No. 17-689

In The Supreme Court of the United States

ANDREW MARCH,

Petitioner,

v.

JANET T. MILLS, Individually and in Her Official Capacity as Attorney General of Maine, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MAINE ATTORNEY GENERAL JANET T. MILLS

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QUESTION PRESENTED

Under the "Noise Provision" of the Maine Civil Rights Act, a person commits a violation if, after having been warned by a law enforcement officer, the person continues making noise that can be heard within a building with the intent to either jeopardize the health of patients receiving health services within the building or interfere with the safe and effective delivery of such services. The question presented is whether the court of appeals correctly held that the Noise Provision, on its face, is a content-neutral restriction on the time, place or manner of expression.

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CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The First Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The relevant portion of the Maine Civil Rights Act, referred to here as the "Noise Provision," states:

> It is a violation of this section for any person, whether or not acting under color of law, to intentionally interfere or attempt to intentionally interfere with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State by any of the following conduct:
>
> * * *
>
> D. After having been ordered by a law enforcement officer to cease such noise, intentionally making noise that can be heard within a building and with the further intent either:
>
> (1) To jeopardize the health of persons receiving health services within the building; or
>
> (2) To interfere with the safe and effective delivery of

> those services within the building.

Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D).

STATEMENT OF THE CASE

I. STATUTORY AND FACTUAL BACKGROUND

1. The Maine Civil Rights Act ("MCRA") was enacted in 1989. 1989 Me. Laws 582. Essentially, it creates a cause of action against any person who, "whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere" with another person's rights secured by the United States or Maine Constitutions or state or federal law. Me. Rev. Stat. Ann. tit. 5, §§ 4681, 4682. The MCRA authorizes both aggrieved persons and the Attorney General to bring actions against violators. *Id*.

In 1995, the Maine Attorney General proposed a bill to amend the MCRA to provide certain protections for patients and providers at reproductive health facilities. Pet. App. 4. The bill was subsequently amended to expand protections to all buildings, not just those providing reproductive health services. *Id*. As amended, the bill made it a violation of the MCRA to interfere or attempt to interfere with a person's civil rights by 1) physically obstructing a building; 2) "making . . . repeated telephone calls to a person or a building" in order to disrupt activities; or 3) "activating a device or exposing a substance that releases noxious and offensive odors within a building." Committee Amendment

to Legislative Document 1216, 117th Maine Legislature (1995) (attached as Exhibit A to Aff. of Alice Sproul, at 72-75). Additionally, and as is relevant here, the bill made the following a violation of the MCRA:

> After having been ordered by a law enforcement officer to cease such noise, intentionally making noise that can be heard within a building, and with the further intent either: (1) To jeopardize the health of persons receiving health services within the building; or (2) To interfere with the safe and effective delivery of those services within the building.

Id.

As the court of appeals noted, the amended bill was supported by a "broad range of interested parties, including both proponents and opponents of abortions rights." Pet. App. 5. Supporters included the Maine Pro-Choice Coalition and the Maine Life Coalition, which consisted of the Maine Right to Life Committee, the Catholic Diocese of Portland, the Christian Civic League, and Feminists for Life of Maine. *Id*. A representative of Feminists for Life of Maine testified to the Maine legislature that "'it is the consensus of the Maine Life Coalition . . . and the Attorney General's Office that this legislation further secures protection for both pro-life and pro-choice individuals.'" *Id.* Legal counsel for the Christian Civic League opined that the bill posed no constitutional issues: "[W]e believe that the AG's new bill will not infringe on the Constitutional rights of peaceful pro-life protestors. . . ." Exhibit A to Sproul Aff., at 30. Given this backing from

concerned interests across a broad political spectrum, it is no surprise that the Legislature enacted the bill and the Governor signed it into law. *See* "An Act to Amend the Maine Civil Rights Act," 1995 Me. Laws 417, *codified at* Me. Rev. Stat. Ann. tit 5, § 4684-B.

