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# ‘Face’-ing the Real Problem: Do Buffer Zones Criminalize Prayer, and Should There Be a Religious Exemption?

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## I. Introduction

On June 24, 2022, The United States Supreme Court announced its pivotal decision of *Dobbs v. Jackson Women's Health Organization*.[1] In *Dobbs*, the Court overturned its landmark decision of *Roe v. Wade* and revoked an individual's constitutional right to abortion.[2] With *Dobbs* again bringing abortion to the forefront of American minds, abortion protests outside of abortion clinics today draw many parallels to those which arose in the aftermath of *Roe*.[3] Specifically, protest activity, such as barricading abortion clinic entrances, contributes to the current on-going debate of restricting access to abortion facilities.[4]

Congress weighed in on this debate when it passed the Freedom of Access to Clinic Entrances Act ('FACE') in 1994.[5] This Act attaches criminal and civil liability to conduct which effectively barricades clinics or threatens clinic employees or patients.[6] Some states raised the floor established in FACE and enacted state buffer zones. Buffer zones are areas outside of abortion facilities in which certain conduct is prohibited, such as passing out leaflets or demonstrating.[7] Although buffer zones offer greater protection to patients and facility workers, their restrictions often implicate First Amendment freedoms of speech and religious exercise. In essence, there are two constitutional rights at stake: the privacy rights of patients at abortion clinics and protestors rights to free speech and free exercise of religion.

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[2] *Id*. at 2337; Roe v. Wade, 410 U.S. 113 (1973).
[3] *National Abortion Federation Releases 2021 Violence & Disruption Report*, NATIONAL ABORTION FEDERATION (Jun. 24, 2022), https://prochoice.org/national-abortion-federation-releases-2021-violence-disruption-report/.
[4] *Id*. (statistics on violence and disruption against abortion providers indicate an increase in blockades of 450% and stalking of 600% since 2020).
[5] 18 U.S.C. § 248 (1994).
[6] *Id*. at (c)(2)(b) (1994).
[7] Jennifer N. Toussaint, *Eight Annual Review of Gender and Sexuality: Constitutional Law Chapter: Abortion Protesting*, 8 GEO J. GENDER & L., 2007, at 137.

Part II of this paper explores the history leading up to the creation of buffer zones, from its origin until the present. This section also examines the history of the pro-life movement and abortion clinic violence. In addition, Part II examines the establishment of FACE and constitutional challenges raised against it. Part III focuses on state buffer zones, explores the distinction between buffer zones and floating buffer zones, and analyzes the case law surrounding their constitutionality. Part IV discusses religious exemptions to generally applicable laws and the standard of scrutiny which courts must apply. Part IV also analyzes case law to highlight the inquiry courts must undergo when determining which standard of scrutiny to apply. Finally, Part V applies strict scrutiny as the appropriate standard of review if courts must decide whether to grant a religious exemption to state buffer zones. Part V also argues that the government's compelling interest is overriding due to viewpoint discrimination and slippery slope concerns. Ultimately, this paper suggests that courts should deny religious exemptions to buffer zones because buffer zones satisfy strict scrutiny, and the governmental interest overrides the substantial burden placed on religious complainants.

## II. History

Although federal law regarding abortion did not emerge until the early 1970's, states began creating laws forbidding abortion as early as the 1820's.[8] By 1965, all fifty states expressly banned abortion, with exception when necessary to save a mother's life, or in cases of incest or rape.[9] Despite strong historic support for abortion bans throughout the states, in the late 1960's, the United States experienced a social shift – citizens began to place greater emphasis on individuals' liberty interest over protection of a potential unborn child's life.[10] Reflecting this

[8] Irin Cameron, *A Brief History of Abortion Law in America,* NO CHOICE (Nov. 14, 2017), https://billmoyers.com/story/history-of-abortion-law-america/.
[9] *Id*.
[10] *Id*.

shift, states began to broaden access to abortion.[11] By 1973, an individual's right to abortion was heavily dependent upon state laws and qualifications, which ranged from liberal grounds for granting abortion to strict prohibitions on the practice.[12] In an attempt to reconcile this split and create a uniform standard, the Supreme Court of the United States decided *Roe v. Wade*.[13] In *Roe*, the Court established a trimester framework for abortions and held that the constitutional right to privacy protects a woman's right to choose to have an abortion.[14]

In response to this landmark decision, many pro-life groups sought legal remedy.[15] For example, the Catholic Church, one of the first major pro-life groups, established a comprehensive plan which peacefully advocated for a constitutional amendment to outlaw abortion.[16] Despite pro-life group's efforts to criminalize abortion through the legislative and legal process, by the 1980's the Court remained unwilling to overturn *Roe*.[17] This failure elicited various emotions from anti-abortion protestors such as sadness, frustration, rage, and fear.[18] By the 1980's the *Roe* decision and its aftermath nationalized and diversified a formerly predominantly-Catholic movement resulting in significant public traction. [19]

**A. Pro-Life Tactics**

Pro-life groups utilized many tactics to stop individuals from exercising their newly recognized constitutional right.[20] After attempting conventional political means to no avail, pro-

[11] *Id*. (noting that in 1967, Colorado, North Carolina, and other states enacted statutes which broadened legal access to abortion).
[12] *Id*.
[13] *Roe*, 410 U.S. at 156.
[14] *Id*.
[15] Regina R. Campbell, *"Face"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?* 64 U. CIN. L. REV. 947 (1996).
[16] *Id*. at 952.
[17] Jeremy L. Sabella, *Pro-Life and Rescue Movements – Timeline Movement*, THE ASSOCIATION OF RELIGION DATA ARCHIVES https://www.thearda.com/us-religion/history/timelines/entry?etype=3&eid=31, (last visited Nov. 22, 2022).
[18] *Id*.
[19] *See* Campbell, *supra* note 15, at 953.
[20] *See id*. at 954.

life advocates utilized protesting as a primary tool to promote the rescue of unborn fetuses.[21] Although most anti-abortion groups participated in a variety of peaceful protests, including silent prayer, singing hymns, and distributing leaflets, a minority of militant groups resorted to violence.[22]

