ORAL ARGUMENT — 12/2/97
97-0171
OPERATION RESCUE, ET AL V. PLANNED PARENTHOOD OF HOUSTON & SOUTHWEST TEXAS, ET AL.

BULL: This case has been before this court once before in *Ex Parte Tucci*. As the court may be aware, the circumstances giving rise to this case occurred during the 1992 Republican convention in Houston in which the defendants and others attempted to influence the Republican platform on the abortion issue by engaging in demonstration protests both around the convention cite and also outside of abortion facilities around the Houston area.

In *Tucci,* this court struck down the first total speech ban adopted by the court in its temporary restraining order. The present no-speech zone, which is before the court, entered by the court 2½ years after the Republican convention is unconstitutional for all of the same reasons set forth in *Tucci* that resulted in invalidation of the first no-speech injunction.

There were five discreet and separate reasons under *Tucci* why this no-speech zone cannot pass muster. First, there was no proof as required by *Tucci,* that a total ban on speech is the least restrictive means of preventing irreparable and imminent injury. In fact, during the equity hearing below, the plaintiff's own expert witness a psychologist, Dr. Taggart, testified that banning all speech on public sidewalks outside of these abortion facilities was not necessary to ensure access, to prevent harassment and to prevent intimidation. The second reason under *Tucci* that it's unconstitutional under the Texas Free Speech provision is that no proof was adduced below as required by *Tucci* that the specific dimensions of the no-speech zones are the least restrictive means of preventing irreparable and imminent injury. In fact, there was no evidence below as to how the specific dimensions of these no-speech zones were developed.

BAKER: Could we infer that since they are all less than what *Madsen* said was all right that that's the reason why those particular zones were picked?

BULL: The *Madsen* zone like the *Schenck* zone is fact specific. The SC was clear in both of these cases as this was in *Tucci*, that a no-speech buffer can be supported by a factual record so long as there is evidence in the record, as discussed in *Tucci,* that the specific buffer is the least restrictive means to protect access. My point is that there was no evidence supporting that particular issue. We don't know anything about how these particular dimensions were developed. Basically we're left to guess whether or not a less restrictive, a smaller buffer zone might accomplish the governmental interest here.

HANKINSON: How did these particular dimensions then end up as part of the injunctive order?

BULL: At the equity hearing, after the jury trial, the attorneys for the abortion facilities submitted a proposed order and they were adopted by the court.

HANKINSON: And is that the first the court heard of those dimensions, or the first that the petitioners heard of those dimensions?

BULL: Yes. The third reason this it's unconstitutional under *Tucci* is that there was no evidence below proving that an injunction against obstruction, interference, trespassing and touching wouldn't be adequate to guarantee and assure access. In other words, again it's related to the first two points, there was no evidence that a specific injunction, which is not challenged in our appeal, which enjoins obstruction, trespassing, touching and similar activity would not be adequate to assure unobstructive access to these facilities. None. The fourth point, and the reason it's unconstitutional is that there were no specific findings of fact supported by the evidence in the TC's injunctive order that a total ban on speech was the least restrictive means to ensure access and prevent obstruction. Now why are findings of fact important? Findings of fact are necessary so that an appellate court can test the findings of fact against the record to determine if indeed the record will support this kind of restriction on free speech. Without specific findings of fact discussing the evidence demonstrating that a total speech ban is the least restrictive means to ensure access, we are left to guess on appeal.

Now there was a heading in the order entitled *Findings of Fact*. But if you read them you will see that they were conclusory and there were no facts set forth under the heading *Findings of Fact* that could be tested against the record, so that this court on appeal could determine whether or not the total speech ban was the least restrictive means. And I submit to you in relation to this reason No. 4, that this court and the Texas CAs have held that only the TC can enter findings of fact. An appellate court can undo findings of fact, but findings of fact are the exclusive province of the TC. And in this case this court set a road map for the TC in *Tucci* that the court below did not adequately follow.

ENOCH: Assuming that the buffer zones are permitted, and accepting that the US SC has held certain distances are permitted, this is less than that, what evidence would you expect the TC to have to determine what these buffer zones ought to be? What's less restrictive than say 31 feet or 15 feet or 13 feet?

