No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), this Court considered whether a town's sign ordinance that distinguished between signs with different purposes constituted a content-based restriction on speech. At the *Reed* oral argument, Justice Scalia posed the question to the town: "What you say about signs I assume applies to noise as well, right? If the city has a noise ordinance, it can distinguish between noises for various purposes." The *Reed* Court unanimously held that sign restrictions based on the purpose of a sign constitute content-based restrictions on speech. The time has come to answer Justice Scalia's question as to how this principle pertains to noise.

The question presented is:

Does a noise provision that restricts speech based on the purpose the speaker has in making the noise constitute a content-based restriction on speech under this Court's ruling in *Reed v. Town of Gilbert*?

PARTIES TO THE PROCEEDING

The Petitioner is Pastor Andrew March.

The Respondents are Janet T. Mills, Attorney General for the State of Maine; City of Portland, Maine; William Preis, Police Lieutenant for the City of Portland; Jason Nadeau, Police Officer for the City of Portland; Donald Krier, Police Major for the City of Portland; and Graham Hults, Police Officer for the City of Portland; collectively referred to as Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew March respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The District Court's order granting Petitioner's preliminary injunction motion is reported at No. 2:15-cv-515-NT, 2016 U.S. Dist. LEXIS 67087 (D. Me. 2016) and reprinted at App. 47-86. The First Circuit panel opinion reversing the District Court's ruling is reported at 867 F.3d 46 (1st Cir. 2017) and reprinted at App. 1-46.

JURISDICTION

The United States Court of Appeals for the First Circuit rendered its decision on August 8, 2017. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the protections of the First Amendment, which states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Maine Civil Rights Act states, in relevant part:

> 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.

5 M.R.S. § 4684-B(2)(D).

STATEMENT OF THE CASE

The Maine Civil Rights Act ("MCRA") contains a noise provision that punishes noise based on the intent—or purpose—the speaker has in making the "noise." Noise that is louder and more disruptive is permitted so long as it does not have the prohibited intent. Minimizing this Court's decision in *Reed*, the First Circuit held that the statute in question was not a content-based restriction by separating the purpose of speech from its content. This result conflicts with the holdings of other courts, including the Fourth Circuit, and creates an exception to *Reed* that swallows its rule. Accordingly, Petitioner respectfully asks that this

Court grant certiorari and reverse the decision of the First Circuit.

I. FACTUAL BACKGROUND

Petitioner Andrew March is a Pastor in Lewiston, Maine. He engages in pro-life ministry by peacefully preaching on the public sidewalk outside of Planned Parenthood in Portland, Maine. This Planned Parenthood is located in the heart of Portland on a large, busy thoroughfare that hosts vehicular traffic with sirens and honking; loud community parades with marching bands, megaphones, amplified music, and shouting and cheering spectators; various protests with hundreds chanting and shouting in unison; and construction work that includes jackhammers and other machinery. It is on this loud and busy street on the public sidewalk before the Planned Parenthood that Pastor March calmly uses his lone, unamplified voice to preach. However, the Noise Provision of MCRA ("Noise Provision") restricts Pastor March's ability to speak by making his purpose in speaking—dissuading women from aborting their unborn children—illegal. 5 M.R.S. § 4684-B(2)(D).

On November 6, 2015, Defendants Jason Nadeau and Donald Krier told Pastor March to lower his voice because Planned Parenthood employees alleged that he could be heard within the building. Pastor March asked Defendant Nadeau several times for an objective volume level at which he could speak so that he could comply with the law, but Defendant Nadeau never told Pastor March how loud was too loud. Defendant Krier handed Pastor March a copy of MCRA and told him that he was officially being "warned" under the standardless warning requirement of the Noise

Provision. This caused Pastor March to lower his voice to a nearly inaudible level on the loud street for fear of violating the Noise Provision with which he did not know how to comply.

Pastor March, again speaking alone and unamplified, had another interaction with police officers roughly a month later on December 4, 2015. Thereon, Defendant William Preis told the Pastor to lower his voice. Pastor March asked Defendant Preis why, earlier on the same day on the same street before the Planned Parenthood facility, police officers were helping citizens shout about climate change at a much louder volume than he was speaking. Defendant Preis admitted the climate change protestors were louder than Pastor March. Yet, Defendant Preis distinguished Pastor March's much quieter speech because the *purpose* of the climate change protestors was not proscribed by the Noise Provision whereas Pastor March's purpose, opposing a health service, was proscribed by the Noise Provision. In explaining how Pastor March's speech violated the Noise Provision while the far louder protest did not, he said, "specifically the type of speech and *what is being said* [by Pastor March] is interfering with a medical procedure." Defendant Preis then explained that, under this "very grey" standard, "other noise may be louder [than Pastor March] but [the standard] is not based on a decibel level." Pastor March then asked Defendant Preis, "So then the content of what I am saying is really the problem?" Answering in the affirmative, Defendant Preis repeatedly confirmed that the Noise Provision allows the officers to restrict speech based on a "combination" of the volume *and the content*.

Pastor March re-confirmed, "It is not necessarily my volume level, because we just conceded that there was a parade out here filled with hundreds of kids which must have outdid me, but it is the content of what I am saying." Defendant Preis affirmed, again saying, "There is, in the Maine Civil Rights Act, language that articulates that if what somebody—the noise that somebody is making—*which could be content*—interferes with the ability of somebody to deliver a medical service, that would be a problem."

On December 11, 2015, Defendant Graham Hults told Pastor March that a Planned Parenthood employee claimed she could hear him inside the abortion facility and that, based on her allegation alone, he needed to quiet down. Pastor March asked for a definitive volume level at which he could speak to avoid false accusations by Planned Parenthood employees designed to silence his speech. Defendant Hults did not give him an answer. Defendant Hults eventually *agreed* with Pastor March that, no matter how quiet his voice was, it would be too loud for Planned Parenthood employees because of his purpose to dissuade women from aborting their children or, as the State of Maine phrases it in the Noise Provision, to interfere with the delivery of a health service.

Thus, the Noise Provision targets pro-life advocates, circumscribing their speech while other louder noises and voices fill the air. The Noise Provision achieves this discriminatory result by requiring enforcement to be predicated on the intent of the speaker "[t]o interfere with the safe and effective delivery of [health] services within the building." The Noise Provision thereby singles out a subset of noise—"noise" made by

pro-life individuals who seek to offer women an alternative to abortion. Under the Noise Provision, Respondents hold the power to censor the speech of any pro-life speaker, as long as Planned Parenthood employees claim to hear it within the building—even if nearly inaudible–because the content of their speech is necessarily intended to dissuade a woman from getting an abortion.

II. PROCEDURAL HISTORY

Pastor March filed suit in the United States District Court for the District of Maine on December 21, 2015, to vindicate loss of his constitutional rights. On February 3, 2016, he amended his complaint to name a previously unknown defendant. Pastor March filed a Motion for Preliminary Injunction on December 30, 2015, to prevent enforcement of the Noise Provision on the grounds that it is a content-based restriction of his speech. The District Court granted his motion on May 23, 2016, holding that, on its face, the Noise Provision is a content-based restriction. App. 47-86. The United States Court of Appeals for the First Circuit reversed the District Court's decision on August 8, 2017. App. 1-46.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT VIOLATED THIS COURT'S PRECEDENT IN *REED* BY UPHOLDING A RESTRICTION ON SPEECH THAT, ON ITS FACE, TARGETS SPEECH BASED ON ITS CONTENT.

A. The First Circuit created a false dichotomy distinguishing between communicative content and the purpose of speech.

Creating a distinction without a difference, the First Circuit held that the content of speech can be separated from its purpose. App. 19-20. In so doing, the Court of Appeals dismissed this Court's central holding in *Reed*—that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, . . . others are more subtle defining regulated speech by its function or purpose"—as merely "a single sentence." App. 20-21 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)) (emphasis added by First Circuit). Ignoring the distinction this Court made between the "obvious" and "subtle" content-based regulations, the First Circuit opined that, in context, "purpose" simply means the content or subject matter of speech. *See id*. After conflating the *Reed* Court's holding, the First Circuit created a false dichotomy, reasoning that communicative content can somehow be separated from the purpose of the speaker. But this is a distinction condemned by this Court nearly thirty years ago.

In *Texas v. Johnson*, this Court considered a statute that made it a crime to desecrate the American flag. 491 U.S. 397, 400 (1989). The Court held that this prohibition on burning the flag—based on the intent to desecrate the flag—is unconstitutional, stating, "whenever [a] person engaging in [] conduct ***intends*** thereby to express an idea" the government is forbidden from prohibiting the conduct because of the expressive intent of the speaker. *Id*. at 404, 406 (emphasis added).

Just as "burning a flag in violation of an ordinance against dishonoring the flag" is a restriction based on the intent of the person communicating his message and, thus, unconstitutional, so too is restricting noise based on the intent of the person making the noise.

This Court expanded on its holding in *Johnson* a few years later. In *R. A. V. v. St. Paul*, this Court made a distinction: "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." 505 U.S. 377, 385 (1992). The act of burning a flag could be punished as a complete ban against outdoor fires but *not* because of the reason the individual burned the flag.

Here, the Noise Provision is different from a blanket ban on noise above a certain decibel level. The Noise Provision aims itself at the noise-maker's intent and stifles only noise made with a certain communicative intent, while allowing other noises with different communicative intent to permeate into a health facility—or other fires to burn.

B. The First Circuit misapplied *Grayned v. City of Rockford.*

In *Grayned v. City of Rockford*, this Court examined a noise ordinance challenged on vagueness and overbreadth grounds because it prohibited "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tends to disturb the peace or good order" near a school. 408 U.S. 104, 108 (1972). Both the Noise Provision and the provision in *Grayned* required that the noise at issue be intentionally or willfully made. *Compare* the Noise Provision, 5 M.R.S. § 4684-B(2)(D) ("intentionally making noise") *with Grayned*, 408 U.S. at 108 ("willfully mak[ing] or assist[ing] in the making of any noise"). This, however, is where the similarities between the two restrictions end. Maine's Noise Provision encroaches on speech much further by punishing only a subset of intentionally made "noise" based on its purpose—and thus its content. It is this second intent element of the Noise Provision that attacks a speaker's content and transforms the law from a mere noise ordinance into a content-based restriction on speech. The First Circuit failed to consider the bifurcated intent requirements in the Noise Provision, unlike the singular intent element in *Grayned*.

As such, whereas *Grayned* allowed a prohibition on noise *qua* noise, the First Circuit here allowed a prohibition targeting only "noise" that has a particular intent and, thus, purpose. What the Court of Appeals overlooked is the fact that, as already explained by this Court in *Reed*, a prohibition based on a speaker's "purpose" is necessarily a prohibition based on content. *Reed*, 135 S. Ct. at 2227.

In an attempt to place the current case within the ambit of *Grayned*, the First Circuit imagined an array of potential protests, such as labor strikes and "opponents of abortion rights," and then, in dismissive parentheticals, severely limited its own hypotheticals to restrict only those with the purpose "to jeopardize the health of those receiving health services inside or to interfere with the safe and effective provision of health services to those inside." App. 17-18. Thus, far from regulating "noise on any topic or concerning any idea" as the First Circuit suggested, the Noise Provision—as even the First Circuit noted in its hypotheticals—is limited to a subset of noise with a specific purpose. *Id*.

In this analysis, the First Circuit ignored this Court's clear identification of—and prohibition on—content-based restrictions of speech that, though "subtle," nonetheless impermissibly "regulate[] speech by it function or purpose." *Reed*, 135 S. Ct. at 2227.

In the process of rewriting this Court's holding in *Reed* so as to salvage the Noise Provision, the First Circuit created a freakish result. Under that Court's reasoning, a massive labor strike with hundreds of shouting protestors who have—or rather who are deemed by authorities to have—the purpose of bringing public awareness to labor practices in a health facility are free to speak and be heard. Such speech is permitted, even if it actually disturbs the provision of services in the facility. In contrast, a lone individual who has—or rather is deemed by authorities to have—the purpose of interfering with the facility's provision of services is lawfully silenced. This individual's speech is censored even if his intended

"interference with services" consists of nothing more than hoping to calmly persuade a would-be client of the facility to have a change of heart about her decision. It is not the effect, or even the likely effect, of sounds that the Noise Provision addresses any more than it regulates the volume of noise. Instead, the Noise Provision proscribes purposes, irrespective of what effects are felt.

Accordingly, the lone and unamplified speaking voice of a Pastor, who seeks to dissuade women from receiving the "health service" of an abortion, falls under the Noise Provision, while hundreds on the same street chanting about the environment or a pro-abortion enthusiast shouting at pro-life advocates does not. *See Johnson*, 491 U.S. at 404, 406 (holding that a statute criminalizing the intent to desecrate the flag is unconstitutional because the government is forbidden from prohibiting conduct because of the expressive intent of the speaker). Instead of prohibiting all intentionally made noise that causes an actual disturbance, as was the case in *Grayned*, the Maine legislature decided to silence only one particular subset of noise. Therefore, rather than adhere to *Grayned*, the First Circuit drastically departed from it.

The First Circuit noted generally that noise can have an adverse effect on the provision of health services. App. 8-9. This uncontroversial notion misses the point of Petitioner's challenge and does nothing to rescue the statute. Properly speaking, the Noise Provision does not actually regulate noise. It does not regulate noise above a specific volume. It does not regulate noise that brings about certain results. It does not even regulate noise that actually interferes with

the provision of health services. To the contrary, the Noise Provision only regulates "noise," regardless of how loud it actually is and what results it brings about, that is made for a specific purpose. This targets pro-life counselors, like Pastor March, because his purpose is to encourage women to abandon their plans to receive a health service. "The vice of content-based legislation . . . is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself to use* for those purposes." *Reed*, 135 S. Ct. at 2229 (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)) (emphasis added). While there is an interest in protecting health facilities from intrusive noise, that interest is not and cannot, within the bounds of the protections afforded by the First Amendment, be based on the purpose of the individual making the noise.

II. THE FIRST CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT REGARDING WHETHER, UNDER *REED*, RESTRICTIONS ON SPEECH THAT TARGET A PARTICULAR PURPOSE CAN PASS CONSTITUTIONAL MUSTER.

Reed established that regulations that restrict speech based on "its function or purpose" are "subtle" content-based restrictions. *Id*. at 2227. The First Circuit's difficulty in recognizing a "subtle" content-based restriction on speech has created a split in authority among the circuits. As a result of this divergence in approaches, consistency in applying this Court's precedent requires further guidance to lower courts.

