INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES

***AMICUS CURIAE* BRIEF PRESENTED BY**
THE CENTER FOR REPRODUCTIVE RIGHTS

IN THE CASE OF

JAMES ROGER DEMERS

V.

CANADA

PETITION NO. P-225-04

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I. INTEREST OF AMICUS CURIAE

The Center for Reproductive Rights (the "Center") is a non-governmental human rights organization dedicated to the advancement of reproductive rights as fundamental human rights. To carry out its work, the Center promotes the domestic and international application of international human rights instruments and consideration of related precedent in comparative law. As a result, the Center has developed a special degree of knowledge and expertise in the international human rights framework as well as in comparative law standards and U.S. constitutional law. In addition, as a global human rights organization focused on reproductive rights, the Center has special expertise in the experiences of women and girls seeking to exercise their fundamental human rights as well as the experiences of reproductive healthcare providers who provide access to those rights. In 2009, the Center conducted a human rights fact finding investigation in the United States which focused on and documented the widespread harassment, intimidation, and other violations of their rights that reproductive healthcare providers are routinely subjected to by those protesting abortion rights. Hence the legitimate interest of the Center for Reproductive Rights in the present case.

The issues raised in the case *James Roger Demers v. Canada* are of vital importance to the protection of the reproductive rights of women and girls and the rights of reproductive healthcare providers whose work ensures that women and girls are able to exercise their fundamental human rights. The Commission's resolution of this case will have implications far beyond the interests of James Roger Demers ("Petitioner"). The Center urges the Commission to determine that Petitioner's conviction under the *Access to Abortion Services Act* (the "Act") did not violate Canada's obligations under the American Declaration of the Rights and Duties of Man (the "American Declaration") and international human rights norms. Given the important impact this case will have, the Center also urges the Commission to articulate the ability of States to place reasonable restrictions on the right to freedom of expression where necessary to protect the fundamental human rights of women and girls and the related rights of reproductive healthcare providers whose work ensures that women and girls have access to safe, legal reproductive healthcare. To this end, this brief provides an analysis of the international human rights and comparative law standards which clearly establish that the Act constitutes a reasonable restriction on Petitioner's right to freedom of expression necessary to protect the fundamental rights of others and in the interest of public order. The Commission is therefore respectfully requested to conduct its review of Petitioner's claims in light of the legal arguments of international and comparative law presented in this brief.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Even in countries where safe, legal abortion services are generally available, such as the United States and Canada, women and girls seeking to exercise their right to access abortion care and reproductive healthcare providers seeking to provide such care face a range of different obstacles: among them, intimidation, harassment, and even violence from anti-choice

protestors.[1] In 2008, 72 percent of the 274 reproductive health clinics in the U.S., who participated in a national survey conducted by the Feminist Majority Foundation, reported being subjected to intimidation tactics.[2] Also in 2008, the National Abortion Federation, a professional association of abortion providers in the United States and Canada, compiled reports of 13 bomb threats, 8 clinic blockades, 19 stalkings, 193 incidents of trespassing or vandalism, and 396 incidents of harassing phone calls or hate mail that occurred at reproductive health clinics during the year.[3] On May 31, 2009, Dr. George Tiller, a physician who provided abortions in Kansas, was shot and killed by an anti-choice activist while he served as an usher during the Sunday morning service at his church. In recognition of the need to balance the legitimate interest of protecting the rights and health of women and girls with the right to freedom of expression, States, like Canada and the United States, have enacted laws that place reasonable limitations on protest activity targeted at abortion providers, their staff, and their patients. These limited restrictions on the freedom of expression are necessary to ensure that women and girls are able to exercise their fundamental rights and that reproductive healthcare providers are able to do their work without fear of intimidation and violence.

The American Declaration and the American Convention on Human Rights (the "American Convention") expressly permit States to place limits on freedom of expression in order to protect the fundamental human rights of others and in the interest of public order and security. In order to determine whether a restriction permissibly limits freedom of expression, the Inter-American Court has adopted a three-part test that seeks to balance the right of freedom of expression with a State's interest in protecting the rights of others and public order. Applying this test to the facts of this case, the Commission should find that the Act constitutes a valid restriction on Petitioner's freedom of expression and, further, constitutes a valid exercise of the State to harmonize the fundamental rights of women and girls and the privacy and dignity rights of reproductive healthcare providers with the rights of an individual to freely express ideas. In addition, the Commission should articulate the extent to which States are allowed to place reasonable limitations on freedom of expression in order to protect the fundamental human rights of others and maintain the public order.

European human rights law and domestic constitutional law of the United States and Canada all support the determination that restrictions on abortion-related protest activity, like those imposed by the Act, constitute permissible limitations on freedom of expression. The European Court of Human Rights (the "ECHR") and the Canadian courts have adopted balancing tests for determining whether a limitation on freedom of expression is a valid exercise of a State's power to protect and balance the rights of all its citizens and protect public order.

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[1] Within the U.S., the term "anti-choice" refers to those individuals and organizations who oppose Constitutional and legal protections for women's reproductive rights and in particular a woman's right to choose an abortion.

[2] Feminist Majority Foundation, 2008 National Clinic Violence Survey (2009), at 6, *available at* http://feminist.org/research/cvsurveys/clinic_survey2008.pdf (last visited Oct. 27, 2009).

[3] National Abortion Federation, NAF Violence and Disruption Statistics (April 2009), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_stats.pdf (last visited Oct. 28, 2009).

The ECHR and the Canadian balancing tests consider similar factors as those applied in the three-part test adopted by the Inter-American system to determine whether a restriction on freedom of expression is permissible under the American Convention. Applying their individual balancing tests to laws that limited abortion-related protest activity, the ECHR and the Canadian courts have consistently held that such laws do not violate the right to freedom of expression. The U.S. has also adopted a balancing test to determine whether a restriction on freedom of expression is constitutional. The U.S. test is stricter than the other tests in that a restriction must meet heightened requirements of content-neutrality before it can be subject to the balancing analysis. Despite its heightened constitutional protections for freedom of expression, the U.S. has also consistently found that restrictions on abortion-related protest activity are content-neutral and constitutionally valid. The decisions of the ECHR and the U.S. and Canadian courts are strong, persuasive authority that the Commission should hold that Canada did not violate Petitioner's rights and that the American Declaration allows States to enact laws like the Act in order to protect the fundamental rights of women and girls and in the interest of public order.

