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Lefemine v. Wideman: Entrenching Judicial Confusion and Beckoning a More Streamlined Analysis of First Amendment Violations in the Anti-Abortion Protest Context

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Notes

LEFEMINE v. WIDEMAN: ENTRENCHING JUDICIAL CONFUSION AND BECKONING A MORE STREAMLINED ANALYSIS OF FIRST AMENDMENT VIOLATIONS IN THE ANTI-ABORTION PROTEST CONTEXT

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In *Lefemine v. Wideman*,[1] the U.S. Court of Appeals for the Fourth Circuit sought to resolve whether the law enforcement officers who engaged in impermissible content-based restrictions on Petitioner Steven Lefemine's rights under the First Amendment of the U.S. Constitution by restricting a roadside anti-abortion demonstration were entitled to qualified immunity.[2] The Fourth Circuit also examined whether the U.S. District Court for the District of South Carolina "abused its discretion by failing to rule on [Lefemine's] request for declaratory relief[, and] by failing to award [Lefemine] attorney's fees," and erred by granting injunctive relief to [Lefemine].[3] While neither party addressed the First Amendment issue on appeal,[4] the

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1. 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

2. *Id.* at 297.

3. *Id.* The district court entered summary judgment in favor of Lefemine with respect to his First Amendment claim but held that the law enforcement officers were entitled to qualified immunity. Lefemine v. Davis, 732 F. Supp. 2d 614, 624, 627 (D.S.C. 2010), *aff'd*, Lefemine v. Wideman 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

4. *Lefemine*, 672 F.3d at 297 ("[N]o one challenges the fundamental conclusion that [the] Defendants' actions were an impermissible content-based restriction on [the] Plaintiff's First Amendment[] rights."). In accepting this "fundamental conclusion," the Fourth Circuit "pass[ed] no judgment on whether the district court was correct in its determination." *Id.*

Fourth Circuit noted, albeit briefly, that at the time of Lefemine's demonstration in 2005, case law from the Fourth Circuit and the Supreme Court of the United States was unclear as to how courts should review the constitutionality of restrictions on speech when faced with restrictions on anti-abortion protest speech.[5] The district court, however, had explored the issue in greater detail.[6] The Fourth Circuit ultimately concluded the officers were entitled to qualified immunity and that the district court had not abused its discretion.[7]

Indeed, each party accepted on appeal the district court's conclusion that the officers' actions violated Lefemine's First Amendment rights to freedom of speech and assembly.[8] In framing its qualified immunity analysis, however, the Fourth Circuit relied on ambiguous precedent surrounding the distinction between content-based and content-neutral restrictions on speech.[9] This conflicting case law, as the district court and the Fourth Circuit in *Lefemine* articulated, lends support to the view that there is no conceptual room for a two-tiered scheme of content-based and content-neutral restrictions on speech in the context of anti-abortion speech.[10] Due to the emotionally charged and socially divisive nature of abortion, the two-tiered scheme only sows judicial confusion and furthers jurisprudential inconsistency. Application of a single strict scrutiny standard to restrictions on anti-abortion speech, while certainly not infallible, would help to resolve this ambiguity.[11] In the end, the impetus for applying any standard to review restrictions on anti-abortion protest speech must hold fast to the principles set forth in the Supreme Court's most prominent trio of abortion cases—*Roe v. Wade*,[12] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] and *Gonzales v. Carhart*[14]—because of the unique nature of the Court's abortion jurisprudence.[15]

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5. *See id.* at 299–301 (citing ambiguous case law from the Fourth Circuit and the Supreme Court concerning the question of whether requesting that demonstrators remove protest signs containing "large, graphic photographs" constitutes "an impermissible infringement of their First Amendment rights").

6. *Lefemine*, 732 F. Supp. 2d at 620–24 (reasoning that the "blanket ban" on all graphic signs was not "narrowly tailored" to the purported "compelling interest" in protecting young children from graphic visual displays and concluding that the ban violated Lefemine's First Amendment rights).

7. *Lefemine*, 672 F.3d at 301–04.

8. *Id.* at 297.

9. *See infra* Part IV.A. Part IV.A will likewise address how the district court, in framing its analysis and making its determination about Lefemine's First Amendment freedoms of speech and assembly, relied on the same backdrop of ambiguous precedent.

10. *See infra* Part IV.B.

11. *See infra* Part IV.B.

12. 410 U.S. 113 (1973).

13. 505 U.S. 833 (1992).

I. THE CASE

On November 3, 2005, in Greenwood County, South Carolina, Steven C. Lefemine endeavored to stage a Christian pro-life demonstration at the "busiest intersection in [the] County."[16] Lefemine was the sole proprietor of the Columbia Christians for Life Counsel ("CCL"), an anti-abortion organization.[17] Twenty other "'like-minded persons,'" accompanying Lefemine and preaching and carrying signs, intended "'to shock the consciences of those who s[aw] the signs to the horror of abortion.'"[18] During the demonstration, Lieutenant Randy Miles of the Greenwood County Sheriff's Office notified Major Lonnie Smith "of complaints that had been received from motorists driving near the intersection."[19] Lt. Miles then informed Lefemine "that he 'had [received] several complaints about the graphic photographs and [that] this was creating a disturbance in the traffic flow.'"[20] Thereafter, Major Smith and Deputy Brandon Strickland arrived on the scene of the protest demonstration to investigate.[21]

Major Smith instructed Lefemine and the other demonstrators to remove the signs because they were "offensive," but told them they could continue their protest without the signs.[22] Lefemine responded that "[b]eing offensive is not a basis for violating First Amendment rights" and argued that his signs were not obscene.[23] Following his conversation with Major Smith, Lefemine and the other demonstrators removed their signs, ended their protest, and left the scene.[24]

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14. 550 U.S. 124 (2007).

15. *See infra* Part IV.C.

16. Lefemine v. Davis, 732 F. Supp. 2d 614, 617 (D.S.C. 2010) (citations omitted), *aff'd*, Lefemine v. Wideman, 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

17. *Id.*

18. *Id.* (citation omitted). In particular, these signs "'depict[ed] aborted babies.'" *Id.* (citation omitted).

19. *Id.* (citation omitted). Lt. Miles informed Major Smith of one particular complaint from a "mother [who] called saying that her son 'was in the backseat screaming, crying because [he] had seen those signs.'" *Id.* (alteration in original) (citation omitted).

20. *Id.* at 617–18 (citation omitted).

21. *Id.* (citation omitted). Major Smith "observed a number of individuals holding signs and megaphones." *Id.* at 618 (citation omitted). Before he approached the CCL demonstrators, Major Smith reported the events to Chief Deputy Mike Frederick. *Id.* at 617–18 (citation omitted). Chief Deputy Frederick instructed Major Smith "'to tell [the protesters] that they could continue to protest but they would either have to put away or take down the signs or . . . possibly be ticketed for breach of peace.'" *Id.* at 618.

22. *Id.* Specifically, Major Smith told Lefemine: "This is offensive because you've got small children—you've got different ones that are seeing this. We have had so many complaints about people that this is offensive." *Id.*

23. *Id.*

24. *Id.* at 619 (citation omitted).

One year later, on November 13, 2006, "an attorney from the National Legal Foundation ('NLF') wrote a letter to Sheriff Dan Wideman" of the Greenwood County Sheriff's Office and to Chief Gerald Brooks of the City of Greenwood Police Department to forewarn the officers that CCL volunteers planned to return to the Greenwood area to "'highlight[] the national tragedy of abortion.'"[25] The letter declared that any disruption of CCL's efforts would leave CCL with no other option than "'to pursue all available legal remedies without further notice.'"[26] Chief Brooks responded "that CCL was welcome to visit the community and properly exercise their [First Amendment] rights."[27] In a separate response, however, Chief Deputy Mike Frederick cautioned NLF "that Major Smith's response in 2005 was based on CCL's methodology not their content."[28] If any officer observed behavior similar to that present at the November 2005 protest, Chief Deputy Mike Frederick further warned, the demonstrators would be ordered to cease their behavior or alternatively face criminal charges.[29] Out of fear of being subjected to criminal sanctions from Greenwood County, Lefemine and the other protesters conducted their demonstrations on the Greenwood City side of the intersection on November 26, 2006 and on another occasion in 2007.[30]

On October 31, 2008, Lefemine, on behalf of himself and CCL, filed suit against Sheriff Wideman, former Chief Deputy Frederick, Major Smith, and Deputy Strickland (collectively, the "defendants") alleging violations of his First Amendment rights.[31] On April 5, 2010, Lefemine and the defendants filed cross-motions for summary judgment.[32] The U.S. District Court for the District of South Carolina held a hearing on the cross-motions on June 23, 2010.[33]

Lefemine brought his lawsuit under 42 U.S.C. § 1983,[34] seeking damages, as well as "injunctive and declaratory relief[,] for the viola-

25. *Id.* (citation omitted).
26. *Id.* (citation omitted).
27. *Id.* (citation omitted).
28. *Id.*
29. *Id.* (citation omitted).
30. *Id.* (citations omitted).
31. *Id.* Lefemine subsequently filed an amended complaint, adding Sheriff Tony Davis as a defendant. *Id.*
32. *Id.*
33. *Id.* at 619–20.
34. Section 1983 permits an individual to bring a lawsuit against a person who, while acting "under color of any [state law]," violated the individual's constitutional rights. *See* 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion of his rights of free speech, peaceable assembly, and the free exercise of religion" under the First Amendment.[35] Lefemine argued that the defendants' demand that the CCL demonstrators remove their signs was "improperly based on" the public's reaction to the *content* of the expression.[36] In response, the defendants argued that Lefemine had failed to establish a violation of his constitutional rights and emphasized "that their restrictions on CCL's speech constituted a reasonable time, place, and manner restriction."[37] The district court reviewing the totality of the evidence within the record, found that the defendants' restriction on Lefemine's and CCL's speech was based on content.[38] The court highlighted that because "[c]ontent-based restrictions on speech 'are presumptively invalid and subject to strict scrutiny,'"[39] the defendants' restriction must be narrowly tailored to achieve a compelling state interest.[40] The defendants alleged that the government had a compelling interest in traffic safety and protecting young children,[41] but the district court noted two weaknesses in the defendants' argument. First, the district court observed that Major Smith never mentioned traffic safety in his conversation with Lefemine on November 3, 2005; second, the district court acknowledged that a blanket ban on all graphic images to protect small children failed the narrow tailoring prong of the strict scrutiny test.[42] The district court then granted Lefemine's motion for summary judgment as to his First Amendment claims based on the freedoms of speech and assembly.[43]

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tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.").

