No. 12-1168

IN THE
Supreme Court of the United States

ELEANOR MCCULLEN,
JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN,
CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents … acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill* v. *Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

PARTIES TO THE PROCEEDING

All petitioners are listed in the caption. Noreen Beebe, Carmel Farrell, and Donald Golden were at one time plaintiffs in the district court but were not parties to the most recent proceeding on appeal.

In addition to respondent Coakley, the appellees below were Daniel F. Conley, in his official capacity as District Attorney for Suffolk County; Joseph D. Early, in his official capacity as District Attorney for Worcester County; and Mark G. Mastroianni, in his official capacity as District Attorney for Hampden County. Michael W. Morrissey, in his official capacity as District Attorney for Norfolk County, was at one point a defendant in the district court but was not a party to the most recent proceeding on appeal.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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BRIEF FOR PETITIONER

OPINIONS BELOW

The courts below considered this case in facial and as-applied phases. The opinions of the court of appeals in the facial (Pet. App. 93a-120a) and as-applied (Pet. App. 1a-28a) phases are reported at 571 F.3d 167 and 708 F.3d 1, respectively. The district court's facial (Pet. App. 121a-210a) and as-applied (Pet. App. 28a-66a) opinions are reported at 573 F. Supp. 2d 382 and 844 F. Supp. 2d 206. An interim order of the district court (Pet. App. 67a-91a) is reported at 759 F. Supp. 2d 133.

JURISDICTION

The court of appeals entered its judgment on January 9, 2013. Pet. App. 1a. The petition for a writ of certiorari was filed on March 25, 2013, and granted on June 24, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted at Pet. App. 219a-221a. The most relevant portion of chapter 266, Section 120E½ of the Massachusetts General Laws provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—
>
> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

Petitioners seek to reach women who may be contemplating abortion, in order to offer them information about, and assistance in pursuing, other options. Eleanor McCullen, for example, is a 76-year-old grandmother who aims to stand on public sidewalks near abortion clinics in order to reach this unique audience, at a unique moment, in a compassionate and non-confrontational way. Over the years, hundreds of women have accepted such offers of help from McCullen and the other petitioners.

Since 2007, however, Massachusetts has enforced selective exclusion zones on the public sidewalks outside abortion clinics. While clinic patrons, clinic employees or agents, and passers-by remain free to use the public way, petitioners or other would-be speakers not affiliated with a clinic may not set foot within marked zones extending 35 feet in each direction from any clinic entrance, exit, or driveway. The prohibition applies even to speakers who are entirely peaceful; do not engage in any obstructive or intimidating conduct; and seek only to proffer leaflets, engage in consensual conversations, or even just stand and display a sign or pray.

Massachusetts has consistently defended these abortion-specific, speaker-specific exclusion zones—and a less-sweeping precursor—as permissible time, place, and manner regulations. It has maintained that its law is content-neutral; is narrowly tailored to serve state interests in protecting public safety and clinic access; and leaves ample alternative channels for speech. The First Circuit upheld the law on this basis. Both the State and the courts below have relied heavily on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000).

A. The Prior No-Approach Law

The 2007 Act at issue here replaced an earlier measure, enacted in 2000, that created 18-foot zones around abortion clinic entrances, inside which speakers were prohibited from approaching within 6 feet of a potential listener without consent. The 2000 law was ostensibly designed to address "violence and aggressive behavior" outside clinics, and was modeled in part on the Colorado statute upheld in *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36, 39-40 (1st Cir. 2001) (*McGuire I*).

The statute in *Hill* applied around all healthcare facilities, establishing zones in which speakers were prohibited from "'knowingly approach[ing] another person within eight feet of such person, unless such person consents.'" *Hill*, 530 U.S. at 707 n.1. In sustaining the statute, this Court relied heavily on the fact that it barred only close physical approaches to unwilling listeners, but allowed all other speech. In particular, the Court noted that (i) an 8-foot radius still allowed a speaker to communicate from a "normal conversational distance," and (ii) prohibiting physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material … which the pedestrians can easily accept." *Id.* at 726-727. Observing that the statute applied equally at all healthcare facilities (not just abortion clinics) and to all speakers (not just abortion opponents), the Court held it content- and viewpoint neutral. *Id.* at 725. The Court repeatedly emphasized that the statute forbade only approaches to unwilling listeners, allowing communications with willing listeners to proceed. *See, e.g.*, *id.* at 715-716, 718.

Although Massachusetts modeled its 2000 law on the law upheld in *Hill*, the two were not identical. The Massachusetts law applied only to abortion clinics, not other medical facilities. And it categorically exempted some individuals, including abortion clinic "employees or agents … acting within the scope of their employment." *McGuire I*, 260 F.3d at 51 (reprinting law).

Despite these differences, the court of appeals concluded in *McGuire I* that "*Hill* controls" and that "through the prism of *Hill*" the 2000 law was a permissible time, place, and manner restriction. 260 F.3d at 39, 43-49; *see also McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*) (upholding 2000 law as applied),

cert. denied, 544 U.S. 974 (2005). The court acknowledged that the law "clearly affect[ed] anti-abortion protestors more than other groups" and that the legislature undoubtedly had targeted "anti-abortion protests." *McGuire I*, 260 F.3d at 44. But it concluded, based on *Hill*, that this "special treatment" and "targeting" corresponded to the "legitimate legislative purpose" of "combating violence at [abortion clinics]." *Id.* at 44 & n.1.

As to the categorical exception allowing clinic employees to approach listeners without consent, the court recognized "a certain logic" to the challengers' view that the exception had "the sole practical purpose of … promot[ing] a particular side of the abortion debate." *McGuire I*, 260 F.3d at 46. Yet, relying on *Hill*, the court asserted that such differential treatment was permissible as long as the reason for it was not "content-based" and could be "rationally explained." *Id.* at 44. The court could "envision at least one legitimate reason" for the exemption, which was "to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution." *Id.* at 47. The court also reasoned, relying again on *Hill*, that "the legislature rationally could have concluded that clinic employees are less likely to engage in directing unwanted speech toward captive listeners." *Id.* at 46 (citing *Hill*, 530 U.S. at 715-717).

B. The Current Act

In 2007, Massachusetts replaced the 2000 law with the Act at issue here—Mass. Gen. Laws ch. 266, § 120E½(b). The Act dispenses with any effort to target only unwanted physical approaches. Instead, it creates large painted zones on public sidewalks near abortion clinics in which traditionally protected

speech—even consensual conversation or silent prayer—is forbidden. Like its predecessor, the Act applies only when and where abortions are performed, and categorically exempts clinic employees acting "within the scope of their employment."

Although styled as an "emergency" measure (Pet. App. 153a), the Act was adopted despite a complete lack of evidence that, from 2000 to 2007, there had been a single conviction under the 2000 law; a single conviction for conduct outside a Massachusetts abortion clinic under any of the various federal and state laws that directly target violence, obstruction, intimidation, trespass, or harassment; or any alleged problem whatsoever outside clinics in Worcester and Springfield, two of the three locations at issue here.

Law enforcement officials claimed in testimony before the legislature that protestors outside clinics were "breaking the [no-approach] law on a routine basis." JA 78. Attorney General Coakley displayed to legislators a video that she said showed "clear" violations of the act. *See id.* ("Here are workers for the clinic who clearly are approached, are touched. That's clearly against the law[.]"). There is no evidence in the record that those "clear" violations were ever prosecuted. Indeed, law enforcement officials could point to only a handful of arrests and a few prosecutions that were dismissed for violating the First Amendment. *See* JA 68-69.[1] The same officials complained that it was hard

[1] The bases for these arrests are unclear (JA 69), although, during this litigation, one law enforcement official noted that most involved statutes other than the no-approach law. *See* JA 123. The same official had previously testified, in *McGuire*, that the police "tr[ied] not to arrest anyone" under the no-approach law and did not "take [a] strict interpretation as far as enforcing it." JA 29-30.

to determine whether a particular approach was in fact a violation of the law. JA 79; *see also* JA 67 (police have to work like "basketball referee[s]" to monitor the floating 6-foot zone). Police officials remarked that a 35-foot zone "where no protesters can go … would be great … [and] would make our job so much easier." JA 68.

The legislature decided to amend the law over the objection of, among others, the American Civil Liberties Union of Massachusetts and the Defending Dissent Foundation. JA 38-40, 64-66. As amended, the Act (reprinted at Pet. App. 219a-221a) establishes zones on public streets and sidewalks extending 35 feet in all directions from each "entrance, exit or driveway of a reproductive health care facility." Mass. Gen. Laws ch. 266, § 120E½(b). In practice, these zones have been implemented by large painted semi-circles around each entrance to a clinic. *See, e.g.*, Pet. App. 211a-218a. The Act generally makes it illegal for a person to "enter or remain" within this zone unless going to or from a clinic or solely passing through. Mass. Gen. Laws ch. 266, § 120E½(b)(1), (4). The Act provides for prison terms of up to 30 months and criminal fines of up to $5,000. *Id.* § 120E½(d).

