NOTE

McGuire v. Reilly: The First Amendment and Abortion Clinic Buffer Zones in the Wake of *Hill v. Colorado*

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INTRODUCTION

The Supreme Court's landmark ruling in *Roe v. Wade* secured a woman's right to abortion in 1973.[1] However the Supreme Court narrowed a woman's right to an abortion in the early 1990s. Correspondingly, the debate over the morality of abortion intensified as abortion opponents took their fight from the courthouse steps to the public forum. Between 1986 and 2000, there were more than 3000 incidents of violence linked to anti-abortion protests outside of clinics.[2] Violent crimes committed at abortion clinics included murder, arson, bombing, vandalism, and anthrax threats.[3]

Several states attempted to minimize violence outside reproductive healthcare facilities ("RHCFs") by restricting the public's right to protest near these facilities.[4] The resulting statutes created what are known as

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[1] 410 U.S. 113, 166 (1973) (striking down Texas' laws criminalizing abortion). Prior to *Roe*, thirty-three states prohibited abortion unless medically necessary to save the life of the mother. *See id.* at 138-40.

Note that, prior to *Roe*, an additional four States had decriminalized abortion. ALASKA STAT. § 11.15.060 (1970); HAW. REV. STAT. § 453-16 (Supp. 1971); N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972-1973); WASH. REV. CODE §§ 9.02.060 to .080 (Supp. 1972).

[2] National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers, available at* http://www.prochoice.org (last visited Dec. 12, 2002); *cf.* Christy E. Wilhem, Note, *If You Can't Say Something Nice, Don't Say Anything at All:* Hill v. Colorado *and the Antiabortion Protest Controversy*, 23 CAMPBELL L. REV. 117, 118 (2000) (comparing areas surrounding abortion clinics to war zones). These acts of violence include seven murders and seventeen attempted murders. Among the murdered are two doctors and their escorts. National Abortion Federation, *Incidents, supra.*

Additionally, the Senate Committee on Labor and Human Resources assembled the following evidence of clinic violence: "From 1977 to April 1993, more than 1,000 acts of violence and more than 6,000 clinic blockades against abortion providers were reported in the United States. Included were at least 327 clinic invasions, 131 death threats, 84 assaults, 81 arsons, 36 bombings, two kidnappings and one murder." Bruce Fein, *Free Speech Depends on the Speaker*, TEXAS LAWYER, July 25, 1994, at 24. Clinic-related violence led to the enactment of federal legislation. The Freedom of Access to Clinic Entrances Act of 1994 created federal penalties for interfering with access to abortion clinics. *See* 18 U.S.C. § 248 (1994).

[3] *See* National Abortion Federation, *supra* note 2; *supra* notes 1-2.

[4] The Abortion Law Homepage, *State Abortion Law Survey, available at* http://members.aol.com/abtrbng/abortl.htm (last visited December 27, 2002). As of 1997,

"buffer zones."[5] Buffer zones are areas surrounding abortion clinic property lines, usually defined by a number of feet, which protesters are prohibited from entering or demonstrating in.[6] Courts, however, are wary of buffer zone statutes because they greatly impact protestors' freedom of speech.[7]

McGuire v. Reilly addressed one buffer zone statute.[8] The case arose from a Massachusetts statute prohibiting sidewalk educators, counselors, and protestors from approaching a non-consenting person within eight feet of a RHCF.[9] The District Court of Massachusetts found the statute unconstitutional, but the First Circuit Court of Appeals upheld the Massachusetts law, arguing that public safety surrounding abortion clinics justified a modest speech restriction affecting abortion protestors.[10]

This Note argues that the *McGuire* court ruled in error. Part I explores the constitutional standards of content-neutrality and intermediate scrutiny governing the legitimacy of state speech regulation.[11] Part II outlines the facts, holding, and rationale employed by the circuit court in upholding the constitutionality of the buffer zone.[12] Finally, Part III argues that the *McGuire* court erred when it found the buffer zone regulation content-neutral and permissible because it survived intermediate scrutiny. Specifically, the court misconstrued the impact of

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twelve states and the District of Columbia prohibited activities near RHCFs that impede safe, public access to reproductive health care. These include California, Colorado, the District of Columbia, Kansas, Maryland, Maine, Massachusetts, Minnesota, Nevada, North Carolina, Oregon, Washington, and Wisconsin. *Id.* Four states had passed resolutions condemning clinic violence: California, Minnesota, New Mexico, and Pennsylvania. *Id.*

[5] *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357, 364 (1997) (defining "buffer zone"); McGuire v. Reilly, 260 F.3d 36, 39 (1st Cir. 2001) (labeling Massachusetts statute restricting speech near abortion clinic as buffer zone); Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, 68 S. CAL. L. REV. 427, 431-32 (1995) (describing rise in buffer zones as means to counteract abortion clinic violence); Wilhelm, *supra* note 2, at 120 (describing 300-foot no-speech zone surrounding abortion clinic as buffer zone).

[6] *See, e.g.*, Kelly, *supra* note 5, at 431-32 (describing buffer zones); Wilhelm, *supra* note 2, at 120 (defining buffer zone).

[7] Hill v. Colorado, 530 U.S. 703 (2000); *see Schenck*, 519 U.S. at 377, 380 (upholding fixed buffer zones but striking down floating buffer zones); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769-71 (1994) (upholding injunction establishing thirty-six foot buffer zone around RHCF entrances).

[8] *McGuire*, 260 F.3d at 38.

[9] MASS. GEN. LAWS ch. 266, § 120E ½ (2000).

[10] *See* McGuire v. Reilly, 122 F. Supp. 2d 97 (D. Mass. 2000), *vacated by* 260 F.3d 36 (1st Cir. 2001).

[11] *See infra* Part III, Subparts B-C.

[12] *McGuire*, 260 F.3d at 39.

the statute's application to RHCFs and exemption for RHCFs employees and agents. Additionally, the court misapplied the intermediate scrutiny analysis. It erroneously found that the statute was narrowly tailored and left open sufficient alternative channels for communication.

I. THE STATE OF FIRST AMENDMENT JURISPRUDENCE

A. Background: The Scope of First Amendment Protection

The United States Constitution commands that Congress "make no law . . . abridging the freedom of speech."[13] Some commentators value this commandment so greatly that they view freedom of speech as the necessary condition for all constitutional liberties.[14] However, the First Amendment does not proscribe all forms of speech regulation by the government. [15] In fact, some speech lies outside the scope of First Amendment protection entirely. This class of non-protected speech includes obscenity, defamation, and speech that creates a clear and present danger of imminent lawless action.[16]

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[13] U.S. CONST. amend. I. The text of the First Amendment is: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The free speech clause of the First Amendment is applicable to the states through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[14] *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937). According to Justice Cardozo, freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* Similarly, "free speech is . . . the touchtone of individual liberty." Knights of Klu Klux Klan v. Arkansas State Highway & Transp. Dep't, 807 F. Supp. 1427, 1433 (W.D. Ark. 1992); *see also* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 1 (1989) (claiming that freedom of speech separates democracy from totalitarianism, liberty from restraint, and freedom from bondage). To trace the First Amendment's history and origin, *see generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983), and Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1003-10 (1994).

[15] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (suggesting that certain government restrictions on speech pose high risk of stifling unwelcome ideas); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (noting that free speech does not require equivalent access to all parts of school building); *see also Palko*, 302 U.S. at 327 (noting that freedom of speech is essential to protect almost all other constitutional freedoms).