BULL: There has to be something in the record. Some kind of proof in the record showing that the ban on obstruction, that a ban on trespassing and intimidation and touching was inadequate. It's a threshold matter. Second, there has to be some testimony. As I read *Tucci*, there has to be some evidence in the record showing that the dimensions picked by the court were in fact the least restrictive dimensions, and it could come by way of extra testimony of an expert on proxemics, which was lacking here. Police officers could testify that they need this kind of buffer in order to guarantee unimpeded access. There was none of that here. In fact, their own witness testified that banning all speech on any of the sidewalks was not necessary. Why wasn't it adequate

just to ban speech if you are going to ban it all outside of the entrances and exists of these facilities? At the Planned Parenthood facility this buffer banned speech virtually the entire half block going 15 feet out into the middle of the road, it even bans the defendant's attorney's ____ from driving through.

ENOCH: The facts that were decided by the CA are not facts that are in the record then?

BULL: I would say not. I would say the CA, with all due respect to them, essentially adopted the factual allegations of my opponents.

ENOCH: As an example, it cites one clinic and described its buffer was 31 feet, but that was because there was not a private drive. In order to have access and egress from this facility it needed 31 feet. Where did that come from?

BULL: Assuming that's true, assuming the CA was correct, that came from their brief. It was not the profit of the CA to develop that.

ENOCH: My question is, that's what the CA says. Now they might have gotten it from the brief. Your point is, no evidence was testified to, no maps were introduced at the time of trial or anything...

BULL: Maps were introduced by Planned Parenthood. But there was no evidence supporting this particular line as opposed to a narrower buffer zone is what I'm saying. No evidence at all.

ENOCH: So your point is that it is not sufficient for a plaintiff to come in and say: Here's the facility, here's what we think is necessary. And the court measured that against a constitutional standard of least restrictive. It's your position that there must be a factual development of least restrictive?

BULL: I think so.

ENOCH: So the constitutional standard of least restrictive is really a fact issue for the jury to determine?

BULL: I think it's an equity issue. Whether it's a fact issue for the jury or fact issue for the court on the equity issue, there has to be some evidence before the fact finder supporting the specific line that's recommended by the abortion facility.

ENOCH: Whether it's a fact issue for the jury or a decision for the judge, under the constitutional standard of least restrictive, can't the court simply look at what the evidence is about: here's the buffer zone that we think is necessary. Can't the TC make a determination from the situs

from what the court sees that that meets the constitutional standard of least restrictive without there being a witness on the witness stand saying: In their opinion, that's least restrictive?

BULL: Whether it's opinion testimony or fact testimony there has to be, as I read *Tucci*, and based upon the higher standard under the Texas Constitution for Free Speech protection, they have to fill the gap. There has to be some specific testimony or evidence adduced at trial supporting the court's conclusion that the no-speech buffer, the dimensions, are the least restrictive means to ensure access. Some evidence addressing that issue as I read *Tucci*.

GONZALEZ: Are you making the same arguments to the injunction on the residences?

BULL: With respect to residences, I think that certainly the same standard applies. There was no evidence adduced in the court, and there were no findings of facts supported by the evidence that banning all speech 13 feet out into a public street is the least restrictive means.

Now we know under *Frisby v. Schultz* and under several courts decided in Texas, that a ban on speech in front of a private residence, at least picketing anyway, is permissible so long as there's an adequate record here. The problem with this case is that the ban extending 13 feet out in the middle of the street bans generalized marching or picketing through an entire neighborhood. It doesn't specifically target picketing occurring directly in front of a house. In other words, it essentially requires people to go up to that no-speech zone, turn around and march back. But essentially it's the same standard. I grant you, the court is more protective of the privacy rights at a private residence, certainly if it is a commercial business.

The fifth reason this injunction is unconstitutional under art. 1, §8 of the Texas Constitution, and this fifth reason alone should be grounds for striking down this buffer provision. The TC did not find in its order imminent harm nor did it find irreparable injury, both required by *Tucci,* and all of the injunction cases impacting free speech in Texas. If you read the order closely, you will see that the TC only found that the defendants were "likely to engage in demonstration protests," and that if they did, that it was likely to cause irreparable injury. Whatever "likely" means in an area where we are banning free speech does not rise to the level of imminent harm and irreparable injury.

HECHT: Regarding the injunction against obstruction. Why wouldn't the TC be concerned that that is so general in the ban that it would be difficult to enforce by content and that it would be better to have a zone so that everybody knew where the lines were?