Pro-life groups mainly targeted protest activity towards reproductive clinic sites because these facilities performed the greatest abortion care.[23] As a result of the importance of clinics to abortion services, during the 1980's and early 1990's, the number of abortion clinic protests and blockades sharply increased.[24] Anti-abortionist groups created blockades because they were an effective tool to prevent ingress and egress from abortion facilities, eventually causing the shutdown of clinics while gaining publicity for the pro-life cause.[25] Operation Rescue, a radical pro-life group, pioneered the rescue movement, which focused on blockading abortion clinics through the use of two types of blockades: physical and constructive.[26] To create a physical blockage, Operation Rescue protestors linked arms around entrances of abortion clinics and used their bodies as human shields.[27] Simultaneously, Operation Rescue protestors created a constructive blockade through aggressive demonstrating behavior, such as screaming and harassing patients and health care workers.[28]

Some anti-abortion protestors also condoned the use of force, often excessive and even deadly, against clinic staff and doctors as an intimidation tactic to deter clinic workers from

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[21] *Id*.
[22] *Id*.
[23] Edward Weinstock et al, *Abortion Need and Services in the United States, 1974-1975,* 8 Family Planning Perspectives 58 (Mar. 1976) (Nonhospital clinics accounted for three-quarters or more of reported abortions).
[24] STEPHEN M. KRASON, ABORTION: POLITICS, AND THE CONSTITUTION, 62–63 (1984).
[25] Campbell, *supra* note 15, at 954.
[26] Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1423–24 (W.D.N.Y. 1992).
[27] *See id*. (describing how protesters trespass on clinic property and sit or lay across clinic entrances to block access).
[28] *See id*. (claiming that demonstrators ran a gauntlet of harassment and intimidation in hopes that the patients will turn away before entering).

performing abortion services.[29] As violence against abortion providers escalated across the country, more militant groups utilized deadly force against abortion providers in pursuit of their cause.[30] These groups describe the murder of abortion providers as a justifiable homicide.[31] Violence peaked in 1993, when both Dr. Gunn and Dr. Till, physicians who performed abortions, faced murder, and attempted murder as a result of violent pro-life tactics.[32] These incidents created urgency within the federal government to address the violence committed against reproductive health care facilities and providers.[33]

### B. Legal Response to the Pro-Life Movement

Pro-abortion groups, clinics, physicians, and patients, responded to anti-abortion tactics by turning to state and federal courts for protection; injunctions being the most sought-after.[34] Court injunctions restrained protestors from blocking clinic entrances, producing loud noises which disrupt the clinic's services, harassing clinic patients or staff, and using physical violence on clinic employees or patients.[35]

Highlighting the effectiveness of injunctive remedies, the Supreme Court in *Madsen v. Women's Health Center* upheld a court injunction which created a 36-foot buffer zone in two areas.[36] The governmental interests at issue here included the need to protect patient's right to

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[29] *See* Campbell, *supra* note 15, at 957.
[30] Laurie Goodstein, *Life and Death Choices; Antiabortion Faction Tries to Justify Homicide*, WASH. POST (Aug. 13, 1994), https://www.washingtonpost.com/archive/politics/1994/08/13/life-and-death-choices/28b2e9a3-9f40-41cf-ae62-4f5b09d7a5a5/.
[31] *Id*. (noting that thirty-two abortion leaders signed a petition declaring abortion doctor's murder a justifiable homicide).
[32] Kristine L. Sendek, *"FAC"-ING the Constitution: The Battle Over The Freedom of Access To Clinic Entrances Shifts From Reproductive Health Facilities to the Federal Courts*, 46 CATH U.L. REV.165, 173 (1996).
[33] *Id*.
[34] *See* Northeast Women's Ctr. v. McMonagle, 939 F.2d 57 (3d Cir. 1991); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989); Portland Feminist Women's Health Ctr. v. Buhler, 859 F.2d 681 (9th Cir. 1988).
[35] Campbell, *supra* note 15, at 947.
[36] Madsen v. Women's Health Ctr., 512 U.S. 753 (1994).

seek legal medical treatment.[37] The Court held that the buffer zone burdened no more speech than necessary to further the significant governmental interests.[38] It reasoned that the buffer zone placed petitioners where they are able to be heard by those in passing cars and those in the clinic's parking lot, while still ensuring the well-being of patients and clinic employees.[39]

Although injunctions provided some relief to clinics, clinic employees, and patients, anti-abortion attacks continued to escalate.[40] In May 1994, Congress responded to this public outcry and enacted FACE, a federal statute aimed to protect patients and reproductive health clinic employees from physical intimidation, threats, and violence.[41] Under FACE, federal criminal and civil liability attaches to anyone who:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; or (2) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services …"[42]

If an individual partakes in a violent act outside of a clinic entrance, an individual can be punished criminally for a first offence with a fine of up to $10,000 and one year imprisonment.[43] Subsequent offenders may be fined up to $25,000 and imprisoned for up to three years.[44] If a nonviolent act occurs, such as a nonviolent physical obstruction, the penalty for the first offense is a maximum of six months imprisonment and up to a $10,000 fine with subsequent offenses

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[37] *Id*.
[38] *Id*. at 775.
[39] *Id*.
[40] Ruth Marcus, *President Signs Clinic Access Law*, WASH. POST (May 27, 1994), https://www.washingtonpost.com/archive/politics/1994/05/27/president-signs-clinic-access-law/8d10bc2b-0369-427b-8185-acca9a62c8cc/.
[41] *Id*.
[42] 18 U.S.C. § 248 (a)(1)–(3).
[43] *Id*. at (c)(2)(b).
[44] *Id.*

carrying a maximum fine of $25,000 and eighteen-months imprisonment.[45] If death results, the prisoner may be sentenced for any term of years or life.[46] Additionally, either the provider of reproductive health services or patient must bring a civil suit for the offender to face civil charges.[47]

The statute provides definitions for its most controversial terms: " "Interfere with' means to restrict a person's freedom of movement"; " "intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another"; and " "physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous."[48] "Reproductive health services" includes services provided at a "hospital, clinic, physician's office, or other facility" which constitute "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."[49]

Although FACE restricts conduct which interferes with clinic operations, pro-life advocates remain free to conduct peaceful protests.[50] Protestors may also engage in activities such as singing hymns, praying, carrying signs, walking picket lines, and distributing anti-abortion materials outside of clinic facilities without facing criminal or civil liability.[51] Despite this, FACE has endured numerous constitutional free speech challenges.[52] For example, In

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[45] *Id*.
[46] *Id*.
[47] 18 U.S.C. § 248 (c).
[48] *Id*. at (e).
[49] *Id*.
[50] *Id*. at (d).
[51] Jennifer Blasdell and Kate Gross, *Freedom of Access to Clinic Entrances (FACE) Act*, NATIONAL ABORTION FEDERATION (2006), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/face_act.pdf.
[52] *See id*.

