First Amendment—Balancing Public Safety and Freedom of Speech Outside Reproductive Healthcare Facilities—McCullen v. Coakley, 571 F.3d 167 (1st Cir. 2009)

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The controversy over abortion rights in the United States has rallied passionate supporters and opponents, which unfortunately has resulted in harassment and violence in some instances.¹ The Commonwealth of Massachusetts has been one of a handful of states and localities to take statutory steps to prevent incidents of violence and harassment outside its reproductive healthcare facilities ("RHCFs").² In McCullen v. Coakley,³ the U.S. Court of Appeals for the First Circuit considered a challenge by anti-abortion activists to the most recent edition of the Massachusetts buffer zone law.⁴

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¹ See Peter Slevin, Slaying Raises Fears on Both Sides of Abortion Debate, WASH. POST, June 2, 2009, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/06/01/AR2009060100612.html (describing public concern after murder of abortion doctor in Kansas); Editorial, Terror at the Clinic, BOSTON GLOBE, June 2, 2009, at 10, available at http://www.boston.com/bostonglobe/editorial-opinion/editorials/articles/2009/06/02/terror_at_the_clinic/ (alleging "hateful" rhetoric fuels anti-abortion violence); infra note 24 and accompanying text (describing fatal shootings at Brookline, Massachusetts clinics in 1994). The Supreme Court's landmark ruling in Roe v. Wade, 410 U.S. 113 (1973), granted women the constitutional right to control their own pregnancies and choose an abortion. In Roe, the Court held that the right to privacy, contained within the Fourteenth Amendment, protected a woman from state interference with her right to terminate a pregnancy. Id. at 154. See also JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 48-59, 309-10 (2007) (for overview of Roe decision and Supreme Court's subsequent decisions on abortion rights).


⁴ See An Act Relative to Public Safety at Reproductive Health Care Facilities (2007 Act), S.B.
These demonstrators alleged the buffer zone law violated their First Amendment right to freedom of speech outside abortion clinics. The court held that the buffer zone law was content-neutral and, therefore, did not infringe the Plaintiffs' rights as it permissibly balanced the rights of demonstrators against legitimate public safety concerns by reasonably regulating the time, place, and manner of any speech or activity outside RHCFs.

The Plaintiff-appellants were Massachusetts residents who regularly express anti-abortion views outside RHCFs and attempt to counsel women entering such clinics to forgo abortions. On January 16, 2008, the Plaintiffs filed suit in federal court to prevent the enforcement of the buffer zone law and have it declared unconstitutional. The buffer zone law, first enacted in 2001 and revised in 2007, establishes a no-contact area of thirty-five feet outside the entrance, exit, and driveway of a RHCF within which no person, with exceptions for authorized personnel, may enter during normal operating hours. McCullen and the other Plaintiffs alleged that this buffer zone violated their

5 The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom to speech." U.S. CONST. amend I. The First Amendment protection of freedom of speech applies to the states through the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

6 See McCullen, 571 F.3d at 184 (reiterating court's holding). The court held the law constitutional against a facial challenge but left open the possibility that a challenge to the law-as-applied may have a different result depending on the specific facts of the situation. Id.


8 McCullen, 573 F. Supp. 2d at 385. Plaintiffs filed suit against Martha Coakley in her role as Attorney General of Massachusetts. Id. As the chief lawyer and law enforcement officer of the Commonwealth, the Attorney General is responsible for enforcing the buffer zone law. Id. Attorney General Coakley was sued in her official capacity only. Id.

9 See An Act Relative to Public Safety at Reproductive Health Care Facilities (2007 Act), S.B. 1353, 185th GEN. CT. (Mass. Nov. 13, 2007) (codified as amended at MASS. GEN. LAWS ch. 266, § 120E ½ (2007)). The Act revised parts of MASS. GEN. LAWS ch. 266, § 120E ½ (2000). The statute defines a RHCF as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Id. at § 120E ½(a). The only persons allowed inside the thirty-five-foot area are persons entering or leaving the facility, clinical personnel, law enforcement personnel, municipal, or utility workers acting within the scope of their employment, and persons crossing the sidewalk solely for the purpose of reaching a destination

10 McCullen and the other Plaintiffs alleged that this buffer zone violated their
federal First Amendment right to freedom of speech to engage in their regular anti-abortion activities and counseling outside these clinics.10

The U.S. District Court for Massachusetts rejected the Plaintiffs’ claims and upheld the law as constitutional.11 The district court undertook a lengthy discussion of the law’s history as well as the legislature’s factual justification and intent in enacting it.12 In various cases, the U.S. Supreme Court has laid out a three-part test known as intermediate scrutiny for determining whether a law affecting First Amendment rights permissibly regulates the time, place, and manner within which a person may freely speak or instead represents an invidious governmental attempt to stifle disfavored speech.13 As a threshold matter, a court must determine whether the law is content-

other than the RHCF. Id. at § 120E ½(b)(1-4). Clinical personnel are also restricted by the qualification that they must act within the scope of their employment to not run afoul of the prohibitions on speech. Id. at § 120E ½(b)(2). In 1994, Congress passed the Federal Access to Clinic Entrances Act (“FACE Act”). 18 U.S.C. § 248 (2006). The FACE Act prohibits any person from intimidating or interfering with any individual who is seeking reproductive health services, including abortions. Id. at § 248(a)(1). The Massachusetts buffer zone law goes a step further than the FACE Act in creating a specific zone of protection outside clinics. See MASS. GEN. LAWS ch. 266, § 120E ½ (2007).


