

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 for the State of Maine, *et al.*,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit*

REPLY BRIEF FOR PETITIONER

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REASONS FOR GRANTING THE PETITION

Respondents spend the bulk of their brief touting the legislative history of the Maine Civil Rights Act (“MCRA”). This emphasis ignores the argument asserted in Pastor Andrew March’s petition. The petition does not assert that the Noise Provision of the MCRA, 5 M.R.S. § 4684-B(2)(D), was adopted by the legislature for “invidious thought-control purposes.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). The petition argues that the Noise Provision is, on its face, a content-based restriction on speech and, thus, lends itself to use for such purposes. *Id.* “Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute” *Id.* Thus, the legislative history and more developed record that Respondents argue is needed are of little use in this case.

I. The Noise Provision is Content-Based on its Face.

In *Reed*, this Court articulated a subtle form of content-based restrictions: those that “defin[e] regulated speech by its function or purpose.” *Id.* at 2227. The Noise Provision is one such subtle form of content-based restrictions, defining regulated speech by its purpose “[t]o interfere with the safe and effective delivery of [health] services.” The intent of the person making noise—or the purpose of the speech—cannot, within the bounds of the protections afforded by the First Amendment, be a reason to suppress speech. *See id.*

Respondents' argument relies on a false dichotomy: that the intent of the speaker can be separated from the content of the speech. Respond. Brief at 21-23. But this Court has already disavowed this notion, holding:

Prohibited, too, are restrictions distinguishing among different speakers, *allowing speech by some but not others*. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Citizens United v. FEC, 558 U.S. 310, 340 (2010) (emphasis added) (internal citation omitted). Even accepting Respondents' false dichotomy, the Noise Provision must fail. By its very wording, it restricts speech by some with one purpose, while allowing others with a different purpose to continue making noise.

If Respondents' true goal is to keep health facilities quiet, there are content-neutral means of doing so, such as restrictions on the volume or duration of noise. Indeed, as the district court rightly noted, there are already content-neutral statutes in place. App. 85. But the Noise Provision is not one of these content-neutral methods, defining and restricting speech based, not on the volume, duration, or even harm it causes, but on the purpose of the speaker and, thus, the purpose of the message or noise.

II. This is the Ideal Time for This Court's Review.

Defendants argue that the Court should deny Pastor March's petition because the Court would benefit from a full factual record. Respond. Brief at 25. Pastor March asserted a facial challenge to the Noise Provision in his motion for a preliminary injunction. The district court determined that the Noise Provision is unconstitutional on its face. App. 83. The First Circuit reviewed the facial challenge and reversed the district court. App. 2-3. This Court recently granted a petition for writ of certiorari to review a Ninth Circuit case that affirmed the district court's denial of a preliminary injunction motion. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017). Both that case and the case at hand deal with pure legal issues concerning whether the promise of free speech guaranteed by the First Amendment applies equally to speech opposing abortion. There is no benefit to delaying review of this case. In fact, great harm would come as Petitioner and other pro-life citizens in Maine would continue to have their speech restricted on the public sidewalk. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This is the ideal time for the Court to protect free speech before the Noise Provision of the MCRA becomes a model for other states to suppress speech because the government officials oppose the message of the speaker.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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