

NOTES

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NOTES

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Susan L. Gogniat*

INTRODUCTION

Angry protesters crowd around the entrance to a women's healthcare facility in Massachusetts. They yell obscenities and furiously shake signs with intimidating messages. One protester even throws an object at a patient walking toward the entrance. Contrast this scene with peaceful sidewalk counselors, whose purpose is to engage patients in quiet conversations about other options besides abortion. A counselor tries to walk alongside a patient to deliver her message, but she is quickly stopped thirty-five feet before the entrance, where a line painted on the sidewalk marks where a buffer zone begins. Just when the patient was beginning to listen, the counselor's message is lost.

Massachusetts, in addition to various other states and localities,¹ took statutory steps to prevent protesters from committing acts of violence and harassment outside of abortion facilities.² For Massachusetts, this included enacting a law restricting people, besides patients or employees, from entering a zone within

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¹ See Part II, *infra*.

² Robert P. Orthman, Comment, *First Amendment—Balancing Public Safety and Freedom of Speech Outside Reproductive Healthcare Facilities—McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009), 6 J. HEALTH & BIOMEDICAL L. 159, 159 (2010).

thirty-five feet of a healthcare facility entrance.³ Despite the alleged protection the Massachusetts law offered, seventy-seven-year-old Eleanor McCullen, a sidewalk counselor, succeeded in challenging the law as an unconstitutional restraint on free speech in *McCullen v. Coakley*.⁴ McCullen did not fall into the category of threatening protestors; instead she gained sympathy from the U.S. Supreme Court, which, in a unanimous opinion, seemed to forget about the fatal shootings of two staff members at abortion clinics in Brookline, Massachusetts, that had led to the law's enactment in 1994.⁵ After the Court deemed the thirty-five-foot zone unconstitutional, the question arose as to whether any law creating a buffer zone could withstand a test of constitutionality.

While defenders of First Amendment free speech rights could read *McCullen* as a means to take down all buffer zone laws, others could view the decision of the Court narrowly, as condemning only overbroad buffer zone laws. A thirty-five-foot fixed zone may not be the only method used to promote safety, so courts are left after *McCullen* to determine whether similar state and local buffer zone laws are justified. To survive the test of constitutionality, the laws must exist without reference to the content of the regulated speech, must be narrowly tailored to serve a significant governmental interest, and must leave open ample, alternative channels for communication of the information.⁶

This Note gives an overview of the effect of the Court's decision in *McCullen* on other buffer zone laws across the United States. Though other existing buffer zone laws contain different restrictions, the decision caused states and cities to reexamine the laws in their own localities. The Note suggests that, despite the

³ MASS. GEN. LAWS ch. 266, § 120E ½ (2007), *invalidated by* *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), *repealed by* 2014 Mass. Legis. Serv. ch. 197 (West).

⁴ 134 S. Ct. at 2525.

⁵ See Peter Schworm & Zachary T. Sampson, *Mass. Abortion Clinic Buffer Zones Ruled Illegal*, BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/metro/2014/06/26/supreme-court-throws-out-massachusetts-abortion-clinic-buffer-zone-law/VTTYHYD8oiVJJNreAPyKAN/story.html> (discussing the balance between keeping people safe and constitutional rights); see also Emily Jane Goodman, *Supreme Court Decision on Abortion Clinic Buffer Zones Opens the Door to Further Challenges*, NATION (July 1, 2014), <http://www.thenation.com/article/180474/supreme-court-decision-abortion-clinic-buffer-zones-opens-door-further-challenges#> (referring to Massachusetts' 8 murders, 17 attempted murders, 550 incidents of stalking, plus harassment and other violations leading to the enacted law); Adam Liptak & John Schwartz, *Court Rejects Zone to Buffer Abortion Clinic*, N.Y. TIMES, June 26, 2014, http://www.nytimes.com/2014/06/27/us/supreme-court-abortion-clinic-protests.html?_r=0 (discussing conflicting interests of protestors and patients in the *McCullen* opinion).

⁶ *McCullen*, 134 S. Ct. at 2529 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

absence of language indicating *McCullen* overruled prior case law upholding buffer zones, both state and local governments have acted as if little is left of those prior decisions. The Note proceeds in four parts. Part I describes the leading precedent prior to *McCullen* and the influential plaintiff that led to the *McCullen* Court's decision. Part II examines the reaction of state and local governments that placed an injunction on or eliminated entirely their buffer zone laws after the *McCullen* decision. The Note argues that states and localities recognized the risk of litigation regarding existing buffer zone laws. Part III describes buffer zone laws that were amended to more narrowly tailored solutions and demonstrates that some localities did not view buffer zones as a valid option post-*McCullen*. However, in Part IV, this Note considers a counterexample to the limited power of pre-*McCullen* precedent and shows that a buffer zone law upheld pre-*McCullen* may still be valid even after the Court's newly rendered decision.

I. THE U.S. SUPREME COURT SPEAKS ON BUFFER ZONES

A buffer zone is defined as “any area serving to mitigate or neutralize potential conflict.”⁷ It creates a space for protection outside of healthcare facility entrances that no patron can enter besides a patient or, in some circumstances, an employee of the healthcare facility. Massachusetts legislators created the statute in response to repeated incidents of violence outside of healthcare facilities, as a way to eliminate intimidation and allow patient access.⁸ The Massachusetts statute that was challenged in *McCullen* contained the following provision:

No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of [thirty-five] 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.⁹

⁷ *Buffer Zone*, DICTIONARY.COM, <http://dictionary.reference.com/browse/buffer%20zone?s=t> (last visited Oct. 16, 2015).

⁸ See, e.g., Christopher B. Daly, *Salvi Convicted of Murder in Shootings*, WASH. POST, Mar. 19, 1996, <http://www.washingtonpost.com/wp-srv/local/longterm/aron/salvi021996.htm>.

⁹ MASS. GEN. LAWS ch. 266, § 120E ½ (2007), *invalidated by McCullen*, 134 S. Ct. 2518, *repealed by* 2014 Mass. Legis. Serv. ch. 197 (West).

The First Amendment to the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”¹⁰ Though the government’s ability to restrict speech in traditional public fora is limited, the government has leeway to regulate features of speech unrelated to its content.¹¹ In *Ward v. Rock Against Racism*, the U.S. Supreme Court set out the following test for determining the constitutionality of restrictions on speech: the government may put “reasonable restrictions on the time, place[,] or manner of protected speech,” so long as 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.”¹² It was the “narrowly tailored” prong that the Massachusetts statute failed in *McCullen*, because the statute burdened more speech than necessary in an area of traditional public fora, and Massachusetts failed to try less intrusive alternatives.¹³

A. *Colorado v. Hill*, 530 U.S. 703 (2000)

McCullen was not the first case in which the U.S. Supreme Court spoke on the issue of buffer zones. Fourteen years before *McCullen* was *Colorado v. Hill*.¹⁴

¹⁰ U.S. CONST. amend. I.