BULL: The court could conclude that if it had something to conclude it on. There is no proof below that the injunction against obstruction was not adequate especially not in the fact that 99% of the complaint misconduct here occurred in August of 1992 at the Republican convention. As I read *Tucci*, I've read it a dozen times in preparation for this argument, there must be some evidence for the court to conclude, which the court didn't here, that this particular ban on speech is

the least restrictive means available to ensure access. We're left to guess whether or not a narrower ban or buffer zone might have been adequate, or as the court points out, maybe the ban on obstruction might have been adequate. We don't know. A good example in terms of factual development would be to go back and look at the state court decision in the *Madsen* case in Florida, and in the federal district court decision in *Schenck*, and look at the kind of factual development that was adduced in those opinions to support the buffer zones there. There was no guessing there. All we have here on this order as it comes up is a no-speech zone that is sort of floating in the air without legs. We don't know how it was developed.

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RESPONDENT

PEDDIE: In granting the portions of this petition for review this court has undertaken to decide two very basic questions. First, did the TC make or can this court presume findings sufficient under the US and Texas constitutions to justify the narrowly tailored restrictions on petitioners' right of free speech imposed here? And, second, was there any evidence to support these findings? Fortunately, both of these questions can easily be decided in favor of the respondents.

Now even though the petitioners allege that there were no findings of least restrictive mean and all sorts of other things, not even the petitioners can deny that the TC made detailed findings of fact and conclusions of law, which include the determination that "narrowly tailored relief will serve several significant governmental interests," which include: ensuring clinic access, protecting the plaintiff physician's privacy rights, and "ensuring that competing constitutional rights of groups with different view points and interests are balanced equitably."

GONZALEZ: It's likely to cause harm, the standard?

PEDDIE: The ordinary injunctive standards apply and where there is a constitutional violation, which the court specifically found here that they threatened the constitutional privacy rights of the physicians and the clinic, irreparable harm is presumed.

ABBOTT: If I understand the argument you're making right now, you're talking about the fact findings that were made by the TC. My question is, are we obligated to abide by those fact findings if they are not supported by evidence adduced at trial?

PEDDIE: If they are not supported by evidence, which we obviously do contend that they are supported by more than _____ evidence, the court need not be bound by them. They can make their own determination. But the standard is extremely high. This court has no jurisdiction to weigh the evidence as I believe the petitioners really would have this court do. Instead, it has a very narrow ability to review no evidence points. I think, as we've suggested in our brief, the court really cannot do that here. First, because the jury found against the defendants, and second, because both the TC and the appellate court held that evidence supports the judgment. So in this case any claim

of evidentiary sufficiency even if it's couched in terms of a no evidence point presents only a question of fact, and this court really has no jurisdiction to hear it.

HECHT: It's very easy looking at this to see an effort by a trial judge to balance everybody's interests, but where do we see that this is the least restrictive means of doing it?

PEDDIE: I think that the court answered the question in the only logical way that it could, and that was to approach it by saying, "What do we need to do to protect the competing constitutional right?" Here, the right to privacy. And the court indicated that the narrowly tailored relief that it had would ensure clinic access and protect the rights, and this was what was necessary to ensure the protection of those rights.

What the petitioners would have trial courts do, and I suggest that this would create a nightmare in the TCs, is start with a universe of restrictions and whittle those down. They would engage in the kind of analysis that we used to refer to as "determining how many angels can dance on a head of a pin." If there is 13 feet, why not 12-½? If there is 10 feet, why not 9-½? The court in *Madsen* and the court in *Schenck* said that the appellate court should not engage in that analysis. Let me read you two quotes from *Madsen*: "The need for a complete buffer zone near clinic entrances and driveways may be debatable, but some deference must be given the state courts' familiarity with the facts and the background of dispute between the parties." Second, under *Schenck*, the case in which Mr. Bull participated, the court explained: "Although one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access, we defer to the TC's reasonable assessment of the number of feet necessary to keep the entrances clear." So it is not required of a TC that every type of restriction be eliminated and evidence be presented as to why those aren't enough.

HECHT: But if a TC said on the record, "I think 10 feet would probably do it, but just out of an abundance of caution, I think I will go with 30, which is closer to the SC cases," wouldn't that show that the TC did not adopt the least restrictive means?

PEDDIE: If there was evidence to support it, I think that's correct. That's not the case in this case or anywhere else.

