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City of Gainesville
Clerk of the Commission
Office of the City Commission

PO Box 490, Station 19
Gainesville, FL 32627-0490
200 E. University Avenue
P: (352) 334-5015
F: (352) 334-2036

City of Gainesville Policy Program
Preliminary Research & Analysis

TOPIC: **Buffer Zones around Medical Facilities (Supplemental)**

PREPARED BY: **Morgan Spicer, Research and Prototyping Fellow**

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REQUESTED BY: **Staff**

EXECUTIVE SUMMARY

The decision of *McCullen v. Coakley* (2014) is the most recent United States Supreme Court ruling regarding buffer zones surrounding abortion clinics. In that decision, the Court held that Massachusetts' fixed buffer zone law was unconstitutional for violating the First Amendment because the policy was not narrowly tailored to achieve a governmental interest. However, within that ruling, the Court maintained that the holding was specific to the Massachusetts buffer zone policy, and that, while the decision could be used to invite future challenges to existing laws, buffer zone policies could still be constitutional so long as they met certain criteria. Since the *McCullen* ruling, the Court has declined to rehear the case of *Hill v. Colorado* (2000), a ruling which upheld buffer zone policies as constitutional so long as they were content-neutral and narrowly tailored to achieve a legitimate government interest. Thus, the most recent federal rulings on the issue have held that, while the ruling in *McCullen* did significantly weaken the *Hill* ruling, buffer zone policies which meet the standards outlined in *Hill* remain constitutional. These existing precedents have established that legitimate interests in implementing a buffer zone can include protecting public health, ensuring access to healthcare, and preventing obstruction outside of facilities. While the City of Gainesville would need to prove that one of these interests is threatened without a buffer zone policy, existing cases do not require an instance of explicit violence in order to justify the creation of a buffer zone, as there was no explicit act of violence which brought upon the Colorado or

Chicago policies described below. As a note, however, the Chicago ordinance is pending a decision on certiorari at the US Supreme Court.

HISTORY/BACKGROUND INFORMATION

Colorado – *Hill v. Colorado (2000)*[1]

Colorado's buffer zone statute makes it unlawful for any person within 100 feet of a health care facility's entrance to knowingly approach within 8 feet of another person to pass a leaflet or form of literature, display a sign, engage in oral protest, counsel, or educate without that person's consent. This statute covers all health care facilities in the state.

A lower ruling in *Hill* held that the state has a compelling interest in protecting citizens entering or existing a medical facility from unwanted communication.[2] Justice Stevens, in his majority opinion for the US Supreme Court, wrote that, "[a]lthough the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities… The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases."[3]

According to Colorado U.S. Representative Diana DeGette, who introduced the buffer zone bill, protestors were blocking the entrances to these healthcare facilities, and trying to intimidate patients and stop them from going inside. However, there were no claims or reports of physical violence occurring.[4] Although acts of violence, including three individuals being killed, have occurred outside of Colorado abortion clinics, these were not until after the Supreme Court had ruled on the buffer zone's legality. Preexisting acts of violence were not necessary for the zone to be declared constitutional.

Similarly, the existence of statewide buffer zone policies indicate that specific threats do not need to be present at every individual clinic. This ruling indicates that, while a constitutional buffer zone policies necessitates a legitimate interest in establishing the policy, specific instances or threats of violence are not necessary to establish that interest.

This ruling additionally established that legitimate interests in implementing a buffer zone can include protecting public health, ensuring access to health care, and preventing obstruction outside of facilities.

[1] https://www.oyez.org/cases/1999/98-1856
[2] https://www.law.cornell.edu/supct/html/98-1856.ZS.html
[3] https://www.oyez.org/cases/1999/98-1856
[4] https://www.coloradoindependent.com/2014/01/16/colorado-health-clinic-bubble-law-found-constitutional-once-now-on-the-legal-bubble-again/

Thus, while explicit acts of violence can compel cities to create buffer zones, protesting which diminishes access to health care or obstructs entrance to facilities may also be sufficient to warrant a buffer zone.

In 2014, after the *McCullen* ruling, the Court declined to rehear a case on the Colorado buffer zone, thus allowing the zone to continue as constitutional.