11 See id. (rejecting the First and Fourteenth Amendment claims of the Plaintiffs).

12 See McCullen, 573 F. Supp. 2d at 387-400 (detailing legislative history of act first passed in 2000 and reasons articulated by legislature and members of law enforcement and public for revising law into current form in 2007); see also infra, notes 31-32 and accompanying text (describing legislative history in detail).

13 See McCullen, 573 F. Supp. 2d at 402-08. While free speech is unquestionably fundamental to ensuring an open and free society, the Supreme Court has made it clear that the First Amendment does not necessarily allow persons to speak or express views wherever, whenever, and however they want. See Greer v. Spock, 424 U.S. 828, 836-37 (1976). As Justice Oliver Wendell Holmes famously put it, even “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Schenck v. U.S., 249 U.S. 47, 52 (1919). See also City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (“It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest”). The government may reasonably regulate the time, place, and manner in which speech and expression may occur in order to further a significant state interest, in contrast to restricting the actual content of the speech. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))). In judging any such time-place-manner regulations, the court subjects them to a three-pronged test: the regulations must be justified without reference to the content of the regulated speech, be
neutral. To be content-neutral, the government's purpose must be justified without reference to the content or viewpoint of the regulated speech or expression; however, a content-neutral law may have an incidental effect on certain speakers or messages as long as it ultimately serves purposes unrelated to the speech's actual content.

If a court determines the government's purpose is unrelated to the content of affected speech, it must then subject the law to the remaining two prongs under the Supreme Court's test. First, the law must be narrowly tailored to serve a legitimate, content-neutral governmental interest. A law is narrowly tailored if it facilitates a substantial governmental interest that would be less effectively served without the law and does so while not burdening substantially more speech than necessary. Secondly, narrowly tailored to serve a significant governmental interest and leave open ample alternative channels to still express those views. See id. This standard, known as intermediate scrutiny under First Amendment jurisprudence, differs from the more exacting standard of strict scrutiny applied to content-based speech regulations. Compare Perry Ed. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (reiterating government action to regulate content-based speech must survive strict scrutiny by serving compelling governmental interest and being narrowly tailored to achieve that interest), with Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue") (internal citation omitted).

See Ward, 491 U.S. at 791 (questioning whether government action was based on disagreement with speech it purports to regulate). "The government's purpose is the controlling consideration." Id. The content-neutrality of a time-place-manner regulation helps to ensure the government is only burdening any speech incidentally, for reasons unrelated to the speaker's viewpoint. See Turner Broad., 512 U.S. at 642-43. Courts deal with the threshold issue of whether the regulation confronts any specific content to determine first what level of scrutiny is required in a First Amendment issue. See Ward, 491 U.S. at 791; supra note 13 and accompanying text (detailing levels of scrutiny depending on government's intent).

See Ward, 491 U.S. at 791-92. If the regulation serves purposes unrelated to the content of the speech, then it is neutral even if it has some incidental effect on certain speakers and messages but does not affect others. See id. In Ward, the Supreme Court upheld New York City guidelines regulating the sound level of outdoor concerts in Central Park. Id. at 803. The Justices held that the sound guidelines were a reasonable attempt by city officials to prevent excessive sound levels at public events and did not interfere with the concerts' music selection or message. See id. In subsequent decisions on buffer zone laws, the Justices have relied on Ward as the standard for adjudicating time-place-manner regulations on free speech. See infra notes 35-38 and accompanying text (describing buffer zone cases before Supreme Court).

See Ward, 491 U.S. at 791; Turner Broad., 512 U.S. at 642; Perry Ed. Ass'n., 460 U.S. at 45; supra note 13 and accompanying text (describing intermediate scrutiny requirements).

See Ward, 491 U.S. at 798. In Ward, the Supreme Court said there was no doubt that governments have a significant interest in shielding their citizens from unwanted and obtrusive noise, as was the issue there. See id. at 796.

See Ward, 491 U.S. at 799. While a valid time-place-manner law must be narrowly tailored to
The law must also leave open ample alternative forms of communicating the desired message. The district court held the law was content-neutral on its face and did not target individuals advocating pro-life speech.

The court determined the restriction was narrowly tailored to prevent crowding and patient harassment close to RCHFs while still allowing demonstrators appropriate space to attract interested persons within the buffer zone through speech, signs, or other forms of communication. The district court held that the legislature was justified in acting on a safety threat it documented and did so in a constitutionally permissible fashion. The Plaintiffs appealed the decision to the First Circuit Court of Appeals.

serve the government’s legitimate and content-neutral goals, it does not need to be the least restrictive or intrusive means of accomplishing that goal. See id. The government may not, however, restrict speech in such a way that a substantial part of the burden on speech does not advance its overall goals. See id. at 799-800.

See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In Ward, New York City’s guidelines satisfied this requirement by permitting expressive activity in the affected area and having no effect on the quality or content of the musical expression beyond regulating its sound level. See id. at 802; supra note 15 and accompanying text (outlining issue in Ward).

