



August 19, 2020

Members of the Louisville Metro Council  
(via email only)

**LEGAL MEMORANDUM REGARDING ABORTION BUFFER ZONES AND  
*MCCULLEN V. COAKLEY***

Dear Council Member:

Before the City of Louisville takes any steps to create an abortion buffer zone within the City, it should take very seriously the decision of the United States Supreme Court in *McCullen v. Coakley*, 573 U.S. 464 (2014).

By way of introduction, the American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ attorneys often appear before the Supreme Court and lower federal and state courts on the side of First Amendment free speech claims. *E.g.*, *Schenck v. ProChoice Network of Western New York*, 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003). *See also Turco v. City of Englewood*, 935 F. 3d 155 (3d Cir. 2019). With headquarters in Washington, D.C., the ACLJ has offices in six states including Kentucky.

In *McCullen*, the Supreme Court *unanimously* struck down a Massachusetts statute that created a 35-foot buffer zone around entrances and driveways of reproductive health care facilities, *i.e.*, “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” *Id.* at 469. That law amended a previous statute that created an 18-foot radius around the entrances and driveways of reproductive facilities that anyone could enter, but once within it, no one come within six feet of another person—unless that person consented—“for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” *Id.* at 470. The law was amended because law enforcement officials had a difficult time enforcing it and the few prosecutions brought under the prior statute were unsuccessful. *Id.* at 471. The captain of the Boston Police Department testified that a fixed buffer zone would “make our job so much easier.” *Id.*

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The amended law was challenged by a group of “sidewalk counselors,” which, as the Court pointed out, “are not protestors”:

[Petitioners] seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm.

*Id.* at 489.

Sidewalk counselors, who regularly visit the EMW Women’s Surgical Center, believe that the most effective way to interact with women approaching an abortion clinic is “to maintain a caring demeanor, a calm tone of voice, and direct eye contact.” *Id.* at 473. They believe that “confrontational methods such as shouting or brandishing signs . . . tend only serve to antagonize their intended audience.” *Id.*

The Court did not hesitate in holding that the Massachusetts buffer zones directly burdened the speech of the sidewalk counselors and negatively impacted their ability to counsel women through the spoken and written word. It held that the zones “compromise[d] petitioners’ ability to initiate the close, personal conversations that they view as essential to ‘sidewalk counseling,’” and “made it substantially more difficult for petitioners to distribute literature to arriving patients.” *Id.* at 487-88. The Court observed that “[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.” *Id.* at 489-90.

Despite the obvious burden on the sidewalk counselors’ speech, Massachusetts asserted that the buffer zones served the substantial governmental interests of “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” *Id.* at 486. Such interests are, obviously enough, legitimate ones. *See id.* (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 376 (1997); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 767-768 (1994)).

The central question before the Court in *McCullen*, however, was not whether the buffer zones served these interests—they clearly did—but whether, in advancing those interests through no-speech zones, the law burdened “substantially more speech than necessary to achieve the Commonwealth’s asserted interests.” *Id.* at 490. The narrow tailoring requirement, noted the Court, “demand[s] a close fit between ends and means,” and “prevents the government from too readily “sacrific[ing] speech for efficiency.” *Id.* at 486 (citations omitted).

The Court held that the law failed this rigorous narrow tailoring standard

because the state's interests in ensuring public safety, preventing harassment and intimidation, and combating the obstruction of clinic entrances, could have all been served with a more narrowly tailored law that directly prohibited these types of conduct. *Id.* at 490-91. Indeed, the Court pointed out a provision of the Massachusetts law not challenged by the *McCullen* plaintiffs subjected to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." *Id.* at 491.

The Court observed that if Massachusetts required additional prohibitions to meet its goals, it could have enacted legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, as other states have done. *Id.*<sup>1</sup> FACE was passed by Congress in 1994 "against a backdrop of escalating violence directed toward reproductive health clinics, their employees, and patients." *United States v. Gregg*, 226 F.3d 253, 259 (3d Cir. 2000).

In addition to FACE, the *McCullen* Court further opined that "[i]f the Commonwealth is particularly concerned about harassment," it could have adopted a law similar to a New York City ordinance that targets activity beyond physical obstruction of clinic entrances. 573 U.S. at 491. That ordinance "not only prohibits obstructing access to a clinic," but also makes it a crime to engage in non-expressive activity amounting to harassment of individuals within a certain distance of reproductive health care facilities. *Id.*

The Court did not stop there in demonstrating how Massachusetts could have achieved its interests of health, safety, and access through means other than a fixed buffer zone. It pointed out that cities within Massachusetts already had laws on the books that prohibit the obstruction of sidewalks, streets, and highways. *Id.* at 492. The Court observed that these laws, "in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like," were examples of the state's "failure to look to less intrusive means of addressing its concerns." *Id.*

The Court also observed that laws such as FACE and New York City's anti-harassment ordinance are not just enforceable through criminal prosecutions "but also through public and private civil actions for injunctions and other equitable relief." *Id.* The Supreme Court has "previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures." *Id.* The virtue of injunctive relief is that "focuses on the precise individuals and the precise conduct causing a particular problem." *Id.* The Court held that "the [Massachusetts] Act, by

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<sup>1</sup> FACE subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).



contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.” *Id.*

Of the many ways that *McCullen* suggested Massachusetts could deal with problems engendered by protest activities surrounding at least one abortion clinic within the state, *it never suggested a smaller buffer zone.*

Indeed, after *McCullen* was decided, Massachusetts did not abandon all efforts to deal with health, safety, and access issues outside abortion clinics within the state. Its answer, however, was not a smaller buffer zone. Instead, the state created a new law, modeled on FACE, prohibiting, *inter alia*, a person “who, by force, physical act or threat of force, intentionally injures or intimidates or attempts to injure or intimidate a person who attempts to access or depart from a reproductive health care facility.” Mass. Gen. Laws, ch. 266, § 120E½(d) (“Impeding Access to or Departure from Reproductive Health Care Facility”). That law has not been challenged in court.

While a buffer zone might be easier to enforce than some of the legislative suggestions offered in *McCullen*, the Court could not have been plainer that efficiency is not an appropriate standard for circumscribing free speech:

To meet the requirement of narrow tailoring, the government must 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. ***A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency.***

573 U.S. at 495 (emphasis added).

Assuming *arguendo* that protest activities outside EMW Women’s Surgical Center are in need of a legislative response, we urge the Louisville Metro Council to pursue a response that does not entail the suppression of free speech on public sidewalks, which “have immemorially . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.* at 476 (citations and marks omitted).

Very truly yours,



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