Supreme Court Unanimously Rules in Favor of WilmerHale Pro Bono Client, Against Speech-Restrictive Law

JULY 1, 2014

WilmerHale secured a significant victory in the US Supreme Court, on behalf of pro bono client Eleanor McCullen and others in a First Amendment challenge to a Massachusetts law restricting speech on sidewalks outside reproductive health care clinics that perform abortions. In a decision delivered on June 26, 2014, the Supreme Court unanimously held that the "buffer zone" law passed in Massachusetts in 2007 was unconstitutional.

Massachusetts first enacted a "buffer zone" law for reproductive health care facilities in 2000, after the Supreme Court upheld such a law in *Hill v. Colorado*, 530 U.S. 703 (2000). In 2007, Massachusetts replaced it with the law at issue in *McCullen* after claiming that the prior measure had not been effective and was difficult to enforce. The new law made it a crime to "enter or remain on a public way or sidewalk" within 35 feet of all clinic entrances and driveways, with exceptions for clinic employees; people going into or out of the clinic; and people entering the zone solely to pass to the other side.

"The Massachusetts law kept the public sidewalks open for clinic employees, but it swept away anyone, such as our clients, who wished to stand and speak peacefully near a clinic entrance or driveway," said Todd Zubler, WilmerHale's lead partner on the pro bono matter. "One of our clients, Ms. McCullen—a grandmother in her seventies—has been stationing herself for several years outside a Boston-area clinic twice a week offering counseling and practical assistance to try to persuade women entering the clinic to choose an alternative to abortion. Hundreds of women have accepted her offers of assistance over the years, but her ability to offer that assistance was dramatically curtailed by the Massachusetts law."

The WilmerHale team successfully argued that the Massachusetts law failed each aspect of the Supreme Court's *Ward* test for regulations of the time, place, or manner of speech: (1) it was not content- or viewpoint-neutral, because it applied only outside abortion clinics and exempted clinic employees; (2) it was not narrowly tailored, because it prevented even peaceful, unobstructive speech with willing listeners; and (3) it did not leave open ample alternative channels of communication.

All nine Justices voted to strike the law down as unconstitutional. The majority and one concurring

Justice agreed with WilmerHale's narrow-tailoring argument. Three concurring Justices agreed with WilmerHale's content- and/or viewpoint-neutrality arguments and would have struck the law down on those grounds, without reaching narrow tailoring.

The majority opinion, by the Chief Justice, echoes many of the narrow-tailoring arguments WilmerHale made in briefs and during oral argument. The Court found that "[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests" in protecting public safety and reducing sidewalk congestion. It noted that many other measures already prevent intentional obstruction, harassment, or other deliberate wrongdoing outside clinics, and that the state also has available to it other tools, like injunctions, to target misconduct by specific individuals. Further, the crowding that the state claimed to be addressing had been demonstrated to occur only on occasion outside a single clinic in Boston. "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution."

The Court's opinion should curtail future efforts by states and localities for enacting special speech-restrictive zones in traditional public fora such as public sidewalks.

The WilmerHale team included Partner Todd Zubler, Counsel Jason Hirsch, and Senior Associates Colin Reardon, Adriel Cepeda Derieux and Matthew Guarnieri.