See McCullen v. Coakley, 573 F. Supp. 2d 382, 402-08 (D. Mass. 2008) (determining law does not distinguish between viewpoints espoused by persons outside clinics but merely regulates manner in which and where persons may engage in such speech outside clinics). The district court here analyzed the legislative history and found no evidence of any intent, open or nefarious, to stifle any particular type of speech outside RHCFs. See id. at 403-04. The court noted the legislature revised the law to address the continuing public safety concerns outside of RHCFs and to clarify the standards for law enforcement. Id. at 403-05. The court pointed out that the statute does not directly regulate the content of any speech and applies equally to all demonstrators regardless of viewpoint. See id. at 403-04.

See McCullen, 573 F. Supp. 2d at 409-11, 413 (analyzing justifications for restricting the time, place, and manner of the speech outside RHCFs and remaining ability of persons to still engage in alternative forms of speech). In light of the ongoing safety problems outside RHCFs following the 2000 law, the district court here determined that legitimate public safety interests would be achieved less effectively without this new fixed-buffer zone law. See id. at 410. The court did not concern itself with the exact size of the buffer zone, as it was satisfied the legislative choice of thirty-five feet was reasonable and not overly burdensome. See id. at 411. The court further noted that demonstrators of any viewpoint could continue to engage in any form of speech outside the buffer zone. See id. at 413. The court gave weight to the point that persons inside the protected zone could still hear and see demonstrators and were free to leave the zone to speak to them. See id.

In 1994, incidents outside RHCFs in Massachusetts reached a crescendo with the murder of two clinical employees at work.\(^2\) In response, state lawmakers enacted the Massachusetts Reproductive Health Care Facilities Act in 2000.\(^25\) The 2000 Act created an eighteen-foot buffer zone around the entrance to a RHCF, within which an individual could come no closer than six feet to any other person or occupied motor vehicle.\(^26\) This created what has been called “a floating buffer zone,” which “floated” or


\(^{25}\) Chapter 217 of the Acts of 2000 (codified at MASS. GEN. LAWS ch. 266, § 120E 1/2 (2000)) [hereinafter “the 2000 Act”]. The bill originally called for a twenty-five-foot fixed buffer zone outside RHCFs. McGuire I, 260 F.3d at 39. Concerned about possible First Amendment infringement, the Massachusetts Senate sought an advisory opinion of the Massachusetts Supreme Judicial Court (“SJC”) on the bill’s constitutionality. Opinion of the Justices to the Senate, 723 N.E.2d 1 (2000). In the opinion, the SJC determined the proposed bill was not aimed at the content of any protected expression and that the government had a rational basis to impose the restrictions. See id. at 4-6. The Senate passed the bill but redrafted it following the Supreme Court’s decision in Hill v. Colorado, 530 U.S. 703 (2000). See infra notes 37-38 and accompanying text (discussing decision in Hill and effect on buffer zone laws).

\(^{26}\) MASS. GEN. LAWS ch. 266, § 120E 1/2(b) (2000). A floating buffer zone consists of a fixed zone outside the RCHF, here one of eighteen feet, and any individual within that eighteen-foot zone essentially has a shield around their person of a radius of six feet. See id. Thus, an individual could be inside the floating zone parameters, and no one else could come within six feet of them. See id. The design is to allow free movement outside the RHCFs but prevent any demonstrator from getting close enough to a patient to harass or disturb her. See McGuire I, 260 F.3d at 44. Within the established zones, individuals could not pass out leaflets, display signs, or engage in oral protest or education with another person. § 120E 1/2(b). A patient within the zone
encompassed individuals as they moved within the eighteen-foot perimeter. In *McGuire v. Reilly* ("McGuire I"), three pro-life activists challenged the law as a violation of their First Amendment rights. The First Circuit Court of Appeals held that the 2000 Act lawfully regulated the time, place, and manner of speech without discriminating based on content or viewpoint and remanded the case to the district court for further proceedings. Eventually, the case returned to the First Circuit where the court rejected could, however, give consent to another person to conduct those activities towards him or her. *McGuire I*, 260 F.3d at 44. The law exempted the following types of individuals from the buffer zone restrictions: 1) persons entering or leaving the facility; 2) employees or agents of the facility acting within the scope of their employment; 3) law enforcement, ambulances, firefighters, construction workers, utility and public works workers, and other municipal agents all acting within the scope of the employment; and 4) persons using the public sidewalk or street adjacent to the facility solely to reach a destination other than the facility. See id. 27 See supra note 26 and accompanying text (describing parameters of floating buffer zone outlined in 2000 Act).

28 *McGuire I*, 260 F.3d at 41. The plaintiffs alleged a violation of their rights to freedom of speech, freedom of association, equal protection, and due process of law. Id. The district court determined the law violated the First Amendment and issued a preliminary injunction against its enforcement. See *McGuire v. Reilly*, 122 F. Supp. 2d 97, 104 (D. Mass. 2000). The district court found the law impermissibly restricted content-based speech that communicates a message of protest, education, or counseling outside abortion clinics. See id. at 103. Additionally, the district court concluded the law discriminated against those with anti-abortion viewpoints by exempting RHCF workers, who would presumably be free to express pro-abortion opinions to persons entering the clinics. See id.

