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# Constitutional Law—Seventh Circuit Upholds Buffer-Zone Ordinances to Protect Women Entering Healthcare Facilities from Sidewalk Counselors—Price v. City of Chicago, 915 F.3d 1107 (7th Cir. 2019)

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# CONSTITUTIONAL LAW—SEVENTH CIRCUIT UPHOLDS BUFFER-ZONE ORDINANCES TO PROTECT WOMEN ENTERING HEALTHCARE FACILITIES FROM SIDEWALK COUNSELORS—*PRICE V. CITY OF CHICAGO*, 915 F.3D 1107 (7TH CIR. 2019).

Since the late twentieth century, courts have grappled with the tension between the First Amendment's right to free speech and the government's desire to provide women with safe, unobstructed access to healthcare facilities that offer birth control and abortion services.[1] To address the interests on both sides of this scale, cities have enacted "buffer zone" ordinances, which make it illegal to approach patients who seek access to such healthcare facilities.[2] In *Price v. City of Chicago,*[3] "sidewalk counselors" asked the Court of Appeals for the Seventh Circuit to strike down a Chicago buffer-zone ordinance given recent Supreme Court decisions that arguably rendered the ordinance unconstitutional.[4] The court, however, affirmed the lower court's decision to uphold the Chicago ordinance, and concluded that the Supreme Court upheld a nearly identical or-

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[1] *See* U.S. CONST. amend. I (delineating right to freedom of speech); Madsen v. Women's Health Ctr., 512 U.S. 753, 767-68 (1994) (noting states' significant interest in protecting access to abortion); Erin Heger, '*It's All About Power': Mississippi Anti-Choice Group Targets Buffer Zone Ordinance*, REWIRE NEWS (Oct. 18, 2019, 10:57 AM), https://rewire.news/article/2019/10/18/its-all-about-power-mississippi-anti-choice-group-targets-buffer-zone-ordinance/ (describing First Amendment claims and competing safety issues); *see also* Sølvi Marie Risøy & Thorvald Sirnes, *The Decision: Relations to Oneself, Authority and Vulnerability in the Field of Selective Abortion*, 10 BIOSOCIETIES 317 (2014) (detailing gravity of decision for women choosing abortion).

[2] *See* Heger, *supra* note 1 (describing history of buffer-zone litigation and referencing case-in-chief).

[3] 915 F.3d 1107 (7th Cir. 2019).

[4] *See id.* at 1110 (describing Petitioners' claims for injunctive relief). Petitioners argue that, while the ordinance at issue is nearly identical to that upheld in *Hill v. Colorado*, the Supreme Court's later decisions in *Reed v. Town of Gilbert* and *McCullen v. Coakley* essentially overruled *Hill*. *Id.* at 1111. Thus, the Court should follow the tests for content-neutrality and narrow-tailoring from these cases. *Id.*; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 173 (2015) (overturning facially content-based ordinance because it did not meet strict scrutiny); McCullen v. Coakley, 573 U.S. 464, 496 (2014) (overturning content-neutral law because it did not serve legitimate government interest); Hill v. Colorado, 530 U.S. 703, 734-735 (2000) (upholding content-neutral statute although it regulated freedom of speech).

dinance in *Hill v. Colorado* that has not yet been overruled by any recent cases.[5]

Veronica Price, David Bergquist, Ann Scheidler, and Anna Marie Scinto Mesia regularly stood on the public sidewalks outside of Chicago abortion clinics to inform patients both of the risks associated with abortion procedures and alternative courses of action available to them.[6] To their dismay, in October of 2009, the City of Chicago ("City") "amended the City's disorderly conduct ordinance to prohibit any person from approaching within eight feet of another person near an abortion clinic for the purpose of engaging in the types of speech associated with sidewalk counseling."[7] The ordinance ("Chicago ordinance") effectively banned sidewalk counseling outside of abortion clinics or healthcare facilities.[8] The aforementioned individuals—self-proclaimed "sidewalk counselors"—joined with two pro-life advocacy groups ("Petitioners") to sue the City.[9] They sought declaratory and injunctive relief against the enforcement of the ordinance; they claimed it stifled their ability to engage in their counseling practices and violated their First Amendment right to free speech.[10] Petitioners insisted that they be allowed to approach women at a close proximity as they entered abortion clinics so they could speak in soft, gentle tones and protect the person's privacy.[11]

Petitioners claimed the Chicago ordinance was a "content-based restriction on speech and [was] facially unconstitutional under strict scruti-

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[5] *See Price*, 915 F.3d at 1119 (explaining court's holding); *see also Hill*, 530 U.S. at 735 (holding statute which regulated speech was constitutional).