III. STATEMENT OF THE CASE

Abortion has been legal in Canada since 1988 when the Supreme Court of Canada determined that a law criminalizing abortion impermissibly infringed upon a woman's right to life, liberty, and security of the person as guaranteed by the Canadian Charter of Rights and Freedoms (the "Canadian Charter").[4] As a result, women in Canada have a right to abortion as a legal medical service. Following the *Morgentaler* decision, there has been extensive anti-choice protest outside abortion clinics in British Columbia, including outside Everywoman's Health Centre where Petitioner was arrested for unlawful activity.[5] Indeed, in the years immediately following the *Morgentaler* decision, there were 26 blockades, which prevented women from entering the clinic and accessing services, of the Everywoman's Health Centreand numerous other attempts to shut down the clinic or make it inaccessible to both women seeking legal medical services and the reproductive healthcare providers seeking to provide those services.[6] In January 1989, Everywoman's Health Centre and another reproductive health clinic obtained court injunctions prohibiting protestors from impeding access to the clinics and harassing patients and service providers; nonetheless, the protest activity continued unabated.[7] From June 1992 until the passage of the Act in 1995, protest activity outside of Everywoman's Health Centre occurred regularly, sometimes around the clock, and included picketing with protestors wearing or carrying signs, sidewalk counseling, prayer vigils, verbal harassment of clinic staff, and intimidation of staff and patients, for example by recording identifying information about them, such as their car license plate numbers.[8] In 1994, a doctor who had provided services at a reproductive health clinic in British Columbia was shot and almost killed in his home by an anti-

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4 *Morgentaler v. The Queen,* [1988] 1 S.C.R. 30, 32-33 (Can.).

5 *R. v. Demers*, [2003] B.C.C.A. 28 para. 7 (Can.).

6 *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 22 (Can.), *available at* http://www.canlii.org/en/bc/bcsc/doc/1996/1996canlii3559/1996canlii3559.html (last visited Oct. 27, 2009).

7 *R. v. Spratt*, [2008] B.C.C.A. 340 paras. 52-53 (Can.).

8 *Id.* at para. 54-56.

choice activist.[9] In response to the increasingly extreme tactics employed by anti-choice protestors, the British Columbia Provincial Legislature determined that it was necessary to pass the Act "to ensure safe access by women to clinics so they can obtain therein the medical service to which they are entitled by law"[10] and to allow women to obtain such "reproductive health services in an atmosphere of privacy and dignity."[11] The Act makes it unlawful to engage in certain types of protest activity within a prescribed boundary around an abortion clinic but does not in any way limit protest activities outside of the defined boundary.[12] In this way the Act "allows for the creation of access zones around facilities providing abortion, where people using or providing abortion services may not be harassed, neither physically nor verbally, on the issue of abortion."[13]

On four separate occasions in December 1996, Petitioner admits that he engaged in unlawful protest activity[14] within the prescribed boundary around Everywoman's Health Centre.[15] Everywoman's Health Centre alerted the police to the fact that Petitioner was engaging in unlawful activities within the access zone.[16] As a result, Petitioner was arrested and charged with having violated the Act.[17] At trial and during his appeals, Petitioner did not dispute that he committed the prohibited acts.[18] Rather, he argued that the Act violated his right to freedom of expression under Section 2(b) of the Canadian Charter because the purpose of his public speech was to protect fetuses' right to life, which he argued Section 7 of the Canadian Charter guaranteed.[19] The courts in British Columbia, including the Supreme Court, disagreed with

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9 *Id*. at para. 64.

10 *R. v. Demers*, [2003] B.C.C.A. 28 para. 7 (Can.).

11 *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 22 (Can.) (*quoting* British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 7 (19 June 1995) at p.15668)).

12 Access to Abortion Services Act, R.S.B.C. 1996, c.1, §§ 2(1), 14(2), *available at* http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-1/latest/ (last visited Oct. 27, 2009) [hereinafter Access to Abortion Services Act].

13 *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 51 (Can.) (*quoting* British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 7 (19 June 1995) at p.15668).

14 On four different days in December 1996, Petitioner stood on the sidewalk outside Everywoman's Health Centre inside the prescribed access zone and engaged in non-violent protest in the form of holding up signs relating to the right to life of fetuses. *See* IACHR, Report Nº 85/06, Petition P-225-04, Admissibility, James Demers, Canada, October 21, 2006, para. 12 [hereinafter Admissibility Report]. Petitioner's protest seemed designed to purposefully provoke his arrest. Indeed, the British Columbia Supreme Court found that Petitioner's "purpose was to be charged, and he was charged, with sidewalk interference and protesting" in violation of the Act. *R. v. Demers,* [1999] 17 B.C.T.C. 117 para. 2 (Can). Petitioner was ultimately convicted of three offences under the Act: unlawful protest within an access zone, besetting a building in which abortions services are provided, and engaging in "sidewalk interference" while in an access zone. Admissibility Report, *supra* note 14, at para. 13.

15 *R. v. Demers*, [2003] B.C.C.A. 28 paras. 1-2 (Can.).

16 Admissibility Report, *supra* note 14, para 12.

17 *Id*.

18 *R. v. Demers*, [2003] B.C.C.A .28 para. 2 (Can.).

19 *Id*. at para. 3.

Petitioner's framing of the Canadian Constitution. Accordingly, the courts upheld Petitioner's conviction and dismissed his challenge to the Act.[20] The British Columbia Court of Appeals also determined that the Act was constitutional under Section 1 of the Canadian Charter.[21]

Under Section 1 of the Canadian Charter, the rights and freedoms guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[22] In finding the Act constitutional, the Court of Appeals relied on previous precedent from the Supreme Court of British Columbia, which had held that the objective "of equal access to abortion services, enhanced privacy and dignity for women making use of the services and improved climate and security for service providers" outweighed the infringement of the right to freedom of expression imposed by the Act and therefore that the Act was "demonstrably justified in a free and democratic society."[23] In his appeal, the Petitioner did not ask the appellate court to determine that the Supreme Court, in *R. v. Lewis*, had incorrectly determined that the Act's protection of the rights of women, girls, and healthcare providers justified its restrictions on the right to freedom of expression; instead, Petitioner merely argued that, when conducting the Section 1 balancing test, the court must also take into consideration that fetuses are guaranteed the right to life under Section 7 of the Canadian Charter, which the *Lewis* court had not done.[24] The Court of Appeals held that the right to life does not extend to fetuses under Section 7 and, therefore, that fetuses "have no rights that must be taken into account engaging in a Section 1 balancing analysis."[25] Accordingly, the Court of Appeals held that the *Lewis* court's determination that the Act was constitutional under Section 1 was controlling precedent.[26] On September 25, 2003, the Supreme Court of Canada dismissed Petitioner's application for leave to appeal.[27]