[16] *See* Miller v. California, 413 U.S. 15, 23, 24 (1973) (qualifying sexually explicit materials as obscenity and affording them less First Amendment protection than other speech); Paris Adult Theatre v. Slaton, 413 U.S. 49, 53 (1973) (excluding pornographic films from First Amendment protection); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267-79 (1964) (excluding defamatory speech from First Amendment's protection and allowing state prohibition of defamation); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)

However, most speech lies within the First Amendment's purview. For example, the First Amendment protects picketing, flag burning, and other symbolic speech activities.[17] States can also regulate speech when it threatens public safety.[18] In such circumstances, the states' interest in preserving public safety outweighs the public's right to speak freely.[19] When a state law regulating speech is challenged, the court balances these competing interests using a two-step process.[20] The first step in

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(defining fighting words as speech likely to incite violence and curtailing their First Amendment protection). *See generally* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 70 n.1 (1997) (observing that speech-inciting violence, fighting words, and obscenity receive no constitutional protection).

[17] *See* Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (holding that First Amendment protection extends to flag burning because it is expressive conduct); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (including non-verbal expression as being within First Amendment's scope); Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (protecting picketing under First Amendment).

[18] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (upholding city ordinance requiring use of city's sound amplification equipment and technician in public parks); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (affirming statute prohibiting overnight camping in public parks when challenged on First Amendment grounds for limiting right to protest homelessness by camping); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding prohibition against sign posting on public property); Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (describing how board members are permitted to discriminate between speakers at meetings in interest of time).

[19] *See* sources cited *supra* note 18; *see also, e.g.*, Hill v. Colorado, 530 U.S. 703, 714 (2000) (observing that Court must balance speakers' rights against Colorado's interest in assuring access to health care facilities); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (noting that city may restrict location of adult theaters to prevent adverse effects on neighborhood); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (discussing interests courts must balance when considering regulations of speech in public forums); Barenblatt v. United States, 360 U.S. 109, 126 (1959) (opining that First Amendment jurisprudence involves courts balancing competing private interest in freedom of speech with states' public interests); McGuire v. Reilly, 260 F.3d 36, 41 (1st Cir. 2001) (noting tension between public's right to freedom of speech and states' obligation to protect important public interests). *See generally* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 114 (1986) (noting factors courts balance in cases challenging restrictions on speech in public forums); Cindy Lee Meyer, *Free Speech v. Public Safety Within Public Forum Analysis*, 59 GEO. WASH. L. REV. 1285, 1285-86 (1991) (discussing factors courts consider when balancing public's freedom to speak against states' interests).

[20] *See, e.g., Ward*, 491 U.S. at 790-803 (upholding ordinance regulating use of sound amplification equipment on city-owned property through two-step analysis); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.47 (2d ed. 1988) (outlining two-step analysis for First Amendment analysis); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988) (outlining "two-track" approach to First Amendment analysis); Brian W. Oberst, Note, *Buffering Free Speech: An Examination of the Impact of Colorado's Buffer Zone Law on Protected Speech after* Hill v. Colorado, 24 HAMLINE L. REV. 89, 104 (2000) (discussing two-step test used to assess constitutionality of Colorado's

determining constitutionality asks whether the regulation restricts speech based on its content.[21] If the regulation proscribes speech on the basis of its message, the court deems it content-based.[22] For example, the United States Supreme Court invalidated a law that prohibited signs within five hundred feet of a foreign embassy that criticized a foreign government. The Court determined that the law was unconstitutionally content-based because the statute restricted speech on an entire subject matter.[23] Alternatively, a content-neutral speech regulation restricts speech without regard to the message conveyed.[24] For example, the Supreme Court upheld a statute prohibiting all sign displays in a public park as content-neutral because it restricted all signs without regard to their message.[25] Thus, speech regulations fall into two classes: content-based and content-neutral.[26]

The second analytical step asks what level of judicial scrutiny is appropriate to determine the regulation's constitutionality.[27] The constitutional standards for content-based and content-neutral regulations differ.[28] Content-based regulations are presumptively

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buffer zone statute).

[21] *See* sources cited *supra* note 20.

[22] *See Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791) (defining content-based statutes as those adopted out of disagreement with speech's content). *See generally* Calvert, *supra* note 16, at 76 (discussing content-based in context of speech restriction); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202-04 (1994) (explaining that both principle and policy of content-neutrality require that government is neutral with regard to subject matter); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 191-94 (1983) (analyzing meaning of content neutrality in First Amendment jurisprudence).

[23] Boos v. Barry, 485 U.S. 312, 334 (1988) (striking down statute prohibiting content that criticizes foreign governments on billboards).

[24] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (holding that laws imposing burdens or benefits on speech without regard to its message are content-neutral); *Boos*, 485 U.S. at 320 (classifying law regulating speech without reference to its content as content-neutral).

[25] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (holding statute that totally banned sign postings on public property content-neutral because it applied even-handedly to all individuals and groups).

[26] *See supra* notes 20-24 and accompanying text.

[27] *See supra* note 20 (stating that second part of two-step process is assessing which level of scrutiny applies to regulation).

[28] *Compare, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (identifying content-based speech regulations aimed at particular topics as particularly offensive to First Amendment), R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that content-based speech regulations are presumptively invalid), City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) (noting that regulations enacted targeting speech based on its message are presumptively invalid), *and* Carey v. Brown, 447 U.S. 455, 462-63 (1980) (applying strict scrutiny to content-based speech regulations), *with*

invalid because they limit public debate.[29] Because the freedom of speech and public debate protect the free flow of ideas, courts strictly scrutinize these types of regulations.[30] In contrast, content-neutral regulations are less likely to dictate topics of public debate, as they do not promote one viewpoint over another.[31] Accordingly, courts analyze

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Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984) (upholding content-neutral statute restricting over-night camping in public parks under intermediate scrutiny), *and* McGuire v. Reilly, 260 F.3d 36, 42-43 (1st Cir. 2001) (applying intermediate scrutiny to content-neutral regulations). *See generally* Calvert, *supra* note 17, at 75 (noting courts' application of intermediate scrutiny to content-neutral speech regulations and strict scrutiny to content-based regulations).

[29] *See Rosenberger*, 515 U.S. at 829 (identifying content-based speech regulations aimed at particular topics as particularly offensive to First Amendment); *R.A.V.*, 505 U.S. at 382 (holding that content-based speech regulations are presumptively invalid); Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 736 (1st Cir. 1995) (affirming presumptive invalidity of content-based speech regulations). The presumptive invalidity of content-based regulation originates from the notion that government cannot influence the course of public debate by using its police power to restrict speech based on content. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (noting "the usual rule that governmental bodies may not prescribe the form or content of individual expression"); Street v. New York, 394 U.S. 576, 593 (1969) (holding that officials cannot proscribe matters of opinion); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (noting First Amendment's critical role in democratic polity); NAACP v. Button, 371 U.S. 415, 433 (1963) (noting both importance and vulnerability of First Amendment freedoms in democratic society); Wood v. Georgia, 370 U.S. 375, 389 (1962) (noting that counterargument and education are weapons against unpopular speech rather than abridgment of rights of speech and assembly); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (noting that ban on government interference with debate is chief distinction between United States and totalitarian regimes); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (noting unfettered speech is essential to democratic society).

[30] *See R.A.V.*, 505 U.S. at 382 (opining that government cannot suppress speech because of the ideas expressed); Cohen v. California, 403 U.S. 15, 24-5 (1971) (noting that regulations distinguishing between speech on the basis of content offend notions that freedom of speech seeks to keep citizens, not government, in control of public debate); *McGuire*, 260 F.3d at 42 (observing that courts presume content-based regulation unconstitutional because such regulations pose danger that government will promote or suppress particular viewpoints).

[31] *See* Hill v. Colorado, 530 U.S. 703, 723 (2000) (noting general applicability of content-neutral regulation); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (noting that content-neutral laws "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue"); *McGuire*, 260 F.3d at 41 (reviewing content-neutrality discussion in *Hill*).

