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 OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO and its affiliated unions have a vital interest in the First Amendment rights of citizens to disseminate their views on the public streets by picketing, handbilling, and engaging in other forms of protected expression. Many of this Court's leading First Amendment decisions involve the efforts of union members to engage in such expressive activities.[2] That being so, the AFL-CIO has filed briefs as *amicus curiae* in a substantial number of this Court's cases involving the exercise of First Amendment rights.[3]

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[1] Counsel for the petitioners and counsel for the respondents have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] *See*, *e.g.*, *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 398 U.S. 147 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1954); *DeBartolo v. Florida Gulf Coast Trades Council*, 486 U.S. 568 (1988).

[3] *See*, *e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 752 (1994); *Int'l Soc'y for*

STATEMENT

The question presented by this case is whether a Massachusetts law, Mass. Gen. Laws ch. 266, § 120E1/2 (2013),[4] that bans all presence adjacent to the entrances and driveways of reproductive health care facilities – and therefore substantially limits speech and other expressive activities – violates the First Amendment. The court of appeals rejected both facial and as-applied challenges to the Massachusetts law, concluding that it was a valid time, place, and manner regulation. *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013); *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). The petitioners then sought a writ of certiorari to review the court of appeals' decision, which this Court granted.

SUMMARY OF ARGUMENT

The 2007 amendments to the Massachusetts Reproductive Health Care Facilities Act of 2000 violate the First Amendment by making it a crime for any person to engage in peaceful expressive activities, such as distributing leaflets, displaying placards, or even

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Krishna Consciousness v. Lee, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 483 U.S. 589 (1987); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 453 U.S. 540 (1981).

[4] The substance of Mass. Gen. Laws ch. 266, § 120E1/2 was enacted in 2007 as an amendment to the Massachusetts Reproductive Health Care Facilities Act of 2000, S.B. 148, 181st Gen. Ct. (Mass. Aug. 10, 2000). We therefore refer to the current law as "the 2007 amendments" and to the former law as "the 2000 Act."

conversing, on the public sidewalks adjacent to reproductive health care facilities. The 2007 amendments are not narrowly tailored to achieve the legitimate goal of protecting access to reproductive health care facilities. Rather, those amendments unnecessarily interfere with expressive activities at the core of the First Amendment by forbidding peaceful efforts to engage in conversation with or distribute leaflets to members of the public on the public sidewalks and streets adjacent to these facilities.

Massachusetts's principal argument in support of the 2007 amendments is that it was too burdensome for police to enforce the floating buffer zone contained in the 2000 Act. However, the convenience of enforcing the prophylactic requirements of the 2000 Act cannot, by itself, justify a prohibition on all speech adjacent to reproductive health care facilities. The State has multiple tools to prevent the obstruction of access to clinics, including specific criminal prohibitions against such obstruction. Massachusetts may not simply ban all speech in a traditional public forum because doing so is administratively easier than enforcing laws that balance the rights of persons to access reproductive health care facilities with the public's First Amendment right to free expression.

The comprehensiveness of Massachusetts' prohibition on speech adjacent to reproductive health care facilities also does not excuse the law from the requirement that that prohibition on speech be narrowly tailored. As *Frisby v. Schultz*, 487 U.S. 474 (1988) illustrates, even where a compelling privacy interest is

at stake, the First Amendment does not permit the government to prohibit core expressive activity in a traditional public forum.

Finally, neither *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), nor *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), support Massachusetts' establishment of a fixed buffer zone prohibiting all speech adjacent to reproductive health care facilities. Unlike the blanket prohibition on speech at issue in this case, both *Madsen* and *Schenck* involved injunctions against specific parties at specific locations in response to specific prior unlawful acts. It hardly bears stating that a court's authority to issue a closely-tailored injunction against a party in such circumstances is not justification for a legislature to enact a broadly applicable prohibition on speech applying prospectively to the public at large. Because the law at issue here constitutes such an overbroad legislative enactment, it is, therefore, unconstitutional.