¹¹ *McCullen*, 134 S. Ct. at 2529.

¹² 491 U.S. 781, 791 (1989) (internal citations omitted).

¹³ *McCullen*, 134 S. Ct. at 2537; see also Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1, 38 (2014) (“*McCullen* recently invalidated one particularly restrictive state law. However, after *McCullen*, officials retain plenty of latitude in terms of restricting abortion speech near health care facilities.” (footnote omitted)).

¹⁴ 530 U.S. 703 (2000). See *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997). A preliminary injunction was issued in New York to aid police in response to protestors blocking abortion clinic entrances. *Id.* at 357. The injunction established a fifteen-foot fixed buffer zone and fifteen-foot floating buffer zone. *Id.* The fixed zone prevented demonstrating within fifteen feet of doorways, doorway entrances, parking lot entrances, driveways, and driveway entrances of clinic facilities. *Id.* The floating zone prevented protestors from coming within fifteen feet of any person or vehicle. *Id.* The Court determined that the governmental interests in ensuring public safety and order, promoting free flow of traffic, protecting property rights, and protecting women’s freedom to seek pregnancy-related services were significant. *Id.* at 358. The Court invalidated the floating buffer zone, however, because it prevented protesters from communicating a message within a normal, conversational distance or handing out leaflets on the public sidewalks. *Id.* In contrast, the Court said the fixed buffer zone was necessary to prevent hindering people from entering and exiting. *Id.* at 359. The Court agreed with the district court that the fifteen-foot distance would ensure access, and that protesters remain free to communicate their message outside the zone. *Id.* at 385. See also *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding a thirty-six-foot fixed buffer zone outside healthcare facilities but striking down restrictions on displaying images and approaching patients within three hundred feet).

In *Hill*, the Court evaluated a Colorado statute that created an eight-foot floating bubble zone within a one-hundred-foot radius of healthcare facility entrances.¹⁵ No protestor or sidewalk counselor could come within eight feet of a patient within this one-hundred-foot zone.¹⁶ The majority's opinion, authored by Justice Stevens, emphasized that the law did not focus on deterring unwanted speech, but it intended to protect those seeking treatment from unwanted communication.¹⁷ Furthermore, the Colorado law did not draw distinctions based on the subject matter of the speech, but it applied equally to all people.¹⁸ The Court held that the eight-foot barrier was not an unconstitutional burden on free speech because signs, pictures, and voices could cross an eight-foot gap with ease.¹⁹ The Court reasoned that an eight-foot separation would not have any adverse impact on the patient's ability to read signs displayed by demonstrators and would not prevent a speaker from communicating at a normal, conversational distance.²⁰ Additionally, the statute did not prevent a leafletter from standing near the path of oncoming pedestrians and handing out material, which the patients could easily accept.²¹ Many localities wanting to deter violent protesters relied on the *Hill* decision when enacting buffer zone laws around women's healthcare facilities. For example, after the *Hill* decision, the Massachusetts legislature used the *Hill* Court's opinion as a guide when enacting a variation for its own state's law.²²

B. McCullen v. Coakley, 134 S. Ct. 2518 (2014)

The Court evaluated a different kind of healthcare facility buffer zone in 2014. In *McCullen*, the Court ruled that the Massachusetts Reproductive Health Care Facilities Act was an unconstitutional violation of the First Amendment protection of free speech.²³ The statute made it a crime to knowingly stand on a

¹⁵ *Hill*, 530 U.S. at 707.

¹⁶ *Id.*

¹⁷ *Id.* at 715–16.

¹⁸ *Id.* at 723 (“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.”).

¹⁹ *Id.* at 729.

²⁰ *Id.*

²¹ *Id.* at 727 (footnote omitted).

²² See *McGuire v. Reilly (McGuire I)*, 260 F.3d 36 (1st Cir. 2001).

²³ *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014).

public way or sidewalk within thirty-five feet of an entrance or driveway to any reproductive health care facility, punishable by a fine of up to five-hundred dollars, three months in prison, or both.²⁴ The Court agreed that public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways were legitimate government interests.²⁵ However, the Court reasoned that the statute imposed serious burdens on free speech in an area typically open to the public, depriving protesters of their two primary methods of communicating with arriving patients: close personal conversations and distribution of leaflets.²⁶ The protesters sought not merely to express their opposition to abortion, but to engage in “sidewalk counseling,” which they described as caring, consensual conversations about various alternatives to abortion.²⁷ The buffer zones eliminated the protesters’ messages and substantially burdened more speech than necessary.²⁸ In its opinion, the Court emphasized other avenues for patient protection that do not restrict speech as substantially as the buffer zone law.²⁹

Early in the *McCullen* opinion, the Court distinguished the petitioners from other protestors.³⁰ It associated protestors with signs, chants, and more aggressive methods, like face-to-face confrontation.³¹ In contrast, sidewalk counselors considered it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during conversations.³² The petitioners asserted that confrontational methods, including shouting and waving signs, antagonized women and were less effective.³³

²⁴ MASS. GEN. LAWS ch. 266, § 120E ½ (2014), *invalidated by McCullen*, 134 S. Ct. 2518, *repealed by* 2014 Mass. Legis. Serv. ch. 197 (West).

²⁵ *McCullen*, 134 S. Ct. at 2535.

²⁶ *Id.* at 2536.

²⁷ *Id.* at 2535.

²⁸ *Id.* at 2537.

²⁹ *Id.* at 2538–39.

³⁰ *Id.* at 2527.

³¹ *Id.*

³² *Id.* (“Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: ‘Good morning, may I give you my literature? Is there anything I can do for you? I’m available if you have any questions.’ If the woman seems receptive, McCullen will provide additional information.” (citation omitted)).