The Act thus makes stationary speech, leafleting, consensual conversation, and prayer a crime on otherwise-open public streets and sidewalks. As a practical matter, the Act primarily, if not exclusively, affects anti-abortion speakers. Like its 2000 predecessor, and unlike the Colorado law sustained by this Court in *Hill*, the Act applies only at abortion clinics—*i.e.*, non-hospital locations "where abortions are offered or performed." Mass. Gen. Laws ch. 266, § 120E½(a). And, unlike the law in *Hill*, the Act again specifically exempts from its prohibitions all "employees or agents of

[a clinic] acting within the scope of their employment." *Id.* § 120E½(b)(2).

Finally, unlike the law in *Hill*, the Act prohibits non-exempt speakers from entering the zones to offer leaflets, display signs, or speak or offer to speak with others at normal conversational distances. Unless exempt, speakers are barred from standing in place in a non-obstructive way on public sidewalks inside the zone. *Compare Hill*, 530 U.S. at 726-727. It is a crime to enter the zone even to continue a quiet conversation with a willing listener.

C. Effect Of The Act On Petitioners

Petitioners are individuals who, prior to the Act, regularly stationed themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. Petitioners testified that they try to engage women who may be seeking abortions in close, kind, personal communication, with calm voices, caring demeanor, and eye contact. They explained that this kind of communication, which they refer to as "counseling" or "sidewalk counseling," is essential to their ability to convey a message of compassion and support. *See, e.g.*, JA 162, 248. They testified, without rebuttal, about hundreds of women who had previously accepted such offers of help on sidewalks outside abortion clinics. And they testified, again without rebuttal, that application of the Act to their activities at specific locations in Boston, Worcester, and Springfield severely restricts their ability to communicate this message effectively to the audience they feel they need to reach most: individuals contemplating an abortion who might welcome information about alternatives and practical assistance in pursuing them.

Eleanor McCullen offers help to women outside of a Boston Planned Parenthood clinic on Tuesdays and Wednesdays. JA 131-132. She has never been arrested or threatened with arrest. *McCullen II* CAJA 217. She and her husband have spent over $50,000 of their own money to help women effectuate their choice to avoid abortion. That money has paid for baby showers, living quarters, furniture, heating oil, electricity, water, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else women needed. JA 132. In McCullen's experience, it is, as a practical matter, impossible to make women aware that such help is available without close personal contact and an opportunity for confidential discussion. *Id.*

The other petitioners are similarly dedicated to sidewalk counseling, advocacy of abortion alternatives, or peaceful expression of moral opposition to abortion. Jean Zarrella is an 85-year-old grandmother who offers counseling on Saturdays and some Wednesdays at the same clinic in Boston as McCullen. JA 175. Gregory Smith is a 77-year-old grandfather who prays the rosary in front of the Boston clinic on Saturday mornings. JA 188-189. Eric Cadin, a Catholic priest, also prays outside the Boston clinic, in addition to offering information and counseling. JA 161-162, 168.[2] Mark Bashour, a community college professor of history, has been offering counseling outside a clinic in Worcester, Massachusetts, twice a week for over twenty years. JA 247. Nancy Clark too counsels outside the Worcester clinic. JA 214-215. Finally, Dr. Cyril Shea is an 84-year-old retired orthopedic surgeon who stands twice a week outside a third facility, in Springfield, Massachusetts,

[2] Father Cadin was a seminarian during the district court proceedings (JA 161) but was ordained in 2012.

holding a sign expressing moral opposition to abortion; he too distributes literature and offers to counsel clinic patrons about abortion alternatives. JA 196, 198, 200.

Petitioners have good reason to believe that some women entering these clinics would welcome their offers of information and help, and would ultimately find petitioners' assistance valuable in making a difficult decision. For example, many women with whom McCullen has spoken have told her that they do not want an abortion but feel that they have no alternative. JA 132-133. Academic studies confirm that some women seek abortions for reasons that may make them receptive to information about alternatives—for example, because they feel they cannot afford a baby or are being pressured by others. *See* Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 113 (2005) (reasons given for abortion: "Can't afford a baby now" [73%]; "Not sure about relationship" [19%]; "Husband or partner wants me to have an abortion" [14%]); *cf. Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 882-883 (1992) (information about abortion and child-support "ensure[s] an informed choice" and helps "reduce[] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed").

Petitioners testified, however, that to be effective, their message must be conveyed in a friendly, gentle manner, with eye contact, at normal volume. JA 133, 176.[3] Shouting from a distance is ineffective or counter-

[3] McCullen typically initiates a sidewalk conversation by asking "Good morning, may I help you this morning?" or "Good morning, may I give you my literature? Is there anything I can do for

productive. *E.g.*, JA 133 (McCullen's experience that speaking from more than "a normal conversational distance of … six to eight feet" can "alarm" listeners or "make them uncomfortable"). As Clark explained, the buffer zone requires "yelling as loud as [she] can" from 35 feet or more away, which "completely ruins" her message by undercutting her compassionate tone. JA 244. Unsurprisingly, people do not respond well to being yelled at from across the street. *Id.*

One of the State's witnesses confirmed that, in her investigations at abortion clinics, she observed only one person respond to attempts at communication: a young woman with whom counselors spoke at close range and with eye contact. JA 284-286. When the only available communication was a pro-life sign or shouting from a distance, people just "walked on by." *Id.* at 285.

Likewise, most people will not make an effort to accept proffered literature unless it can be placed near their hands. JA 179. Such leafleting is an integral part of petitioners' efforts to provide information about alternatives to abortion. *E.g.*, JA 315-316 (flyer for A Woman's Concern Pregnancy Resource Centers: "The decision you are about to make deserves careful consideration and understanding of all options available to you. We recognize that there are no easy solutions, and no one answer that is right for everyone. Call, come in, and together let's explore your situation."); *see also* JA 311-314 (other leaflets). Several petitioners testified that distributing Spanish-language literature is especially important because they do not themselves speak

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you? I'm available if you have any questions." JA 138. If the listener shows interest, she continues: "Perhaps we can talk a little bit before you rush into anything here, let's just talk a couple of minutes…. [T]here is help available." *Id.*

Spanish and thus have no other means of communication with individuals who speak only Spanish. JA 200, 218, 252; *see also* JA 314 (example leaflet).

These problems cannot be ameliorated by distributing leaflets or conversing at normal volumes outside the exclusion zones. By keeping petitioners at least 35 feet from all entry points, the Act prevents petitioners from distinguishing between their intended audience—those headed into clinics—and mere passers-by. JA 135, 179. McCullen testified that even when she recognizes that a woman approaching from the opposite side of the zone is heading for the clinic, she often cannot circumnavigate the zone quickly enough to try to begin a conversation or offer literature near the woman's hands outside the zone. JA 134, 154-155. In some areas, the zones effectively encompass the entire public sidewalk, making it impossible even to stand at the edge of the zone.[4] Finally, the Act forces any conversa-

[4] In Boston, for example, the exclusion zone includes all but one foot of the public sidewalk and on one side extends four feet into the street. JA 294. Petitioners presented similar evidence regarding clinics in Worcester and Springfield. In Worcester, zones around the clinic's pedestrian and driveway entrances both extend far into the street. JA 295-296. Clark and Bashour are forced to stand behind a fence 75-100 feet away from the clinic doorway, or 35 feet away from the driveway entrance that the vast majority of clinic patrons use to enter the facility's private parking lot. JA 218-219, 251. One of the zones at the Springfield clinic similarly prohibits Dr. Shea from standing or distributing literature on the public sidewalk next to the driveway entrance used by most patrons. JA 200, 297-298. Photographs of the painted exclusions in Boston are reproduced at Pet. App. 211a-213a. *See also* Pet. App. 214a-216a, JA 321 (Worcester); Pet. App. 217a-218a, JA 317-320 (Springfield). The precise contours of the zones—some longer than 80 feet, when the 35-foot buffer is added to both sides of the clinic driveway or entrance—are set forth in stipulations at JA 293-299.

tion that may be initiated outside the zone to stop at the boundary line of the zone, lest the speaker risk criminal prosecution. Being forced to stop, mid-conversation, at the edge of the zone makes speakers like petitioners appear "untrustworthy." JA 135, 251. McCullen explained, for example, that she faces a choice at the edge of the zone of either stopping to explain that she cannot enter the zone, which makes her appear "suspicious" ("Who is this person if she can't go further[?]"), or raising her voice to continue the conversation at a distance, which "comes across as not caring." JA 152-153.

Meanwhile, clinic employees or agents are free to remain in the zone and to approach and speak with anyone within it. Clinics regularly station "escorts" in the exclusion zones, wearing blue Planned Parenthood vests. JA 177; *see also* Pet. App. 211a (photo). The escorts use their statutory exemption to interfere with petitioners' attempts to communicate. For example, escorts surround and walk with women approaching the clinic, sometimes yelling, making noise, chattering and/or talking loudly, saying things such as "you don't have to listen to" her, "don't pay any attention to" her, "don't listen to" her, or she is "crazy." JA 178. Escorts also raise and lower their arms to prevent petitioners from offering literature near the hands of recipients. JA 165. And escorts, unlike petitioners, need not stop at the buffer zone line; if they approach a person who has been engaged by a sidewalk counselor outside of the zone—as they are instructed to do by their employer (*McCullen II* CAJA 490)—they can freely accompany the person and continue talking while moving through the zone. JA 178, 189-190.