Having failed to persuade any of the Canadian courts that the Act and his conviction were unconstitutional, Petitioner then raised his arguments before the Inter-American Commission. In his petition, Petitioner alleged that Canada violated the American Declaration with respect to himself, hundreds of thousands of unborn children, and their mothers.[28] In particular, Petitioner alleged the violations of the following rights of the unborn children: the right to life, the right to equal protection under law, the right to participate in the benefits of scientific discoveries, the right to be recognized as a person having rights and obligations, and the right to fully form and develop personality.[29] With respect to the mothers of unborn children, Petitioner alleged that Canada violated their right to special protection during pregnancy, the right to participate in the benefits of scientific discoveries, and the right to be recognized as a person having rights and

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20 *Id*. at para. 1; *R. v. Demers,* [1999] 17 B.C.T.C. 117 para. 90-91 (Can.).
21 *Id.* at para. 23.
22 *Id*. at para. 3.
23 *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 paras. 79, 101 (Can.).
24 *R. v. Demers*, [2003] B.C.C.A. 28 paras. 12-14 (Can.).
25 Admissibility Report, *supra* note 14, at para. 18.
26 *R. v. Demers*, [2003] B.C.C.A. 28 para. 27 (Can.).
27 *R. v. Demers*, [2003] 2 S.C.R. vi, at *1 (Can.).
28 Admissibility Report, *supra* note 14, at para. 2.
29 *Id*.

obligations.[30] Finally, he alleged that Canada had violated his right to freedom of expression of and dissemination of ideas and the right to associate with others.[31]

Canada argued that Petitioner's petition should have been found inadmissible in its entirety for various procedural and substantive reasons.[32] Canada further stated that Petitioner had received a "final judgment" on his claim that his right to freedom of expression had been violated; other than its general contention that the petition was untimely, however, it offered no argument to challenge the admissibility of this claim.[33]

Having analyzed the positions of the parties in the case, the Commission concluded that Petitioner's claims brought on behalf of unborn children and their mothers were "*in abstracto*, and therefore inadmissible, *ratione personae*."[34] Although these claims are no longer at issue in this case, it is worth noting that the Commission's dismissal of Petitioner's claims on behalf of unborn children was also appropriate under its previous well-established precedent of *In re Baby Boy*, which determined that legally provided abortion services do not violate any rights under the American Declaration.[35]

The Commission further dismissed Petitioner's claim that Canada had violated his right to associate with others, reasoning that Petitioner had failed to exhaust domestic remedies.[36] Finally, the Commission found that Petitioner had stated facts—regarding his criminal conviction under the Act—that could establish a *prima facie* violation of his right to freedom of

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30 *Id*.

31 *Id*.

32 *Id*. at para. 31.

33 *Id*. at para. 37.

34 *Id*. at para. 45.

35 In 1981, the Commission addressed the question of whether the legalization of abortion in the United States constituted a violation of the right to life for an unborn fetus under the American Declaration. *See* IACHR, Resolution No. 23/81, Case No. 2141, Baby Boy, United States of America, 1981 [hereinafter *In re Baby Boy*]. In *In re Baby Boy*, the petitioners filed a case with the Commission against the U.S. and the Commonwealth of Massachusetts, arguing that a legal abortion performed by a physician in Massachusetts violated the fetus's, Baby Boy's, right to life as guaranteed under the American Declaration. Prior to the petitioners bringing the case to the Commission, the Massachusetts Supreme Court had overturned a criminal conviction of the physician, finding that the abortion was legal under *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 1979 (1973). The U.S. Supreme Court determined that it did not have jurisdiction to hear the appeal. *See id*. at para. 3. In resolving the case, the Commission determined that the decisions of the U.S. Supreme Court and the Massachusetts Supreme Court not to impose criminal sanctions on the physician for the performance of the abortion did not constitute a violation of the American Declaration. In so holding, the Commission stated that the petitioner's interpretation of the definition of the right to life in the American Declaration, as clarified by the American Convention, was incorrect and that the American Declaration had *not* "incorporated the notion that the right of life exists from the moment of conception." *Id*. at para. 19(h).

36 Admissibility Report, *supra* note 14, at para. 66.

expression under Article IV of the American Declaration.[37] As a result, the only issue remaining before the Commission, and accordingly the only claim discussed in this amicus brief, is whether Petitioner's conviction under the Act violated his right to freedom of expression as guaranteed by Article IV.

The underlying facts and the domestic proceedings in the instant case pertain specifically to the case of Petitioner and to Canada. However, the widespread prevalence and severity of harassment and intimidation of women and girls who seek safe, legal medical services and the reproductive healthcare providers who provide such services demand an articulation by the Commission of the ability of States to impose reasonable limitations on the right to freedom of expression in order to protect the rights of women and girls and the related rights of reproductive healthcare providers.

IV. ARGUMENT

A. THE ACT'S LIMITATIONS ON FREEDOM OF EXPRESSION ARE A PROPER MEANS OF PROTECTION FOR THE FUNDAMENTAL RIGHTS OF WOMEN AND HEALTH CARE PROVIDERS AND THE STATE'S INTEREST IN PUBLIC ORDER AND SECURITY.

The Inter-American Commission and the Inter-American Court have held that the exercise of fundamental human rights must be carried out with respect for other rights, and that in the process of harmonizing competing rights, the State plays a critical role by establishing the limits and liabilities necessary to achieve such harmonization.[38] To this end, both the American Declaration and the American Convention expressly permit States to place limits on the right to freedom of expression in order to protect the fundamental human rights of others and in the interest of public order and security. In enacting the Act, Canada was properly fulfilling its essential role of harmonizing the competing rights of freedom of expression and the fundamental rights of women and girls to dignity, privacy, security, and reproductive health as well as the related rights of reproductive healthcare providers by placing reasonable limits on abortion-related protest activity. Accordingly, the Commission should determine that Petitioner's conviction under the Act did not violate his rights under the American Declaration and that, in fact, the limitations placed on Petitioner's freedom of expression were permissible because they were necessary to protect the human rights of others and secure public order. Moreover, the Commission should clearly articulate that the American Declaration permits reasonable limitations on the right to freedom of expression in the context of abortion-related protest activity in order to protect the fundamental rights of women and girls and the proper functioning of democracy.

Article IV of the American Declaration states that "every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium

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37 *Id*. at para. 62.