But see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994). In *Madsen*, operators of a RHCF in Melbourne, Florida sought an injunction restricting protestors' speech in the area surrounding the clinic. *Id.* at 758. The *Madsen* Court upheld a thirty-six foot buffer zone surrounding the clinic's entrance, but struck down the provision prohibiting non-consensual approach within three hundred feet of the clinic under intermediate scrutiny. *Id.* at 770, 773-74. The Court also required that the statute use the least restrictive means effective to further the state's interest, a proposition the Supreme Court flatly rejects in Hill as irrelevant unless considering an injunction. *Compare id.* at 765,

content-neutral regulations under an intermediate level of judicial scrutiny.[32] A speech regulation survives intermediate scrutiny if it is narrowly tailored to serve a significant state interest and leaves ample opportunity to communicate through alternative channels.[33]

Hill v. Colorado documents the Supreme Court's application of this standard to a content-neutral speech regulation.[34] In *Hill*, the Supreme Court offered an analytical framework for determining a statute's content posture and explicated the elements of the intermediate scrutiny standard.[35] The next section of this Note explores the content-neutrality and intermediate scrutiny analyses the Supreme Court adopted in *Hill*.

B. Content-Neutrality as Applied in Hill v. Colorado

Hill involved a Colorado statute that established an abortion clinic buffer zone.[36] The buffer zone prohibited all persons within one hundred feet of a health care facility from approaching those seeking access to the facility for the purposes of education, counseling, or protesting.[37] The state sought to prevent clashes that often lead to violence between patients, clinic employees, and anti-abortion protestors.[38] Anti-abortion advocates objected to the statute, with one activist noting that speech restrictions outside abortion clinics were about the purported connection between vehement anti-abortion protests and abortion clinic violence.[39] The United States Supreme Court

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with Hill, 530 U.S. at 726.

[32] *See, e.g., Madsen*, 512 U.S. at 765 (inquiring whether content-neutral injunction burdened no more speech than necessary to serve significant government purpose); *Clark*, 468 U.S. at 293 (noting that content-neutral restrictions are constitutional if they are "narrowly tailored to serve a significant government interest" and leave open alternative channels for communication); *McGuire*, 260 F.3d at 43 (noting that courts analyze statutes under intermediate scrutiny when statutes do not regulate speech per se). *See generally* Calvert, *supra* note 16, at 74-75 (noting that whatever precise formulation courts use to analyze content-neutral restrictions, recognized standard is intermediate scrutiny).

[33] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)) (suggesting that content-neutral regulations must be narrowly tailored to serve significant state interest and provide alternative channel for speakers to communicate); ROTUNDA & NOWAK, *supra* note 20, at § 20.47 (noting elements of intermediate scrutiny test).

[34] *Hill*, 530 U.S. at 725-30; *infra* notes 48-57 and accompanying text (outlining *Hill* analysis of content-neutrality and intermediate scrutiny).

[35] *Hill*, 530 U.S. at 725-30.

[36] *Id.* at 707.

[37] *Id.* at 707-08.

[38] *See id.*; *supra* notes 2-4 and accompanying text (documenting RHCF violence).

[39] Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1.

disagreed. When challenged by anti-abortion advocates, the Court held that the statute was content-neutral and a reasonable restriction that served the important interest of preserving unfettered access to health care facilities.[40]

1. Factual Background and Procedural Posture

Petitioners Leila Hill, Audrey Himmelmann, and Everitt Simpson challenged Colorado's Revised Statute section 18-9-122(3) ("the Colorado statute").[41] The statute prohibited all people from approaching, without consent, to within eight feet of another person to leaflet, display a sign, educate, counsel, or protest on a public way or sidewalk within one hundred feet of a health care facility entrance.[42] Petitioners sometimes engaged in these prohibited activities to communicate their anti-abortion viewpoint.[43]

Petitioners claimed that the statute diminished their ability to exercise their freedom of expression.[44] The lower Colorado court denied petitioners' request for an injunction against the statute's enforcement.[45] The Colorado Appellate and Supreme Courts affirmed.[46]

2. Holding and Rationale

The United States Supreme Court granted certiorari in 1999.[47] The Court held that the Colorado statute was content-neutral and survived

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[40] *See Hill*, 530 U.S. at 714.

[41] *Id.* at 703, 707.

[42] Colo. Rev. Statute § 18-9-122(3) (1993). The Colorado statute's text is as follows:

> The general assembly . . . declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility. . . . No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral education, counseling, or protest with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Hill, 530 U.S. at 707 n.1.

[43] *Hill*, 530 U.S. at 708.

[44] *Id.* at 709.

[45] Hill v. City of Lakewood, 911 P.2d 670, 672 (Colo. Ct. App. 1995), *aff'd sub nom.* Hill v. Thomas, 973 P.2d 1246, 1249 (Colo. 1999).

[46] *Hill v. Thomas*, 973 P.2d at 1259; *City of Lakewood*, 911 P.2d at 675.

[47] Hill v. Colorado, 527 U.S. 1068 (1999) (granting certiorari).

intermediate scrutiny analysis.[48] Affirming the Colorado state courts, the Supreme Court upheld the statute as a permissible speech regulation.[49] The court based its holding on the two-step analysis applicable to First Amendment challenges outlined above.[50]

Accordingly, the Court first assessed the Colorado statute's content-neutrality.[51] Holding that the government's purpose in adopting the statute determines content-neutrality, the Court asked whether the state enacted the statute to affect the content of permissible speech.[52]

The Court held that Colorado adopted the statute to promote public safety, indicating to the Court that the state's interest was unrelated to regulating the speech's content.[53] That is, the Court found Colorado's statute content-neutral because its interest was in public safety, not in prohibiting anti-abortion speech.[54] The statute's equal application to all persons inside the buffer zone was key to this line of reasoning. Because the statute restricted speech by all persons inside the buffer zone, the Court found that Colorado did not enact the statute out of disagreement with petitioners' anti-abortion speech.[55] This evidence corroborated for the Court that Colorado's intent to protect public safety was legitimate.[56]

With content-neutrality decided, the Court then balanced petitioners' rights to speak against Colorado's interest in public safety.[57] As

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[48] *Hill*, 530 U.S. at 725.

[49] *Id.*; *see* Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (upholding statute prohibiting use of sound amplification equipment in public parks because it regulates manner and place where speech occurs, not speech itself); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding regulation governing sign posting on public property as valid place restriction on expression).

[50] *See supra* Part I, Subpart A.

[51] *Hill*, 530 U.S. at 719 (holding that content neutrality's principal inquiry is whether Colorado adopted its buffer zone statute out of disagreement with proscribed speech); *see also Ward*, 491 U.S. at 791 (holding that government's purpose in enacting speech regulations controls content neutrality analysis); *cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 432 (1996) (noting that government cannot permit some speakers greater freedom of speech because it prefers their message).

[52] *Hill*, 530 U.S. at 719.

[53] *Id.* at 719-20, 724.

[54] *Id.* at 719-20 & n.27. Colorado's interest was in preserving and promoting public safety outside health care facilities. *Id.* The statute incidentally impacted speakers' freedom of speech, but Colorado's interest in public safety was unrelated to the state's goal. *Id.* at 723. Extrapolating from the Court's reasoning, if Colorado enacted the Colorado statute to further its interest in minimizing public protest at health care facilities, the state interest would then be related to the speech regulation.

[55] *Id.* at 719.

[56] *Id.* at 725.

[57] *See supra* note 19.

explained below, the Court applied a three-part intermediate scrutiny test and found the statute constitutional.

C. The Intermediate Scrutiny Standard as Applied in Hill

The intermediate scrutiny standard balances the state's interest against the people's right to speak freely.[58] In *Hill*, the Court applied the intermediate scrutiny test and found the regulation proper.[59] First, it found that states' significant interests usually arise from their traditional stake in maintaining public order.[60] Generally, public safety is the most pervasive state interest justifying speech regulations.[61] The *Hill* decision clearly legitimated Colorado's interest in protecting safe access to health care facilities.[62]

Second, the Court asked whether the regulation was narrowly tailored. The narrow tailoring requirement analyzes the degree of burden placed on the regulated speech.[63] Narrow tailoring requires that a speech regulation only burden speech closely related to the state's targeted problem.[64] However, the *Hill* Court did not require that Colorado use the least restrictive speech regulation needed to achieve its goal.[65] The Court determined that the statute was narrowly tailored

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[58] *Id.*

[59] *See Hill*, 530 U.S. at 719-30.