HECHT: The problem in this case is, we don't see the TC saying to itself, "I agree with you, we shouldn't be asking is 9-1/2 better than 10, but somebody should ask that question."

PEDDIE: That's correct. What the court did here, and I'm quite surprised that the petitioners have really suggested that it was provided after the fact, was conduct an evidentiary hearing that explained in detail why the certain distances were chosen, why they were necessary. There was evidence from a second psychological expert that indicated that a total ban was appropriate. Mr. Bull has picked out one particular piece of expert testimony. There was an enormous amount of evidence. And second, and I think most importantly, the petitioners stipulated

to the evidence as to how these were configured, that signs could be seen outside of the buffer zone, and all of the types of evidence that the court in *Madsen* required. So the TC here, I believe, attempted to satisfy itself that what it was doing was providing the means necessary to protect the constitutional right, which is simply another way of saying, that we can't do anything less than that, and so we must have this restriction and this restriction alone, and that's where the court struck the constitutional balance. It didn't start from the top and work down. It started from the bottom and worked up.

ENOCH: It's possible that someone needs to determine what the facility is, or the size of the facility, or maybe where the driveway is, or that sort of thing. But is it really a factual inquiry on the least restrictive, or is that not a constitutional inquiry that this court can make as well as any other court can make to the least restrictive?

PEDDIE: I believe that it almost has to be a constitutional inquiry.

ENOCH: If this court determines that 10 feet was least restrictive based on the record that's before the court in terms of the size of the facility, or what the events were, is this court bound by the TC's conclusion that 15 feet was the least restrictive?

PEDDIE: Under *Madsen* and under *Schenck*, the court really shouldn't engage in that analysis, because it wasn't there, it didn't hear the evidence of the case.

ENOCH: But should the court simply say, "We're not going to _____ so finely over a 1-½ feet or 2-½ feet." The question is, least restrictive, and is this within the bounds of least restrictive? Isn't that what *Madsen* is really saying?

PEDDIE: The *Madsen* test is not least restrictive means. It burdens no more speech than necessary to protect a significant governmental interest. Now, the CA has suggested that that's the same standard, but I think that it really is one that is based on the TC's determination of the evidentiary sufficiency. It has looked at all the evidence in this case, not just the evidence at a remedies hearing.

ENOCH: The TC's decision of least restrictive would not be dependent on some expert or some party or some witness testifying at the TC that this is least restrictive? It wouldn't be bound to rely on that kind of testimony would it?

PEDDIE: The TC is required to strike a constitutional balance. What this court did, it didn't use the magic word, which is I think all the petitioners require here, it simply said, that the specific restrictions that it had were necessary to ensure clinic access, which is a way of saying, that we must have all of these things in order to protect the constitutional right. I suggest, that that places the court squarely at the same level of constitutional protection that it would get if it engaged in the unbelievably complex constitutional analysis and proxemics analysis the petitioners would urge.

Again, it's starting at the bottom and working its way up. And if there is evidence to support that, then I believe that this court given its jurisdictional restrictions has to abide by that. It can make a separate constitutional determination, but its ability to work with the facts in that case I think is limited both by *Madsen* and by the jurisdictional...

OWEN: What about the fact that the injunctions in some instances extend 15 feet into public streets?

PEDDIE: There was evidence in this case that the petitioners had blocked cars coming to and from residences and to and from clinics. And as a result, there was evidence that there was a need to have some vehicle access to the clinics and to the residences. There was also testimony that basically 15 feet was one lane of traffic. And that's how those were arrived at. And that I believe was stipulated to by the petitioners here.

HANKINSON: Do I take it by your comment that you disagreed with the CA that the *Madsen* balancing test and the least restrictive means test that was pronounced in the *Tucci* plurality opinion are not the same, or do you think that they are the functional equivalence?

PEDDIE: I think the CA has said that they are the functional equivalent. I would argue, however, that the tests set forth in *Tucci* doesn't apply here, or ought not apply here. Because it deals with a temporary restraining order where this case involved a jury trial. And the court, I believe, in its opinion actually made that distinction, and noted that there was a limited record as there always is in a temporary restraining order. What we would argue is that Justice Gonzalez's dissent in *Valenzuela v. Aquino* and the standard enunciated there ought to apply because that case involved a jury trial and a determination of liability not a suggestion that there was probably liability, but an absolute finding of liability. And in that case, he would have supported a 400 foot ban on protests, because it "represents as narrowly tailored a remedy as possible in balancing the right to privacy and the right to free speech," which is precisely the language that the court used here. We believe that that's a more appropriate test in Texas.