³³ *Id.*

The Court then proceeded to give specific examples of how Ms. McCullen and the rest of the petitioners were forced to stand on the opposite side of the road of the three clinics due to the buffer zone law, resulting in many fewer conversations and many fewer distributions of leaflets on public sidewalks since the zone went into effect.³⁴ The opinion described how the law placed a serious burden on petitioners' conversations.³⁵ For example, Ms. McCullen was unable to distinguish patients in time before they entered the buffer zone.³⁶ When she was able to initiate a conversation, she had to stop abruptly at the buffer zone, which made her appear "untrustworthy" or "suspicious," and she often needed to raise her voice at patients from outside the zone, which was at odds with the compassionate message she wished to convey.³⁷ Likewise, literature was less likely to be accepted because the petitioners could not approach women in time to place literature near their hands.³⁸ Although the petitioners could engage in forms of protest outside of the zone, the buffer zone had made it impossible for them to effectively convey their message "through personal, caring, consensual conversations."³⁹

As a seventy-seven-year-old grandmother, Eleanor McCullen represented a peaceful sidewalk counselor well.⁴⁰ She centered her advocacy on gentleness and love, and she found violence and anger to be counterproductive.⁴¹ Since the Court must consider the party in front of it, the anti-abortion advocates⁴² presented a party

³⁴ *Id.* at 2527–28 (describing the thwarted efforts of the petitioners at the Boston, Worcester, and Springfield clinics).

³⁵ *Id.* at 2535–36.

³⁶ *Id.* at 2535.

³⁷ *Id.*

³⁸ *Id.* at 2536.

³⁹ *Id.*

⁴⁰ Matt Bowman, *A Quiet Grandmother Wins One for Free Speech at the Supreme Court*, WASH. TIMES, July 1, 2014, <http://www.washingtontimes.com/news/2014/jul/1/quiet-grandmother-wins-one-free-speech-supreme-cou/>.

⁴¹ E.g. Shira Schoenberg, *Anti-Abortion Plaintiff Eleanor McCullen Says Clinic Protests Are About "Surrounding Women With Love,"* MASSLIVE (June 27, 2014, 7:59 AM), http://www.masslive.com/politics/index.ssf/2014/06/anti-abortion_plaintiff_eleano.html ("We need gentle, loving people that are not judgmental, that are there to help," McCullen said in a phone interview with The Republican/MassLive.com . . . McCullen said her mission is about 'surrounding (women) with love.' 'I love women and love women that need help,' McCullen said.").

⁴² In 2008, Alliance Defending Freedom, a conservative Christian nonprofit organization, filed the lawsuit resulting in the *McCullen v. Coakley* appeal. *McCullen v. Coakley*, 844 F. Supp. 2d 206, 209 (D. Mass. 2012) *aff'd*, 708 F.3d 1 (1st Cir. 2013) *rev'd and remanded*, 134 S. Ct. 2518 (2014) ("On

that embodied everything a violent protestor is not. Ms. McCullen hardly looked like a threat, and the Massachusetts buffer zone law looked extremely oppressive when applied to her. A law that criminalized a grandmother who wanted to quietly and gently exercise her freedom of speech in a traditional public forum was not a law the Court was willing to uphold.⁴³

When examined previously by lower courts, the First Circuit sustained the Massachusetts buffer zone law against a First Amendment challenge due to the *Hill* precedent.⁴⁴ The First Circuit majority recognized that the Massachusetts statute had been modeled from the Colorado statute in *Hill*, though there were distinguishing characteristics between the two.⁴⁵ In contrast to the First Circuit, the *McCullen* majority did not mention *Hill* at all in the opinion other than in the procedural history.⁴⁶ Furthermore, the majority gave no indication that *Hill* had been overruled.⁴⁷ Was the preservation of *Hill* a precondition for Justices that were part of the majority in *Hill* to join the more conservative majority of a seemingly

January 16, 2008, Plaintiffs filed the Complaint, which advanced eight counts under 42 U.S.C. § 1983”). Prior to July of 2012, Alliance Defending Freedom was named the Alliance Defense Fund. Press Release, Alliance Defending Freedom, Alliance Defense Fund Now Alliance Defending Freedom (July 9, 2012), available at <http://www.adflegal.org/detailspages/press-release-details/alliance-defense-fund-now-alliance-defending-freedom>.

⁴³ Cf. Bowman, *supra* note 40. The article accuses Planned Parenthood as advocating for the buffer zone law because without it, sidewalk counselors will effectively convey their message and show women other options than abortions. *Id.* This would deprive Planned Parenthood of the money the organizations would have received from the abortion procedure. *Id.*

⁴⁴ McGuire v. Reilly (*McGuire II*), 386 F.3d 45 (1st Cir. 2004); *McGuire I*, 260 F.3d 36 (1st Cir. 2001).

⁴⁵ *McCullen*, 134 S. Ct. at 2525. The Colorado statute created an eight-foot zone around patients within one hundred feet of the facility. *Hill v. Colorado*, 530 U.S. 703, 703 (2000). The Massachusetts statute imposed a thirty-five-foot zone around the facility entrance. *McCullen*, 134 S. Ct. at 2526.

⁴⁶ *McCullen*, 134 S. Ct. at 2525.

⁴⁷ See *McCullen*, 134 S. Ct. at 2525–41. *Contra McCullen*, 134 S. Ct. at 2545 (Scalia, Kennedy & Thomas, JJ., concurring) (“In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled.”); 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) (“*McCullen* does in fact provide a basis for overruling *Hill* with respect to the government’s ability to protect unwilling listeners from unwanted communication in traditional public fora. The majority opinion suggests that a statute concerned with protecting unwilling listeners from unwanted communication would not be content neutral and, thus, an unwilling listener’s interest in avoiding unwanted communication in traditional public fora will rarely outweigh the rights of law-abiding speakers.”).

contrary opinion in *McCullen*?⁴⁸ The *McCullen* opinion did not address whether the Massachusetts law was more restrictive than the Colorado statute, nor did it make any comparison with the Colorado statute at all.⁴⁹ Despite being a unanimous opinion, *McCullen*'s limited instruction leaves First Amendment advocates wondering if *Hill* remains good law that can be used to uphold certain buffer zone legislation.⁵⁰ Nevertheless, many localities with buffer zone laws have seemed to abandon their confidence in *Hill* and have considered *McCullen* to put their buffer zone laws in danger.

II. REPEALING BUFFER ZONES ENTIRELY

Despite no particular direction from the *McCullen* Court as to whether any buffer zone law could be narrowly tailored to pass the test of constitutionality, many localities, after the *McCullen* decision, were forced to reexamine their buffer zone laws before and after lawsuits ensued.

A. New Hampshire

On June 10, 2014, New Hampshire signed into law Senate Bill 319-FN, a bipartisan effort that created a twenty-five-foot fixed buffer zone outside of reproductive health care facilities⁵¹ and required specific signage to denote the

⁴⁸ For example, Justice Ginsburg and Justice Breyer both joined the majority opinion in *McCullen*. *McCullen*, 134 S. Ct. at 2525.

⁴⁹ See Hannah Levin, Note, *Broken Buffers and Fragile Bubbles—McCullen v. Coakley*, 40 AM. J.L. & MED. 473, 475 (2014) (“Also, the Court did not address the fact that the buffer zone in the Colorado statute from *Hill* was larger than the one in the 2007 amendment to the Massachusetts Act.”).