29 See *McGuire I*, 260 F.3d at 42-49. The court began by determining the law regulated the time, place, and manner of speech as opposed to the content. See id. at 43. The court determined that, while the law may affect anti-abortion groups more than others, the legislative intent was to enhance public safety and protect vulnerable patients from evidenced threats at RHCFs. See id. at 44-45. The court credited the legislature with producing solid evidence of the aggressiveness of some anti-abortion protestors outside RHCFs and its effect on patients, many of whom are particularly vulnerable while seeking reproductive health care. See id. at 44. Additionally, the court noted that the state may select RHCFs for this special treatment in order to combat the secondary effects of some protests outside their doors (namely, patient harassment) as long as the law applied to all forms of speech taking place there, not just anti-abortion protests. See id. at 45. The court rejected the plaintiffs’ assertion that the law enforcement and clinical worker exceptions constituted impermissible viewpoint-based discrimination, concluding there were legitimate reasons for this exception. See *McGuire I*, 260 F.3d at 47. The court saw no probative evidence of clinical personnel engaging in pro-abortion speech outside RHCFs. See id. at 45. Indeed, the legislative record indicated clinical personnel often escort patients into the clinics to protect them from harassment, so the court concluded this exemption could very well buttress the goal of protecting patients and ensuring safe access into the RHCFs. See id. at 46. Having determined the law was content-neutral, the court subjected it to further intermediate scrutiny. See id. at 48. Under intermediate scrutiny, a law is constitutionally permissible if it is: 1) narrowly tailored to serve significant state interests while 2) leaving open ample alternative channels of communication. See supra note 13 and accompanying text (detailing intermediate scrutiny).
the plaintiffs' main assertion that law enforcement was applying the law in an unequal and biased manner against pro-life activists.

In 2007, the legislature revisited the buffer zone law as a result of continuing public safety concerns outside RHCFs. Law enforcement personnel expressed frustration with the difficulty in enforcing a floating buffer zone that shifted as a person walked within eighteen feet of a clinic entrance. To address the continuing concerns and clarify the law, the legislature revised the statute to create a thirty-five-foot "fixed no-entrance" buffer zone around the entrances and driveways of the RHCFs, eliminating the floating zone provisions.

court upheld the law as a reasonable use of traditional state police authority to promote public safety and protect patients. See McGuire I, 260 F.3d at 48. The court noted that demonstrators could still transmit visual images and verbal messages across the buffer zone to persons within it. See id.

30 See McGuire v. Reilly, 386 F.3d 45, 65 (1st Cir. 2004) ("McGuire II"). The district court, on remand, granted summary judgment to the defendants on both the facial challenge to the law and the as-applied-challenge on law enforcement's role in enforcing it. McGuire v. Reilly, 271 F. Supp. 2d 335 (D. Mass. 2003). The court reviewed the instructions the Attorney General gave to the police. See McGuire II, 386 F.3d at 64. The Attorney General interpreted the clinical personnel exception to prohibit RHCF employees from espousing pro-choice views to persons within the buffer zone. See id. The court determined that law enforcement had carried out this interpretation in an evenhanded, constitutionally content-neutral manner. See id. at 65.

31 See Wangsness, supra note 2 (describing concerns raised by RHCFs over continuing intimidation outside clinics). During a state Senate committee hearing on a proposed change to the law, a Planned Parenthood League of Massachusetts official spoke of protestors intimidating patients and staff and taking photographs of patients' and employees' cars and license plate numbers to post online. Reproductive Health Centers: Hearing on S. 1353 Before the Joint Committee on Public Safety and Homeland Security, 2007 Leg., 185th Gen. Ct. (Mass. 2007) (statement of Angus McQuilken, Vice-President for Public Relations, Planned Parenthood League of Massachusetts). A captain from the Boston Police Department testified that the law did not prevent protestors from standing right in front of the entrance of a RHCF as long as they stood still and did not approach patients. Id. (statement of Captain William Evans, Boston Police Department). The police captain also spoke of observing protestors wearing police hats and uniforms in an attempt to get patients within the buffer zone to consent to an approach. Id.


33 An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the
The United States Supreme Court has addressed the constitutionality of RHCF buffer zone laws on a few recent occasions. In 1994, the Supreme Court upheld a Florida state court injunction restricting demonstrations within thirty-six feet of a RHCF but struck down prohibitions on displaying images and approaching patients within three-hundred feet of a RHCF. In 1997, the Justices struck down a court-ordered fifteen-foot floating buffer zone around any person entering or leaving RHCFs as infringing more speech than necessary to protect public safety and being too ambiguous for demonstrators to comply with it. Most recently, in 2000, the Supreme Court rejected a First Amendment challenge to a Colorado statute creating a hundred-foot fixed buffer zone outside RHCFs and an eight-foot floating zone around any person

Acts of 2007 (codified as amended at MASS. GEN. LAWS ch. 266, § 120E ½ (2007)).
34 See Hill v. Colorado, 530 U.S. 703, 735 (2000) (upholding statutory eight-foot floating buffer zone within one hundred feet of RHCF as a proper time, place, and manner restriction on First Amendment); Schneck v. Pro-Choice Network of Western N.Y, 519 U.S. 357, 385 (1997) (upholding fifteen-foot fixed buffer zone ordered through injunction but striking down floating buffer zone of same distance); Madsen v. Women's Health Ctr., 512 U.S. 753, 776 (1994) (upholding injunction ordering thirty-six-foot fixed buffer zone outside RHCFs but striking down restrictions on displaying images and approaching patients within three hundred feet of RHCF).