BAKER: Was the two-day hearing on the equity part a jury trial or to the court?

PEDDIE: There was a six-week jury trial in this case, and then there was a separate two-day remedies hearing that included evidence that the jury really didn't need to hear because it wasn't going to participate in the injunction.

BAKER: But wasn't that hearing directed to the type of the injunction and the extent of the buffer zone?

PEDDIE: That's correct.

BAKER: So we don't have a jury finding there?

PEDDIE: No, we do not have jury findings as to the...

BAKER: We have what the court said in its findings of fact?

PEDDIE: That's correct.

HECHT: What is the response to the argument that an injunction against obstruction generally would have been sufficient, and would have been less restrictive?

PEDDIE: First is, that the *Madsen* and *Schenck* cases permit a total ban on speech under the circumstances that are strikingly similar to the fact situation here. In fact, if the court looks at the findings of fact and the evidence in *Madsen* and the *Tucci* cases and puts it side-by-side with the evidence in the findings of fact in this case, it will find that in this case there is an equal amount or a greater amount of evidence to support all of those findings than there was in either *Madsen* or *Schenck*. I would also suggest that the court pay some attention to the findings of fact and the factual determinations that were made in the *Madsen* case, because they are nothing like the ones that Mr. Bull would suggest this court apply. There's no ___ submission in sight, there's no whittling down saying, "this might work or this might not work," and we have to make all these factual inquires. In fact, the findings of facts and conclusions of law are strikingly similar, and so that's what we would argue ought to govern in this case.

HECHT: Would it make any difference if this were a union dispute?

PEDDIE: I'm not familiar with the union statutes. I think that the court has fashioned a particular standard in these types of cases. I believe that the standards that apply here ought to apply across the board, but I'm not sure if there's a particular protection.

HECHT: Environmental cases or antiwar cases, pollution, whatever?

PEDDIE: Yes. And I would also suggest that if the court wants to put these in perspective, it can contrast the ban on each and every member of this court on every election day - the 50 ft. buffer zone that is placed between each candidate for office and a voter and contrast that with the 13-foot ban around the Planned Parenthood clinic. This is not a huge restriction on speech. I don't think that it's something that burdens more speech than necessary, and I think that each of the restrictions is quite well supported by evidence that it's necessary to ensure the right to clinic access.

Now I would like to turn to the second question, because I think we've talked about *Madsen*, *Frisby* and *Tucci*, and that is whether there is actually evidence to support them. As we've suggested, this court may not have jurisdiction to consider an evidentiary weighing as the petitioners would suggest.

BAKER: His comments on his 5 reasons why this order violates *Tucci* are all based on the premise on no proof, no proof, no proof, no proof, which basically under Texas law is the no evidence point, which we do have jurisdiction to discuss.

PEDDIE: He suggested that there is no proof of these items. The CA has found that there was sufficient evidence to support those findings, and the TC has found those. Under this court's decisions in *Johnson*, which we cited in our brief and *Texas Power & Light*, the court does not have jurisdiction under those circumstances. Because even though it's couched as a no evidence point, which is exactly what he needs to argue in order to even have a chance of getting before this court, it doesn't matter how it's described, that's what it is is an evidentiary sufficiency.

BAKER: Would you agree that if he asserts no evidence, then this court's function is to conduct a traditional no evidence review, which we do have the jurisdiction on each assertion that he makes there is no evidence to see if there is some evidence to support it?

PEDDIE: It's our position that the court is not bound by the petitioner's characterization of their own claims. The court needs to look at the substance of the action, which the CA has already found, that there was evidence to support these ideas, and under these conclusions...

BAKER: But that's why he's here, he doesn't agree with that.

PEDDIE: That's obviously right. But I am urging that the court abide by its own decisions, and not be bound by his characterization of his claims. Obviously, he's going to make a no evidence claim. I would suggest that a review of the record suggests that there is more than adequate evidence to support the necessity of the restrictions. We will concede that there is not evidence of this whittling down. Why isn't it 9-½ as opposed to 10? Why is it a total ban as opposed to restriction on obstruction? In all those instances, I think the court needs to go back to *Madsen* and needs to go back to the *Schenck* case and see what the findings were in that case. There was none of this analysis of whether this is least restrictive or not. In each of those cases, the court focused on what it was going to take to protect the competing constitutional right, and when it found what was absolutely necessary to do that, that's where the restriction stopped. I would suggest to you that there is no difference between the least restrictive means test and what is required to ensure the competing constitutional rights, that the constitutional balance is struck at exactly the same point, and there is no need for the kind of evidence and the kind of circular analysis that Mr. Bull and the petitioners would suggest the TC undergo.