35. *Lefemine*, 732 F. Supp. 2d at 620 (citation omitted).

36. *Id.* at 620–21 (citations omitted).

37. *Id.* at 620 (citation omitted). The district court noted that a state's right to restrict private expression in traditional public forums is limited, observing that, while the state "'may impose reasonable content-neutral time, place, and manner restrictions . . . it may regulate [private expression] only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest.'" *Id.* at 620–21 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995)). For a more detailed discussion of the distinction between content-based and content-neutral restrictions on protected speech, see *infra* Part II.A.

38. *Lefemine*, 732 F. Supp. 2d at 621. The district court further noted that the defendants confused "*viewpoint* neutrality" with "*content* neutrality," reasoning that "their restriction [wa]s content-neutral because it was not motivated by disapproval or disagreement with Plaintiff's pro-life stance." *Id.*

39. *Id.* at 622 (quoting Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009)).

40. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

41. *Id.* at 622-23.

42. *Id.* at 623–24.

43. *Id.* at 624. Lefemine also sought summary judgment on his free exercise of religion claim. He claimed that "'[i]n the exercise of his religious beliefs, CCL either displays

In their cross-motion for summary judgment, the "Defendants allege[d] that they [we]re entitled to qualified immunity because there was no clearly established law indicating that their conduct would violate [Lefemine]'s constitutional rights."[44] Relying on U.S. Supreme Court precedent, the district court first established that "'[g]overnment officials performing discretionary functions generally are . . . shielded from liability for civil damages [only] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[45] The district court then emphasized that the Supreme Court's two-part test for resolving qualified immunity claims—first proposed in *Saucier v. Katz*[46] and later suggested as a discretionary standard in *Pearson v. Callahan*[47]—should guide the qualified immunity analysis in the present case.[48]

Applying the *Saucier* test and finding a constitutional violation of Lefemine's First Amendment rights, the district court then reasoned that the primary question "becomes whether a reasonable officer could have believed that prohibiting demonstrators from displaying large signs containing pictures of dismembered, aborted fetuses at a major intersection was lawful, in light of clearly established First Amendment law and the information they possessed."[49] The district court emphasized that in November 2005, no clearly established law

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or supervises the display of pro-life signs.'" *Id.* While Lefemine's free exercise of religion claim falls outside the scope of this Note, the district court similarly granted Lefemine's motion for summary judgment with respect to this claim. *Id.* at 625.

44. *Id.* (citation omitted).

45. *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)). The district court acknowledged that, as a practical matter, whether an officer is protected by qualified immunity "turns on the objective legal reasonableness of [his] action[s]." *Id.* (quoting *Wilson*, 526 U.S. at 614) (internal quotation marks omitted). Furthermore, the district court noted that "'[c]learly established for purposes of qualified immunity means that [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (alteration in original) (quoting *Wilson*, 526 U.S. at 614–15).

46. 533 U.S. 194, 201 (2001).

47. 555 U.S. 223, 236 (2009).

48. *See Lefemine*, 732 F. Supp. 2d at 625–26 ("The court finds that the *Saucier* procedure is worthwhile in the instant case . . . ."). The district court observed that the two-part test for resolving qualified immunity claims requires that the plaintiff *first* establish a constitutional violation, and *only then* can the court "decide[] whether the right at issue was 'clearly established' at the time of" the alleged violation. *Id.* at 625 (quoting *Pearson*, 555 U.S. at 232) (internal quotation marks omitted). The district court noted that, while *Pearson* adopted the two-part test from *Saucier*, the *Pearson* Court also established that district court judges should be given latitude in exercising their own judgment regarding which of the two qualified immunity prongs to address first in a particular case. *Id.* (citing *Pearson*, 555 U.S. at 236).

49. *Id.* at 626.

existed in the Fourth Circuit addressing the extent to which officers may prohibit the use of photographs depicting aborted fetuses in public forums.[50] The district court concluded that, in light of the specific facts of the instant case, the current state of First Amendment law, and the general knowledge the officers possessed when they acted, "it was not unreasonable for Defendants to believe that their prohibition was lawful."[51] As a result, the district court granted the defendants' cross-motion for summary judgment on the qualified immunity claim, determining that the defendants were immune from suit in their individual and official capacities.[52]

Lefemine and the defendants filed cross-appeals to the Fourth Circuit challenging different portions of the district court's opinion,[53] but neither party challenged the basic premise that the "Defendants' actions were an impermissible content-based restriction on [Lefemine]'s First Amendment[] rights."[54]

II. LEGAL BACKGROUND

The First Amendment rights to freedom of speech and assembly form the bedrock of American democracy.[55] As the Supreme Court recently re-affirmed in *Snyder v. Phelps*,[56] "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[57] Nevertheless, the *Snyder* Court also acknowledged that "'[n]ot all speech is of equal First Amendment importance'" and that "where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[58]

With regard to protest speech in particular, the interweaving of the right to protest with First Amendment protections first emerged

50. *Id.*

51. *Id.*

52. *Id.* at 625, 627. Based on a review of "the totality of the facts in this case," the district court denied Lefemine's request for attorney's fees. *Id.* at 627.

53. Lefemine v. Wideman, 672 F.3d 292, 295 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

54. *Id.* at 297.

55. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."); R.A.V. v. City of St. Paul, 505 U.S 377, 430 (1992) (Stevens, J., concurring in the judgment) ("'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989))).

56. 131 S. Ct. 1207 (2011).

57. *Id.* at 1215 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

58. *Id.* (internal citation omitted).

during the labor union protests in the early twentieth century.[59] In *Thornhill v. Alabama*,[60] the Supreme Court further acknowledged the distinction between violent and peaceful protests.[61] More than forty years later, the Court elaborated on the distinction between peaceful protests and those involving violent and threatening conduct in *NAACP v. Claiborne Hardware Company*.[62] The Court acknowledged that the First Amendment protects "'the opportunity to persuade [others] to action, not merely to describe facts.'"[63] *Claiborne* involved an NAACP-staged boycott of white merchants stemming from widespread dissatisfaction with an inadequate response to "a list of particularized demands for racial equality and integration" presented to white elected officials in Claiborne County, Mississippi; the business owners subsequently filed suit "to recover losses caused by the boycott and to enjoin future boycott activity."[64] The *Claiborne* Court drew upon its decision in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*,[65] which it decided only a year prior, to support its determination that the petitioners' boycott involved constitutionally protected activity.[66]

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59. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911) ("Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association.").

60. 310 U.S. 88 (1940).

61. *See id.* at 104 ("[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."). In *Thornhill*, the petitioner participated in a picket line at his place of employment in violation of an Alabama statute that made it unlawful to picket near a place of business "without a just cause or legal excuse." *Id.* at 91–92, 94–95. The Supreme Court held that the Alabama statute was unconstitutional because it foreclosed *any and all* means by which a protester could peacefully disseminate his views to the public on a matter of public concern. *See id.* at 98–99, 104–05 ("[The statute] has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone . . . .").

62. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 916 (1982) (stating that the states do not have a "right to prohibit peaceful political activity such as that found in the boycott in this case," but noting that "[t]he First Amendment does not protect violence").

63. *Id.* at 910 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)). The Court emphasized that "[t]hrough speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens." *Id.* at 912.

64. *Id.* at 889.

65. 454 U.S. 290 (1981).

66. *See Claiborne*, 458 U.S. at 907 (observing that "[t]he black citizens named as Defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect" and that

While First Amendment protection of protest speech is certainly not absolute,[67] the content-based versus content-neutral distinction for determining the permissibility of speech restrictions places certain limits on the government's ability to impede otherwise constitutionally protected speech.[68] The interplay between content-based and content-neutral restrictions on speech has unique implications for anti-abortion protests due to the emotionally charged nature of the topic.[69] In addition, the Supreme Court has recognized certain categories of government interests that are sufficiently compelling to justify intrusions on protected speech.[70] Although the trio of *Roe*, *Casey*, and *Gonzales* does not fall within the realm of First Amendment jurisprudence, the cases will frame the discussion in this Note because these prominent cases notably address the relationship between the government's interest in protecting human life, on the one hand, and a pregnant woman's constitutional right to terminate her pregnancy, on the other hand.[71]

A. The Content-Based Versus Content-Neutral Distinction Limits the Government's Power to Impede Speech

The government's ability to restrict expressive speech in public forums is limited.[72] As the Supreme Court re-articulated in *Hudgens v. NLRB*,[73] "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[74] Nevertheless, the fact that the public commonly traffics a particular area of public property does not automatically transform the property into a "public forum" within which the government's ability to restrict expressive

"th[is] practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process" (quoting *Citizens Against Rent Control*, 454 U.S. at 294)).

67. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

68. *See infra* Part II.A.

69. *See infra* Part II.B.

70. *See infra* Part II.C.

71. *See infra* Part II.D.

72. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.").

73. 424 U.S. 507 (1976).