35 See Madsen, 512 U.S. at 769-76. In reaching its decision, the court announced a new test for cases in which content-neutral speech was prohibited by an injunction. See id. at 765-66. Having first determined the injunction was content-neutral, the court concluded the proper standard was whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. See id. at 765. This is a more stringent standard than that applied to statutory time, place, and manner restrictions on free speech. See id. at 764; see also supra note 13 and accompanying text (describing standard for time-place-manner regulations). The court based its decision on a belief that injunctions pose a greater threat of censorship than do general laws, because, in its view, the government is less likely to act in an arbitrary and discriminatory manner if its actions affect all citizens alike instead of the few specific individuals targeted in an injunction. See Madsen, 512 U.S. at 764-65 (quoting Railway Express Agency Inc. v. N.Y., 336 U.S. 106, 112-13 (1949) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally”)). In McCullen, the First Circuit Court of Appeals rejected the Plaintiffs’ argument that the court should judge the Massachusetts buffer zone law effectively under the Madsen content-neutral injunction standard. See infra note 43 and accompanying text.

36 See Schenck, 519 U.S. at 377-78. The court said it was too difficult for demonstrators to remain in compliance with a zone that continuously shifts as the target of a protest walks along the sidewalk outside a RHCF. See id. at 378. In particular, the court noted that the fifteen-foot moving zone presented a difficult and potentially dangerous obstacle to a demonstrator protesting on a seventeen-foot wide sidewalk as in the case’s circumstances. See id. The court did uphold a fifteen-foot fixed buffer zone outside RHCFs as consistent with its decision in Madsen. See id. at 380-81.
entering or leaving the RHCF within the fixed zone.\textsuperscript{37} The Justices concluded that the Colorado legislature had properly enacted the law as a reasonable restriction on where speech may occur while still narrowly-tailoring it to balance patients’ safety with demonstrators’ rights.\textsuperscript{38}

\textsuperscript{37} See Hill, 530 U.S. at 719-30 (determining law was a constitutionally permissible content-neutral time, place, and manner restriction). Following the Supreme Court’s decision in Hill, Massachusetts legislators decided to shelve their initial plans to create a twenty-five-foot fixed buffer zone outside RHCFs. See McGuire I, 260 F.3d at 40. The legislators settled on the combination of a fixed and floating zone similar to Colorado’s. See id. In October, the U.S. Court of Appeals for the Third Circuit struck down Pittsburgh’s buffer zone ordinance that was largely a replica of the one the Supreme Court upheld in Hill. See Brown v. City of Pittsburgh, 586 F.3d 263, 298-99 (3rd Cir. 2009); Pittsburgh, Pa., Code tit. 6, §§ 623.04-623.07. In Brown, the court focused on the combination of a large one hundred-foot fixed zone outside the clinics and a fifteen-foot floating zone emanating from their entrances. See id. at 275. The court determined while each zone standing alone was permissible, in combination they were not sufficiently narrowly tailored. See id. at 281. The challenged buffer zone law also allowed for exceptions similar to the ones in the Massachusetts buffer zone law. Compare Pittsburgh, Pa., Code tit. 6, §§ 623.04 with MASS. GEN. LAWS ch. 266, § 120E ½(b)(1)-(4)). The Third Circuit relied in large part on the First Circuit’s analysis in McCullen in determining the exceptions did not constitute content-based discrimination. See Brown, 586 F.3d at 275.

\textsuperscript{38} See Hill, 530 U.S. at 723. Writing for the majority, Justice Stevens determined a speaker’s interest in avoiding unwanted communication may be particularly acute while entering or exiting a medical facility. See id. at 717. Nevertheless, Justice Stevens pointed out, the Colorado law did not focus on deterring unwanted speech but intended to protect those seeking medical treatment from potential physical or emotional harm resulting from an unwanted communication via approach at a close distance. See id. at 718, n.25. The Court noted that the law applied to all speech regardless of specific content. See id. The majority declared the law would apply equally to “used car salesmen, environmentalists and missionaries” as it would anti-abortion demonstrators. See id. The Court found the statute was narrowly tailored because it still allowed a person entering or leaving a RHCF to see a sign or hear a demonstrator and also permitted a demonstrator to offer leaflets for any person to accept. See Hill, 530 U.S. at 725-30. The Court also differentiated this floating zone from the one in Schenck due to its smaller size and different requirement on the speaker, who could comply with it by standing still and letting people pass by. See id. at 713. Some legal commentators have criticized the Hill court as ignoring the Colorado law’s focus on anti-abortion speech even if on its face the law never even mentions abortion protests specifically. Colloquium, Professor Michael W. McConnell’s Response, 28 PEPP. L. REV. 747, 750 (2001) (quoting Lawrence H. Tribe describing Hill decision as “slam-dunk simple and slam-dunk wrong”); Kathleen M. Sullivan, Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term, 28 PEPP. L. REV. 723, 734-38 (2001). Erwin Chemerinsky, a noted constitutional professor, has said he agrees with the majority’s overall ruling but remains concerned about the content-neutrality proclamations by the majority. See Colloquium, supra, at 752-53. Chemerinsky believes that abortion clinics may deserve special consideration as places where the government should justifiably protect patients and the clinics themselves, given the nature of what goes on inside and outside the clinics. See id. In their writ of certiorari to the Supreme Court, the McCullen Plaintiffs urged the Justices to reexamine what constitutes a
In *McCullen v. Coakley*, the First Circuit Court of Appeals held that the Massachusetts thirty-five-foot fixed buffer zone law was a constitutional regulation on the time, place, and manner of speech and denied a First Amendment challenge to the revised statute. The court began its analysis by concluding the statute was content-neutral and thus properly subject to intermediate scrutiny as a time-place-manner regulation. The court determined that the exceptions for clinical personnel did not constitute a sanctioning of pro-choice speech within the zone, because clinical personnel are limited to furthering patient safety by escorting them into the RHCFs and barred from espousing any pro-choice viewpoints within the zone. As a content-neutral law, content-based legislative determination. Petition for a Writ of Certiorari, *McCullen v. Coakley*, No. 09-592 (U.S. Nov. 13, 2009). The Justices declined to hear the Plaintiffs' appeal. *McCullen v. Coakley*, 78 U.S.L.W. 3321, 2010 WL 1005961 (U.S. Mar. 22, 2010) (No. 09-592).