I think Justice Hecht's point is a good one with regard to other areas of the law: unions, etc. I think that there is a danger in cases involving or touching upon the abortion issue of creating a new standard and a new area of the law that just deals with that issue. I urge this court not to do that, and to use its ordinary rules about what its jurisdiction is and what kind of evidence is required for injunctions, to look at the cases in *Madsen* and in *Schenck* and to utilize those standards.

I think what we have left is that this court has before it, despite the characterization that the petitioners would put on it, a mountain of photographs of maps, which are exactly the kind of evidence that was required by the court in *Tucci* and found lacking. It has videotape depositions. It has 29 volumes of live testimony introduced at a 6-week trial. It has 500 jury findings; those made by the court, and those that can be presumed here. And it combines that all with a 2-day remedies hearing that included evidence much of which was stipulated to by the petitioners. When it reviews all of that evidence, which is a lot more significant amount than was the case in *Tucci*, it will find that there is not just some evidence, and the standard is extremely high, can overturn only if there is a complete absence of evidence, the no evidence point that was discussed earlier, and it can only consider evidence and reasonable inferences that tend to support the court's judgment. When it utilizes the proper standards, utilizes its own decisions it will find that there is not just some, but there is overwhelming evidence to support the notion that the narrowly tailored restrictions here are necessary to preserve competing constitutional rights and as a result are the least restrictive means to preserve clinic access and burden no more speech than necessary to protect a significant governmental interest. On that basis, this court ought to affirm at the TC and the CA.

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REBUTTAL

BULL: With all due respect to my colleague Ms. Peddie, she's dead wrong on the stipulation. If the court will look at the transcript of the equity hearing, we did not make the stipulation that Ms. Peddie represented to the court. We only stipulated that these were the maps prepared by Planned Parenthood that they were submitting to the court as the maps of the injunction. That was it. Anything more is simply incorrect and a quick review of the equity transcript will demonstrate that.

The reason Ms. Peddie is asking this court to disregard the *Tucci* decision is because she knows and anybody who reads the court's opinion below, the order below, and compares it to the requirements of the *Tucci* decision granted a plurality it must be overturned and invalidated and sent back to the TC to do what the *Tucci* court told it to do. There was simply no proof, no findings of fact based upon the evidence that could be tested on appeal that the no speech zones and the dimensions of those zones were the least restrictive means necessary to ensure access.

OWEN: Was there any evidence that protestors had in the past purposefully blocked or hindered entry into the clinics, or into the driveways?

BULL: It depends how you characterize it.

OWEN: What was the evidence on blocking access to clinics?

BULL: There was no evidence on that that I'm aware of.

OWEN: In the 6-week trial?

BULL: There may have been some. I came in at the equity side of it. I reviewed the appeal. This was during the Republican convention in August 1992. There were many people on the sidewalks outside of the clinics that made it difficult and effectively obstructed these abortion facilities at that time.

OWEN: Wasn't the TC entitled to take that into account?

BULL: Of course. Yes. And we believe that an injunction against further obstruction, interference, intimidation or touching, things of that matter would accomplish and satisfy the governmental interests here. My problem is not with that part of the injunction. My problem is banning all speech, which goes well beyond physical obstruction. In addition, it's constitutionally over-broad because it targets and eliminates more in the exact source of the evil, the government needs to address here, which is physical access.

OWEN: How are these buffer zones different from the *Madsen* buffer zones?

BULL: There was evidence, "that the standard is different" to start with.

OWEN: Why is the standard different? Under the US constitution what's the difference here between this case and *Madsen*'s buffer zones?

PHILLIPS: Are you conceding that if this case were tried solely under the US Constitution, that the TC's order should be upheld?

BULL: No, I think it doesn't even satisfy the *Madsen* decision or *Schenck*. Under either the Texas standard or the federal standard there has to be some evidence that this is the least restrictive means necessary or the least burdensome...