38 IACHR, 2008 Annual Report. Vol. II, *Report of the Office of the Special Rapporteur for Freedom of Expression*, February 5, 2009, paras. 69, 93 [hereinafter Annual Report].

whatsoever."[39] However, the right to freedom of expression, as guaranteed by the American Declaration, is not without limits. As the Commission has acknowledged, the right of freedom of expression may be subject to limitations by a State where necessary to protect the fundamental human rights of others and in the interest of public order and security.[40] Indeed, such limitations are expressly permitted by the American Declaration itself. The American Declaration states that the rights it establishes may be "limited by the rights of others, by the security of all, and by the just demands of the general welfare and the general welfare and the advancement of democracy."[41]

Similarly, the American Convention guarantees that "everyone has the right to freedom of thought and expression"[42] but also establishes that freedom of expression is not an absolute right.[43] Indeed, freedom of expression may be limited "to the extent necessary to ensure respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals."[44] In addition, under the American Convention, "the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."[45]

In interpreting the right to freedom of expression under the American Convention, the Inter-American system has developed a three-part test to determine whether a State's restrictions on freedom of expression are permissible. Under the case law of the Inter-American system, a limitation to freedom of expression is permissible if: (1) the limitation has been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation serves a compelling objective authorized by the American Convention; and (3) the limitation is necessary in a democratic society to serve such compelling objective, strictly proportionate to such compelling objective, and appropriate to serve such compelling objective.[46]

Although Canada is not a party to the American Convention, it is still useful to analyze the restrictions imposed on Petitioner's freedom of expression by the Act under this three-part test because the American Declaration, like the American Convention, permits limitations on freedom of expression to protect the rights of others and in the interest of public order and security. In addition, the Commission's previous precedent supports using the American

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39 American Declaration on the Rights and Duties of Man, O.A.S. Off.Rec. OEA/Ser.L?V/II.82doc.6, rev. 1, Art. IV (1948) [hereinafter American Declaration].

40 Admissibility Report, *supra* note 14, at para. 62.

41 American Declaration, *supra* note 39, at Art. XXVIII.

42 American Convention on Human Rights, Nov. 22, 1969, O.A.T.S. No. 36, O.A.S. Off. Rec. OEA.SER.L/V/II.23, doc.21, rev. 6, Art. 13(1) (*entered into force* July 18, 1978) [hereinafter American Convention].

43 I/A Court H.R., *Case of Eduardo Kimel v. Argentina*, Judgment of May 2, 2008, Series C No. 177. para. 54.

44 *Id*. at Art. 13(2)(1)-(2).

45 *Id*. at Art. 27.

46 Annual Report, *supra* note 38, at para. 52.

Convention to help interpret the scope of rights guaranteed by the American Declaration.[47] As a result, if the limitations on Petitioner's freedom of expression meet the strict requirements established by the Inter-American system under the American Convention, the limitations should similarly be permissible under the American Declaration. The Act, and consequently Petitioner's conviction for unlawful protest activity under the Act, meet all the requirements for a permissible limitation on freedom of expression under the three-part test.

1. The Act's Limitations Are Precise and Clear.

The Act clearly and precisely defines the limitations it places on protest activity within an access zone around an abortion clinic. Sections 2(1), 3, and 4 of the Act "spell[] out the activity prohibited in an access zone," including engaging in sidewalk interference, protesting, besetting, physically interfering with or attempting to interfere with a healthcare provider, and intimidating or attempting to intimidate a healthcare provider.[48] The Act also defines each prohibited activity in Section 1 of the Act.[49] In addition, no one may be convicted under the Act unless they have notice of the location of the access zone.[50]

2. The Act's Limitations Serve a Compelling Objective.

In order to meet the requirement of serving a compelling objective, the Inter-American system has held that the limitation must pursue one of the limited compelling objectives set forth in the American Convention, which include "the protection of the rights of others, the protection of national security, public order, or public health or morals."[51] In addition, "where limitations to freedom of expression are imposed for the protection of the rights of others, it is necessary for those rights to be clearly harmed or threatened."[52]

The restrictions placed on protest activity by the Act serve the compelling objectives of protecting the rights of others and protecting the State's interest in public order and security. Indeed, as the British Columbia Supreme Court has articulated in two separate cases, the Act was enacted to serve the compelling interests of protecting the rights to dignity, privacy, and security of persons seeking and providing abortion services. These same rights of dignity,[53] privacy,[54] and security[55] are guaranteed by the Inter-American system. The Act also serves the compelling

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47 *See In re Baby Boy*, *supra* note 36 (relying on language of the American Convention to assist in the interpretation of the scope of the right to life guaranteed by the American Declaration).

48 *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 paras. 38-41 (Can.).

49 Access to Abortion Services Act, *supra* note 12, at § 1.

50 *Id.* at § 8.

51 Annual Report, *supra* note 38, at para. 67.

52 *Id*. at para.70.

53 American Convention, *supra* note 42, Art. 11.

54 American Declaration *supra* note 39, Art. V; American Convention, *supra* note 42, Art. 11.

55 American Declaration *supra* note 39, Art. I; American Convention, *supra* note 42, Art. 7.

interest of protecting women's and girl's right to reproductive healthcare.[56] Furthermore, the Act serves a number of other fundamental rights, recognized by international human rights law, including the right to life,[57] the right to health,[58] and the right to reproductive self-

[56] The right to reproductive healthcare for women and girls derives from under the principles, well-established in the Inter-American system, of gender equality and the right to health. In particular, Article II of the American Declaration guarantees the right to equality before law and Article XI guarantees the right to health. While Article II does not specifically address the right to be free from discrimination in the context of the right to health, it should be interpreted consistently with international human rights law which *does* guarantee the right to reproductive healthcare by establishing that it is discriminatory "to refuse to provide legally for the performance of certain reproductive health services for women" and that States must ensure access to all aspects of healthcare for women and girls, including access to reproductive healthcare. *See* Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and Health* (20th Sess., 1999), *in* Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, at 244, U.N. Doc. HRI/Gen/1/Rev.5 (2001). The right to reproductive healthcare for women and girls is also rooted in the guarantees of non-discrimination under Articles 1 and 24 the American Convention and of the right to health under Article 10 of the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights. American Convention, *supra* note 42, Art. 1, 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, O.A.S.T.S. No. 69, 28 I.L.M. 156 (Nov. 14, 1988), Art. 11.

[57] The right to life is a fundamental human right, protected in such core human rights instruments as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. *See*, *e.g.*, Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), at 71, U.N. Doc A/810 (1948) [hereinafter Universal Declaration], at art. 3; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc A/6316 (1966) 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter Civil and Political Rights Covenant], at arts. 6.1, 9.1. The right to life requires states to take measures to protect individuals from arbitrary and preventable losses of life. *See* Human Rights Committee, *General Comment 6: The Right to Life (Art. 6)* (16th Sess., 1982). This includes taking steps to protect women against the unnecessary loss of life related to pregnancy and childbirth by ensuring that health services are accessible. *See* Human Rights Committee, *General Comment 28: Equality of right between men and women (article 3)*, para. 10, U.N. Doc. CCPR/C21/Rev.1/Add.10 (Mar. 29. 2000) [hereinafter HRC, *Gen. Comment 28*]; Human Rights Committee, *Concluding Observations: Mali*, para. 14, U.N. Doc. CCPR/CO/77/MLI (2003).

