exiting the facility, and engaging in other conduct – for the proposition that "these restrictions on First Amendment rights of speech were justified by the state's compelling interest in assuring reasonable access to health care for its citizens." *Id.*

As a whole, the legislative history indicates that the Legislature (1) intended for 9A.50.020 to protect patients' access to health care facilities against interference by protesters; (2) understood that these measures may implicate First Amendment freedoms; and (3) nonetheless empowered courts and police to enforce the state law in such a way that protected patients' access to health care without infringing upon First Amendment rights.

B. The First Amendment Protects Speech; But Does Not Foreclose Reasonable Limits on the Volume and Location of Speech

"The rights of free speech and peaceable assembly are fundamental rights which are safeguarded against State interference by the due process clause of the Fourteenth Amendment." *Bering*, 106 Wn.2d at 221,721 P.2d at 924-25. Picketing, protesting, and demonstrating are all expressive speech activities that merit protection under the First and Fourteenth Amendments, and streets and sidewalks are considered "public forums" to exercise those protected activities. *Id* at 221-22, 721 P.2d at 925. "Nevertheless, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Id*. at 222, 721 P.2d at 925 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2564, 69 L. Ed. 2d 298 (1981) (internal quotation marks omitted)).

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Instead, "[a] state may impose reasonable time, place and manner restrictions upon all expression"—even in public forums—provided that the restrictions are necessary to serve "a significant government interest." *Id*.

As such, many provisions of state and municipal law impose penalties for unreasonable disruption, interference, or noise in specific circumstances. *See, e.g.,* RCW 9A.84.030(1)(b)(disorderly conduct to "[i]ntentionally disrupt[s]" an assembly or meeting); RCW 9A.84.030(1)(d)(i) (unlawful to make "unreasonable noise" at sensitive locations like funerals); RCW 9.08.080-.090 (prohibiting conduct that "substantially disrupt[s]" animal research facilities); RCW 9.66.010-.030 (illegal to "annoy, injure or endanger" the health or repose of a group of persons or to "offend public decency"); Spokane Mun. Code (SMC) 10.08D.050 (unlawful to make sound in excess of specified levels); SMC 10.08D.030, 10.08D.090 (defining and prohibiting "public disturbance noise" and "unreasonable sound"). Local law enforcement officers regularly enforce laws when speakers unreasonably disrupt others and violate noise ordinances and other state and municipal laws.

Courts also routinely uphold ordinances or grant injunctive relief to enforce noise restrictions—even where those restrictions impact demonstrators' ability to protest in traditional public forums. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772, 114 S. Ct. 2516, 2528, 129 L. Ed. 2d 593 (1994) (upholding an injunction that imposed noise restrictions on demonstrators outside an abortion clinic because "[n]oise control is particularly important around hospitals and medical facilities during surgery and recovery periods"); *Grayned v. City of Rockford*, 408 U.S. 104, 117, 92 S. Ct. 2294, 2304, 33 L. Ed. 2d 222 (1972) (upholding noise restrictions on protesters outside public schools); *Bering*, 106 Wn.2d at 221, 721 P.2d at 924 (upholding an injunction that imposed noise restrictions on protesters outside an abortion-providing facility); *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 366, 371 (1988) (upholding a city ordinance prohibiting disruptive noise on buses and noting that "restrictions on the *volume* of speech do not necessarily violate the First Amendment"). Each of these decisions clearly

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indicates that First Amendment freedoms are *not* absolute, that courts are capable of determining whether noise restrictions unduly burden First Amendment freedoms, and that courts are empowered to enforce those restrictions.

C. A State May Impose Reasonable Time, Place and Manner Restrictions on Speech if Necessary to Serve a Significant Government Interest Such As Protecting Access to Health Care

Both the Washington State Supreme Court and the Legislature have confirmed that protecting Washingtonians' right to access health care is a significant government interest. *See Bering*, 106 Wn.2d at 225, 721 P.2d at 927 (holding that the state has a "substantial interest in ensuring its citizens unimpeded access to necessary medical care"); RCW 9A.50.005 (establishing that "seeking or obtaining health care is fundamental to public health and safety"). Washington precedent and RCW 9A.50.020 both empower this Court to take action that protects *both* the State's interest in upholding First Amendment rights and Washingtonians' right to access health care.