A recent decision of the Fourth Circuit stands in contrast to the First Circuit's opinion below. In *Cahaly v. Larosa*, the Fourth Circuit considered a statute that prohibited "only those robocalls that are for the purpose of making an unsolicited consumer telephone call or are of a political nature." 796 F.3d 399, 402 (4th Cir. 2015) (internal quotation marks omitted). In analyzing the statute, the Fourth Circuit held that it was a content-based restriction because it "applie[d] to calls with a consumer or political message but d[id] not reach calls made ***for any other purpose***." *Id*. at 405 (emphasis added). As counseled by *Reed*, the Court recognized that the statute attempted to regulate robocalls based on the purpose for which they were made. Because the statute's scope depended on the purpose of the speaker, it was content-based, even though the statute did not look to the explicit words of the message itself.

Likewise, several district courts have struck down panhandling ordinances as content-based restrictions because they regulate speech based on its purpose—a request for assistance. *Blitch v. City of Slidell*, 2017 U.S. Dist. LEXIS 93751, at *36 (E.D. La. June 19, 2017); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 U.S. Dist. LEXIS 103204, at *11 (M.D. Fla. Aug. 5, 2016). The Fourth Circuit and district courts in the Fifth and Eleventh Circuits, therefore, interpret *Reed* to prohibit a restriction on speech when the prohibition in question depends on the purpose or intent possessed by the speaker.

Similarly, the District Court in this case properly noted that speech restrictions based on purpose are necessarily restrictions on content. The Court correctly

grasped that the intent of the speaker cannot be separated from the content of his message, noting:

> Outside a health care facility that performs abortions, a pro-life protester's activity would be treated differently under the Noise Provision than a pro-choice protester's activity. Conversely, outside a crisis pregnancy counseling center, a pro-choice protester's noise would be treated differently than a pro-life protester's noise. The difference in treatment is based on the message expressed.

App. 72.

In contrast, the First Circuit here created an illusory distinction between the purpose of the speaker on the one hand and the content of the message on the other. In its opinion below, the First Circuit strikingly held that regulating the purpose of the speaker did not regulate content because the Noise Provision would permit or forbid the same sound, like a drum or horn, depending on the purpose of the person making the noise. App. 18-19. This hypothetical completely ignores the communicative impact of conduct or wordless expression. *See United States v. Eichman*, 496 U.S. 310, 318 (1990). It also fails under this Court's well-established precedent discussed in Part I.A *supra* that forbids limiting expressive conduct, like burning a flag, because of the intent or desired impact of the person doing the act. *R.A.V.*, 505 U.S. at 385. Thus, the First Circuit missed a necessary analysis that, forgotten, led to the illogical conclusion that the communicative impact of noise should—or even could—be separated from the intent of the speaker in communicating his message.

III. THE ISSUE PRESENTED IS IMPORTANT TO OUTLINE THE SHELTER OF FIRST AMENDMENT PROTECTIONS.

The discrepancy between the circuits is of utmost importance because the protections guaranteed under the First Amendment will vary significantly depending on how this Court clarifies *Reed*. If the First Circuit's reasoning is allowed to stand, federal, state, and local governments will interpret it as permission to enact laws with creative word play to control and limit free speech.

For example, under the First Circuit's interpretation, governments could proscribe core political speech simply by casting their restrictions in terms of the purpose for which the words are spoken rather than the words themselves. This would include speaking with such purposes as influencing a voter, proselytizing, shedding light on police brutality, or any other purpose an individual has in speaking. These limitations on speech would be content-neutral under the First Circuit's reasoning because they go to the purpose of the speaker, not the content of the message. These restrictions are the future if this Court allows the lower court's opinion to stand. The marketplace of ideas cannot withstand the onslaught of restrictions such verbal sleight of hand would permit. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). Petitioner respectfully asks this Court to steer the Nation back on the course that protects speech.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1771

[Filed August 8, 2017]

ANDREW MARCH,

Plaintiff, Appellee,

v.

JANET T. MILLS, individually and in her official capacity as Attorney General for the State of Maine,

Defendant, Appellant,

CITY OF PORTLAND, MAINE; WILLIAM PREIS, individually and in his official capacity as a Police Lieutenant of the City of Portland; JASON NADEAU, individually and in his official capacity as a Police Officer of the City of Portland; GRAHAM HULTS, individually and in his official capacity as a Police Officer of the City of Portland; DONALD KRIER, individually and in his official capacity as a Police

Major of the City of Portland,)
)
Defendants.)
_____)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, Chief U.S. District Judge]

_____

Before

Lynch, Stahl, and Barron,
Circuit Judges.

_____

Christopher C. Taub, Assistant Attorney General, with whom Janet T. Mills, Attorney General, and Leanne Robbin, Assistant Attorney General, were on brief, for appellant.

Kate Margaret-O'Reilly Oliveri, with whom Thomas More Law Center, Stephen Whiting, and The Whiting Law Firm, P.A., were on brief, for appellee.

_____

August 8, 2017

_____

BARRON, **Circuit Judge**. This appeal concerns a constitutional challenge brought by a protester who opposes abortion. He seeks to enjoin the enforcement of a provision of the Maine Civil Rights Act ("MCRA"), Me. Rev. Stat. Ann. tit. 5, § 4684-B(2), that, he contends, facially violates the First Amendment's

guarantee of the freedom of speech.[1] The challenged provision bars a person from making noise that "can be heard within a building" when such noise is made intentionally, following an order from law enforcement to cease making it, and with the additional "intent either: (1) [t]o jeopardize the health of persons receiving health services within the building; or (2) [t]o interfere with the safe and effective delivery of those services within the building." Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D).

The District Court ruled that the measure restricts speech based on its content rather than on the time, place, or manner of its expression. And, the District Court concluded that the measure likely cannot survive the strict constitutional scrutiny to which such content-based speech restrictions are subject. Thus, the District Court concluded that the plaintiff was likely to succeed on the merits of his contention that the measure is unconstitutional on its face and granted his request for a preliminary injunction. We now reverse.

I.

We begin by providing some background regarding the MCRA and the noise restriction that it sets forth. We also describe the relevant procedural history.

A.

The Maine legislature enacted the MCRA in 1989. 1989 Me. Legis. Serv. 582. The MCRA creates a cause

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[1] The First Amendment applies to Maine by virtue of the Due Process Clause of the Fourteenth Amendment. Schneider v. New Jersey, 308 U.S. 147 (1939).

of action that the Attorney General of Maine or any "aggrieved" person may bring 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.

In 1995, the Attorney General proposed a bill to amend the MCRA. The proposed amendment sought to "add[] to the protections already contained in the [MCRA] for persons seeking services from reproductive health facilities and for persons providing services at those facilities."

The Attorney General indicated at the time that the impetus for the proposed amendment, which contained a number of distinct provisions of which this lawsuit concerns only one, was a concern that "the most extreme violence tends to occur in situations where less serious civil rights violations are permitted to escalate," because "[w]hen the rhetoric of intolerance and the disregard for civil rights do, in fact, escalate, then some people at the fringes of society will take that atmosphere as a license to commit unspeakable violence." The amendment, as a whole, was thus intended to "represent[] a commitment on the part of both sides of the abortion debate to reduce tensions in order to lessen the chances of tragic violence."

In the course of the legislative process, the District Court noted, the proposed amendment was expanded "to cover conduct outside all buildings, rather than just reproductive health facilities." March v. Mills, No. 2:15-CV-515-NT, 2016 WL 2993168, at *2 (D. Me. May 23, 2016). The expansion sought to ensure that the

measure would cover, in addition to "reproductive health facilities," "crisis pregnancy centers, pro-life groups' headquarters and offices, etc." Id.

A broad range of interested parties, including both proponents and opponents of abortion rights, supported the amendment. Supporters included the Maine Pro-Choice Coalition -- a coalition of twenty-five pro-choice organizations -- 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.

A representative of Feminists for Life of Maine testified to the Maine legislature in support of the proposed amendment by stating 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." The representative specifically noted that, "[f]or the first time in Maine and perhaps the nation, legislation has been developed with pro-life and pro-choice activists participating with the Attorney Generals' [sic] Office." In addition, a representative of the American Civil Liberties Union of Maine -- at that time known as the Maine Civil Liberties Union -- testified in support of the bill by noting that "this Act protects important constitutionally guaranteed rights, and does not in any way run afoul of the free speech provisions of the Maine and United States Constitutions."

Maine enacted the amendment in 1995. The amendment makes it a violation of the MCRA, as the District Court usefully summarized, "to interfere or attempt to interfere with a person's civil rights by:

(1) physically obstructing the entrance or exit of a building; (2) making repeated telephone calls to disrupt activities in a building; (3) setting off any device that releases 'noxious and offensive odors' within a building; or (4) making noise" in a certain way and for certain reasons. March, 2016 WL 2993168 at *2 (quoting Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)).

This last part of the amendment, subsection (D) of section 4684-B, is the only part of the MCRA that is at issue here. We shall refer to that part, for ease of reference, as the Noise Provision. The Noise Provision defines the "conduct," see Me. Rev. Stat. Ann. tit. 5, § 4684-B(2), that may give rise to an action under the MCRA as follows:

> 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.

Id. § 4684-B(2)(D).[2]

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[2] The full text of the portion of the MCRA in which the Noise Provision appears reads:

> It is a violation of this section for any person, whether or not acting under color of law, to intentionally interfere or

B.

The plaintiff in the case before us is Andrew March. He is a "co-founder of a church in Lewiston, Maine called Cell 53." March, 2016 WL 2993168 at *1. A part of the church's mission "is to plead for the lives of the unborn at the doorsteps of abortion facilities." Id. In keeping with that mission and with March's personal belief that "abortion is the killing of unborn citizens" and "harms women," March makes known his

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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:

A. Engaging in the physical obstruction of a building;

B. Making or causing repeated telephone calls to a person or a building, whether or not conversation ensues, with the intent to impede access to a person's or building's telephone lines or otherwise disrupt a person's or building's activities;

C. Activating a device or exposing a substance that releases noxious and offensive odors within a building; or

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).

opposition to abortion outside the Planned Parenthood Health Center on Congress Street in Portland, Maine. Id.

March filed his suit pursuant to 42 U.S.C. § 1983 on December 21, 2015, in the United States District Court for the District of Maine. He named various defendants, including Maine's Attorney General. He alleges in his complaint that, among other things, the Noise Provision violates the First Amendment's guarantee of the freedom of speech both on its face and as applied to him. He seeks both declaratory and injunctive relief.

More specifically, March alleges that, in November and December 2015, law enforcement on three occasions told him, pursuant to the Noise Provision, to lower the volume of his activity outside the Planned Parenthood facility in Portland. He alleges that he repeatedly "asked for a definitive volume level that he could speak at," but did not receive a standard. Thus, he claims, he can no longer "communicate audibly," due to fears that his speech will subject him to an enforcement action.

On December 30, 2015, March filed a motion for a preliminary injunction. In its opposition to that motion, Maine articulated its interest in enacting the Noise Provision by emphasizing that "[p]atients have the right to receive safe and effective health care . . . without interference from Mr. March or anyone else." Relying on affidavits from health professionals, Maine noted specifically the "physiological effect on patients, often causing additional stress and elevated blood pressure, pulse, and respiratory rates" that noise can cause when made so loud it can be heard inside a

health facility, and the disruption that results to the safe and effective treatment of those patients.

Maine also challenged in its papers March's allegations about how the measure restricts speech. In particular, Maine contended that March has "yell[ed] so loudly that the patients cannot escape his rants," but that, under the measure, he remains free to express his views loudly enough to conduct conversations and be heard within the immediate vicinity, and that he has in fact done so.

The District Court heard oral argument on the motion on April 4, 2016, and received supplemental briefing. On May 23, 2015, the District Court granted March's motion for a preliminary injunction based solely on March's facial constitutional challenge, thereby leaving his as-applied challenge unaddressed.[3] In granting the requested relief on the facial challenge, the District Court applied the standard we set forth in Arborjet, Inc. v. Rainbow Treecare Scientific

[3] There is one other case of which we are aware that addresses the Noise Provision's constitutionality. In that case, the Attorney General, in bringing an action under the MCRA's Noise Provision, alleged that the defendant "repeatedly stood on the sidewalk" outside of the Planned Parenthood Health Center on Congress Street in Portland, Maine and "loudly yelled directly at patients inside of the facility," such that his conduct "interfered with Planned Parenthood's ability to provide medical care." The defendant in that case moved to dismiss the suit on the ground that the Noise Provision is unconstitutional on its face, but the Maine Superior Court held that the Noise Provision was a permissible time, place, or manner restriction on speech. See State v. Ingalls, No. CV-15-487, 2016 Me. Super. LEXIS 55, at *12, *14 (Me. Super. Ct. Mar. 17, 2016) (order denying motion to dismiss). No appeal was taken.

Advancements, Inc., 794 F.3d 168, 171 (1st Cir. 2015), regarding what a plaintiff seeking a preliminary injunction must demonstrate. Under that standard, a plaintiff must show: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest." March, 2016 WL 2993168 at *6.

With respect to likelihood of success, the District Court first concluded that the Noise Provision is a content-based restriction on speech. The District Court explained that the Noise Provision "targets a subset of loud noise -- noise made with the intent to jeopardize or interfere [with the delivery of health services] -- and treats it less favorably." Id. at *11. And the District Court determined that the measure singled out that subset of loud noise due to its content rather than in consequence of the time, place, or manner of its expression. Id.

The District Court then ruled that, as a content-based speech restriction, the measure could survive March's facial constitutional challenge only by satisfying strict scrutiny. Id. And, the District Court explained, under that standard, a speech restriction must serve a compelling state interest through the least restrictive means. Id.

The District Court determined that Maine had a compelling interest in protecting the health and safety of its citizens, protecting its citizens from unwelcome noise around medical facilities, and de-escalating potential violence that can occur around facilities that perform abortions. Id. at *12. But, the District Court ruled, "adequate content-neutral alternatives could

achieve the State's asserted interest." Id. at *13. In particular, the District Court explained that Maine "could enact a law prohibiting all loud, raucous, or unreasonably disturbing noise outside of facilities providing medical care[,] . . . prohibit all noise made within a certain proximity to such facilities that has the effect of disrupting the safe and effective delivery of health care[,] . . . [or] limit all noise outside of buildings offering health services if the noise exceeds a certain decibel level." Id. (citations omitted). The District Court thus concluded that March was likely to succeed on the merits of his claim because the Noise Provision did not serve a compelling governmental interest by the least restrictive means. Id. at *14.

The District Court also concluded that the hardship to the defendants resulting from the granting of the preliminary injunction would be "minimal," whereas continued enforcement of the Noise Provision would "result in irreparable harm to [March]." Id. at *15. Finally, the District Court concluded that March "has met his burden of showing that granting an injunction to prevent continued enforcement of a content-based law would serve the public interest." Id. Accordingly, the District Court granted March's motion for a preliminary injunction to enjoin the defendants from enforcing the provision. Id.