*American Life League v. Reno*, anti-abortion protesters challenged FACE, claiming it would interfere with their free speech.[53] The court concluded that, although FACE does not target speech protected under the First Amendment, it could incidentally affect conduct of individual expression.[54] The Fourth Circuit held that FACE is consistent with the Free Speech Clause because it "does not prohibit protestors from praying, chanting, counseling, carrying signs, distributing handbills or otherwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner" and any impact was related to, and was no greater than required to address the substantial government interests involved.[55] To date, a uniform line of decisions hold that FACE does not violate the First Amendment.[56]

**III. The Use of Buffer Zones**

Many states recognized a need to implement statutory "buffer zones" to further deter protestors from utilizing tactics such as intimidation, violence, and obstruction around abortion facilities.[57] Buffer zones are areas designated as protest-free zones, which either limit or completely prohibit free speech within a defined area outside of a health care facility.[58] State buffer zones provide additional protection to reproductive health care facilities by creating a space for protection outside of entrances where no one can enter besides a patient or facility employee.[59] Although buffer zone restrictions are state dependent, nearly all buffer zones prohibit protestors from demonstrating within a prescribed distance from clinics.[60]

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[53] Am. Life League v. Reno, 47 F.3d 642 (4th Cir. 1995).
[54] *Id*.
[55] *Id.* at 646.
[56] Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002).
[57] *See e.g.*, COLO REV. STAT. ANN.. § 18-9-122(3) (West 2007); CAL. CIV. CODE § 3427.1 (West 2008); CAL. PENAL CODE§ 423 (West 2008); N.Y. CIV. RIGHTS LAW§ 79-m (McKinney 2007).
[58] Toussaint, *supra* note 7, at 137.
[59] Susan L. Gogniat, *McCullen v. Coakley and Dying Buffer Zone Laws*, 77U. PITT. L. REV. 235, 237 (2015).
[60] 40 Days for Life and Alliance Defending Freedom, *A Legal Guide for Sidewalk Counselors*, ALLIANCE DEFENDING FREEDOM (July 2018), https://adflegal.blob.core.windows.net/mainsite-new/docs/default-

### A. Different Types of Buffer Zones

In general, there are two main types of buffer zones: 'fixed' and 'floating.'[61] Fixed buffer zones have a perimeter around a facility and where protestors cannot enter or demonstrate and engage in pro-life speech.[62] Clinics have discretion to create physical markers of fixed buffer zone areas outside of clinics to aid protestors and bystanders.[63] Floating buffer zones, sometimes dubbed "bubble" zones, are those which create an area outside of clinic entrances where a protestor can stand and speak but cannot approach a person within a certain distance unless the individual consents.[64] What qualifies as "consent" is state dependent, but verbal consent from an individual to approach within a restricted area qualifies as consent in every jurisdiction.[65] Additionally, if a person approaches a protestor standing in a floating buffer zone to take a leaflet, the individual may take the leaflet and the protestor may engage in conversation so long as he did not step towards the person.[66] Thus, protestors in states with floating buffer zones must consider what distance to remain at without approaching an individual exiting a facility.

### B. Buffer Zone Cases

Debate over the constitutionality of statutory buffer zones led to significant adjudication across the courts.[67] During these cases, courts balanced the governmental interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" against

source/documents/resources/campaign-resources/life/sidewalk-counselors/a-legal-guide-for-sidewalk-counselors.pdf.
[61] *Id*. at 8.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *See* 40 Days for Life and Alliance Defending Freedom, *supra* note 60.
[66] *Id*. at 9.
[67] *See* e.g., *Madsen*, 512 U.S. 753 (1994); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997); Hill v. Colorado, 530 U.S. 703 (2000); McCullen v. Coakley, 573 U.S. 464 (2014).

protestor's first amendment right of free speech.[68] The Supreme Court decided two foundational cases involving buffer zones at health care facilities: *Hill v. Colorado*[69] and *McCullen v. Coakley*.[70] *Hill v. Colorado* was the first case in which the Supreme Court spoke on the issue of buffer zones.[71] Nearly fourteen years later, the Court evaluated a different kind of healthcare facility buffer zone in *McCullen*.[72]

In *Hill v. Colorado*, pro-life protestors challenged Colorado's eight-foot floating buffer zone which applied within a one-hundred-foot radius around healthcare facility entrances.[73] This buffer zone made it unlawful for any person with intentions to pass leaflets, display signs, or engage in oral protests, education, or counseling to knowingly invade an individual's floating buffer zone, without that person's consent.[74] Protestors contended that the statute chilled their free speech.[75] The Supreme Court upheld the floating buffer zone and recognized the privacy interest in avoiding unwanted communication, especially at medical facilities.[76] The Court reasoned that the eight-foot restriction did not limit protestors speech because protestors remained able to effectively communicate messages through mediums such as signs, pictures, and voice.[77]

In 2014, the Supreme Court gave a limited victory to anti-abortion protestors in its decision of *McCullen v. Coakley.*[78] In this case, petitioners, individual "Sidewalk Counselors" who quietly counseled women outside of abortion clinics, challenged a Massachusetts statute which

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[68] *See id.*
[69] Hill v. Colorado, 530 U.S. 703 (2000).
[70] McCullen v. Coakley, 573 U.S. 464 (2014).
[71] *See Hill*, 530 U.S. 703.
[72] *See McCullen*, 573 U.S. at 471.
[73] *See Hill*, 530 U.S. 703.
[74] *Id*. at 707.
[75] *Id.*
[76] *Id*. at 716.
[77] *Id*. at 727.
[78] *McCullen*, 573 U.S. 464.

made it illegal for anyone to knowingly stand within thirty-five feet of an abortion clinic.[79] The Court found the buffer zone unconstitutional because the law was not narrowly tailored to serve its governmental interest.[80] The Court reasoned that the statute was not narrowly tailored for two main reasons. First, the Court determined that the buffer zone stifled the petitioners' consensual conversations because women within the buffer zone would not be able to hear the petitioners' message over the noise of vocal protestors.[81] Second, the Court found Section (e) of FACE already provided patient protection and prohibited obstruction of clinic entrances.[82]

Additionally, the history of Circuit Court rulings merit consideration. Below is a brief discussion of how courts in New York, Pennsylvania, and Vermont analyzed the constitutional issues behind buffer zones and their potential infringement upon free speech.