[60] *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 376 (1997) (identifying as significant state's interest in ensuring public safety and order near RHCFs); Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (identifying promotion and maintenance of public health and safety as traditionally within states' police power); McGuire v. Reilly, 260 F.3d 36, 48 (1st Cir. 2001) (finding significant Massachusetts' interest in securing safe access to RHCF); *see also* Madsen v. Women's Health Center, Inc., 512 U.S. 753, 767 (1994) (noting that Florida Supreme Court found that confrontational protest outside health care facilities creates strong state interest in safe access to health care facilities).

[61] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (O'Connor, J., concurring in part, dissenting in part) (identifying public necessity as a significant state interest); JOHN D. ZELEZNY, COMMUNICATIONS LAW, LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 56 (2d ed. 1997) (defining compelling state interest as a justification of great magnitude); sources cited *supra* note 60.

[62] Hill v. Colorado, 530 U.S. 703, 719-20 (2000).

[63] *See id.* at 725-26; Frisby v. Schultz, 487 U.S. 474, 485 (1988) (defining ordinance as narrowly tailored when state's regulation eliminates no more than source of "evil" it seeks to remedy); *McGuire*, 260 F.3d at 48 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)) (requiring that substantial portion of burdened speech directly advance state interest); *see also* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (requiring that narrowly tailored regulations have material relationship between regulatory scope and interest served).

[64] *See* cases cited *supra* note 65.

[65] *See Madsen*, 512 U.S. at 765 (noting that injunctions are subject to more stringent narrow tailoring analysis); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)

because it restricted speech only within areas necessary to access medical facilities.[66]

Finally, the *Hill* Court determined whether ample, alternative opportunities existed for petitioners to communicate their message.[67] Under this prong the Court found the statute allowed for educators, counselors, and protestors to communicate their message, albeit from a distance.[68] The Colorado statute thus satisfied the requirement because the buffer zone did not prevent these groups from communicating by shouting, using sound amplification equipment, or displaying signs.[69]

Accordingly, the Court found the Colorado statute narrowly tailored to serve a significant state interest while leaving open alternative channels for communication. The *Hill* Court's opinion reviews the relevant facets of both the content-neutrality and intermediate scrutiny tests.[70] Together with the two-step analysis for speech regulations discussed above, *Hill* summarized the state of First Amendment jurisprudence. It is against this backdrop that the First Circuit Court of

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(requiring precise regulation of constitutionally protected activity). Some confusion about this portion of the intermediate scrutiny test ensued from the Court's suggestion that an injunction must employ the least restrictive means available to satisfy narrow tailoring. The Supreme Court clarified the standard in *Hill*, explaining that the least restrictive means analysis is not required when challenging a statute's narrow tailoring. 530 U.S. at 726 n.32 (citing *Ward*, 491 U.S. at 498); *see also* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (noting that commercial speech regulations need not satisfy least restrictive means analysis); *Ward*, 491 U.S. at 799-800 (finding that availability of less restrictive alternative does not undermine narrow tailoring); S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (requiring that commercial speech restriction be no more extensive than necessary to advance government interest).

However, there is some support for the notion that the relationship between the state's interest and the speech regulation must grow stronger as the burden on speech increases. *See Ward*, 491 U.S. at 799-800 (implying that complete ban of speech requires more narrow tailoring than partial ban); United States v. Grace, 461 U.S. 171, 181 (1983). In *Grace*, the Court invalidated a prohibition on displaying flags and banners on the Supreme Court's campus and the immediately surrounding public sidewalks. *Id.* at 172-73, 185. The Court found that the "nexus" between the speech restriction and the federal government's interest in public safety was not sufficient to justify the regulation. *Id.* at 181-82.

[66] *See Hill*, 530 U.S. at 730 (detailing that speech is regulated only where necessary).

[67] *See* sources cited *supra* note 33.

[68] *Hill*, 530 U.S. at 727-29.

[69] *Id.* at 726.

[70] *See* Wilhem, *supra* note 2, at 117 (identifying *Hill* as most current opinion from Supreme Court regarding content-neutrality analysis); *see also* Mark Villanueva, Note, Hill v. Colorado: *The Supreme Court's Deviation From Traditional First Amendment Jurisprudence to Silence the Message of Abortion Protestors*, 51 CATH. U. L. REV. 371, 371-72 (2001) (asserting that role of buffer zone controversies and *Hill v. Colorado* is significant in First Amendment jurisprudence); *cf.* Donald L. Beschle, *Clearly Canadian?* Hill v. Colorado *and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 231 (arguing that *Hill* is not anomalous in First Amendment jurisprudence).

Appeals decided *McGuire v. Reilly* in 2001.[71]

II. IN THE WAKE OF *HILL*: *MCGUIRE V. REILLY*

McGuire v. Reilly was the first buffer zone case decided in the wake of *Hill v. Colorado*.[72] Confusion clouded many courts' intermediate scrutiny analysis prior to the *Hill* decision.[73] *Hill* did, however, bring much needed clarity to content-neutrality analysis.[74] The *McGuire* court wholly adopted the *Hill* precedent in its analysis of the Massachusetts buffer zone statute.[75]

A. Factual Background and Procedural Posture

Following Colorado's lead, Massachusetts lawmakers enacted Massachusetts General Law 266 ("the Act") to counteract violence occurring outside RHCFs.[76] The Act prohibited approaching any person for the purpose of educating, counseling, or protesting within an eighteen-foot radius of a RHCF entrance or driveway without consent.[77] Note that the Act permitted education, counseling, and protesting inside the buffer zone so long as the speaker maintained a six-foot radius from non-consenting listeners. It also exempts RHCF employees and agents from its purview.[78] The Massachusetts legislature memorialized its

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[71] 260 F.3d 36 (1st Cir. 2001).

[72] *See Hill*, 530 U.S. 703; *McGuire*, 260 F.3d 36; *see also* sources cited *supra* note 70.

[73] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (establishing intermediate scrutiny analysis to assess constitutionality of content-neutral speech regulations). The Supreme Court claimed that the test was already clear from prior precedent. *Id.* (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (upholding statute fixing locations available for groups to sell, exhibit, or distribute printed materials at state fair); ISKCON Miami, Inc. v. Metropolitan Dade County, 147 F.3d 1282, 1285-86 (11th Cir. 1988) (upholding regulation on free distribution of literature in non-public forum using moderate scrutiny).

[74] *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 377, 380 (1997) (applying *Madsen* precedent uncertainly); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 770, 773-75 (1994) (announcing more stringent content-neutrality requirements for injunctions); Frisby v. Schultz, 487 U.S. 474, 487-88 (1988) (upholding complete ban on residential picketing affecting only one home despite bans impact on anti-abortion protestors). For a history of content neutrality doctrine, *see* J. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214-31 (1982).

[75] *See McGuire*, 260 F.3d at 40-41; *infra* notes 84-86 and accompanying text (discussing *McGuire* court's content-neutrality rationale).

[76] *See* sources cited *supra* note 75.

[77] *See* MASS. GEN. LAWS ch. 266, § 120E ½ (2000).

[78] *See* MASS. GEN. LAWS ch. 266, § 120E ½ (2000). Education, counseling, and protesting are permissible for any speaker inside the buffer zone so long as the listener consents and

intent in enacting this statute in section one of Senate Bill 148, which detailed two aims for the Act: increasing public safety and preventing pedestrian and vehicular congestion.