⁵⁰ See, e.g., Kevin Russell, *What Is Left of Hill v. Colorado?*, SCOTUSBLOG (June 26, 2014, 4:34 PM), <http://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado/> (“It may be that they recognized that there are no longer five votes to permit buffer zones, and thought it more important to preserve *Hill*'s standard of review (i.e., avoiding strict scrutiny of measures restricting abortion protestors' activities).”); see also Eugene Volokh, *Massachusetts abortion clinic buffer zone law overturned* (in *McCullen v. Coakley*), WASH. POST, June 6, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/26/massachusetts-abortion-clinic-buffer-zone-law-overturned-in-mccullen-v-coakley/> (“The *Hill* law was materially less restrictive, even of face-to-face conversations, and protected a form of personal privacy—freedom from close, directed approaches that intrude on one's personal space—that is not implicated in this case.”).

⁵¹ S. 319-FN, 2014 Sess., at 81:1–81:3 (N.H. 2014), available at <http://gencourt.state.nh.us/legislation/2014/SB0319.html> (“No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to [twenty-five] feet of any portion of an entrance, exit, or driveway of a reproductive health care facility.”).

zone.⁵² Before the New Hampshire buffer zone law had gone into effect and signs had been installed, the Supreme Court declared the similarly-structured Massachusetts law unconstitutional in *McCullen*.⁵³ When suit in New Hampshire immediately followed, the U.S. District Court of New Hampshire ordered that the state not enforce the new buffer zone law and issued a stay on the law indefinitely.⁵⁴ The order stated that if healthcare facilities were to display the signs contemplated by the buffer zone law, the court would then decide whether to issue a preliminary injunction.⁵⁵ Until such action, New Hampshire could enforce any other statute, ordinance, or regulation against protestors.⁵⁶

On January 8, 2015, the New Hampshire buffer zone law took one more step back when House Bill 403 (“H.B. 403”) was introduced with the purpose of repealing the buffer zone law entirely.⁵⁷ H.B. 403 stated that the repeal was necessary to eliminate costly lawsuits that would result from defending the law after *McCullen*.⁵⁸ What started as a bipartisan effort ended as a fight during the House Judiciary Committee debate, as some insisted the New Hampshire law was crafted more narrowly than the Massachusetts law due to its requirements to put up signs and consult with local officials.⁵⁹ Others argued that the law was not necessary, as harassment was not occurring outside such facilities and protestors were acting peacefully when exercising their First Amendment rights.⁶⁰ While H.B.

⁵² *Id.* (“Reproductive health care facilities shall clearly demarcate the zone authorized in paragraph I and post such zone with signage.”).

⁵³ *See McCullen*, 134 S. Ct. at 2522.

⁵⁴ *Reddy v. Foster*, No. 14-cv-299-JL (D.N.H. July 23, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ H.R. 403-FN, 2015 Sess., at 132:47–132:40 (N.H. 2015), available at <http://www.gencourt.state.nh.us/legislation/2015/HB0403.pdf>.

⁵⁸ *Id.*

⁵⁹ Kathleen Ronayne, *Lawmakers Consider Abortion Clinic Buffer Zone Appeal*, WASH. TIMES, Feb. 10, 2015, <http://www.washingtontimes.com/news/2015/feb/10/new-hampshire-taking-up-abortion-clinic-buffer-zon/> (“Democratic Sen. Donna Soucy of Manchester, who sponsored the original buffer zone bill, told the committee she believes it is constitutional because it’s crafted more narrowly than the Massachusetts law. Any facilities wishing to enact a buffer zone would be required to put up signs marking the zone and consult with local officials.”).

⁶⁰ *Id.* (“Rep. Kathleen Souza, a Manchester Republican and co-sponsor of the repeal bill, said the repeal is needed to ward off a costly lawsuit and because harassment is not occurring outside such facilities.”).

403 passed in the New Hampshire House of Representatives, a deadlock vote in the New Hampshire Senate effectively killed the bill, leaving the stay on the law in place but keeping the buffer zone law alive.⁶¹

Litigation will likely ensue to test whether the New Hampshire buffer zone law is a constitutional and more narrowly tailored solution than the Massachusetts law. However, might any buffer zone law that prohibits speech, no matter what size or what signs are required, be deemed unconstitutional after *McCullen*? By considering a repeal of a law—one that created a zone ten feet smaller than the Massachusetts zone and required explicit markings beyond just a painted line—the New Hampshire legislature seems to have little faith in the strength of buffer zone laws post-*McCullen*. Yet, after weighing the costs and benefits, the New Hampshire Senate made a statement by risking costly litigation at the price of not abandoning the potential benefit of a law that may not hold up in court post-*McCullen*.

B. Portland, Maine

Officials in Portland, Maine, went further than the New Hampshire legislature and eliminated all restrictions around reproductive healthcare facilities entirely.⁶² In Portland, members of the City Council recognized an atmosphere of intimidation and shaming of people trying to access their city’s abortion clinic.⁶³ On November 18, 2013, all nine members of the Portland City Council voted to enact an ordinance that created a thirty-nine-foot buffer zone around the three entrances of a single abortion clinic in downtown Portland.⁶⁴ The ordinance, titled “Access to Reproductive Health Care Facilities,” had the purpose “to balance both the fundamental right to assemble peacefully and to demonstrate on matters of public concern, with the right to seek and obtain reproductive health care services.”⁶⁵ The

Instead, she said, people are acting peacefully. Creating a buffer zone violates the First Amendment rights of people who want to stand outside the clinics, she said.”)

⁶¹ S. Journal, 164th Sess. 13–14, at 403 (N.H. 2015), available at <http://www.gencourt.state.nh.us/scaljournals/journals/2015/SJ%2014.pdf>.

⁶² *Fitzgerald v. City of Portland*, No. 2:14-CV-00053-NT, 2014 WL 5473026, at *10 (D. Me. Oct. 27, 2014).

⁶³ Craig Lyons, *City Council Enacts Buffer Zone Around Planned Parenthood Clinic*, PORTLAND SUN (Nov. 19, 2013), <http://www.portlanddailysun.me/index.php/newsx/local-news/10762-city-council-enacts-buffer-zone-around-planned-parenthood-clinic>.