74. *Id.* at 515 (quoting Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968)).

speech is more circumscribed.[75] In a traditional public forum, namely streets, public sidewalks, and parks, a state "may impose reasonable, content-neutral time, place, and manner restrictions . . . but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest."[76] A government restriction on speech in a public forum must satisfy four elements to withstand the level of scrutiny applied to content-neutral time, place, and manner ("TPM") restrictions on speech.[77] The standard for TPM restrictions occupies "what has come to be known as 'intermediate scrutiny.'"[78] The intermediate scrutiny standard for content-neutral TPM restrictions stands in stark contrast to the strict scrutiny standard applied to content-based restrictions on protected speech.[79]

Case law addressing content-based restrictions on speech is not limited to discerning an intent to limit speech; instead, case law suggests that restrictions on the content of speech occur along a fluid spectrum. At the most prejudicial end of the spectrum are viewpoint-based restrictions, whereby a law carries a specific prejudice toward a certain point of view related to a given topic.[80] The "symbolic

75. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 836 (1976) (disagreeing with the argument "that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment" and instead declaring that "[s]uch a principle of constitutional law has never existed, and does not exist now").

76. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

77. United States v. Grace, 461 U.S. 171, 177 (1983) ("[T]he government may enforce reasonable [TPM] regulations as long as the restrictions 'are [(1)] content-neutral, are [(2)] narrowly tailored to serve a [(3)] significant government interest, and [(4)] leave open ample alternative channels of communication.'" (quoting *Perry Educ. Ass'n*, 460 U.S. at 45)).

78. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 791 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part); *see also id.* (further explaining that TPM restrictions on speech are subject to intermediate scrutiny, which is the "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied . . . to government regulation of nonspeech activities").

79. *Compare Perry Educ. Ass'n*, 460 U.S. at 45 ("The state may also enforce regulations of the [TPM] of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."), *with id.* ("For the state to enforce a content-based exclusion [in a traditional public forum] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

80. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." (internal citation omitted)).

speech"[81] line of cases is particularly illustrative of viewpoint discrimination.[82] Regulations based on viewpoint discrimination are "'presumptively invalid.'"[83] On the other end of the spectrum are the least prejudicial restrictions—content-neutral regulations.[84] As the Supreme Court has noted, "the content neutrality principle is [generally] invoked when the government has imposed restrictions on speech related to an entire *subject area*."[85] Thus, "[t]he content neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination."[86] According to the Supreme Court, the primary inquiry shaping the content neutrality determination "is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys."[87]

Despite the seemingly fluid spectrum of content-related restrictions on speech, Supreme Court precedent in the area is at best unclear and ambiguous. In *Turner Broadcasting System, Inc. v. FCC*,[88] for example, the Court acknowledged that the content-related analy-

81. The Supreme Court noted in *Virginia v. Black* that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." 538 U.S. 343, 358 (2003). *But see id.* at 361, 363 (noting that the protection is not absolute and determining that even though "cross burning is symbolic expression," Virginia was constitutionally permitted "to outlaw cross burnings done with the intent to intimidate").

82. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 510–11 (1969) (declaring unconstitutional a decision by school officials to prohibit students from wearing black armbands to protest the war in Vietnam even though other similarly political symbolic forms of protest were permitted). *But see Black*, 538 U.S. at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.").

83. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 353 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." (citation omitted)).

84. *See* Consol. Edison Co. of N.Y., Inc. v. Pub. Svc. Comm'n of N.Y, 447 U.S. 530, 536 (1980) (noting that TPM "regulations must be 'applicable to all speech irrespective of content'" and that "[a] restriction that regulates only the [TPM] of speech may be imposed so long as it is reasonable" (citation omitted)).

85. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983) (emphasis added).

86. *Id.*; s*ee also Consol. Edison Co. of N.Y., Inc.*, 447 U.S. at 536 ("Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" (alteration in original) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972))); *see also Mosley*, 408 U.S. at 95 ("The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited.").

87. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added); *see also Mosley*, 408 U.S. at 96 ("Selective exclusions from a public forum may not be based on content alone, and may not be *justified by reference to content alone*." (emphasis added)).

88. 512 U.S. 622 (1994).

sis is not straightforward in application.[89] With few exceptions, however, the Court has treated laws as content-based that explicitly classify expression on the basis of discrete categories of subject matter or viewpoints.[90] The Court did, however, carve out a limited exception to this general rule in *Young v. American Mini Theatres*[91]—the Court referenced the "secondary effects" doctrine to justify a zoning ordinance that differentiated between movie theaters that did and did not "exhibit sexually explicit 'adult' movies."[92] Ten years later, in *City of Renton v. Playtime Theatres, Inc.*,[93] the Court relied on *Young* and reaffirmed that a neutral justification can render an otherwise facially discriminatory law content-neutral.[94] Specifically, the *Renton* Court acknowledged that the City of Renton's "'predominate' intent" was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods,'" which the Court determined was sufficient justification for classifying an ordinance "that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" as

89. *Id.* at 642–43 ("Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . [W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." (internal citations omitted)).

90. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 868 (1997) (concluding that the Communications Decency Act, or "CDA[,] applies broadly to the entire universe of cyberspace[, and t]hus . . . is a content-based blanket restriction on speech"); Boos v. Barry, 485 U.S. 312, 321 (1988) (noting that a District of Columbia law prohibiting displays of signs critical of foreign government within 500 feet of the embassies of those governments was content-based because it "[wa]s justified *only* by reference to the content of the speech").

91. 427 U.S. 50 (1976).

92. *Id.* at 52. *See also id.* at 71 n.34 ("The [Detroit] Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." (plurality opinion)). For a more recent judicial framing of the secondary effects doctrine—and operating in a similar context—see City of Erie v. Pap's A.M., 529 U.S. 277, 278, 295 (2000) (addressing the constitutionality of a city ordinance making it a crime to appear in public "in a state of nudity" and noting that "there is nothing objectionable about a city passing a general ordinance to ban public nudity and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects").

93. 475 U.S. 41 (1986).

94. *Id.* at 46, 48 (noting that "the resolution of this case is largely dictated by our decision in Y*oung v. American Mini Theatres, Inc.*," and that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech'" (citations omitted)).

content-neutral instead of content-based.[95] Three years later, in *Ward v. Rock Against Racism*,[96] the Supreme Court invoked *Renton* and clarified that "[t]he government's purpose is the controlling consideration" in any content-related analysis.[97]

While the Supreme Court has upheld as content neutral laws supported by purely content-free justifications,[98] the Court has also upheld as content neutral laws with relatively clear message-related justifications.[99] This is particularly evident in the context of anti-abortion protests. For example, in *Madsen v. Women's Health Center, Inc.*,[100] the Court emphasized concerns with patient privacy and psychological well-being in "hold[ing] that the establishment of a 36-foot buffer zone on a public street [outside of an abortion clinic] from which [anti-abortion] demonstrators [we]re excluded" was constitutional under the First Amendment.[101] Three years after *Madsen*, in *Schenck v. Pro-Choice Network of Western New York*,[102] the Court concluded that the governmental interest in "protecting a woman's freedom to seek pregnancy-related services . . . justif[ied] an appropriately tailored injunction to secure unimpeded physical access to [abortion] clinics;"[103] the Court's conclusion conflicted with the protesters' claim that the injunction was based purely on "disagreement with the message being conveyed," in part because "the condition on the [counselors'] freedom to espouse [their views] within the buffer zone [was in fact] the result of their own previous harassment and intimidation of patients."[104]

Although it is difficult to deduce a bright-line rule from the Supreme Court's content-related speech jurisprudence, it remains un-

95. *Id.* at 43, 48.

96. 491 U.S. 781 (1989).

97. *Id.* at 791–92 ("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." (citing *Renton*, 475 U.S. at 47–48)).

98. *See, e.g., id.* at 792 (upholding a municipal noise regulation as content-neutral because "the principal justification for the sound-amplification guideline is the city's desire to control noise levels . . . and to avoid undue intrusion into residential areas and other areas of the park").

99. *Cf.* Hill v. Colorado, 530 U.S. 703, 715 (2000) (acknowledging a neutral interest in "unimpeded access to health care facilities" and an arguably content-related interest in "the avoidance of potential trauma to patients associated with confrontational protests").

100. 512 U.S. 753 (1994).

101. *Id.* at 757, 768 (observing that the state had a "strong interest in residential privacy . . . applied by analogy to medical privacy" and in protecting "not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance" (citations omitted)).

102. 519 U.S. 357 (1997).

103. *Id.* at 376.

104. *Id.* at 384–85.

disputed that certain categories of speech do not receive First Amendment protection. This category includes speech involving obscene materials,[105] and speech likely to incite immediate violence and cause injury.[106] Regarding obscenity, the Supreme Court in *Miller v. California*[107] established more concrete standards for judging whether material should be regarded as obscene, and thus not constitutionally protected. Under the *Miller* framework:

> The basic guidelines for the trier of fact must be: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[108]

Obscenity occupies a particularly limited category of speech, the restriction of which has very rarely triggered a constitutional problem. Otherwise, as the Supreme Court has noted, "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees."[109]

B. The Content-Based Versus Content-Neutral Distinction Has Important Implications for Anti-Abortion Protests

Anti-abortion protests implicate the important distinction between content-neutral and content-based restrictions on speech. The analysis in this area is somewhat muddied because the emotionally charged nature of certain speech, including anti-abortion protests,

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105. *See, e.g.*, Roth v. United States, 354 U.S. 476, 479 n.1, 492 (1957) (upholding a federal statute criminalizing the mailing of any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character" against a First Amendment challenge); *see also* New York v. Ferber, 458 U.S. 747, 763 (1982) (recognizing that child pornography constitutes another category receiving less than full constitutional protection under the First Amendment); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (reasoning that "the States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole").

106. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the . . . insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (footnotes omitted)).

107. 413 U.S. 15 (1973), *abrogation recognized by* State v. Claiborne, 818 P.2d 285, 289 (Idaho 1991).

108. *Id.* at 24.