2. The Petitioner, Andrew March, expresses his opposition to abortion while standing outside of the Planned Parenthood Health Center (the "Health Center") in Portland, Maine. Pet. App. 7-8. March has never been charged with violating the Noise Provision.[1] Nevertheless, on December 21, 2015, March filed a lawsuit in the United States District Court for the District of Maine against the Attorney General, the City of Portland, and several City of Portland police officers. March alleged that on various occasions, while protesting abortion outside of the Health Center, he was warned by police officers to lower his voice or risk being in violation of the Noise Provision. Complaint, ¶¶ 55-69, 71-82, 84-93. March claims that these warnings have deterred him from exercising his First Amendment rights outside of the Health Center, Complaint, ¶¶ 70, 83, 94, 99-106, and he sought injunctive and declaratory relief. Pet. App. 8.

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[1] In the 23 years since the Noise Provision was enacted, the Attorney General has charged only one person with a violation. Aff. of Leanne Robbin, ¶ 4. The Attorney General brought that charge in October 2015, *id*., and the matter is still pending in state court.

II. PROCEDURAL HISTORY

March brought claims pursuant to 42 U.S.C. § 1983 and alleged that 1) the Noise Provision, both on its face and as applied, violates the First Amendment; 2) Respondents violated the Equal Protection Clause by allegedly selectively enforcing the Noise Provision against a speaker expressing a "Christian, Pro-Life viewpoint;" and 3) the Noise Provision is unconstitutionally vague. Complaint, ¶¶ 116-178. On December 30, 2015, March filed a motion for a preliminary injunction to enjoin Respondents from enforcing the Noise Provision. Pet. App. 8. In seeking an injunction, March advanced only his First Amendment facial and as-applied challenges to the Noise Provision. He did not press his claims that the Noise Provision is unconstitutionally vague or being enforced in violation of the Equal Protection Clause.

On May 23, 2016, following oral argument and supplemental briefing, the district court issued an order granting March's preliminary injunction motion. Pet. App. 47-86. Based on affidavits from Health Center medical providers (which were not controverted by Mr. March), the district court made several significant factual findings regarding the impact of noise on the safe and effective delivery of health care services:

> Loud and sustained yelling that is audible within the Health Center interferes with the Health Center's staff's ability to provide care to their patients. This noise is problematic because:

- To effectively deliver health services, staff need a calm and quiet environment for their interactions with patients. Effective communication between Health Center staff and patients is essential because of the importance of obtaining accurate information regarding patients' "medical histor[ies], allergies, and other issues that may impact . . . medical care."

- It is essential that patients fully understand and retain the information provided to them by the Health Center regarding their medical procedure. Health Center staff need to explain to patients "the various symptoms they may experience after they leave [the] facility, including which symptoms are to be expected and which symptoms are abnormal." If a patient does not understand or retain this information, the medical repercussions can be significant.

- It becomes very difficult to communicate with patients when protesters are loud enough that they can be heard inside the building. The loud noise distracts patients and renders them unable to concentrate on their discussions with staff. This in turn causes staff to spend more time repeating instructions to patients, which causes additional delays for the entire facility.

* * *

- Loud noise from outside the building has a physiological effect on patients, causing "additional stress and elevated blood pressure,

> pulse, and respiratory rates." Such physical effects interfere with medical care because patients require "additional evaluation and treatment." This also can lead to treatment being delayed.
>
> • The Health Center provides "many patients with anti-anxiety medications prior to abortion procedures." When patients are subjected to noise from protesters on the sidewalk, staff often have to "give patients multiple doses of medication until the[ir] anxiety is under control." Providing these additional doses can result in further delay of care.

Pet. App. 53-55 (citations omitted).

Significantly, the district court found that there is a qualitative difference between sustained noise targeting patients inside the Health Center and other types of noise:

> • Transitory noise produced by parades, sirens, and car horns have the potential to disrupt medical care. However, those noises are normally brief in duration and any disruption dissipates quickly. "[U]nabated constant noise" that is specifically directed at patients "is uniquely disruptive" to the Health Center's ability to provide medical care.

Pet. App. 55-56 (citation omitted). Despite finding that noise targeting Health Center patients and staff is uniquely harmful, the district court concluded that "it is likely that the Noise Provision is content-based and will not survive strict scrutiny." Pet. App. 83. Because

the district court concluded that March was likely to succeed on his facial First Amendment challenge to the Noise Provision, it did not address his as-applied challenge. Pet. App. 61.