⁶⁴ *Id.*

⁶⁵ PORTLAND, ME., CODE § 17-108-112 (2013) (repealed July 7, 2014), available at <http://www.portlandmaine.gov/DocumentCenter/Home/View/3069>.

ordinance was modeled after the Massachusetts law, which, at that time, had withstood constitutional challenges.⁶⁶ Eleven days after the *McCullen* decision, the Portland City Council met and voted to repeal the ordinance, effective immediately.⁶⁷ This ended anti-abortion advocates' pending challenges to the law before a judge could make a decision, and the Portland City Council has not yet enacted a new ordinance in its place.⁶⁸

Though the *McCullen* Court gave no specific limit to buffer zone size, a fixed buffer zone with an additional four feet would likely face even greater challenges in passing the narrow tailoring analysis.⁶⁹ While the right to seek and obtain reproductive healthcare services would likely be considered a legitimate interest,⁷⁰ pushing protestors thirty-nine feet from the entrance would similarly compromise the protestors' ability to initiate conversations and would effectively shield their message.⁷¹ Preventing conversations would burden more speech than necessary, and a court would likely need proof that less intrusive methods were attempted.⁷² Had Portland chosen to keep its law, challengers would likely have an easy time analogizing it with the Massachusetts statute ruled unconstitutional in *McCullen*.

III. BRINGING MORE NARROWLY TAILORED SOLUTIONS

Rather than abandoning the government's interest in preventing harassment, intimidation, and patient access around women's healthcare facilities, some localities have developed new laws post-*McCullen* that serve the same purposes as buffer zone laws without putting restrictions on free speech within a fixed zone.

A. Massachusetts

After failure in *McCullen*, the Massachusetts legislature attempted to refine its law with a more narrowly tailored solution. Instead of focusing on a buffer zone,

⁶⁶ *Fitzgerald*, 2014 WL 5473026, at *1.

⁶⁷ *Id.* at *4.

⁶⁸ *Id.* at *10.

⁶⁹ *United States v. Grace*, 461 U.S. 171, 177 (1983).

⁷⁰ *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (“[R]espondents claim that the Act promotes ‘public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.’” (internal citation omitted)).

⁷¹ *Id.* at 2536–37.

⁷² *Id.* at 2538–39.

the new law focused on patient access to facilities.⁷³ In July of 2015, Massachusetts Governor Deval Patrick signed the law, which permitted police to order anyone who “impedes” people entering or exiting abortion clinics to move twenty-five feet away from the clinic until it closes for the day.⁷⁴ People who resist the new law could still face a five-hundred dollar fine and jail time.⁷⁵ The new Massachusetts law is a state version of the federal Freedom of Access to Clinic Entrances Act (“FACE”), which “prohibits the use of force, physical act[,], or threat of force directed at an individual attempting to access or depart from a reproductive health facility.”⁷⁶

The new Massachusetts law takes into account the *McCullen* Court’s opinion and does a better job of balancing the rights of protestors and the rights of patients. Under the new law, sidewalk counselors can speak with patients within the buffer zone range so long as they do not interfere with the government’s interests in preventing harassment and blocking of facility entrances. No burden would then be placed upon Ms. McCullen and other sidewalk counselors’ speech, as they could peacefully initiate conversations and hand out leaflets without a buffer zone to stifle their messages.

B. Madison, Wisconsin

The *Hill* Court precedent was further weakened when the City Attorney in Madison, Wisconsin, advised the City Council to stop enforcing the eight-foot floating bubble zone that prevented protestors from passing a leaflet, displaying a sign, or engaging in oral protest, education, or counseling within one-hundred-and-sixty feet from a healthcare facility entrance.⁷⁷ Though this ordinance was more similar to the bubble zone ruled constitutional in *Hill*, the Madison City Attorney said that the city was not able to enforce the ordinance in light of *McCullen* and that keeping the law would expose the city to additional lawsuits.⁷⁸ On August 5,

⁷³ See 2014 Mass. Legis. Serv. ch. 197 (West) (amended July 30, 2014).

⁷⁴ *Id.*; see also Jonathan Miller, *Case Focus: The Buffer Zone: Where We’ve Been and Where We’re Going*, BOSTON B. J. (Oct. 7, 2014), <http://bostonbarjournal.com/2014/10/07/the-buffer-zone-where-weve-been-and-where-were-going/>.

⁷⁵ See Miller, *supra* note 74 (“The provisions of the new law are enforceable . . . criminally.”).

⁷⁶ 18 U.S.C. § 248 (2012).

⁷⁷ Thaddeus Baklinski, *City of Madison Repeals Bubble Zone Law After Supreme Court Ruling*, LIFE SITE NEWS (Aug. 26, 2014), <https://www.lifesitenews.com/news/city-of-madison-repeals-bubble-zone-law-after-supreme-court-ruling>.

⁷⁸ *Id.*

2014, the City Council repealed all of the ordinance's restrictions on speech.⁷⁹ While eliminating the buffer zone, the City Council revised the ordinance to focus on activities that might prevent patient access.⁸⁰ The amendments prohibited anyone from physically and intentionally hindering a person's entrance or exit and from injuring or threatening to injure that person.⁸¹ The drafter's analysis stated that the amended ordinance would be used in conjunction with other Wisconsin ordinances and statutes.⁸²

The Madison City Attorney's concern over the ordinance that the City Council unanimously enacted seems to explicitly recognize that little is left of *Hill*. The Western District of Wisconsin had spoken pre-*McCullen*, and though the court expressed that it found the precedent troubling, it was constrained by *Hill* and ruled the ordinance valid.⁸³ The court ultimately deemed the city ordinance constitutional because the differences between the Madison ordinance and the Colorado statute were not sufficient enough to distinguish them and to come to a different result regarding constitutionality.⁸⁴ Interestingly, the Western District of Wisconsin recognized the plaintiffs' argument by highlighting that "the Supreme Court has recently been presented in *McCullen* . . . with an opportunity to overrule *Hill*, should it choose to do so."⁸⁵ Although the Western District of Wisconsin acknowledged that the Supreme Court is the only court that can overrule one of its own precedents, the court did give a disclaimer that holds true post-*McCullen*: "It is

⁷⁹ MADISON, WIS., GEN. ORD. ch. 23.01 (amended Aug. 13, 2014), available at <http://www.adfmedia.org/files/MadisonSec23-01Modification.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Madison Vigil for Life, Inc. v. City of Madison, Wis.*, 1 F. Supp. 3d 892, 894 (W.D. Wis. 2014); see also *Protest Buffer Zone Around Abortion Clinic Is Constitutional, Judge Says*, 21 WESTLAW J. HEALTH L. 4 (2014).