[6] *See Price*, 915 F.3d at 1109-10 (identifying Petitioners).

[7] *See id.* at 1110-11 (describing amendment of City's ordinance).

[8] *See id.* (citing to ordinance at issue: CHI. ILL. CODE § 8-4-010(j)(1)). The ordinance provides that a person commits disorderly conduct when he or she:

> [K]nowingly approaches 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 protest, education, or counseling with such other person in the public way* within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility.

*Id.* (emphasis added) (outlining ordinance at issue).

[9] *See id.* at 1110 (explaining how Petitioners sued City under 42 U.S.C. § 1983).

[10] *See id.* (stating Petitioners' purpose for suit); *see also* U.S. CONST. amend. I (articulating right to free speech).

[11] *See Price*, 915 F.3d at 1109-10 (describing tactical need for proximity to people entering abortion clinics). "These conversations must take place face to face and in close proximity to permit the sidewalk counselors to convey a gentle and caring manner, maintain eye contact and a normal tone of voice, and protect the privacy of those involved." *Id.*

ny."[12] Alternatively, they argued that, even if the court applied intermediate scrutiny, the ordinance failed to satisfy the narrow-tailoring requirement for content-neutral restrictions on speech and violated free speech as applied.[13] The lower court dismissed the claim, pursuant to Fed. R. Civ. P. 12(b)(6) and the Supreme Court's rejection of a similar argument for a nearly identical ordinance in *Hill v. Colorado.*[14] This appeal subsequently followed and contested the dismissal.[15] The question then became whether later Supreme Court decisions so undermined the *Hill* decision—particularly in terms of its analysis on content-neutrality and narrow-tailoring requirements—to justify an abandonment of this precedent.[16] The Court of Appeals for the Seventh Circuit affirmed the lower court's decision, decided that *Hill* still governs, and consequently foreclosed a facial First Amendment challenge to this ordinance.[17]

The First Amendment's right to free speech contravenes with states' Tenth Amendment police power to protect the health and safety of their citizens—with weighty fundamental rights on both sides of the scale.[18] The standard of review for speech restrictions differs depending on whether the restriction is content-based, which requires strict scrutiny, or content-neutral, which calls for intermediate scrutiny.[19] Restrictions are

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[12] *See id.* at 1110-11 (explaining Petitioners' claims). Petitioners raised four claims in total: (1) the ordinance infringes on their right to free speech both facially and as applied, (2) the ordinance is unconstitutionally vague, (3) the City selectively enforces the ordinance, and (4) the ordinance infringes on the Petitioners' state constitutional right to freedom of speech and of assembly. *Id.*

[13] *See id.* (explaining Petitioners' alternative argument). "Their fallback position is that the ordinance flunks the narrow-tailoring requirement of the intermediate test for content-neutral restrictions on speech." *Id.*

[14] *See id*. (articulating court reviews "a rule 12(b)(6) dismissal de novo"); *see also* Hill v. Colorado, 530 U.S. 703, 725, 730 (2000) (finding Colorado statute constitutional because it was both content-neutral and narrowly-tailored).

[15] *See id.* at 1110 (explaining procedural history).

[16] *See Price*, 915 F.3d at 1111 (discussing Petitioners' argument). "As they see it, however, *Hill* is no longer an insuperable barrier to suits challenging abortion clinic bubble-zone laws. The premise of their claim is that the Court's more recent decisions in *Reed* and *McCullen* have so thoroughly undermined *Hill's* reasoning that we need not follow it." *Id.*

[17] *See id.* at 1119 (holding "*Hill* directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*.") The court further stipulated that "only the Supreme Court can bring harmony to these precedents" and affirmed the district judge's dismissal of facial challenge. *Id.*

[18] *See* U.S. CONST. amend. I (granting free speech); U.S. CONST. amend. X (describing police power); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 768 (1994) (establishing protection of abortion access is justifiable use of police powers).