Petitioners Mary Anne McGuire, Ruth Schiavone, and Jean B. Zarrella regularly picketed outside RHCFs to discourage women from having abortions.[79] Their activities included sidewalk counseling and protesting.[80] Petitioners filed a complaint in the District Court of Massachusetts, contending that the Act curtailed their right to freedom of speech.[81]

B. Holding and Rationale

The district court granted petitioners' motion for injunction against the Act's enforcement.[82] On appeal, the First Circuit Court of Appeals overturned the district court on First Amendment grounds. It found the Act's speech regulation content-neutral and permissible under intermediate scrutiny analysis. Consequently, the circuit court remanded the case back to the district court for further adjudication consistent with its opinion.[83]

The circuit court applied *Hill's* content-neutrality analysis to the Act's speech restrictions.[84] First, the court reasoned that Massachusetts' purpose in adopting the Act was ensuring public safety, thus satisfying the legislative purpose inquiry.[85] Second, the court noted that Massachusetts' interest was sufficiently unrelated to the proscribed speech to satisfy *Hill's* unrelated interest criterion.[86] Thus, the court held that the Act was content-neutral and proceeded to apply the

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the speaker maintains a distance of at least 6 feet from the unwilling listener. *Id.* However, RHCF employees and agents have unrestricted speech rights inside and outside the buffer zone. *Id.*

[79] *McGuire*, 260 F.3d at 41.

[80] *Id.*

[81] *Id.* Petitioners also allege violations of due process, equal protection, and freedom of association. *Id.* The court rejected these claims under analysis not relevant to this Note. *Id.* at 49-51.

[82] *Id.* at 41; McGuire v. Reilly, 122 F. Supp. 2d 97, 104 (D. Mass. 2000).

[83] *McGuire*, 260 F.3d at 51.

[84] *See id.* at 40-41, 44 (holding that Act was not adopted out of disagreement with anti-abortion speakers' message); *supra* note 52 and accompanying text (discussing *Hill's* legislative purpose inquiry).

[85] *McGuire*, 260 F.3d at 44-45. Recall that *Hill's* content neutrality analysis requires that the state adopt the statute for a purpose unrelated to curtailment of the speech affected by the regulation. *See supra* note 52.

[86] *Id.* *Hill's* unrelated interest criterion requires that the state's significant interest be wholly unrelated to affecting the content of regulated speech. *See supra* note 52.

intermediate scrutiny standard.[87] It found the Act comparable to the Colorado statute, but somewhat less restrictive than the Colorado statute because it applied only to RHCFs, demanded a buffer zone of only eighteen feet, and exempted employees and agents from its purview.[88] The court reasoned that just as the Colorado statute satisfied intermediate scrutiny, the Massachusetts Act was also narrowly tailored to serve a significant state interest, yet left open alternative channels for communication.[89]

Petitioners also argued that exempting RHCF employees and agents was content-based discrimination under the Act.[90] The court rejected their claim. It reasoned that allowing only RHCF employees and agents to educate, counsel, or protest within the buffer zone did not amount to a content-based restriction because the restriction was not drawn along the lines of viewpoint.[91] The court further reasoned that because the statute did not discriminate on the basis of content, the statute was content-neutral and did not violate the First Amendment.[92]

III. ANALYSIS

The First Circuit's opinion in *McGuire v. Reilly* applied the much-maligned *Hill* precedent.[93] While *McGuire* held that the Act was content-neutral and survived intermediate scrutiny analysis, the court's holding is fundamentally flawed because it misapplied *Hill*'s content-neutrality test. The court's intermediate scrutiny rationale collapses as well because it's narrow tailoring and alternative channels of communication rationales were unsubstantiated.

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[87] *Id.* at 48-50.

[88] *Id.*

[89] *Id.* at 48-50; *see also supra* notes 59-69 and accompanying text (outlining and applying intermediate scrutiny test).

[90] *Id.* at 45.

[91] *McGuire*, 260 F.3d at 44, citing *Hill*, 530 U.S. at 719 (outlining criteria for content-neutrality); *see also* sources cited *infra* notes 108-112 (discussing *McGuire*'s application of content-neutrality analysis).

[92] *McGuire*, 260 F.3d at 44-45.

[93] *Id.* at 40-41. *See generally* Oberst, *supra* note 20, at 121-27 (arguing that Court misapplied test for time, place, and manner speech regulations); David G. Pettinari, Note, Hill v. Colorado — *The United States Supreme Court Squares Off with Colorado Over the First Amendment Rights of Abortion Protesters*, 77 U. DET. MERCY L. REV. 803 (2000) (explicating *Hill* in light of recent First Amendment jurisprudence); Wilhelm, *supra* note 3, at 134-37 (critiquing Hill's content-neutrality and overbreadth analysis).

A. The Court Erred by Finding the Act Content-Neutral

McGuire adopted *Hill*'s content-neutrality inquiries.[94] However, the court applied the analysis incorrectly and ignored the employee/agent exemption's impact on the Act's neutrality posture. Consequently, the court erred in holding that the Act was content-neutral.

1. The Court Misapplied *Hill*'s Content-Neutrality Analysis

Petitioners argued that because the Act applied solely to RHCFs, Massachusetts' purpose in enacting the statute was to curtail anti-abortion speech.[95] If so, the act would fail *Hill*'s content-neutrality test because the statute was enacted to proscribe speech on a specific topic, leaving all other topics untouched. But, the First Circuit rejected petitioners' claim.[96] Rather, it found the Act content-neutral because Senate Bill 148 demonstrated that the legislature's purpose was to promote public safety.[97] The court found unsubstantiated the notion that Massachusetts' interest was regulation of anti-abortion speech.[98]

McGuire incorrectly concluded that the Act satisfied *Hill*'s content-neutrality inquiry. The court's misapplication of *Hill*'s content neutrality analysis originated in its interpretation of both the Act and the Colorado statute.[99] The court asserted that the Act's narrow scope necessarily implied content-neutrality by virtue of comparison to the broader, content-neutral Colorado statute.[100] But, the Colorado statute's application to all health care facilities was highly relevant to the Supreme Court.[101] The *Hill* Court identified the Colorado statute's broad

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[94] *McGuire*, 260 F.3d at 44-45.

[95] *Id.* at 45.

[96] *Id.*

[97] *Id.* at 44.

[98] *Id.* The circuit court ends its inquiry into Massachusetts' legislative intent after facial examination of the legislative history. *See id.*

[99] *See McGuire*, 260 F.3d at 41. The circuit court notes the Act's similarity to the Colorado statute, but identifies five differences: 1) the Colorado statute applies to all health care facilities while the Act applies only to RHCFs; 2) the *Hill* buffer zone extends 100 feet around health care facility entrances while the Act's buffer zone is only 18 feet; 3) the Colorado statute allows protestors to approach listeners to a distance of eight feet while the Act allows approach to a distance of six feet; 4) unlike the Colorado statute, the Act applies only when the RHCF is open and the buffer zone is clearly demarcated; and 5) the Colorado statute is universally applicable while the Act exempts RHCF employees and agents from its scope. *Id.*

[100] *Id.* at 44 (noting that targeting medical facilities did not render *Hill*'s statute content-based, and comparing Act with Colorado statute).

[101] *See* Hill v. Colorado, 530 U.S. 703, 724-25 (2000) (noting virtue of statute's broad applicability).

applicability as evidence of Colorado's interest in regulating all types of protest outside health care facilities, not just anti-abortion protests.[102]

In contrast, the Massachusetts legislature specifically targeted abortion-related speech by restricting the Act to RHCFs performing abortions.[103] *McGuire* glossed over this distinction by deferring to Massachusetts' purported legislative purpose — public safety.[104] However, it is highly probable that the educators, counselors, and protestors outside RHCFs will be abortion opponents.[105] The statute's narrow scope strongly suggests that the Massachusetts legislature purposefully proscribed anti-abortion speech.[106]

Thus, Massachusetts' limiting the Act to RHCFs insufficiently supports the proposition that its purpose in enacting the statute was *only* public safety. Massachusetts' true interest was regulating an entire

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[102] *See id.* at 730-31 (construing statute's applicability to all health care centers as virtuous and evidence against discriminatory motive); *see also* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (noting that generally applicable speech regulations are preferred over regulations unreasonably targeting only some speech).

