/O=MONTANA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENT

From: VanDyke, Lawrence
Sent: Tuesday, September 10, 2013 3:50 PM
To: Fox, Tim; Mattioli, Mark; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: RE: Amici merits brief in McCullen v. Coakley (U.S.)
Attachments: State amici brief - McCullen v. Coakley 9.10.13.docx

Some more information about this: Montana is one of three states (together with Massachusetts and Colorado) that have "buffer zone" laws. *See* Mont. Code Ann. 45-8-110 (provided in its entirety below).

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But there are key differences between Montana's and Massachusetts' law, that go directly to the issue of content and viewpoint neutrality. Massachusetts' law applies to "reproductive health care facilities," whereas Montana's law applies more generally to "health care facilities." As Michigan's brief points out (see page 9), Massachusetts' limitation to abortion clinics alone raises content neutrality concerns right off the bat.

But the real content/viewpoint neutrality problem with Massachusetts' law is that it has a specific exceptions for "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment." (See draft brief at page 10). Montana's law has neither of these exceptions. So for example, in Massachusetts an abortion clinic worker can "counsel" someone within the buffer zone (or a pro-choice person who the clinic allows to "enter" the clinic), but a pro-life protestor cannot. This raises serious viewpoint/content neutrality concerns. In Montana, nobody can "counsel" someone in the buffer zone, so our law is viewpoint/content neutral.

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To: Fox, Tim; Mattioli, Mark; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: FW: Amici merits brief in McCullen v. Coakley (U.S.)

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Also FYI – there will likely be an opposing multi-state amicus brief *supporting* Massachusetts.

Thanks,

Lawrence

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From: Schweitzer, Dan [mailto:DSCHWEITZER@NAAG.ORG]
Sent: Tuesday, September 10, 2013 8:27 AM
To:
Subject: Amici merits brief in McCullen v. Coakley (U.S.)

To: Civil Amicus Contacts
From: John Bursch, Michigan Solicitor General

Attached is an amici merits brief that Michigan has prepared in support of the petitioners in McCullen v. Coakley, No. 12-1168, a First Amendment case the Supreme Court will hear this term involving speech-free buffer zones around abortion clinics.

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1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If Hill v. Colorado, 530 U.S. 703 (2000), permits enforcement of this law, whether Hill should be limited or overruled.

The amici brief addresses only the first question presented and answers that question "yes." The brief explains that while every state has buffer zone statutes protecting certain events (like polling places during elections and funerals), those statutes are permissible because they are viewpoint neutral. The Massachusetts statute, in contrast, discriminates based on who is speaking, so that employees and agents of abortion clinics can speak within the buffer zone, but no one else can.

The amici brief is due for filing next Monday, September 16, and Michigan can accept sign-ons until 9 a.m. EDT that same day. The contact person for Michigan is:

Aaron Lindstrom
Michigan Assistant Solicitor General
G. Mennen Williams Building, 7th Floor
525 West Ottawa Street
P.O. Box 30212
Lansing, MI 48909
Office: (517) 241-0367
Fax: (517) 373-3042
lindstroma@michigan.gov

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From: VanDyke, Lawrence
Sent: Wednesday, September 11, 2013 10:32 AM
To: Mattioli, Mark; Fox, Tim; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: RE: Amici merits brief in McCullen v. Coakley (U.S.)

I both agree and disagree with Mark. I think the "legal distinctions" I discuss below are the distinctions that legally matter in this case. Michigan's brief isn't saying that buffer zones per se are unconstitutional – to the contrary, they go out of their way to distinguish Colorado's. They are saying that Massachusetts' buffer zone is unconstitutional because it isn't viewpoint neutral, and the "legal distinctions" I point out below comprise all of the reasons they say it isn't viewpoint neutral. So as a legal matter, at least as relates to Michigan's points, there is a world of difference between Montana's law and Massachusetts'.

And I'm not particularly convinced by the argument that Montana's law isn't viewpoint neutral because abortion providers will be counseling clients on their own private property, not in the buffer zone. The abortion providers can do that because people are voluntarily entering their private property to be counseled. Pro-life folks could buy the building next door and invite folks to be voluntarily counseled on their private property. The question is who has a right to involuntarily counsel people in the buffer zone – and in Montana, nobody has that right. So the law if viewpoint neutral.

Moreover, as a practical matter no court is going to ultimately agree that Montana's law isn't viewpoint neutral because of Tim's argument because it would undercut the funeral buffer zone law. The same argument could be made there (the funeral speakers don't need to talk in the buffer zone because they were invited to the funeral).

So both as a practical matter, and even in principle, I think Montana's law is entirely legally distinguishable from Massachusetts'.