Maine has now filed this timely appeal. See 28 U.S.C. § 1292(a). Our review of the District Court's grant of the preliminary injunction on the ground that the Noise Provision is unconstitutional on its face is for abuse of discretion. Corp. Techs., Inc. v. Hartnett, 731 F.3d 6, 10 (1st Cir. 2013). We assess the underlying

conclusions of law de novo and the findings of fact for clear error. Id.

II.

The threshold question we must decide in resolving this facial constitutional challenge is whether the Noise Provision -- which restricts noisemaking even in public parks, plazas, sidewalks, or other traditional public fora, see Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) -- is a content-based or a content-neutral speech restriction.[4] The answer matters to our analysis

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[4] We bypass Maine's contention that, in accord with the MCRA's own characterization of the Noise Provision as one that targets "conduct," Me. Rev. Stat. Ann. tit. 5, § 4684-B(2), the District Court erred by not reviewing the measure under the more lenient standard of review that applies to restrictions on conduct that merely impose an incidental burden on speech. See United States v. O'Brien, 391 U.S. 367, 377 (1968) (establishing that such a restriction is permissible under the First Amendment if the restriction "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). As we will explain, March fails to show that the Noise Provision is facially unconstitutional even if we analyze it as a restriction on speech rather than on conduct. We thus treat the measure, as the District Court did, as one that targets speech. See Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772-73 (1994) (treating a noise restriction as a regulation of speech, not conduct); Grayned v. City of Rockford, 408 U.S. 104 (1972) (same); Kovacs v. Cooper, 336 U.S. 77 (1949) (same). We do not foreclose the conclusion that the statute regulates conduct rather than speech. We simply see no need to address the issue in light of our conclusion that the Noise Provision is constitutional even if it restricts speech.

for the following reason.

When a restriction on speech in a traditional public forum targets the content of speech, that restriction raises the special concern "that the government is using its power to tilt public debate in a direction of its choosing." Cutting v. City of Portland, 802 F.3d 79, 84 (1st Cir. 2015). Accordingly, such content-based restrictions, to be upheld against a facial challenge, must serve a compelling governmental interest by the least restrictive means. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

By contrast, restrictions on speech in traditional public fora that target only the time, place, or manner of expression "[have] the virtue of not singling out any idea or topic for favored or un-favored treatment." Cutting, 802 F.3d at 84. Thus, such content-neutral restrictions ordinarily need only to be narrowly tailored to serve a significant governmental interest and to leave open ample alternative channels for communication of the information in order to be upheld on their face. Id. (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

In general, a "[g]overnment regulation of speech" is content based, rather than content neutral, if it "applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015). There are two distinct ways in which a regulation may be deemed to be content based.

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. (citation omitted). Second, there is a "separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: 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.'" Id. (alteration in original) (quoting Ward, 491 U.S. at 791).

We start by considering whether the Noise Provision is content based on its face. Because we conclude that it is not, we then consider whether it is "justified without reference" to content or was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. (alteration in original) (quoting Ward, 491 U.S. at 791). In the end, we conclude that the Noise Provision is, in light of its facial neutrality and the content-neutral reasons for its enactment, properly treated as a content-neutral time, place, or manner restriction.

A.

In considering whether the Noise Provision is content based on its face, we must be mindful that the First Amendment reflects our commitment to the protection of public discourse and dissent, even where such speech inspires outrage or offense. For that reason, restrictions on speech in public places are suspect when they curb debate by restricting expression about certain topics or by limiting the discussion of certain ideas. Nevertheless, it is well established that, even in public places, the government may enforce reasonable restrictions on the time, place, or manner of speech in order to protect persons from

unduly burdensome noise. "If overamplified loudspeakers assault the citizenry," after all, the "government may turn them down." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). And that is especially the case when loud noise would disrupt sensitive functions in nearby buildings, such as schools or hospitals. See Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("[N]o mandate in our Constitution leaves States . . . powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of . . . buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.").

Against this backdrop, March appears to accept that a statute that restricts noise made outside a building that actually "jeopardize[s] the health of persons receiving health services within the building; or . . . interfere[s] with the safe and effective delivery of those services within the building" would be, on its face, content neutral. And, in light of the Supreme Court's decision in Grayned, 408 U.S. 104, we do not see how he could contend otherwise.

Grayned concerned a town ordinance that prohibited noise made outside of schools that "disturbs or tends to disturb the peace or good order" of the school. Id. at 107-08 (quoting Rockford, Ill. Code of Ordinances, ch. 28, § 19.2(a)). The Court concluded -- presumably because of the limitless range of sounds that could be used to make noise that would disrupt teaching and learning in a school -- that the ordinance was not targeting the disruptive noisemaking "because of its message." Id. at 115. Rather, the Court explained,

the restriction -- in targeting noise "which disrupts or is about to disrupt normal school activities," id. at 119 -- "gives no license to punish anyone because of what he is saying," id. at 120 (emphasis added). On that basis, the Court treated the measure as a content-neutral time, place, or manner restriction.[5]

Nonetheless, March contends that the Noise Provision is different in an important respect from the measure considered in Grayned. He points out that this measure, unlike the one considered in Grayned, does not single out for restriction loud (and thus disruptive) noise. Rather, the Noise Provision targets only the subset of loud noise made with the intent to "jeopardize the health of persons receiving health services within the building; or . . . interfere with the safe and effective delivery of those services within the building." Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D).

In March's view, this disruptive-intent requirement, in narrowing the measure's reach, makes the measure content based on its face by necessarily regulating noisemaking based on the content of the message

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[5] We note that in Grayned the appellant also brought a challenge to the ordinance on the ground that the phrase "tends to disturb" was unconstitutionally vague. The Court rejected that contention on the ground that, in light of state court precedent, the phrase was fairly construed "to prohibit only actual or imminent interference with the 'peace or good order' of the school." Id. at 111-12. March makes no similar vagueness challenge -- under either the First Amendment or any other constitutional provision -- to the phrases "[t]o jeopardize the health of persons receiving health services within the building" and "[t]o interfere with the safe and effective delivery of those services within the building," Me. Rev. Stat. Ann. tit. 5, § 4684-B(2), or to any other aspect of the Noise Provision.

conveyed, rather than on the manner of its expression. In particular, March contends that the disruptive-intent requirement necessarily ensures that those who make noise while protesting abortion rights will be treated less favorably than other noisemakers because, unlike in the case of other speakers, the content of their message necessarily will establish their disruptive intent.[6]

We do not agree. On its face, 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. And, 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. One's manner of making noise can itself be highly probative of one's disruptive intent quite independent of what one actually says. In consequence, the restriction, at least on its face, would appear to apply, just like the ordinance in Grayned, to noise on any topic or concerning any idea.

For example, the measure, by its terms, restricts the volume that hospital staff may use in calling for higher wages during a labor strike outside a hospital (provided that the staff make the noise in order to

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[6] March makes no argument that the Noise Provision's requirement that law enforcement authorities order the cessation of noise in and of itself raises any constitutional concerns that would require the measure's facial invalidation. Nor did the District Court so hold. We thus focus, like March in his briefing and the District Court in its ruling, on whether the measure is facially invalid in light of its disruptive-intent requirement.

jeopardize the health of those receiving health services inside or to interfere with the safe and effective provision of health services to those inside) just as surely as the measure regulates the volume of speech that opponents of abortion rights may use in advocating for their views outside of a Planned Parenthood facility (provided that they, too, seek to jeopardize the health of those receiving health services inside or to interfere with the safe and effective delivery of services to them). Likewise, the measure, by its terms, may restrict the volume that others may use in expressing opposition to or support for a seemingly endless array of issues that relate to buildings in which health services are provided, from protests favoring or disfavoring vaccination to demonstrations concerning the effects on the rental market of a given health facility's presence (again, provided that such supporters or opponents are found to have had the specified disruptive intent).

Moreover, the measure applies even to loud noise that, in and of itself, conveys no message at all, as it applies to wailing sirens, beating drums, and blaring horns -- provided that, following a cessation order, they may be heard inside and are made with the specified disruptive intent -- no less than to inspiring chants and political speeches. And, at least according to the face of the measure, loud sounds made with the intent to "jeopardize the health of persons receiving health services within the building; or . . . interfere with the safe and effective delivery of those services within the building," Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D), are restricted no less than loud words.

Consistent with this content-neutral focus, the Noise Provision on its face also permits loud noise -- no matter the topic discussed or idea expressed -- if the noise is made without the specified disruptive intent. In consequence, by its terms, the Noise Provision permits loud messages to be communicated concerning any topic or idea, including opposition to abortion, so long as those messages are not made with the specified disruptive intent.

Simply put, under the Noise Provision, all noisemakers may be found to have the requisite intent or to lack it based on what the evidence shows about whether they intend for their noise to be disruptive. And, whether an individual has the requisite intent to interfere with or jeopardize the delivery of healthcare services 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." Me. Rev. Stat. Ann. tit 5, § 4684-B(2)(D). Thus, at least on its face, the measure does not say anything that makes the outcome of that evidentiary inquiry turn on the "communicative content" of the noise. Reed, 135 S. Ct. at 2227.

For these reasons, the Noise Provision is no more content based, as a facial matter, than is the restriction on disruptive noise found to be content neutral in Grayned. This measure, like that one, does not on its face purport to restrict noise "because of its message." Grayned, 408 U.S. at 115. Rather, like that ordinance, the Noise Provision -- in targeting a subset of loud noise -- does not on its face give "license to punish

anyone because of what he is saying." Id. at 120 (emphasis added).[7]

In response, March presses a number of arguments as to why the measure, due to its disruptive-intent requirement, is content based on its face. But, we are not persuaded.

March first contends -- as the District Court ruled -- that the measure is content based on its face because, in targeting noise based on the noisemaker's purpose in making it, the measure expressly and necessarily regulates speech based on its "function or purpose." See March, 2016 WL 2993168 at *10 (citing Reed, 135 S. Ct. at 2227). Here, March, like the District Court, relies on a single sentence in Reed, in which the Court noted that while "[s]ome facial distinctions based on a

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[7] Of course, the measure does appear to target noise only near certain buildings -- namely those in which health services are provided -- just as the ordinance in Grayned applied only to noise made outside schools. And, those buildings -- like the schools in Grayned -- may well attract certain kinds of speakers, including ones who wish to advocate certain views, like March himself. But, that fact does not make the measure facially content based. "[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen, 134 S. Ct. at 2531 (noting also that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others" (alteration in original) (quoting Ward, 491 U.S. at 791) (modification in original)); see also Madsen, 512 U.S. at 763 (finding an injunction prohibiting anti-abortion protestors from engaging in certain types of disruptive activity was content neutral and noting that "the fact that [a speech restriction] cover[s] people with a particular viewpoint does not itself render the [restriction] content or viewpoint based").

message are obvious, defining regulated speech by particular subject matter, . . . others are more subtle, defining regulated speech by its function or purpose." Reed, 135 S. Ct. at 2227 (emphasis added).

Considered in context, however, this passage has little bearing on our case. Reed concerned a town sign ordinance that regulated the size and location of signs but exempted twenty-three categories of signs from its reach, including three categories of signs that were the focus of the Court's inquiry into whether the ordinance was, on its face, content based. Id. The ordinance defined those three categories -- "[i]deological," "[p]olitical," and "[d]irectional" signs -- in terms of the purpose of the message that a sign conveyed.[8] Id. Reed thus ruled that the town's sign measure was content based on its face, because, as the Court put it, the measure's restrictions that apply "to any given sign . . . depend entirely on the communicative content of the sign."[9] Id. at 2227 (emphasis added).

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[8] Specifically, the sign ordinance defined "[i]deological" signs as signs "communicating a message or ideas for noncommercial purposes"; "[p]olitical" signs as signs "designed to influence the outcome of an election called by a public body"; and "[t]emporary [d]irectional [s]igns" as signs "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" Reed, 135 S. Ct. at 2224-25 (emphases added) (quoting Gilbert, Ariz., Land Development Code, ch. 1, § 4.402 (2005)).

[9] As the Court explained by way of example, "[i]f a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election." Reed, 135 S. Ct. at

At least on its face, however, the Noise Provision does not "depend entirely" for its application on the "communicative content" of noise. Id. To borrow the terms used by the ordinance at issue in Reed, the Noise Provision's application does not depend entirely (if, in any case, it depends at all) on whether a review of the noise would reveal its communicative content to convey an ideological ("Abortion is murder"), political ("Vote for the pro-choice candidate"), directional ("Go to our rally down the street"), or, for that matter, entirely unintelligible message. All of these messages are restricted if -- but only if -- they are conveyed with the intent to disrupt health services being provided in the building in which the noise can be heard, after the noisemaker has "been ordered by a law enforcement officer to cease such noise." Me. Rev. Stat. Ann. tit. 5, § 4684-B(2). Conversely, none of these messages are restricted if they are not made with that disruptive intent. And that is true of any other message that one can conjure.

Thus, while the restriction is "entirely depend[ent]" on the noisemaker's disruptive "purpose" in making noise, the restriction is not entirely dependent -- as was the ordinance at issue in Reed -- on the noise's "communicative content." Id. In fact, it is not clear that the Noise Provision's application is, in any case, dependent on the communicative content of the noise at all. For, as we have explained, one can loudly communicate any content -- on any topic or concerning any idea or message, including even, as Maine

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2227. And, indeed, "both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government." Id.

recognizes, messages favoring abortion rights -- or even generate noise that does not carry any message whatsoever, with a disruptive intent. And, so long as one does so, the Noise Provision, by its terms, regulates that noise.

Nor are we aware of authority to support the conclusion below that a restriction on disruptive noise, like the one deemed content neutral in Grayned, necessarily becomes content based if it targets only those noisemakers who actually intend for their noise to be disruptive. Indeed, we would be surprised to find authority to that effect. It is hard to discern the First Amendment interest furthered by a rule that would deem such an otherwise content-neutral restriction to be especially constitutionally suspect simply because it excuses those who violate it only inadvertently.[10]

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[10] In addition to Reed, March cites to two other cases to support his contention that a speech restriction is content based if it turns on the intent of the speaker. Neither case helps March, however, as both involved provisions that, like the provision in Reed, refer to the "purpose" of speech only as a means of distinguishing among types of content that such speech communicates. See Cahaly v. Larosa, 796 F.3d 399, 402, 405 (2015) (holding that a statute prohibiting "robocalls that are for the purpose of making an unsolicited consumer telephone call or are of a political nature" was content based because it "applie[d] to calls with a consumer or political message but [did] not reach calls made for any other purpose" (quotation marks omitted)); Nat'l Fed'n of Indep. Bus. v. Perez, Civil Action No. 5:16-cv-00066-C, 2016 WL 3766121, at *32 (N.D. Tex. June 27, 2016) (holding that a Department of Labor rule was content based because it turned on whether the speaker "undertakes activities with an object to persuade employees" on issues concerning collective bargaining). Nor are the panhandling cases that March cites to the contrary, as they, too, turn on the content of the regulated speech. See Homeless Helping Homeless,

March also contends, as the District Court concluded, that the Noise Provision is content based on its face for the distinct reason that the Noise Provision "require[s] enforcement authorities to examine the content of the message that is conveyed." March, 2016 WL 2993168 at *10 (emphasis added) (quoting McCullen, 134 S. Ct. at 2531). McCullen did state that the abortion clinic buffer-zone provision there at issue would have been content based "if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." 134 S. Ct. at 2531 (citing Fed. Trade Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)). And, in the case on which McCullen relied for that proposition, League of Women Voters, the Supreme Court did find that a regulation that prohibited certain "noncommercial educational broadcasting station[s]" from "engag[ing] in editorializing," League of Women Voters, 468 U.S. at 366, except on "controversial issues of public importance," id. at 381, was content based on its face. The Court explained that the regulation was facially content based because it defined prohibited speech "solely on the basis of the content of the suppressed speech," such that "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.'" Id. at 383.