On appeal, the United States Court of Appeals for the First Circuit reversed. Pet. App. 1-44. The court began with the "threshold question" of whether the Noise Provision "is a content-based or a content neutral speech restriction." Pet. App. 12. The court noted that "[t]here are two distinct ways in which a regulation may be deemed to be content based." Pet. App. 13. "First, a regulation may be deemed content based because the 'regulation of speech on its face draws distinctions based on the message a speaker conveys.'" *Id*. (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). Second, regulations that are facially content-neutral nevertheless "'will be considered content-based regulations of speech . . . if they cannot be justified without reference to the content of the regulated speech, or . . . were adopted by the government because of disagreement with the message [the speech] conveys.'" Pet. App. 14 (quoting *Reed*, 135 S. Ct. at 2227) (internal quotation marks omitted).

Turning to whether the Noise Provision is content-based on its face, the court of appeals recognized that in light of *Grayned v. City of Rockford*, 408 U.S. 104 (1972), March could not dispute that a statute restricting noise that actually interferes with the safe and effective delivery of health care services is content-neutral. Pet. App. 15. At issue in *Grayned* was an ordinance that prohibited "noise made outside of schools

that 'disturbs or tends to disturb the peace or good order' of the school." Pet. App. 15 (quoting *Grayned*, 408 U.S. at 107-08). The court of appeals noted that the *Grayned* Court held that the ordinance was content-neutral because it targeted disruptive noise without regard to any message being conveyed. Pet. App. 15-16 (citing *Grayned*, 408 U.S. at 120). The court of appeals found that the Noise Provision, "at least on its face, would appear to apply, just like the ordinance in *Grayned*, to noise on any topic or concerning any idea." Pet. App. 17. The court concluded that the Noise Provision is thus "no more content based, as a facial matter, than is the restriction on disruptive noise found to be content neutral in *Grayned*." Pet. App. 19.

The court rejected March's argument that the Noise Provision is distinguishable from *Grayned* because it has a "disruptive-intent requirement" which "necessarily ensures" that the content of a message will be used to establish intent. Pet. App. 16-17. First, the court recognized that the Noise Provision "says not a word about the relevance – if any – of the content of the noise that a person makes to the determination of whether that person has the requisite disruptive intent." Pet. App. 17. The court noted that "[o]ne's manner of making noise can itself be highly probative of one's disruptive intent quite independent of what one actually says." *Id*. As the court recognized, the Noise Provision applies to loud noise even when it "conveys no message at all," such as beating on a drum. Pet. App. 18.

The court rejected the notion that content of speech will necessarily be used to determine intent; rather, determining intent is a "fact-specific inquiry that may depend on a variety of factors, including, crucially, whether the individual has ignored an initial order 'by a law enforcement officer to cease such noise.'" Pet. App. 19 (quoting Me. Rev. Stat. Ann. tit 5, § 4684-B(2)(D)). The court of appeals acknowledged that under this Court's precedents, a regulation may be content-based when enforcement authorities must necessarily examine the content of the speech to determine whether there is a violation. Pet. App. 24 (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984)). The court recognized, though, that there is "nothing on the face of the Noise Provision indicat[ing] that enforcement authorities *must* examine the content of the speaker's communication in order to find a violation." Pet. App. 25 (emphasis in original). Intent can be determined wholly apart from the noise's communicative content, if any. Indeed, the court agreed with Maine that the "most probative evidence of disruptive intent is a person's decision to intentionally keep making loud noise after having been warned of its disruptive effect." Pet. App. 28.

The court recognized "[i]t is possible that, on the facts of a given case, the communicative content of noise may supply helpful evidence (to one side or the other) regarding the noisemaker's intent." Pet. App. 26. The court concluded, though, that this does not make the Noise Provision content-based on its face. *Id*. In

support, the court of appeals cited *Hill v. Colorado*, 530 U.S. 703, 721 (2000), in which this Court held that a speech restriction was content-neutral despite that the content of a speaker's statements would sometimes need to be examined to determine whether the restriction applied. Pet. App. 26. The court also found support in *Grayned*, noting that there, the Court found that the ordinance was content-neutral despite that the ordinance "appeared to contemplate" that the "message shouted" would be probative of whether the person acted with the requisite intent. Pet. App. 26-27. Finally, citing *Reed*, the court stated that a restriction is content-based if it depends "entirely" on the communicative content. Pet. App. 27. A restriction is not content-based "merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent." *Id*.

