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McCullen v. Coakley; 134 S. Ct. 2518 (2014)

McCullen v. Coakley
134 S. Ct. 2518 (2014)

Opinion by Roberts, J.

Overarching Issue

Whether a local ordinance creating a "buffer zone" around an abortion clinic is in violation of the First Amendment of the United States Constitution, when the ordinance makes it a crime to "knowingly stand" within the buffer zone, but does not, on its face, regulate speech.

Statement of Facts

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act. [1] The law was enacted to address confrontations between opponents and advocates of abortion rights that occurred outside clinics.[2] The statute was amended in 2007.[3] As amended, the Act made it a crime "to knowingly stand on a 'public way or sidewalk' within thirty feet of an entrance or driveway to any place, other than a hospital, where abortions are performed."[4] The buffer zone applied only during business hours.[5]

Eleanor McCullen, and other Petitioners ("Petitioners") attempted to engage women entering the clinics to offer information about alternatives to abortion.[6] Petitioners claimed the buffer zones significantly impaired their ability to engage women in communication about the cons of abortion.[7]

In January 2008, Petitioners brought a suit against Attorney General Coakley and other Massachusetts officials.[8] They alleged that the Act violated the First and Fourteenth Amendments, facially and as applied to them.[9] The district court denied the Petitioners' facial challenge.[10] The Court of Appeals for the First Circuit affirmed.[11]

The court upheld the Act as a reasonable "time, place, and manner" regulation.[12] It also rejected the Petitioners' arguments that the Act was "substantially overbroad, void for vagueness, and an impermissible prior restraint."[13]

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1. McCullen v. Coakley, 134 S. Ct. 2518, 2525 (2014).
2. *Id.*
3. *Id.* at 2526.
4. *Id.* at 2525.
5. *Id.* at 2526.
6. *Id.* at 2527.
7. *McCullen*, 134 S. Ct. 2518 at 2528.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *McCullen*, 134 S. Ct. 2518 at 2528.

ANALYSIS

The Supreme Court held that by its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]."[14] These places, "traditional public fora," " 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "[15] The Court concluded that, even though the Act did not concern speech on its face, "there is no doubt. . . that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny."[16]

The Court stated that the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum.[17]

Petitioners contended that the Act is not content-neutral for two independent reasons. First they argued that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions.[18] Second, petitioners contended that the Act, by exempting clinic employees . . . favors one viewpoint about abortion over the other.[19] The Court held that "if either of these arguments [was] correct, then the Act must satisfy strict scrutiny . . . it must be the least restrictive means of achieving a compelling state interest."[20]

The Court found that the Act does not draw content-based distinctions on its face.[21] Therefore, the question in such a case is whether the law is " 'justified without reference to the content of the regulated speech.' "[22]

Still, the Court noted, "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its view to the people.' "[23] But here, the Court held that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers.[24] Therefore, the Court held the Act is "neither content nor viewpoint based and [therefore] need not be analyzed under strict scrutiny."[25]

But, as the Court stated, even though the Act is content-neutral, it still must be "narrowly tailored to serve a significant governmental interest."[26] For a content-neutral time, place, and manner regulation to be narrowly tailored, it must not "burden

14. *Id.*
15. *Id.* at 2529.
16. *McCullen*, 134 S. Ct. 2518 at 2529.
17. *Id.*
18. *Id.* at 2530.
19. *Id.*
20. *Id.*
21. *McCullen*, 134 S. Ct. 2518 at 2531.
22. *Id.*
23. *Id.* at 2533.
24. *McCullen*, 134 S. Ct. 2518 at 2533.
25. *Id.* at 2534.
26. *Id.*

substantially more speech than is necessary to further the government's legitimate interests." [27]

The Court found "the buffer zones burdened substantially more speech than necessary to achieve the Commonwealth's asserted interests."[28] "[T]he Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate."[29]

The Court reversed the judgment of the Court of Appeals for the First Circuit and remanded the case for further proceedings consistent with their opinion.[30]

Legal Significance

In this case, the Supreme Court held that "buffer zones" around abortion clinics which restrict access solely to employees and clients are a violation of abortion opponents' First Amendment rights to free speech. The decision was decided on narrower grounds than the Petitioners had hoped, or that Justice Scalia contended were warranted by the facts. As the Court noted in its decision, the ordinance would not have survived strict scrutiny, and further stated "[r]espondents do not argue that the Act can survive this exacting standard."[31]

The Court considered and ultimately rejected Petitioners' arguments that the Massachusetts ordinance was either content-based or viewpoint-based. A finding that either of these free speech restrictions existed would have required the Court to apply strict scrutiny.

The argument advanced by Petitioners to show that the ordinance was content-based was the ordinance, by creating buffer zones only around abortion clinics, served to limit discussion about abortion. Alternately, Petitioners argued that the ordinance was viewpoint-based, since it created an exemption for clinic employees. These employees are presumably in favor of abortion; therefore any discussions about abortion that would occur in the buffer zone would only advance a pro-abortion viewpoint. However, the court rejected both of these arguments. The Court found that the ordinance was not facially content-based, and that employees were allowed in the zone so as to be able to perform their jobs, not to engage in sharing their pro-abortion views.

Ultimately the ordinance did not survive even an intermediate scrutiny standard as applied by the court. The Court held that although the state had a legitimate governmental interest "justified without reference to the regulated speech,"[32] it was not narrowly tailored enough to serve that interest. The Court found

27. *Id.* at 2535.
28. *McCullen*, 134 S. Ct. 2518 at 2537.
29. *Id.* at 2539.
30. *Id.* at 2541.
31. *Id.* at 2530.
32. *Id.* at 2523.

that the ordinance "burden[ed] substantially more speech than [was] necessary."[33] Further the Court found the Government did not "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."[34]

The intermediate scrutiny standard applied by the Supreme Court will limit the reach of this decision. By not banning buffer zones outright, they will still be held constitutional if it can be demonstrated these zones are narrowly tailored enough so as to closely fit the circumstances, and if there are alternative means for protesters to express their opinions.[35]

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33. *McCullen*, 134 S. Ct. 2518 at 2523.
34. *Id.*
35. The author of this summary, Michael Zatlin, is a Juris Doctor candidate, May 2015, at Western State College of Law.