109. *Roth*, 354 U.S. at 484.

makes it difficult to escape restrictions motivated by content. Content-neutral restrictions do, however, exist and have typically included justified public nuisance regulations. In *Kovacs v. Cooper*,[110] for example, the Supreme Court upheld a city ordinance from Trenton, New Jersey that prohibited trucks and other instruments from emitting "loud and raucous noises," reasoning that the regulation was addressed to the "comfort and convenience" of citizens.[111] In the anti-abortion protest context, other courts have likewise characterized restrictions targeted at protecting listeners from loud and unwelcome noise as content-neutral.[112]

Additionally, while TPM restrictions fall squarely into the category of content-neutral regulations,[113] the inclusion of certain forms of symbolic speech in this category has sown further confusion surrounding the proper test courts should apply when distinguishing between "symbolic speech" and "pure speech."[114] Nevertheless, content-neural regulations of speech must still be justified by reference to the traditional TPM test, to a reformulated version, or to a combination thereof. In *United States v. O'Brien*,[115] the Supreme Court upheld O'Brien's conviction for burning his draft card as a form of protest against the Vietnam War, articulating a four-part variation of the traditional TPM test.[116]

110. 336 U.S. 77 (1949).

111. *Id.* at 86, 88; *see also id.* at 88 ("The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.").

112. *See, e.g.*, Eanes v. State, 318 Md. 436, 440–42, 453–54, 569 A.2d 604, 606, 612 (1990) (upholding the application of a Maryland statute prohibiting willful disturbance of neighborhoods "when used by the State to limit the volume of speech" of an anti-abortion protester against a First Amendment challenge on the grounds that "the statute [went] no further than to afford content-neutral protection to the captive auditor . . . who cannot avoid continuing, unreasonably loud and disruptive communications emanating from the street").

113. *See supra* text accompanying notes 72–78.

114. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (1965) (emphasizing that the First and Fourteenth Amendments do not provide "the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways as these amendments afford to those who communicate ideas by pure speech"); Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting written or spoken word.").

115. 391 U.S. 367 (1968).

116. *Id.* at 369, 372. The four-part test from *O'Brien* for determining whether a government regulation in the symbolic speech context is constitutional states:

> [A] government regulation is sufficiently justified [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial governmental interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged

Then, in *Ward v. Rock Against Racism*, the Court outlined the following standard for determining the constitutionality of TPM restrictions: "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but it need not be the least restrictive or least intrusive means of doing so."[117] It remains unclear whether the four-part formulation from *O'Brien* is more or less restrictive than the TPM test articulated in *Ward*.

Compounding the confusion stemming from the Supreme Court's adoption of varying formulations of the TPM test, the Court in *Madsen* appears to have created a TPM test specifically tailored to abortion cases—this test requires that the restriction on speech "*burden no more speech than necessary* to serve a significant government interest."[118] Justice Scalia opined in his dissent in *Madsen* that the difference between the old standard and the new standard was subtle yet profound, labeling the new test "intermediate-intermediate scrutiny."[119]

The anti-abortion protest context provides a unique forum for judicial interpretation of content-based and content-neutral restrictions on speech. Restrictions on anti-abortion protest speech have in large part been justified as content neutral on the basis of secondary effects. In *Medlin v. Palmer*,[120] for example, the United States Court of Appeals for the Fifth Circuit upheld the constitutionality of an ordinance that prohibited the use of loudspeakers within a certain range of any school in session, single-family or multiple family dwellings, hospitals, or other medical facilities providing outpatient services.[121] In considering anti-abortion activists' First Amendment

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> First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

117. 491 U.S. 781, 798 (1989).

118. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (emphasis added). The *Madsen* Court reinforced the notion that "when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous." *Id.* at 765. *Madsen* involved a constitutional challenge to a multi-faceted injunction prohibiting anti-abortion protestors from "demonstrating in certain places and in various ways outside of a health clinic that performs abortions." *Id.* at 757.

119. *See id.* at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The Court . . . creates, *brand new for this abortion-related case*, an additional standard that is (supposedly) 'somewhat more stringent,' than intermediate scrutiny, yet not as 'rigorous,' as strict scrutiny. . . . [P]erhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny . . . is frankly too subtle for me to describe . . . ." (emphasis added)).

120. 874 F.2d 1085 (5th Cir. 1989).

121. *Id.* at 1086, 1092.

challenge to the ordinance, the Fifth Circuit concluded that the ordinance was specifically tailored "to protect people suffering from ill health, the aged, and school children from the nuisance of loudspeaker noise" *in spite of* the message conveyed.[122] Furthermore, in *Portland Feminist Women's Health Center v. Advocates for Life*,[123] the United States Court of Appeals for the Ninth Circuit upheld the constitutionality of a preliminary injunction, with certain modifications, that regulated anti-abortion protests outside of a women's health center that provided abortions.[124] The court reasoned that the ordinance was content-neutral because it did not specifically target the views espoused by the demonstrators, but rather protected the clinic from physical intimidation and noise.[125] Courts have thus recognized that, in the anti-abortion protest context, there is a special need to carefully balance the protester's right to free speech with the public's desire to be free from unwanted invasions of personal privacy and safety.

C. The Supreme Court Recognizes Discrete Categories of Government Interests That Support Restricting Otherwise Constitutionally Protected Speech

The Supreme Court has recognized certain government interests that justify restricting speech that would otherwise be protected by the First Amendment. These interests include, among others, protecting residential privacy,[126] protecting normal school activity,[127] and regulating the use of public streets for the protection of personal safety.[128]

122. *Id.* at 1090; *see also, e.g., id.* ("The ordinance makes no reference whatsoever to the content of speech . . . .").

123. 859 F.2d 681 (9th Cir. 1988).

124. *Id.* at 683–84, 686–87.

125. *Id.* at 686.

126. *See* Frisby v. Schultz, 487 U.S. 474, 483, 486 (1988) (concluding that an ordinance that prohibited "focused picketing taking place solely in front of a particular residence" was constitutional on the grounds that the picketers' "activity nonetheless inherently and offensively intrudes on residential privacy[because t]he devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt").

127. *See* Grayned v. City of Rockford, 408 U.S. 104, 120 (1972) (upholding an "anti-noise ordinance" that prohibited willfully disturbing school sessions while on grounds adjacent to a school, reasoning that the "ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' enters and leaves the school").

128. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order . . . ."); Schneider v. New Jersey, 308 U.S. 147, 160 (1939) (explaining that "[m]unicipal authorities . . . have the duty to keep their communities' streets open and available for movement of people and property" and that "[s]o long as legislation . . . does not abridge the constitutional liberty of one

Regulating anti-abortion protests raises similarly important interests. Abortion clinics are hotspots for anti-abortion protests, and courts have thus articulated two important governmental interests operating within this framework: (1) the interest in keeping streets and sidewalks free from obstruction[129] and (2) the interest in prohibiting conduct that disrupts the provision of medical care.[130] In Part II.D, this Note addresses how *Roe*, *Casey* and *Gonzales* have permitted increased state interference with a woman's decision to terminate her pregnancy on the basis of two additional government interests: (1) protecting the potentiality of human life, and (2) protecting the pregnant woman's health.[131]

Under *Ward*, to restrict expressive speech that would otherwise be constitutionally protected, the restriction (1) must be "narrowly tailored to serve a significant governmental interest" *and* (2) must "leave open ample alternative means for communication of the information."[132] According to the Supreme Court, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[133] To pass muster under *O'Brien*, however, "an incidental burden on speech [must be] no greater than is essential" and "the neutral regulation [must] pro-

rightfully upon the street to impart information through speech or the distribution of literature, [the State] may lawfully regulate the conduct of those using the streets."); *see also* Cameron v. Johnson, 390 U.S. 611, 617 (1968) (upholding the constitutionality of a Mississippi statute that prohibited picketing insofar as the picketing "'unreasonably interfere[d] with free ingress or egress to or from any public premises[, including] courthouses'" and also "'unreasonably interfere[d] with free use of public streets'").

129. *See, e.g.*, N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989) (describing the protesters who attempted to block "ingress and egress" to the abortion clinics as "trespassers without right, constitutional or otherwise, to be there" and reasoning that, "[i]nsofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to tortiously assault or harass them, appellants' rights ended where those women's rights began").

130. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 708–09, 719–20 (2000) (reasoning that Colorado's interest in protecting women's privacy and ensuring meaningful access to abortion clinics "[we]re unrelated to the content of the demonstrators' speech"); *see also* Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 666 (E.D. Pa. 1985) (explaining that verbal harassment of women entering and leaving abortion clinics results in increased anxiety for these women, which could in turn impact the women's abortion decision as well as the safety and efficacy of the procedure).

131. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767–68 (1994) (acknowledging "that the State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy").

132. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

133. Frisby v. Schultz, 487 U.S. 474, 485 (1988) (citation omitted).

mote[] a substantial government interest that would be achieved less effectively absent the regulation."[134]

Despite the permissibility of restrictions on speech, "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners.'"[135] As the Court has acknowledged, "'to do so there must be opportunity to win [willing listeners'] attention.'"[136] In the anti-abortion protest context, however, protesters may not effectively block all access to abortion clinics as a form of protest, for such an overt action would impede the delivery of basic and essential medical services.[137] Still, courts have struck down restrictions on anti-abortion protest speech on the grounds that the ordinance or statute at issue prohibited any and all means by which the protesters could reasonably reach their target audience.[138]

D. Roe, Casey, *and* Gonzales *Permit State Interference into a Woman's Right to Terminate Her Pregnancy in the Name of Maternal Health and Potential Life*

In the aftermath of *Roe v. Wade*,[139] the Supreme Court gradually redefined a woman's right to terminate her pregnancy. In *Roe*, the Supreme Court defined a woman's decision to terminate her pregnancy as a fundamental right.[140] The Court went on to note that gov-

134. *See* United States v. Albertini, 472 U.S. 675, 687–89 (1985) (discussing *O'Brien* and its progeny).

135. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

136. *Id.* (quoting *Kovacs*, 336 U.S. at 87).

137. *See* Bering v. Share, 721 P.2d 918, 930 (Wash. 1986) ("In the absence of a place restriction, women visiting the clinic for abortion-related services would be forced to walk a gauntlet of placard-carrying anti-abortionists.").