[19] *See* Frisby v. Schultz, 487 U.S. 474, 481(1988) (stating appropriate levels of scrutiny for speech restrictions); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358-60 (2006) (explaining levels of scrutiny). Siegel discusses the origins of strict scrutiny in *Skinner v. Oklahoma* and *Korematsu v. United States*. Siegal, *supra* note 19, at 359. He emphasizes that the doctrine heightens the standard of

content-based when the government targets speech for its particular meaning or message.[20] A restriction is content-neutral when the government adopts the restriction for any reason other than to stifle the message.[21] Restrictions based on the time, place, or manner of speech are a subcategory of content-neutral speech because they do not seek to silence a particular message or meaning; rather, these restrictions regulate where, when, and how a person or entity may communicate a message, without reference to its meaning.[22] To determine content-neutrality in time, place, or manner cases, the government must satisfy the standard set forth in *Ward v. Rock Against Racism.*[23] This standard requires proving that the restriction is "justified without reference to the content of the regulated speech, that [it is] narrowly tailored to serve a significant governmental interest, and that [it leaves] open ample alternative channels for communication of the information."[24]

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review courts use in three ways: "[i]t shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.'" Siegal, *supra* note 19, at 356, 359-60 (citing to Skinner v. Oklahoma, 316 U.S. 535 (1942) and Korematsu v. United States, 323 U.S. 213 (1944)).

[20] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (explaining Court's reasoning for determining content-neutrality). A restriction is content-based when "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (holding facially content-neutral laws can be meaningfully content-based). In *Reed*, the Court explained that strict scrutiny applied to facially content-based laws and to laws that, despite being facially content-neutral, "cannot be 'justified without reference to the content of the regulated speech.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). The Court explains that a facially content-based restriction is subject to strict scrutiny, even if the government has a benign justification for it. *Reed*, 576 U.S. at 164.

[21] *See Reed*, 576 U.S. at 163-165 (describing content-neutrality). The government's underlying purpose controls the analysis as to whether a restriction is content-neutral. *Id.* A restriction is content-neutral if the regulation is enacted to serve purposes unrelated to the content of the speech. *Id.* In *Reed*, the Court decided that determining a content-based distinction is a two-part test: whether (1) the restriction is content-based on its face, and (2) the government's purpose or justification is content-based. *Id.* The restriction is content-neutral if it passes both prongs of the test. *Id.*

[22] *See id.* at 170-71 (explaining analysis for content-neutral cases involving time, place, and manner restrictions); *see also* Richard Albert, *Protest, Proportionality, and the Politics of Privacy: Mediating the Tension Between the Right of Access to Abortion Clinics and Free Religious Expression in Canada and the United States*, 27 LOY. L.A. INT'L & COMP. L. REV. 1, 10, 19 (2005) (explaining rationale for classifying restrictions on time, place, and manner of speech as content-neutral).

[23] *See Ward*, 491 U.S. at 791 (identifying standard set forth in case).

[24] *See id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Heffron v. Int'l. Soc'y. for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)). These cases establish that:

Applying this standard in *Hill v. Colorado*, the Supreme Court upheld an ordinance that provided an eight-foot buffer zone around patients entering abortion or healthcare facilities wherein no person could approach patients for the purpose of counseling, educating, or leafletting.[25] The majority declared the ordinance content-neutral because it neither discriminated among viewpoints nor restricted "any subject matter that may be discussed by a speaker."[26] Justice Scalia's dissenting opinion attacked the majority's application of the *Ward* standard, and argued that the buffer zone was a content-based restriction because it targeted speech that "communicates a message of protest, education, or counseling."[27] Additionally, Justice Scalia's dissent stated that the actual underlying governmental interest was to protect a nonexistent "right to be let alone."[28]

Since *Hill*, the Supreme Court has decided similar cases on narrower grounds, compelling some to question whether these subsequent decisions have rendered *Hill* obsolete in abortion-speech cases.[29] The Court upheld the content-neutrality of a similar buffer zone in *McCullen v. Coakley*, but decided the thirty-five-foot radius prevented pro-life advocates from accessing the sidewalk adjacent to the driveway, and consequently "burden[ed] substantially more speech than necessary" to achieve the gov-

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> [E]ven in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

*See Ward*, 491 U.S. at 791.

