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How McCullen Affects San Antonio's Anti-Panhandling Ordinance.

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RECENT DEVELOPMENT

HOW *MCCULLEN* AFFECTS SAN ANTONIO'S ANTI-PANHANDLING ORDINANCE

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I. INTRODUCTION

In June 2014, the U.S. Supreme Court decided *McCullen v. Coakley*,[1] overturning a Massachusetts statute restricting public speech outside abortion clinics.[2] Though the Court found the statute content-neutral, it based this classification on the state justifications for the statute, namely, the right to public ingress and egress.[3] This abandoned the rationale the Court used to uphold a similar statute fourteen years earlier in *Hill v. Colorado*.[4] Whereas *Hill* emphasized the rights of unwilling listeners,[5] *McCullen* declared that such a justification, on its own, precludes

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1. McCullen v. Coakley, 134 S. Ct. 2518 (2014).
2. *Id.* at 2541.
3. *See id.* at 2532 (discussing the state interests justifying the Massachusetts statute).
4. Hill v. Colorado, 530 U.S. 703 (2000).
5. *See id.* at 718 ("The restrictions imposed by the Colorado statute only apply to

content neutrality.[6] This change could affect the classification of San Antonio's Anti-Solicitation Ordinance, which targets an unsavory form of speech—panhandling.[7]

The Court's latest approach casts doubt upon the content neutrality of San Antonio's Ordinance, and thus, questions its presumption of constitutionality. In light of *McCullen* and recent circuit court cases on the topic, this Recent Development explores how San Antonio's Anti-Solicitation Ordinance may stand against a challenge on content neutrality. In conclusion, it suggests how the Ordinance may be amended to avoid a potential challenge.

II. BACKGROUND

The San Antonio City Council passed its first anti-solicitation ordinance in 2005.[8] After six years, the San Antonio Police Department found it inadequate and requested the Council increase its coverage of public places;[9] the Council complied.[10] The Ordinance now prohibits "aggressive" solicitation at any public place[11] and restricts other types of solicitation within fifty feet of public areas "considered vulnerable or where solicitation would interfere with the flow of traffic."[12]

The U.S. Supreme Court has identified solicitation as protected speech when practiced in public areas traditionally used for speech activity.[13] Sidewalks and public walkways, as described in the Ordinance, constitute traditional public fora.[14] At these locations, content-based restrictions

communications that interfere with these rights rather than those that involve willing listeners.").

6. *See McCullen*, 134 S. Ct. at 2531–32 (providing an example of a current statute that prevents speech from causing offense to listeners).

7. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29 (2011).

8. *Id.*

9. SAN ANTONIO POLICE DEP'T, REQUEST FOR COUNCIL ACTION (Oct. 20, 2011), *available at* https://webapps1.sanantonio.gov/agendabuilder/RFCAMemo.aspx?RId=8374 (last visited Apr. 15, 2015).

10. Justin Horne, *Panhandling Ordinance Passes*, KSAT.COM (Nov. 17, 2011), http://www.ksat.com/content/pns/ksat/news/2011/11/17/panhandling-ordinance-passes0.html; *see also* OFFICE OF THE CITY CLERK, SAN ANTONIO CITY COUNCIL MEETING MINUTES (Nov. 17, 2011), *available at* http://www.sanantonio.gov/Portals/0/Files/Clerk/Minutes/2011/2011-11-17.pdf (documenting the unanimous passage of the Ordinance).

11. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29(b)(1) (2011).

12. This includes: automated teller machines, automated teller facilities, bank exits and entrances, check cashing businesses, charitable contribution meters, parking meters, public parking garages, restaurant exits and entrances, buses, bus stations, and crosswalks. *Id.* § 29(b)(2).

13. *See* United States v. Kokinda, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."(citation omitted)).

14. *See, e.g.*, United States v. Grace, 461 U.S. 171, 179 (1983) ("Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive

face strict scrutiny and are presumed unconstitutional.[15] Content-neutral "time, place, and manner" restrictions, however, face only intermediate scrutiny.[16]

The Supreme Court has never directly addressed whether an ordinance targeting panhandling speech is content neutral.[17] Circuit courts remain split on the issue.[18] At the passing of the Ordinance, *Hill*, decided five years earlier, was the most relevant Supreme Court decision on the subject. The statute at issue in *Hill* imposed a buffer zone of eight feet around unwilling listeners within one hundred feet of the entrance of abortion facilities.[19] The Court decided this was a content-neutral restriction and ultimately determined the ordinance was narrowly tailored to satisfy the government's interest in protecting visitors from harassment.[20] *Hill* has served as a basis for circuit court decisions upholding anti-solicitation ordinances.[21] However, circuit court cases overturning anti-solicitation ordinances have attacked the reasoning in *Hill*.[22]

In *McCullen*, the Court took a different approach on the same basic issue addressed in *Hill*.[23] The statute at issue in *McCullen* proscribed speech within thirty-five feet of the entrance of reproductive health clinics.[24]

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activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.").

15. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 814 (2000) (requiring a content-based restriction on speech "be narrowly tailored to promote a compelling Government interest").

16. *See* Hill v. Colorado, 530 U.S. 703, 710 (2000) (referencing the lower court's decision that the Court affirmed).

17. *Contra* Norton v. City of Springfield, 768 F.3d 713, 715 (7th Cir. 2014) (juxtaposing panhandling with organized fundraising to find Supreme Court cases covering the subject).

18. *See id.* at 714 ("[C]ourts of appeals have divided on the question whether rules similar to Springfield's [anti-panhandling ordinances] are content-based.").

19. COLO. REV. STAT. § 18-19-122 (2012).

20. *See Hill*, 530 U.S. at 715–16 (discussing the state interest in protecting citizens from the harassment of unwanted speech).

21. *See* Thayer v. City of Worcester, 755 F.3d 60, 68 (1st Cir. 2014), *petition for cert. docketed*, No. 14-428 (Oct. 14, 2014) (upholding a panhandling ordinance based on *Hill's* argument that speech activity with undesirable consequences can be regulated if government has "a legitimate, non-censorial motive"); Gresham v. Peterson, 225 F.3d 899, 905–06 (7th Cir. 2000) (mentioning *Hill* as support in upholding an Indianapolis panhandling ordinance).

22. *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 967 (9th Cir. 2011) (Kozinski, C. J., dissenting) (hoping the Supreme Court would take up the case and overturn *Hill*, while disagreeing with the majority's decision to disregard stare decisis of *Hill*); ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 794–95 (9th Cir. 2006) (distinguishing *Hill* as inapplicable to uphold regulation of the distribution of written messages in public as a content-neutral regulation).

23. McCullen v. Coakley, 134 S. Ct. 2518, 2545 (2014) (Scalia, J., concurring) ("In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case . . . .").

24. *Id.* at 2526 (citing MASS. GEN. LAWS, ch. 266, § 120E½(b) (2012)).

Though this restriction is not narrowly tailored to satisfy a significant government interest, it is still content neutral.[25] The conflicting outcomes in *McCullen* and *Hill* can be distinguished upon the reasoning in each case. A recent circuit court decision examining *McCullen* offers yet another approach on the issue.[26]

III. THE "RIGHT TO BE LET ALONE"[27]

Much of the basis for the *Hill* decision on content neutrality rests upon Justice Stevens's emphasis on the privacy rights of "unwilling listeners" in public.[28] Justice Stevens cites to previous Court decisions mentioning the right as applied to one's home[29] and its surrounding areas.[30] Justice Stevens relies upon a 1921 Supreme Court case concerning the passage to and from one's place of employment as basis for the right to be free from the "unjustifiable annoyance and obstruction" of intimidating public communication with others in confrontational settings.[31] In his dissent, Justice Kennedy dismissed this emphasis as a recognition of the "right to avoid unpopular speech in a public forum."[32] Justice Stevens does not address whether or not the majority believes such a right exists.[33]

San Antonio's Anti-Solicitation Ordinance defines "aggressive manner," which it proscribes in all public places,[34] as solicitation that reasonably intimidates listeners and causes them to fear imminent bodily harm.[35] Like in *Hill*, offended listeners do not welcome such intimidation and fear. Under *Hill*, this particular part of the Ordinance "appl[ies] to communications that interfere with the[] right[] [to avoid unwanted speech] rather than those that involve willing listeners," rendering the

25. *Id.* at 2534, 2537.

26. Norton v. City of Springfield, 768 F.3d 713, 714 (7th Cir. 2014).

27. Hill v. Colorado, 530 U.S. 703, 716 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

28. *See id.* at 716–17 (identifying the Court's previous recognition of the privacy rights of unwilling listeners).

29. *Id.* at 717 (citing Rowan v. U.S. Post Office Dept., 397 U.S. 728, 738 (1970)).

30. *Id.* (citing Frisby v. Schultz, 487 U.S. 474, 485 (1988)).

31. *Id.* (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)).

32. *Id.* at 771 (Kennedy, J., dissenting).

33. *See id.* at 718 (majority opinion) ("We, of course, are not addressing whether there is such a 'right.' Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners[,] . . . . 'pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers . . . .'" (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 208 (1975))).

34. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29(b)(1) (2011).

35. *Id.* § 29(a)(2).

