No. 17-689

IN THE

Supreme Court of the United States

ANDREW MARCH,

Petitioner,

v.

JANET T. MILLS, individually and in her official capacity as Attorney General for the State of Maine, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a noise provision that restricts speech based on the speaker's purpose in making the noise constitute a content-based speech restriction under this Court's decision in *Reed v. Town of Gilbert*?

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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom ("ADF") is a nonprofit, public interest legal organization dedicated to the defense of our first constitutional liberty—religious freedom. ADF regularly serves as counsel or amicus curiae in First Amendment cases before this Court. *See, e.g., Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, No. 16-111 (oral argument heard Dec. 5, 2017); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

Most pertinent here, ADF served as counsel for the petitioner in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, this Court articulated a "clear and firm rule" that strict scrutiny applies to all facially content-based speech regulations because of the "danger of censorship" they present. *Id.*, at 2229, 2231. ADF is concerned that the decision below significantly weakens *Reed* and endangers core First Amendment freedoms.

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[1] Pursuant to Rule 37.6, ADF certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than ADF or its counsel has made a monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.2, ADF timely notified Counsel of Record for all parties at least ten days prior to the due date of Amicus' intention to file this brief. All parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The "Noise Provision" of the Maine Civil Rights Act prohibits "intentionally making noise that can be heard within a building," following an order from law enforcement to stop, "with the further intent … [t]o interfere with the … effective delivery of [health] services within the building." 5 M.R.S.A. § 4684-B(2)(D). A "health service" is defined as "any medical, surgical, laboratory, testing or counseling service relating to the human body," § 4684-B(1)(B), and includes abortion procedures as well as counseling services provided at crisis pregnancy centers.

By virtue of its specific intent element, the Noise Provision is content based on its face. A pro-abortion demonstrator, however noisy and disruptive, could not violate the statute on the sidewalk outside of an abortion clinic, because his intent would be to *promote*, rather than to "interfere" with, the clinic's delivery of abortion services. But an equally noisy pro-life advocate necessarily *would* possess the required specific intent. The Noise Provision treats these two speakers differently solely on the basis of their message.

These same two speakers would also be treated differently on the sidewalk outside of a crisis pregnancy center that counsels against abortion. There, the pro-abortion demonstrator would possess the specific intent to "interfere" with the center's counseling services while the pro-life advocate would not. Again, the differential treatment under the law would be entirely a function of the speakers' competing messages.

This Court should grant certiorari to prevent the erosion of its "clear and firm rule governing content neutrality" that will occur if the decision below is allowed to stand. *Reed*, 135 S. Ct. at 2231. *Reed* recognized that a law is facially content based if it defines restricted speech by its "function *or purpose*"—as the Noise Provision plainly does. *Id.* at 2227 (emphasis added). In upholding the Noise Provision as content neutral, the First Circuit avoided this aspect of *Reed*'s holding by concocting a meaningless and nonsensical distinction between the purpose of a *speaker* and the purpose of his *message*. Under the First Circuit's rule of decision, any law that restricts speech based on the purpose or intent of the speaker, rather than the purpose of his message, will be treated as facially content neutral. The decision below thus creates a significant loophole in this Court's definition of "facially content based" that could allow a whole host of content-based speech restrictions to escape strict scrutiny.

The decision below poses a particularly serious threat to First Amendment rights because of the context from which it arose. Other states and localities will look to the Noise Provision as a blueprint for silencing disfavored speech outside of abortion clinics and elsewhere—unless this Court reverses. Core First Amendment rights will be lost. The Noise Provision is not just any "abridg[ement of] the freedom of speech." U.S. Const. amend. I. It discriminates based on the speaker's *viewpoint*—an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). And it silences speakers in a quintessential public forum and on a subject of extraordinary moral and political importance.