Inc. v. City of Tampa, No. 8:15-cv-1219-T-23AAS2016, 2016 WL 4162882 (M.D. Fla. Aug. 5. 2016); Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015); Browne v. City of Grand Junction, 136 F. Supp. 3d 1276 (D. Colo. 2015); City of Lakewood v. Willis, 375 P.3d 1056 (Wash. 2016).

As we have explained, however, the Noise Provision -- unlike the measure at issue in League of Women Voters -- is not, on its face, dependent for its application on a determination by enforcement authorities regarding the content of the noise made. Rather, its application depends on whether the noisemaker intended to be disruptive in making the noise, whatever its content. Thus, nothing on the face of the Noise Provision indicates that enforcement authorities must examine the content of the speaker's communication in order to find a violation.

As Maine explains, "it is the continuation of [making noise] after a warning notifying the person that he or she is interfering with the safe and effective delivery of health care that is most probative of [the requisite disruptive] intent," rather than the content of anything that a noisemaker may communicate. And, reinforcing this conclusion, the Attorney General represented at oral argument that the state interprets the Noise Provision to apply to a speaker who intentionally makes noise that can be heard inside a medical building with a reckless disregard for the disruptive effect that such loud noise may have on the provision or receipt of health services being offered inside that building.[11]

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[11] In taking account of the Attorney General's construction, see Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."); see also Ward, 491 U.S. at 795-96 (in considering a First Amendment facial challenge, "[a]dministrative interpretation and implementation of a regulation are, of course, highly relevant to

It 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. But, that fact does not show that the measure is content based on its face. Cf. Hill v. Colorado, 530 U.S. 703, 721 (2000) (noting that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose" in finding a measure that restricted the purposes for which persons could be approached near medical facilities to be content neutral). In Grayned, for example, the Court held that the disruptive noise restriction at issue was content neutral, even though that measure targeted noisemakers only if they acted "willfully" in making noise that is "actually incompatible with normal school activity" where there is "a demonstrated causality" between the noise made and the disruption that occurs. 408 U.S. at 113. Thus, that measure, like this one, appeared to contemplate that, in a given instance, the message shouted -- for example, "Shut Down Schools Now!" as opposed to "Keep Them Open!" -- might at least be probative,

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[the] analysis"), we are aware that March contends that the Attorney General's construction "would conflate" the Noise Provision's two separate intent requirements "into one -- merely continuing to make noise after being warned by law enforcement[,]" and, by doing so, would thereby "leave the second intent requirement of intent to interfere with a medical procedure without any operative effect." But, that is plainly wrong. The second intent requirement, unlike the first, would, for example, protect an unwitting speaker who, after having been ordered to stop making noise loud enough to be heard in a nearby medical facility, continues intentionally to make such noise but does so unaware that medical services are being provided nearby at that time.

though not necessarily determinative, of whether the intent standard had been met. Yet, the Court did not find that measure to be content based. And, as we have explained, Reed held that the sign ordinance at issue in that case was content based only because the ordinance's applicability "depend[ed] entirely on the communicative content" of a given sign. 135 S. Ct. at 2227 (emphasis added). Thus, Reed does not suggest that a provision is content based merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent.

Finally, March argues, citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), that the Noise Provision is on its face an "unconstitutional content based restriction because, in 'practical operation,'" it targets "proponents of specific topics." Id. at 391-92 (emphasis added). R.A.V. did not, however, find a measure to be content based on its face in consequence of its "practical operation." Id. R.A.V. instead found only that a measure that was facially content based was in "practical operation" viewpoint based. Id.

Even assuming that such a practical inquiry can make a facially content-neutral measure facially content based -- a surprising proposition for which March cites no authority -- we do not see how this is a case that would yield such an outcome. As we have explained, an inquiry into whether a noisemaker has a disruptive intent -- given the limitless means that one may use to make noise in a disruptive manner -- is not inherently an inquiry into what message a speaker is trying to convey. And, on its face, it is the disruptive intent, and not the message, if any, conveyed with that

intent, that determines whether the Noise Provision applies.

Nor is this conclusion undermined by March's vivid hypothetical, in which he posits a person who stands in front of an abortion clinic and shouts, "Honey, you forgot your lunch!" directly inside the facility. March contends that such a speaker, precisely because of his well-meaning message, obviously will not be found to have the disruptive intent that the statute requires. By contrast, March contends, the anti-abortion protester enjoys no such protection, as the content of that protester's speech will necessarily be found to evince the protester's disruptive intent.

But, while we agree that the provision would be subject to a serious as-applied challenge if its disruptive-intent requirement were enforced in an entirely content-dependent way, the measure does not require, as a practical matter, such uneven, content-based enforcement. As Maine points out, 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. March's seemingly thoughtful shouter is thus not immune, even practically speaking, from the Noise Provision's reach in consequence of the seemingly kind content of his message -- any more than is any noisemaker in consequence of theirs. And, by the same token, the anti-abortion protester is not necessarily subject to the restriction because of the anti-abortion message that he may espouse. The protester is, like the helpful shouter, subject to the Noise Provision's restriction on noisemaking only if he expresses that message in a certain manner -- that is, with the specified disruptive

intent and "after having been ordered by a law enforcement officer to cease," Me. Rev. Stat. Ann. tit. 5, § 4684-B(2) -- and not because of "what he is saying," Grayned, 408 U.S. at 120.

B.

There remains the question whether the Noise Provision, despite its facial neutrality, is "justified without reference to content" or was instead adopted because of the state's disagreement with the content of any message expressed. Ward, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984)). According to Maine, the Noise Provision is content neutral in purpose, just as it is on its face, even accounting for the disruptive-intent requirement, because it (1) aims to protect patients from "[t]he type of noise 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.

To understand why we agree with Maine, it helps to review the findings that the District Court made regarding the differing deleterious effects of certain types of noise -- independent of the communicative content of that noise -- on the provision and receipt of health services. The District Court made these findings in connection with evidence regarding noise heard within the Planned Parenthood Health Center on Congress Street in Portland, where March has been protesting.

Specifically, the District Court found, from the evidence in the record, that "[l]oud 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." March, 2016 WL 2993168 at *3. And, the District Court explained, such noise is problematic because, as common sense would suggest, "[t]o effectively deliver health services, staff need a calm and quiet environment for their interactions with patients." Id. The District Court further found, again based on evidence in the record and in accordance with common sense, that, wholly apart from the content of any message communicated by loud noise, "loud noise distracts patients and renders them unable to concentrate on their discussions with staff," which "in turn causes staff to spend more time repeating instructions to patients, which causes additional delays for the entire facility." Id.

As the District Court pointed out, "[l]oud noise from outside the building has a physiological effect on patients, causing additional stress and elevated blood pressure, pulse, and respiratory rates." Id. at *4 (quotation omitted). As a result, "such noise often causes patients to . . . move to other areas of the Health Center where the noise is less audible," which causes "patients [to be] separated from people who are there to support them." Id.

But, and this is the crucial point, the District Court also found, based on evidence in the record, that a certain type of loud noise -- again, for reasons wholly independent of the content of any message that such noise may convey -- is especially likely to jeopardize

patients' health or to interfere with the delivery and receipt of health services. The District Court explained that, while evidence in the record showed that "[t]ransitory noise produced by parades, sirens, and car horns" has "the potential to disrupt medical care," such loud sounds are "normally brief in duration and any disruption dissipates quickly." Id.

By contrast, according to the District Court, the record showed that "[l]oud and sustained yelling that is audible within the [facility] interferes with the . . . staff's ability to provide care to their patients." Id. at *3. And, the District Court further found, "[u]nabated constant noise that is specifically directed at patients is uniquely disruptive to the . . . ability to provide medical care." Id. at *4 (emphasis added).

These findings support Maine's contention that Maine is regulating a type of loud noise that is likely to be uniquely disruptive for reasons that have to do with the manner in which the noise is made rather than with the content of any message that such noise may convey. After all, given the requirement that the prohibited noise must have been intentionally made after law enforcement authorities order its cessation, the Noise Provision does target only loud noise that is made in a "sustained" manner. Id. at *3. And, given the requirement that the noise be made with the specified disruptive intent, the Noise Provision regulates such sustained loud noisemaking only when it is likely to be "specifically directed" at the building in which health services are provided. Id. at *4. We thus have no reason to doubt that the Noise Provision proscribes a subset of speech that is likely to constitute the kind of "[u]nabated constant noise that is specifically directed

at patients" that the record shows has a "unique" capacity to be disruptive in consequence of the manner -- rather than the content -- of the expression. See id. (emphasis added).[12]

A simple example -- having nothing to do with the charged context that this suit foregrounds -- helps to illustrate why we conclude that, on this record, Maine's decision to target only this subset of loud noise is justified "without reference to the content" of the noise restricted or because of any disagreement with any

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[12] This measure is thus unlike the one addressed in Boos v. Barry, 485 U.S. 312 (1988). There, the Court considered a District of Columbia regulation that prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" Id. at 315. The Court explained that such a regulation may be content neutral if justified by a "secondary effect," such as "congestion," "visual clutter," "interference with ingress or egress," or "the need to protect the security of embassies." Id. at 321. The Court also concluded, however, that such a regulation could not be content neutral if "justified only on the content of speech and the direct impact that speech has on listeners" -- that is, "[t]he emotive impact of speech on its audience." Id. (emphasis in original). But, unlike in Boos, the Noise Provision does not require a judgment as to whether noise tends "to bring [the listener] into 'public odium' or 'public disrepute.'" Id. It is enough under the Noise Provision that the noise -- whatever its communicative content -- is made loud enough for the listener to hear and with the intent to jeopardize the health of people receiving health services or to interfere with the medical service that patients have sought to obtain. Cf. Texas v. Johnson, 491 U.S. 397, 407 n.4 (1989) (stating that regulations justified by the desire merely "to prevent an audience from being offended" may be distinguishable from those justified by the desire "to prevent a violent audience reaction," even where that reaction "would be the result of the message conveyed" by the regulated speech).

message that may be expressed. Reed, 135 S. Ct. at 2227. As any parent knows, a child who makes loud noise in order to disrupt her parent can do so as readily with endearing words as annoying ones, or, for that matter, with "words" that are quite impossible to discern. A parent thus might understandably seek to shush that intentionally disruptive child even as the parent tunes out the nearby sibling whose equally loud sounds are easier to ignore precisely because they are, thankfully, not intended to bother anyone at all. And, in quieting the one child and not the other, the parent is not favoring or disfavoring any message. The parent is merely acting on what we might describe as a perfectly understandable content-neutral interest in putting an end to an unwanted disruption that, because intended, may be especially hard to put out of one's mind. See Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 546-47 (1980) (Stevens, J., concurring) (explaining that "a communication may be offensive in two different ways," in that some speech, "even though elegantly phrased in dulcet tones, [is] offensive simply because the listener disagrees with the speaker's message," while other speech is offensive "[i]ndependently of the message the speaker intends to convey," due to "the form of [the] communication . . . perhaps because it is too loud or too ugly in a particular setting").

The Supreme Court has deployed a similar logic in finding speech restrictions not unlike Maine's to be content neutral. For example, in finding content neutral the restriction on "knowingly approaching" another person for certain purposes outside certain medical facilities, the Court in Hill explained that "[i]t may not be the content of the speech, as much as the

deliberate 'verbal or visual assault,' that justifies proscription." Hill, 530 U.S. at 716 (alteration in original) (emphasis added) (quoting Erzoznik v. City of Jacksonville, 422 U.S. 205, 210-211, n.6 (1975)). Similarly, in Frisby v. Schultz, 487 U.S. 474 (1988), the Court concluded that the fact that an ordinance prohibiting picketing in front of a single home -- conduct that obviously conveyed to the homeowner that he was the object of the expression -- did not render the ordinance content based. Id. at 488. The Court emphasized that targeted picketing "inherently and offensively intrudes on residential privacy," resulting in a "devastating effect . . . on the quiet enjoyment of the home," regardless of whether "such picketers have a broader communicative purpose," id., and that "the 'evil'" of the restricted speech was thus not what was said but only "the medium of expression itself," id. at 486 (quoting Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).

C.

For these reasons, we reject the contention that, on its face or in its object, the Noise Provision is content based. Rather, we conclude that, the measure is a content-neutral restriction on the time, place, or manner of expression that, accordingly, need be justified only under the standard of review to which such content-neutral speech restrictions are subject in order to survive this facial constitutional challenge.

III.

Because the District Court concluded that the Noise Provision is content based, the District Court did not address whether the measure survives the less-

demanding standard of scrutiny -- often referred to as intermediate (as opposed to strict) scrutiny -- applicable to content-neutral restrictions. Neither party, however, asks us to remand the case for the District Court to apply that form of review in the first instance or to undertake further factual development. Rather, both parties have briefed the issue fully. We thus turn to the question whether the Noise Provision can survive March's facial challenge under the intermediate level of scrutiny that usually applies to content-neutral speech restrictions. See Cutting, 802 F.3d at 86 (declining to remand for the District Court to apply intermediate scrutiny in the first instance). That inquiry requires us to determine if the restriction is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information. See Ward, 491 U.S. at 791.

A.

We begin by considering the strength of the interest that Maine seeks to advance through the Noise Provision. Maine asserts a number of interests, including that the Noise Provision is intended to ensure that "all of [Maine's] citizens are able to receive safe and effective health care." And, as the District Court recognized, that interest is quite clearly a significant one. March, 2012 WL 2993168 at *12.[13]

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[13] Maine emphasizes, in addition, that "patients arriving at a facility for abortion services are already in a highly emotional and anxious state," particularly if they have "recently experienced emotional or physical trauma." Maine further emphasizes that the difficulties communicating with such patients are often

For example, in finding that a restriction on noise outside an abortion clinic served a significant governmental interest, the Supreme Court in Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994), explained that hospitals are places "where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere." Id. at 772 (quoting NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84 n.1 (1979)). And, the Court added, "[t]he First Amendment does not demand that patients in a medical facility undertake Herculean efforts to escape the cacophony of political protests." Id. at 772-73. Moreover, as the Court has elsewhere explained, the "privacy interest in avoiding unwanted communication" is strongest when listeners are "powerless to avoid it" -- for example, because they are being targeted "in the confines of [their] own home[s]" or, as here, when they are "patients at a medical facility." Hill, 530 U.S. at 716 (citations omitted).

