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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, KANSAS, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a statute that regulates speech content neutral if it is concerned with undesirable effects that arise from the direct impact of the speech on its audience or with listeners' reactions to speech?

2. Is a statute content neutral if it prohibits noise only if the noisemaker has a specific intent to interfere with the provision of health services in a building?

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INTEREST OF AMICI CURIAE[1]

As this Court has often recognized, public sidewalks "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *United States* v. *Grace*, 461 U.S. 171, 180 (1983)). The amici States recognize the importance of preserving this traditional forum for free speech and of defending "the guiding First Amendment principle that the 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . .' " *Id.* (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972)). Noise ordinances, common across the country at both the state and municipal level, typically preserve the right to engage in sidewalk speech by regulating only the time, place, or manner of speech, but not its content. The amici States thus are interested in preserving valid, content-neutral noise ordinances.

But the amici States also recognize that content-based prohibitions on speech should not escape heightened review merely because they include a noise component. Here, a state statute prohibited noise only if the speaker had an intent to interfere with the provision of health services. By treating this

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[1] The undersigned counsel of record provided notice to respondent Janet T. Mills five days in advance of this filing, rather than ten days in advance, as required by Rule 37.2. Counsel for Attorney General Mills has indicated that the Attorney General does not object to the late notice. The other respondents waived responses prior to the ten-day period.

statute as content neutral, the First Circuit disregarded this Court's precedents stating that a speech restriction is content based if is concerned with how the speech affects the listener. The First Circuit also failed to recognize that noise coupled with an intent to interfere with health services conveys a specific message: that the noisemaker opposes those services. The amici States urge this Court to address this important free-speech issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sidewalks have long been recognized in this country as "areas of public property that traditionally have been held open to the public for expressive activities . . . ." *Grace*, 461 U.S. at 179 (addressing sidewalks adjacent to this Court). In such areas, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *Id*. at 177. Content neutrality is a particularly important part of this analysis, as it protects the marketplace of ideas from being distorted by government restrictions on what topics people may discuss.

A statute violates this principle of content neutrality if it focuses on the direct impact the speech has on its audience. *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531–32 (2014). Yet the First Circuit upheld a Maine statute despite the statute's focus on the impact the speech would have on the audience—on whether the

communication would "interfere with the safe and effective delivery of [health] services within the building." Me. Rev. Stat. tit. 5, § 4684-B. In contrast to the court of appeals' view, police who read the statute understood its plain text to treat speakers differently based on the content of their speech; they understood it to forbid a pastor from speaking against abortion on a busy sidewalk (because his speech would interfere with the provision of abortion services) but not to forbid a loud crowd of climate-change protestors or loud pro-choice advocates from speaking (because their speech would not interfere with the provision of abortion services). The First Circuit also failed to recognize that noise made with the *intent to interfere* with health services in fact communicates a particular message—that the speaker *opposes* those services.

This Court should grant review to address this important First Amendment issue.

ARGUMENT

I. The Act is content based because it is concerned with the direct impact of speech on its audience.

Just three years ago, this Court explained in the specific context at issue here—speech outside an abortion clinic—that a statute is content based if the statute prohibits speech because of its effect on the listener: "To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' " *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531–32 (2014) (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988)). At least eight

justices agreed with this point. *Id.* (majority); *id.* at 2546 (three justices concurring in the judgment and quoting the same language from *Boos*); cf. *id.* at 2549 (Alito, J.) (concurring in the judgment) (concluding the statute discriminated based on viewpoint, not just content). And even though *Boos* itself was a plurality decision as to some points, a majority in *Boos* agreed that a statute would be content based if it focused on the listeners' reactions. 485 U.S. at 321 ("The emotive impact of speech on its audience is not a 'secondary effect.' Because the [statute limiting signs near foreign embassies] regulates speech due to its potential primary impact, we conclude it must be considered content-based."); accord *id.* at 334 (Brennan, J., concurring in part and concurring in the judgment) (agreeing that the statute "constitutes a content-based restriction on speech that merits strict scrutiny" because "[w]hatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech").

Despite this principle, the First Circuit upheld a statute that prohibited a pastor from preaching on the sidewalk based on the effect such speech might have on the listeners. The plain text of the statute targets speech based on the speech's direct impact on the listeners: it prohibits only noise that would "jeopardize the health of persons receiving health services" within a building or would "interfere with the safe and effective delivery of those services." Me. Rev. Stat. tit. 5, § 4684-B. The second part, about interfering with health services, is not content neutral.

As is evident from its plain text, Maine's statute is not designed to protect against health effects resulting from exposure to loud noise. That is because the

statute applies only to loud noises made with a specific intent—an intent to interfere with health services. The First Circuit acknowledged this point: the statute "on its face" "*permits* loud noise—no matter the topic discussed or idea expressed—if the noise is made *without* the specified disruptive intent." Pet. App. 19. The statute covers only a certain type of noise—"the subset of noise that Maine has identified as being especially problematic." *Id.* at 39. In other words, in Maine's view it is not the decibel level that jeopardizes health or that interferes with the provision of services—what makes the noise "especially problematic" is the noise's intent: the intent to disrupt.