[25] *See* Hill v. Colorado, 530 U.S. 703, 707, 712-13 (2000) (explaining effect of statute and holding of lower court, respectively).

[26] *See id.* at 723 ("Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.")

[27] *See id.* at 744 (Scalia, J., dissenting) (rejecting majority's reasoning). Justice Scalia explains that not only was the ordinance content-based, but the majority also improperly considered the government interest of protecting the "right to be let alone." *Id.* at 744, 751-52.

[28] *See id.* at 741 (Scalia, J., dissenting) (providing theory for government interest at issue); *see also* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31-32, 38 (2003) (arguing Court wrongly decided that restriction in *Hill* was content-neutral).

[29] *See* Brief of *Amicus Curiae* Justice and Freedom Fund in Support of Petitioners at 9-11, Price v. Chicago, 915 F.3d 1107 (2019) (7th Cir. 2019) (No. 18-1516) LEXIS 2506, at *9 (explaining how *McCullen* and *Reed* changed standard for content-based restrictions); *see also* Zachary J. Phillipps, Note, *The Unavoidable Implication of McCullen v. Coakley: Protection Against Unwelcome Speech is Not a Sufficient Justification for Restricting Speech in Traditional Public Fora*, 47 CONN. L. REV. 937, 969 (2015) (explaining sufficient basis for Court's decision that *McCullen* overrules *Hill*).

ernment's interests.[30] In deciding that this ordinance was not narrowly tailored, the Court gave much import to the fact that the state had too eagerly foregone alternative measures that would have burdened speech to a substantially lesser degree.[31] Shortly after *McCullen* limited the narrow-tailoring component set by *Hill*, the Court in *Reed v. Town of Gilbert* proceeded to expand the basis for labeling a restriction content-based.[32] In *Reed*, the Court decided that even a restriction that is content-neutral on its face can be deemed content-based if the law "cannot be 'justified without reference to the content of the regulated speech.'"[33] The Court explained that any restriction targeting specific subject matter is content-based, even if it does not discriminate among viewpoints within that subject matter.[34] The Court's decisions in *McCullen* and *Reed* have substantially undermined the force of *Hill* in determining both whether a restriction is content-based and whether a restriction is sufficiently narrowly-tailored.[35] For these reasons, Petitioners unsuccessfully argued that the Court should apply the *McCullen* and *Reed* standards and reverse the lower court's decision to uphold the Chicago ordinance.[36]

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[30] *See* McCullen v. Coakley, 573 U.S. 464, 490 (2014) (outlining Court's holding). Petitioners explained that they could not distinguish between patients with whom they wished to speak to and mere passersby before the thirty-five-foot buffer zone began, which prevented them from engaging in this type of speech at all. *Id.* at 487.

[31] *See id.* at 492-94 (discussing alternative, less restrictive means of achieving goal). For example, the City could:

> [E]nact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act) . . . which 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.

*Id.* at 491. Similarly, if the City is concerned about harassment, it "could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.*

[32] *See* Reed v. Town of Gilbert, 576 U.S. 155, 164-65 (2015) (expanding analysis for content-based determination).

[33] *See id.* at 165 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[34] *See id.* at 169 (explaining content-based regulations and providing examples of speech regulation targeted at specific subject matter).

[35] *See* Price v. Chicago, 915 F.3d 1107, 1119 (7th Cir. 2019) (noting *Reed* and *McCullen* "have deeply shaken *Hill's* foundation").

[36] *See* Petition for a Writ of Certiorari at 23, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516) LEXIS 2068, at *13 (explaining Petitioners' argument that "*Hill* is in irreconcilable conflict with this Court's more recent First Amendment decisions, including *Reed* and *McCullen*"). The Supreme Court subsequently denied certiorari on July 2, 2020. *See* Price v. City of Chicago, No. 18-1516, 2020 U.S. LEXIS 3527 (U.S. 2020).