March contends that the Noise Provision "cannot be regarded as protecting" a significant governmental interest because "it leaves appreciable damage to [the]

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exacerbated by such patients' relative lack of sophistication "when it comes to obtaining health care," and by language difficulties. From the record before us, those concerns would appear to apply equally to patients seeking to receive other types of health services in the state, and March does not contend otherwise.

supposedly vital interest unprohibited."[14] Reed, 135 S. Ct. at 2232 (citation omitted). Specifically, March argues that the state's interest is implicated equally by noise made loudly and in a sustained fashion but without the disruptive intent specified in the Noise Provision. March therefore contends that the measure is fatally underinclusive. March notes in this regard that a restriction on the decibel level or duration of noise, or perhaps both combined, would better address the disruption Maine claims to be addressing. And yet, March contends, Maine has opted for a less protective restriction that -- through its disruptive-intent requirement -- invites an examination of the content of the message communicated by the noise.

We agree with March that, if a speech restriction tolerates too much of the very harm that the state claims it is trying to address, there may be reason to doubt the seriousness of that harm. See Reed, 135 S. Ct. at 2232. In addition, when a restriction on speech is underinclusive, there may be reason to doubt "whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." See Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1668 (2015) (quoting Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 802 (2011)); see also Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (explaining

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[14] March chiefly presses his underinclusiveness argument in connection with his argument as to why the Noise Provision, if content based, would fail strict scrutiny. March makes at most a glancing argument as to why the Noise Provision, if found to be content neutral, would fail intermediate scrutiny due to its alleged underinclusiveness. We nonetheless reject the argument even assuming it is preserved.

that the very idea that the government "has an interest in preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment"); Snyder v. Phelps, 562 U.S. 443, 458 (2011) (explaining that speech may not be restricted "simply because it is upsetting").

In this case, however, there is no underinclusivity problem of the sort that March alleges. As we have explained, March does not challenge the District Court's finding that "[u]nabated constant noise that is specifically directed at patients" is "uniquely disruptive." March, 2016 WL 2993168 at *4 (emphasis added). And, as we have also explained, noise that is (1) intentionally made loud enough to be heard inside a building, (2) in disregard of an earlier order by law enforcement to cease making it, and (3) with an intent to jeopardize the health of those receiving medical services in that building or to interfere with the effective delivery in that building of those services, would seem to be just that kind of noise. Thus, 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, we cannot say that Maine has chosen to leave "appreciable damage to [the] supposedly vital interest unprohibited." Reed, 135 S. Ct. at 2232 (citation omitted).

For this reason, this case is not like Cutting, 802 F.3d 79, on which March mistakenly relies. There, we held that, because a city had identified only a small subset of expressive activity that actually caused harm, the city's sweeping speech restriction could not be justified. See id. at 89-90. Here, by contrast, the Noise

Provision targets the subset of noise that Maine has identified as being especially problematic.

B.

March next contends that, even if the Noise Provision does serve Maine's claimed interest in protecting the safe and effective provision and receipt of health services, the Noise Provision is facially unconstitutional because it is not narrowly tailored to serve that interest. Here, too, we disagree.

The narrow tailoring requirement does not demand perfect tailoring. The requirement is "satisfied as long as the particular regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F.3d 25, 33 (1st Cir. 2001) (quotation omitted). Nevertheless, the narrow tailoring restriction does require "that a challenged speech restriction not burden 'substantially' more speech than is necessary to further the government's interest." Cutting, 802 F.3d at 86 (quoting McGuire v. Reilly, 260 F.3d 36, 48 (1st Cir. 2001)).

Maine, relying on Frisby's conclusion that the targeted picketing ordinance there was narrowly tailored because it applied only to speakers who intended to "intrude upon the targeted resident . . . in an especially offensive way," 487 U.S. at 486, contends that the Noise Provision "prohibits only the making of noises that can be heard within a building and [are] made with the intent to interfere with the safe and effective delivery of health services." As a result, Maine argues that the Noise Provision does not restrict

substantially more speech than necessary because "[t]here is simply no way that the restriction could be more narrowly tailored."

March argues in response that the Noise Provision is too sweeping because it applies "24-hours a day, seven days a week regardless of the actual hours that 'health services' are being offered or the hours of the building's operation." (quoting Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D)). In fact, however, the Attorney General has interpreted the Noise Provision not to apply when a building providing health services is closed, or when there are no patients inside, and we have no reason not to accept that perfectly sensible representation about how the disruptive-intent requirement operates. See Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 131 (1992); Ward, 491 U.S. at 795-96; Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 66 (1st Cir. 2011).

March contends, next, that the Noise Provision is not narrowly tailored because it applies to public fora including streets and sidewalks. But, without more, this fact hardly shows that this provision is not narrowly tailored. After all, we evaluate whether this restriction is narrowly tailored in part because it applies to speech in traditional public fora.

Finally, March posits that the statute is "extremely broad in manner" because it "has no decibel level requirements or even shouting requirements, allowing enforcement against . . . lone, unamplified voices." March suggests that by requiring only that noise be loud enough to be heard within a building, the Noise Provision "allows abortion providers to claim violations where none exist."

To be subject to the Noise Provision, however, a "lone, unamplified voice[]" must still be loud enough to be heard within a building and must speak with the requisite disruptive intent. Thus, the requirements laid out on the face of the Noise Provision do not indicate that the measure would apply to speech expressed at a normal, conversational tone -- or even at a louder volume -- absent the speaker's intent to disrupt the provision or receipt of medical services.

March appears to be contending in part that this disruptive-intent requirement does not meaningfully narrow the measure's scope in light of his apparent belief that the messages he wishes to propound will necessarily establish the requisite intent. But, for reasons we have explained, the face of the measure provides no support for this understanding of its application, and we need not consider "[p]articular hypothetical applications of the [challenged] ordinance" which "may present somewhat different questions" than the question whether the ordinance is constitutional on its face. Frisby, 487 U.S. at 488.

March does allege several examples where enforcement of the Noise Provision seems to have been inconsistent with the face of the provision, both in terms of uneven application to different speakers and in terms of the permissible volume of regulated speech. It is not entirely clear whether March means for these points to constitute the basis for a facial challenge rather than an as-applied one, and the record contains conflicting evidence. But, in any event, we have no basis for concluding that inconsistent enforcement of the type that March alleges has occurred outside the Planned Parenthood Health Center in Portland is

mandated by the measure. Moreover, March's allegations about how the measure may have been enforced in ways that the terms of the measure do not require at a lone clinic in a single city do not suffice to render the state statute too sweeping on its face. See United States v. Stevens, 559 U.S. 460, 473 (2010) (noting that courts will not find a speech restriction facially overbroad under the First Amendment unless "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").[15]

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[15] In addressing whether the Noise Provision satisfies strict scrutiny, March relies on R.A.V., 505 U.S. at 395, to contend that the measure is not the least restrictive means necessary to achieve the state's interest because the measure could have relied on a "content neutral alternative" to the intent requirement, such as limiting the volume or duration of noise, which he contends would have had "the same beneficial effect." March does not raise a similar argument with regard to whether the Noise Provision satisfies intermediate scrutiny, which does not require that the restriction be the least restrictive possible means to achieve the state's interest. See Cutting, 802 F.3d at 86. Thus, it is not clear that March means to make this argument in connection with his contention that the measure fails even the less-demanding scrutiny that applies to content-neutral measures. But, insofar as this argument is properly before us, we note that, for the reasons we have explained, the disruptive-intent requirement is not content based. And thus this measure does not on its face privilege a content-based means over a content-neutral one. Nor, given the state's interest in reducing the unique harm caused by noise that is targeted directly at patients, is Maine lacking a content-neutral reason for concluding that a limit on decibel level or duration would not serve its asserted interest just as well as would this measure. Rather, such a decibel or durational limit would, instead, restrict more speech than Maine claims to have any comparable need to restrict. And Maine can hardly be faulted under the First Amendment for regulating in such a tailored fashion.

C.

We turn, then, to the final aspect of the inquiry: whether the Noise Provision, at least on its face, "leave[s] open ample alternative channels for communication." Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293). We conclude that it does.

The Supreme Court held that the disruptive noise restriction in Grayned left open ample alternative channels of communication because permitted means of expression, like "picketing and handbilling[,] . . . can effectively publicize grievances" to both those within a building and passersby. 408 U.S. at 119; see also Frisby, 487 U.S. at 484 (explaining that the prohibition on targeted picketing "preserves ample alternative channels of communication" because protesters may still "enter [residential] neighborhoods, alone or in groups, even marching[,]" "go door-to-door to proselytize their views" or "distribute literature," "distribute literature . . . through the mails," and "contact residents by telephone"). Maine emphasizes that the Noise Provision similarly 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 views loudly enough to be heard in the immediate vicinity."

March responds that, in fact, the measure does not leave open alternative channels of communication because it prohibits him from "rais[ing] his voice to be heard even by those close to him over the volume of the traffic," and thus "effectively eliminates [his] ability to counsel . . . women on a public sidewalk." But the face of the Noise Provision simply does not show that it

restricts speech in the manner that March contends. And, as we have explained, March misapprehends the nature of a facial challenge to the extent that his argument relies on allegations about how the statute has been applied (or, perhaps, how it has been misapplied) in certain specific instances. We thus see no basis for accepting the only contention that he makes for concluding that the measure does not permit ample alternative channels of communication.

March therefore has not shown that the measure, on its face, fails this aspect of intermediate scrutiny. And, in light of our conclusions regarding the preceding aspects of our analysis under this form of review, the Noise Provision survives intermediate scrutiny.

IV.

The Noise Provision was the product of a careful legislative process. That process sought to forge a consensus among many competing interests in order to address what all parties to this dispute agree is a serious concern regarding the health and safety of those seeking health services. The result is a facially content-neutral measure that targets noise for reasons that have nothing to do with the content of any topic discussed, idea propounded, or message conveyed. Moreover, by its terms, the measure serves that significant state interest without burdening substantially more speech than necessary and while leaving open ample alternative avenues for communication. Accordingly, March has not shown that he has a likelihood of success on the merits of his facial constitutional challenge to the Noise Provision. The judgment of the District Court is therefore **reversed**.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1771

[Filed August 8, 2017]

ANDREW MARCH,

Plaintiff, Appellee,

v.

JANET T. MILLS, individually and in her official capacity as Attorney General for the State of Maine,

Defendant, Appellant,

CITY OF PORTLAND, MAINE; WILLIAM PREIS, individually and in his official capacity as a Police Lieutenant of the City of Portland; JASON NADEAU, individually and in his official capacity as a Police Officer of the City of Portland; GRAHAM HULTS, individually and in his official capacity as a Police Officer of the City of Portland; DONALD KRIER, individually and in his official capacity as a Police Major of the City of Portland,

Defendants.

JUDGMENT
Entered: August 8, 2017

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed.

By the Court:
/s/ Margaret Carter, Clerk

cc:
Hon. Nancy Torresen
Christa Berry, Clerk, United States District Court for the District of Maine
Stephen C. Whiting
Kate Margaret-O'Reilly Oliveri
John J. Wall III
Leanne Robbin
Christopher C. Taub
Edward R. Benjamin Jr

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket No. 2:15-cv-515-NT

[Filed May 23, 2016]

ANDREW MARCH,	)
	)
Plaintiff,	)
	)
v.	)
	)
JANET T. MILLS, Attorney General for the State of Maine, CITY OF PORTLAND, WILLIAM PREIS, Police Lieutenant of the City of Portland, JASON NADEAU, Police Officer of the City of Portland, DONALD KRIER, Police Major of the City of Portland, GRAHAM HULTS, Police Officer of the City of Portland,	)
	)
Defendants.	)

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Before the Court is the Plaintiff's motion for a preliminary injunction pursuant to Federal Rule of

Civil Procedure 65(a) (ECF No. 4). For the reasons stated below, the motion is **GRANTED**.

BACKGROUND

This case presents the difficult question of whether a state law providing protection to women seeking access to constitutionally-protected health care violates the First Amendment rights of an individual who wishes to voice his opposition to abortion on a public sidewalk. I conclude that it does.

The plaintiff in this case is Andrew March. He is a Christian pastor and co-founder of a church in Lewiston, Maine called Cell 53. Dec. 28, 2015 March Decl. ¶ 4 ("**First March Decl**.") (ECF No. 5-1). Part of the mission of Cell 53 "is to plead for the lives of the unborn at the doorsteps of abortion facilities." First March Decl. ¶ 5. March believes that "abortion is the killing of unborn citizens" and that it "harms women." First March Decl. ¶¶ 6-7. He voices his opposition to abortion outside the Planned Parenthood Portland Health Center on Congress Street in downtown Portland (the "**Health Center**"). First March Decl. ¶¶ 8-15. The Defendants in this case are the Maine Attorney General, the City of Portland (the "**City**"), and Portland law enforcement officers who interacted with March outside of the Health Center in November and December of 2015.

This is not the first lawsuit sparked by activity outside the Health Center. In 2014, abortion opponents challenged a City ordinance that created a buffer zone around the Health Center. *See Fitzgerald v. City of Portland*, 2:14-cv-53-NT, 2014 WL 5473026 (D. Me. Oct. 27, 2014). The City repealed the ordinance after

the United States Supreme Court struck down a similar Massachusetts regulation in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Following the repeal of the buffer zone, the City looked to alternative ways to address protests outside of the Health Center. Sept. 2, 2014 Memo. re: Reproductive Health Facility Protests—Buffer Zone Alternatives ("**Sept. 2, 2014 Memo**") (ECF No. 43-2). Counsel for the City advised against passing any new regulations, and instead recommended—consistent with *McCullen*—that law enforcement focus on enforcing existing laws. Sept. 2, 2014 Memo. 6 ("[T]he city should not pursue passage of any new regulations at this time. This is particularly true given the potential of another lengthy legal battle, and considering our current legal expenses and pending budget challenges."); *cf. McCullen*, 134 S. Ct. at 2538 (pointing out that the state had less-intrusive, targeted laws it could enforce to address problems around clinics that would burden less speech than a generally applicable buffer zone). One of the existing laws counsel for the City identified to address issues around the Health Center was the Maine Civil Rights Act, 5 M.R.S.A. § 4684-B.