[103] *See* MASS. GEN. LAWS ch. 266, § 120E ½(a) (2000) (defining RHCFs as places, other than hospitals, where abortions are offered or performed); S.B. 148, 181st Gen. Ct. Reg. Sess. (Mass. 1999). The senate bill says explicitly that the Act is a response to blockades, disturbances, violence, and the shooting on December 30, 1994. *Id.* Note that the shooting victims of December 30, 1994 were RHCF employees. National Abortion Federation, *supra* notes 2-4.

[104] *McGuire*, 260 F.3d at 44 (concluding "without much question" that significant state interest justifies Act's narrow application to RHCFs). The *Hill* Court assessed the plausibility of Colorado's purported purpose for enacting the statute before finding its legislative purpose benign. *Id.*; *see supra* notes 53-54 and accompanying text. Additionally, at least one commentator cautions against the "serious danger that superficial and phony legislative intent," functioning as "a content-neutral rationale," will mask content-based objectives. Calvert, *supra* note 16, at 109 (arguing that because search for legislative intent is speculative, laws should look at actual impact and effect of laws regulating speech to determine if it is content-neutral or content-based); *see also* Kevin R. Bruning, Note, *Nudity and Alcohol: Morality Lies in Public Discussion*, 29 STETSON L. REV. 775, 787-88 (2000) (raising concern that legislatures anticipate content-neutrality attack and create legislative history to support disingenuously benign legislative purpose).

[105] *See McGuire*, 260 F.3d at 46 n.2 (considering possibility that clinic employees were involved with violent incidents); McGuire v. Reilly, 122 F. Supp. 2d 97, 103 (D. Mass. 2000) (calling RHCF employees and agents zealous abortion advocates); *id.* at 103 n.9 (suggesting that RHCF employees and agents encourage clinic patients to undergo abortions inside buffer zone); Calvert, *supra* note 16, at 109 (suggesting that buffer zones disproportionately impact abortion protestors); Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1868-69 (1988) (highlighting Court's acknowledgement that Colorado's buffer zone statute disproportionately impacted abortion-related speech). *But see McGuire*, 260 F.3d at 45 (arguing that affiliation with RHCF does not necessarily lead to expression of pro-choice views inside buffer zone).

[106] *Supra* note 103 and accompanying text.

category of speech based upon its subject matter.[107] Upholding the Act distorts the meaning of *Hill*. Thus, the Act fails *Hill*'s content-neutrality test.

2. The Court Disregarded the Impact of the Act's Employee/Agent Exemption

McGuire further misapplied *Hill*'s content-neutrality analysis when it considered petitioners' challenge to the employee and agent exemption. The court's error was two-fold. First, it failed to consider the central thrust of *Hill*'s content-neutrality framework — the State's equal application of the speech restriction to all speakers. Second, it disregarded the similarity between permitting only RHCF employees and agents unfettered speech rights inside the buffer zone and permitting only pro-choice speech inside the same area, undermining its classification of the Act as content neutral.

The Court's conclusions that the employee/agent exemption did not discriminate between speakers on the basis of viewpoint sharply contrasted with the district court's opinion.[108] The district court held that the employees' RHCF affiliation rendered them *de facto* abortion proponents.[109] The district court found that allowing these speakers unfettered speech rights inside the buffer zones created a distinction based on the speaker's message because speech by non-exempt parties was almost certainly anti-abortion.[110] The First Circuit rejected this claim, citing the relationship between the employees' position, viewpoint, and speech as too tenuous.[111] Because the Act did not expressly prohibit the expression of any viewpoint, the court found the Act content-neutral.[112]

However, *McGuire*'s rationale is unpersuasive. The court ignored the central thrust of content-neutrality analysis — equal application across

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[107] *Supra* note 104 and accompanying text. Courts have also found statutes content-based when state had multiple purposes in enacting the legislation and one purpose was impermissible. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 679 (1994). Justice Ginsburg echoes this view, suggesting that existence of a content-neutral justification is not sufficient for content-neutrality when a content-based justification also exists. *Id.* at 686 (Ginsburg, J., concurring in part, dissenting in part).

[108] 122 F. Supp. 2d 97, 103-04 (D. Mass. 2001) (noting that abortion advocates' speech rights exceeded those of abortion foes under Act).

[109] *See id.* at 103 & n.9 (stating that RHCF employees and agents "exhort [potential] abortion clients" to undergo abortions within the restricted areas).

[110] McGuire v. Reilly, 122 F. Supp. 2d 97, 103 (D. Mass. 2000).

[111] *See McGuire*, 260 F.3d at 45-46 (finding unsubstantiated district court's assertion that RHCF employees and agents are universally pro-choice).

[112] *See id.* at 48.

all speakers. In fact, the *Hill* Court noted that the statute applied equally to any speaker inside the buffer zone.[113] The Court's exact language is critical: "Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries."[114]

Implicit in the Supreme Court's jurisprudence on content-neutrality is the notion that discrimination according to group identity is discrimination according to viewpoint.[115] Therefore, the similar treatment of all persons, regardless of group membership or viewpoint was essential to content-neutrality in *Hill*.[116] This type of equal treatment is the level of neutrality constitutionally required.[117]

Following the Supreme Court's rationale, the Act's exemption for RHCF employees and agents did not rise to a constitutionally neutral level. Allowing one group, namely RHCF employees and agents, unrestricted speech rights discriminates against non-exempt persons' speech based on content.[118]

However, proponents of the *McGuire* holding might argue that the relationship between group membership and speech content is insufficient to create content bias. This argument originates from the Act's differentiation between speakers on the basis of what they *might* say and not what they do say. The First Circuit's *McGuire* opinion focused on this reasoning in upholding the Act, noting that the exemption would not always give rise to a content-based speech

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[113] Hill v. Colorado, 530 U.S. 703, 723 (2000).

[114] *Id.*

[115] *See* Carey v. Brown, 477 U.S. 455, 460-63 (1980). The *Carey* court holds that allowing protestors unfettered speech rights outside places of employment involved in labor disputes is comparable to restricting the subject matter of protest to labor disputes. *Id.*; *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48-49 (1983) (analogizing speaker-based restrictions to subject-matter restrictions); Stone, *supra* note 23, at 249 (asserting that apparently content-neutral regulations that distinguish between speakers often have viewpoint-differential effects, and suggesting that courts should treat statutes as content-based where group identity is closely correlated with specific viewpoint).

[116] *Hill*, 530 U.S. at 723.

[117] *Id.* at 725 (highlighting that Colorado statute impacted all demonstrators); *see supra* note 115.

[118] Some courts would clearly imply that RHCF employees and agents espouse pro-choice views. *See* cases cited *supra* note 115 (equating statutes regulating speech based on its speaker with statutes regulating speech based on content when nexus between group membership and viewpoint is strong). As the only protestors challenging the Act offer an anti-abortion message, permitting one group more speech rights than the other amounts to discrimination on the basis of content. *Id.*

restriction.[119] Essentially, the circuit court found the link between group membership and prospective speech too tenuous to create content bias.[120]

This rationale does not comport with Supreme Court precedent. The *Hill* Court analogized group membership to speech content, a link the First Circuit cannot apply only when it sees fit.[121] Consequently, the Supreme Court's content-neutrality test requires the Act's application to all education, counseling, and protesting.[122] The Act does not meet this requirement because it does not apply to RHCF employees and agents that educate, counsel, and protest inside the buffer zone.[123] Thus, the Act fails *Hill*'s content-neutrality analysis.

In sum, *McGuire* misapplied *Hill*'s content-neutrality analysis by ignoring the fact that the Act's discriminatory application to RHCFs and exemption for RHCF employees and agents amounts to content-based discrimination.[124] The court ignored the impact of both the Act's narrow scope and exemption, rendering its content-neutrality analysis unconvincing.[125] The district court reached the better conclusion: the Act is a content-based speech regulation.[126]

However, even if it is conceded that the Act was content-neutral, its constitutionality still hinges on the intermediate scrutiny test. The First Circuit erred again in its intermediate scrutiny analysis. The next section explores how the court misapplied two prongs of *Hill*'s intermediate scrutiny test: the narrow tailoring requirement, and the maintenance of alternative channels of communication.

