AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

McCullen v. Coakley, 708 F. 3rd 1 (1st Cir. 2013)

Eleanor McCullen regularly engaged in pro-life counseling outside an abortion clinic in Boston, Massachusetts. In 2007, the Massachusetts legislature passed a law creating a fixed thirty-five-foot buffer zone around all abortion clinics in the state. Persons were not allowed within that zone unless they were government officials, employees of the abortion clinic, patients of the abortion clinic, or individuals using the sidewalks or streets solely to reach some other destination. McCullen and other persons who engaged in pro-life counseling outside of clinics in Boston, Springfield, and Worcester, Massachusetts, asked a lower federal court for an injunction forbidding Martha Coakley, the state attorney general, from implementing the buffer zone. The federal district court ruled that the law was constitutional on its face and that decision was sustained by the Court of Appeals for the First Circuit. McCullen then filed a lawsuit claiming the buffer zone was unconstitutional as applied. The federal district court also rejected that claim. McCullen appealed to the Court of Appeals for the First Circuit.

The First Circuit unanimously sustained the Massachusetts buffer zone. Judge Bruce Selya's opinion declared that the buffer zone was a neutral time, place, and manner restriction that left pro-life counselors with adequate means of communicating their messages to women seeking abortions. Why did Judge Selya believe the buffer zone was content neutral? Is he correct? Why did he believe that pro-life counselors have adequate means of communicating their messages? Is that correct? Judge Selya was appointed to the federal bench by Ronald Reagan. Chief Justice Rehnquist, who was also appointed by Reagan, tended to sustain restrictions on abortion protests outside of clinics. Was this just a coincidence or did this reflect an important strand of Reagan Republicanism? Does this strand still have representation on the Supreme Court, which will consider McCullen's appeal from the First Circuit's decision in the 2013–2014 term?

SELYA, CIRCUIT JUDGE

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Few subjects have proven more controversial in modern times than the issue of abortion. The nation is sharply divided about the morality of the practice and its place in a caring society. But the right of the state to take reasonable steps to ensure the safe passage of persons wishing to enter healthcare facilities cannot seriously be questioned. The Massachusetts statute at issue here is a content-neutral, narrowly tailored time–place–manner regulation that protects the rights of prospective patients and clinic employees without offending the First Amendment rights of others. We therefore affirm the judgment below.

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The plaintiffs' principal challenge to the entry of judgment on the pleadings relates to their claim of viewpoint discrimination. . . . [T]hey aver that "pro-choice advocates [ ] surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." They further aver that clinic "employees and/or agents stand idly on the public sidewalks and streets inside the [buffer] zone"—sometimes smoking, speaking with each other or on mobile phones, or drinking coffee—"even when clinic clients are not present."

Because this issue was resolved at the pleading stage, we assume arguendo that the raw facts are as the plaintiffs have alleged. The question remains, however, whether the depicted conduct can fairly be characterized as viewpoint discrimination attributable to the state. The plaintiffs say that it can. The Attorney General demurs.

We begin with the basics. The Act, on its face, is viewpoint-neutral. Although it contains a "clinic employee" exemption, that exemption does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others.

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The conduct described, without more, has nothing to do with the First Amendment. While loitering in a buffer zone by an exempt person is not expressive in nature and arguably does not serve the purposes of the Act, such conduct, simpliciter, does not prefer one viewpoint over another.

What is more, the employees and agents about whom the plaintiffs complain are not state actors but . . . are agents of a private entity (Planned Parenthood). The Act allows these individuals to be in buffer zones under the clinic employee exemption. But to the extent that they have tried to use their exempt status either to advocate a particular point of view or to drown out the plaintiffs' message, there is no allegation that such behavior has been sanctioned by the state.

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The bottom line is that, to be cognizable, a claim of uneven enforcement requires state action. Whatever actions the clinic employees and agents may have taken, this record reveals no basis for a plausible claim that those actions reflect a viewpoint preference of the state.

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This brings us to the pivotal question of whether the Act, as applied, leaves open adequate alternative means of communication. Each of the plaintiffs engages in communicative activities outside one of the three designated RHCFs. According to the plaintiffs, these communicative activities are intended to influence individuals seeking or considering abortions as well as "those who approve or perform abortions."

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The record makes plain that communicative activities flourish at all three places. To begin, the plaintiffs and their placards are visible to their intended audience. Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. When they and their cohorts deem it useful to do so, they congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments. They sometimes don costumes (dressing up as, say, the Grim Reaper).

To be sure, the Act curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles. But as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication. In the last analysis, "there is no constitutional requirement that demonstrators be granted . . . particularized access" to their desired audience. As long as adequate alternative means of communication exist, the First Amendment is not infringed.

Our inquiry into the adequacy of alternative means of communication is, of course, site-specific. At the Boston clinic, all prospective patients must traverse a public sidewalk to gain entry. Given this reality, many channels of communication remain available to the plaintiffs. Those alternative channels are adequate to offset the restrictions inherent in the buffer zones.

The analysis is somewhat different with respect to Worcester and Springfield. At these sites, it is not the buffer zones that constitute the main impediment to communicative activity; instead, it is the prospective patients' unwillingness to venture off the clinics' private property. Most prospective patients arrive by car, park in private lots, and use non-public walkways to enter the facility. The fact that these patients are not readily accessible to the plaintiffs is more a function of the physical characteristics of the sites than of the operation of the Act.

This is a critically important datum. The law does not require that a patient run a public-sidewalk gauntlet before entering an abortion clinic. That patients choose to stay on private property or not to stop

their cars on approach is a matter of patient volition, not an invidious effect of the Act. First Amendment rights do not guarantee to the plaintiffs (or anyone else, for that matter) an interested, attentive, and receptive audience, available at close-range.

One additional observation seems appropriate. In the context of abortion-related demonstrations, the Supreme Court has specifically recognized the interest of clinic patients both "in avoiding unwanted communication" and "pass[ing] without obstruction." Consistent with this interest, the First Amendment does not compel prospective patients seeking to enter an abortion clinic to make any special effort to expose themselves to the cacophony of political protests. Nor does it guarantee to the plaintiffs the same quantum of communication that would exist in the total absence of regulation. A diminution in the amount of speech, in and of itself, does not translate into unconstitutionality. So long as adequate alternative means of communication exist, no more is constitutionally exigible.

We add a coda. Even if the plaintiffs' audience is diminished in some respects by the existence of the buffer zones, that diminution is not constitutionally fatal. The fact that a regulation "may reduce to some degree the potential audience for [the plaintiffs'] speech is of no consequence," as long as adequate alternative means of communication exist.

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