OWEN: My specific question, "How are these buffer zones different from the ones that the US SC upheld in *Madsen*?"

BULL: There was evidence in those cases that less restrictive means have proven inadequate. Especially in *Madsen* it talks about that. In other words, there were earlier attempts to guarantee and assure access to prevent intimidation that had failed. What this court did was start with a total ban and never worked backwards. What the state court in *Madsen* did and also in *Schenck* was to start smaller, and when that didn't work, then it enacted a total buffer on speech. I grant you, a total ban on speech will ensure access but we are left to guess whether or not an injunction against obstruction and intimidation would have accomplished that purpose.

OWEN: But there had been evidence of obstruction and intimidation that had happened

had it not?

BULL: Yes. And we haven't challenged that part of the injunction.

SPECTOR: Besides obstruction wasn't there evidence of vandalism to parts of the building?

BULL: Yes. They were awarded over $1 million in damages, which alone would chill any similar kind of misconduct.

HANKINSON: Did I understand you correctly in response to Justice Owens' questions, that the least restrictive means test is the equivalent of the balancing test used by the US SC in *Madsen* and *Schenck*?

BULL: No, I am not saying that at all.

HANKINSON: You're saying that they are different tests?

BULL: I am saying that the Texas constitution requires a higher standard for banning speech.

BAKER: What is that standard?

BULL: This court told me that in the *Tucci* case.

PHILLIPS: And we're to take the 4 votes in *Tucci* and just kind of ____ it up to 5?

BULL: Well as lawyers practicing in this field, *Tucci* is the case that's closest to this.

PHILLIPS: But there is no majority opinion?

BULL: Even under the test suggested by Judge Gonzales, I do not believe this would pass muster. There was simply no evidence...

PHILLIPS: But isn't that the test we have to look to to get it to 5 votes?

BULL: There was a concurring opinion in *Tucci*. The lead opinion was what we follow, and under that opinion it simply doesn't match up with what the court said in *Tucci*.

PHILLIPS: You're upset about the TC's findings of fact. They were specific enough. Did you object to those findings?

BULL: Yes, we did. We did at the hearing. We filed a motion for a new trial in which we said, "This thing labeled Findings of Fact were not findings of fact at all, they were totally conclusory. They were not supported by any discussion of the evidence. We had no basis when this case went up and the court did not tell us what the basis was for drawing these dimensions the way they did, for enacting the kind of buffer zones the way she did, and there is no way an appellate court could test whether or not this total ban on speech was in fact the least restrictive means. Just labeling something Findings of Fact doesn't make it so. If you read them, they are simply not. At least they don't match up with what the court said in *Tucci*.

HANKINSON: I think I was trying to understand what your view is the difference between least restrictive means test under the *Tucci* plurality opinion and *Madsen's* balancing test. And you're saying that least restrictive means is a higher standard?

BULL: As I read the *Tucci* plurality granting, because the Texas constitution provides a _____ a little bit more is required in the TC, whether that's evidence or a specific finding of fact demonstrating that this is in fact least restrictive means.

HANKINSON: And I think I understand what you're talking about, what that evidence needs to look like. Do you agree with Ms. Peddie though, that this record does contain evidence that reflects the type of balancing that the SC required in *Madsen*?

BULL: No, I would disagree.

HANKINSON: You think it's devoid of any evidence that would relate to the balancing test as well?

BULL: I think it's devoid of any evidence demonstrating that a ban on obstruction and physical misconduct was not adequate to bring order on the sidewalks outside of the abortion facilities.

HANKINSON: But my question to you is in terms of the balancing. She has specifically said to us that there is evidence in the record to support the balancing test that the SC applied in *Madsen*. Is there evidence of the competing interests in the record in this case?

BULL: I think the evidence in this case is inadequate.

HANKINSON: Is there any evidence?

BULL: There is evidence that certain misconduct occurred, primarily in 1992.

HANKINSON: My specific question is, is that we're looking at competing interests. And Ms. Peddie has told us that there is evidence in the record of those competing interests that would allow

the TC to do the balancing necessary under the *Madsen* test. And my question to you, is there any evidence of these competing interests in the record that allowed the TC to conduct the balancing?

BULL: Certainly, there was evidence in the record. Granted, some equitable relief was justifiable. We just don't know, and we submit that there was inadequate evidence and inadequate findings of facts based upon the evidence, that a total ban on speech was warranted here especially under *Tucci*.