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[119] *See McGuire*, 260 F.3d at 47-48. The circuit court suggests that an as-applied challenge is appropriate if RHCF employees and agents utilize the exemption to promote pro-choice views. *Id.* Implicitly, the court holds that challenging the *McGuire* Act as-applied is inappropriate if RHCF employees and agents do not engage in pro-choice advocacy inside the buffer zone. *Id.*

[120] *See id.*

[121] *See* sources cited *supra* note 115 and accompanying text.

[122] *Hill*, 530 U.S. at 725.

[123] *Compare* MASS. GEN. LAWS ch. 266, § 120E ½ (2000) (permitting unrestricted protest, counseling, and education by RHCF employees and agents inside the buffer zone but limiting all other protest, education, and counseling inside the buffer zone), *with Hill*, 530 U.S. at 725 (holding that content-neutrality requires regulation of all protesting, educating, and counseling inside the buffer zone), *and* cases cited *supra* note 115 (outlining notion that regulation according to group membership can result in regulation along content lines).

[124] *See McGuire*, 260 F.3d at 48.

[125] *See* sources cited *supra* notes 100-107 and accompanying text (concluding that Act's application to RHCFs alone renders it content-based); sources cited *supra* notes 115-123 and accompanying text (outlining how Act's exemption renders it content-based under *Hill*).

[126] *McGuire*, 122 F. Supp. 2d 97, 103-04 (D. Mass. 2000).

B. The Court Erred in Applying the Intermediate Scrutiny Test

As discussed in Part II, intermediate scrutiny requires that a statute be narrowly tailored to serve a significant state interest and leave open alternative channels of communication.[127] While neither the district court nor the circuit court questioned the legitimacy of Massachusetts' interest in safe access to RHCFs, petitioners challenged both the narrow tailoring and alternative communication channels requirements in the circuit court.[128] The circuit court incorrectly concluded that the Act satisfied both requirements by misapplying the intermediate scrutiny test.

1. The Act Fails to Further the State's Interest More Effectively Than the Existing Statutory Scheme

Narrow tailoring requires that a speech regulation serve the significant state interest more effectively than other regulations designed to protect the same interest.[129] As Massachusetts regulated conduct within the Act's purview prior to the Act's passage, the court had to conclude that the existing regulation failed to protect the state's interest in public safety to show that public safety was underserved without the Act in place.[130] The court held that the Act's very passage demonstrated that its provisions protected public safety more effectively than the prior statutory scheme.[131]

The court's conclusion is erroneous because at least one other Massachusetts statute, Section 272[132], addressed the state's interest in safe access to RHCFs.[133] This provision proscribed any action, including speech, that obstructed entry to a health care facility.[134] Therefore,

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[127] *See supra* notes 56 (outlining three-part test for intermediate scrutiny), 58-69 (discussing alternative channels of communication), and accompanying text.

[128] *See Hill*, 530 U.S. at 715 (noting petitioners' failure to challenge legitimacy of state's interest); *McGuire*, 260 F.3d at 48. The District Court does not consider the sufficiency of Massachusetts' interest in public safety because its content-neutrality analysis renders the intermediate scrutiny standard inapplicable. McGuire v. Reilly, 122 F. Supp. 2d 97, 102 (2000) (finding the Act content-based and subject to strict scrutiny).

[129] *Supra* notes 60-63.

[130] *McGuire*, 260 F.3d at 49.

[131] *Id.* The circuit court concludes that narrow tailoring is satisfied without breaking its analysis into two prongs. *Id.* The court does, however, address the requirement that the statute serve Massachusetts interest effectively by implication. *Id.*

[132] *See* MASS. GEN. LAWS ch. 12, § 11H (2000) (impairing civil rights); MASS. GEN. LAWS ch. 265, § 13A (2000) (prohibiting assault and battery); MASS. GEN. LAWS ch. 272, § 53 (2000) (disturbing the peace).

[133] *See* MASS. GEN. LAWS ch. 272, § 53 (2000) (prohibiting blockage of RHCF entrances).

[134] *Id.*

Massachusetts previously prohibited the same behavior that the Act in *McGuire* purported to target.[135] Accordingly, Massachusetts already had the legal mandate to address educating, counseling, and protesting outside RHCFs that impaired safe access, rendering the Act unnecessary.[136]

Nevertheless, proponents of the Act might argue that protecting public safety was an important interest furthered by the Act's passage. In fact, *McGuire* argued that protections afforded under Massachusetts' law prior to the Act were insufficient to protect the state's interest.[137] Consequently, the Massachusetts legislature believed that protecting its interest in safe access to RHCFs required the Act's passage.[138] Supporting this view, the court reasoned that the Act's scope covered a broad number of speech activities, including educating, counseling, and protesting, activities that threatened public safety despite the enforcement of Massachusetts' statutory scheme prior to the Act's passage.[139] The occurrence of these speech activities suggested to the court that Massachusetts' interest was ineffectively served without the Act.[140] From this perspective, the Act was narrowly tailored.[141]

This argument, however, ultimately collapses. The court acknowledged that Section 272's coverage included educating, counseling, and protesting intended to obstruct entry to RHCFs.[142] The court's acknowledgement tacitly admits that the Act prohibited speech already regulated under Massachusetts law. Moreover, the court failed to identify any specific flaw in Section 272 that would necessitate the

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[135] *Id.* "A person who knowingly obstructs entry to or departure from such medical facility or who enters or remains in such facility so as to impede the provision of medical services after notice to refrain from such obstruction or interference, may be arrested by a sheriff, deputy sheriff, constable, or police officer."

[136] *Id.* Note the circuit court's fallacy of logic. It concludes that the Act's existence is evidence of Massachusetts' need for its adoption. *See McGuire*, 260 F.3d at 49. This reasoning is an example of the logical fallacy *post hoc ergo propter hoc* (after this therefore because of this). COPI, IRVING M. & COHEN, CARL, INTRODUCTION TO LOGIC 101 (8th Ed. 1990). An author commits the fallacy when a causal relationship is assumed because one thing follows another in time. *Id.* The circuit court commits this error because it assumes that Massachusetts needed the Act to protect its state interest because abortion clinic violence preceded the Act's passage. *See McGuire*, 260 F.3d at 49.

[137] *McGuire*, 260 F.3d at 49.

[138] *Id.*

[139] *Id.*

[140] *See id.* at 48-49 (deferring to Massachusetts' legislative judgment that Act was necessary to insure public safety).

[141] *See id.* The circuit court finds Massachusetts' need for the Act was plausible, but cannot say with certainty that furthering public safety required its adoption. *Id.*

[142] *See supra* notes 135-136 and accompanying text.

Act's supplemental speech restrictions.[143] This undermines the court's conclusion that the Act satisfied narrow tailoring because it is unclear whether Massachusetts' interest would be less effectively served in the absence of the Act.[144]

2. The Act Burdens More Speech Than Necessary

The second requirement of narrow tailoring demands that states regulate no more speech than necessary to achieve their interest.[145] *McGuire* failed to consider this issue at all in its intermediate scrutiny analysis, a clear misapplication of the narrow tailoring analysis.[146] If the court had considered this aspect of narrow tailoring, the Act would have failed under intermediate scrutiny. The court's erroneous conclusion that the Act satisfied this requirement further undermined its intermediate scrutiny analysis.[147]

The Act contains three distinct speech regulations governing educating, counseling, and protesting. Narrow tailoring requires that each regulation further Massachusetts' interest in safe access to RHCFs.[148] Although evidence gathered in the legislative process substantiated the threat posed by protests to safe RHCF access,[149] there was no evidence that educating and counseling increased the risk of RHCF violence.[150] Because educating and counseling are not demonstrably dangerous to RHCF access, Massachusetts' interest in regulating them was not

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[143] *Id.*

[144] *See McGuire*, 260 F.3d at 48-49 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (holding that Act was narrowly tailored); sources cited *supra* note 136.