After concluding that the Noise Provision is content-neutral on its face, the court of appeals considered whether it is " 'justified without reference to content' or was instead adopted because of the state's disagreement with the content of any message expressed." Pet. App. 29 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The court found that the Noise Provision is "content neutral in purpose, just as it is on its face" because it

> aims to protect patients from the "[t]ype of harm most likely to cause harm" to their "right to receive safe and effective medical care," and (2) serves to identify the subset of noise that is "most likely" to cause that harm

> on the basis of characteristics that are not dependent on the content of any message that the restricted noise may communicate.

Pet. App. 29. In reaching these conclusions, the court of appeals relied on the district court's factual findings, as discussed above, regarding the uniquely harmful nature of sustained noise targeting patients and staff at medical facilities. Pet. App. 29-31. The court found that the Noise Provision proscribes the "subset of speech" that is likely to be disruptive not because of its content, but because of the manner in which it is expressed. Pet. App. 31-32. The court cited to *Frisby v. Schultz*, 487 U.S. 474 (1988), which involved an ordinance prohibiting picketing in front of a single home. Pet. App. 34. The Court in *Frisby* recognized that it was the targeted nature of the communication that was the real harm, and not the substance of any message. *Frisby*, 487 U.S. at 486. The appeals court found that the Noise Provision proscribes noise that is uniquely harmful not because of its communicative content but because of the manner in which it is specifically directed at patients. Pet. App. 31.

After concluding that the Noise Provision is content-neutral both "on its face" and "in its object," the court applied the standard of review applicable to content-neutral restrictions on the time, place or manner of speech – *i.e.*, whether the restriction is "narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information." Pet. App. 35. The court found that the Noise Provision serves Maine's significant interest in ensuring that patients are able to

receive safe and effective health care. Pet. App. 35-36. The court noted that in *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753 (1994), this Court "found that a restriction on noise outside an abortion clinic served a significant governmental interest" in promoting peace and calm around medical facilities. Pet. App. 36. The Noise Provision serves this same interest.

The court rejected March's argument that the Noise Provision does not further Maine's interest in preventing the disruption of health care because it fails to address "noise made loudly and in a sustained fashion but without the disruptive intent specified in the Noise Provision." Pet. App. 36-37. The court noted that March "does not challenge the District Court's finding that '[u]nabated constant noise that is *specifically directed* at patients' is 'uniquely disruptive.' " Pet. App. 38 (emphasis in original). The court of appeals concluded that "because Maine has targeted a subset of loud noise that is likely to cause the 'unique' harm that Maine has a significant interest in singling out," the Noise Provision is not underinclusive. *Id*. In response to March's allegations that the Noise Provision was too broad because it "allows abortion providers to claim violations where none exist," the court noted that allegations of inconsistent or improper enforcement do not make the Noise Provision facially overbroad. Pet. App. 40-42.

Finally, the court of appeals held that the Noise Provision leaves open ample alternative channels for communication. The court agreed with Maine that the Noise Provision "permits speakers to 'congregate in the

vicinity of clinics, hand out literature, display signs, attempt to engage in conversation with persons entering or passing by the clinic, and orally express their view loudly enough to be heard in the immediate vicinity.'" Pet. App. 43.[2] The only contention March made in response was to claim that the Noise Provision prevents him from speaking loudly enough to be heard by passersby over the volume of other street noises. The court noted, though, that the "face of the Noise Provision simply does not show that it restricts speech" in such a manner and thus there was no basis for concluding that the Noise Provision "does not permit ample alternative channels of communication." Pet. App. 43-44.[3]

The court of appeals concluded that the Noise Provision is a "facially content-neutral measure that

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[2] In *McCullen v. Coakley*, 134 S. Ct. 2518, 2536-37 (2014) this Court emphasized the importance of permitting abortion protesters to identify patients as they approach a clinic so that they can engage in conversation and hand them literature before the patients enter the clinic. The Noise Provision permits this activity. Protesters can stand as close as they like to the entrance of a clinic, hand out literature, and attempt to speak with patients before they enter.