These constraints have significantly burdened petitioners' counseling efforts. For example, Zarrella testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction with an incoming woman since the Act took effect—after approximately 100 successful interactions before the Act. JA 180. McCullen testified that although she continues to help some women with whom she is able to speak (JA 148), the Act has drastically reduced the number of such conversations. In her estimate, the Act prevents her from speaking at all with at least 5-6 people per day of outreach activity, or 480-586 people per year. JA 136-137. Even when she is able to make initial contact, McCullen testified that the Act's restrictions change the nature of her conversations, making them shorter and less effective because she is forced to speak hurriedly, sometimes speak louder, and stop walking at the painted exclusion line. *See* JA 137 ("I reach far fewer people under the new buffer law than I did under the old [no-approach] law.").

The impact at Worcester and Springfield is equally severe. Most patients arrive at these clinics by car and park in the clinic's parking lot. JA 249 (85-90% in Worcester); JA 200 (90% in Springfield). This means that petitioners' only chance to reach this audience is to stand on the public sidewalk next to the driveway and offer leaflets. *E.g.*, JA 244-245, 252-253. Now that they are forced 35 feet away from that driveway—and cannot hand even a willing recipient a leaflet through the window—virtually no one arriving by car ever accepts their literature. JA 213, 218, 252. Handing out literature to people arriving by foot is equally ineffective in light of the zones: Petitioners rarely hand out more

than one piece of literature per week, and can almost never begin a conversation. JA 218, 225, 252, 261.

D. Prior Proceedings

Petitioners brought suit to enjoin enforcement of the Act under the First and Fourteenth Amendments in January 2008. JA 1.

Less than two weeks later, Attorney General Coakley's Office sent a letter to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the Act. JA 92. The "guidance" indicated that, despite the Act's facially absolute exemption, clinic employees and agents acting within the scope of their employment were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." JA 93. Similarly, the guidance instructed that persons crossing through the zone as mere passers-by were criminally prohibited from "expressing their views about abortion or engaging in other partisan speech." JA 93-94.

1. The district court bifurcated the proceeding, first addressing petitioners' facial challenge and request for preliminary relief. The court held a bench trial on a stipulated record and in August 2008 upheld the Act on its face as a content-neutral time, place, and manner regulation. Pet. App. 121a-210a.

The court of appeals affirmed. Pet. App. 93a-120a (*McCullen I*). It regarded its own prior *McGuire* decisions as controlling on two threshold issues of neutrality, despite differences from the prior law. First, the court reasoned that objections to the Act's exclusive focus on abortion clinics (as opposed to all health care facilities) had been addressed and rejected in the

McGuire cases. *Id.* 105a (citing *McGuire I*, 260 F.3d at 44-47, and *McGuire II*, 386 F.3d at 56-59). Second, the court reasoned that any challenge to the Act's categorical exemption for clinic employees also had been "squarely repulsed" in *McGuire I*. *Id.* (citing 260 F.3d at 45-47).

The court further concluded that, on its face, the Act was narrowly tailored, not overbroad, and left ample alternative channels of communication. Pet. App. 108a-112a. Dismissing petitioners' objection that the Act outlaws peaceful leafleting on public sidewalks and restricts petitioners from speaking to willing listeners at the "conversational distance" discussed in *Hill*, the court reasoned that "the Constitution neither recognizes nor gives special protection to any particular conversational distance" and that "handbilling is not specially protected." *Id.* 110a. It relied on *Hill* for the proposition that time, place, and manner restrictions "routinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels, the court held that "as long as [the court could] envision circumstances in which a 35-foot buffer zone allow[ed] adequate alternative means of expression, [a facial] challenge must fail." Pet. App. 111a. The court saw ample alternative channels because petitioners could stay outside the zones to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and "[a]ny willing listener [was] at liberty to leave the zone [and] approach those outside it." *Id.*

2. On remand, the district court permitted petitioners to advance only a claim that the Act, as applied, did not leave petitioners with adequate alternative means of communication. Pet. App. 88a. As to that issue, the court permitted discovery and then held a bench trial based on written testimony and factual submissions from the parties. In February 2012, the district court again upheld the Act. *Id.* 65a-66a.

The court of appeals affirmed. Pet. App. 1a-28a.

First, the court rejected petitioners' request to revisit its previous rulings that the Act is content- and viewpoint-neutral and constitutional on its face. Pet. App. 9a-14a. In the court of appeals' view, nothing in this Court's recent First Amendment cases involved any "retreat from [the Court's] well-settled abortion clinic/buffer zone jurisprudence." *Id.* 12a (citing *Hill* and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

Next, the court sustained the grant of judgment on the pleadings as to most of petitioners' as-applied claims. Pet. App. 14a-20a. In that regard, the court, among other points, reiterated its holding that the Act is "viewpoint-neutral" despite its exemption for clinic employees and agents. *Id.* 15a. The court asserted, without explanation, that the exemption—which states that the Act "shall not apply" to "employees or agents of such facility acting within the scope of their employment," Mass. Gen. Laws ch. 266, § 120E½(b)(2)—"does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." Pet. App. 15a.

Finally, the court affirmed the rejection of petitioners' as-applied challenge. Pet. App. 20a-26a. The court viewed the "pivotal question" as "whether the Act, as

applied, leaves open adequate alternative means of communication." *Id.* 22a. The court acknowledged that the Act "curtails [petitioners'] ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," *id.* 23a, relegating them instead to "shorter, louder, and less personal exchanges," *id.* 22a. The court thought this difference insignificant, however, because petitioners could leave the zones to engage in "oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups." *Id.* 23a, 26a.

SUMMARY OF ARGUMENT

Massachusetts' 2007 Act is not a permissible time, place, and manner regulation. Such restrictions can be sustained only if they are content- and viewpoint-neutral; are narrowly tailored to serve significant government interests; and leave open ample alternative channels for communication. Massachusetts' Act fails each aspect of this test. Expressly designed to go beyond the law sustained in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the Act discards each of the safeguards that this Court carefully considered and relied on in that case.

The Act is not content-neutral because it creates speech exclusion zones only at abortion clinics and, as a practical matter, affects speech on only one controversial issue—abortion. In contrast, *Hill* emphasized that Colorado's statute could be viewed as neutral "precisely because" Colorado had made a "general policy choice" to regulate speech equally at all healthcare facilities. 530 U.S. at 713.

The Act is also impermissibly viewpoint-based. It exempts abortion-clinic employees and agents from the prohibition on entry into the exclusion zones. *Hill*, in contrast, emphasized that the Colorado statute applied "to all demonstrators whether or not the demonstration concerns abortion and whether they oppose or support … an abortion decision. *That is the level of neutrality that the Constitution demands*." 530 U.S. at 725 (emphasis added).

Massachusetts also cannot show that the Act is narrowly tailored. Legitimate interests in safety and access are already amply served by other laws. The Act unnecessarily bans petitioners and others from entering parts of otherwise public sidewalks to leaflet or conduct (or even continue) consensual conversations with willing listeners. In contrast, *Hill* emphasized that Colorado had sought to regulate only close physical approaches to unwilling listeners.

Finally, the Act does not leave open ample alternative channels for communication. Petitioners seek to offer women information and assistance in pursuing alternatives to abortion. They testified without contradiction that these messages can be effectively conveyed only through personal communication, from a conversational distance, with a calm voice, caring demeanor, and eye contact. The alternative means of communication suggested by the court of appeals—standing outside the exclusion zones and shouting, using bullhorns, or waving large signs—are not remotely adequate substitutes. The Act leaves open none of the alternative channels specifically relied upon by *Hill*, including the ability to speak with listeners or proffer literature from a "normal conversational distance." 530 U.S. at 726-727.

This Court should, at a minimum, hold that the Act goes well beyond the outer limit marked by *Hill* on government power to criminalize peaceful, non-obstructive speech on public sidewalks. Alternatively, the Court may wish to consider whether *Hill* should be substantially clarified, narrowed, or overruled.

ARGUMENT

I. THE ACT IS NOT A PERMISSIBLE TIME, PLACE, AND MANNER REGULATION

Public sidewalks, including those outside abortion clinics, are quintessential public forums. "[T]ime out of mind," such areas "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *United States* v. *Kokinda*, 497 U.S. 720, 743 (1990) (quoting *Hague* v. *Committee for Indus. Orgs.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

The ability of speakers to engage in such activities, including through leafleting or by asking others if they are willing to stop and converse, has been jealously protected by this Court. *See, e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940). So has the right of listeners to receive proffers of speech, which have substantial value not just to the speaker but to the listener and the community. *See, e.g.*, *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

The government's ability to restrict speech on public sidewalks is therefore "very limited." *United States* v. *Grace*, 461 U.S. 171, 177 (1983). Of course, it may prohibit abusive conduct—violence, intimidation, or obstruction. And it may impose reasonable restrictions on the time, place, and manner of even public-forum

speech. *See, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Such restrictions are, however, subject to significant constitutional scrutiny. They will be sustained only if they are content- and viewpoint-neutral; are narrowly tailored to serve significant government interests; and leave affected speakers with ample alternative channels to communicate their message. *Id.* The government bears the burden of proving the constitutionality of speech restrictions. *See Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989); *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000).