See *id.* at 175-78; *supra* note 13 and accompanying text (providing detailed explanation of First Amendment standard and test for intermediate scrutiny). The Plaintiffs alleged that the expanded size of the revised zone was suspicious, the zone contradicted its public safety goal by causing more safety hazards than it abates, the legislature relied on biased sources in collecting evidence, and that the emergency preamble to the law was unnecessary. *See McCullen*, 571 F.3d at 176. The court determined that the Plaintiffs' arguments about the legislature having a pretext to stifle abortion protestors' views were, by and large, a rehashing of similar arguments made and rejected in the earlier *McGuire* cases. *See id.* at 176-77; *supra* note 29 and accompanying text (detailing *McGuire I* arguments). The court further agreed with the district court that the legislative history was full of specific incidents and problems outside RHCFs that discount the Plaintiffs' claims and buttress the stated public safety intent behind the law. *See McCullen*, 571 F.3d at 176-77; *supra* notes 31-32 and accompanying text. The decisive question in the court's eye was whether a legitimate reason existed for the legislature to decide this specific type and size of buffer zone along with the certain exceptions. *See McCullen*, 571 F.3d at 177. The court determined the thirty-five-foot zone and exceptions for persons associated with RHCFs were reasonably related to the stated goal to protect public safety, and did not lend any weight to the Plaintiffs' concerns over these provisions. *See id.* at 176-78.

See *McCullen*, 571 F.3d at 177-78. The court determined the exception for clinical personnel was reasonably related to the legislature's legitimate public safety objectives. *See id.* at 178. The court harkened back to its prior rulings in *McGuire I*, which addressed the clinical personnel exceptions. *See id.* at 177; *McGuire v. Reilly* (*McGuire I*), 260 F.3d 36, 45-47 (1st Cir. 2001); *supra* note 29 and accompanying text (describing *McGuire I* court's analysis of clinical personnel exception). In *McGuire I*, the First Circuit found no evidence that clinical personnel encouraged patients to undergo abortions or engage in pro-choice speech while in the buffer zone. *See McGuire I*, 260 F.3d at 45-46. The court rejected the lower court's characterization of all agents and employees of RHCFs as "very zealous advocates for this controversial procedure [abortion]." *See id.* at 45 (quoting *McGuire v. Reilly*, 122 F. Supp. 2d 97, 103 (D. Mass. 2000)). The legislative debate revealed that the clinical personnel exception furthered the public safety aim of the law because clinical employees often assist in protecting patients and ensuring safe passage to the
the court turned its analysis to whether the statute was narrowly tailored and allowed sufficient alternative means of communication. The court focused on the amount of speech burdened by the buffer zone and determined that the law did not burden substantially more speech than necessary to ensure public safety outside RHCFs, satisfying the requirement of narrow tailoring. Further, the court determined that the buffer zone left open many other ways for protestors to express their message to persons entering the RHCFs through signage, loudspeakers, and other activities at the periphery of the proscribed thirty-five-foot line. The First Circuit concluded the RHCF entrances. See id. at 46. Clinical employees, therefore, merely acted within the scope of their employment in escorting patients in this fashion. See id. at 46. Plaintiffs alleged that RHCF employees would naturally counsel or educate prospective patients with a pro-choice viewpoint and the legislature was sanctioning this. See id. The court noted this argument had some logic in theory but concluded that this one possible explanation for the exemption's inclusion by the legislature could not alone defeat the measure in light of the valid public safety-oriented reasons already articulated. See id. Additionally, in McCullen, the court pointed to the Attorney General's guidance to law enforcement that clinical personnel expressing their views on abortion or engaging in other partisan speech in the buffer zone would be in violation of its restrictions. See McCullen, 571 F.3d at 184, app. 1.