Ordinance content neutral.[36]

On the other hand, in *McCullen*, Chief Justice Roberts cites to a 1988 case, *Boos v. Barry*,[37] noting an "[a]ct would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or listeners' reactions to speech."[38] Unlike Justice Stevens, Chief Justice Roberts makes no mention of any right of unwilling listeners to avoid unwanted speech in public. The Anti-Solicitation Ordinance, specifically Section b(1), "arise[s] from 'the direct impact of speech on its audience,'" and also targets speech that "cause[s] offense or ma[k]e[s] listeners uncomfortable."[39] Departing from *Hill*, the analysis from *McCullen* would classify this part of the Anti-Solicitation Ordinance as content based.

IV. PUBLIC INGRESS & EGRESS

In *Boos*, the Court found a certain speech restriction content based because it was "justified *only* by reference to the content of speech."[40] Without explaining whether it would make any difference to the determination of content basis, *Boos* includes the "interference with ingress or egress" as a potential content-neutral justification for a speech restriction.[41] Both Sections b(1) and b(2) of San Antonio's Anti-Solicitation Ordinance cite interference with ingress and egress as justification for the restriction.[42] While *Hill* and *McCullen* recognize this justification as content neutral, *McCullen* addresses the precise issue on record that necessitated the law in question.[43] Such a review of San Antonio's Anti-Solicitation Ordinance is telling.

The San Antonio Police Department's 2011 report recommending the

36. Hill v. Colorado, 530 U.S. 703, 718 (2000).

37. Boos v. Barry, 485 U.S. 312 (1988).

38. McCullen v. Coakley, 134 S. Ct. 2518, 2531–32 (2014) (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

39. *Id.* at 2532.

40. *Boos*, 485 U.S. at 321 (1988) (emphasis in original).

41. *See id.* ("Respondents and the United States do not point to the 'secondary effects' of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies.").

42. The definition of "aggressive manner" as proscribed under Section b(1) includes "[b]locking the safe or free passage of the person being solicited." SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29(a)(4) (2011). Section b(2) means to protect "areas where the public is considered vulnerable or where solicitation would interfere with the flow of traffic." *Id.* § 29(b)(2).

43. *See McCullen*, 134 S. Ct. at 2523 (documenting "a record of crowding, obstruction, and even violence outside Massachusett's abortion clinics" to demonstrate Massachusetts's intention to increase public safety at such facilities through the statute).

city council expand the coverage of the Anti-Solicitation Ordinance shows the actual justification for the Ordinance.[44] The report makes no mention of maintaining ingress and egress through public ways. Instead, it focuses on panhandling itself as a continuing problem in the city.[45] The places included under Section b(2) of the Ordinance are not identified as places that become overly crowded and stall traffic, but as cited in the report, as places "where pedestrians will obviously be in possession of money and likely be solicited."[46] Local media reports discussing the passage of the Ordinance reference the impact of panhandling on the tourism market and on the fears of pedestrians.[47] City council minutes also reference the tourism industry's interest in the Ordinance.[48]

It seems the Ordinance's purported "interfere[s] with the flow of traffic" rationale has more to do with sustaining the Ordinance as content neutral than protecting any actual right to public ingress and egress.[49] If that is the case, then the entire reliance on this secondary effect is merely illusory. Analysis should revert to the primary justification—the effect on listeners. This poses no problem under *Hill.* However, as shown earlier, applying *McCullen* will create a different result.

V. THE NATURE OF PANHANDLING

Two months after *McCullen*, in *Norton v. City of Springfield*,[50] the Seventh Circuit Court of Appeals held Springfield's Anti-Panhandling Ordinance, which shares many similarities with its San Antonio counterpart,[51] as

44. SAN ANTONIO POLICE DEP'T, *supra* note 9.

45. *Id.*

46. *Id.*

47. *See, e.g.*, Guillermo X. Garcia, *Targets of Panhandlers Pleading for City to Get Tough*, MYSA.COM, http://www.mysanantonio.com/news/local_news/article/Targets-of-panhandlers-plead-for-city-to-get-tough-2247423.php (last updated Nov. 2, 2011, 1:59 AM) (reporting on the intimidation of those who feel compelled to give to panhandlers, and the negative effect of panhandling on San Antonio visitors).

48. *See* OFFICE OF THE CITY CLERK, *supra* note 10 ("[A concerned citizen] noted that individuals also entered her studio in La Villita to ask for money and [she] expressed concern with the impact [of panhandling] to tourism."); *id.* (Nov. 3, 2011), *available at* http://www.sanantonio.gov/Portals/0/Files/Clerk/Minutes/2011/2011-11-03.pdf (noting the presence of members of the tourism industry and their support for the Ordinance).

49. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29(b) (2011) ("A person commits an offense if the person solicits . . . [w]ithin fifty . . . feet of . . . where solicitation would interfere with the flow of traffic . . . .").