The Act fails each aspect of this test. Expressly designed to go beyond the law sustained in *Hill* v. *Colorado*, it discards each of the safeguards carefully relied on in that case. Applying only outside abortion clinics, it turns the traditional free-speech zone of public sidewalks into a speech-free zone—or, more precisely, a zone open to clinic speakers, but closed to speech offering alternatives. Defended as necessary to prevent violence and obstruction, it bars entry even for wholly peaceful, non-obstructive speech with willing listeners. And far from leaving these petitioners with ample alternative means of communication, the Act severely burdens their ability to reach a unique audience in the only way that is effectively adapted to their message of calm, compassionate support.

A. The Act Is Not Content- or Viewpoint-Neutral

As the Court explained in *Hill*, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." 530 U.S. at 731 (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S.

106, 112 (1949) (Jackson, J., concurring)). Here, Massachusetts has instead taken care to frame an Act that as a practical matter affects speech on only one issue—and, indeed, on only one side of that issue. The Act's lack of generality or neutrality is demonstrated both by the specific locations at which it applies and by the specific speakers whom it affects.

1. The Act applies only where abortions are performed

The Act's restrictions apply only to free-standing facilities where abortions are performed—and only during business hours. Mass. Gen. Laws ch. 266, § 120E½ (a)-(c). By design, virtually all speech affected by the Act is speech concerning abortion.

The courts below reasoned that *Hill* had blessed this approach. "'Just as targeting medical centers did not render Colorado's counterpart statute content based, so … too the Act's targeting of [abortion clinics] fails to undermine its status as a content neutral regulation.'" Pet. App. 166a-167a (quoting *McGuire I*, 260 F.3d at 44) (second alteration added). That misreads *Hill*.

Hill emphasized that Colorado's statute was content-neutral because the State asserted an interest in protecting patients from confrontational speech; patients at all healthcare facilities shared that interest; and the State's restriction on close, unconsented approaches applied equally at all such facilities. Thus, the law did not "distinguish among speech instances that [were] similarly likely to raise the legitimate concerns to which it respond[ed]." 530 U.S. at 724. In assessing content-neutrality, "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence

against there being a discriminatory governmental motive." *Id.* at 731. Indeed, it was "*precisely because* the Colorado Legislature made a *general policy choice* that the statute [was] assessed under the constitutional standard" for time, place, and manner restrictions, rather than a stricter standard. *Id.* (emphasis added).

Here, in contrast, Massachusetts has cordoned off the single activity of abortion, putting otherwise public sidewalks off limits to individuals (other than clinic agents) who want to enter the area to speak. The interests the State advances—freedom from violence and obstruction—apply outside every building in the State that hosts any activity that might occasion protest or comment. The special restrictions imposed by the State outside abortion clinics do not. Indeed, in its statute protecting access to health care facilities generally, Massachusetts prohibits only actual obstruction—carefully preserving the "right[] to engage in peaceful picketing which does not obstruct entry or departure." Mass. Gen. Laws ch. 266, § 120E.

The "inevitable effect" of the 2007 Act's targeted approach is that virtually all of the speech burdened by the Act will be speech about abortion. *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968); *see also Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2663-2664 (2011) (law is content-based when its "'practical operation'" is to "impose[] burdens that are based on the content of speech" (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992))); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). It is thus no surprise that after more than six years of litigation, there is no record of any speech about other topics at the locations affected by the Act.

This sort of targeted burdening of speech outside abortion clinics is no more permissible than a law prohibiting picketing at schools except if they are "involved in a labor dispute." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 93, 101-102 (1972); *see also Carey* v. *Brown*, 447 U.S. 455, 457, 461-463 (1980). Just as the government may not may create rules favoring speech on "one preferred subject," *Mosley*, 408 U.S. at 101, it may not create rules that effectively disfavor speech on one topic. The same problem would exist if a legislature effectively regulated environmental, animal-rights, or labor protests by establishing special speech-restrictive zones outside only power plants, or slaughterhouses, or unionized factories. Such laws ignore Justice Jackson's admonition that regulations "impose[d] upon a minority must be imposed generally." *Railway Express*, 336 U.S. at 112; *see also Hill*, 530 U.S. at 731.[5]

Similarly, the Act is not a neutral regulation with an "incidental effect on some speakers or messages but

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[5] The Court's opinion in *Hill* observes that "[a] statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would … not be 'content based' even if it were enacted by a racist legislature that hated civil rights protestors[.]" 530 U.S. at 724. That might be true if the statute advanced a legitimate state interest (*but see id.*) and addressed that interest in a way that could plausibly be described as involving a "general policy choice." *Id.* at 731. It would not be true if the statute applied, for example, only at a subset of lunch counters that refused to serve African-American customers. Likewise, a law purporting to protect passenger access by restricting speech at all airports might not be content-based simply because it was subjectively "motivated" by experience with a particular type of speech. *Id.* at 724. But a similar law applying only to airports where (and when) troops were embarking or returning, or to airports involved in labor disputes, would surely be recognized as content-based.

not others." *Ward*, 491 U.S. at 791. On the contrary, both the State and the lower courts have consistently acknowledged that the Act's focused effect on speech about abortion is deliberate. Massachusetts did not set out to keep down noise levels generally, *see id.* at 792, or to maintain all public spaces in an attractive condition, *see Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). It acted, as the court of appeals concluded, to "combat[] the deleterious secondary effects *of anti-abortion protests*." Pet. App. 166a (emphasis added) (quoting *McGuire I*, 260 F.3d at 44); *see also id.* 113a. Indeed, in *McCullen I* the First Circuit rejected a vagueness challenge to the Act because petitioners "must know" that "anti-abortion protest[] … falls squarely within the hard core of the proscriptions." *Id.* 117a.

For these reasons, the Act is not like the no-approach law sustained in *Hill*. That law may have been motivated by specific concerns about abortion-related speech, but it was drawn and defended in general terms as a means of protecting a broad class of potentially vulnerable listeners outside all healthcare facilities. *See* 530 U.S. at 709-710, 723-725.[6] It was also drawn to restrict only unconsented approaches—not speech with willing listeners, and not speech proffered by a stationary speaker. In his concurring opinion, Justice Souter reasoned that "[t]he fact that speech by a stationary speaker [was] untouched by th[e] statute show[ed] that the reason for its restriction on ap-

[6] Similarly, *Frisby* v. *Schultz*, 487 U.S. 474 (1988), held content-neutral a statutory prohibition on residential picketing that was motivated by abortion protests, *id.* at 476, but was generally drawn to prohibit picketing at all residences, *id.* at 476-477, 481-482, not merely residences of abortion-providers.

proaches [went] to the approaches, not to the content of the speech of those approaching." *Id.* at 738. In contrast, the Act prohibits speakers (other than clinic agents) from entering its restricted zones at all. Their speech is categorically restricted, whether or not it raises any prospect of the violence and obstruction that the Act was ostensibly designed to prevent.[7]

A law that, like the 2007 Act, is so selective in the locations to which it applies that it deliberately and disproportionately burdens speech about one particular topic cannot properly be viewed as "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791.

2. The Act exempts abortion-clinic speakers

Indeed, the 2007 Act is not only content-based, but viewpoint-based. On its face, the Act exempts all "employees or agents of [an abortion clinic] acting within the scope of their employment." Mass. Gen. Laws ch. 266, § 120E½(b)(2). This Court has recognized that such an exemption from a speech regulation "may rep-

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[7] Ironically, the Act's targeting of content is confirmed by the fact that it applies at all abortion clinics, even those such as Worcester and Springfield, about which the legislature heard no evidence of any problems. Rather than proceed by injunction against specific wrongdoers at specific locations, the State apparently assumed that abortion clinics will always prompt anti-abortion speech that will be problematic. But that assumption is inconsistent with the First Amendment. *See Mosley*, 409 U.S. at 100-101 ("Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.").

resent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional[.]"); *R.A.V.*, 505 U.S. at 392 (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). Here, the exemption for clinic speakers is inescapably viewpoint-based. Any speech by clinic agents "within the scope of their employment" will necessarily express the clinic's view.

Moreover, the evidence below confirmed that clinic speakers do, in fact, use their privileged access to the public sidewalks both to speak the clinics' message and to obstruct or counter petitioners' speech. Clinic agents express the clinics' views by saying things like "abortion is legal," "it's important for women to have a choice," "we have help," or "we'll help you get inside." JA 165. And they seek to drown out petitioners' alternative message by surrounding incoming women; raising and lowering their arms to prevent petitioners from placing literature near the hands of potential recipients; and yelling, making noise, chattering, or talking loudly, saying things such as "you don't have to listen to [him, her, them]," "don't pay any attention to [him, her, them]," "don't listen to [him, her, them]," or "[She, He, They] is/are crazy." JA 165, 169, 178, 189-190. All this the Act leaves them free to do within the zones from which petitioners are excluded.