**1. New York**

In *New York ex rel. Spitzer v. Operation Rescue National*, the Second Circuit reviewed a preliminary injunction that, among other things, expanded previously imposed fixed buffer zones at two facilities from fifteen to sixty feet.[83] The court struck down the enlarged, sixty-foot buffer zones because they were "more extensive than necessary" to preserve access to the clinics. The court retained the original fifteen-foot buffer zones.[84]

**2. Pennsylvania**

In *Brown v. City of Pittsburgh*, the Third Circuit addressed the constitutionality of a Pittsburgh ordinance that established a floating buffer zone virtually indistinguishable from the Colorado statute in *Hill*, as well as a fixed buffer zone of fifteen feet within which "[n]o person

[79] *Id.* at 472.
[80] *Id.* at 515.
[81] *Id.* at 491.
[82] *Id.* at 464.
[83] New York ex rel. Spitzer v. Operation Rescue National, 273 F.3d 184 (2d Cir. 2001).
[84] *Id.* at 192.

or persons shall knowingly congregate, patrol, picket, or demonstrate."[85] The court determined that each of these provisions were facially valid on their own but "the layering of two types of prophylactic measures [was] substantially broader than necessary to achieve those interests."[86] The Third Circuit instructed the City of Pittsburgh to choose the provision it wanted to enforce and directed the district court to enjoin enforcement of the other. [87]

**3. Vermont**

In *Clift v. City of Burlington*, Vermont created a thirty-five foot buffer zone.[88] Plaintiffs alleged that the ordinance severely disrupted their ability to approach, counsel, and distribute information to individuals because the buffer zone provided only three locations for protestors to occupy: (1) 193 feet away from the main entrance on the same side of the clinic, (2) 35 feet north of the buffer zone and directly in front of a hair salon, or (3) 68 feet from the clinic entrance and across the street.[89] Despite protestors' concern, the court upheld the buffer zone as constitutional.[90] It reasoned that the 35 foot buffer zone was narrowly tailored since it was similar to the one upheld *Madsen* (thirty-six feet) and did not burden more speech than necessary to achieve its governmental interest.[91]

**4. Kentucky**

In *Sister for Life, Inc. v. Louisville-Jefferson County*, Kentucky anti-abortion activists sued the Louisville-Jefferson County after it enacted a ten (10) foot buffer zone, which effected a women's surgical center in Louisville.[92] The activists argued that the buffer zone violated their

[85] Brown v. City of Pittsburgh, 586 F.3d 263, 273 (3d Cir. 2009).
[86] *Id*. at 279.
[87] *Id*. at 298.
[88] Clift v. City of Burlington, 925 F. Supp. 2d 614, 648 (D. Vt. 2013).
[89] *Id*. at 621.
[90] *Id*. at 648.
[91] *Id*. at 639.
[92] Sisters for Life, Inc. v. Louisville-Jefferson Cnty., 56 F.4th 400, 402 (6th Cir. 2022).

right to free speech as peaceful "sidewalk counselors."[93] The court relied on the Supreme Court's 2014 decision in *McCullen* and found the buffer zone unconstitutional because it was not narrowly tailored to satisfy rational basis review.[94]

**IV. Religious Exemption Regime**

In addition to the Free Speech Clause, which the cases above focus on, the First Amendment also contains an Establishment Clause and Free Exercise Clause.[95] Both clauses were incorporated at different times against all fifty states.[96] Legislation that either directly targets religion or inadvertently burdens religion potentially violates an individual's right to free exercise of religion and is challengeable under the Free Exercise Clause.[97] If a petitioner brings a successful free exercise claim, courts may create a religious exemption or "carve-out" for the particular religious group or practice at issue.[98] Religious exemptions are granted when law infringes upon an individual's religious beliefs or practices.[99] The principle of religious exemption is often defended on the theory that "people should be free to do what their religion requires, so long as no harm to others is brought."[100] Although courts have yet to face a free exercise challenge against state buffer zones, religious anti-abortionists will predictably argue that buffer zones substantially burden their freedom of religion, therefore necessitating a

[93] *Id*. at 403.
[94] *Id.* at 407.
[95] U.S. CONST. art. 1. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").
[96] Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause to the states); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (incorporating the Free Exercise Clause to the states).
[97] Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV.1465, 1480 (1999).
[97] Clift v. City of Burlington, 925 F. Supp. 2d 614, 647–48 (D. Vt. 2013).
[98] *See* Gonzales v. O'Centro Espirita Uniao Vegetal, 546 U.S. 418, 426 (2006).
[99] *Id*.
[100] *See* Volokh, *supra* note 94, at 1499.

religious exemption. Importantly, courts must always engage in a judicial test prior to granting any religious exemption.[101]

### A. What Level of Scrutiny Applies?

#### 1. Case Law Standards of Review

The first step in a free exercise analysis is to determine what judicial test, or level of scrutiny, applies. The level of scrutiny a court applies is highly important.[102] In 1963, the Supreme Court began to establish free exercise of religion as a right which could only be restricted through a strong showing by the government.[103] In *Sherbert v. Verner,* a member of the Seventh-day Adventist Church was discharged by her employer because she refused to work on a Saturday, the day of her Sabbath.[104] The state denied Plaintiff unemployment compensation because the state compensation law barred benefits to workers who failed, without good cause, to accept suitable work when offered.[105] The Court held that a state may not deny unemployment benefits to an applicant who refused to accept employment because a condition of the employment violates her religious beliefs.[106] The Court found that if a law prohibits a person's ability to practice or observe religion, that restriction is enough to trigger strict scrutiny.[107]