138. *See, e.g.*, Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194, 235–36, 246 (Cal. Ct. App., 3d Dist. 1989) (affirming the lower court's decision to deny the Women's Health Center injunctive relief excluding anti-abortion protesters "from 'any vantage point from which clients entering the [clinic] can be identified' on Saturdays when abortions are performed" on the grounds that "ample alternative channels of communication do not exist if a speaker's target audience is altogether insulated from the speaker's message[, which] is the case here[because t]he Center performs abortions only on Saturdays"). In *Scully*, the California Court of Appeal for the Third Appellate District reasoned that, by excluding the protesters from demonstrating on the only day when abortions were performed, the health center effectively cut off any and all alternative means by which the protest organization could reach its intended audience. *See id.* at 246 ("The Center made no showing that Defendants had any means of reaching their target audience—women obtaining abortions—if Defendants were excluded from the vicinity of the Center on Saturdays.").

139. 410 U.S. 113 (1973).

140. *See id.* at 152–53 (observing "that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy" and determining that "[t]his right of privacy . . . is broad enough to en-

ernment interference with this fundamental right "may be justified only by 'a compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[141] The Court noted that a fetus is not a "person" within the meaning of the Fourteenth Amendment, concluding that a "fetus's right to life" is not guaranteed by the U.S. Constitution.[142] The *Roe* Court confirmed, however, that the State has two important and legitimate interests at stake in the abortion context—(1) "protecting the potentiality of human life" and (2) "preserving and protecting the health of the pregnant woman"—that become "compelling" at a certain point during a woman's pregnancy.[143] Regarding the state's interest in protecting "potential life," the Court emphasized that "the 'compelling' point is at viability . . . because the fetus then presumably has the capability of meaningful life outside the mother's womb."[144] Regarding the state's interest in protecting "the health of the mother," the Court concluded that "the 'compelling point' . . . is at the end of the first trimester . . . because of the now-established medical fact that . . . until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[145] The Supreme Court established a trimester framework to explain the tangible points at which the state interests became compelling and to justify state intervention into a woman's otherwise fundamental right to terminate her pregnancy.[146]

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compass a woman's decision whether or not to terminate her pregnancy" (internal citation omitted)).

141. *Id.* at 155–56 (citations omitted).

142. *Id.* at 157 (noting that "[t]he Constitution does not define 'person' in so many words . . . [b]ut [that] in nearly all these instances, the use of the word is such that it has application only postnatally" and affirmatively concluding that "the word 'person,' as used in the Fourteenth Amendment does not include the unborn" (footnote omitted)).

143. *Id.* at 162–63.

144. *Id.* at 163.

145. *Id.*

146. The Court's trimester framework included the following distinct stages:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164–65.

Nearly twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[147] the Supreme Court once again addressed a woman's right to terminate her pregnancy. The *Casey* Court reaffirmed the three core principles established in *Roe*,[148] while a plurality of the Court modified other portions of the *Roe* opinion, specifically the trimester framework.[149] The *Casey* plurality abandoned *Roe*'s trimester framework and instead embraced the undue burden standard for determining the permissibility of regulating a woman's right to terminate her pregnancy.[150] In doing so, the plurality also vested states with greater power to regulate that right.[151] In sum, a plurality of the Court determined that four of the five provisions of the Pennsylvania law at issue—informed consent, a twenty-four hour waiting period, parental notification, and recordkeeping and reporting requirements—were constitutional because they did not impose an undue burden on a woman's right to terminate her pregnancy pre-viability.[152]

147. 505 U.S. 833 (1992).

148. *Id.* at 845–46 (recognizing the following three principles: (1) a woman's right to have an abortion pre-viability absent interference from the state; (2) the state's power to restrict abortions post-viability; and (3) the state's legitimate interest in protecting the health of the woman and the life of the fetus "from the outset of the pregnancy").

149. *See id.* at 872 ("The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary.").

150. *Id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

151. *Id.* at 871, 876 (acknowledging that cases decided after *Roe* concluded "that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest," but instead reasoning that "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted," thus making "the undue burden standard . . . the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty").

152. *Id.* at 881–88, 899–901; *see also* Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 95 & nn. 51–54 (2012) ("[T]he plurality upheld Pennsylvania's requirements for parental consent for a minor's abortion, record keeping and reporting to the state, informed consent, and a twenty-four-hour waiting period." (footnotes omitted)). A majority of the Court, however, struck down the spousal notification requirement as imposing an undue burden on a woman's right to access an abortion. *See Casey*, 505 U.S. at 889–98 ("Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . . These considerations confirm our conclusion that [the spousal notification requirement] is invalid.").

The plurality emphasized that, although a woman has a right to terminate her pregnancy pre-viability, the state is not entirely prohibited from taking steps to ensure that the woman's choice is adequately informed. *Id.* at 872. For example, the plurality noted that

In *Gonzales v. Carhart*,[153] the third case in the trio of abortion cases, the Supreme Court addressed the constitutionality of the Partial-Birth Abortion Ban Act of 2003.[154] In a majority opinion written by Justice Kennedy, the Court rejected a facial challenge to a federal statute banning pre-viability partial birth abortions, known in the medical community as intact dilation and evacuation ("intact D & E"), dilation and extraction ("D & X"), and intact dilation and extraction ("intact D & X").[155] As Justice Kennedy reasoned, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life."[156] In dissent, Justice Ginsburg argued that the Court's opinion was "alarming" because it not only "tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases," but it also "blurs the line, firmly drawn in *Casey* between previability and postviability abortions."[157] Since *Roe*, as the trio of abortion cases suggests, the Supreme Court has permitted increased state intrusion into a woman's right to terminate her pregnancy.

III. THE COURT'S REASONING

In *Lefemine v. Wideman*, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision of the U.S. District Court for the District of South Carolina that law enforcement officers, who demanded that anti-abortion protesters remove their graphic signs while conducting an anti-abortion demonstration, were entitled to qualified immunity.[158] Because neither party challenged whether the defendants' actions amounted to a content-based restriction on the protestors' speech, the Fourth Circuit presumed that the defendants' actions were unconstitutional under the First Amendment.[159] On appeal, plaintiff Steven Lefemine "contend[ed] that the district court (1)

even in the preliminary stages of a pregnancy, "the State may enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.*

153. 550 U.S. 124 (2007).

154. 218 U.S.C. § 1531 (2006).

155. *Id.* at 136, 167–68 ("Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception.").

156. *Id.* at 158.

157. *Id.* at 170–71 (Ginsburg, J., dissenting).

158. 672 F.3d 292, 295 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

159. *Id.* at 297.

erred in granting Defendants qualified immunity" and abused its discretion by (2) "failing to rule on Plaintiff's request for declaratory relief" and (3) "failing to award Plaintiff attorney's fees."[160] Defendants' sole argument on appeal was that the district court erred in granting injunctive relief against named defendant Chief Deputy Mike Frederick because he "[wa]s no longer employed by the Greenwood County Sheriff's Office."[161] The Fourth Circuit's decision can be broken down into four parts.

First, the Fourth Circuit began by addressing Lefemine's argument that the district court erred in granting the defendants qualified immunity.[162] Lefemine argued that the officers violated a "clearly established right" under the First Amendment and that any "reasonable officer[] should have known that [his] actions violated that right."[163] In response, the court noted that "[t]he doctrine of qualified immunity 'protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[164] The court relied on the Supreme Court's two-prong balancing test for determining whether the state is entitled to qualified immunity.[165] In determining whether a right was clearly established at the time of its alleged infringement, the Fourth Circuit concluded that the right must be defined "'in light of the specific context of the case, not as a broad general proposition.'"[166]

Still addressing qualified immunity, the Fourth Circuit then turned to Lefemine's assertion that the right should be considered in light of the "heckler's veto."[167] The court rejected Lefemine's argument, reasoning that such a broad construction would undoubtedly upset the "interest-balancing" underpinning any qualified immunity

160. *Id.*
161. *Id.* at 303.
162. *Id.* at 297–301.
163. *Id.* at 297.
164. *Id.* at 297–98 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).
165. *Id.* at 298. Quoting the Supreme Court, the Fourth Circuit observed that "'[q]ualified immunity balances two important interests—[(1)] the need to hold public officials accountable when they exercise power irresponsibly and [(2)] the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Id.* (quoting *Pearson*, 555 U.S. at 231).
166. *Id.* (quoting McKinney v. Richland Cnty. Sheriff's Dep't, 431 F.3d 415, 417 (4th Cir. 2005)).
167. *Id.* at 299. The Fourth Circuit has characterized the heckler's veto as "'the successful importuning of government to curtail offensive speech at peril of suffering disruptions of public order.'" *Id.* at 299 n.3 (quoting Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985)).

analysis.[168] The court noted that while a clearly established right to be free from certain restrictions on expression exists, the right to free speech does not translate into a right to express any opinion or belief at any public place at any time.[169] The court acknowledged, however, that any content-based restriction must be narrowly tailored to serve a compelling government interest.[170] Instead, the Fourth Circuit framed the issue as whether "it was clearly established that law enforcement officers could not proscribe the display of large, graphic photographs in a traditional public forum."[171]

The Fourth Circuit noted that, at the time when the incident occurred in 2005, precedent within both the Fourth Circuit and the Supreme Court was unclear on this precise issue—namely, whether asking protesters in a public forum to remove "large, graphic" signs constituted a proscribed infringement of First Amendment rights.[172] The court pointed out that "there was no clear holding concerning whether such restrictions might be deemed content-based or content-neutral," which was "a sometimes difficult and thorny question."[173] The Fourth Circuit did acknowledge, however, that the Supreme Court has issued at least one opinion suggesting that certain restrictions on anti-abortion protest demonstrations may be deemed content-neutral.[174]

Ultimately, the Fourth Circuit affirmed the district court's grant of summary judgment to the defendants in their individual capacities on qualified immunity grounds.[175] The court clarified its decision by emphasizing that the "Defendants believed they were acting in a content-neutral manner to safeguard legitimate, compelling government interests."[176] To bolster its analysis, the court proffered two inde-

168. *Id.* at 299.