42 See McCullen, 571 F.3d at 178; supra note 18. "A regulation is narrowly tailored if it 1) facilitates a substantial governmental interest that would be less effectively served without the regulation and 2) accomplishes this end without burdening substantially more speech than necessary." McCullen, 571 F.3d at 178 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

43 See McCullen, 571 F.3d at 179. There was little dispute that enhancing public safety and protecting patients outside RHCFs was a substantial governmental interest. See id. at 178. The Plaintiffs focused their attention on the second part of the narrow tailoring test, arguing the statute infringed more speech than necessary to satisfy this governmental interest. See id. at 178; supra note 18 and accompanying text (describing definition of narrowly tailored under intermediate scrutiny). The court explained that the Plaintiffs falsely equated the Supreme Court's holdings in Madsen v. Women's Health Center, Inc. and Schenck v. Pro-Choice Network of Western N.Y. to the situation before them. See McCullen, 571 F.3d at 178-79; supra note 35 and accompanying text (articulating standard for injunctions set in Madsen); supra note 36 and accompanying text (describing the decision in Schenck). In those cases, the Supreme Court was judging the validity of injunctions centering on speech outside RHCFs. See supra notes 35-36 and accompanying text. Injunctions must not burden any more speech than is necessary, but the court here distinguished a buffer zone created by a legislature. See McCullen, 571 F.3d at 178-79. A legislatively-created buffer zone only must not burden substantially more speech than necessary to accomplish the intended goal. See id. at 179 (citing Madsen, 512 U.S. at 764) (emphasis added). Here, the court relied on the testimony about the ineffectiveness of the prior version of the Massachusetts law and the legislature's considerable study of the issue as sufficient proof of the legislature's attempts to balance First Amendment concerns with its legislative judgment to change the buffer zone to a fixed thirty-five feet. See id.

44 See McCullen, 571 F.3d. at 180-81. The statute places no burden or restrictions on a person's activities outside the buffer zone. See id. at 180. The court further noted that any person within the zone may leave it to speak with a person outside it offering literature or spoken advice. See id.
buffer zone satisfied the intermediate scrutiny test for constitutionality and struck the proper balance between public safety and free speech concerns outside RHCFs.45

The First Circuit correctly upheld the Massachusetts buffer zone law in McCullen v. Coakley.46 The court appropriately concluded the law was a valid time, place, and manner regulation consistent with understood First Amendment jurisprudence.47 While the majority of the speech likely affected will be anti-abortion protest, the overall state interests in ensuring a safe and comfortable environment for patients coming and going and keeping order at the scene of locations known to breed disorder are significant and not indicative of a governmental preference for one side in the abortion debate.48 Patients entering the RHCFs are often in a sensitive physical and emotional state and preventing undue harassment or cajoling of them is a proper use of the state’s police power.49 In addition, the legislature’s focus on providing clear guidelines for law enforcement and clarity in the revised law buttresses the overall public safety focus of the buffer zone law.50

Having already determined that the size of the zone was reasonable, the court buttressed its conclusion by pointing out this buffer zone’s similarity to the thirty-six-foot zone upheld in Madsen, which was much smaller than the one hundred-foot one upheld in Hill v. Colorado, 530 U.S. 703 (2000). See McCullen, 571 F.3d at 180; supra note 35 and accompanying text (describing Madsen); supra notes 37-38 and accompanying text (describing Court’s decision in Hill).

See supra notes 13-14 and accompanying text (describing standards for time-place-manner restrictions).

45 See supra note 40 and accompanying text (noting persuasiveness of legislature’s public safety objective).

46 See supra note 34-38 and accompanying text (detailing Supreme Court’s recent buffer zone law decisions).

47 See supra note 31-32 and accompanying text (detailing statements of individuals and law enforcement at legislative hearings on buffer zone bill); supra note 40 and accompanying text (noting court’s reliance on these statements as proof of legislature’s legitimate concern for public
The Massachusetts law does not prevent an individual from holding a sign or voicing an opinion from outside the zone to reach the eyes or ears of a person inside the zone.\footnote{See supra note 44 and accompanying text (stating that buffer zone law places no restrictions on actions of individuals outside the zone).} As a practical matter, a demonstrator can merely stand on the edge of the thirty-five-foot zone and ask to speak to any person approaching or leaving the zone and may offer him or her any literature as well.\footnote{Id.} While the Plaintiffs alleged the buffer zone was larger than required to ensure safe passage to and from the RCHFs, the Massachusetts legislative determination on the parameters and size of the buffer zone is due discretion because it is backed by reasonable justifications with a body of evidence on the risk to patients and overall orderliness outside clinics.\footnote{See supra note 43 and accompanying text (discussing court's comparison of injunctions versus legislative actions). The buffer zone law is a statutory law of general application given more leeway as a time, place, and manner regulation because it applies to all people. Id. Courts review buffer zones created by injunction under a stricter standard, because judges set them in response to specific circumstances and individuals. See supra note 35 and accompanying text.} The size of the zone is large enough to ensure a patient unencumbered passage to and from a RHCF entrance, but not so large as to make it impossible for a patient to see and hear a demonstrator standing at the zone's boundary.\footnote{See supra note 44 and accompanying text (describing Hill decision).}