BUT, Mark is right that many folks, including probably our media, will miss the legal subtleties and simply note that Montana is one of the few other states that has a buffer zone law, so we must be attacking our own law by joining this brief. It could put Tim in the awkward position of defending Montana's buffer zone law to the media, which presumably is something Tim doesn't want to do.

I think that adding a paragraph to the brief distinguishing Montana's law would help a lot in that regard. I took the liberty of asking Michigan whether they would be open to that – they would. They would like our support for the reasons I laid out below – especially because having another buffer zone state join their brief would emphasize that this is not an attack on buffer zones per se, but only those that are viewpoint discriminatory.

Finally, I think we need to be careful not to overreact to those AGs who have refused to defend their marriage laws. The truth is that there are appropriate times to refuse to defend a statute because it violates the constitution (state or federal). Indeed, we are doing that right now. In the *Willems* case, Monforton has shown that the Redistricting Commission blatantly violated two different Montana statutes – which they did. But those two statutes are plainly unconstitutional, so not only are we are not defending them, we are asking the Court to invalidate them. The question of when and how we decide not to defend a Montana statute because it is unconstitutional is complicated and challenging – but it is clear that there are legitimate times we may choose to uphold the Constitution (state or federal) instead of a statute.

Thankfully, though, that issue is not presented here.

From: Mattioli, Mark
Sent: Tuesday, September 10, 2013 5:41 PM
To: VanDyke, Lawrence; Fox, Tim; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: RE: Amici merits brief in McCullen v. Coakley (U.S.)

Although there are legal distinctions to make, as Lawrence points out, as a practical matter there's not a lot of difference between these laws because, as Tim points out, abortion providers aren't going to be counseling prospective clients in the buffer zone. Because the A.G. would be charged with defending Montana's statute if it were challenged, I recommend against joining this brief, which some will interpret as a willingness to forgo defending laws for moral or policy reasons.

If we decide to join, however, we should do so on the condition that the brief contrast the Massachusetts law with Montana's content-neutral law. The brief references the constitutionality of Colorado's law (page 9). The brief would be more effective if it contrasted the Massachusetts law with *both* the Colorado and Montana statutes. If Montana joined the brief, the reader may wonder why that argument is being advanced.

Mark

From: VanDyke, Lawrence
Sent: Tuesday, September 10, 2013 4:34 PM
To: Fox, Tim; Mattioli, Mark; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: RE: Amici merits brief in McCullen v. Coakley (U.S.)

You raise a good point, although I think a lot of courts wouldn't dig that deep in content/viewpoint neutrality analysis. I think Massachusetts' law is viewpoint/content discriminatory on its face, while Montana's is not – certainly not anywhere to the same degree. So I think there is a real distinction between our laws.

As to your second point – I think it depends on all the circumstances. In some cases, we may not want to join if we have our own "problematic" law because it may undercut the other states' efforts (the media may focus on our supposed hypocrisy, and attribute that to all the joining states). In other cases, being accused of undercutting Montana's own law(s) might become such a big distraction or time-waster that it simply isn't worth the effort. So I think there is some balancing involved.

Here, I do think that Montana's law differs meaningfully from Massachusetts', so we would not be directly attacking our own law (although we have to recognize that we may be accused by the media of doing so). And I think that our joining might be particularly helpful to the cause because unlike most states, we have our own "buffer zone" law, albeit one that is more neutral on its face. That shows this isn't just an attack on buffer zones, but a more principled attack on a particularly non-neutral one.

From: Fox, Tim
Sent: Tuesday, September 10, 2013 4:13 PM
To: VanDyke, Lawrence; Mattioli, Mark; Bennion, Jon; Swanson, Cory; Barnes, John
Cc: Darkenwald, Scott
Subject: RE: Amici merits brief in McCullen v. Coakley (U.S.)

Thank you Lawrence. One thought occurred to me concerning your last comment ("In Montana, nobody can "counsel" someone in the buffer zone, so our law is viewpoint/content neutral."). Of course, an abortion clinic counselor only need walk in the door of the clinic to counsel someone, and would never need to counsel anyone outside. So, is Montana's law really viewpoint/content neutral when the reality is that only the pro-life people would be prohibited from counseling within the buffer zone because the pro-abortion people have no need to counsel in the buffer zone? This may be a minor distinction, but I thought I'd bring it up anyway.

Regardless of the subtle question I raise above about Montana's law, the decision on whether to join this amicus ultimately focuses on whether the Massachusetts law in question is, in our opinion, unconstitutional. That holds true regardless of whether Montana has a similar law that passes constitutional muster. Would you agree?