50. Norton v. City of Springfield, 768 F.3d 713 (7th Cir. 2014).

51. *See* SPRINGFIELD, ILL., CODE OF ORDINANCES § 131.06 (2007) (banning "aggressive panhandling" and all panhandling in certain city locations).

content neutral.[52] *McCullen* factors little into the *Norton* decision, which is based on Justice Kennedy's concurrence in the 1992 case *International Society for Krishna Consciousness, Inc. v. Lee*.[53] Though *Lee* held airports as a non-public forum,[54] Justice Kennedy felt the airports should be classified as public fora.[55] Kennedy concluded the regulation of the solicitations was content neutral because it targeted conduct rather than speech.[56] Justice Souter expressed this view while sitting by designation for the First Circuit Court of Appeals in *Thayer v. City of Worcester*,[57] decided less than a week before *McCullen*. Citing to Justice Kennedy's concurrence in *Lee*, as well as the decision in *Hill*, Justice Souter held an ordinance restricting the "risky behavior" of panhandlers as content neutral because the city lacked "censorial motive" in targeting behavior rather than speech.[58]

With this backing, *Norton* held the Springfield Ordinance did not restrict speech due to any idea conveyed or disagreement with any message.[59] According to *Norton*, the government may proscribe the speech because it "does not express an idea or message about politics, the arts, or any other topic on which the government may seek to throttle expression in order to protect itself or a favored set of speakers."[60]

The *Norton* dissent completely disputes this argument.[61] It argues the majority mistakenly believes a restriction must be based on viewpoint in order to be content based.[62] However, in quoting an earlier case from the same circuit, the dissent explains: "Beggars at times may communicate important political or social messages in their appeals for money . . . ."[63]

Furthermore, Justice Kennedy's concurrence in *Lee* does not provide any lesser protection for solicitation as speech. Instead, he argues that if the "solicitation regulation prohibited all speech that requested the contribution of funds, [he] would conclude that it was a direct, content-

52. *See id.* at 717–18 ("Evaluated by the standard for time, place, and manner restrictions[,] Springfield's [O]rdinance is within the power of state and local government.").

53. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

54. *See id.* at 680 (analyzing a regulation targeting solicitations by Hare Krishnas in airports).

55. *Id.* at 693 (Kennedy, J., concurring).

56. *See id.* at 706 (arguing the solicitation regulation restricts abusive practices associated with solicitation rather than solicitation itself).

57. Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014), *petition for cert. docketed*, No. 14-428 (Oct. 14, 2014).

58. *Id.* at 69.

59. *See* Norton v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014) (citing to the two common reasons regulations are classified as content based).

60. *Id.*

61. *Id.* at 718 (Manion, J., dissenting).

62. *Id.* at 722.

63. *Id.* (quoting Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000)).

based restriction of speech in clear violation of the First Amendment."[64] This is exactly what San Antonio's Anti-Solicitation Ordinance does,[65] and *McCullen* provides support for Justice Kennedy's view. Chief Justice Roberts attacked the Massachusetts statute for completely depriving certain speakers of the right to express a certain message.[66] To be protected, that message need not be political in nature. It may be as practical as giving personal advice to women about alternatives to abortion[67] or asking for monetary contributions due to a lack of resources.

VI. CONCLUSION

Based on the above findings, it appears San Antonio's Anti-Solicitation Ordinance would not be found content neutral in light of *McCullen*, but instead would be presumed unconstitutional.[68] That is not to say the Ordinance will not survive strict scrutiny analysis, though such analysis is difficult to overcome.[69]

If the Ordinance is not narrowly tailored to satisfy a compelling government interest, alternatives do exist.[70] The city council could limit applicability to the downtown area where the panhandling problem largely exists.[71] Such limitations would allow beggars to solicit elsewhere in the city limits. Concerns about harassment could be mollified with an ordinance specifically proscribing only that particular behavior rather than proscribing an entire class of speech.[72]

64. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring).

65. *Compare* SPRINGFIELD, ILL., CODE OF ORDINANCES § 131.06 (2007) (banning panhandling in the historic district), *with* SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 29 (2011) (banning all solicitation in specified areas).

66. McCullen v. Coakley, 134 S. Ct. 2518, 2536 (2014).

67. *See id.* ("They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them.").

68. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed.").

69. *See id.* at 813 (describing the high bar for overcoming a strict scrutiny analysis).

70. *Cf. McCullen*, 134 S. Ct. at 2538–39 (providing alternatives for dealing with the problems the Massachusetts statute targets).

71. *Cf.* SPRINGFIELD, ILL., CODE OF ORDINANCES § 131.06 (2007) (limiting its panhandling ban to the city's historic district).

72. *Cf. McCullen*, 134 S. Ct. at 2538 (giving an alternative to the Massachusetts statute to alleviate concerns of harassment).