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Don't Let Abortion Cloud Free-Speech Issue

By Trevor Burrus
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Eleanor McCullen is a 76-year-old grandmother who believes women who have abortions are often not informed about the options available to them. The state of Massachusetts, however, made it illegal for her to stand within 35 feet of an abortion clinic when she calmly talks to women about other options. The Supreme Court will hear Mrs. McCullen's case this week and hopefully see through the divisive rhetoric that surrounds abortion. The Court should decide that the Massachusetts law is both an unconstitutional abridgement of free speech and an infringement on the right to peacefully be in a public place.

Mrs. McCullen is not an offensive, in-your-face abortion protester. She and her husband have spent over $50,000 of their own money to provide women options other than abortion, paying for such things as living quarters, clothing, electricity, and baby formula. Twice a week she offers help and counseling to women outside of a Boston abortion clinic, usually walking up to them and asking, "May I help you this morning?" She then lets them know that she is available if the women have any questions.

Massachusetts, in a clear effort to diminish the effectiveness of pro-life speech, passed the 35-feet law in 2007. It only applies to places where abortions are "offered or performed." Of course, the vast majority of people who stand outside of clinics to voice their constitutionally protected opinions are pro-lifers.

One of the cornerstones of the First Amendment is that the government cannot regulate speech based on its content. In a 1972 case the Court said, "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." It is hard to believe that this isn't precisely what Massachusetts was doing with the 35-feet law.

Despite the controversial subject matter, this case is not about abortion. It's about the First Amendment. Both pro-lifers and pro-choicers must see past the polarizing issue of abortion and focus instead on the freedom of speech and freedom of peaceful public presence issues underneath. Pro-choicers should stand against this law in the spirit of the maxim, usually attributed to Voltaire: "I may disagree with what you say, but I will defend to the death your right to say it." After all, the law is so broad that if a pro-choicer wanted to stand within 35 feet

of a Massachusetts abortion clinic and repeat that maxim, they would be breaking the law.

Unfortunately, a 2000 Supreme Court opinion, *Hill v. Colorado*, makes the arguments for declaring the Massachusetts law unconstitutional more difficult. In that case, the Court upheld a Colorado statute that created an eight-foot "bubble" around those entering abortion clinics. The statute prohibited entering that bubble to distribute handbills, protest, educate, or counsel those going into clinics.

In a spirited and constitutionally correct dissent, Justice Antonin Scalia chided the Court for being unable to see past the abortion issue in order to invalidate a clear attempt to stifle pro-life speech. Scalia wrote that he had no doubt the Court would invalidate such a law if it "involved antiwar protesters, or union members seeking to 'educate' the public about the reasons for their strike." On this, he is certainly correct.

Regrettably, even the ACLU, the most persistent and reliable defender of free speech, now has difficulty seeing past the abortion issue. In 2000, the ACLU agreed with Justice Scalia that the law was unconstitutional. Now, the ACLU has changed its position and argues that Massachusetts's law is constitutional.

That is surprising not only because the ACLU broke its reliable track record of dogged free speech advocacy, but because the 35-feet law is an even bigger constitutional violation than the law in *Hill*. Rather than creating a bubble that more narrowly addresses the problem of people obstructing women with in-your-face shouting, Massachusetts makes it illegal for anyone to even enter the 35-feet zone (except for those entering the clinic, people using it as a right of way, and state officials like police and EMTs). Not only is it illegal to set up a non-obstructing information table or to politely talk to the women, it is even illegal to sit and play checkers or to stand and gaze around absentmindedly.

Hopefully a different Supreme Court will see the error they made 14 years ago and overrule *Hill v. Colorado*'s bizarre "right to be protected from unwanted information." The abortion issue should not obscure a clear First Amendment violation.

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