[145] *See supra* text accompanying note 33 (stating intermediate scrutiny requirements).

[146] *See McGuire*, 260 F.3d at 48-49 (discussing Act's satisfaction of narrow tailoring); *supra* notes 63-69 (outlining intermediate scrutiny's criteria that regulations burden no more speech than necessary to further state's interest); *supra* note 136 (discussing circuit court's failure to break narrow tailoring analysis into two steps).

[147] *Supra* notes 60-63 and accompanying text.

[148] *See supra* text accompanying note 33 (stating intermediate scrutiny requirements).

[149] *See McGuire*, 260 F.3d at 44 (suggesting that legislative investigation produced evidence showing that abortion protestors are particularly aggressive). Similar findings supported the Colorado statute's adoption. *See* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, *supra* note 105, at 1856-57 (describing negative effects of abortion protest on patient health). Other courts have also noted the danger posed to patient health by zealous anti-abortion protestors. *See, e.g.*, Pro-choice Network v. Project Rescue, 799 F. Supp. 1417, 1438-40 (1992).

[150] *See McGuire*, 260 F.3d at 44 (observing that Massachusetts provided evidence of danger posed by protestors to support Act's adoption but appears silent on education and counseling's impact); *cf.* Oberst, *supra* note 20, at 124 (criticizing Hill v. Colorado, 530 U.S. 703 (2000), and noting general absence of evidence establishing that peaceful counselors and educators contribute to clinic violence).

significant. Inclusion of these types of speech under the Act burdened more speech than necessary to maintain safe RHCF access. Consequently, the Act fails the second component of narrow tailoring analysis.[151]

In all, the court's narrow tailoring rationale is erroneous. It failed to establish that the Act both served the significant state interest more effectively than other regulations designed to protect the same interest and burdened no more speech than necessary.[152]

3. The Act Forecloses Alternative Channels for Communication

The court ignored not only the Act's flawed tailoring but also the reality of human communication. The second prong of intermediate scrutiny analysis requires that purveyors of affected speech have alternative means to communicate their message.[153] The Act required that educating, counseling, and protesting occur from a distance of at least six feet.[154] *McGuire* asserted that the public's ability to educate, counsel, and protest under this statute remained intact.[155] This conclusion flows from the *Hill* Court's finding that affected speakers could overcome the buffer zone distance by speaking loudly and displaying posters, thereby preserving their channel to communicate.[156]

The *McGuire* court's conclusion that the buffer zone did not reduce the efficacy of protesting is substantiated. Evidence and common sense suggest that protesting is possible at a distance of six feet or greater.[157] However, the buffer zone affects educators and counselors more than protestors. In fact, the United States Supreme Court has held that the special nature of such educating and counseling require communication

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[151] *See supra* text accompanying note 33 (stating intermediate scrutiny's requirement that regulation burden no more speech than necessary).

[152] *See supra* text accompanying notes 129-144 (detailing Massachusetts' failure to demonstrate Act's necessity to protect public safety); *supra* text accompanying notes 148-151 (demonstrating Act's burdening of more speech than necessary to achieve its objective).

[153] *See supra* note 33.

[154] MASS. GEN. LAWS ch. 266, § 120E ½ (2000).

[155] *See McGuire*, 260 F.3d at 49 (reasoning by analogy that six-foot buffer zone does not undermine alternative communication channel because *Hill*'s eight-foot buffer zone was sufficient); Darrin Alan Hostetler, Note, *Face-to-Face with the First Amendment:* Schenck v. Pro-Choice Network *and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 STAN. L. REV. 179, 204 (1997) (arguing that picketing is effective despite reasonable distance).

[156] *Hill*, 530 U.S. at 726-27; *see also* Madsen v. Women's Health Care Center, Inc., 512 U.S. 753, 769-70 (1994) (deferring to state court's determination about efficacy of communication from exterior of buffer zone); sources cited *supra* note 155.

[157] *See* cases cited *supra* note 155.

at less than shouting distance.[158] The Act's six-foot buffer zone also demands that speakers speak loudly, if not shout.[159] The buffer zone does not provide ample opportunity to educate or counsel because the efficacy of these communications is reduced by distance.[160]

Note that this conclusion does conflict somewhat with the *Hill* holding. The *Hill* Court acknowledges that the eight-foot buffer zone impairs the efficacy of oral communication, but finds that ample alternative channels for communication exist because the efficacy of sign and pictures is not impaired by the buffer zone, and amplification equipment may also overcome the distance.[161] While helpful in assessing the restriction on protesting, this observation does not speak to the alternative channels available to speakers for educating and counseling.[162] *Hill*'s majority does not distinguish between ordinary oral communication and educating and counseling, an omission noted in Justice Scalia's dissent in *Hill*.[163] In truth, commentators and anti-abortion groups agree with Justice Scalia that distance prohibits the efficacy of educating and counseling.[164]

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[158] *See* Schenck v. Pro-choice Network, 519 U.S. 357, 377 (1997). In *Schenck*, petitioners challenged a floating buffer zone provision prohibiting protest within fifteen feet of any person. *Id.* at 371. The Court underscored that the floating zone prevented conversation. *Id.* at 377.

[159] *See Hill*, 530 U.S. at 757 (Scalia, J., dissenting) (suggesting that normal conversation occurring on public sidewalk cannot reasonably occur at eight-foot distance and noting that education and counseling are personal in nature so prohibiting face to face encounters via eight-foot buffer zone prevents communication of speaker's message); *see also id.* at 738 (noting that speech's efficacy is determined by ideas and time, place, and manner determinations).

[160] *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (holding that insufficiency of alternative channels for communication sometimes renders them closed); *supra* notes 157-159 and accompanying text (describing impairment to communication posed by distance).

[161] *Hill*, 530 U.S. at 726.

[162] *See supra* note 159 and accompanying text (addressing distance's impact on speech's efficacy).

[163] *Compare Hill*, 530 U.S. at 727-28, *with id.* at 756-57 (Scalia, J., dissenting).

[164] *See* Hostetler, *supra* note 155, at 204 (arguing that buffer zones create "substantial risk of diminishing the communicative impact . . . of the intended message"); Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, *supra* note 105, at 1860 (describing ability to approach listener as facilitating forms of speech that have unique communicative value); Judith Fetrow, *Don't Panic: The Sidewalk Counselor's Guidebook* 8, 12, available at http://www.ewtn.com/library/prolife/sidewalk.txt (last visited Oct. 8, 2002) (observing that effectiveness of "sidewalk counseling" hinges on counselor's ability to personally approach individuals and create rapport of trust). *See also* cases cited *supra* notes 158-160 and accompanying text (describing distance's detrimental impact on speakers' ability to educate and counsel).

Accordingly, the Act forecloses speakers' channels to educate and counsel, causing it to fail the intermediate scrutiny analysis.[165] In addition, for reasons explained above, the Act fails the narrow tailoring analysis.[166] Because the Act fails two prongs of the intermediate test, *McGuire* erroneously held that the Act survives intermediate scrutiny.

CONCLUSION

By straining *Hill*'s rationale to uphold the Act, *McGuire* diminishes the speech rights of anti-abortion protestors in the name of public safety. The court shrinks the constitutional chasm between content-neutral and content-based discrimination by misapplying the tenets of *Hill*. In spite of the Supreme Court's opinion in *Hill*, the First Circuit permits expression of some viewpoints over others. Perhaps Massachusetts' buffer zone movement is, after all, about silencing the anti-abortion message[167]

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[165] *See supra* note 127 and accompanying text.

[166] *See supra* notes 60-63, 147 and accompanying text.

[167] *See* Goodstein & Thomas, *supra* note 39, at A1.