The First Circuit's ruling has particular implications for other courts analyzing clinical personnel exceptions to buffer zone laws.\footnote{See supra notes 35-38 and accompanying text (describing Supreme Court decisions on buffer zone laws).} None of the buffer zones upheld by the Supreme Court in Madsen, Schenck, and Hill allowed for such exceptions.\footnote{See McCullen v. Coakley, 571 F.3d 167, 177-78 (1st Cir. 2009), cert. denied, 78 U.S.L.W. 3321, 2010 WL 1005961 (U.S. Mar. 22, 2010) (No. 09-592) (analyzing Plaintiffs' challenge to exception); supra note 37 and accompanying text (mentioning Third Circuit's handling of clinical personnel exception).} Indeed, the McCullen Plaintiffs argued that the exceptions here constitute a content- and viewpoint-based attempt by the legislature to sanction the presumably pro-choice speech safety outside RHCFs). The court echoed the sentiments of the Supreme Court in Hill v. Colorado that the law applied equally to anyone exhibiting or proclaiming a viewpoint outside a RHCF. See supra notes 37-38 and accompanying text (describing Hill decision). 

\footnote{Compare COLO REV. STAT. § 18-9-122 (2009) (protecting passage to and from health care facility and prohibiting certain activities near facility) with MASS. GEN. LAWS ch. 266, § 120E ½ (2009) (disallowing persons to remain on public ways or sidewalks within thirty-five feet of an entrance, exit, or driveway of a reproductive health care facility).}
of clinical personnel and workers. The First Circuit, in analyzing these allegations, appropriately noted that clinical personnel play an important role in ensuring patients’ safe passage into the clinics, a role consistent with the stated public safety aim of the buffer zone law. Further, the court noted the importance of the clinical personnel exception qualifier that any such personnel act strictly in the scope of their employment, a restriction that should limit their role to escorting patients and bar advocating of pro-choice views. The Third Circuit, in recently hearing a buffer zone law containing analogous clinical personnel exceptions, chose to follow the First Circuit’s determination in McCullen. Still, the clinical personnel exception does make the buffer zone law vulnerable because it rests on the belief that clinical personnel will not engage in pro-choice speech while escorting patients into the facility. Persuasive evidence to the contrary could damage the law’s content-neutrality in suggesting it unfairly allows pro-choice speech in the zone to continue unabated. Nevertheless, the First Circuit’s assessment of the exception as reasonably related to the law’s public and patient safety goal is the stronger of the arguments and stands as persuasive authority for other courts tasked with clarifying the ongoing debate surrounding buffer zone laws and the boundaries of their constitutionality.

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57 See supra note 41 and accompanying text (detailing court’s analysis of clinical personnel exception). The Plaintiffs’ argument was a reiteration of one previously rejected by the First Circuit, where the court saw no probative evidence that clinical personnel engaged in pro-choice speech in the buffer zones. See McGuire v. Reilly (McGuire I), 260 F.3d 36, 45-46 (1st Cir. 2001).

58 See supra note 41 and accompanying text (noting appropriateness of exempting clinical personnel where they act to further patient safety).

59 See supra note 41 and accompanying text. If a clinical worker enters the buffer zone to escort a patient, but begins to engage in pro-choice advocacy, that worker would be acting outside the scope of employment and be in violation of the zone’s restrictions. See McCullen, 571 F.3d at 184, app. 1.

60 See supra note 37 (describing Third Circuit’s ruling in Brown v. City of Pittsburgh).

61 See supra note 41 (noting court found no evidence that clinical personnel engaged in pro-choice speech in zone or encouraged patients to have abortions).

62 See supra note 41. The first judge to look at the law, the Honorable Edward Harrington, adopted a view of clinical personnel as “very zealous advocates for this controversial procedure [abortion]” in issuing an injunction against it. McGuire v. Reilly, 122 F. Supp. 2d 97, 103 (D. Mass. 2000); supra notes 28, 41 and accompanying text. Subsequent courts analyzing the buffer zone law have rejected this characterization as unsubstantiated. See supra note 41 and accompanying text.

In McCullen v. Coakley, the First Circuit considered the constitutionality of the Massachusetts fixed buffer zone law outside reproductive healthcare facilities in the face of a First Amendment challenge. The court held that the buffer zone is a constitutionally-permissible time, place, and manner restriction on activities and speech outside the clinics. The focus of the legislature was to protect RHCF patients and personnel after a series of high-profile incidents and concerns over safety outside the clinics. The court's ruling will protect patients and clinical personnel from harassment as they enter and leave RHCFs. The ruling also enables anti-abortion protestors or counselors to be seen and heard outside the clinic consistent with their First Amendment rights. The First Circuit correctly determined that the Massachusetts buffer zone law struck an appropriate balance between protecting an individual's right to reproductive services and upholding the right of individuals to demonstrate outside those clinics.

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64 571 F.3d at 184. See supra notes 40-45 and accompanying text (describing court's reasoning).
65 See supra notes 43-45 and accompanying text (analyzing law under intermediate scrutiny).
66 See supra notes 31-32 and accompanying text (detailing concerns of law enforcement and testimony at committee hearing on subject).
67 See supra note 40 and accompanying text (determining size of buffer zone was reasonable given desire to protect patients).
68 See supra note 44 and accompanying text (noting size of buffer zone allows demonstrators to be easily seen and heard by persons inside zone).