The lower courts believed such speaker distinctions in the public forum were permissible so long as a court could "envision" at least one "legitimate reason" for the preferences. *McGuire I*, 260 F.3d at 47; *accord* Pet. App. 105a-106a. They held that this standard—stated in the language of rational-basis review—could be satisfied by a legislative preference for activities that would "'facilitate safe access'" to abortion clinics, or a desire to make "'crystal clear'" that speakers with that objective "'need not fear prosecution,'" Pet. App. 172a-173a (quoting *McGuire I*, 260 F.3d at 46)—in contrast to petitioners, who of course were meant to fear prosecution and therefore to keep their speech outside the forbidden zone. Citing *Hill*, the lower courts also thought that clinic agents could be exempted because the State "'could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners.'" *Id.* 172a (quoting *McGuire I*, 260 F.3d at 46).

The First Amendment cannot tolerate any such approach. It is axiomatic that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor may the government "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96. Indeed, *Hill* made precisely this point in holding that the statute at issue there was content-neutral:

> The close approach of the latter, more hostile, demonstrator may be more likely to risk being perceived as a form of physical harassment; but *the relevant First Amendment point* is that the statute would prevent *both* speakers, unless

> welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion…. It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion and whether they oppose or support … an abortion decision. *That is the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added).

In upholding a statute that does not apply equally to clinic and non-clinic speakers, the lower courts completely ignored this passage from *Hill*. It is neither neutral nor permissible for the State to prefer clinic agents' use of public sidewalks over petitioners' wish to enter the same area to extend peaceful offers of alternative help. *See also, e.g.*, *Mosley*, 408 U.S. at 96.

The Ninth Circuit properly rejected government favoritism in precisely the same context in *Hoye* v. *City of Oakland*, 653 F.3d 835, 851-852 (9th Cir. 2011). In enforcing a *Hill*-style "no approach" law, the Oakland police as a matter of policy preferred speakers who "facilitate[d] access to clinics" to those who peacefully offered access to alternatives. As Judge Berzon explained, however, "distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction." *Id.* at 851. An enforcement policy "permit[ting] speech on one side of a controversial public debate, but not on the other" was "indubitably content-based":

> Asking a woman "May I help you into the clinic?" facilitates access; "May I talk to you about alternatives to abortion?" discourages it. Telling a woman, "It's your right to have an abor-

> tion!" facilitates access; telling her, "If you have an abortion, you will regret it!" discourages it.

Id. at 852. Looking to *Hill*, the court had no trouble concluding that favoring speakers who facilitated access "does not meet th[e required] level of neutrality." *Id.* (quoting *Hill*, 530 U.S. at 725). The same is true here.

The record in this case confirms that such discrimination has real consequences for women considering whether to have abortions. Before adoption of the 2007 Act, hundreds of women accepted the information and assistance offered by petitioners, and many ultimately chose an alternative to abortion. *See, e.g.*, JA 136 (McCullen: "Over the years, hundreds of women have accepted my offers of help."). After 2007, those numbers precipitously declined. *See, e.g.*, JA 180 (Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the Act took effect[.]").

Undisputed evidence shows that women often have abortions because of financial or other pressures, including pressure from husbands or boyfriends. *See, e.g.*, JA 132-133 (McCullen: "Most women that I speak with tell me they do not want an abortion but feel they have no viable alternative."); JA 101 (respondents' witness acknowledging that "economic hardship" "might be a problem" and that women "to some extent" may feel pressured by husbands or boyfriends who want them to abort). Academic studies confirm that women often seek abortions because they feel they cannot afford a baby, are having relationship problems, or are

being pressured. *See, e.g.*, Finer et al. (discussed *supra* p. 11).

Massachusetts has made it harder for petitioners to reach such women with their peaceful offers of help, and thus deprived these women "of the right and privilege to determine for [themselves] what speech and speakers are worthy of consideration." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340-341 (2010). The First Amendment "protects the public's interest in receiving information" precisely so that the government cannot do what it has done here: "limit[] the range of information and ideas to which the public is exposed." *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Calif.*, 475 U.S. 1, 8 (1986).

3. The Attorney General's "guidance"

In January 2008, the Attorney General sent a letter to local law enforcement and clinic personnel providing "guidance" with respect to the exemptions in the 2007 Act. JA 90-94; *see* Pet. App. 98a, 119a-120a, 155a-157a. The letter asserts that the exemption for clinic employees and agents "does not allow them to express their views about abortion or to engage in any other partisan speech" within the Act's exclusion zone. JA 93. It likewise seeks to limit the exemption for passers-by, instructing that they may not "do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech)." JA 93-94.

The Attorney General's "guidance" should be taken for what it is—a deliberate but unsuccessful attempt to "rewrite a law to conform it to constitutional requirements." *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and ellipsis omitted).

The proffered construction lacks any basis in the statutory text. A statutory provision expressly permitting clinic agents to use public sidewalks "within the scope of their employment," or permitting citizens to use a stretch of sidewalk on their way somewhere else, cannot be read to forbid those uses if they involved abortion-related or "partisan" speech.

Moreover, in seeking to avoid one constitutional infirmity, the Attorney General only highlights others. Her guidance seeks to make the Act seem even-handed, by prohibiting the expression of "views about abortion" by persons otherwise exempted from the Act. That effort, however, simply confirms that regulation of such abortion-related speech is the very purpose of the Act. Similarly, in seeking to make the Act seem neutral, the guidance would make it both impermissibly vague and expressly content-based. While speakers offering alternatives to abortion would still have to stay outside the Act's painted exclusion zones, clinic agents and passers-by could enter the zones so long as they then restricted their speech to stay away from "views about abortion" or whatever the police or the Attorney General might deem "other partisan speech."[8]

In any event, the Attorney General's "guidance" has no legal significance. Enforcement authorities, like courts, may sometimes adopt *narrowing* constructions to avoid questions about the constitutionality of a facially broad statute. *See, e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 482-483 (1988). Here, however, the Attorney

[8] Explaining the purported limitations on passer-by speech to the First Circuit, respondents suggested that wearing a Cleveland Indians shirt in Red Sox territory or singing "We Shall Overcome" could result in arrest. Oral Arg. Tr., 2009 WL 1346643 at *10-12; *see also* Pet. App. 114a-115a.

General purports to *broaden* the scope of a criminal statute. That is something neither a prosecutor nor a court may do. If Massachusetts sought to prosecute a clinic agent for speaking on behalf of the clinic—or two citizens who walked by the clinic while arguing heatedly about abortion or the death penalty—the charge would have to be dismissed as a matter of law by reason of the unambiguous statutory exemption. The Attorney General's attempt to rewrite the statutory exemptions actually adopted by the state legislature is "pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Stevens*, 559 U.S. at 480.

B. The Act Is Not Narrowly Tailored

The second requirement for a permissible time, place, and manner regulation is that it be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791. Massachusetts cannot show such tailoring here. Its legitimate interests are already amply served by prohibitions on abusive conduct. In fact, subsection (e) of the Act—which is not challenged here—expressly prohibits the conduct the Act purports to remedy. Pet. App. 220a-221a ("Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished" by fine or imprisonment.). By establishing a further broad, prophylactic zone from which petitioners and similar speakers are wholly excluded, the 2007 Act burdens substantially more speech than can be justified.

1. Existing laws, if used, would amply protect the State's interests in public safety and clinic access

Massachusetts has articulated two primary interests it seeks to advance through the 2007 Act: protecting public safety "very close to" and in the areas "immediately outside [of]" clinic entrances and ensuring safe, unhindered access to the clinics. *McCullen I* CA-JA 294-296; *see also* Pet. App. 107a, 177a-178a; *McGuire I*, 260 F.3d at 48 & n.3. The original 2000 Act was ostensibly adopted in light of "repeated incidents involving violence and other unduly aggressive behaviors in the vicinity of reproductive health care facilities" in the 1990s, and the 2007 amendments (creating the current exclusion zones) assertedly resulted from "unanticipated difficulties in enforcing the 2000 Act [that] called into question that Act's efficacy." Pet. App. 95a, 97a.

Petitioners have never disputed the general legitimacy of state interests in protecting public safety and preventing obstruction, intimidation, or harassment. *See, e.g.*, Pet. App. 178a. But to justify regulations that burden public-forum speech, the State must show that it is addressing a real problem in a narrowly-tailored way. In particular, this Court has invalidated speech restrictions where, among other considerations, less problematic measures were adequate to protect government interests. *See, e.g.*, *Riley* v. *National Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it."); *Kunz* v. *People of New York*, 340 U.S. 290, 294 (1951) ("There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence.").

Here, the interests in public safety and access are already amply served by numerous state and federal criminal prohibitions, including subsection (e) of the Act, that precisely target inappropriate conduct: harassment, blockading, hindering, impeding, assault, intimidation, disturbing the peace, or the like.[9] Similarly, both federal and state law allow government agencies, medical facilities, and individuals to seek injunctive and other civil relief against persistent offenders.[10] On a proper evidentiary record, a targeted injunction may ban a repeat lawbreaker from a zone around a clinic. *Madsen*, 512 U.S. at 768-769 (upholding exclusionary injunction where those restrained "repeatedly had interfered with the free access of patients and staff").