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Aaron - here is my short analysis of Montana's law. I'm still working on seeing if we'll join; will let you know. Can you give me a call sometime to ask you about my SCOTUS procedural question?

Thanks!

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To: Civil Amicus Contacts
From: John Bursch, Michigan Solicitor General

Attached is an amici merits brief that Michigan has prepared in support of the petitioners in McCullen v. Coakley, No. 12-1168, a First Amendment case the Supreme Court will hear this term involving speech-free buffer zones around abortion clinics.

The petition presents two questions:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If Hill v. Colorado, 530 U.S. 703 (2000), permits enforcement of this law, whether Hill should be limited or overruled.

The amici brief addresses only the first question presented and answers that question "yes." The brief explains that while every state has buffer zone statutes protecting certain events (like polling places during elections and funerals), those statutes are permissible because they are viewpoint neutral. The Massachusetts statute, in contrast, discriminates based on who is speaking, so that employees and agents of abortion clinics can speak within the buffer zone, but no one else can.

The amici brief is due for filing next Monday, September 16, and Michigan can accept sign-ons until 9 a.m. EDT that same day. The contact person for Michigan is:

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From: VanDyke, Lawrence
Sent: Thursday, September 12, 2013 1:38 PM
To: 'Hirsch, Jason'
Cc: RIENZI@law.edu
Subject: RE: Reaching Out Per Aaron Lindstrom re Supreme Court Amicus Brief

Thank you, Jason. We actually told Michigan this morning that we will be joining their brief, so you had me at hello. ☺

We support your effort and think Michigan has put together a great brief. Like Colorado, Montana has its own "buffer zone" law, but unlike Massachusetts' law it is viewpoint neutral. Michigan has added some language to its brief noting that. Hopefully it is helpful to have one of the other few states with a "buffer zone" law joining your effort, since it emphasizes that this is not about buffer zones per se, but about viewpoint discrimination.

I did not realize Mark Rienzi was involved with the petition. Mark and I serve together on the Federalist Society's executive committee for the religious liberty practice group. And I believe we spoke at one point about an Austin ordinance directed at pregnancy centers, back when I was in private practice. Nice to have our paths cross again, Mark.

Thanks again, and glad to help the effort.

Sincerely,

Lawrence VanDyke
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From: Hirsch, Jason [mailto:Jason.Hirsch@wilmerhale.com]
Sent: Thursday, September 12, 2013 1:20 PM
To: VanDyke, Lawrence
Cc: RIENZI@law.edu
Subject: Reaching Out Per Aaron Lindstrom re Supreme Court Amicus Brief

Lawrence,

Aaron Lindstrom in the Michigan Solicitor General's Office recommended that we reach out to you regarding a case before the Supreme Court this term, *McCullen v. Coakley*, in which we represent the petitioners. The case presents a First Amendment challenge to a Massachusetts buffer zone statute aimed at eliminating speech in the vicinity of abortion clinics. In concrete ways, the law is more restrictive of speech and more viewpoint-discriminatory than any previously upheld by the Court, including the Colorado law upheld in *Hill v. Colorado*. For example, the law only applies at abortion clinics, outlaws even peaceful, consensual conversations on public sidewalks, and has an exception that allows speech by clinic employees in what are now otherwise speech-free zones for all others. The petitioners are sidewalk counselors who simply wish to have conversations with (or pass information to) willing listeners at a normal

conversational distance, so that they may communicate their message of support without shouting, waving graphic signs, or undertaking other behavior that is often counterproductive.

Attorney General Schuette and Solicitor General Bursch have decided to file an amicus brief in support of our position. We understand that they have already circulated the brief to you and others earlier this week. We think that Michigan's brief is terrific and makes a critical contribution to the case. It is very important that the Court understand that if we win, States will still have ample regulatory tools available to address safety, access, and the protection of people in emotionally fragile state. Attorney General Schuette's Office strongly believes, as do we, that it is important to send a strong message to the Court that States have the ability to preserve significant interests in protecting the public - whether it be at health-care facilities, funerals, polling places, or otherwise – without trampling on free speech rights, and, more importantly, without giving one side of a contested issue a substantial advantage in an ongoing debate. To the end of sending a strong message, we are working with Michigan to build a broad coalition of support for the brief.

We hope that you will consider signing onto the brief; we would love to have Montana's support in this important case. If your office did not receive a copy of Michigan's brief, and would like me to send one on, let me know. In addition, I am attaching our merits brief, which we filed with the Court on Monday.

We would welcome the opportunity to discuss the case and Montana's possible support as an amicus with you or someone from your Office. Let us know if you would be willing to do that, and we would be happy to work around your schedule. Michigan's brief is due to the Court on September 16.

Thank you for your consideration.

Jason

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