1. The Court May Protect Washingtonians' Right to Access Health Care from Activities that "Unreasonably Disturb the Peace" Within the Health Care Facility

Washington courts construe the words of a statute—here, the prohibition on noise that "unreasonably disturbs the peace" within a health care facility—using "common sense" and give those words their "ordinary, everyday meaning." *State v. Dixon*, 78 Wn.2d 796, 787, 804, 479 P.2d 931, 932, 936 (1971). To determine whether a disturbance is "unreasonable," the Court must consider the particular context of the activities disturbed—here, the normal, routine activities that occur inside a medical facility. *See Eze*, 111 Wn.2d at 29, 759 P.2d at 369. Here, the normal activities would include examining patients, counseling patients, conducting tests, performing medical procedures, discussing diagnoses and options with patients and their families, coordinating patient services among co-workers, using the telephone to handle appointments and deliver test results, and performing various daily tasks that require concentration such as interpreting test results, reviewing relevant medical guidelines, and

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updating charts. *See Bering*, 106 Wn.2d at 216, 721 P.2d at 922. This is the context in which any noise-related disturbances should be analyzed. *See Grayned*, 408 U.S. at 112, 92 S. Ct. at 2301 (analyzing "a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school").

This Court need not determine whether TCAPP's activities would unreasonably disturb the peace in some other context, such as a public park far from a medical facility. Rather, this Court needs to determine whether TCAPP's amplified protests might "unreasonably disturb" a patient receiving reproductive care, cancer screenings, or other health care services on the other side of the wall.

2. If the Court Finds that TCAPP's Activities "Unreasonably Disturb the Peace" Within the Facility, the Court Should Grant Injunctive Relief

If the Court finds that TCAPP's activities "unreasonably disturb the peace within the facility," then the Court's injunctive relief must be crafted to meet three requirements: it must be content neutral, narrowly-tailored to serve the significant government interest at issue, and recognize the ample alternative forums for expressive speech.

First, the Court's injunctive relief must be content-neutral. *See Bering*, 106 Wn.2d at 222, 721 P.2d at 952 (citing *Heffron*, 452 U.S. at 648, 101 S. Ct. at 2564) (holding that restrictions of freedom of speech "may not be based upon either the content or the subject matter of the speech"). In *Ward v. Rock Against Racism*, the Supreme Court explained that "[a] regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S. Ct. 925, 929-30, 89 L. Ed. 2d 29 (1986)). "Government regulation of expressive activity is content-neutral so long as it is *justified* without reference to the content of the regulated speech." *Id*. (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221 (1984) (internal quotation marks omitted).

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For example, in the *Bering* case the trial court ordered an injunction to block protesters from demonstrating on the public sidewalk outside a medical clinic; threatening anyone entering or leaving the clinic; and interfering with patients' entrance to the clinic, among other restrictions. *See* 106 Wn.2d at 219, 721 P.2d at 923. The trial court justified these restrictions on the factual grounds that (1) the picketers had obstructed access to the facility by physically blocking the sidewalk/pathway leading to the entrance; and (2) the "aggressive, disorderly, and coercive" nature of the picketing and "counseling" created a substantial risk of physical and mental harm to physicians, patients and visitors." *Id*. at 222-23, 721 P.2d at 925. The Washington Supreme Court upheld the injunction as content-neutral because "the picketers' *conduct* had given rise to a clear and present danger to patients and physicians, and the picketers' *conduct* was incompatible with the character and function of the facility." *Id*. at 223, 721 P.2d at 925. The restrictions were permissible because they "clearly [were] not related to the content of picketer's speech, but rather to the way in which they conducted themselves at the picket site." *Id*. *See also Ward*, 491 U.S. at 792, 109 S. Ct. at 2754 (upholding a city guideline which required an anti-racist advocacy group to use the city's sound equipment for its outdoor performances as content-neutral because "[t]he principal justification for the sound-amplification guideline is the city's desire to control noise levels… to avoid undue intrusion into residential areas," which has "nothing to do with content"); *Madsen*, 512 U.S. at 764, 114 S. Ct. at 2524 (upholding an injunction that restricted antiabortion protesters from blocking patients' entrance to a clinic because the protesters' *conduct* impeded access to health care). Here, the Court's inquiry must be whether the noise of TCAPP's protesters, loudspeakers, amplifiers, and microphones, aimed directly at the patient exam rooms of a reproductive health care facility, still "unreasonably disturb" the clinic's functioning if TCAPP were expressing any other message? If so, the Court should order injunctive relief to enforce RCW 9A.50.020.