[58] International human rights law guarantees individuals "the highest attainable standard of physical and mental health." International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976), at art. 12(1). The right to health includes the freedom to control one's sexual and reproductive health, and to that end, international law requires states to protect women's health by providing access to "a full range of high quality and affordable health care, including sexual and reproductive services." Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard*

determination.[59] Additionally, the Act serves to protect the public order by controlling the aggressive and, even violent, abortion-related protest activity, including the near-fatal shooting of an abortion provider, that had been taking place in British Columbia prior to the Act's passage.[60] In addition, the legislative history of the Act establishes that the British Columbia Legislature was responding to real and immediate harms to the rights of women and girls seeking legal abortion services and the rights of reproductive healthcare providers that were being committed by protestors.[61]

3. The Act's Limitations are Necessary, Strictly Proportionate, and Appropriate to Serve the Foregoing Compelling Objectives.

In order to meet the requirements of the third prong of the Inter-American system's three-part test for limitations of freedom of expression, the limitation must be necessary, strictly proportionate, and appropriate to serve the compelling objectives the limitation pursues. The Act's creation of access zones around reproductive health clinics and the homes of reproductive healthcare providers meets all of these requirements. The history of blockades and other forms of protest activity designed to prevent women and girls from accessing legal medical services and healthcare providers from providing those services firmly establish a "compelling need to impose the limitation[s]" on freedom of expression.[62] The Act's limitations on abortion-related

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of Health, para. 1, U.N. Doc. E/C.12/2000/4 (2000), para. 21. States are specifically obligated to remove barriers that deny women access to sexual and reproductive health services. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report on maternal mortality and access to medicines*, para. 21, U.N. Doc. A/61/338 (2006), at para. 14.

[59] Support for women's right to reproductive self-determination derives from a number of human rights instruments, which contain provisions that ensure autonomy in decision-making about intimate matters; those provisions include protections of the long-recognized rights to physical integrity, to privacy, and to freely and responsibly decide the number and spacing of one's children. *See* Universal Declaration, *supra* note 57, at art. 3; Civil and Political Rights Covenant, *supra* note 57, at arts. 6.1, 9.1, 17.1; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990), at arts. 6.1, 6.2, 16.1, 16.2; *Programme of Action of the International Conference on Population and Development, Cairo*, Egypt, Sept. 5-13, 1994, U.N. Doc.A/CONF.171/13/Rev.1 (1995), at Principle 8, paras. 7.3, 7.15, 7. 45; 8.34; *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, U.N. Doc. DPI/1766/Wom (1996), at paras. 96, 106, 108; *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, U.N. Doc. DPI/1766/Wom (1996), at paras.106, 107, 223; *See* Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), at art. 16 (1.e).

[60] *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 paras. 51-52 (Can.); *R. v. Spratt*, [2008] B.C.C.A. 304 para. 68 (Can.).

[61] *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 paras. 43-44 (Can.).

[62] Annual Report, *supra* note 38, at para. 70.

protest activity within an access zone are therefore necessary to curtail the physical and verbal harassment and intimidation of women and girls seeking abortion services at reproductive health clinics in British Columbia, including the clinic outside of which Petitioner was arrested, and of the service providers working at those clinics.[63] In addition, the creation of access zones is necessary to ensure that every Canadian citizen has access to legal medical services, which Canada has determined "is one of the foundations of the Canadian medicare system," and that reproductive healthcare providers can work and live in an atmosphere of liberty, respect, and privacy.[64]

The restrictions the Act places on freedom of expression are strictly proportionate to its objective and do not burden freedom of speech more than is necessary. The purpose of the Act to protect the dignity, privacy, and security of persons seeking and providing abortion services is sufficiently important to justify the creation of an access zone in which certain types of protest activity may not occur. The creation of an access zone around an abortion clinic does not foreclose any means of expression, but instead places a limitation on the way in which freedom of expression is exercised in an area adjacent to an abortion clinic. As a result, the Act does not constitute a complete restraint on freedom of expression and does allow for alternative channels of protest.[65] Moreover, given the circumstances of the passage of the Act, it is clear that the

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[63] British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 7 (19 June 1995) at p.15668, *available at* http://www.leg.bc.ca/hansard/35th4th/h0619pm1.htm (last visited Oct. 27, 2009).

[64] British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 11 (22 June 1995) at pp.15977-78, *available at* http://www.leg.bc.ca/hansard/35th4th/h0622am.htm (last visited Oct. 27, 2009).

[65] The creation of access zones by the Act does not foreclose any form of speech, including any form of abortion-related protest activity, but merely limits where such activity can occur. Indeed, as the British Columbia Supreme Court noted in *R. v. Lewis*, protestors can gather, post signs, and refer those women who desire counseling to Gianna House, a private house located directing across the lane from Everywoman's Health Centre. *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 35 (Can.). As a result, the Act does not constitute prior censorship of speech and need not be subject to the more rigorous scrutiny applied to prior censorship of speech required by the Inter-American system. Moreover, the Act does not fall within the extreme forms of total restraint on speech that have been found to constitute prior censorship, which include:

> the seizure of books, printed materials and electronic copies of documents; the judicial prohibition against publishing or circulating a book; the prohibition of a public official from making critical comments with regard to a specific case or institution; an order to include or remove specific links, or the imposition of specific content in Internet publications; the prohibition against showing a film; or the existence of a constitutional provision that establishes prior censorship in film production; government confiscation or banning of books; the judicial prohibition of a book's entry into, circulation or distribution in a country; or the judicial prohibition of the republishing of a book.

Annual Report, *supra* note 38, at para. 125 & n. 147-50.

limits on expression it imposes are proportional to the important interests protected by it. Prior to the passage of the Act, abortion protestors routinely and repeatedly shut down access to abortion clinics in British Columbia. Attempts by the clinics to obtain court ordered injunctions to prevent protestors from impeding access to the clinics proved wholly insufficient to stop the protests. As a result, the British Columbia Legislature determined that the passage of the Act was necessary to curtail the ongoing protests and illegal activities engaged in by protestors and therefore, to protect public order and the fundamental rights of women and girls and the healthcare providers.