In 1972, the Supreme Court again faced a free exercise challenge to a facially neutral law. The Court in *Wisconsin v. Yoder*, examined a criminal statute mandating school attendance for

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[101] *Smith*, 494 U.S. at 878–79.
[102] *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test (last visited Oct. 22, 2022) (defining rational basis review); *Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Oct. 22, 2022) (defining intermediate scrutiny); *Strict Scrutiny*, Legal Info. Inst., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Oct. 22, 2022) (defining strict scrutiny).
[103] MICHAEL W. MCCONNELL, THOMAS C. BERG, & CHRISTOPHER C. LUND, ASPEN PUBLISHING, RELIGION AND THE CONSTITUTION, 110 (5th ed. 2022).
[104] Sherbet v. Verner, 374 U.S. 398, 399 (1963).
[105] *Id*. at 401.
[106] *Id*.
[107] *Id*. at 409.

all children below the age of sixteen.[108] Yoder, a member of the Amish community, argued that the statute violated the religious freedom of Amish parents to raise their children as directed by their religious tenets.[109] Although the State had a compelling interest in education, the Court held that a religion-neutral criminal statute mandating school attendance violated the religious freedom of Amish parents to raise their children under the dictates of their religious beliefs.[110] The Court reasoned that, despite the states compelling interest in education, there would be de minimis impairment to those objectives if an exemption was recognized because the Amish are an extremely productive, law abiding, and sufficient group.[111] *Yoder* established that a strict scrutiny analysis must occur where a facially-neutral law significantly burdens the free exercise of religion and the state must show with particularity how its compelling interest would be adversely affected by granting an exemption to a religious group.[112]

A few years later, the Court drastically limited *Sherbert* and *Yoder* in *Employment Division v. Smith*.[113] In Smith, respondents ingested peyote, a Schedule I drug under federal law and a felony under Oregon law, for ceremonial purposes at a Native American Church and were subsequently fired by their employer for their consumption.[114] When respondents applied to the Employment Division for unemployment compensation, the Division denied respondent's request and deemed them ineligible because they were fired for work-related "misconduct."[115] Instead of adhering to the strict scrutiny *Sherbert/Yoder* test, the Court held that rational basis review is the proper standard for valid and facially-neutral laws of general applicability.[116]

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[108] Wis. v. Yoder, 406 U.S. 205, 207 (1972).
[109] *Id*. at 207.
[110] *Id*. at 230.
[111] *Id*. at 231.
[112] *Id*.
[113] Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).
[114] *Id*. at 874.
[115] *Id*.
[116] *Id*. at 879.

Despite this holding, the Court also stated that strict scrutiny still applies when a facially neutral, generally applicable law presents a hybrid situation.[117] A hybrid scenario exists when an individual's challenge to a facially neutral, generally applicable law involves the free exercise clause in conjunction with another constitutionally protected right, such as free speech or press.[118]

**2. State RFRA Standards of Review**

From 1963 to present day, religious exemptions and their accompanying standard of scrutiny experienced massive fluctuation throughout the courts.[119] Recognizing this instability, a federal statute was passed in 1993, called the Religious Freedom Restoration Act (RFRA), which restored the *Sherbert/Yoder* line of strict scrutiny.[120] Under RFRA, the federal government may not substantially burden a person's exercise of religion even if the burden results from a generally applicable rule.[121] An exception to this rule applies only if the Government satisfies the compelling interest test: that the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[122] Under RFRA, which applies exclusively to federal law, the compelling interest test is satisfied through the application of the challenged law "to the person" whose sincere exercise of religion is being substantially burdened.[123] Many states followed the federal government's tactic and moved to enact their own state RFRAs or interpreted their state constitutions to require strict scrutiny.[124] As of December 20, 2022, twenty-one states have

[117] *Id*.
[118] *Smith*, 494 U.S. at 882.
[119] *See Sherbet,* 374 U.S. 398 (1963); *Yoder,* 406 U.S. 205 (1972); *Smith*, 494 U.S. 872 (1990).
[120] 107 STAT. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb-4) (purpose is to restore the compelling interest test as set forth in *Sherbert* and *Yoder*).
[121] *See id*.
[122] McConnell *supra* note 100, at 190.
[123] Gonzales v. O'Centro Espirita Uniao Vegetal, 546 U.S. 418, 430 (2006).
[124] *Id*.

enacted state RFRAs and an additional ten states have similar state constitutional provisions, totaling to thirty-one states with RFRA or RFRA-like protections that require strict scrutiny.[125]

The Supreme Court decided whether federal RFRA requires religious exemptions in two cases. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the UDV church sued federal officials after U.S. Customs inspectors seized a shipment of hoasca, a Schedule 1 drug, intended to be distributed to the church and used in sacramental tea.[126] The officers claimed three compelling interests.[127] Under RFRA, compelling interest existed only when the application of the challenged law *to the person* whose sincere exercise of religion was substantially burdened served the asserted governmental interest.[128] In other words, to satisfy the compelling interest prong of strict scrutiny, the law must have advanced the governmental interest when applied directly to the burdened individual. Ultimately, the Court granted a religious exemption and held that the government failed to demonstrate a compelling interest in barring the church's sacramental use of hoasca because the government failed to submit any evidence addressing the consequences of granting UDV an exemption. [129]

The seminal case of *Burwell v. Hobby Lobby Stores, Inc.* once again enforced strict scrutiny as the applicable test under RFRA.[130] Under the Affordable Care Act, employers with fifty or more full time employees needed to provide health insurance which covered preventative care and screenings for women without cost sharing requirements.[131] Plaintiffs, owners of Hobby Lobby, a closely held corporation, brought a suit seeking an exemption from the contraceptive

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[125] *Numbers,* BECKET RELIGIOUS LIBERTY FOR ALL, https://www.becketlaw.org/research-central/rfra-info-central/numbers/ (last visited October 23, 2022).
[126] *Gonzales*, 546 U.S. at 418.
[127] *Id*. at 429 (protecting the health and safety of church members, preventing the diversion of hoasca from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Substances).
[128] *Id*.
[129] *Id*. at 438.
[130] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705 (2014).
[131] *Id*. at 703.