⁸⁴ *Madison Vigil for Life*, 1 F. Supp. 3d at 895–96. The plaintiffs argue that the eight-foot "bubble" zone in *Hill* extends out to a radius of one hundred feet from the entrance of health care facilities, whereas the eight-foot "bubble" zone in this case extends out in a 160-foot radius. *Id.* There was also evidence in *Hill* of demonstrations in front of abortion clinics that had impeded access to those clinics and were often confrontational, whereas the City has proffered no such evidence. Finally, the plaintiffs argue that the definition of "health care facility" appears to vary between the Colorado statute and the ordinance. *Id.*

⁸⁵ *Id.* at 896 (emphasis added).

not a given that *Hill* will be addressed, much less narrowed or overruled.⁸⁶ While the district court clarified its reasoning by distinguishing between bubble zones and buffer zones, the court seemed to assume that *Hill* would remain precedential and bubble zones constitutional should the Court decline to address its old precedent. Despite the Western District of Wisconsin's distinction, the Madison City Attorney and City Council did not have enough confidence in the *Hill* precedent to keep the buffer zone law on the books.⁸⁷

C. Burlington, Vermont

The City Attorney recommended examining a Burlington, Vermont, buffer zone ordinance at a July 14, 2014, City Council meeting in Burlington.⁸⁸ The City Council stopped enforcing the part of their ordinance which created a thirty-five-foot buffer zone after *McCullen*, while still enforcing the part of the ordinance that makes it a crime to block people from entering the clinic.⁸⁹ For two-and-one-half months, the City Council and Ordinance Committee took suggestions for an alternative to the thirty-five-foot zone.⁹⁰ On October 9, 2014, the Ordinance Committee proposed changes that turned the buffer zone ordinance into a "Reproductive Health Center Access Ordinance."⁹¹ One proposed change added a definition of "harass," while another increased the penalty of noncompliance from five-hundred to eight-hundred dollars.⁹² The Burlington City Attorney explained

⁸⁶ *Id.* at 896 n.2.

⁸⁷ Baklinski, *supra* note 77; MADISON, WIS., GEN. ORD. ch. 23.01.

⁸⁸ John Dillon, *After Supreme Court Rules, Burlington to Amend Clinic Buffer Zone Ordinance*, VT. PUB. RADIO (July 2, 2014), <http://digital.vpr.net/post/after-supreme-court-rules-burlington-amend-clinic-buffer-zone-ordinance>.

⁸⁹ *Id.*

⁹⁰ Hannah McDonald, *Proposed Changes to Buffer Zone Law in City Make Waves*, WPTZ NEWS (Sept. 24, 2014), <http://www.wptz.com/news/vermont-new-york/burlington/proposed-changes-to-buffer-zone-law-in-city-make-waves/28234882>.

⁹¹ BURLINGTON, VT., CODE ch. 14, art. IX, §§ 21-111–21-115 (2014) (as adopted on July 14, 2014 and with Oct. 9, 2014 proposed changes), *available at* <http://www.burlingtonvt.gov/CityCouncil/OrdinanceCommittee-2014>.

⁹² *Id.* § 21-114(a) (raising the penalty from five hundred to eight hundred dollars); *Id.* § 21-112(4) ("Harass shall mean: (1) [a]pproaching, following or otherwise acting towards a person (a) in a threatening manner with the intent of, or recklessly creating the risk of, causing a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property; or (b) using abusive or obscene language, which shall be construed as the Vermont Supreme Court has construed the same language in 13 V.S.A. § 1026(3); (2) [c]ontinually attempting to engage or otherwise solicit a person after such person has indicated that he or she does not desire to be engaged or solicited;

that the words chosen for the amended ordinance had been upheld by courts, thereby minimizing the risk of litigation over the constitutionality of the previous version containing questionable words, such as “intimidation.”⁹³ The final revisions, adopted on October 20, 2014, gave law enforcement officers a right to order individuals who obstruct, detain, hinder, impede, harass, or block another person’s entry or exit to move twenty-five feet from the entrance or driveway of the facility for twelve hours.⁹⁴

In *Clift v. City of Burlington, Vermont*, the District Court of Vermont examined the pre-amended ordinance, without the benefit of *McCullen*, when residents moved for a preliminary injunction.⁹⁵ The court relied on *Schenck*,⁹⁶ *Madsen*,⁹⁷ and *Hill*, as well as other circuit court decisions that “have addressed the constitutionality of provisions that are substantially similar” and ultimately dismissed the preliminary injunction.⁹⁸ In one portion of the discussion, the district court addressed the plaintiffs’ argument that the Burlington buffer zone ordinance was distinct from and more suspect than the Colorado bubble zone statute in *Hill*.⁹⁹ The court acknowledged the differences in the statutes, themselves, as well as

(3) [i]ntentionally touching or causing physical contact with a person without that person’s consent; or
(4) [u]sing violent or threatening gestures toward a person.”)

⁹³ CITY COUNCIL ORDINANCE COMM., *City Council Ordinance Committee Meeting Minutes*, CITY BURLINGTON, VT. (Oct. 9, 2014), https://www.burlingtonvt.gov/sites/default/files/Agendas/ORD%20COM%2010-9-14%20Minutes_0.docx.

⁹⁴ BURLINGTON, VT., CODE ch. 14, art. IX, § 21-114(b) (amended Oct. 20, 2014).

⁹⁵ 925 F. Supp. 2d 614, 619 (D. Vt. 2013).

⁹⁶ *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376–82 (1997) (upholding a fifteen-foot fixed buffer zone was constitutionally permissible but striking down a fifteen-foot floating zone as unconstitutional).

⁹⁷ *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding a thirty-six-foot fixed buffer zone outside healthcare facilities but striking down restrictions on displaying images and approaching patients within three hundred feet).

⁹⁸ *Clift*, 925 F. Supp. 2d at 626–29.

⁹⁹ *Id.* at 639 (“The Plaintiffs point to language in *Hill* indicating the Supreme Court’s concern with the ability of protesters to ‘communicate at a normal conversational distance’ and to distribute handbills to unwilling recipients; however, the Court has never held that either form of expression is guaranteed by the First Amendment. The Plaintiffs also contend that the [o]rdinance is more suspect than the statute at issue in *Hill* because the [o]rdinance applies to willing listeners as well as unwilling ones and because the [o]rdinance regulates all expressive activity, not merely the display of signs, leafleting, and oral speech.” (internal citation omitted)).

differences in concerns arising from fixed and floating zones.¹⁰⁰ Though the court acknowledged that the Colorado statute was framed more narrowly, it determined that the plaintiffs' distinctions were much less significant than the plaintiffs suggested.¹⁰¹ The lack of differences between the Colorado statute and the Burlington ordinance was reflected in the post-*McCullen* amendments to the ordinance: it was not amended to create a floating bubble zone, but rather, it eliminated speech restrictions entirely.¹⁰² If the District Court of Vermont was correct in determining that the differences between the floating bubble zone and a fixed buffer zone are not significant, then after *McCullen*, *Hill* seems to retain little precedential value in preserving any type of restricted speech buffer zone.