Finally, the Act's restrictions are appropriate to serve the compelling interests of protecting public order and the dignity, privacy, and security of those persons seeking and providing abortion services. By creating an access zone and placing limitations on the types of activities that may occur within that zone, the Act ensures that women and girls seeking legal reproductive health services have access to facilities that provide such services and can obtain such services without being vulnerable to unwarranted intimidation, harassment, and even violence. In addition, the creation of access zones allows reproductive healthcare providers to work in an environment where their dignity, privacy, and security are protected.

Because the Act constitutes a valid restriction on the right to freedom of expression under the three-part test adopted by the Inter-American system, the Commission should determine that Petitioner's conviction under the Act did not violate his rights under the American Declaration. Moreover, because harassment and intimidation of women and girls who seek reproductive health services and reproductive healthcare providers is widespread throughout the Americas, the Commission should also affirmatively articulate that States have the ability to impose reasonable limitations, like those imposed by the Act, on the right to freedom of expression in order to protect the fundamental human rights of others and the interests of public order and security.

B. THE EUROPEAN CONVENTION SUPPORTS THE DETERMINATION THAT THE ACT CONSTITUTES A REASONABLE RESTRICTION ON THE RIGHT TO FREEDOM OF EXPRESSION NECESSARY TO PROTECT THE RIGHTS OF OTHERS.

Similar to the Inter-American system, the ECHR and the European Commission on Human Rights (the "European Commission") are regional human rights bodies charged with adjudicating human rights claims. The European Commission is the only regional human rights body that has addressed the issue of restrictions on freedom of expression in the context of protecting women's access to safe, legal reproductive healthcare services. As a result, the European Commission's determination that freedom of expression may be restricted within a prescribed boundary around an abortion clinic, in order to protect the rights of both women and girls seeking legal abortion services and the healthcare professionals providing those services, provides the Commission with support for the determination that the Act did not violate Petitioner's right to freedom of expression.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") guarantees the right to freedom of expression, including the freedom to "hold opinions and to receive and impart information and

ideas without interference by public authority."[66] However, similarl to the American Declaration and American Convention, Article 10 of the European Convention permits the exercise of freedom of expression to be subject to restrictions or conditions "as are prescribed by law and are necessary in a democratic society" in the interests of such goals as public safety, the prevention of disorder and crime, and the protection of the rights of others.[67]

The ECHR has established a test for determining whether a restriction on the right to freedom of expression is permitted under the European Convention, which is substantially similar to the three-part test adopted by the Inter-American system for analyzing such limitations under the American Convention. When analyzing the permissibility of a limitation on the right to freedom of expression, the ECHR determines: (1) whether there has been an actual interference with an individual's freedom of expression; (2) whether such interference has been prescribed by law, meaning that the interference is based in law and the relevant law meets standards of clarity and accessibility; (3) whether the interference has a legitimate aim under Article 10, paragraph 2 of the European Convention; and (4) whether the interference was "necessary in a democratic society."[68] In order to establish that a restriction on freedom of expression is "necessary in a democratic society," the ECHR has further stated that it must be established that there is an existence of a "pressing social need" for the restriction and that the restriction is "proportionate to the legitimate aim pursed."[69]

In *Van Den Dungen v. Netherlands*, the European Commission applied the ECHR balancing test to limitations on abortion-related protest activity that are substantially similar to the limitations challenged by Petitioner in this case. In *Van Den Dungen*, a court injunction prevented the applicant from protesting against abortion within 250 meters of an abortion clinic after the clinic alleged that the applicant's protest activity had shocked and upset the clinic visitors, sometimes to the extent of causing them to have to postpone medical treatment.[70] The applicant claimed that the injunction violated his rights to freedom of expression as well as other rights guaranteed under the European Convention. The Netherlands maintained that the injunction constituted a reasonable restriction on freedom of expression that was necessary to protect the rights of others, including the rights of women and girls to seek legal medical services without being intimidated or harassed.[71] Applying the ECHR balancing test, the European Commission determined that the injunction did constitute an interference with the applicant's right to freedom of expression under the European Convention and that the interference was prescribed by law. The European Commission also found that the interference was "aimed at the

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66 European Convention for the Protection of Human Rights and Fundamental Freedoms *signed* Nov. 4, 1950, 213 U.N.T.S. 222, Art. 10 (*entered into force* Sept. 3, 1953) [hereinafter European Convention].

67 *Id*. at Art. 10, para. 2.

68 Van Den Dungen v. the Netherlands, App. No. 22838.93, 80 Eur. Comm'n H.R. Dec. & Rep. 147, § 2 (1995); *see also* Open Door and Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A.) (1992).

69 Van Den Dungen v. the Netherlands, App. No. 22838.93, 80 Eur. Comm'n H.R. Dec. & Rep. 147, § 2 (1995).

70 *Id*.

71 *Id*.

protection of the rights of others," specifically the rights of women and girls seeking legal abortion services at the clinic and the healthcare professionals providing such services. It therefore determined that "the interference had a legitimate aim under Article 10, para[graph] 2."[72] Finally, the European Commission held that the interference with the applicant's freedom of expression was "proportionate to the legitimate aim pursued in that it can reasonably be considered 'necessary' for the protection of the rights of others."[73] In determining that the restriction of the applicant's protest activity within a certain zone around the clinic met the requirement of proportionality, the European Commission noted that the injunction did not deprive the applicant of his right to protest abortion entirely, but merely restricted his right in order to protect the rights of others.[74]

It is clear from the foregoing that the European Convention has adopted a similar approach to restrictions on the right to freedom of expression as the Inter-American system. The application of that approach to facts substantially similar to the facts of this case by the European Commission in *Van Den Dungen* establish that that approach compels the determination that Canada did not violate Petitioner's freedom of expression by enacting the Act or convicting Petitioner for violations of the Act. Given the substantial similarities between the balancing test adopted by the ECHR and the three-part test of the Inter-American system, as well as the similarities between the injunction upheld in *Van Den Dungen* and the limitations imposed on abortion-related protest activity by the Act, the Commission should find the European Commission's reasoning to be persuasive authority for the determination that the Act constitutes a reasonable restriction on freedom of expression necessary to protect the fundamental rights of others.

C. BOTH U.S. AND CANADIAN LAW SUPPORT A DETERMINATION THAT THE ACT DOES NOT VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE AMERICAN DECLARATION.

1. U.S. Courts Have Consistently Held that Limitations on the Right to Freedom of Expression Similar to Those Imposed By the Act Are Constitutional.