mandate.[132] Plaintiffs argued that helping facilitate access to contraceptive drugs violated their personal religious beliefs and the company's purpose of "honoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."[133] The Court held that a religious exemption should be granted because the least restrictive means requirement was not satisfied.[134] The Court reasoned that there were additional straightforward ways of achieving the government's goal without imposing substantial burdens such as, forcing the Government to assume the cost of providing contraception or expanding the existing workaround that existed for non-profit entities.[135]

### B. State RFRAs and Supreme Court Jurisprudence Suggests that the Court Would Apply Strict Scrutiny to Buffer Zones[136]

As established in *Smith*, rational basis review is the proper standard for laws that are both neutral and generally applicable.[137] Despite this standard, a plaintiff who brings a free exercise challenge against state buffer zones will enjoy the heightened protection of strict scrutiny. One reason strict scrutiny will apply is because, in response to the return of rational basis review enacted under *Smith*, most states adopted state RFRAs or state constitutional provisions which require the application of strict scrutiny to free exercise challenges.[138] Thus, if a complainant challenges buffer zones in a state with a RFRA or similar constitutional provision, courts must apply strict scrutiny.[139]

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[132] *Id.* at 701.
[133] *Id*.
[134] *Id*. at 690.
[135] *Id.* at 728.
[136] This paper focuses on state RFRAs because the federal RFRA does not apply to state buffer zone laws.
[137] *Smith*, 494 U.S. 872 (generally neutral facially applicable laws require rational basis review).
[138] Congressional Research Service, *The Religious Freedom Restoration Act: A Primer,* IN FOCUS(Apr. 03, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11490.
[139] 42 U.S.C. § 2000bb (West).

Assuming arguendo that a claimant raises a free exercise claim against buffer zones in a minority state without a RFRA or similar constitutional provision, strict scrutiny will still apply. Reaching strict scrutiny through the Court's free exercise analysis is a lengthy inquiry. The analysis begins with whether a buffer zone ordinance is facially neutral and generally applicable.[140] Although *Smith* fails to articulate a clear test for determining a neutral, generally applicable law, case law is illustrative in examining three questions.[141] First, does the law target religion on its face?[142] This is a straightforward textual analysis of the law which will likely result in the answer no. Generally, buffer zones make no mention of religious sects or religious practices. The second question is whether the law is discriminatory in its object or purpose?[143] This question focuses on whether there is evidence suggestive of a discriminatory intent on the part of lawmakers. The answer to this question should also be no because the statute's clear purpose is to promote the safety of individual's access to clinic entrances. The final question is whether the law discriminates in operation or effect?[144] Laws that have a general applicability and enforceability among nearly all citizens are typically held to be generally applicable. Since buffer zones apply to all citizens, with a narrow exception for facility employees and patients, buffer zones are likely generally applicable. Without further inquiry under this application, courts should find buffer zones facially neutral and generally applicable and seemingly apply the *Smith* rational basis review.

Nevertheless, in the situation detailed above, courts must apply strict scrutiny as the appropriate standard of review because the ordinance presents a hybrid scenario which triggers

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[140] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).
[141] *Id.* at 547 (finding city ordinances prohibiting ritual sacrifice of animals nonneutral and not generally applicable under Smith).
[142] Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045 (Oct. 2000).
[143] *Lukumi*, 508 U.S. at 548.
[144] Kaplan, *supra* note 139, at 1045.

strict scrutiny under *Smith*.[145] A hybrid carve-out to the *Smith* rational basis rule occurs only when two constitutional rights are challenged.[146] Here, as discussed above, buffer zones restrict not only an individual's ability to demonstrate through prayer within a certain proximity to clinics, but also limits an individual's free speech. Thus, even if a state does not have a RFRA requiring strict scrutiny, buffer zones invoke two constitutional rights and create a hybrid scenario mandating the application of strict scrutiny as the appropriate standard of review.

## V. How Courts Should Conduct Their Strict Scrutiny Analysis and Reject the Exemption Claim

It is not only possible, but probable that strict scrutiny will apply to a free exercise challenge against buffer zones whether under a federal law, state RFRA, or state constitutional provision. Thus, this paper applies strict scrutiny to determine whether state buffer zones violate an individual's right to religious freedom. To determine whether a law passes strict scrutiny, we must ask: (1) whether the belief is sincerely held; (2) whether the state action substantially burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state used the least restrictive means to achieve that interest.[147] Whether the challenge should survive must now be analyzed.

### A. The Sincerity of Belief

The first inquiry into whether a law or statute passes constitutional muster looks to whether an individual seeking religious exemption is sincere in claiming a substantial religious penalty from complying with the law.[148] The sincerity of the belief does not question the validity

[145] *Smith*, 494 U.S. 872, 881 (1990).
[146] *Id*. at 882.
[147] *Yoder*, 406 U.S. at 214; 107 STAT.1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb-4).
[148] *Cf*. United States v. Ballard, 322 U.S. 78, 80–82, 88 (1944) (affirming jury instructions submitting whether defendant was sincere in his religious beliefs but prohibiting finding whether those beliefs were true or false).

of a religious belief, but simply asks whether the person asserting the belief holds it.[149] This is a factual inquiry determined by the courts which is often judged through extrinsic and intrinsic evidence.[150] Because evidence is not always conclusive, an assumption of sincerity is usually attached to the claimant.[151] In our buffer zone inquiry, complainants will likely state that their faith dictates peaceful prayer immediately outside of abortion facilities, violating buffer zone limits. Courts should assume this belief is true. To strengthen a showing of sincere belief, complainants can produce additional evidence such as, a showing off frequent participation in religious abortion protests or visiting religious institutions which hold pro-life beliefs.[152]