This Court's review is also needed to resolve a conflict in the lower courts. In addition to the circuit split identified in the Petition, the decision below conflicts with the decisions of two state courts of last resort. The Texas Court of Criminal Appeals and the Maine Supreme Court each have held that a law is content based if it restricts speech based on the intent of the speaker. The First Circuit created a split of authority by reaching the contrary conclusion.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECADES OF THIS COURT'S CONTENT-NEUTRALITY PRECEDENT CULMINATING IN *REED*.

A. *Reed* reaffirmed that a "clear and firm rule" governing content neutrality is "essential" to protecting free speech.

The "guiding" principle of the First Amendment is that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Thus, this Court long has held that "content-based" speech restrictions must satisfy strict scrutiny. *E.g., R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

In *Reed*, this Court clarified that strict scrutiny applies to *all* laws that are content-based "on their face," regardless of the government's "benign motive" or "content-neutral justification" in enacting the law.

135 S. Ct. at 2228. The government's motives and justifications, *Reed* explained, become relevant only if a law is facially content neutral. *Id.* at 2227-28. That is because a content-based purpose or justification may demonstrate that a law, "though facially content neutral," nevertheless should "be considered [a] content-based regulation[] of speech." *Id.* at 2227. But the reverse is never true: "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228.

Reed emphasized that such a "clear and firm rule" governing facially content-based laws is "an essential means of protecting the freedom of speech." *Id.* at 2231. Even if this bright-line rule may occasionally require "laws that might seem 'entirely reasonable'" to be "'struck down because of their content-based nature,'" *id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)), the First Amendment "requires no less," because of the inherent "danger of censorship presented by a facially content-based statute." *Id.* at 2229 ("'The vice of content-based legislation … is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting))); *see also Reed*, 135 S. Ct. at 2233 (Alito, J., concurring) ("Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo.").

In short, any incursion upon *Reed*'s "clear and firm rule" requiring facial content-neutrality raises the specter of the government "suppress[ing] disfavored speech." *Id.* at 2229, 2231.

B. The decision below creates a broad exception to *Reed*'s definition of a facially content-based statute.

Reed defined a facially content-based law as one that "draws distinctions based on the message a speaker conveys." *Id.* at 2227. Such facial distinctions can come in two forms. The first is "obvious"—laws that "defin[e] regulated speech by particular subject matter"—while the second is "more subtle"—laws that "defin[e] regulated speech by its *function or purpose*." *Id* (emphasis added).

The Noise Provision is a textbook example of this second form of facially content-based legislation. By proscribing speech only when made with the "intent … [t]o interfere" with certain "health services," 5 M.R.S.A. § 4684-B(2)(D), the Noise Provision restricts speech based *entirely* on its "function or purpose." *Reed*, 135 S. Ct. at 2227.

The First Circuit reached the contrary conclusion by drawing a meaningless distinction between the purpose of a *speaker* and the purpose of his *speech*. *See* Pet. App. 17-23. It concluded that the Noise Provision is not facially content based because its restriction of speech is "entirely depend[ent]" on the "noise-maker's"—i.e., the *speaker's*—purpose. *Id.* at 22. That speaker-focused intent requirement, according to the First Circuit, somehow distinguished the Noise Provision from the sign code that this Court invalidated in *Reed*, because that sign code subjected signs to differential treatment in accordance with "the *purpose of the message* that a sign conveyed." *Id.* at 21 (emphasis added); *see also id.* at n.8 (noting that the sign code in

Reed defined "Temporary Directional Signs" as signs "*intended to direct* pedestrians, motorists, and other passersby to a 'qualifying event'" (quoting *Reed*, 135 S. Ct. at 2224-25) (emphasis the First Circuit's)). According to the First Circuit, the distinction between proscribing speech based on the purpose of the *speaker*, rather than the purpose of the *message*, is dispositive of whether a law is content-based.

This is a classic distinction without a difference. A message has no purpose separate and apart from its speaker's intent; indeed, it has no existence but for the speaker who conveys it. The purpose of a message and its speaker's intent in conveying it are one and the same in that the message's purpose can only be what its speaker intends it to be.