Freedom of speech and expression are protected by the First Amendment to the U.S. Constitution. The First Amendment states that "Congress shall make no law … abridging the freedom of speech."[75] Despite strict constitutional protections for the freedom of speech, the Supreme Court of the United States has clearly established that certain limitations on the right to free speech are justified by a state's legitimate interest in protecting the rights of others and the public's health and safety. In particular, the U.S. Supreme Court and other U.S. courts have determined that restrictions on protest activity that impede access to abortion clinics or subject patients and staff to harassment and intimidation do not violate the right to freedom of expression and are justifiable based on the legitimate government interests of ensuring public

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72 *Id*.
73 *Id*.
74 *Id*.
75 U.S. Const. amend. I.

safety and order and protecting women's reproductive rights. Such restrictions include the creation of "buffer zones" around abortion clinics.[76]

In determining whether a restriction on abortion-related protest activity violates the First Amendment, the U.S. Supreme Court applies a "time, place, and manner analysis,"[77] which requires a court to determine whether the restriction is: (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) leaves open ample alternative channels for communication of the information.[78] A restriction is content-neutral if it is not aimed at the speaker's particular message or viewpoint, but rather at the speaker's method of conveying that message or viewpoint.[79] If a restriction on freedom of expression meets all three requirements of the time, place and manner analysis, then it is Constitutional. The U.S. approach is more protective of freedom of expression than the three-part test employed by the Inter-American system because the latter test does not require content-neutrality. Nevertheless, despite the heightened protections for freedom of expression under U.S. law, the U.S. Supreme Court and other U.S. courts have consistently determined that laws and injunctions that create "buffer zones" and otherwise regulate protest activity at abortion clinics constitute valid restrictions on freedom of expression which serve significant government interests.

For example, in *Hill v. Colorado*, the U.S. Supreme Court considered, and upheld, a Colorado law that regulated speech-related activity in the vicinity of healthcare facilities.

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[76] Buffer zones are prescribed boundaries typically around reproductive health clinics' entrances and driveways in which certain types of protest activity is not permitted. The size and exact parameters of buffer zones vary depending on how the buffer zone is defined by the law, ordinance, or injunction that created it and usually are tailored to take into account the specifics of the clinic around which the zone is located. For example, in *Hill v. Colorado*, the Colorado law created a fixed buffer zone of 100 feet around healthcare facilities entrances and driveways. 530 U.S. 703, 708 (2000). Within the fixed buffer zone, the law prohibited protestors from approaching within eight feet of anyone entering or leaving a healthcare facility without their consent. *Id*. The requirement of protestors staying at least eight feet from anyone entering or leaving the facility was considered a floating buffer zone of eight feet around that person. Accordingly, buffer zones are essentially another name for the access zone created by the Act.

[77] *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 369 (1997). It should be noted that the U.S. Supreme Court has rejected the argument that injunctions and laws that create "buffer zones" around abortion clinics constitute prior restraint on speech. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994) (holding that injunction creating a "buffer zone" did not entirely prohibit abortion-related protest activities, but merely did so within the "buffer zone," and therefore did not constitute a prior restraint on speech); *Schenck*, 519 U.S. at 374 n. 6 (holding that an injunction creating a "buffer zone" did not constitute prior restraint on speech because there were alternative channels of communication open and the injunction was issued because of protestors' previous unlawful conduct, not because of the content of their speech).

[78] *Id.*

[79] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that to be considered content-neutral, the government must not have "adopted a regulation of speech because of disagreement with the message it conveys.")

Specifically, the Colorado law created a 100-foot buffer zone around healthcare facilities, and made it illegal to approach within eight feet of another person, without that person's consent, within that buffer zone.[80] The Court determined that the law was content-neutral because it did not regulate what speakers could say, but only where certain speech could occur.[81] Similar to the Act, the Colorado law at issue in *Hill* was adopted after the Colorado Legislature decided it was necessary to curtail aggressive and abusive abortion-related protest activity aimed at abortion clinics.[82] As a result, the Court found that the law "was not adopted because of disagreement with the message" of the speech being regulated;[83] rather it was adopted to further the state's interests in protecting women's access to legal medical services and the privacy rights of women and healthcare providers; interests which were unrelated to the content of the protestor's speech.[84]

Having determined that the law was content-neutral, the Court also found that there was no dispute as to the legitimacy and significance of the government interests in protecting "the health and safety of its citizens." [85] The Court then found that the law was narrowly tailored to serve these legitimate interests and left open ample alternative channels for communication because it merely created a "buffer zone" and did not "foreclose any means of communication."[86] Notably, the Court considered where the regulations applied—that is at healthcare facilities—in determining whether the law burdened more speech than was necessary.[87] The Court pointed out that persons seeking medical services are often in "particularly vulnerable physical and emotional conditions," that governments have a legitimate interest in protecting such persons from unwanted encounters and confrontations, and that governments may do so by enacting certain restrictions on the speakers' ability to approach.[88] As a result, the Court determined that Colorado had demonstrated the need to protect those seeking access to reproductive health clinics based on the history of protest activity and found that the buffer zone was a valid way of protecting such access.[89] Accordingly, the Court held that the law did not violate the First Amendment.

In numerous other cases, the U.S. Supreme Court and other U.S. courts have similarly upheld restrictions on abortion-related protest activity, including laws and injunctions creating "buffer zones" around reproductive healthcare clinics. For instance, in *Schenck v. Pro-Choice*

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80 *Hill v. Colorado*, 530 U.S. at 707.

81 *Id*. at 719.

82 *Id*. at 709-10.

83 *Id*. at 719 (internal quotations omitted).

84 *Id*.

85 *Id*. at 715.

86 *Id*. at 725-26.

87 *Id*. at 728.

88 *Id*. at 729. It should be noted that, similar to the Petitioner, the protestors challenging the Colorado law engaged only peaceful protest activity, but nevertheless the Court determined that the law, which regulated protestors' peaceful activity, was narrowly tailored to serve the legitimate interest of protecting persons seeking and providing legal medical services from intimidation and harassment. *Id*. at 710.

89 *Id*. at 726-30.

Network of Western N.Y., the U.S. Supreme Court found that an injunction that created a fixed buffer zone around an abortion clinic constituted an appropriately tailored regulation which served the government interests of ensuring public safety and order and protecting women's reproductive rights.[90] In determining that the fixed buffer zone was narrowly tailored and did not burden more speech than was necessary, the Supreme Court noted that the buffer zone was appropriate given the fact that the protestors had ignored previous court orders enjoining them from blocking or interfering with clinic access.[91] *See also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (finding that a content-neutral injunction that established a buffer zone around an abortion clinic burdened no more speech than was necessary to serve significant government interests); *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) (upholding statute creating fixed buffer zone around reproductive healthcare facilities under time, place, and manner analysis); *Hoye v. Oakland*, 2009 WL 2392133 (N.D. Cal. 2009) (upholding city ordinance creating buffer zone around people seeking access to reproductive healthcare clinics); *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004).