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[9] *See, e.g.*, Mass. Gen. Laws ch. 266, § 120E½(e) (obstructing, detaining, hindering, impeding, or blocking a person's entry to abortion clinic); *id.* § 120E (obstructing entry to medical facilities); 18 U.S.C. § 248(a)(1) (using force, threat of force, or physical obstruction to injure, intimidate, or interfere with any person obtaining or providing reproductive health services); Mass. Gen. Laws ch. 265, § 13A (assault and battery; enhanced sentence if perpetrator knows victim is pregnant); *id.* ch. 272, § 53(b) (disturbing the peace). State and federal laws also specifically prohibit impersonating a police officer—a form of misconduct advanced as a justification for the 2007 Act. *See id.* ch. 268, § 3; 18 U.S.C. § 912; JA 124.

[10] *See* 18 U.S.C. § 248(c)(1) (permitting any person seeking to provide or obtain reproductive health services to seek injunctive relief, attorneys' fees, and compensatory and punitive damages); *id.* § 248(c)(2)-(3) (permitting federal and state attorneys general to seek injunctive relief, civil penalties, and compensatory damages on behalf of aggrieved persons); Mass. Gen. Laws ch. 266, § 120E (permitting medical facilities to obtain injunctive relief and compensatory and exemplary damages against persons obstructing entry); *id.* ch. 12, § 11H (permitting state attorney general to obtain injunctive relief against private persons who intimidate, interfere with, or coerce a person seeking to exercise rights protected by federal or state law).

Massachusetts enacted its 2007 Act despite the lack of any legislative record showing that either the State or private parties had even tried to use these laws to address any improper conduct outside abortion clinics. There is no reason to think that this failure to use available tools reflects any special problem with the enforceability of clear prohibitions on assault, obstruction, and the like. People outside a clinic either block doors and driveways, for example, or they do not. (Petitioners do not.) If such behavior actually occurs, the appropriate response is to proceed against specific wrongdoers—not to ban non-obstructive and peaceful speakers from entering broad swaths of public sidewalk to speak.

At hearings on the 2007 Act, some witnesses did suggest that the State's 2000 no-approach law, partly modeled on the law upheld in *Hill*, was difficult to enforce. *See, e.g.*, JA 79 (testimony of Attorney General Coakley). That is ironic, given that *Hill* sustained Colorado's law in part on the theory that the no-approach standard provided a "bright-line prophylactic rule," "offer[ed] clear guidance," and "avoid[ed] subjectivity." 530 U.S. at 729. It is also inconsistent with the Attorney General's testimony, at the same hearing, that a video she displayed for legislators showed "clear" violations of the original Act. *See* JA 78 ("Here are workers for the clinic who clearly are approached, are touched. That's clearly against the law, by people who … do not … have the right to harass and intimidate under the Constitution.").[11] If the State had clear, recorded evi-

[11] Law enforcement testimony in the *McGuire* case—when respondents were defending the 2000 Act—likewise indicated that it was "easy" to analyze consent to approach under that Act, but that enforcement authorities "tr[ied] not to arrest anyone" even though they "d[id] see violations." JA 29-30.

dence of unlawful assault, harassment, intimidation, or unwanted "approaches," it was free to bring its allegations before the courts.

In any event, possible difficulties in enforcing an unnecessary and constitutionally suspect law would be a reason to repeal it—not to replace it with an even less justifiable Act that flatly prohibits petitioners and other from entering parts of the public sidewalks to engage in peaceful, non-obstructive speech. And certainly the Act at issue here cannot be justified as "narrowly tailored" to protect safety or prevent obstruction when the State has evidently chosen not to avail itself of many other available tools that are both constitutionally unobjectionable and designed quite precisely to serve its stated ends.

2. Excluding all speakers from public sidewalks near clinic entrances is not a narrowly tailored way to protect state interests

Even if the State could establish a need to burden some speech in order to protect its interests, excluding most speakers from large, otherwise public zones outside clinic entrances is not a "narrowly tailored" approach to Massachusetts' articulated interests. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (citing *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)). The State must not "burden substantially more speech than is necessary to further [its] legitimate interests." *Ward*, 491 U.S. at 799. A "complete ban" on a particular place or method of communication "can be narrowly tailored, but only if each activi-

ty within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485-486.

Previous abortion-related "buffer zones" this Court has considered have been tailored either to apply only to proven wrongdoers, *Madsen*, 512 U.S. at 768-769; *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997), or to close, physical approaches to unwilling listeners, *Hill*, 530 U.S. at 715-718. Similarly, in other cases, the Court has taken care to require that governments avoid broad, supposedly "prophylactic" rules, and instead target only activities that actually threaten their asserted interests. *See, e.g.*, *Riley*, 487 U.S. at 801 ("'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'"); *Grayned* v. *City of Rockford*, 408 U.S. 104, 119-120 (1972) (law upheld because government did not use an "impermissibly broad prophylactic ordinance" but instead required determinations about disruption "on an individualized basis").

Here, Massachusetts in 2007 replaced a law that at least started from the unconsented-approaches model upheld in *Hill* with a broad exclusion zone that is avowedly prophylactic in nature—justified primarily by asserted difficulties in enforcement of rules against specific conduct, and responding to police testimony that having an area "where no protesters can go" would "make [enforcement] so much easier." JA 68. But "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. Three examples should suffice to confirm that that is exactly what Massachusetts has done.

a. *Consensual conversations*

The 2007 Act makes large swaths of public sidewalk off-limits to anyone (other than a clinic employee or agent) who wants to enter the area near clinic entrances to speak about abortion (or anything else). The prohibition covers not only loud, raucous, or confrontational speech, but also petitioners' quiet, consensual conversations. Barring use of a quintessential public forum for the peaceful exchange of ideas or information among willing citizens strikes at the very heart of the First Amendment. *See, e.g.*, *Kokinda*, 497 U.S. at 743 (public access to sidewalks "is not a matter of grace by government officials but rather is inherent in the open nature of the locations."); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("a principal purpose of traditional public fora is the free exchange of ideas"); *Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939) (streets and sidewalks "are natural and proper places for the dissemination of ideas and opinion"). And a regulation that bars even consensual speech is not narrowly tailored to serve interests in public safety or orderly access.

In *Hill*, Colorado prohibited speakers from "approaching" within eight feet of a potential listener *without obtaining consent*. In sustaining the law, this Court noted the "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." 530 U.S. at 715-716. It emphasized that Colorado had sought to regulate "only the latter." *See*, *e.g.*, *id.* at 718 (restrictions "only apply to communications that interfere with" a "'right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined"); *id.* at 723 (characterizing law as establishing "a minor place re-

striction on … communications with unwilling listeners"); *id.* at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected."); *see also, e.g.*, *Frisby*, 487 U.S. at 484-485.

Massachusetts, in contrast, has banned petitioners and others from entering parts of its public sidewalks even to proffer literature or continue consensual conversations with willing listeners. They may not enter or stand within the forbidden zone to make a peaceful "offer to communicate" which the listener could accept or decline. *Hill*, 530 U.S. at 718. And even if they are already engaged in a consensual conversation with a listener who is headed toward the zone, they must stop in their tracks when the listener steps over the State's painted line—thus interrupting the discussion and communicating to the listener that the *government* deems petitioners and their message untrustworthy, unsafe, or bothersome, rather than letting her listen to the message and make her own decisions about whether she wants to continue conversing. These restrictions cannot be defended as necessary to protect public safety or clinic access.

b. *Leafleting*

The 2007 Act also bans leafletting within its zones. This, too, burdens core protected speech. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression," and "no form of speech is entitled to greater constitutional protection." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Here too Massachusetts has gone far beyond what this Court allowed in *Hill*. There, speakers could enter and remain in the zones so long as they did not affirma-

tively approach within eight feet of a potential listener without first obtaining consent. The Court recognized that this raised a serious issue, because "an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients." 530 U.S. at 727. "[T]he First Amendment," the Court observed, "protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Id.* at 728 (internal quotation marks omitted). Ultimately, however, the Court accepted Colorado's law as adequately tailored to safeguard those rights because it did not "prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians [could] easily accept." *Id.* at 727.

Massachusetts, in contrast, flatly forbids speakers from entering the zones extending 35 feet in all directions from clinic entrances. The prohibition applies even if the leafletter remains in one place, and without regard to any consideration of violence, obstruction, physical approach, or listener consent.[12] Depending on where they are standing when a particular potential listener approaches the zone, petitioners' only "opportunity to win their attention" may be to shout or wave from a distance of 70 feet or more.