D. San Francisco, California

San Francisco, California, enacted a buffer zone ordinance as early as 1993.¹⁰³ The ordinance prohibited "harassment" by creating an eight-foot bubble zone around anyone within one-hundred feet of a healthcare facility.¹⁰⁴ In 2013, the city revised the ordinance, claiming that the prohibition had proven ineffective in preventing harassment, delay, and deterrence of patients due to the density and space constraints of the city's urban landscape.¹⁰⁵ The new ordinance was almost identical to the thirty-five-foot fixed buffer zone in the Massachusetts statute; it similarly created a twenty-five-foot buffer zone around the entrances, exits, and driveways of reproductive health facilities.¹⁰⁶

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² BURLINGTON, VT., CODE ch. 14, art. IX, § 21-111 (amended Oct. 20, 2014).

¹⁰³ S.F., CAL., POLICE CODE art. 43, §§ 4301–4304 (added by S.F., Cal., Ordinance 226-93 (1993)) (amended by S.F., Cal., Ordinance 88-13 (2013)) (amended by S.F., Cal., Ordinance 230-14 (2014)), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances13/o0088-13.pdf>.

¹⁰⁴ *Id.* ("Harassment" was defined in Section 4303 as "knowingly approach[ing] 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.").

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

After the *McCullen* decision, protesters disregarded the painted yellow line and moved closer to the entrance.¹⁰⁷ In response, police used a twenty-year-old section of the city's Municipal Police Code, section 122, that prohibited "aggressive pursuit . . . with the intent to cause annoyance, intimidation or fear on the part of the person being pursued," and defined aggressive pursuit as "willful, malicious or repeated following or harassment of another person."¹⁰⁸ In October of 2014, the San Francisco Board of Supervisors expanded upon this section and combined it with the old buffer zone statute to attempt to comply with *McCullen*.¹⁰⁹ The new law focuses on the conduct of the individual and the kinds of protests allowed within the zone, rather than banning speech within the zone completely.¹¹⁰ For example, no protestor is allowed to follow or harass any person within twenty-five feet of the entrance to a reproductive healthcare facility.¹¹¹ Under the new ordinance, sidewalk counselors are protected; those wishing to engage in "quiet, consensual conversations" do not fall under the definition of "harassment," and they would be allowed within the twenty-five-foot buffer zone.¹¹² Furthermore, the ordinance prohibits excessive noise through yelling or amplification of sound within "[fifty] feet of the property line" of the facility.¹¹³ The ordinance also prohibits people from "impeding access to the door" of a facility.¹¹⁴ If a protestor violates any of the provisions, law enforcement officials could require the person to "disperse and cease to stand or be located within at least twenty-five feet" from the facility for "eight hours or until the close of business."¹¹⁵

In *McCullen*, the Court emphasized that to meet the narrow tailoring prong of a First Amendment restriction, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the

¹⁰⁷ See Heather Knight, *S.F. proposal would keep buffer zone around abortion clinics*, S.F. GATE (Sept. 3, 2014), <http://www.sfgate.com/bayarea/article/S-F-proposal-would-keep-buffer-zone-around-5732149.php>.

¹⁰⁸ *Id.*; see also POLICE art. 2, § 122.

¹⁰⁹ POLICE art. 2, § 122.

¹¹⁰ *Id.* art. 43, §§ 4301–4304.

¹¹¹ *Id.* § 4303(a)(1).

¹¹² *Id.* § 4302 (providing a definition of "Harass").

¹¹³ *Id.* § 4303(a)(3).

¹¹⁴ *Id.* § 4303(a)(2).

¹¹⁵ *Id.* § 4304(c).

government's interests, not simply that the chosen route is easier."¹¹⁶ When San Francisco's buffer zone was no longer enforceable after *McCullen* and police were left to protect patients by other means, the city was forced to "try other laws already on the books"—a step that the Court said was not taken by Massachusetts before enacting its statute.¹¹⁷ The question arises whether, by enforcing section 122 of the Municipal Police Code, the San Francisco Board of Supervisors has "shown that it seriously undertook to address the problem with less intrusive tools readily available to it," should those laws that intrude less on free speech fail.¹¹⁸ If section 122 had done an adequate job of fulfilling the government's interests in protecting abortion clinic patients, then the new buffer zone law that limits the kinds of protests within the zone would be unnecessary, and a court would likely find the new San Francisco ordinance as an intrusion on free speech.¹¹⁹

IV. FIGHTING FOR BUFFER ZONES TO STAY

Despite the majority of states and localities eliminating their buffer zone laws, the City of Pittsburgh chose to defend its law in court. Due to litigation in the Third Circuit pre-*McCullen* that had determined the city's buffer zone law was constitutional based upon *Hill* precedent, the lower court post-*McCullen* refused to reconsider its old determination. The court asserted that, since the *Hill* decision was not explicitly overruled, the *McCullen* Court had left the *Hill* decision intact.

A. Pittsburgh, Pennsylvania

In December of 2005, the City Council of Pittsburgh, Pennsylvania, enacted an ordinance that established an "eight-foot personal bubble zone," as well as a provision that "no person or persons shall knowingly congregate, patrol, picket, or demonstrate in a zone extending fifteen feet from any hospital and or health care facility."¹²⁰

Shortly after enactment, an action was brought challenging the constitutionality of the ordinance in *Brown v. City of Pittsburgh*.¹²¹ Relying on

¹¹⁶ *McCullen v. Coakley*, 134 S. Ct 2518, 2540 (2014).

¹¹⁷ *Id.* at 2538.

¹¹⁸ *Id.* at 2539.

¹¹⁹ *See id.* ("Although respondents claim that Massachusetts 'tried other laws already on the books,' . . . they identify not a single prosecution brought under those laws within at least the last 17 years.").

¹²⁰ PITTSBURGH, PA., CODE tit. 6, § 623.04 (2015).