In *Price v. City of Chicago*, the Petitioners' argument depended on the court abandoning the *Hill* precedent in favor of the standards set forth in *Reed* and *McCullen*.[37] The court first addressed the Petitioners' stance by noting that while "[t]he [Supreme] Court's intervening decisions have eroded *Hill's* foundation . . . the case still binds [this court]; only the Supreme Court can say otherwise."[38] Next, the court emphasized the urgency and importance of free speech and acknowledged that the time and place of the speech at issue here was the most protected type.[39] Despite the Supreme Court's acknowledgement of the significance of this type of speech, it has historically applied the intermediate standard of scrutiny to abortion speech.[40] Accordingly, this court did the same.[41]

The court subsequently analyzed relevant Supreme Court decisions and acknowledged that *Hill* directly conflicts with *Reed* and *McCullen* in two critical ways: (1) its facial analysis failed to satisfy the tests set out in *Reed* and *McCullen*,[42] and (2) those later cases that explicitly rejected *Hill's* narrow-tailoring process.[43] Nevertheless, the court concluded that, because *Hill* is the controlling law and the Supreme Court has not overruled it's decision, the court's analysis of the matter at hand is controlled by *Hill*.[44] Furthermore, because *Hill's* narrow-tailoring analysis "was highly general-

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[37] *See Price*, 915 F.3d at 1111 (describing basis of Petitioners' argument).

[38] *See id.* (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[39] *See id.* at 1112 (explaining this type of speech is most protected on public sidewalks). "That the sidewalk counselors seek to reach women as they enter an abortion clinic— at the last possible moment when their speech may be effective— 'only strengthens the protection afforded [their] expression.'" *Id.* (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)).

[40] *See id.* (justifying decision to apply intermediate level of scrutiny). "To date, the Supreme Court has applied the intermediate standard of scrutiny to abortion-clinic buffer zones, with mixed results." *Id.*

[41] *See id.* (noting court applied same standard of scrutiny).

[42] *See* Price, 915 F.3d at 1117-18 (explaining how *Hill's* facial analysis contradicted *Reed* and *McCullen). Hill's* facial analysis fails to satisfy the *McCullen* test because it determined that an ordinance requiring law enforcers to examine the content of the message can still be content-neutral, an idea explicitly rejected by *McCullen*. *Id.* at 1118. *Hill* predicated its decision of content-neutrality on the fact that the restrictions did not distinguish between viewpoints, but *Reed* explicitly stated that the "lack of viewpoint or subject-matter discrimination does not spare a facially content-based law from strict scrutiny." *Id.* (citing Reed v. Town of Gilbert, 576 U.S. 155, 164-65 (2015)). *Hill* also failed to satisfy *McCullen's* facial analysis because it accepted the speech's harmful effect on the listener as a reasonable justification. *Id.*

[43] *See id.* (describing how *Hill's* narrow-tailoring analysis failed *Reed* and *McCullen* standards). *Hill* justified the restriction because the alternative methods of achieving this interest—which were less burdensome on speech—were harder to enforce. *Id.* at 1118. *McCullen,* however, explicitly rejected this as an acceptable factor in a narrow-tailoring analysis. *Id.*

[44] *See id.* at 1119 (reiterating only Supreme Court can overrule *Hill*). "*Hill* directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*. Only the Supreme Court can bring harmony to these precedents." *Id.*

ized," the court noted that remanding this case for a fact-specific, narrow-tailoring analysis would "deny *Hill's* controlling force."[45] In showing deference to *Hill's* power, the court emphasized that denying remand would avoid creating a circuit split.[46]

The court in *Price v. Chicago* was correct in upholding the ordinance out of deference to the *Hill* standard; however, the court should have gone a step further to address how the Chicago ordinance at issue would prevail—even if the Supreme Court abandoned the *Hill* standard in favor of *Reed* and *McCullen*.[47] Even though the Court in *Reed* unquestionably particularized the test for content-neutrality after *Hill*, the Chicago ordinance would still pass this test.[48] *Reed* explicitly noted that a restriction can be content-based because it either restricts particular viewpoints or prohibits public discussion of an entire topic or purpose.[49] The appellants in *Reed* argued that *Hill* only addressed the first of these possibilities.[50] *Hill's* failure to address the second option, however, is immaterial as applied to *Price* because the Chicago ordinance does not restrict speech based on any topic or purpose.[51] Petitioners want the court to expand the meaning of "purpose" to include broad categories of linguistic objectives such as informing,

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[45] *See id.* (providing rationale for rejecting remand).