The court of appeals dismissed this concern with the observation that "handbilling is not specially protected." Pet. App. 110a. That cavalier approach to the required narrow tailoring analysis cannot be reconciled with *Hill*. As *Hill* clearly recognizes, the core First Amendment right to speak peacefully in the public fo-

[12] Massachusetts likewise bars speakers from entering the zone to stand and display a sign. *Compare Hill*, 530 U.S. at 726.

rum "extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943); *see Hill*, 530 U.S. at 715, 727-728. If government regulation burdens that right—even only as to time, place, or manner—it must be narrowly tailored to serve significant interests. Here, Massachusetts' interests in public safety and clinic access cannot justify the heavy burden it has placed on petitioners' ability to engage in peaceful leafletting in otherwise public space.

c. *Conversational distance*

Finally, *Hill*'s narrow-tailoring analysis makes clear that it matters how far a regulation keeps a speaker from her potential audience. Contrasting Colorado's unconsented-approach law with an injunctive provision struck down in *Schenck*, the *Hill* Court reasoned that "[u]nlike the 15-foot zone in *Schenck*, [Colorado's] 8-foot zone allow[ed] the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-727. As the United States explained in its brief in *Hill*, the eight-foot distance from which a speaker was required to seek consent before approaching further could be viewed as narrowly tailored to serve interests in "preventing assaults, intimidation, and obstruction without unduly burdening speech." 98-1856 U.S. Br. 13. Eight feet, the United States argued, was "close enough to deliver a message, but not close enough to obstruct access or to deliver a blow." *Id.* at 12.

Here, in contrast, Massachusetts has established zones that often keep petitioners or other speakers 35 feet or more from individuals with whom they would offer to speak. The court of appeals, again, rejected (as "jejune") petitioners' argument that this difference was even relevant to narrow-tailoring. Pet. App. 110a. But

the degree of separation that the State seeks to impose between speakers and potential listeners makes an obvious difference when the question is whether state-imposed burdens on speech are adequately justified by asserted state interests. Where the governmental interests are public safety and preventing obstruction or harassment, an eight-foot unconsented-approach zone may be adequately tailored to the goal. A 35-foot fixed exclusion zone is not.

* * *

These examples of speech prohibited or burdened by the Act without justification in terms of the State's asserted interests are sufficient to show a lack of narrow tailoring. But they do not stand alone. The Act forecloses *all* speech activities on public sidewalks by non-exempt speakers within the zones. Almost by definition, such a categorical speech-exclusion zone Act does not "respon[d] precisely to [any] substantive problem which legitimately concern[ed]" the State, *Vincent*, 466 U.S. at 810, because it does not even purport to differentiate between problematic and unproblematic activities. The law thus lacks the "'[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Riley*, 487 U.S. at 801.

3. The Act is impermissibly overbroad

For the same reasons that it is not narrowly tailored, the 2007 Act is also impermissibly overbroad. "'[A] substantial number of its applications are unconstitutional, judged in relation to [any] plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473.

Except for specially exempted speakers, the Act "purports to create a virtual 'First Amendment Free Zone'" on public sidewalks near abortion clinics. *Board*

of Airport Comm'rs of L.A. v. *Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). Like the law banning speech in airports at issue in *Jews for Jesus*, the Act "does not merely regulate expressive activity … that might create problems such as congestion or … disruption" but outlaws all communicative activity on otherwise open sidewalks—even "talking and reading, or the wearing of campaign buttons or symbolic clothing." *Id.* at 574-575.[13] These activities "are presumptively protected by the First Amendment but … remain subject to the criminal sanctions of" the Act. *Stevens*, 559 U.S. at 481.

Jews for Jesus held that "no conceivable governmental interest would justify such an absolute prohibition of speech" *even in a non-public forum*. 482 U.S. at 575. *A fortiori*, Massachusetts may not create such speech-free zones on public sidewalks. The State may, of course, "prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). But it is constitutionally required to pursue such goals "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Id.* Here, whatever legitimate sweep the 2007 Act may have is surely dwarfed by the number of its applications that have no constitutional justification. The Act is thus impermissibly overbroad. *Stevens*, 559 U.S. at 473.

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[13] *Compare* Pet. App. 205a-206a (district court reasoning that Act, at least as construed by the Attorney General, "clearly" prohibits even wearing "shirts with abortion-related messages" while passing through marked zones).

C. The Act Does Not Leave Open Ample Alternative Channels Of Communication

The final part of the time, place, and manner standard requires the government to prove that its regulation of speech leaves open "ample" alternative channels of communication. *E.g.*, *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977). This Court has struck down statutes for not preserving ample alternative channels where the statute relegates the speaker to options that "are less likely to reach persons not deliberately seeking [the] information" or are "less effective media for communicating the message that is conveyed." *Id.*; *see also Ladue*, 512 U.S. at 57 (striking down statute that left "no practical substitute" for prohibited activity and where intended audience "could not be reached nearly as well by other means").[14]

The court below upheld the Act on the theory that petitioners could communicate by standing outside the State's painted lines and shouting, using bullhorns, waving large signs, or dressing in costumes.[15] Pet. App. 111a. As this Court unanimously explained, however, "direct one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue

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[14] *Linmark*, for example, struck down an ordinance prohibiting the posting of "For Sale" and "Sold" signs on property because it unduly burdened speakers' ability to reach their intended audience. 431 U.S. at 93.

[15] Despite the lower court's unsupported suggestion to the contrary, Pet. App. 23a, petitioners do not dress up in costumes and there is no evidence that suggests otherwise. Petitioners believe such behavior would be an ineffective way to communicate their supportive message of help, and indeed, some testified that such tactics are counter-productive. JA 215, 246.

of political discourse." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988).[16] The alternatives to which the State and the court of appeals would relegate petitioners are far less effective and far less likely to reach persons who would not deliberately seek out the information petitioners offer. They are not remotely adequate substitutes for ordinary access to public sidewalks for the purpose of offering to engage fellow citizens in peaceful conversations as civilized and caring adults.

1. The Act fails to leave open the alternative channels this Court relied on in *Hill*

Massachusetts cannot deny petitioners the right to speak on public sidewalks simply because they may still speak elsewhere. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163. This Court, therefore, generally considers what alternative means of communication remain *inside* speech-restricting zones, not just outside them.[17]

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[16] Even in the realm of commercial speech, the Court has recognized the constitutional significance of being able to engage in one-on-one communication. *See Edenfield* v. *Fane*, 507 U.S. 761, 766 (1993) ("Unlike many other forms of commercial expression … [personal solicitation] allows direct and spontaneous communication between buyer and seller" and permits buyers "to meet and evaluate the person offering the product or service[.]").

[17] *See, e.g.*, *Vincent*, 466 U.S. at 812 (prohibition on "posting of signs on public property" left open adequate alternatives where it preserved "freedom to exercise the right to speak and to distribute literature *in the same place*" (emphasis added)); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 & n.16 (1981) (regulation limiting distribution of literature to fixed booths sustained where petitioners could still "mingle with the crowd and orally propagate their views," and were not subject

In *Hill*, for example, this Court emphasized that Colorado's restrictions on unconsented approaches left speakers in exactly the same areas outside healthcare facilities with many remaining options. They remained free to engage in any speech with willing listeners; to distribute leaflets from a distance of no more than eight feet; to stand holding a sign; and to proffer speech to potential (and even unwilling) listeners from a "normal conversational distance" of, again, no more than eight feet. 530 U.S. at 726-730.

In 2007, Massachusetts stripped petitioners of all these alternatives. Petitioners may not enter the zones to engage in *any* speech. Gone is the freedom to speak face to face with a willing listener. Gone is the ability to speak from a normal conversational distance. Gone is the ability to offer leaflets. Gone is the ability of a potential listener to respond to a non-threatening proffer of information or support by inviting petitioners to approach and talk. Gone is the ability to stand peacefully and hold a sign, or even simply stand in silent prayer. Each of these activities, permitted under *Hill*, is foreclosed here. For that reason, the Act does not leave open ample or even adequate alternative means for petitioners to proffer their speech. It cannot be sustained under *Hill*.

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to "a total ban on protected First Amendment activities in the … fairgrounds"); *Frisby*, 487 U.S. at 483-484 (targeted residential picketing regulation upheld where availability of ample alternatives was "virtually self-evident" because protesters retained ability to "march[] through residential neighborhoods … in groups," "walk[] a route in front of an entire block of houses," and "go door-to-door to proselytize their views" and "distribute literature").

2. The record in this case confirms the inadequacy of alternative channels for petitioners' speech

The specific factual evidence presented in this case further demonstrates the inadequacy of the remaining channels of communication. The Act has left petitioners with alternatives that are demonstrably and without dispute "less effective media for communicating" their message. *Linmark*, 431 U.S. at 93.

As described at pp. 9-16 above, petitioners' evidence both memorializes and supports their view that women often have abortions because of financial or other pressures that make them feel they have no real alternative. Petitioners testified without contradiction that in order to be effective their messages must be conveyed through personal communication, from a conversational distance, with a calm voice, caring demeanor, and eye contact. In particular, shouting from a distance is ineffective and counter-productive. Petitioners testified, from long personal experience, that even women who would welcome a message about alternatives to abortion will typically not make the effort to accept proffered literature unless it can be offered near their hands in a peaceful, non-threatening manner.