[3] A few weeks after filing his lawsuit, March stood on a milk crate outside of the Health Facility for at least an hour expressing his opposition to abortion. Aff. of Meredith Healey, ¶ 27. The Attorney General submitted a video of March engaging in similar conduct on a separate occasion. Robbin Aff., ¶ 7 and Exhibit A thereto. The video demonstrates that March could easily be heard by passersby without violating the Noise Provision. The fact that March has continued to engage in protest activities outside of the Health Facility thus not only calls into question March's claim that he is "chilled" by the Noise Provision, but also his claim that no alternative channels of communication are available to him.

targets noise for reasons that have nothing to do with the content of any topic discussed, idea propounded, or message conveyed" and that it serves a "significant state interest without burdening substantially more speech than necessary . . . while leaving open ample alternative avenues for communication." Pet. App. 44. The court thus found that March was not likely to succeed on the merits of his facial challenge. *Id*.

REASONS FOR DENYING THE PETITION

The court of appeals correctly held that the Noise Provision is content-neutral because it does not draw a distinction based on the communicative content, if any, of the noise. It applies to noise made with the intent to interfere with the delivery of medical services, regardless of whether the noise even conveys any message. Distinctions based on the intent of the speaker do not make a restriction content-based, and no case from this or any other court is to the contrary. Intent can be determined without considering the content of any message the noise might contain, and the most dispositive factor will often be whether an individual continued making noise at the same volume after being warned that he could be heard within the health care facility and was interfering with the delivery of medical services. While content might sometimes be used to determine intent, such an evidentiary inquiry does not make the Noise Provision content-based. The Noise Provision is justified without reference to the content of any speech and it was not adopted because of

disagreement with any particular message. It was adopted simply to prevent noise from being used to interfere with a person's right to receive safe and effective medical care.

The court of appeals' decision does not conflict with decisions of this Court or lower federal courts. The court's decision is interlocutory, and the Court should not depart from its usual practice of declining to review non-final judgments. The factual record has not been fully developed, and the lower courts have not yet addressed March's as-applied First Amendment challenge or his claims that the Noise Provision is unconstitutionally vague and is being discriminately enforced in violation of the Equal Protection Clause.

I. The Court of Appeals Correctly Held That the Noise Provision is Content-Neutral on its Face.

The court of appeals, applying well-established precedent from this Court, correctly held that the Noise Provision is not, on its face, a content-based restriction on speech. There are two categories of content-based laws: 1) laws that draw distinctions "based on the message a speaker conveys;" and 2) "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Noise Provision does not fall into either

category. It makes no distinction based on any message the noise might convey, and its purpose is to prevent noise from being used to interfere with medical care, regardless of the political, social or philosophical agenda of the noisemaker.

As this Court recently explained, whether a regulation is content-based or content-neutral depends on whether it makes distinctions based on the message being expressed:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S. Ct. at 2227 (citations omitted). The Noise Provision does not make distinctions based on the message being expressed. Rather, it applies to all noise that can be heard within a health care facility and that is made with the intent to interfere with the delivery of medical services. Any message the noise might contain is irrelevant.

The Noise Provision applies to all manner of protesters who might attempt to use noise to disrupt health care services, not just those opposed to abortion. Facilities that treat potentially disfavored populations such as immigrants or the homeless, or that provide potentially controversial medical care such as stem cell treatments, vaccinations, in vitro fertilization, gender reassignment surgery, or methadone treatment, could all become the targets of protesters seeking to disrupt the health care the facilities are attempting to provide. As the court of appeals noted, health care facilities could become the subject of protests by their own employees in the event of a labor dispute. Pet. App. 17-18. In all of these situations, the Noise Provision would prevent noise from being intentionally used to interfere with the delivery of health care services, regardless of its content.