The Maine Civil Rights Act ("**MCRA**") was enacted in 1989. In broad strokes, 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 the exercise or enjoyment by any other person" of rights secured by the United States or Maine Constitutions or federal or state laws. 5 M.R.S.A. §§ 4681, 4682. The MCRA authorizes suit by the Attorney General or any aggrieved person. *Id.*

In 1995, the Office of the Attorney General submitted a bill to amend the MCRA by adding a section that prohibited certain conduct in and around reproductive health facilities. L.D. 1216 (117th Legis. 1995) (ECF No. 36-1). Through the legislative process, the scope of protection was expanded to cover conduct outside all buildings, rather than just reproductive health facilities. One observer noted that this change made the bill "generic or neutral . . . [t]he new bill protects all buildings and business establishments . . . including crisis pregnancy centers, pro-life groups' headquarters and offices, etc." L.D. 1216 at 29 (117th Legis. 1995). A summary of the proposed bill included a section on why it had been offered:

> The history of civil rights enforcement in this country over the past several years has demonstrated that the most extreme violence tends to occur in situations where less serious civil rights violations are permitted to escalate. When the rhetoric of intolerance and the disregard for civil rights do, in fact, escalate, then some people at the fringes of society will take that atmosphere as a license to commit unspeakable violence. The amended version of L.D. 1216 represents a commitment on the part of both sides of the abortion debate to reduce tensions in order to lessen the chances of tragic violence.

L.D. 1216 at 14 (117th Legis. 1995). As enacted, the amendment made it a violation of the MCRA to interfere or attempt to interfere with a person's civil rights by: (1) physically obstructing the entrance or exit of a building; (2) making repeated telephone calls to

disrupt activities in a building; (3) setting off any device that releases "noxious and offensive odors" within a building; or (4) making noise that can be heard within a building, after having been ordered by law enforcement to stop, with the intent to jeopardize or interfere with the delivery of health services inside. 5 M.R.S.A. § 4684-B(2).

In the instant suit, March challenges the constitutionality of the noise portion of the amendment, which reads:

> 2. **Violation.** It is a violation of this section for any person, whether or not acting under color of state law, to intentionally interfere or attempt to intentionally interfere with the exercise or enjoyment by any other person 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.

5 M.R.S.A. § 4684-B(2)(D) (the "**Noise Provision**").[1]

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[1] "Building" is defined as "any structure having a roof or a partial roof supported by columns or walls that is used or intended to be used for shelter or enclosure of persons or objects regardless of the materials of which it is constructed." 5 M.R.S.A. § 4684-B(1)(A). "Health service" is defined as "any medical, surgical, laboratory,

March filed suit in December of 2015, along with a motion for a preliminary injunction. Compl. (ECF No. 1); Pl.'s Mot. for Prelim. Inj. (ECF No. 4). He later filed an amended complaint. First Am. Compl. (ECF No. 30). The parties declined to exchange discovery or present evidence through a hearing in connection with the preliminary injunction motion, and instead simply chose to present their positions through oral argument. Report of Hr'g & Order Re: Scheduling (ECF No. 46). The parties also submitted supplemental briefing to address additional questions raised at oral argument. Thus, the evidence at my disposal is limited to the declarations, videos, and additional documents the parties attached as exhibits to their preliminary injunction briefing.

FACTUAL FINDINGS

The Health Center is located on the second floor of a building on Congress Street, a loud and busy thoroughfare. First March Decl. ¶¶ 10, 22; Feb. 22, 2016 March Decl. ¶ 6 ("**Second March Decl**.") (ECF No. 43-5). The Health Center relocated to Congress Street in September of 2011. Feb. 8, 2016 Healey Aff. ¶ 4 ("**Healey Aff.**") (ECF No. 38). After this relocation, protesters opposed to abortion began to congregate on the sidewalk in front of the entrance to the Health Center. Healey Aff. ¶ 5. Approximately a dozen protesters would gather along the sidewalk carrying signs, handing out literature, and attempting to engage in conversation with individuals entering the building. Healey Aff. ¶ 7. In response to these protests, the

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testing or counseling service relating to the human body." *Id.* at § 4684-B(1)(B).

Health Center implemented a "greeter program" whereby volunteers would stand outside of the facility to escort patients past the protesters into the Health Center. Healey Aff. ¶ 6. The Health Center also hired City police officers to stand outside to ensure that patients could safely enter and exit the facility. Healey Aff. ¶ 6.

Although protesters had gathered on the sidewalk outside of the Health Center for years, they generally could not be heard within the facility. Healey Aff. ¶ 26. But after the City repealed the buffer zone ordinance around the Health Center, the protesters became much louder. Healey Aff. ¶¶ 8-9. One protester, Brian Ingalls, began yelling disruptively outside of the Health Center, occasionally yelling directly at patients inside the facility. Healey Aff. ¶ 10. At times, his yelling could be heard inside the Health Center's waiting room, counseling rooms, and an exam room. Healey Aff. ¶ 11. In the counseling rooms, employees obtain patients' medical histories, take vital signs, discuss treatment options, potential risks, complications, and side-effects. Healey Aff. ¶ 12. Employees also explain what a patient should expect post-procedure and what at-home care the patient may require, while also answering questions and ensuring that the patient has provided informed consent to the treatment. Healey Aff. ¶ 12. Medical examinations and procedures are performed in the Health Center's exam rooms. Healey Aff. ¶ 13.

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. Healey Aff. ¶ 15. This noise is problematic because:

- To effectively deliver health services, staff need a calm and quiet environment for their interactions with patients. Healey Aff. ¶ 14. 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." Feb. 8, 2016 Dowling Aff. ¶ 8 ("**Dowling Aff.**") (ECF No. 35).

- 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." Dowling Aff. ¶ 10. If a patient does not understand or retain this information, the medical repercussions can be significant. Dowling Aff. ¶ 10.

- 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. Dowling Aff. ¶¶ 11-12

- "When abortion procedures are delayed, the medical risks associated with such procedures

increase." Dowling Aff. ¶ 13; *see also* Healey Aff. ¶ 20. At least one patient requested that her appointment be postponed to a later date "because of the disruptive effect of noise." Dowling Aff. ¶ 13.

- "[D]elays have an escalating effect throughout the facility" because they impact all patients waiting for care. Dowling Aff. ¶ 15. "The longer patients wait, the longer they are subjected to the loud shouting of protesters, with a corresponding increase in their agitation and emotional distress." Dowling Aff. ¶ 15.

- Loud noise from outside the building has a physiological effect on patients, causing "additional stress and elevated blood pressure, pulse, and respiratory rates." Healey Aff. ¶ 16. Such physical effects interfere with medical care because patients require "additional evaluation and treatment." This also can lead to treatment being delayed. Healey Aff. ¶ 16.

- The Health Center provides "many patients with anti-anxiety medications prior to abortion procedures." Healey Aff. ¶ 18. 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." Healey Aff. ¶ 18. Providing these additional doses can result in further delay of care. Healey Aff. ¶ 18.

- 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. Healey Aff. ¶¶ 29-30.

Furthermore, such noise often causes patients to complain to staff and ask to move to other areas of the Health Center where the noise is less audible. Healey Aff. ¶ 22. The Health Center has tried to mitigate the impact of noise on their patients by relocating exam rooms and moving patients into recovery areas where the noise is less audible. This can be problematic, however, because patients are then separated from people who are there to support them, as recovery areas are restricted to patients and staff. Healey Aff. ¶ 28.

The Health Center contacts the police when at least two staff members determine that the noise level outside has reached a point where it is having an impact on patients and interfering with the staff's ability to provide medical care. Healey Aff. ¶ 23. Typically, the responding police officer will enter the Health Center to verify the noise level before taking any action.[2] Healey Aff. ¶ 24. The Health Center called the police on multiple occasions after Ingalls repeatedly yelled and screamed directly at patients inside the Health Center. Healey Aff. ¶ 10.

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[2] The parties dispute whether the noise level was verified by police on the instances where the Health Center lodged complaints against March. *See* pg. 10 n.4 *infra*.

In October of 2015, the Attorney General's Office brought an action against Ingalls under the MCRA. Feb. 8, 2016 Robbin Aff. ¶ 4 ("**Robbin Aff.**") (ECF No. 37). Since the MCRA was enacted in 1995, the Attorney General's Office has filed 12 other actions relating to incidents around clinics that provide abortion and family planning services. Robbin Aff. ¶ 5. Ten actions have been filed to protect abortion protesters' First Amendment rights and two actions have been brought against abortion protesters. Robbin Aff. ¶ 5. The Ingalls case is the first instance in which the Attorney General's Office has brought a case under the Noise Provision of the MCRA. *See* Robbin Aff. ¶ 6.

After the State sued Ingalls under the MCRA, March began preaching on the public sidewalk in front of the Health Center. First March Decl. ¶ 11. He preaches from the sidewalk so he can effectively reach his intended audience of women and employees before they enter the Health Center. First March Decl. ¶¶ 20-21. The parties' affidavits conflict on whether March ever shouted, but he was loud enough to be heard within the Health Center on three occasions.[3] He does

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[3] Healey avers that on November 6, December 4, and December 11, 2015, March could be heard within the building and was disrupting patient care. Feb. 8, 2016 Healey Aff. ¶ 25 ("**Healey Aff.**") (ECF No. 38). March does not dispute that he could be heard within the building, but he does argue that he was "peacefully" preaching on those dates. Dec. 28, 2015 March Decl. ¶¶ 27, 50, 61 ("**First March Decl.**") (ECF No. 5-1). Sneddon claims that March peacefully preaches at a normal volume and was not excessively loud on November 6, 2015. Dec. 28, 2015 Sneddon Decl. ¶¶ 6, 12 ("**First Sneddon Decl.**") (ECF No. 5-2). Leen asserts that March never shouts or yells, that he was "peacefully preaching" on November 6 and December 4, and that he was "preaching" on

not engage in group chanting or use an amplification device while preaching outside of the Health Center. First March Decl. ¶¶ 12-15.

On November 6, 2015, March was approached by Defendant Nadeau and another police officer while he was preaching on the sidewalk outside of the Health Center. First March Decl. ¶¶ 27-28. Officer Nadeau informed March that he had received a complaint from a Health Center employee who said that March could be heard within the building. First March Decl. ¶ 29. The parties dispute whether the police officers verified whether March could be heard inside the building.[4] When March asked Officer Nadeau for an objective volume at which he could speak, Officer Nadeau informed him that there was no objective volume and that the law was based on whether Health Center employees could hear him inside. First March Decl. ¶ 32. After March again asked Officer Nadeau for an objective standard, he requested that March keep his voice down so they cannot hear him inside. Pl.'s Ex. B (ECF No. 9).

An officer approached March later that day and handed him a copy of the MCRA. First March Decl.

December 11, 2015. Dec. 29, 2015 Leen Decl. ¶¶ 6, 19, 29, 36 ("**Leen Decl.**") (ECF No. 5-3).

[4] Healey asserts that typically the police verify the noise level before taking any action, and that the police likely verified March's volume on all three occasions that they spoke to March. Healey Aff. ¶¶ 24, 25. March and Leen assert "upon information and belief" that the police officers who approached him on November 6, 2015 did not confirm that his voice could be heard inside the building. First March Decl. ¶ 30; Leen Decl. ¶ 21.

¶¶ 41-42. The officer informed March that he was officially being warned under the MCRA. First March Decl. ¶ 45. After March was officially warned, he spoke at a quieter volume, but this made it more difficult for him to convey his pro-life message over the noise on Congress Street. First March Decl. ¶ 47. March feared he would be completely banned from speaking on the sidewalk. First March Decl. ¶ 48.

On December 4, 2015, March was again preaching on the sidewalk in front of the Health Center when Defendant Lieutenant Preis told him to lower his voice. First March Decl. ¶¶ 50-51. Earlier in the day, a climate change march, which included hundreds of people shouting and chanting in unison, had passed in front of the Health Center on Congress Street. First March Decl. ¶ 25. March asked Lieutenant Preis why the much louder climate change protest was permissible but his preaching was not. First March Decl. ¶ 52. Lieutenant Preis explained to March that the MCRA 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. Pl.'s Ex. F (ECF No. 9). Lieutenant Preis acknowledged that the standard was "very grey" and that other noises may be louder than March. First March Decl. ¶ 55; Pl.'s Ex. F. March asked Lieutenant Preis if the content of his speech was the problem, and Preis said that it was a combination of things. Pl.'s Ex. F. March responded that, what Lieutenant Preis had just said to him was that it was not necessarily his volume that was the problem, but the content of what he was saying. Pl.'s Ex. F. Lieutenant Preis again explained that the MCRA applies if the noise that someone makes, which could be content, interferes with the ability of

somebody to deliver medical services. Pl.'s Ex. F. March's interaction with Preis made him fear that he would be sued for preaching on the sidewalk. First March Decl. ¶ 60.

On December 11, 2015, March was again preaching outside of the Health Center. Second March Decl. ¶ 1. A Health Center employee came down to the sidewalk and told Defendant Officer Hults that March could be heard upstairs. Second March Decl. ¶ 2. After going upstairs to confirm the employee's allegation, Officer Hults gave March the "thumps up sign," which March interpreted to mean he could continue to speak at the same volume. Second March Decl. ¶ 4. Approximately 20 minutes later, a Health Center employee came back downstairs and spoke with Officer Hults. Second March Decl. ¶ 6. After speaking with the employee, Officer Hults told March to quiet down.[5] First March Decl. ¶¶ 61-62. He also told March he could be charged with disorderly conduct. First March Decl. ¶ 66.

On other occasions, individuals outside of the Health Center have been louder than March and other pro-life advocates. For instance, an unidentified man often loudly plays guitar and sings down the road in front of the Health Center. Dec. 29, 2015 Leen Decl. ¶¶ 15-16 ("**Leen Decl.**") (ECF No. 5-3). In October of 2015, a woman yelled at Ingalls outside of the Health Center for approximately five minutes. Feb. 20, 2016 Hebert Decl. ¶¶ 12-13 ("**Hebert Decl.**") (ECF No. 43-3). The woman was not cited under the MCRA. Hebert

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[5] March also attests that Officer Hults did not reconfirm that he could be heard within the Health Center on December 11, 2015. Second March Decl. ¶ 7.

Decl. ¶¶ 14-15. On or about December 18, 2015, another woman loudly yelled and cursed at March on the sidewalk outside of the Health Center. Leen Decl. ¶¶ 17-18. March asked a nearby police officer if the woman's behavior violated the MCRA, and the officer said that the woman had a right to free speech. Leen Decl. ¶ 17. And pro-choice advocates frequently yell and scream at pro-life advocates outside of the Health Center for up to ten minutes at a time. Hebert Decl. ¶¶ 20-23.