This focus on the intent to disrupt reveals that the statute regulates speech based on its direct impact on the listener and based on the listener's reactions to the speech. Noise directed at health facilities—including the type of noise present on the facts of this case, namely speeches by a pastor who preaches that abortion is wrong, Pet. App. 7—interferes with the provision of health services in a specific way: it influences the listener's decision whether to proceed with the health services at all; it causes the listener to second-guess her decision to have an abortion. And the reason it has that specific type of effect is straightforward: the listener understands the message that such speech or noise necessarily conveys, because noise made with the intent to interfere with the provision of, for example, abortion services inherently conveys a message of opposition to those particular health services (i.e., of opposition to abortion). See *Cramer* v. *United States*, 325 U.S. 1, 31 (1945) (explaining that

the law "assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts").

The listener-focused nature of the statute can be seen from how Maine law-enforcement officials have understood its plain language. They have not read the statute to prohibit noises that were simply loud and distracting, but that did not affect those inside Planned Parenthood's Health Center. "For instance, an unidentified man often loudly plays guitar and sings down the road in front of the Health Center." Pet. App. 60; *id*. at 52 (describing the Health Center as being on "a loud and busy thoroughfare"). It does not appear the statute has been enforced against him. Similarly, a group of "hundreds of people shouting and chanting in unison" about the issue of climate change had passed in front of the Health Center. *Id*. at 59. When March asked a police officer why the noise of the climate protesters was considered permissible, the police officer responded by explaining that it depended on the reaction of the listeners: "the [statute] applies if *Health Center staff* can articulate that noise, *and specifically* the type of speech and *what is said*, is interfering with a medical procedure." *Id*. (emphasis added). Similarly, although "pro-choice advocates frequently yell and scream at pro-life advocates outside of the Health Center for up to ten minutes at a time," *id*. at 61, police have not understood pro-choice speech to be covered by the statute.

To be clear, this is not a point about whether there was an as-applied violation; rather, these examples

are relevant to the *facial* validity of the statute because they show how ordinary English speakers—the police officers—have understood the plain text. And they have understood the statute's coverage to depend on how the noise at issue affects the listeners: noise relating to different topics, or even made in support of abortion, did not attempt to interfere with the offered health services.

Maine's statute does not restrict speech in a content-neutral way, "irrespective of any listener's reactions." *McCullen*, 134 S. Ct. at 2532. Quite the opposite, the statute covers noise, including speech, only if it causes listeners to react and only if that reaction is negative. Under *McCullen* and *Boos*, that means the statute is content based.

II. The Act is content based because noise made with the intent to interfere with the provision of health services conveys a particular message: opposition to those services.

Even apart from the statute's focus on the listener's reaction, its intent-to-interfere element imposes a content-based requirement. As noted above, noise made with an intent to disrupt the provision of health services conveys a particular message—the message that the noisemaker *wants* to interfere with those health services. That is what "intent to interfere" means. Thus, when the health services at issue are abortion services, a specific message is being communicated—that the noisemaker opposes abortion. *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("[A] message may be delivered by conduct that is intended to be communicative and that, in

context, would reasonably be understood by the viewer to be communicative."). In short, if someone were directly outside Planned Parenthood banging on pots and pans, that noise could reasonably be understood to communicate opposition to Planned Parenthood's health services. (And in that situation, an ordinance prohibiting disturbing the peace would likely prohibit the conduct, without the need for this sort of content-based, specific-intent statute.)

Of course, the type of noise present in efforts to interfere with health services is usually not just noise; it is actual speech. Yet the First Circuit minimized the relevance and frequency of the actual words being spoken: "It is possible that, on the facts of a given case, the communicative content of the noise may supply helpful evidence (to one side or the other) regarding the noisemaker's intent." Pet. App. 26. In its view, "given the limitless array of noises that may be made in a disruptive manner, there is no reason to conclude that disruptive intent is necessarily a proxy for a certain category of content." *Id*. at 17.

But the actual words being spoken would seem to be a very good proxy for whether there was an intent to disrupt the services: "It is common in the law," this Court has explained, "to examine the *content* of a communication to determine the speaker's *purpose*." *Hill* v. *Colorado*, 530 U.S. 703, 721 (2000) (emphasis added).

It is common in ordinary life to take the same approach. For example, the police officers in this case probably concluded that the hundreds of shouting climate protesters did not *intend* to interfere with the provision of health services because of the *content* of

those shouts—that they addressed climate issues, not health services. No further investigation into the intent of the climate protesters appears to have been undertaken, nor would it be necessary, because viewed in context it would reasonably be understood by the listener to be communicating a different message. See *Clark*, 468 U.S. at 294. Similarly, even though "pro-choice advocates frequently yell and scream at pro-life advocates outside of the Health Center for up to ten minutes at a time," Pet. App. 61, the *content* of their message would seem to show that they lacked the necessary *intent* to interfere with the provision of services. In short, under the plain text of Maine's statute, an intent to interfere with health services communicates, either by words or by noise, opposition to those services, and so the statute is content based.

* * *

Because Maine's statute is content based as to the only type of noise it covers—noise made with an intent to interfere with the provision of health services—it lacks a plainly legitimate sweep. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008). As the district court held, it is therefore facially unconstitutional.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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