The State offered nothing to rebut this evidence. It did not contest petitioners' showing that, under the 2007 Act, even when they can begin conversations, those conversations are shorter, louder and have different content than when petitioners were permitted to speak without the restrictions imposed by the Act's exclusion zones. To the contrary, the State's own witnesses confirmed that the only effective communication they witnessed on streets and sidewalks around abor-

tion clinics was the sort of personal conversation that the Act severely restricts. *See supra* p. 12.

Further, respondents failed to rebut testimony regarding the particular burdens created by the Act at the Worcester and Springfield clinics. There, the Act virtually eliminates petitioners' previous ability to make contact with potential listeners, because it creates an exclusion zone around the driveways used by the vast majority of persons visiting the clinics. *See* JA 200, 217, 249. Petitioners Bashour and Clark testified without contradiction about how far away they are forced to stand from any incoming car in Worcester, and how they are now effectively unable to distribute any literature to incoming cars. JA 244, 252. Likewise, petitioner Shea testified without contradiction about his inability to distribute literature or begin conversations while avoiding the exclusion lines painted around the Springfield clinic driveways. JA 200.[18]

The evidence also confirmed that these restrictions have had a real impact on the number and quality of petitioners' conversations. For example, petitioner Zarrella testified that although she had approximately 100

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[18] The court of appeals viewed the use of private driveways as the "main impediment to communicative activity" at the Worcester and Springfield sites. Pet. App. 24a. The court erred in disregarding petitioners' evidence that it was the Act's imposition of an exclusion zone *around the driveways* that cut off what had been—because of the pre-existing conditions noted by the court—their only meaningful opportunity to interact with most clinic patients. *Compare Hill*, 530 U.S. at 730 ("Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied."); *Hoye*, 653 F.3d at 858-859 ("the factual predicate of an as-applied challenge does not need to be created by the State").

successful interactions with women approaching clinics before the 2007 Act, the Act so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction since it took effect. JA 180. McCullen testified that the Act has prevented her from speaking with at least 5-6 people per day of her outreach activity, or 480-586 people per year. JA 136-137. Clark testified that she rarely gets more than a fleeting look from women entering the front door of the Worcester clinic to the spot across the street where she is now forced to stand. JA 217.

The district court responded to this evidence by suggesting that people were "simply unreceptive" to petitioners' message. Pet. App. 49a-50a. But that response defies common sense. Petitioners' message has not changed; the rules governing their speech have.

To the contrary, the evidence fully supports petitioners' contention that calm, peaceful, personal communication is crucially and constitutionally significant in this case because it "carries a message quite distinct from," and provides "information about the identity of the speaker" quite unlike, the speech the Act allows—signs, shouting, or hurried half-conversations carried on while making sure not to step over the State's exclusion line. *See Ladue*, 512 U.S. at 56 (invalidating restriction on residential lawn signs because of particular messages and information they conveyed, even though speakers remained fee to employ "hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings'" (emphasis omitted)).[19] "The First Amendment protects [citizens']

[19] The court below declined to apply *Ladue* because this Court's later abortion-clinic speech cases—*Hill*, *Madsen*, and

right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. Massachusetts cannot bear its burden of proving that the Act leaves petitioners with ample alternative channels for their speech.

D. The Act Cannot Survive Strict Scrutiny

Because the Act substantially burdens public-forum speech and cannot be sustained as a permissible time, place, and manner regulation, it must be invalidated unless Massachusetts can show that it is nonetheless the least restrictive means available to achieve a compelling governmental interest. *See, e.g.*, *Playboy*, 529 U.S. at 813. The State must prove the existence of an "actual problem" in need of solving, and then demonstrate that its curtailment of free speech is "actually necessary" to the solution. *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks omitted). This strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

For the same reasons that Massachusetts cannot establish that its Act is narrowly tailored to serve significant state interests, it certainly cannot show that the law is the least restrictive means of pursuing a compelling interest. As discussed above (*see supra* Part I.A), the State's interests in protecting safety and ensuring unobstructed access, even if "compelling" in this context, could be amply protected by the enforcement of any number of existing, constitutionally unproblematic prohibitions on improper conduct. The

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Schenck—did not rely on it. The court characterized as "much different" the "problem of how the First Amendment operates when the special concerns of public-sidewalk protests around abortion clinics are at stake." Pet. App. 26a; *see also id.* 11a–14a.

State thus cannot show either that it has an actual problem or that speech restrictions are necessary to solve it. And even if it could make that showing, it could not further show that the broad, indiscriminate exclusion zones it has created are remotely necessary to address whatever problem may exist, let alone the least restrictive means to that end. *See supra* Parts I.B and I.C. Accordingly, for the same reasons that it is not a permissible time, place, or manner regulation, the Act cannot survive strict scrutiny review.

II. THIS COURT SHOULD REVISIT *HILL*

For the reasons set forth above, the Act cannot be sustained under *Hill*, because it abandons both *Hill*'s insistence on true neutrality and its narrow focus on close physical approaches to unwilling listeners. In deciding this case this Court should, at a minimum, emphasize that these limiting principles are real, and that *Hill* marks an outer limit of government power to criminalize peaceful, non-obstructive speech on public sidewalks. Alternatively—and certainly if any plausible reading of *Hill* might suggest, as the court below concluded, that the Act at issue here could be sustained—the Court may wish to consider whether *Hill* should be substantially clarified, narrowed, or overruled.

Stare decisis is not an inexorable command. *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). This is particularly true in constitutional cases, where "correction through legislative action is practically impossible." *Id.* at 828 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). Moreover, where a decision is "unworkable or … badly reasoned, this Court has never felt constrained to follow precedent." *Id.* (quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944)).

Hill has proved to be badly reasoned, out of step with the Court's other First Amendment jurisprudence, and unworkable or destructive in practice. In the fourteen years since *Hill* was decided, this Court has considered many other important cases involving the freedom of speech, and yet no majority has ever relied on *Hill*'s central First Amendment analysis. This may be because, as Justice Kennedy observed at the time, *Hill* "contradict[ed] more than a half century of well-established First Amendment principles. For the first time, the Court approve[d] a law which bar[red] a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." 530 U.S. at 765 (Kennedy, J., dissenting). Also in the time since *Hill* was decided, a broad range of constitutional scholars has strongly criticized the decision. *See, e.g.*, *Symposium*, 28 Pepp. L. Rev. 747, 750 (2001) (Professor Laurence Tribe: "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.").[20]

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[20] *See also Symposium*, 28 Pepp. L. Rev. at 748 (Professor Michael McConnell: "*Hill v. Colorado* departed from standard First Amendment free-speech analysis … [by permitting] a statute that makes it a criminal violation for people to engage in entirely peaceful, non-coercive, non-obstructive, quiet speech in a quintessential public forum; namely discussing an issue of undoubted public importance on the public streets and sidewalks."); Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) ("*Hill* is unusual in the other way, with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincing-

In practice, *Hill* has both emboldened legislatures to engage in discriminatory speech regulation and lulled some lower courts into nearly dismissive treatment of core First Amendment liberties—as well demonstrated by this case. *See, e.g.*, Pet. App. 110a-113a. Applied in this manner, *Hill* conflicts with longstanding, foundational precedents of this Court. *See, e.g.*, *Mosley*, 408 U.S. at 96 ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Grace*, 461 U.S. at 177 ("[G]overnment's ability to permissibly restrict expressive conduct [on public sidewalks] is very limited[.]"); *Jews for Jesus*, 482 U.S. at 574-575 (even in a non-public forum, "no conceivable governmental interest would justify" the "absolute prohibition of speech" involved in creating a "First Amendment Free Zone"); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (when proscribable "conduct occurs in the context of constitutionally protected activity … precision of regulation is demanded" (internal quotation marks omitted)).

This problem is not limited to abortion speech or to the lower courts in this case. Courts throughout the country have used *Hill* to uphold laws that push the boundaries of First Amendment doctrine across a variety of categories of speech. *See, e.g.*, *Brown* v. *Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013) (relying on *Hill* to "reject any absolutist reading of content neutrality,

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ly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); Volokh, *The First Amendment and Related Statutes* 339 (4th ed. 2011) (*Hill*'s statement of the content-neutrality test "cannot be taken entirely literally" because it would conflict with numerous prior cases).

and instead orient our inquiry toward why—not whether—the Town has distinguished content in its regulation"); *Gibson* v. *Texas Dep't of Ins.-Div. of Workers' Comp.*, 700 F.3d 227, 233 (5th Cir. 2012) (statute banning use of particular advertising content held content-neutral under *Hill*); *Spingola* v. *Village of Granville*, 39 F. App'x 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to reject facial challenge to ordinance permitting public speaking at events only in "designated speaking areas," on ground that "there is at least one legitimate reason for the Ordinance, crowd control"); *Ross* v. *Early*, 758 F. Supp. 2d 313, 322 (D. Md. 2010) (relying on *McCullen I* to hold there is "no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message").

Freedom of speech is of central importance to our society. This Court can correct only a certain number of errors in particular cases. In the meantime, unclear or unsound precedents can sow confusion and error and chill the exercise of this fundamental right, harming both individuals and the Nation.[21] In light of these considerations, petitioners respectfully suggest that the Court may wish to consider using this case as an opportunity to revisit *Hill*.

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[21] *See, e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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