Since March filed a motion for a preliminary injunction on December 30, 2015, he has continued to preach on the sidewalk outside of the Health Center. On January 8, 2016, March stood on a milk crate outside of the Health Center and spoke to passers-by and a group of protesters. Robbin Aff. ¶ 7; *see* Ex. A to Robbin Aff. (ECF No. 37-1). March could be heard by those in his vicinity even though he did not yell or raise his voice. Robbin Aff. ¶ 7. Likewise, on January 28, 2016, March again stood on a milk crate on the sidewalk outside of the Health Center for an hour to an hour and a half and spoke about his opposition to abortion. Healey Aff. ¶ 27. Although March could be heard by others on the sidewalk, the Health Center did not complain to the police because he could not be heard inside the building. Healey Aff. ¶ 27.

DISCUSSION

The Plaintiff challenges the Noise Provision as a violation of the First and Fourteenth Amendments, both facially and as-applied. Because I find that the Plaintiff is likely to succeed on his claim that the Noise Provision is facially unconstitutional, I do not go on to consider the as-applied challenge.

I. Legal Standard for Injunctive Relief and Burdens of Proof

A plaintiff seeking a preliminary injunction must demonstrate: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest." *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015). The First Circuit has described likelihood of success on the merits as "the main bearing wall" of the preliminary injunction standard. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996); *accord Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013).

As the party seeking a preliminary injunction the Plaintiff bears the overall burden of showing a likelihood of success on the merits. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). In the First Amendment context, the moving party must make an initial showing that the challenged law infringes on First Amendment rights. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984). If a plaintiff makes this initial showing, then the burden shifts to the government to justify its regulation on speech. *See Ashcroft*, 542 U.S. at 666; *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) ("Courts asked to issue preliminary injunctions based on First Amendment grounds face an inherent tension: the moving party bears the burden of showing likely success on the merits—a high burden if the injunction changes the status quo before trial—and yet within that merits

determination the government bears the burden of justifying its speech-restrictive law.").

II. Likelihood of Success on the Merits

A. Legal Background

1. Facial Challenge

Generally, a plaintiff mounting a facial attack must meet the demanding burden of "establish[ing] 'that no set of circumstances exists under which [the law] would be valid.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In the First Amendment context, however, this requirement is refined: a plaintiff can attack a law on its face by arguing that it "do[es] not have 'a plainly legitimate sweep.'"[6] *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). In addressing the facial challenge, I focus "not on the historical facts of how the statute has been applied," but on the text of the law itself. *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004).

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[6] A party may also mount a second type of facial challenge to a statute under the overbreadth doctrine. Under this standard, "[a] facial challenge may . . . succeed where even though 'one or more valid application exists, the law's reach nevertheless is so elongated that it threatens to inhibit constitutionally protected speech.'" *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 n.7 (1st Cir. 2014) (quoting *McGuire v. Reilly*, 260 F.3d 36, 47 (1st Cir. 2001)). Here, the Plaintiff does not raise an overbreadth challenge.

2. Framework for Analysis Under the First Amendment

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I. "Freedom of speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'" *McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001) [hereinafter *McGuire I*] (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.)). Freedom of speech, however, is not an absolute right. At times, it must be weighed against other rights and legitimate interests that the state seeks to protect, and "[t]his balance may be weighted differently . . . depending upon the nature of the restriction that the government seeks to foster." *Id.*

The well-recognized framework for addressing the constitutionality of the Noise Provision turns on three considerations: (1) whether the First Amendment protects the speech at issue; (2) the nature of the forum; and (3) the appropriate level of scrutiny. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). It is undisputed that the Plaintiff's speech is protected under the First Amendment[7] and that the Noise Provision restricts speech in a public forum. Traditional public fora—such as sidewalks, streets, and parks—"occupy a 'special position in terms of First Amendment protection'

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[7] Only a few categories of speech are not protected by the First Amendment. These categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468 (2010).

because of their historic role as sites for discussion and debate." *McCullen*, 134 S. Ct. at 2529 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). Given this importance, the government's ability to regulate speech in these fora is highly constrained. *Id*. at 2529.

Turning to the third factor, the proper level of scrutiny depends on whether the law is content-based or content-neutral. The government may not "inhibit, suppress, or impose differential content-based burdens on speech" *McGuire I*, 260 F.3d at 42. Such restrictions are generally impermissible because they "pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives." *Id.* Given this high risk, content-based restrictions are subject to strict scrutiny. *See R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 386 (1992). Under this exacting standard, the law "must be the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). Although content-based restrictions are presumed unconstitutional, *R.A.V.*, 505 U.S. at 382, such restrictions can survive in rare cases. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

"[W]hen a statute does not regulate speech per se, but, rather, restricts the time, place, and manner in which expression may occur," judicial review is more lenient. *McGuire I*, 260 F.3d at 43. These "laws are less threatening to freedom of speech because they tend to burden speech only incidentally, that is, for reasons

unrelated to the speech's content or the speaker's viewpoint." *Id.* Accordingly, while content-based restrictions are presumed unconstitutional, content-neutral time, place, and manner restrictions "enjoy a presumption of constitutionality." *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 33 (1st Cir. 2008). Such restrictions are subject to intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC*., 512 U.S. 622, 642 (1994). Under this standard, the government must demonstrate that the restriction "is 'narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information.'" *Cutting v. City of Portland*, 802 F.3d 79, 84 (1st Cir. 2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

As evidenced by the number of sharply divided Supreme Court cases on the topic, determining whether an ordinance is content-neutral or content-based is tricky,[8] and abortion protest cases are uniquely challenging. Two recent Supreme Court cases—*McCullen* and *Reed*—shed light on this difficult inquiry.

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[8] *See Turner Broad. Sys., Inc. v. FCC*., 512 U.S. 622, 642 (1994) "deciding whether a particular regulation is content based or content neutral is not always a simple task."); s*ee also City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986) (applying content-neutral standard to a law that applied only to theaters showing films with sexually explicit content because law was aimed at the secondary effects of adult theatres on the surrounding community).

a. *McCullen*

The Supreme Court addressed the constitutionality of a Massachusetts law which established buffer zones around abortion facilities in *McCullen*. The law provided:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012), *invalidated by McCullen*, 134 S. Ct. at 2541, *repealed by* 2014 Mass. Legis. Serv. Ch. 197 (S.B.2283) (West). The law defined a "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." *Id.* § 120E½(a). And the law exempted:

> (1) persons entering or leaving such facility; (2) employees or agents of such facility acting within the scope of their employment; (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to such

> facility solely for the purpose of reaching a destination other than such facility.

McCullen, 134 S. Ct. at 2526 (citation and internal quotation marks omitted).

The Court first found that the law was facially content-neutral because it did "not draw content-based distinctions on its face[,]" nor "require[] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 2531 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). A violation of the law did not depend on *what* was said, but rather *where* it was said. *See id.* ("[P]etitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.").

The fact that the law only established buffer zones outside of clinics that performed abortions did not render the law content-based. Although this limitation had "the 'inevitable effect' of restricting abortion-related speech more than speech on other subjects[,]" the Court explained that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* Rather, "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id.* (quoting *Ward*, 491 U.S. at 791). Because the State's asserted justifications for the law—public safety, promoting access to healthcare, and the unobstructed use of sidewalks and roadways—were content-neutral, the Court applied (and ultimately struck down) the law under intermediate scrutiny. *Id.* at 2532-34.

The Court likewise rejected the argument that the law's exemptions rendered it viewpoint based. While acknowledging that exemptions can be problematic at times, the Court found that the record did not show that the exemptions for clinic employees and their agents were an attempt by the State to favor one side of the abortion debate over the other. *Id*. at 2533. To the extent that the record reflected instances where escorts acted outside of the scope of their employment by "thwart[ing] petitioners' attempts to speak and hand literature to" women inside the buffer zones, the Court noted that those allegations might amount to a claim for selective enforcement. *McCullen*, 134 S. Ct. at 2533.

b. *Reed*

The Supreme Court's most recent case examining the distinction between content-based and content-neutral laws is *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015). *Reed* involved a municipal sign code that regulated where and how various signs could be placed within the Town. For example, "Ideological Sign[s]" were permitted to be 20 square feet in area and allowed "in all zoning districts without time limits," but "Political Sign[s]" were only allowed to be "up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and rights-of-way." *Id.* at 2224 (citation and internal quotation marks omitted). "Temporary Directional Signs Relating to a Qualifying Event" were limited to six square feet and were only permitted on "private property or on a public right-of-way," and only four signs could be "placed on a single property at any time" *Id.* at 2225.

After a small local church was twice cited for violating the sign code for placing too many temporary signs in a public right-of-way, it brought suit to challenge the law on First Amendment grounds. *See id.* The Ninth Circuit, agreeing with the District Court, held that the sign code "was content-neutral because the Town 'did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,' and its justifications for regulating temporary directional signs were 'unrelated to the content of the sign.'" *Id.* at 2227 (quoting *Reed v. Town of Gilbert,* 707 F.3d 1057, 1071-72 (9th Cir. 2013)).

The Supreme Court disagreed. Writing for the Court, Justice Thomas explained:

> 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.

Id. at 2227 (internal citations omitted). Applying this standard, the Court held that the Town's sign code was "content based on its face" because whether it applied "depend[ed] entirely on the communicative content of the sign" in question. *Id.* Simply put, "the Church's

signs inviting people to attend its worship services [were] treated differently from signs conveying other types of ideas." *Id.* Accordingly, the constitutionality of the code needed to be assessed under strict scrutiny.

The Court found that the Ninth Circuit overlooked "the crucial first step in the content-neutrality analysis" by failing to consider whether the law was content-based on its face. *Id.* at 2228. If a law is content-neutral on its face, a court may go on to examine the government's justification for the law to determine whether an improper legislative intent exists. But "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Thus, "an innocuous justification cannot transform a facially content-based law into one that is content neutral" *Id.* Given that the sign code was content-based on its face, the Town's justifications for enacting it were irrelevant. *Id.* Applying strict scrutiny, the Court struck down the sign code. *Id.* at 2232.

B. Application of Law

1. Whether the Noise Provision is Content-Based or Content-Neutral on its Face

As *Reed* makes clear, I must first determine whether the Noise Provision draws content-based distinctions on its face before considering the State's justification for its enactment. In arguing that the law is facially content-based, the Plaintiff focuses primarily on the portion of the Noise Provision that restricts

making noise with the intent "[t]o interfere with the safe and effective delivery of [health services]." 5 M.R.S.A. § 4684-B(2)(D)(2). According to the Plaintiff, this language demonstrates that the Noise Provision is content-based because it disfavors "oppositional" speech. Pl.'s Reply in Support of Mot. for Prelim. Inj. 3 ("**Pl.'s Reply**") (ECF No. 43).

As noted above, the *Reed* Court observed that: "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."135 S. Ct. at 2227. The Noise Provision applies only to individuals who intentionally make noise that can be heard within a building with the "intent . . . [t]o jeopardize the health of persons receiving health services . . . or . . . interfere with the safe and effective delivery of those services" 5 M.R.S.A. §4684-B(2)(D)(1)-(2). The application of the Noise Provision turns both on the mode or method of expression (i.e., the volume) *and* on the purpose of the noise (i.e., to disrupt). In other words, the Noise Provision regulates noise, in part, by its function or purpose. Outside a health care facility that performs abortions, a pro-life protester's activity would be treated differently under the Noise Provision than a pro-choice protester's activity. Conversely, outside a crisis pregnancy counseling center, a pro-choice protester's noise would be treated differently than a pro-life protester's noise. The difference in treatment is based on the message expressed.[9]

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[9] The State contends that the Noise Provision is content-neutral because it is not limited to individuals expressing pro-life messages. *See* State Def.'s Opp'n 14 ("**Def.'s Opp'n**") (ECF No. 34).

In *McCullen*, the Court stated that a statute "could be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." 34 S. Ct. at 2531 (quoting *League of Women Voters of Cal.*, 468 U.S. at 383). Here, where there is protest involving speech, authorities would need to examine the content of that speech to determine whether the speaker is in violation of the Noise Provision. As the State concedes, "[t]he fact that a person shouting loudly outside a reproductive health clinic is expressing views against abortion is evidence that the person is attempting to interfere with the delivery of medical services inside the facility." State Def.'s Opp'n 15 ("**Def.'s Opp'n**") (ECF No. 34). On the other hand, a person who screams back at pro-life protestors would not be in violation of the Noise Provision since she would lack

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But contrary to the State's argument, the fact that the Noise Provision would apply equally to pro-choice protestors outside of a pro-life crisis pregnancy counseling center only demonstrates that it is not viewpoint-based, not that it is content-neutral. Viewpoint-based restrictions on speech are "an egregious form of content discrimination" because they "target[] not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The fact that the Noise Provision would apply equally to speakers on both sides of the debate does not render it content-neutral. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."). Although the Plaintiff asserted in briefing that the Noise Provision was viewpoint-based, at oral argument Plaintiff's counsel indicated that she was withdrawing that argument.

the requisite intent to interfere with delivery of medical services.[10]

The State cites *Hill v. Colorado*, 530 U.S. 703 (2000), another abortion buffer zone case, for the proposition that a law can be content neutral even if it allows authorities 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." Def.'s Opp. 15 n.9 (citing *Hill*, 530 U.S. at 721). In *Hill*, pro-life "sidewalk counselors" challenged a law that banned any approach within eight feet of a person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling" 530 U.S. at 707 (citation and quotation marks omitted). The law applied "to all . . . demonstrators whether or not the demonstration concern[ed] abortion." *Id.* at 725. Although Justice Stevens recognized that "[t]heoretically . . . cases may arise in which it is

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[10] The Maine Supreme Judicial Court's decision in *State v. Janisczak*, 579 A.2d 736 (Me. 1990) lends support to my conclusion that the Noise Provision is content-based. There, the court analyzed the validity of Maine's obstructing government administration statute in light of a First Amendment challenge. At the time, the statute provided that a person "is guilty of obstructing government administration if he . . . engages in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function." 17–A M.R.S.A. § 751 (1983), *amended by* P.L. 1997, ch. 351, § 2 and P.L. 2003, ch. 657, § 5. The court reasoned that, because the law "applies only where the violator's intention is to obstruct government officials in the course of their duty, an application of this statute to verbal protests cannot be deemed content-neutral." *Janisczak*, 579 A.2d at 739 n.6. As a result, the court held that "the time, place, and manner test for the constitutionality of content-neutral restrictions on speech" was inapplicable. *Id.*

necessary to review the content of the statements made by a person approaching . . . an unwilling listener to determine whether the approach is covered by the statute[,]" he reasoned that this "kind of cursory examination" would not be problematic. *Id.* at 721-22. But Justice Stevens also wrote: "it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling' rather than pure social or random conversation." *Id*. at 721. In context, it is clear that Justice Stevens's "cursory examination" was to determine the broad category of speech at issue: whether this was a social interaction or an oral protest. The type of examination that the Noise Provision invites is more extensive: whether the speaker outside a health facility that performs abortions was expressing a pro-choice message or an anti-abortion message. Thus, even under *Hill*, the Noise Provision is content-based because "its application turns on the *substance* of a communication," not merely "the mode or method of expression." *Bruni v. City of Pittsburgh*, 91 F. Supp. 3d 658, 668 (W.D. Pa. 2015).

Citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the State contends that it is permissible to "[c]onsider[] a speaker's words in determining the speaker's intent" without implicating the First Amendment. Def.'s Opp'n 15 n.9. In *Mitchell*, the Supreme Court dealt with a Wisconsin statute that enhanced criminal sentences for defendants who intentionally selected their victims based on "race, religion" or other protected categories. 508 U.S. at 480. The defendant argued—and the Wisconsin Supreme Court agreed—that the statute violated the First Amendment because it punished

"offenders' bigoted beliefs." *Id*. at 485. The Supreme Court held that the law survived the defendant's First Amendment challenge, reasoning that the law was not directed at protected expression itself, but rather overt criminal conduct that was unprotected by the First Amendment. *Id.* at 487. The State has not advanced an argument that the speech targeted by the Noise Provision is unprotected under the First Amendment. Thus, the State's reliance on *Mitchell* is not persuasive.

The State contends that the Noise Provision is content-neutral because it "applies equally to all noise" and that it is "indifferent as to the nature or content of the noise." Def.'s Opp'n 13. The State cites *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989), where the Fifth Circuit held that an ordinance that banned the use of loudspeakers within a certain proximity to medical facilities was content-neutral because it "merely prohibit[ed] amplified speech within 150 feet of certain facilities without regard for what [was] being said." *Id*. at 1090. Yet, unlike the ordinance at issue in *Medlin* and contrary to the State's characterization, the Noise Provision does not ban all noise; it bans only noise made with the "intent . . . [t]o jeopardize the health of persons receiving health services . . . or . . . interfere with the safe and effective delivery of those services." 5 M.R.S.A. § 4684-B(2)(D)(1)-(2). Thus, the Noise Provision targets a subset of loud noise—noise made with the intent to jeopardize or interfere—and treats it less favorably.

The State also argues that the Noise Provision can be violated by conduct that has no communicative content. As an example, the State posits that a person playing a drum loudly "outside a medical facility with

the intent to interfere with the provision of medical services would be in violation of the statute even though the noise being made expresses no message at all." Def.'s Opp'n 14-15. It is certainly true that there are ways to violate the statute that do not involve pure speech. But it is also true that a person playing a drum is expressing a message. *Clark*, 468 U.S. at 294 ("[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."). This message is what triggers the Noise Provision, whether it is delivered verbally or by expressive conduct.

Finally, in arguing that the Noise Provision is content-neutral, the State relies heavily on the MCRA's benign legislative history, contending that the fact that pro-life groups supported the enactment of the 1995 MCRA amendment undercuts any argument that it is content-based. Def.'s Opp'n 12. However, like the Ninth Circuit in *Reed*, the State skips the crucial first step of the analysis—the determination of whether the law is content-neutral on its face. *Reed* makes clear that "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228. The legislature's justification for enacting the MCRA is irrelevant because the Noise Provision is content-based on its face. Accordingly, under *Reed*, there is no need to address the legislature's motives in enacting the law. The Noise Provision must survive strict scrutiny in order to be upheld as constitutional.

2. Whether the Noise Provision Survives Strict Scrutiny

Given that the Noise Provision is content-based, it is presumed to be unconstitutional. *R.A.V.,* 505 U.S. at 382. "While courts theoretically will uphold such a regulation if it is absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end, such regulations rarely survive strict scrutiny." *McGuire I*, 260 F.3d at 43 (citations omitted). Under strict scrutiny's demanding standard, the law "must be the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entm't Grp., Inc.*, 529 U.S. at 813. And "[t]he existence of adequate content-neutral alternatives . . . undercut[s] significantly any defense of such a statute" *R.A.V.,* 505 U.S. at 395 (citations and internal quotation marks omitted). It is the government's burden to show that the law is constitutional. *Playboy Entm't Grp., Inc.*, 529 U.S. at 816.

This case implicates a number of important interests. It is well-established that the State has a legitimate interest in protecting the health and safety of its citizens, which is a "traditional exercise of the [State's] police powers." *Hill*, 530 U.S. at 715 (citation and internal quotation marks omitted). As is stated in the summary of L.D. 1216, there is a history in this country of violence, sometimes extreme, that arises from the tensions inherent in the abortion debate. L.D. 1216 at 14 (117th Legis. 1995). The State has a legitimate interest in deescalating these situations so

that they do not lead to violence. Moreover, the State has "a substantial interest in protecting its citizens from unwelcome noise." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984). And the Supreme Court has also recognized an individual's "right to avoid unwelcome speech" when such speech "is so intrusive that the unwilling audience cannot avoid it." *Hill*, 530 U.S. at 716-17; *see also Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."). These interests become particularly significant around hospitals and medical facilities "'where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772 (1994) (quoting *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783 n.12 (1979)). Thus, even "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id.* at 772-73. Accordingly, protecting the captive audience inside hospitals and medical facilities from unwelcome noise that threatens their health and well-being is paramount. The State has established that it likely has compelling interests at stake.

However, "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey v. Brown*, 447 U.S. 455, 465-66 (1980). Here, the Noise Provision will not likely survive strict scrutiny

because adequate content-neutral alternatives could achieve the State's asserted interest.[11] *See R.A.V.*, 505 U.S. at 396 (content-based ordinance not necessary because "[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect"). Current authority suggests that the State could enact a law prohibiting all "loud, raucous, or unreasonably disturbing noise" outside of facilities providing medical care. *See Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1273 (11th Cir. 2014). Or, the State might prohibit all noise made within a certain proximity to such facilities that has the effect of disrupting the safe and effective delivery of health care. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (upholding anti-noise ordinance that "punishes only conduct which disrupts or is about to disrupt normal school activities"). In addition, the State (or the

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[11] The State has proffered two limiting interpretations of the Noise Provision. The first is that "a person would not be acting with the requisite intent" to interfere with health services "if there were no possibility that he would interfere with the safe and effective delivery" of those health services. State's Suppl. Br. 2 (ECF No. 67). The import of this interpretation is that "a person would not be in violation of [the Noise Provision] if . . . he protested outside of a closed health facility or outside of a building where health services are not provided." State's Suppl. Br. 2. The second interpretation concerns the longevity of an official warning under the Noise Provision. According to the State, it interprets the warning provision as requiring that "the noise that forms the basis for an MCRA action must be the same or substantially the same noise that was the subject of the warning." State Suppl. Br. 3. Although I have read the Noise Provision "in light of the limits set forth in" the State's construction of the law, *Cutting* v. *City of Portland*, 802 F.3d 79, 84 (1st Cir. 2015), this does not change my conclusion that the Noise Provision is unlikely to survive strict scrutiny.

City) could limit all noise outside of buildings offering health services if the noise exceeds a certain decibel level. *See, e.g.,* City of Portland Ordinance § 4-57 (prohibiting noise over a certain decibel level for facilities licensed by the state to sell liquor). Given the available content-neutral alternatives, I conclude that it is likely that the Noise Provision is not necessary to serve the State's asserted interest.

The State argues that the intent element of the Noise Provision narrows the reach of the law and targets only the noise that is the problem.[12] It cites *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion), for the proposition that there is "no evidence" that any other noise is a problem and that "[t]he First Amendment does not require States to regulate for problems that do not exist."[13] State Supp. Br. 10 (ECF

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[12] It is not clear to me that the Plaintiff's loud protesting is the only noise that it problematic. The Healey Affidavit suggests that other noise at least has the potential to be disruptive. Healey Aff. ¶¶ 29-30. The video marked as Plaintiff's Exhibit B illustrates this point. *See* Ex. B to Pl.'s Reply (ECF No. 43-6). In it, a woman loudly and profanely assails the pro-life protestors. The pro-choice woman shouts, "What are you doing with your child." She is addressing the comment to the pro-life protestor who has his child with him, and she objects to him exposing the child to the signs with pictures of aborted fetuses. A patient in the examination room would be unlikely to realize that the loud pro-choice protestor is addressing the pro-life protester and not the patient. The pro-choice protestor, who lacks the intent to disrupt medical services inside the building, would not be in violation of the Noise Provision. But the pro-life protestor's loud preaching would likely be a violation.

[13] Further, beyond the fact that the State's evidence seems to suggest that other noise at least has the potential to be disruptive, *see* Healey Aff. ¶¶ 29-30, this portion of the plurality opinion in

No. 67). It does seem "counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee*, 135 S. Ct. at 1668. But "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes.'" *Id*. (quoting *Brown v. Entm't Merch. Ass'n*., 564 U.S. 786, 802 (2011)).

Finally, the Plaintiff claims that other laws found in the Maine criminal statutes could adequately serve the State's interests of keeping order on the sidewalk.[14] Pl.'s Mot. for Prelim. Inj. 14. Although it is the State's burden to demonstrate that the Noise Provision can survive strict scrutiny, the State has not offered any explanation as to why these alternative laws are inadequate.[15]

Burson is not consistent with the strict scrutiny inquiry. As Justice Stevens points out in dissent, this "no evidence" justification "contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State*." *Burson v. Freeman*, 504 U.S. 191, 226 (1992) (Stevens, J., dissenting) (plurality opinion). Requiring the challenger to present evidence of a problem takes the burden away from the State to justify its restriction on speech.

[14] A person violates Maine's disorderly conduct statute if, "[i]n a public place, the person intentionally or recklessly causes annoyance to others by intentionally [m]aking loud and unreasonable noises." 17-A M.R.S.A. § 501-A(1)(A)(1). Moreover, a person violates Maine's harassment statute if, without reasonable cause, they "engage[] in any course of conduct with the intent to harass, torment, or threaten another person" after having been warned "not to engage in such conduct." *Id.* § 506-A(1)(A).

[15] I offer no opinion as to whether these laws "would pass constitutional muster." *McCullen*, 134 S. Ct. at 2538 n.8.

Accordingly, I conclude that the State has not shown at this stage of the proceeding that the Noise Provision is necessary to serve its interest in protecting its citizens' ability to receive safe and effective health care. Because it is likely that the Noise Provision is content-based and will not survive strict scrutiny, I find that the Plaintiff has demonstrated a likelihood of success on the merits of his claim.

III. Remaining Injunctive Relief Factors

"In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Thus, "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Fortuño*, 699 F.3d at 11; *see also Asociación de Educación Privada de P.R., Inc. v. García-Padilla*, 490 F.3d 1, 21 (1st Cir. 2007).

Given my conclusion that the Plaintiff is likely to succeed on the merits of his First Amendment claim, there is a presumption of irreparable harm. In arguing that the Plaintiff is not likely to suffer irreparable harm absent an injunction, the State points out that the Plaintiff continues to express his views in opposition to abortion outside of the Health Center. Def.'s Opp'n 23. But the fact that the Plaintiff has continued to preach outside the Health Center can cut the other way as well, as it makes the threat to the Plaintiff's First Amendment rights more imminent by

making it more likely that he will be cited for violating a content-based restriction on speech.

Moreover, the Plaintiff has attested that his encounters with the police have caused him to speak more quietly, and that this makes it more difficult for him to convey his message over the noise from Congress Street. The Plaintiff fears that the State will bring a civil action against him because of the content of his constitutionally protected speech, while other speakers on the public sidewalk are free to voice opposing views at a louder volume. The harm is not so much that his message will be "driven out" as it is that it may be "drowned out" of the marketplace of ideas. The Plaintiff has met his burden of establishing that he will suffer irreparable harm absent injunctive relief.

Turning to "the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues," *Esso Standard Oil Co. (P.R.) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006) (citation omitted), I conclude that this factor supports the granting of a preliminary injunction. The hardship to the Defendants if enjoined from enforcing a law that is likely unconstitutional will be minimal. On the other side of the scale, continued enforcement of a content-based restriction on speech would result in irreparable harm to the Plaintiff.

Finally, whether an injunction serves the public interest is a close question. Protecting constitutional rights and the free flow of ideas in traditional public fora plainly serves the public interest. *See McCullen*, 134 S. Ct. at 2529 (citation and quotation marks omitted) ("[T]he 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 applies with full force in a traditional public forum."). But it is also unquestionably in the public interest to allow women to receive medical treatment in a safe and peaceful environment. If I were balancing a woman's right to receive safe and effective medical treatment against the Plaintiff's right to speak at his chosen volume outside the windows of the Health Center, I would conclude that the former is considerably more important than the latter. However, I must also consider the realities of the situation. *See Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004). The Defendants can further their interests of maintaining order and protecting individual patients through the criminal code, most obviously the disorderly conduct and harassment statutes. And the Defendants are free to pass content-neutral legislation that can achieve the goal of a peaceful environment for people receiving health care. While I understand the Defendants' frustration with the shifting sands of First Amendment jurisprudence, avenues are still open to protect the interests on both sides of this debate. Given that there are alternatives available to the State and the City, I conclude that the Plaintiff has met his burden of showing that granting an injunction to prevent continued enforcement of a content-based law would serve the public interest.

CONCLUSION

For the reasons stated above, the Plaintiff's motion for a preliminary injunction (ECF No. 4) is **GRANTED.** The Defendants are hereby

PRELIMINARY ENJOINED from enforcing the Noise Provision, 5 M.R.S.A. § 4684-B(2)(D). The remaining portions of the MCRA may be enforced.[16]

SO ORDERED.

/s/ Nancy Torresen
United States Chief District Judge

Dated this 23rd day of May, 2016.

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[16] I find that 5 M.R.S.A. § 4684-B(2)(D) is severable from the remainder of the MCRA. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law"*); Gilbert v. State*, 505 A.2d 1326, 1329 (Me. 1986) (citation and quotation marks omitted) ("[W]here an unconstitutional and invalid portion of a statute is separable from and independent of a part which is valid the former may be rejected and the latter may stand."). The remainder of the MCRA can still be given effect without the Noise Provision.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1771

[Filed August 30, 2017]

ANDREW MARCH	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
JANET T. MILLS, individually and in her official capacity as Attorney General for the State of Maine	)
	)
Defendant - Appellant	)
	)
CITY OF PORTLAND; WILLIAM PREIS, individually and in his official capacity as a Police Lieutenant of the City of Portland; JASON NADEAU, individually and in his official capacity as a Police Officer of the City of Portland; GRAHAM HULTS, individually and in his official capacity as a Police Officer of the City of Portland; DONALD KRIER, individually and in his	)

official capacity as Police Major of the City of Portland)
)
)
Defendants)
_____)

MANDATE

Entered: August 30, 2017

In accordance with the judgment of August 8, 2017, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Edward R. Benjamin Jr.
Kate Margaret-O'Reilly Oliveri
Leanne Robbin
Christopher C. Taub
John J. Wall III
Stephen C. Whiting