169. *Id.* at 299 n.4 (citing Cox v. Louisiana, 379 U.S. 536, 554 (1965)). The Fourth Circuit acknowledged that the government is permitted to enforce and protect safety on public streets. *Id.* (citing *Cox*, 379 U.S. at 554–55).

170. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

171. *Id.* at 299.

172. *Id.*

173. *Id.* The Fourth Circuit observed that by 2005, at least two other circuit courts of appeals "had found similar restrictions on large, graphic signs in heavily trafficked areas to be content-neutral, not content-based." *Id.* at 300 n.6 (citing Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 791–92 (8th Cir. 2004); Foti v. City of Menlo Park, 146 F.3d 629, 641–42 (9th Cir. 1998)).

174. *See id.* at 300 ("'But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, it *may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription.*'" (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000))).

175. *Id.* at 301.

176. *Id.*

pendent justifications for the defendants' actions "even if [the court accepts as true that the] Defendants should have been aware that they were engaging in content-based restrictions, subject to strict scrutiny."[177] The Fourth Circuit concluded that, given the state of the law in 2005, it was not objectively unreasonable for defendants to believe they could permit the continued protest and remove the graphic signs both to protect the public from foreseeable traffic hazards and to protect minors from seeing the images.[178]

The second part of the Fourth Circuit's opinion addressed Lefemine's "argume[nt] that the district court abused its discretion by failing to rule on [his] request for declaratory relief."[179] Noting that Lefemine was "awarded summary judgment on [his] request for a declaratory judgment that [the] Defendants' actions were an unconstitutional infringement on [his] First Amendment rights," the Fourth Circuit could "discern no abuse of discretion in the district court's decision not to make the declaratory judgment more explicit."[180]

Third, the Fourth Circuit addressed Lefemine's "argume[nt] that the district court abused its discretion by failing to award [him] attorney's fees."[181] As the prevailing party, Lefemine argued he should "'recover attorney's fees unless special circumstances would render [the fee] award unjust.'"[182] The Fourth Circuit relied on the Supreme Court's definition of "prevailing party" to conduct its abuse-of-discretion analysis.[183] Specifically, the Fourth Circuit acknowledged that "'to be considered a prevailing party . . . the plaintiff must be able to'" highlight a change in "'the legal relationship between itself and

177. *See id.* at 300 (describing the state's "'substantial and legitimate interest in traffic safety'" and its "'compelling interest in protecting the physical and psychological well-being of minors'" (citations omitted)).

178. *Id.* at 300–01. The court observed that the case record supported this proposition, as Chief Deputy Frederick had testified in his deposition that he was particularly concerned with "'the combination of [the signs'] graphic nature and their proximity to the roadway.'" *Id.* at 301 (alteration in original) (citation omitted).

179. *Id.* at 301–02.

180. *Id.* Specifically, the court observed: "The injunction issued by the district court did not follow the language employed by Lefemine in its motion for summary judgment, while the opinion and order concludes that Plaintiff's First Amendment rights were violated by [the] Defendants' actions." *Id.* at 302.

181. *Id.* at 302–03.

182. *Id.* at 302 (quoting People Helpers Fund, Inc. v. City of Richmond, 12 F.3d 1321, 1327 (4th Cir. 1993)).

183. *Id.* at 302–03. According to Supreme Court precedent, "'plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" *Id.* at 302 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 789 (1989)).

the defendant.'"[184] The court concluded "that a judicial determination that a plaintiff's civil rights had been violated, without more, was insufficient" to qualify the plaintiff as a prevailing party entitled to attorney's fees.[185] The Fourth Circuit ultimately affirmed the denial of attorney's fees to Lefemine, concluding that the outcome of the litigation "'ha[d] not altered the relative positions of the parties'" on two grounds—(1) there was limited support for the proposition that Lefemine was a prevailing party and (2) there were no other damages awards.[186]

The final part of the Fourth Circuit's decision addressed the defendants' two interwoven contentions for cross-appeal.[187] First, the defendants argued that "the district court erred in granting injunctive relief against Chief Deputy Frederick, who [wa]s no longer employed by the Greenwood County Sheriff's Office."[188] Second, the defendants argued that "the award of injunctive relief against each of them in their individual capacities" should be dismissed as duplicative and that "injunctive relief against them in their official capacities" should also be dismissed.[189] In dismissing the defendants' individual and official capacities contentions, the court concluded that "[c]laims for . . . injunctive relief are not affected by qualified immunity."[190] Regarding the contention about former Chief Deputy Frederick, the court reasoned that "injunctive relief against a state officer in his official capacity may be appropriate if 'the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as pro-

184. *Id.* (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792).

185. *Id.* (citing Hewitt v. Helms, 482 U.S. 755, 763 (1987)).

186. *Id.* at 303 (quoting *People Helpers Fund, Inc.*, 12 F.3d at 1329). The Supreme Court granted Lefemine's petition for a writ of certiorari "to review the Fourth Circuit's determination that he was not a prevailing party." Lefemine v. Wideman, 133 S. Ct. 9, 11 (2012). Disagreeing with the Fourth Circuit's analysis, the Supreme Court concluded that Lefemine was a "prevailing party" because the legal relationship between the parties was materially altered—"Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner. So when the District Court 'ordered [d]efendants to comply with the law,' the relief given . . . supported the award of attorney's fees." *Id.* (internal citation omitted). The Court vacated the Fourth Circuit's judgment and remanded for further proceedings to determine whether any "special circumstances" existed that would render an award of attorney's fees unjust. *Id.* at 11–12.

187. *Lefemine*, 672 F.3d. at 303–04.

188. *Id.* at 303.

189. *Id.*

190. *Id.* (citing Roller v. Cavanaugh, 984 F.3d 120, 122 (4th Cir. 1993)); *see also id.* ("The district court appears to have been analyzing whether Defendants might be liable for damages, not whether they could be subject to an injunction in either their official or individual capacities.").

spective.'"[191] The court noted that even though Chief Deputy Frederick's employment with the Greenwood County Sheriff's Office may have ceased, there remained a "'cognizable danger of recurrent violation'" because he was "still a police officer, albeit elsewhere, in the state of South Carolina."[192] Having found "no abuse of discretion in the district court's decision to order [the] Defendants to . . . refrain from impermissible content-based restrictions," the Fourth Circuit affirmed the district court's grant of injunctive relief against the defendants.[193]

IV. ANALYSIS

In *Lefemine v. Wideman*, the Fourth Circuit issued a four-part holding, in which it determined that the defendant law enforcement officers "were entitled to qualified immunity from suit in their individual capacities" for violations of Lefemine's First Amendment rights on the grounds that "the specific rights at issue were not clearly established at the time of the violations."[194] Neither party addressed the violation of Lefemine's First Amendment rights on appeal,[195] but the Fourth Circuit nonetheless relied on an ambiguous body of case law regarding the distinction between content-based and content-neutral restrictions on speech in its qualified immunity analysis.[196] This confusion suggests that restrictions on constitutionally protected speech in the anti-abortion protest context are not amenable to the standard content-based versus content-neutral analysis—there appears to be no conceptual space for content-neutral regulations due to the emotionally charged nature of anti-abortion protests.[197] Because the content-based versus content-neutral distinction sows judicial confusion over the constitutionality of restrictions on anti-abortion protest speech, courts should eliminate this initial inquiry and apply a single strict

191. *Id.* at 304 (citing Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002)).

192. *Id.* (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).

193. *Id.*; *see also id.* ("In sum, we affirm the district court's grant of summary judgment to [the] Defendants on grounds of qualified immunity, the denial of an award of attorney's fees to Lefemine, and the grant of injunctive relief to Lefemine against [the] Defendants.").

194. *Id.* at 295, 301. For a detailed explanation of the Fourth Circuit's decision, see *supra* Part III.

195. *See supra* text accompanying notes 54, 159.

196. *See infra* Part IV.A. Part IV.A similarly discusses the district court's improper reliance upon ambiguous jurisprudence concerning the distinction between content-based versus content-neutral restrictions on speech.

197. *See infra* Part IV.B

scrutiny standard to all government regulations targeted at these forms of speech.[198]

In addition, the proper analytical strategy for framing First Amendment violations in the context of anti-abortion protests necessitates calling upon *Roe*, *Casey*, and *Gonzales*,[199] in which the Court has permitted increased government interference into a woman's *personal* decision to terminate her pregnancy.[200] This shift in the Court's abortion jurisprudence should influence future Supreme Court decisions addressing the constitutionality of government infringement on protected speech in this limited context. In light of the Supreme Court's recognition of the state's legitimate interests in preserving maternal health and potential human life, then, anti-abortion protesters' First Amendment rights must be given heightened recognition and protection under the U.S. Constitution.[201]

A. The District Court and Fourth Circuit in Lefemine *Relied on Ambiguous Precedent Governing the Content-Neutral Versus Content-Based Distinction for Constitutional Restrictions on First Amendment Speech*

Relying on doctrinally "ambiguous" case law from the Fourth Circuit and the Supreme Court, the Fourth Circuit in *Lefemine* reasoned that when the incident occurred between Lefemine and the defendants in 2005, there was no consistent and clear holding that addressed "whether asking demonstrators to remove [graphic anti-abortion protest signs] would be an impermissible infringement of their First Amendment rights."[202] The court even acknowledged that deciding whether such restrictions were content-based or content-neutral was a "thorny question."[203] The court cited *Hill v. Colorado*,[204] a Supreme Court case upholding the constitutionality of a "Colorado statute that regulate[d] speech-related conduct within 100 feet of the entrance to any health care facility,"[205] as an analogous case.[206] Indeed, the Fourth Circuit construed *Hill* as standing for the proposi-

198. *See infra* Part IV.B.
199. *See infra* Part IV.C.
200. *See supra* Part II.D.
201. *See infra* Part IV.C.
202. Lefemine v. Wideman, 672 F.3d 292, 299 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).
203. *Id.*
204. 530 U.S. 703 (2000).
205. *Id.* at 707, 714.
206. *See Lefemine*, 672 F.3d at 300 (discussing *Hill*, which suggested that restrictions on anti-abortion protest speech "might . . . be content-neutral" (citing *Hill*, 530 U.S. at 716)).

tion "that certain restrictions, *even if made in response to the graphic and offensive nature of images to the viewer*, might still be deemed content-neutral."[207]

The Supreme Court has noted that the proper inquiry for "determining content neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys."[208] As *Hill* suggested, however, when determining the "'content neutrality'" of a statute, "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose."[209] In addition, when balancing the right of protesters "to attempt to persuade others to change their views" against the right of listeners to have "free passage in going to and from . . . a medical facility," the *Hill* Court specifically stressed the public's "interest in avoiding unwanted communication."[210] In response, Justice Kennedy noted in his dissenting opinion that as a result of the Court's ruling in *Hill*, "we learn today that citizens have a right to avoid unpopular speech in a public forum."[211] As Justice Kennedy suggested, by legitimating the *unwilling audience*—an argument upon which the Fourth Circuit similarly relied in *Lefemine*[212]—the *Hill* Court appears to have carved out a judicial caveat to what otherwise would have presumably been a content-based restriction on protected speech.[213]

In *Lefemine*, the Fourth Circuit reasoned that, "even if [the] Defendants should have been aware that they were engaging in content-based restrictions, subject to strict scrutiny," the state may otherwise be justified in restricting such speech through exercise of its police powers.[214] As the Supreme Court established in *Ward*, however, the

207. *Id.* (emphasis added).

208. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added).

209. 530 U.S. at 719–21. *But see id.* ("With respect to the conduct that is the focus of the Colorado statute, 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.").

210. *Id.* at 715–17.

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

212. *See Lefemine*, 672 F.3d at 300 (discussing "'speech that is so intrusive that the unwilling audience cannot avoid it'" (quoting *Hill*, 530 U.S. at 716)).

213. *See, e.g.*, Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1353 (2006) ("[T]he vagaries inherent in characterizing speech regulations as content-based versus content-neutral have resulted in standards for distinguishing between them that are applied in an inconsistent and results-driven manner by the Court."); *see also id.* at 1405 ("Imagine a lawyer attempting to explain to her pro-life client that the Court upheld the law in *Hill* primarily on the grounds that the restrictions on his 'protests, education and counseling' were not based on the content of his speech.").

214. *Lefemine*, 672 F.3d at 300 (citing *Hill*, 530 U.S. at 715; Lytle v. Doyle, 326 F.3d 463, 470 (4th Cir. 2003)). Specifically, the *Lefemine* court acknowledged that "this Court had

government's purpose, specifically, whether the government restricted the speech at issue because it disagreed with its message, is the "controlling consideration" when determining content neutrality.[215] If a court may simply construe a government's restriction as content-neutral, even when the restriction responds directly to the graphic nature of the particular *message* conveyed, then the foundation of First Amendment jurisprudence will no doubt be threatened by this disingenuous application of a two-tiered content-based versus content-neutral scheme.[216]

In addition, the district court's analysis in *Lefemine*, which more extensively addressed the violation of Lefemine's First Amendment rights to freedom of speech and assembly,[217] is troubling for two primary reasons— both of these reasons further illuminate the confusion surrounding the two-tiered content-based versus content-neutral scheme. First, in concluding that the defendants' restrictions were content-based, the court stated: "Despite [the] Defendants' argument that traffic safety was a compelling interest, in his conversation with Lefemine, Major Smith did not mention traffic safety as his reason for wanting the graphic signs down."[218] This statement reveals a concession from the district court that if the defendants had been savvy in how they framed their restriction to Lefemine—by merely stating that the protesters were interfering with and endangering traffic safety—then they might have been able to successfully argue that the restriction was content-neutral and thus subject to a lower level of scrutiny.[219] It appears unlikely, however, that the district court would have been so disingenuous as to intend or permit this result.[220] Second, the

indicated in at least one anti-abortion protest case that 'the State may act to protect its substantial and legitimate interest in traffic safety.'" *Id.* (quoting *Lytle*, 326 F.3d at 470).

215. Ward v. Rock Against Racism, 491 U.S. 781, 791 (2009).

216. *Cf.* McDonald, *supra* note 213, at 1407–08 ("[*Hill*] is the poster child, then, for a deeply flawed free speech doctrine rather than a Court that took leave of its common sense in calling the restriction at issue 'content-neutral.'").

217. *See generally* Lefemine v. Davis, 732 F. Supp. 2d 614, 620–24 (D.S.C. 2010), *aff'd*, Lefemine v. Wideman 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012).

218. *Id.* at 623.

219. *Cf.* McDonald, *supra* note 213, at 1406 ("It hardly needs pointing out that it is normally not difficult to come up with a reasonable sounding content-neutral justification for a regulation that is covertly designed to suppress certain expression. The [Supreme] Court, moreover, is usually reluctant to question or inquire into the true motivations of its co-equal branches of government, even if a predominant motive did exist that differed from the asserted purpose for a regulation.").

220. It appears that the only reference to a traffic safety argument from the defendants came from the Incident Report Lt. Miles prepared after arriving at the scene of the demonstration. *See Lefemine*, 732 F. Supp. 2d at 623 ("'I told Mr. Lefemine that he would have to quit using the blow horn while showing the photographs because it was disturbing

district court rejected the defendants' argument that their restriction was not motivated by disapproval of Lefemine's pro-life stance.[221] In rejecting that argument, however, the district court's analysis confused viewpoint and content neutrality in the same manner in which the court proclaimed that the defendants had confused the distinction. For example, the district court noted that the speech restriction at issue "was motivated solely based upon the *content* of the graphic signs"[222]—this statement suggests that the court in fact equated graphic content (depictions of aborted fetuses) with an implicit viewpoint (opposition to abortion). The district court seems to have made this determination in part because the defendants failed to sufficiently prove content-neutral concerns.[223] Why, however, would the district court concern itself with whether the defendants properly supported their content-neutral concerns if viewpoint neutrality plays no part in discerning content neutrality? It appears, therefore, that the district court's finding that the restriction on Lefemine's speech was content-based largely arose out of an implicit bias against the defendants' viewpoint.

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people and upsetting traffic flow.'" (citation omitted)). The district court noted that the record was otherwise "devoid, however, of any evidence of car accidents, unusual or dangerous congestion, or any similar traffic concerns." *Id.* As a result, the court "f[ou]nd[] that traffic safety, under the facts of th[e] case, was not a compelling interest to justify [the] Defendants' restriction." *Id.*

221. *See id.* at 621–22 ("While [the] Defendants contend that their restriction is content-neutral because it was not motivated by disapproval or disagreement with [Lefemine]'s pro-life stance, this argument confuses viewpoint neutrality with content neutrality."). The district court relied on prior Supreme Court precedent to support the proposition that viewpoint neutrality and content neutrality are not one and the same. *See id.* at 621 ("The United States Supreme Court has consistently 'rejected the argument that viewpoint neutrality equals content neutrality.'" (quoting Capital Area Right to Life, Inc. v. Downtown Frankfurt, Inc., 511 U.S. 1135, 1135 (1994) (O'Connor, J., dissenting))). The district court acknowledged that "'content-neutral speech restrictions . . . are *justified* without reference to the content of the regulated speech.'" *Id.* at 622 (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)); *see also* 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:9 (3d ed. 1996) ("A content-based regulation either explicitly or implicitly presumes to regulate speech on the basis of the substance of the message. A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express. Viewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is first content discrimination, but not all content discrimination is viewpoint discrimination." (footnotes omitted)).

222. *Lefemine*, 732 F. Supp. 2d at 622 (emphasis added).

223. *See id.* at 623 ("Despite [the] Defendants' argument that traffic safety was a compelling interest, in his conversation with [Lefemine], Major Smith did not mention traffic safety as his reason for wanting the graphic signs down. The record evidences that two citizens made complaints; however, neither complaint stated that the signs were interfering with traffic." (footnote omitted)); *see also supra* note 220.

B. Discarding the Content-Based Versus Content-Neutral Inquiry in Favor of a Single Strict Scrutiny Standard Would Eliminate Judicial Confusion and Promote Consistency for Courts Analyzing Future First Amendment Violations in the Anti-Abortion Protest Context

The Supreme Court has carved out three categories to help frame its analysis of First Amendment violations in different public locations,[224] each of which warrants a different level of judicial scrutiny.[225] There should likewise be a judicially mandated categorical exception for anti-abortion protests that abolishes the content-neutral versus content-based distinction.[226] The emotionally charged nature of anti-abortion protests, combined with the difficulty in distinguishing the message from the restriction, has resulted in disparate application of the two-tiered scheme by the Supreme Court in many contexts.[227] In those cases before the Supreme Court that have upheld certain restrictions on anti-abortion protesters, the dissenting Justices have consistently characterized the regulations at issue as content- or viewpoint-based,[228] while the majority has characterized the regula-

224. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (articulating the public forum doctrine and describing the manner in which states may impose restrictions on speech in each of three distinct categories of public property: (1) the "quintessential public forum[]," namely "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" (2) "public property which the state has opened for use by the public as a place for expressive activity," and (3) "[p]ublic property which is not by tradition or designation a forum for public communication" (citations omitted)); *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802–04 (1985) (discussing "the traditional public forum, the public forum created by government designation, and the nonpublic forum" identified by the *Perry* Court).

225. For a general discussion of the relationship between the nature of the public forum and the level of judicial deference, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 88–94 (1987) (acknowledging that "existing doctrine divides public property into three categories," which may affect the standard of review and observing that "it seems clear . . . that the [Supreme] Court does indeed apply different standards of review to public forums and nonpublic forums").

226. *Cf.* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 617 (1991) ("The [Supreme] Court, with the concurrence of most commentators, has interpreted content discrimination quite narrowly as involving a particular type of government purpose served by the regulation of speech. It has, therefore, ignored other types of content discrimination unrelated to the government's purpose. This refusal to recognize other types of content discrimination has resulted in the systematic underprotection of speech and serious doctrinal confusion.").