March claims that because the intent of the noisemaker is relevant to whether the Noise Provision applies, the court of appeals' decision "violates" this Court's precedent in *Reed*, 135 S. Ct. at 2218. March seems to argue that in *Reed*, this Court held that a restriction is content-based if it requires consideration of a person's subjective intent. This is simply not so. In *Reed*, a town had an ordinance that regulated the display of outdoor signs. 135 S. Ct. at 2224. The ordinance treated signs differently depending on the type of information they conveyed. *Id*. The Court noted that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id*., at 2227. This "requires a court

to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. An "obvious" facial distinction is when speech is regulated by "particular subject matter," while a "more subtle" distinction is when speech is regulated by "its function or purpose." *Id*. The common feature is that "[b]oth are distinctions drawn based on the message a speaker conveys." *Id*. The sign ordinance in *Reed* was content-based on its face because its application was entirely message dependent. For example, a sign with a message regarding the time and place of a meeting was treated differently than a sign with a message promoting a particular candidate. *Id*. As the Court recognized, the restrictions imposed on a particular sign depended "entirely on the communicative content of the sign." *Id*.

Whether the Noise Provision applies in a particular circumstance, on the other hand, does not depend on the noise's communicative content. Rather, it depends on whether the noise is loud enough to be heard inside of a health facility and is being made with the intent of disrupting the delivery of medical services. It is not necessary to consider any communicative content of noise to determine the noisemaker's intent. Rather, as the court of appeals noted, the most important factor is likely to be whether the individual continued making noise after being warned that he is interfering with the provision of health care services. Pet. App 28.

It may well be that in some cases, communicative content could be used as evidence of intent. This, though, does not make the Noise Provision content-based on its

face. *See Hill v. Colorado*, 530 U.S. 703, 721 (2000) ("It is common in the law to examine the content of a communication to determine the speaker's purpose. . . . We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."); *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). Unlike in *League of Women Voters*, 468 U.S. at 383, it is not necessary for enforcement authorities to consider the noise's communicative content to determine whether it violates Noise Provision.

March's reliance on *Texas v. Johnson*, 491 U.S. 397 (1989) is puzzling. At issue in that case was a statute prohibiting burning the American flag, and the statute applied regardless of whether the flag burner intended to express a message. *Id*., at 400 & n.1. Because burning the flag was expressive conduct, *id*., at 405-06, the Court considered whether the statute violated the First Amendment. The Court noted that while the government generally has "a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," the government's interest must be "'unrelated to the suppression of free expression.'" *Id*., at 406-07 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The Court found that the flag-burning statute furthered only the government's interest in "preserving the flag as a symbol of nationhood and national unity" and that it did not further any interest

unrelated to the suppression of expression. *Id*., at 410. The Court did not hold, as March claims, that the statute was unconstitutional because it was a "restriction based on the intent of the person communicating his message." Pet. 8. Moreover, if the Noise Provision were analyzed under *Johnson* as a restriction targeting conduct, not speech, it is constitutional. [4] The Noise Provision's purpose is unrelated to the suppression of free expression. As the court of appeals recognized, it furthers Maine's significant interest in ensuring that its residents receive safe and effective health care. Pet. App. 35.[5] It prevents noise from being used to interfere with the delivery of medical services, and it does not suppress free expression.

March claims that the court of appeals' decision creates a "freakish result" because under the court's analysis, the Noise Provision does not prevent a boisterous labor protest that actually interferes with the

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[4] Below, Maine argued that the Noise Provision targets conduct, not speech, and should be reviewed "under the more lenient standard of review that applies to restrictions on conduct that merely impose an incidental burden on speech." Pet. App. 12 n.4. The court of appeals did not reach that issue because it held that the Noise Provision is facially constitutional even when analyzed "as a restriction on speech rather than on conduct." *Id*.

[5] March notes that in *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992), the Court stated that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." Pet. 8. Of course, this is because an ordinance prohibiting outdoor fires serves an interest wholly unrelated to the suppression of free expression, while one prohibiting dishonoring the flag furthers only the suppression of free expression. *See Johnson*, 491 U.S. at 410.

delivery of medical services but does prevent someone like March from "calmly" attempting to persuade a woman not to have an abortion. Pet. 10-11. March is wrong. It is simply not true that boisterous labor protests are necessarily exempt from the Noise Provision. If the labor protest were loud enough to be heard within a nearby medical facility, and if the protesters were warned that their conduct was interfering with the facility's ability to deliver safe and effective health care services, the Noise Provision would apply if the protesters did not abide by the warning. *See* Pet. App. 28 (court of appeals' conclusion that the "most probative evidence of disruptive intent" is decision to keep making noise after being warned). It is also not true that the Noise Provision would necessarily apply to a protester "calmly" speaking with a passerby outside of a medical facility. Indeed, March himself has engaged in just such an activity without running afoul of the Noise Provision. *See* n.3, *supra*. If he is not loud enough to be heard in the health care facility, his conduct would come within the purview of the statute.