The hypotheticals that the First Circuit gave to try to buttress its holding only confirm that it is nonsensical to separate a speaker's intent from the purpose of his message. The First Circuit posited that the Noise Provision could apply to pro- as well as anti-abortion demonstrators, provided they speak with the required intent. *See* Pet. App. 22-23. But that suggestion is absurd, since a pro-abortion protestor *by definition* lacks the intent to interfere with the clinic's abortions. Nor is it true that the Noise Provision applies equally to "protests favoring or disfavoring vaccination." *Id.* at 18. Only those protestors advocating *against* a medical facility's vaccination practices could possibly have the required disruptive intent. As these examples illustrate, a speaker's intent cannot be divorced from the purpose of his message. Only in a world in which speakers do not say what they mean or mean what they say could there be any truth to the

First Circuit's conclusion that "any … message that one can conjure" is equally subject to the Noise Provision. *Id.* at 22.

Moreover, the police-officer Respondents considered the content and purpose of Petitioner's message when they invoked the Noise Provision to censor his speech. On December 4, 2015, Respondent Preis conceded that Pastor March's speech was quieter than a group of protesters who had been shouting about climate change earlier in the day, but explained that only Pastor March was violating the Noise Provision because "specifically the type of speech and *what is being said*." Pet. 4. Pastor March then asked: "So then the content of what I am saying is really the problem?" *Id.* Respondent Preis confirmed that it is a "combination" of the volume *and the content*. *Id.* This blatant content discrimination against Pastor March is nothing more than the straightforward application of a statute that on its face restricts speech according to its "function or purpose."[2] *Reed* 135 S. Ct. at 2227.

[2] The Respondent officers' candor that the content of Pastor March's speech was at issue underscores the Noise Provision's nature as a content-based restriction on speech. If the Provision's legislative authors had actually cared about the disruptive effect of noise created by the speaker, then they would have focused on noise level and not on *intent* or *purpose*. Such a provision would be truly content neutral: any speech demonstrably affecting the delivery of health services because of noise levels could be halted, or the volume turned down. But of course the Provision's authors were not really concerned about decibel levels; they aimed to block messages whose content or viewpoint might be upsetting to people inside a clinic.

In nevertheless upholding the Noise Provision as content-neutral, the First Circuit created a broad and unwarranted exception to *Reed*. Under the First Circuit's rule of decision, any law that facially differentiates between speakers based on their "intent," rather than the purpose of their message, will be deemed content neutral.

If uncorrected, this rule would enable a whole host of facially content-based regulations to be readily rewritten to escape strict scrutiny. For example, a substantively identical version of the sign code in *Reed* could be resurrected under the First Circuit's rule. All the Town of Gilbert would have to do is to reinstate the restrictions it placed on "Temporary Directional Signs" on any sign, regardless of its content, that is posted with the "intent" to "direct pedestrians, motorists, and other passersby to a 'qualifying event.'" *Reed*, 135 S. Ct. at 2225 (quoting Gilbert, Ariz. Sign Code, ch. 1, § 4.402 (2005)). Similarly, Chicago could reenact the content-discriminatory ordinance invalidated decades ago in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). That ordinance banned picketing outside schools but exempted "the peaceful picketing of any school involved in a labor dispute." *Id.* at 93. Under the decision below, Chicago could save this content-based exception by simply rewriting it to exempt anyone who pickets with the "intent" to influence labor negotiations. Even a law restricting any person from speaking with the "intent to influence an election" would qualify as content neutral under the First Circuit's rule.

The decision below permits these and many other end-runs around *Reed*. Under the First Circuit's decision, this Court's holding in *Reed* no longer imposes a "clear and firm" speech-protective rule on lawmakers, but rather can easily be evaded by mere semantic revisions to otherwise unconstitutional legislation. This Court should grant certiorari to reverse the First Circuit's potentially far-reaching decision and to reaffirm *Reed*'s bright-line rule against facially content-based restrictions on free speech.