[46] *See id.* (explaining that remanding would create circuit split).

[47] *See Price,* 915 F.3d at 1119 (affirming lower court's holding and noting Supreme Court must be one to overrule *Hill*).

[48] *See* Reed v. Town of Gilbert, 576 U.S. 155, 162-63 (2015) (reversing and deciding lower court misapplied *Hill's* content-neutrality standard). Relying on *Hill*, the lower court deemed the restriction at issue content-neutral because the city's rationale for restricting the speech was not due to a disagreement with the message and it was unrelated to the content of the message. *Id.* The Supreme Court reversed this decision, noting that:

> [P]recedents have also recognized a separate and additional category of laws that, though facially content-neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government 'because of disagreement with the message [the speech] conveys.

*Id.* at 164. Courts must first determine whether a restriction is content-based on its face before analyzing a law's justification or purpose; if it is content-based on its face, it must withstand strict scrutiny regardless of its purpose. *Id.* at 165.

[49] *See id.* at 167-71 (explaining content-neutrality standard).

[50] *See id.* (explaining content-neutrality standard).

> [A] speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed . . . A regulation that targets a sign because it conveys an idea about a specific event is no less content-based than a regulation that targets a sign because it conveys some other idea.

*Id.* at 171.

[51] *See Price*, 915 F.3d at 1110 (summarizing ordinance at issue).

educating, or leafletting—all of which the Chicago ordinance specifically includes.[52] This interpretation, however, broadens the meaning of "purpose" beyond that intended in the *Reed* opinion and contradicts the reason behind a content-based determination in the first place.[53] Courts employ a content-based distinction primarily to trigger strict scrutiny for government restrictions that discriminate in ways that are likely to censor particular viewpoints.[54] The Chicago ordinance targets the mode of the communication, not the content of the speech, and is therefore correctly categorized as a content-neutral time, place, or manner restriction.[55] Similarly, Petitioners argue that *McMullen* contradicts *Hill* by asserting that a restriction is content-based anytime a law enforcement officer has to determine the content of speech to know if it is prohibited.[56] This distinction, however, is overly broad and irrelevant to the analysis of the Chicago ordinance because an officer would not have to listen to the content of speech to determine whether a sidewalk counselor was passing a leaflet or educating a stranger.[57]

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[52] *See* Brief for Petitioner at 25, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516) LEXIS 2068, at *8 (explaining Petitioners' interpretation of term "purpose"); *see also* CHI. ILL. CODE § 8-4-010(j)(1) (2009) (summarizing ordinance at issue). The ordinance restricts the conduct of individuals seeking to approach patients of a healthcare facility absent clear consent from the individual. CHI. ILL. CODE § 8-4-010(j)(1). The ordinance does not restrict the topics that may be discussed with those patients. CHI. ILL. CODE § 8-4-010(j)(1).

[53] *See* Brief for Petitioner, *supra* note 52, at 25 (rejecting expansion of "purpose" definition).

[54] *See* Hill v. Colorado, 530 U.S. 730, 723 (2000) (discussing purpose of content-based determination). The majority highlighted the point Justice Scalia's raised in his dissenting opinion that "the vice of content-based legislation in this context is that it 'lends itself' to being 'used for invidious thought-control purposes.'" *Id.*; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 181-82 (2015) (Kagan, J., concurring) (explaining rationale for applying strict scrutiny to content-based restrictions). Justice Kagan explained that the purpose of applying strict scrutiny to facially content-based restrictions is to address any "realistic possibility that official suppression of ideas is afoot." *Reed*, 576 U.S. at 181-82 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992)).

[55] *See* Brief for Defendants-Appellees at 16, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 17-2196), 2017 WL 6550745, at *5 (arguing ordinance is based on mode of communication, not content); *see also* Richard Albert, *supra* note 22, at 10 (explaining time, place, and manner restrictions' classification as content-neutral). Albert discusses that there are contexts in which speech is so "'interlaced with burgeoning violence' as to fall outside the protections of the First Amendment. Albert, *supra* note 22, at 10. Therefore, it follows that people do not have an inalienable right "to engage in such activity whenever, however, and wherever they please" and that "no one has the right to impose even 'good' ideas on unwilling recipients of the message." Albert, *supra* note 22, at 10.