Second, any injunctive relief issued should be narrowly tailored to allow the facility to function normally. Restrictions on First Amendment freedoms are permissible provided that they

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are "narrowly tailored to serve a significant government interest." *Bering*, 106 Wn.2d at 222, 721 P.2d at 918 (quoting *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 1707, 75 L. Ed. 2d 736 (1983)). Here, the significant government interest is in protecting Washingtonians' right to access health care. The Supreme Court established the "narrowly tailored" standard in *Ward*, holding that relief "must be narrowly tailored to serve the government's legitimate, content-neutral interests but *that it need not be the least restrictive or least intrusive means of doing so*." 491 U.S. at 798-99, 109 S. Ct. at 2757-58 (emphasis added). Instead, 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." *Id*. at 799, 109 S. Ct. at 2758 (citing *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536 (1985)). A restriction on protected speech activities "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id*. at 800, 109 S. Ct. at 2758.

For example, in *Madsen*, the Supreme Court upheld noise restrictions that restrained protesters from shouting and using bullhorns and sound amplification equipment during a clinic's working hours. 512 U.S. at 772, 114 S. Ct. at 2528. The Court reasoned that:

> Noise control is particularly important around hospitals and medical facilities . . . where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family… need a restful [and] helpful atmosphere.

Id. (citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783 n.12, 99 S. Ct. 2598, 2604 n.12, 61 L. Ed. 2d 251 (1979)). For this reason, the Court held that the court-ordered noise restrictions "burden[ed] no more speech than necessary to ensure the health and well-being of the patients," and furthermore that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id*. at 772-73, 114 S. Ct. at 2528. Instead, "[i]f overamplified loudspeakers assault the citizenry,

[courts] may turn them down." *Id*. at 773, 114 S. Ct. at 2528 (citing *Grayned*, 408 U.S. at 116, 92 S. Ct. at 2303).

Third, the Court should ensure that any injunctive relief it issues leaves in place ample "alternative forums" for TCAPP's protected speech. *Bering*, 106 Wn.2d at 232, 721 P.2d at 930. In *Bering*, the Court upheld a lower court's injunction (which required protesters to remain across the street, away from the entrance and the sidewalk leading up to the clinic) in part because "the injunction does not prevent [the protestors] from picketing anywhere in the city, except upon a limited stretch of sidewalk[.]" *Id*. Critically, the First Amendment does not guarantee anyone "the right to a captive audience, but rather the opportunity to win the attention of passerby and engage them in conversation if the latter so desire." *Id*. As long as an enjoined party retains the ability to express his message in alternative forums, the injunction does not unduly burden his First Amendment freedoms. *Id*. *See also Ward*, 491 U.S. at 802, 109 S. Ct. at 2760 ("That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.").

VI. CONCLUSION

The Attorney General respectfully requests that the Court construe and apply the law protecting access to health care services and facilities with the principles and authorities discussed above.

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DATED this 9th day of September 2020.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
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PLANNED PARENTHOOD OF GREATER WASHINGTON AND NORTHERN IDAHO, Plaintiff, v. COVENANT CHURCH & COVENANT CHRISTIAN SCHOOL; KEN PETERS; REPRESENTATIVE MATTHEW SHEA; CLAY ROY; GABRIEL BLOMGREN; AND SETH HABERMAN, Defendants.	NO. 20-2-01703-32 DECLARATION PURSUANT TO GR 17(a)(2)

I, Bonnie Patey, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct.

1. I am an Office Assistant for the Attorney General's Office. I make this Declaration based on my own personal knowledge. I am competent to testify to the facts stated herein.

2. This Declaration is filed in accordance with GR 17(a)(2).

3. On the 9th of September, 2020, I received the Amicus Curiae Brief of the Attorney General by electronic mail, from Legal Assistant Allie Lard of the Civil Rights Division of the Attorney General's Office. I have examined the document, which consists of eighteen (18) pages including this Declaration.

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4. The foregoing document is a complete and legible facsimile transmitted original signed by Assistant Attorney General Ashley McDowell.

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