In sum, the First Amendment strongly protects the right to freedom of expression and requires that any limitations on that right meet strict constitutional requirements. The test adopted by the U.S. Supreme Court to determine whether a restriction violates the First Amendment considers many of the same factors as the test adopted by the Inter-American system to determine whether a restriction constitutes a valid limit on an individual right to freedom of expression under the American Declaration, but is ultimately more stringent. As a result, when analyzing Petitioner's case, the Commission should look to the case law of the U.S. courts as strong persuasive authority. Since the Act would survive the more stringent test under U.S. law, the Commission should conclude that it also passes the three-part balancing test established by the Inter-American system and determine that Canada did not violate Petitioner's rights under the American Declaration because the Act places reasonable restrictions on freedom of expression necessary to protect the fundamental rights of others and in the interest of public order.

2. Legal Restrictions on Abortion-Related Protest Activity Have Consistently Been Upheld Under Canadian Law as Consistent with the Canadian Charter.

Section 2(b) of the Canadian Charter protects freedom of expression as a "fundamental freedom."[92] However, as described in Section III above, the protections guaranteed by the Canadian Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under Section 1.[93] Under Canadian constitutional law, for a limitation on freedom of expression to be justified under Section 1, a court must find that: (1) the objective of the limitation is "of 'sufficient importance' to warrant

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90 *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

91 *Id.* at 372.

92 *The Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c.11, Part 1, § 2, *available at* http://www.canlii.org/en/ca/const/const1982.html#sec35 (last visited Oct. 27, 2009).

93 *Id*.

overriding the constitutionally protected right," meaning that "the objective must relate to concerns that are 'pressing and substantial'"; and (2) the means chosen to achieve the objective are reasonable and justified.[94] Furthermore, to satisfy the second prong of the foregoing test, the court must determine that: the limitation is not "arbitrary, unfair, or based on irrational considerations;" the limitation impairs the right as little as possible; and there is proportionality between the effects of the limitation and the objective of the limitation.[95]

Thus, Canada, like the ECHR and the U.S., has adopted a balancing test for determining the legitimacy of law that restricts freedom of expression that is markedly similar to the three-part test adopted by the Inter-American system. Moreover, the Canadian courts have been asked to apply this test to the Act on several occasions and have consistently held that the Act's restrictions constituted valid restrictions on freedom of expression. As noted in Section III above, the British Columbia courts upheld both the constitutionality of the Act under Section 1 and Petitioner's conviction under the Act. Indeed, the trial court, the intermediate court of appeals, and the British Columbia Supreme Court all rejected Petitioner's contention that Section 7 of the Canadian Charter protects the right to life of unborn fetuses.[96] As a result of having found that Petitioner's argument regarding Section 7 was without merit, the British Columbia Court of Appeals conducted the requisite Section 1 balancing analysis and determined that, based on *R. v. Lewis*, the Act was permissible under the Section 1.[97] Moreover, in *R. v. Spratt,* the Court of Appeals has subsequently had the opportunity to once again analyze the constitutionality of the Act and it again determined that the Act survives constitutional scrutiny. The decision of the Court of Appeals in *R. v. Spratt* is informative in this case because it helps to further articulate why the Act not only meets the requirements of the Canadian Charter, but also why the Act should be upheld under the American Declaration because it meets all the requirements of the Inter-American system's three-part test for limitations on freedom of expression.

In *Spratt*, the Court of Appeals rejected arguments that the Act was not adequately prescribed by law and found that it clearly and precisely set out the boundaries of permissible and non-permissible conduct.[98] The Court of Appeals then found the Act's objective of enhanced privacy and dignity for women seeking legal abortion services and improved climate and security for reproductive healthcare providers was a sufficiently important objective to pass the first prong of the Section 1 balancing test.[99] The Court of Appeals also held that the Act's restrictions were reasonable and justified. In so determining, the Court of Appeals first determined that the creation of an access zone was not "arbitrary, unfair, or based on irrational considerations" because the access zone created "distance and therefore protection to the staff

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94 *R. v. Spratt*, [2008] B.C.C.A . 340 at para. 32 (Can.) (*quoting R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.)).

95 *Id*.

96 *R. v. Demers*, [2003] B.C.C.A. 28 paras. 17-25 (Can.); *R. v. Demers,* [1999] 17 B.C.T.C. 117 para. 90 (Can.) (relying in part on *In re Baby Boy* to determine that the right to life under the Canadian Charter does not extend to unborn fetuses).

97 *R. v. Demers*, [2003] B.C.C.A. 28 para. 23-27 (Can.).

98 *R. v. Spratt*, [2008] B.C.C.A. 340 paras. 34-40 (Can.).

99 *Id*. at paras. 71-72.

and patients of the clinic from the physical threats and emotional upset caused by the actions of the protesters and the proximity of their strong message."[100] Relying in part on the reasoning of the U.S. Supreme Court in *Hill v. Colorado*, the Court of Appeals also determined that the access zone created by the Act was reasonably tailored to the specifics of the protest activity that had necessitated the passage of the Act and, therefore, did not impair the right to freedom of expression more than was necessary.[101] Finally, the Court of Appeals determined that there was proportionality between the effects of the Act and its objective because the "objective of the Act [was] sufficiently important to justify a limitation on the way in which freedom of expression is exercised in an area adjacent to the facilities providing abortion services."[102]

Given the similarities between the Section 1 balancing test and the requirements adopted by the Inter-American system for upholding a restriction on freedom of expression, the Commission should consider the reasoning of the Canadian courts as persuasive authority as supporting a finding that the Act did not violate Petitioner's right to freedom of expression under the American Declaration.

V. CONCLUSION

In accordance with the foregoing well-established jurisprudence of the Inter-American system, international human rights law under the European Convention, and domestic constitutional law of the United States and Canada, the Commission should find that the limitations on freedom of expression imposed by the Act did not violate Petitioner's right to freedom of expression under the American Declaration. Moreover, because of the widespread harassment and intimidation of women and girls seeking reproductive healthcare services and those who provide such services, the Commission should clearly articulate that States have the ability to protect the fundamental human rights of women and girls as well as the related rights of reproductive healthcare providers by placing reasonable restrictions on an individual's right to freedom of expression in the context of abortion-related protest activity.

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100 *Id*. at para. 74.

101 *Id*. at paras. 77-89.

102 *Id*. at para. 91.