In sum, the Noise Provision does not make distinctions based on the communicative content, if any, of the noise. It applies when noise is loud enough to be heard inside of a medical facility and is being made with the intent to interfere with the delivery of health care services. Intent will not necessarily be determined from the communicative content. That the Noise Provision was supported by both sides of the abortion debate demonstrates that it was not adopted because of disagreement with any particular message. Rather, it was

adopted solely to prevent noise from being used to disrupt health care. The court of appeals properly held that it is content-neutral on its face. No further review is warranted.

II. The Court of Appeals' Decision Does Not Conflict With Decisions From Other Federal Courts.

March argues that the court of appeals' decision conflicts with decisions from other federal courts. Pet. 12-14. There is no conflict. In the cases March cites to, the courts applied the well-settled rule that a restriction is content-based if its application depends entirely on the message being expressed. As discussed above, the Noise Provision makes no references to the "communicative content" but rather regulates the volume of the noise when it disrupts health care services.

At issue in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) was a statute regulating automated telephone calls delivering recorded messages (referred to as "robocalls"). Only robocalls relating to consumer or political messages were subject to the statute. *Id*., at 402. The Fourth Circuit recognized that *Reed* "instructs that '[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id*., at 405 (quoting *Reed*, 135 S. Ct. at 2227). The court held that under this test, the "anti-robocall" statute was content-based because it applied only to "calls with a consumer or political message." *Id*. In the cases

March cites to involving challenges to ordinances restricting panhandling, the courts found that the ordinances were content-based because whether they "appl[y] to speech depends entirely on the expressed message (*i.e.*, a solicitation for 'donations or payment')." *Homeless Helping Homeless, Inc. v. City of Tampa, Fla.*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *4 (M.D. Fla. Aug. 5, 2016); *see also Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017) ("So only speakers that wish to raise a particular topic of speech on the streets of Slidell – a request for assistance, and even then a particular type of request for assistance – need to obtain a police permit before speaking.").

The robocall statute and panhandling ordinances were content-based because they drew distinctions based on the nature of the communicative content. The Noise Provision, on the other hand, draws no such distinction, and there is thus no conflict with decisions from other courts.

III. There is No Final Judgment and the Court Should Decline to Review an Interlocutory Decision Vacating an Order Granting a Preliminary Injunction Motion.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (statement of Scalia, J., respecting denial of petition for a writ of certiorari before judgment); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*,

240 U.S. 251, 258 (1916) (except in "extraordinary cases," a writ of certiorari is not issued until entry of a final judgment). There are good reasons for this general practice. It enables the Court to decide cases on a full factual record, prevents unnecessary delays in the lower courts, and allows the Court to consider all issues raised in a case at one time, rather than addressing them piecemeal.

The present matter is particularly unsuited for interlocutory review. As is clear from the extensive discussion in March's brief of his interactions with police officers, Pet. 3-5, the brunt of his challenge is his argument that the Noise Provision is being applied to him unconstitutionally. The police interactions are not relevant to his facial challenge, and facts relating to these interactions have not yet been developed below. There has been no discovery, and the Respondent has had no opportunity to cross-examine March. The case should not yet be reviewed by this Court, but instead should return to the district court so that the parties can develop the facts necessary to resolve March's as-applied challenge.

Further, March presents several arguments as to why the Noise Provision is unconstitutional, and the court of appeals resolved only one of them. The court held that the Noise Provision does not facially violate the First Amendment, but it did not decide the as-applied challenge or March's arguments that the Noise Provision is unconstitutionally vague and is being enforced in violation of the Equal Protection Clause. If this Court were to review the matter now and affirm

the court of appeals' decision, the case would be far from over. The matter would return to the district court for resolution of the remaining issues. This Court should resolve all of the constitutional challenges to the Noise Provision at one time and should not depart from its usual practice of declining to grant certiorari before entry of a final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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