# US Supreme Court strikes down abortion clinic “buffer zone”

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The US Supreme Court last Thursday unanimously struck down a Massachusetts law that barred anyone other than patients, medical staff, police and passers-by from coming within a 35-foot radius of entrances to abortion clinics.

The case, *McCullen v. Coakley*, was brought by various antiabortion activists who challenged the constitutionality of the law. The plaintiffs named Massachusetts Attorney General Martha Coakley in their suit and requested a court order preventing the state from enforcing the law in question.

In the United States, health facilities that provide access to abortion are frequently targeted by far-right religious activists. It is a settled practice among certain religious fundamentalist groups—encouraged by sections of the Republican Party and the political establishment—to set up shop outside abortion clinics to harass, degrade and intimidate patients as they attempt to use the facilities. It is a vile operation that not infrequently turns violent.

Many states enacted laws to protect abortion clinics and their patients following a wave of shootings and bombings throughout the 1990s, including the 1994 shooting of two clinic workers in Brookline, Massachusetts. Since 1993, four doctors who performed abortions have been shot and killed, the most recent being Dr. George Tiller of Wichita, Kansas in 2009.

Notwithstanding the reactionary and obscurantist character of the protests at abortion clinics, the Massachusetts law that is the subject of the *McCullen* case presents significant concerns from the standpoint of freedom of speech. While it ostensibly addresses harassment and intimidation at places where violent protest is not unusual, the blanket “buffer zone” aspect of the law essentially creates a legal “no free speech zone” outside of abortion clinics.

If such zones were upheld, it would set a precedent for the establishment of similar “no free speech zones” at other public venues. From the standpoint of a principled defense of democratic rights, measures such as Massachusetts’s “buffer zones” cannot be supported.

The Massachusetts legislature passed the original version of the law in 2000, amending it in 2007 to include the provision establishing the buffer zones around clinic entrances. In legislative hearings prior to the amendment’s approval, Attorney General Coakley and various law enforcement officials testified that policing the entrances to abortion clinics was unworkable and that the buffer zones were needed to protect women’s safe entry and exit from the clinics.

The 2007 amendment’s 35-foot buffer zone was unprecedented from a legal standpoint. Previous Supreme Court decisions on the subject had upheld some limitations on protests and leafleting near clinic entrances, but legislation had not been attempted that simply proscribed being within a certain distance of entrances.

For example, a Colorado law upheld by the Supreme Court in 2000 makes it a crime for someone leafleting—or “sidewalk counseling” as its practitioners euphemistically call it—to come within six feet of someone entering or exiting a clinic without their consent. This six-foot “bubble” component of the Colorado law applies within 100 feet of any hospital or health care facility in the state. New York state has a “bubble” rule similar to Colorado’s.

Chief Justice John Roberts delivered the majority opinion in the *McCullen* case, joined by the so-called “liberal” justices Stephen Breyer, Ruth Bader Ginsburg, Sonya Sotomayor and Elena Kagan. The

majority opinion found that the Massachusetts law's buffer zone infringed free speech, which is protected by the First Amendment (part of the Bill of Rights). The decision is available here .

According to the Supreme Court's longstanding First Amendment jurisprudence, a government entity can set certain limitations on speech and expression, known as "time, place and manner restrictions." For example, a city can enact an ordinance prohibiting the use of loudspeakers after a certain time in the evening. The Supreme Court has upheld time, place and manner restrictions where they are neutral as to the content and viewpoint of the speech or expression.

The Supreme Court in *McCullen* found that the buffer zone measure was content and viewpoint neutral—i.e., it prohibited prochoice and antiabortion speech alike within the buffer zones. However, the court found that the buffer zones were too restrictive as a means of protecting ingress and egress from clinics, and thus were unconstitutional. The opinion suggested that the aim of securing the clinic entrances might be attained by different means, including by prosecuting protesters as trespassers.

The arch-reactionary Antonin Scalia wrote a concurring opinion that was joined by justices Clarence Thomas and the supposedly "swing" justice, Anthony Kennedy. Justice Samuel Alito wrote a brief additional concurrence along the lines of Scalia's.

Scalia's concurring opinion is remarkable—even by Scalia's standards—for its unhinged, raving style. Much more a sermon or diatribe than a legal opinion, Scalia went out of his way to paint the antiabortion movement as a righteous, persecuted tendency.

The majority opinion, according to Scalia, "carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents." This is a bizarre statement, given the fact that the majority's decision actually strikes down the Massachusetts buffer zone law.

"There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion," Scalia writes, declaring that the majority opinion "continues the onward march of abortion-speech-only jurisprudence."

The case was previously heard by a federal district court and the First Circuit Court of Appeals, both of which upheld the Massachusetts law. The First Circuit found that the buffer zones were justified given difficulties in enforcing any of the alternatives.

The majority opinion goes out of its way to placate and defer to religious obscurantism. Unlike the First Circuit's opinion, the Supreme Court's decision accepts as good coin the contention that the antiabortion protesters are engaged in "sidewalk counseling" of women seeking abortions.

The Supreme Court noted that the "success rate" of the activists (i.e., turning women away from the clinics) had fallen since the 2007 law went into effect, and that the buffer zones had thus "taken their toll."

"Although [one protester] claims that she persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she also says that she reaches 'far fewer people' than she did before the amendment. [Another protester] reports an even more precipitous decline in her success rate…"

There is certainly a strong element of hypocrisy in the *McCullen* decision. In a period of a massive rollback of basic democratic rights, the Supreme Court upheld the democratic rights of antiabortion fanatics. Meanwhile, torture, mass surveillance, assassination, incommunicado detention, police brutality, infiltration, corporate criminality and blanket official secrecy persist unaddressed.

As an editorial in the *Des Moines Register* pointed out, the Supreme Court building itself sits in a plaza where it is illegal to "parade, stand or move in processions or assemblages… or to display in the building and grounds a flag, banner or device designed or adapted to bring into public notice a party, organization or movement."