227. *See* Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMMC'N. L. & POL'Y 131, 144 (2008) (noting that the majorities and dissents in recent anti-abortion protest cases have reached different results by adopting conflicting approaches and methodologies).

228. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 795 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("I think the injunction in the

tions as content-neutral.[229] As one scholar has so aptly noted, "the ill-defined viewpoint and content concepts . . . make it even easier for a justice's 'rooting interests' to steer his or her decision in these cases involving such divisive social issues."[230]

By removing the content-neutral versus content-based distinction and applying a blanket standard of strict scrutiny to all restrictions on anti-abortion protest speech, courts can begin the inquiry by looking directly to the compelling government interest furthered by limiting such speech.[231] While *Lefemine* did not involve a speech-restricting injunction, the real danger is that *any* form of anti-abortion protest speech "lends itself . . . to the targeted suppression of particular ideas."[232] The unavoidable "targeting" problem makes it nearly impossible to apply the two-tiered content-neutral and content-based scheme in a meaningful manner. For example, the *Madsen* Court's rewording of the intermediate scrutiny standard for content-neutral injunctions that restrict speech suggests that there is no conceptual space for this two-tiered scheme in the anti-abortion protest context.[233] In addressing the narrow tailoring prong of the strict scrutiny analysis, courts should apply a "totality of the circumstances" approach[234]—this approach would enable courts to assess the value of

present case was content based (indeed, viewpoint based) to boot."); *cf.* Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) ("What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.").

229. *See Madsen*, 512 U.S. at 763–65 (majority opinion) (determining that injunction issued against a group of abortion protesters was content neutral because it was directed at the group's prior unlawful conduct, and thus was adopted without reference to the content of the speech); *see also Hill*, 530 U.S. at 719–23 (majority opinion) (reasoning that the Colorado law at issue was content neutral because (1) "it [wa]s not a 'regulation of speech,'" (2) "it [wa]s not adopted 'because of disagreement with the message it conveys,'" and (3) "the State's interests in protecting access and privacy, and providing the police with clear guidance, [we]re unrelated to the content of the demonstrators' speech").

230. *See* Kozlowski, *supra* note 227, at 138.

231. For policies and reasons, supported by precedent, that favor subjecting speech-restricting injunctions to strict scrutiny, even where such restrictions are not content-based, see *Madsen*, 512 U.S. at 790–800 (Scalia, concurring in the judgment in part and dissenting in part).

232. *See id.* at 793 (referring to "a speech-restricting injunction").

233. *See id.* at 765 (majority opinion) ("[W]hen evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous."); *id.* at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that the "Court has left a powerful loaded weapon lying about today[,]" for "[t]he proposition that injunctions against speech are subject to a standard indistinguishable from . . . the 'intermediate scrutiny' standard . . . ought to give all friends of liberty great concern"); *see also supra* text accompanying notes 118–119.

234. As one scholar has noted, in assessing the constitutional value of speech, specifically "the degree of tailoring required," one proposal for reform argues that "free speech

the suppressed speech and balance the multitude of interests at stake without first pigeonholing these cases into the content-based or content-neutral camp.[235] Finally, it is worth noting that a single strict scrutiny standard is appropriate in the anti-abortion protest context because it ensures that content-based regulations masquerading as content-neutral regulations will not go unnoticed by the courts.[236] Ultimately, a strict scrutiny standard would limit the possibility that a court would reach an outcome-determinative decision.

Applying a blanket strict scrutiny standard does have its shortcomings. For example, the Supreme Court has specifically recognized that obscenity should not be afforded First Amendment protection.[237] In the context of anti-abortion protest speech then, at least two possible caveats exist. On the one hand, a court could redirect certain anti-abortion protest cases, particularly those involving the display of aborted fetuses and other disturbing images, into the realm of obscenity due to their objectively graphic nature. On the other hand, a court may decide to afford weighty consideration to the government's interest in morals legislation.[238] In spite of arguments on

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cases are said to 'involve the interaction of five variables: content, character, context, nature, and scope.'" R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 358–59 (2006) (footnotes omitted).

235. *Cf.* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 808 (2004) ("I suggest that by considering these five factors [of content, character, context, nature, and scope], the [Supreme] Court should be able to estimate the value of the expression that is being suppressed, and may then use that estimation of value to calibrate the quantum of proof that the State must offer to justify the regulation of expression. The same five factors are also relevant in determining whether the law could be more narrowly tailored, that is, less restrictive of expression.").

236. Examples from other contexts suggest that the two-tiered content-based versus content-neutral scheme has enabled courts to characterize truly content-based restrictions as content-neutral ones to avoid heightened scrutiny. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49–53 (1986) (treating an ordinance that regulated the locations of adult entertainment theaters as content-neutral because the regulation targeted only the *secondary effects* of such speech, and thus had only an *incidental* impact on protected speech).

237. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) ("[W]e have today reaffirmed the basic holding of *Roth v. United States* that obscene material has no protection under the First Amendment"); Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

238. As one scholar recently noted, however, many state and lower federal courts have inconsistently interpreted the recent *Lawrence* Court's sanctioning of morals legislation—some courts argue that morals legislation is still a robust doctrine while other courts believe the Court's decision in *Lawrence* marks a new era in the decline of morals legislation. *Cf.* Manuel Possolo, *Morals Legislation After* Lawrence*: Can States Criminalize the Sale of Sexual Devices?* 65 STAN. L. REV. 565, 566–67 (2013) (adopting the view that the *Lawrence* Court appears to have embraced "a new, much more restrictive approach to morals legislation").

either side of the morals legislation debate, both the line of obscenity and recent abortion cases appear to re-affirm the Court's approval of such legislation. For example, in *Paris Adult Theatre I v. Slaton*,[239] the Supreme Court acknowledged the moral underpinnings of obscenity law, reasoning that, "[i]n an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.'"[240] Almost thirty-five years later, in *Gonzales*, the Court noted that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[241] While anti-abortion protesters' views are seemingly aligned with the government's interest in respecting and protecting the life within a woman,[242] courts, however, may not be so lenient in affording First Amendment protection to graphic and disturbing anti-abortion protest displays.

When courts apply a blanket standard of strict scrutiny to all government restrictions in the anti-abortion protest context, this Note proposes that the result should be a healthy balance between preserving the First Amendment right to free speech, on the one hand, and respecting those recognized important government interests, on the other hand. Eliminating the content-based versus content-neutral distinction will help extinguish judicial confusion and disparate outcomes.[243] This approach is certainly not infallible, as courts could still redirect certain anti-abortion protest cases into the realm of obscenity, thus affording anti-abortion protesters limited First Amendment protection. Nonetheless, it is an improvement that will allow for more concrete guidance in the future.

239. 413 U.S. 49 (1973).

240. *Id.* at 57 (citations omitted).

241. Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

242. *See supra* Part II.D.

243. *Cf.* David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 196 (1987) (noting that under a "two-track approach, governmental regulations of the 'content' of protected speech appear to receive a higher level of judicial scrutiny than do governmental regulations which are purportedly 'content-neutral,'" and that the "two-track system, like any analytical model, does not perfectly describe the [Supreme] Court's approach [because t]he Court has frequently strayed from a strict application of the two-track system").

C. Roe, Casey, *and* Gonzales *Establish a Useful Framework for Understanding the First Amendment Rights of Anti-Abortion Protesters*

As *Roe*, *Casey*, and *Gonzales* suggest, increased state interference with a woman's decision to terminate her pregnancy has slowly eroded a woman's personal liberty in this arena.[244] In the aftermath of *Roe*, the plurality in *Casey* observed: "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted[, meaning that n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue."[245] For example, a plurality of the *Casey* Court upheld a statutory provision that mandated a woman wait twenty-four hours after receiving information about the status of the fetus and about possible alternatives before choosing to terminate her pregnancy.[246] Certainly, a woman could deem such information unwarranted and find the waiting period to be an impermissible invasion of personal freedom and choice, but the Supreme Court has sanctioned this result.[247] If a state may curtail a woman's right to terminate her pregnancy for the reasons set forth in *Casey*—arguably demoting a woman's otherwise fundamental right to choose to terminate her pregnancy in the interest of maternal health and potential human life—it would thus be counterintuitive to restrict anti-abortion protest speech on these same grounds.

V. CONCLUSION

In *Lefemine v. Wideman*, the Fourth Circuit affirmed the district court's decision that law enforcement officers who restricted the speech of anti-abortion protesters were entitled to qualified immunity.[248] This Note, however, addresses an issue that neither party addressed on appeal to the Fourth Circuit—the determination that the defendants violated Lefemine's First Amendment rights.[249] The Fourth Circuit and, to a lesser extent, the U.S. District Court for the

244. *See supra* Part II.D.

245. 505 U.S. 833, 876 (1992).

246. *Id.* at 881–87.

247. For example, the *Casey* plurality reasoned that by "attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an [un-informed] abortion." *Id.* at 882. The plurality also suggested that the waiting period aligns the interests of the State and the woman seeking the abortion by protecting the woman from the "devastating psychological consequences" of a decision that "was not fully informed." *Id.*

248. *See supra* Part III.

249. *See supra* text accompanying notes 54, 159, 195.

District of South Carolina relied on ambiguous precedent regarding content-based versus content-neutral restrictions on protected speech.[250] This Note proposes that, because the two-tiered scheme for determining the constitutionality of restrictions on anti-abortion protest speech promotes judicial confusion, courts should eliminate this inquiry and apply a blanket standard of strict scrutiny to all restrictions on this type of speech.[251] *Roe*, *Casey*, and *Gonzales* reflect the narrowing of a woman's right to terminate her pregnancy, which is evident in decisions that permit increased state interference with this right.[252] Consistent with the permissible state interferences articulated by the trio of abortion cases, anti-abortion protesters should likewise be given greater latitude to disseminate their views to the public.[253]

250. *See supra* Part IV.A.
251. *See supra* Part IV.B.
252. *See supra* Part II.D.
253. *See supra* Part IV.C.