**B. The Substantial Governmental Burden on Free Exercise**

Assuming religious groups seeking an exemption from buffer zones carry a sincere belief, the next inquiry explores whether buffer zones "substantially burden" their free exercise of religion.[153] In other words, whether state buffer zones impose a substantial burden on the objecting parties' religious beliefs or practices. "Not all burdens on religion are unconstitutional."[154] The "substantial burden" element asks whether the claimant would suffer "substantial" religious penalties from complying with a law and "substantial" secular penalties from violating it.[155] Religious cost is largely determined by examining the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression.[156] Secular costs includes penalties such as criminal and civil liability or fines.[157] If obedience to a

[149] United States v. Seeger, 380 U.S. 163, 174 (1965) (whether a belief is truly held is a question of fact).
[150] *Id*.
[151] Matthew Linnabary, *Employment Division v. Smith and State Free Exercise Protections: Should State Courts Feel Obligated To Apply The Federal Standard In Adjudicating Alleged Violations of Their State Free Exercise Clauses?*, 93 NOTRE DAME L. REV. 99, 105 (Jan. 2018).
[152] *Id*.
[153] *Id*. at 106.
[154] United States v. Lee, 455 U.S. 252, 256 (1982).
[155] *Id*.
[156] *See* Linnabary, *supra* note 148, at 108.
[157] *Id*.

law entails minimal religious costs but large secular cost, then the law has not imposed a substantial burden on free exercise.[158] Inversely, if obedience to a law entails minimal secular cost but large religious cost, there is no substantial burden.[159]

*McCullen* makes clear that limiting an individual's ability to pray outside of abortion clinics imposes a substantial burden on the individual's religious exercise.[160] Although buffer zones only prohibit prayer within a certain distance from a facility, this restriction creates religious penalty by severely restricting an individual's ability to pray where they can be heard and provide support to patients in need as dictated by their faith.[161] Additionally, some religions may require prayer at a specific distance from clinic entrances, which may be impossible to comply with without violating the ordinance. Moreover, individuals who violate buffer zones face hefty secular liability. Although only states can file criminal charges against violators of buffer zones, private parties can bring private causes of action for civil damages as well.[162] Thus, buffer zones force an individual to choose between sanctions and violating his religious belief, which suggests a substantial burden on free exercise exists.

### C. The Compelling Governmental Interests and Concerns of Slippery Slope and Viewpoint Discrimination

The government can overcome a substantial burden on an individual's free exercise with a showing of a compelling or overriding governmental interest.[163] There is little trouble

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[158] *See* Holt v. Hobbs, 574 U.S. 352 (2015) (finding substantial burden based solely on findings of claimant sincerity and substantial secular costs).
[159] Fredrick Mark Gedicks, *"Substantial" Burden: How Courts May (And Why They Should) Judge Burdens On Religion Under RFRA* (Feb. 20, 2016), https://law.pepperdine.edu/nootbaar-institute/annual-conference/content/fred-gedicks.pdf.
[160] *McCullen* 573 U.S. at 252.
[161] *Id*.
[162] Memorandum from Melissa Goodman & Katarine Bodde, New York Civil Liberties Union Reproductive Rights, to New York City Reproductive Health Facilities (Feb. 28, 2011), available at https://www.nyclu.org/sites/default/files/Clinic%20Access%20Memo.pdf.
[163] *Yoder*, 406 U.S. at 221.

concluding that the government has a compelling governmental interest which buffer zones serve.[164] Courts have found that buffer zones serve public interest by "[e]nsuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[165] The design of this system requires adherence from all individuals without exception because widespread exemptions for peaceful prayer would undermine the soundness of buffer zones and once again threaten the health and safety of the public.

The difficulty in attempting to accommodate religious beliefs is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference."[166] The Court has recognized it must strike a balance between the values of the law it is seeking to enforce and the consequences of allowing religiously based exemptions.[167] In *United States v. Lee*, the Court rejected a claim brought by a religious group for a social security tax exemption and held that there is no less restrictive alternative to the categorical requirement to pay taxes.[168] The Court noted that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violated their religious belief."[169]The Court explained that allowing taxpayers to withhold a portion of their tax obligation on religious grounds would lead to chaos.[170] Similar to *United States v. Lee*, in our buffer zone analysis, it would be extremely difficult for state buffer zones to accommodate an exception for one religious group's peaceful prayer without providing exceptions for the myriad

[164] *Hill*, 530 U.S. 703 (2000); *McCullen*, 573 U.S. 464.
[165] *Madsen*, 512 U.S. at 767–768.
[166] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).
[167] *Lee*, 455 U.S. at 259 (1982).
[168] *Id.*
[169] *Id*. at 258.
[170] *Id*. at 260.

of other religious groups. As of December 20, 2022, there are thousands of different religions, faiths, beliefs, churches, and denominations in the world.[171] Because each faith has its own unique beliefs and practices, a religious exemption for buffer zones given to Roman Catholics must also extend to other religious groups seeking the same. To date, there are approximately 225 million religiously affiliated American citizens. If all or even a fraction of those citizens is given the opportunity to claim religious exemption and they exercises this right, buffer zones will no longer be able to serve their compelling governmental interest, and the exemption will swallow the rule. This problem ultimately creates chaos and a slippery slope concern; the idea that if an exception is made for one individual it must be made for everyone, ultimately eliminating the rule.

Adding to the slippery slope concern is the inevitable influx of insincere religious claims courts will receive. This is best illustrated with a proposed religious exemption for a major burden like vaccination. In most states with mandatory vaccination requirements, individuals are allowed to claim exemption only for sincerely held religious beliefs.[172] This exemption does not apply to individuals who have only suddenly held beliefs invented purely to avoid vaccination.[173] However, because state and federal governments appear to be ill-suited to adjudicate the sincerity of claims, many individuals make insincere claims to receive the benefit of the exemption.[174] Relating vaccination exemptions to buffer zones, given the highly polarizing nature of abortions, it is likely that a non-religious individual would join, or claim to join, a

[171] The Bible Answer, *How Many Religions Are There In The World?*, THE BIBLE ANSWER(Sep. 30, 2022), https://thebibleanswer.org/how-many-religions-in-the-world/.
[172] National Conference of State Legislatures, *States with Religious and Philosophical Exemptions From School Immunization Requirements*, NCSL (May 25, 2022), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.
[173] Mark E. Wojcik, *Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?* A.B.A.(Jul. 05, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/sincerely-held-or-suddenly-held/.
[174] *Id*.

religion to receive an exemption. Thus, if a religious exemption for peaceful prayer is granted, courts will be unable to parse through peaceful religious conduct dictated by religion and purely secular beliefs.