[56] *See* Brief for Defendants-Appellees, *supra* note 55, at 19-20 (describing fault in Petitioners' reasoning). The City of Chicago argued that Petitioners were wrong to say *McCullen* overruled *Hill* on content-neutrality because the *McCullen* Court did not contradict *Hill* as there was nothing unconstitutional about law enforcers conducting a "cursory examination" to determine the purpose of speech. *Id.* The Court in *Hill* used an example of a common and innocuous instance of a law enforcer using a "cursory examination" to distinguish between picketing and casual conversation. *Id.*

[57] *See id.* (emphasizing futility of Petitioners' argument).

The Court should have also acknowledged that, even though *Hill's* narrow-tailoring test is undeniably different from the Petitioners' preferred *McCullen* test, the Chicago ordinance still satisfies both.[58] Petitioners focus narrowly on the stark contradictions between *Hill* and *McCullen* regarding whether a state can justify its restrictions based on concerns about the effect on listeners and the difficulty of enforcing alternative measures.[59] Petitioners fail to see, however, that even without these additional justifications, the Chicago ordinance largely satisfies the *McCullen* standards.[60] The Court decided the ordinance in *McCullen* was not narrowly tailored because the thirty-five-foot buffer zone was so large that sidewalk counselors could not distinguish patients from passersby, which prevented them from addressing patients altogether.[61] Thus, this restriction prevented more speech than was necessary to achieve the government's objective.[62] While the thirty-five-foot buffer zone in *McCullen* effectively prevented sidewalk counseling altogether, the much smaller radius at issue here renders that concern immaterial and arguably demonstrates the exact type of narrow tailoring required to resolve the over-breadth issue in *McCullen*.[63] In fact, the majority in *McCullen* suggests that to narrowly tailor their restrictions,

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[58] *See* Price v. City of Chicago, 915 F.3d 1107, 1118 (7th Cir. 2019) (noting *Hill's* narrow-tailoring test conflicts with that of *McCullen*'s).

[59] *See id.* at 1118 (discussing inconsistencies between *Reed* and *McCullen* compared with *Hill*); *see also* McCullen v. Coakley, 573 U.S. 464, 481 (2014) (disqualifying effect on listener as justification for restriction).

[60] *See* Brief for Petitioners at 35, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516), 2017 WL 6550745, at *22-23 (explaining justifications *Hill* uses that *Reed* later bars); *see also McCullen*, 573 U.S. at 480 (noting limitations of *McCullen* narrow-tailoring requirements). *McCullen* explicitly notes that a content-neutral law does not become content-based due to its disproportionate impact on certain topics. *McCullen*, 573 U.S. at 480.

[61] *See McCullen*, 573 U.S. at 487 (describing effect of thirty-five-foot buffer zone).

[62] *See id.* (explaining consequence of restriction).

[63] *See* CHI. ILL. CODE § 8-4-010(j)(1) (2009) (establishing ordinance's limit at 50-foot radius from facility's entrance). *Compare McCullen*, 573 U.S. at 471 (providing statute at issue and demonstrating larger radius of protection). The ordinance at issue in *McCullen* protects a much larger radius that extends in a rectangle from multiple points in the property; it states:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

*McCullen*, 573 U.S. at 471 (citing MASS. GEN. LAWS, ch. 266, § 120E1/2(b) (2012)); *Price*, 915 F.3d at 1109-10 (distinguishing ordinance from that in *McCullen*). Note that there is no evidence that Petitioners had trouble distinguishing patients from passersby because of the Chicago ordinance. *See Price*, 915 F.3d at 1109-10.