¹²¹ *Brown v. City of Pittsburgh*, 586 F.3d 263, 266 (3d Cir. 2009).

prior Supreme Court decisions, the Third Circuit determined that the ordinance was a content-neutral time, place, and manner regulation because it prohibited even the exempted classes of persons—those who perform important safety functions—from picketing or demonstrating within the buffer zone.¹²² The court said that the law was not imposed because of the content of the speech but because of offensive behavior identified with its delivery in response to aggressive protests and confrontations.¹²³ However, the court held that the Pittsburgh ordinance’s combination of the “bubble zone” and the “buffer zone” was broader than necessary.¹²⁴ Though the court recognized Pittsburgh’s legitimate interest in protecting those entering healthcare facilities from physical violence and verbal harassment, the statute was not sufficiently tailored.¹²⁵ The court said that either of the two zones, standing alone, would advance the ordinance’s objectives, but it noted that the combination burdened too much speech.¹²⁶ As a result, the Third Circuit remanded the case back to the district court for further proceedings.¹²⁷

Subsequently, the district court issued an order stating that the city must construe the ordinance in a manner that does not permit any person to picket or demonstrate within the boundaries of the fixed buffer zone.¹²⁸ The only narrow exemption for inside the zone was for emergency personnel congregating and patrolling “in the course of their official business” and for employees of hospitals and health care facilities, insofar as they are engaged in “assisting patients and other persons to enter or exit” the facility.¹²⁹ The order also extended to provide police with oral and written training materials regarding enforcement of the ordinance.¹³⁰

¹²² *Id.* at 275.

¹²³ *Id.* at 266, 270–71.

¹²⁴ *Id.* at 298.

¹²⁵ *Id.* at 279.

¹²⁶ *Id.* at 280.

¹²⁷ *Id.* at 299.

¹²⁸ Order Granting Permanent Injunction at 1, *Brown v. City of Pittsburgh*, No. 2:06-cv-00393-NDF (W.D. Pa. Dec. 17, 2009).

¹²⁹ *Id.*

¹³⁰ *Id.*

On September 4, 2014, another lawsuit ensued after *McCullen*, when the plaintiffs moved the court to issue a preliminary injunction to restrain the city from enforcing the ordinance.¹³¹ For the first time since *McCullen*, a court upheld a buffer zone as constitutional, and the court dismissed the motion for preliminary injunction.¹³² The District Court for the Western District of Pennsylvania distinguished the ordinance from the Massachusetts statute, and it relied on both *Brown* and *Hill* in determining its constitutionality.¹³³ Repeatedly, the court insisted that *Hill* was not overruled and was still good law.¹³⁴

In response to the argument that the ordinance was facially overbroad, the district court acknowledged that *McCullen* did not reach the issue. Therefore, the *McCullen* Court did not alter the relevant doctrine from *Hill*, and the reasoning of the Third Circuit in *Brown*, where the court relied on *Hill*, applied.¹³⁵ When the plaintiffs argued that the ordinance was content- and viewpoint-based on its face and in application, the court once again contended that the Third Circuit, relying on *Hill*, had already found the ordinance to be content-neutral.¹³⁶ Since *McCullen* did not overrule or alter the content neutrality doctrine as set forth in *Hill*, the Third Circuit's previous determination in *Brown* must stand.¹³⁷

The court then made comparisons between the Pittsburgh ordinance and the Massachusetts statute. First, the court discussed how the burden on speech was significantly greater in Massachusetts, where the statewide buffer zone radius was of thirty-five feet, where sidewalk counselors were pushed across the street, and

¹³¹ *Bruni v. City of Pittsburgh*, 91 F. Supp. 3d 658, 666 (W.D. Pa. Mar. 6, 2015).

¹³² *Id.* at 683.

¹³³ *Id.* at 666–79.

¹³⁴ *Id.* at 674–75 (“First, the Supreme Court did not explicitly overrule *Hill* or articulate a deviation from the standard outlined in that case If the Supreme Court opted to leave *Hill* intact in deciding *McCullen*, far be it for this Court to do otherwise.”); see *contra* *McCullen v. Coakley*, 134 S. Ct. 2518, 2545 (Scalia, Kennedy & Thomas, JJ., concurring) (“In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled.”); Phillips, *supra* note 47, at 969.

¹³⁵ *Bruni*, 91 F. Supp. 3d at 666–67.

¹³⁶ *Id.* at 667–73.

¹³⁷ *Id.*; see *contra* *The Supreme Court 2013 Term: Leading Case: Constitutional Law: First Amendment—Freedom of Speech—Content Neutrality—McCullen v. Coakley*, 128 HARV. L. REV. 221, 221 (2014) (“The Court instead should have recognized that a restriction on speech that applies only at abortion clinics is content based, but that because it protects women’s constitutional right to seek abortions, it could, with more adequate tailoring, survive strict scrutiny.”).

where the counselors could not approach potential patients in order to hand them literature and speak to them in normal, conversational tones.¹³⁸ Furthermore, the court said that, unlike in *McCullen*, alternative channels for sidewalk counseling existed in Pittsburgh, as the *Brown* court and *Hill* Court “noted approvingly that . . . the . . . zone allowed leafletters to stand stationary in the path of oncoming pedestrians.”¹³⁹ Due to the distinguishing factors between the Massachusetts statute and the Pittsburgh ordinance, the court determined that *McCullen* did not invalidate Pittsburgh’s less burdensome ordinance, as the ordinance was narrowly tailored to pursue what the *Hill* Court determined was a legitimate government interest.¹⁴⁰

The district court, here, was the first court after *McCullen* to rekindle the flame behind *Hill* and conclude that the *McCullen* Court’s failure to mention overruling the decision was an indication that *Hill* remains good law.¹⁴¹ Rather than using *McCullen* as a way to reevaluate the ordinance, the court relied on the Third Circuit’s previous opinion, which had used *Hill*, as untouched by the *McCullen* decision. By distinguishing the Massachusetts statute, the court revitalized the possibility of buffer zone laws and left buffer zone advocates with the hope that a fixed zone which restricts speech could still be considered narrowly tailored. Whether the Third Circuit will once again uphold the Pittsburgh buffer zone law on appeal may test the viability of existing buffer zone laws post-*McCullen* and will help determine whether the waning authority of *Hill* still applies.

CONCLUSION

As buffer zone laws continue to be challenged, courts will have to decide whether to construe *McCullen* broadly, as affecting all existing buffer zone laws, or to limit the decision to laws with substantial similarities to the Massachusetts statute. Left with the vague *McCullen* precedent, determining what is the proper size of buffer zones or what specific restrictions should be allowed within the zone for a law to be narrowly tailored is left to the discretion of the courts. Despite the fall of many buffer zone laws across the country after *McCullen*, pro-life advocates will likely continue to challenge any restrictions around women’s healthcare

¹³⁸ *Bruni*, 91 F. Supp. 3d at 675–76.

¹³⁹ *Id.* at 677 (quoting *Brown v. City of Pittsburgh*, 586 F.3d 263, 278 (3d Cir. 2009) (citing *Hill v. Colorado*, 530 U.S. 703, 727–28 (2000))).

¹⁴⁰ *Id.* at 675, 678–79.

¹⁴¹ *Id.* at 675.

facilities as infringements on First Amendment rights, until no restrictions on speech remain.