II. THIS CASE PRESENTS A FIRST AMENDMENT ISSUE OF EXCEPTIONAL IMPORTANCE.

This Court granted certiorari in *Hill v. Colorado* "[b]ecause of the importance of the case." 530 U.S. 703, 714 (2000). *Hill* was one of a series of cases in which this Court has considered various buffer-zone restrictions on speech outside of abortion clinics. *See also McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). This case is of at least equal "importance" as these buffer-zone cases, *Hill*, 530 U.S. at 714—both because the Noise Provision, if allowed to stand, will serve as a blueprint for other jurisdictions and because it endangers core First Amendment freedoms.

A. If left intact, Maine's facially content-based Noise Provision will serve as a blueprint for other states and localities to silence disfavored speech outside of abortion clinics.

Until recently, the City of Portland restricted speech outside of its abortion clinic by enforcing a buffer-zone ordinance that mirrored the Massachusetts law struck down in *McCullen*. *See* Pet. App. 48-49. Portland repealed its buffer-zone ordinance following *McCullen*. *See id.* In a subsequent memo, counsel for Portland advised against passing any new regulations and instead recommended that law enforcement focus on enforcing existing laws. *See id.* at 49 (citing Sept. 2, 2014 Memo re: Reproductive Health Facility Protests—Buffer Zone Alternatives). Counsel specifically recommended enforcement of the Noise Provision as an alternative to its since-repealed buffer zone. *See id.*

Other state and local governments undoubtedly have taken notice of Portland's post-*McCullen* regulatory approach and this ensuing litigation. Many other states and localities had or have buffer-zone laws and were closely following *McCullen*.[3] In the wake of that

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[3] *See, e.g.,* Brief for the States of New York, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Nevada, New Mexico, Oregon, Vermont, Washington and the Territory of the U.S. Virgin Islands as *Amici Curiae* in Support of Respondents, *McCullen v. Coakley*, No. 12-1168 (filed Nov. 22, 2013), at 13-16; Brief for the City and County of San Francisco, California, and Seventeen other Municipalities as *Amici Curiae* in Support of Respondents, *McCullen v. Coakley*, No. 12-1168 (filed Nov. 22, 2013), at 1-4.

decision, they, like the City of Portland, surely have been reevaluating their policies. As a general matter, moreover, states and localities routinely model their statutes and ordinances after each other's, particularly in an area like this where there has been considerable litigation and constitutional rights are at stake. *See supra* note 3 (citing numerous similar state statutes and local ordinances regulating speech at abortion clinics).

Accordingly, if the decision below is allowed to stand, the Noise Provision will predictably become a blueprint for other states and municipalities. Such an outcome would clear the way for a proliferation of content-discriminatory noise ordinances, resulting in incalculable harm to First Amendment freedoms and values.

B. The Noise Provision proscribes speech in a viewpoint-discriminatory manner, in a classic public forum, and on a topic of grave moral and political importance.

The Noise Provision strikes at the very heart of the First Amendment for several reasons.

First, the Noise Provision, "[i]n its practical operation," goes beyond "mere" content discrimination to "actual viewpoint discrimination." *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Outside of an abortion clinic, the Noise Provision applies only to speakers who express an anti-abortion viewpoint. Pro-abortion speakers may continue as loud and long as they like. Indeed, as the district court in this case found, "pro-choice advocates frequently yell and scream at pro-life

advocates outside of the Health Center for up to ten minutes at a time." Pet. App. 61. Unrestrained by the same Noise Provision that applies to pro-life advocates, these pro-choice advocates can easily drown them out. The Noise Provision thus impermissibly permits "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