Massachusetts should mimic a New York statute that is very similar to the Chicago ordinance at issue here.[64]

The court should have noted that the combined effect of applying both Petitioners' preferred content-neutrality requirements and narrow-tailoring requirements would essentially subject all government restrictions of speech near abortion clinics to strict scrutiny, and thus presumptively make them invalid (although some are nondiscriminatory).[65] It is difficult to imagine any way a city could narrowly tailor a means to address its compelling interest without wandering into Petitioners' extremely over-broad world of content-based determination.[66] Regardless of the speech's goal, an ordinance that restricts all speech within eight feet of patients near abortion clinics— regardless of the goal of the speech— would fail because it would prohibit patients from uttering so much as a harmless "excuse me" on their way into the clinic.[67] Consequently, this would regulate substantially more speech than is necessary to achieve this goal; however, it is difficult to imagine how lawmakers could write laws that would allow such impersonal, harmless speech while still addressing their legitimate interests

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[64] *See McCullen*, 573 U.S. at 491 (suggesting alternative to address narrow-tailoring requirement). The Court in *McCullen* suggested that the Commonwealth adopt a statute similar to one in New York City, which "not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.* (citing N. Y. C., N.Y. ADMIN. CODE § 8-803(a)(3) (2014)).

[65] *See* Reed v. Town of Gilbert, 576 U.S. 155, 179-82 (2015) (Kagan, J., concurring) (discussing problem with "entirely reasonable" speech being subjected to strict scrutiny). Justice Kagan's concurrence explains that even if speech restrictions are reasonable, the Court will strike down most of these restrictions if they must always apply strict scrutiny. *Id.* at 180; *see also* Victoria L. Killion, *Facing the FACT Act: Abortion and Free Speech (Part II)*, CONG. RES. SERV. 1, 2 (Jan. 2018), https://fas.org/sgp/crs/misc/LSB10056.pdf (explaining presumption of invalidity under strict scrutiny). Killion emphasized that in *Reed*, Justice Kagan noted that in prior cases, the Court had considered not only the wording of the challenged law, but also whether it has "the intent or effect of favoring some ideas over others." Killion, *supra* note 65, at 2. Justices Kagan, Breyer, and Ginsburg "expressed concern that applying strict scrutiny to all ostensibly content-based laws would invalidate some 'entirely reasonable' ones. The majority in Reed rejected this argument, favoring a clear rule that leaves room for content-neutral distinctions and sufficiently tailored content-based ones." Killion, *supra* note 65, at 2.

[66] *See* Brief for Petitioners, *supra* note 60, at 23-24 (oversimplifying analysis by stating Chicago ordinance at issue "bans certain categories of speech while permitting others and is therefore content-based."). Petitioners prefer that courts consider *Reed's* use of "purpose" to mean that courts should apply strict scrutiny not only to restrictions that target specific meanings or types of activism, but also to restrictions that delineate specific linguistic goals regardless of their viewpoint or message. *Id.*

[67] *See* Chen, *supra* note 28, at 38 (explaining effect of overbreadth on First Amendment cases). Chen notes that the standard for narrow-tailoring involves the government choosing a means that is not "substantially broader than necessary" to achieve its interests. *Id.*

of providing safe and unobstructed access to abortion clinics.[68] Since the Court requires narrow tailoring, it has to allow some form of limitation that does not render innocent restrictions content-based.[69]

In *Price v. City of Chicago*, the court showed deference to the *Hill* precedent and upheld a buffer-zone ordinance that restricted speech according to its time, place, and manner. The court fell short, however, in addressing the Petitioners' incorrect assertion that the Chicago ordinance is content-based. The Petitioners' argument is flawed for two reasons. First, the Chicago ordinance would pass the *Reed* and *McCullen* tests. Second, the combination of the *Reed* and *McCullen* tests, if applied as expansively as the Petitioners suggest, would subject all speech restrictions on time, manner, and place to strict scrutiny. This application would tip the judicial scale unfairly towards deregulation, and would leave states and cities with no realistic ability to address their legitimate need to provide safe and unobstructed access to healthcare facilities. Rather, the court should have taken the opportunity to influence the Supreme Court in this particularly controversial and ever-changing field of law.

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[68] *See id.* at 38 (explaining effect of over breadth on First Amendment cases). Chen notes that the standard for narrow-tailoring requires that the government choose means that are not "substantially broader than necessary" to achieve its interests. *Id.*

[69] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (outlining narrow-tailoring requirement); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 179-82 (2015) (Kagan, J., concurring) (discussing problem with subjecting harmless speech to strict scrutiny).