A final concern for courts involves the violation the First Amendment's prohibition against content or viewpoint discrimination in a traditional public forum. Although the government can grant a peaceful prayer exemption, once granted, the court cannot go further by allowing only specific forms of prayer to qualify for an exemption without creating viewpoint discrimination.[175] Therefore, if a religious exemption for peaceful prayer is granted, the exemption encompasses *all* forms of peaceful prayer. Since prayer is deeply linked to an individual's personal religious life, as well as tethered to tenets of a religious practice, prayer presents itself in a variety of ways. Different religious communities pray in different forms: communal prayer, silent prayer, verbal prayer, etc. Given the thousands different religions in the world, it conceivable that certain religious groups believe holding a sign which reads "Abortion is Murder" with graphic images of an aborted fetus is a form of prayer, while others may silently recite rosary beads.[176] Thus, a religious exemption should be denied because once granted courts will receive an influx in both legitimate and illegitimate claims for exemption, be unable to regulate the types of "peaceful" prayer occurring within buffer zones, and ultimately negate the buffer zone's purposes.

**D. The Narrow Tailoring to Achieve the Compelling Governmental Interest**

It is well settled that levels of scrutiny determine how narrowly tailored a law must be to pass constitutional muster. Strict scrutiny is the most exacting standard and requires the

[175] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 400 (1993).
[176] Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV.605 (1999); Dr Stephen Juan, *What are the most widely practiced religions of the world?*, THE REGISTER (Oct. 06, 200), https://www.theregister.com/2006/10/06/the_odd_body_religion/.

government to prove that the law is the least restrictive means of serving the government's interest.[177] Unlike the compelling interest inquiry which poses a legal question, the determination of least restrictive means is a fact specific inquiry.[178] Under strict scrutiny, to be narrowly tailored, the law can neither be overinclusive nor underinclusive.[179] Narrow tailoring does not require exhaustion of every conceivable alternative, but does require a serious good faith consideration of workable alternatives that will achieve the government's goal.[180] Whether buffer zones are overinclusive or underinclusive must now be analyzed.

An overinclusive law is one which is broader than necessary to advance a compelling governmental interest.[181] In the case of buffer zones, courts consider a variety of factors when determining overinclusivity, including: (1) those covered by the ordinance; and (2) the distance prohibited.[182] To answer the first consideration, buffer zones plainly apply to all individuals, with limited exception for facility employees and patients. Although this ordinance entails broad citizen application, like the tax system in *Lee*, this application is necessary because mandatory compliance is indispensable to the vitality of buffer zones. Due to the thousands of denominations that exists in the United States and millions of religiously associated citizens, a sweeping ordnance without exception for peaceful prayer is needed to ensure governmental interest is furthered and mitigate slippery slope concerns. Additionally, the limited exclusion for facility employees and patients does not make this exception underinclusive because the exclusion for those minimal individuals is necessary for them to perform their clinic functions.

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[177] *Strict Scrutiny*, *supra* note 99.
[178] *Compare Hill*, 530 U.S. 703, *with McCullen*, 573 U.S. 464.
[179] Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV.1267, 1327–28 (2007).
[180] Grutter v. Bollinger, 539 U.S. 306 (2003).
[181] *See* Fallon, *supra* note 176, at 1328.
[182] *McCullen*, 573 U.S. at 521.

Additionally, the distance factor considers the perimeter around clinic facilities. The Court has refrained from creating a bright line rule which determines the specific distance permissible before a buffer zone is deemed overinclusive. Nonetheless, the Court has made buffer zone determinations on a case-by-case analysis.[183] Looking to case law for guidance, the Court in *McCullen* held that a 35 foot buffer zone was not narrowly tailored to satisfy intermediate scrutiny.[184] It noted that there were additional means the state could have adopted or which already existed that further the same governmental interest.[185] In contrast, the Court in *Hill* upheld an eight-foot floating buffer zone as narrowly tailored because protestors were still able to effectively communicate a message through speech outside of the buffer zone.[186]

In addition to the factors above, courts should bear in mind that buffer zones are the only workable restriction which effectively serves the government's interests. Although the Robert's Court contends that buffer zones are not narrowly tailored because other alternatives such as FACE exist, this argument ignores the clear limitation of FACE; FACE applies only to clinic entrances.[187] State legislatures recognized the need to extend protection beyond the threshold of clinic entrances and created buffer zones to supplement FACE and broaden protection to surround facility perimeters.[188] Moreover, although laws already exist which criminalize harassing and assaulting individuals, these laws do not fully protect abortion clinic employees, patients, or facilities, from the violence and fear which demonstrators uniquely create and which buffer zones aim to relieve.[189] Thus, a court should find that buffer zones are a workable and narrowly tailored ordinance.

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[183] *Compare McCullen*, 573 U.S. 464, *with Hill*, 530 U.S. 703.
[184] *McCullen*, 573 U.S. at 496.
[185] *Id.*
[186] *Hill*, 530 U.S. at 726.
[187] 18 U.S.C.S. § 248.
[188] Toussaint, *supra* note 7, at 137.
[189] *Id*.

## VI. Conclusion

In this time of uncertainty surrounding an individual's fundamental right to abortion services, it is essential that the courts refrain from carving out exemptions to any strong support which federal or state governments provide. Buffer zones provide this support. In a manner suggest by this Essay, courts should find buffer zones survive strict scrutiny because they: (1) substantially burden the claimant; (2) serve a compelling or overriding governmental interest; and (3) are narrowly tailored by the least restrictive means. In the court's overriding governmental interest analysis, it is critical to consider, and find persuasive, the massive influx of both sincere and insincere claims courts will face if the exemption is granted. Additionally, courts should consider that once an exception is granted, courts cannot dictate or limit the specific type of religious peaceful prayer permitted without violating the Free Speech Clause due to viewpoint discrimination. Courts must and should deny claims brought by religious groups seeking a religious exemption from state buffer zones for a peaceful prayer purpose.