Such viewpoint discrimination is an "egregious form of content discrimination" and a violation of the First Amendment that "is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). That is especially true of the Noise Provision. Not only are pro-abortion speakers exempt from its noise restrictions, but as this case illustrates, in practice it permits almost *no speech* from a pro-life advocate outside of an abortion clinic. Pastor March sought guidance on December 11, 2015, as to a permissible, non-disruptive volume level at which he could convey his message. Pet. 5. Respondent Hults initially avoided answering, but eventually admitted that however quiet Pastor March was, it would be too loud for Planned Parenthood, and would violate the Noise Provision, *because of his purpose* to dissuade women from having abortions. *Id.* That is flagrant viewpoint discrimination and unconstitutional in *any* forum, *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (even in a non-public forum, the government may not "favor some viewpoints or ideas at the expense of others"), but it is particularly pernicious given the locations to which the Noise Provision applies.

Second, the Noise Provision applies to a quintessential public forum—the public ways and sidewalks outside of abortion clinics and other facilities that provide "health services." 5 M.R.S.A. § 4684-B(2)(D). Such areas, this Court has long recognized, "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen*, 134 S. Ct. at 2529 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

Here, moreover, the sidewalk outside of the Planned Parenthood Health Center is the only place that speakers like Pastor March can effectively deliver their message. Pastor March believes it is his religious and moral duty to "plead for the lives of the unborn at the doorsteps of abortion facilities." Pet. App. 7. If these pleas are "to be effective" at all, they must, of course, "take place at the very time and place a grievous moral wrong, in [Petitioner's] view, is about to occur." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting).

Third, the Noise Provision silences speech on an issue of fundamental moral and political importance. Commenting on such a "matter[] of public concern" is a "classic form[] of speech that lie[s] at the heart of the First Amendment." *Schenck*, 519 U.S. at 377; *see also Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech … is at the core of what the First Amendment is designed to protect.") (internal quotation marks omitted).

III. THE DECISION BELOW CREATES A CONFLICT IN THE LOWER COURTS.

Even before *Reed*, state courts of last resort recognized that laws that proscribe speech based on the intent of the speaker are content based. The decision below conflicts with those opinions, as well as those identified in the Petition (Pet. 13).

In *Ex parte Thompson*, the Texas Court of Criminal Appeals held that a provision of Texas's "Improper Photography and Visual Recording" statute was a facially unconstitutional, content-based speech regulation. 442 S.W.3d 325 (Tex. Crim. App. 2014). The provision at issue prohibited the unauthorized photographing or electronic visual recording of another "with intent to arouse or gratify the sexual desire of any person." *Id.* at 333 (quoting Tex. Penal Code § 21.15(b)(1) (2014)). The Court held that the statute "discriminate[d] on the basis of content" because it "penalize[d] only a subset of non-consensual image and video producing activity—that which is done with the intent to arouse or gratify sexual desire." *Thompson*, 442 S.W.3d at 347.

Similarly, as the district court noted (Pet. App. 74 n.10), the Maine Supreme Court has held that a statute which regulates speech based on the intent of the speaker is content based. *See State v. Janisczak*, 579 A.2d 736 (Me. 1990). The defendant in *Janisczak* was convicted under a statute that prohibited "engag[ing] in any criminal act"—in that case, engaging in "disorderly conduct" by "intentionally making loud and unreasonable noises"—"with the intent to interfere with a public servant performing or purporting to perform

an official function." *Id.* at 738-39 (internal quotation marks omitted). In overturning the defendant's conviction, the Court reasoned that, because the law "applies only where the violator's intention is to obstruct government officials in the course of their duty, an application of this statute to verbal protests cannot be deemed content-neutral." *Id.* at 739 n.6.

The holdings in these cases are irreconcilable with the decision below. All of these cases considered restrictions of speech based on the intent of the speaker. The Texas and Maine high courts held that this feature of the challenged statute rendered it content based. The decision below reached the contrary conclusion, creating a split of authority.[4]

[4] Because the First Circuit and the Maine Supreme Court are on opposite sides of the split, First Amendment rights in Maine differ depending on whether a case is heard in state or federal court.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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