Massachusetts – *McCullen v. Coakley (2014)*[5]

In response to reported verbal harassment outside of abortion clinics, the State of Massachusetts created a 35-foot fixed buffer zone around abortion clinics. The only individuals permitted within this zone were those entering or leaving the facility, law enforcement or medical officials, or people using the sidewalk to reach a destination. In this unanimous decision, authored by Chief Justice Roberts, the Court held that the First Amendment prohibits speech restrictions around abortion clinics and, therefore, the Massachusetts law was unconstitutional. The court ruled that the law burdened free speech more than was necessary to achieve the state's interests of protecting access to health care and preventing obstruction.[6] This was justified by the fact that the statute deprived petitioners of their two primary methods of communicating with patients, both face to face communication and through the provision of literature, as the statute forced individuals to remain more than 35 feet away from the clinic. Additionally, the State of Massachusetts claimed that the only disruptive behavior occurred at one specific abortion clinic at one specific time (Saturday morning) every week, and the Court thus held that a state-wide statute creating a 35 foot fixed buffer zone was not narrowly tailored to achieve their interests.

However, this decision still upheld the ruling in *Hill v.* Colorado, as it held that there exist buffer zones which can be/are content neutral, and that the state's goals of protecting public health and preventing obstruction can be legitimate state interests. In the case of *McCullen,* although the law was not narrowly tailored to achieve a state interest, it was determined to be content neutral and thus strict scrutiny standards did not apply to the case. Therefore, the reason that the Massachusetts statute was found unconstitutional was not because it was not content neutral or was not directed towards a legitimate state interest, but rather because the policy was not narrowly tailored to achieve that interest. Thus, the ruling held that any policy designed to protect such interests must be narrowly tailored to achieve those interests and not overburden free speech.[7]

In the *McCullen* decision, the Court explicitly referred to the Massachusetts statute as "truly exceptional", claiming that there exist several other legal paths which the State could take to achieve the same goals as the fixed buffer zone, but which are narrowly tailored to achieve those goals. For instance, the Court referred to the passing of a state-wide ordinance similar to the federal Freedom of Access to Clinic Entrances (Face) Act of 1994, which prohibits the use of force, threat of force, or physical obstruction in an attempt to interfere with any person who is obtaining reproductive health services.

[5] https://www.oyez.org/cases/2013/12-1168
[6] https://www.supremecourt.gov/opinions/13pdf/12-1168_6k47.pdf
[7] https://www.npr.org/sections/thetwo-way/2014/06/26/325806464/states-cant-mandate-buffer-zones-around-abortion-clinics-high-court-says

Additionally, the Court referred to a New York City law which prohibits obstructing access to a clinic and makes it a crime to follow and harass another person within 15 feet of the premises of a reproductive health care facility.[8] Finally, the Court referred to existing buffer zone policies which incorporate floating zones, such as the Colorado statute. The State of Massachusetts claims those zones are significantly harder to enforce, however the Court stated that this does not relieve the State of its burdens of narrowly tailoring an ordinance.

Chicago – *Price v. City of Chicago*

Courts have similarly upheld city-wide policies in the wake of the *McCullen* decision. For instance, in the most recent federal court decision involving buffer zones, Chicago's policy of not allowing anyone within a 50 foot radius around a clinic entrance to approach within 8 of another individual without their consent was upheld. In this decision of *Price v. City of Chicago* (2019), the United States Court of Appeals for the Seventh Circuit argued that, while *Hill*'s content-neutral holding is hard to reconcile with the *McCullen* ruling, the United States Supreme Court explicitly did not overturn *Hill* in the *McCullen* ruling, and thus *Hill* remains binding until the United States Supreme Court clarifies the precedent, which to date they have chosen not to do.

The court additionally held that Chicago's bubble-zone law is narrower than Colorado's zone, it is classified as content-neutral, and is narrowly tailored, all of which justify the court's decision to uphold the policy.[9] This case has been appealed to the United States Supreme Court and is pending a decision on certiorari by the Court.

[8] http://prochoice.org/pubs_research/publications/downloads/Legal_Remedies.pdf
[9] https://www.supremecourt.gov/DocketPDF/18/18-1516/97765/20190426142534810_SeventhCirc.pdf