ARGUMENT

1. At issue in this case is the constitutionality of the 2007 amendments to the Massachusetts Reproductive Health Care Facilities Act of 2000. That law was enacted to "restrict[]" the free speech activities of "protesting and educating in the vicinity of reproductive health care facilities." Mass. Gen. Laws ch. 266, § 120E1/2 (2013) (capitalization omitted). The 2007 amendments substantially expand the original restrictions on protesting and educating by flatly prohibiting those activities and other forms of expression on public sidewalks in the vicinity of reproductive health care facilities. The amendments make it a crime for anyone to "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" for any purpose other than going to or from the facility on business or passing through on the way to another destination. *Id.* § 120E1/2(b).

The 2007 amendments to the Act make it a crime for anyone to engage in peaceful expressive activities, such as distributing leaflets, displaying placards, or even conversing, on the public sidewalks adjacent to reproductive health care facilities during the facilities' hours of operation. This places a substantial burden on the ability of a speaker to engage in any expression concerning the facility, its employees or its operations. Such communication will often most effectively take place at or near the facility for the simple reason that the potentially interested audience will most likely be found at that location, *i.e.*, in exactly the place where the statute forbids communication.

For example, a labor union seeking to organize a group of employees will typically seek to communicate with the employees by distributing leaflets to them or by seeking to engage them in conversation on public sidewalks or at driveway entrances immediately outside their workplace. These locations are "particularly appropriate place[s] for the distribution of [union-related] material" and for employees to speak about "matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks omitted). But the Massachusetts statute at issue here would forbid the union from communicating with employees of a reproductive health care facility *in any*

manner on the sidewalks or next to driveways outside their workplace. The union could not distribute leaflets to those employees in these areas. Its representatives could not engage in conversation with them. Indeed, even the facility's employees are forbidden to stop on those sidewalks to discuss the union campaign with their co-workers. *See* JA 93 (employees are forbidden "to engage in any . . . partisan speech within the buffer zone").

The "public way[s] [and] sidewalk[s] adjacent to [] reproductive health care facilit[ies]," Mass. Gen. Laws ch. 266, § 120E1/2(b), like all "public streets and sidewalks," are "traditional public fora," and "'have immemorially been held in trust for the use of the public.'" *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)). "[R]egulations of the time, place, and manner of expression" in such "quintessential public for[a]" must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 481 (quoting *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45 (1983) (citations omitted in *Frisby*)). The 2007 amendments to the 2000 Act clearly fail this test.

The 2000 Reproductive Health Care Facility Act, S.B. 148, 181st Gen. Ct. § 1(d) (Mass. Aug. 10, 2000), was designed "to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." The Act created an 18-foot zone around the entrances and driveways of reproductive health care facilities within

which it was unlawful to approach within six feet of another person for the purpose of communicating with that person without the other person's consent. *Id.* § 2. As enacted, the 2000 law thus allowed those who wished to express their views to a person entering or leaving the facility to do so in all cases from a distance as close as six feet and from an even closer distance with the person's permission. *Ibid.*

Like the eight-foot buffer zone at issue in *Hill v. Colorado*, 530 U.S. 703, 726-27 (2000), the six-foot interval in the 2000 Massachusetts law was large enough to avoid pushing and shoving of individuals who seek to enter a clinic, while close enough to "allow[] [a] speaker to communicate at a normal conversational distance." (Internal quotation marks omitted). Although the "interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients," as in *Hill*, "[t]he [2000 Massachusetts] statute d[id] not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians c[ould] easily accept." *Id.* at 727. Rejecting a constitutional challenge to the 2000 Massachusetts law, the court of appeals explained that "visual and verbal images are able to cross . . . [the] floating buffer zone with sufficient ease that the 'restriction on an unwanted physical approach leaves ample room to communicate a message through speech.'" *McGuire v. Reilly*, 260 F.3d 36, 49 (1st Cir. 2001) (quoting *Hill*, 530 U.S. at 729).

In contrast, the 2007 amendments to the Massachusetts law show no regard for such expressive considerations. In *Schenck*, this Court found a 15-foot floating buffer zone unconstitutional because it "bur-

den[ed] more speech than necessary to serve the relevant governmental interest" by preventing individuals "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." 519 U.S. at 377. *See also Hill*, 530 U.S. at 726-27 (explaining that "[u]nlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a normal conversational distance"). The fixed 35-foot buffer contained in the 2007 Massachusetts amendments is thus, *a fortiori*, far too large to permit "[a] speaker to communicate at a normal conversational distance" or "a leafletter from . . . proffering his or her material[] [in a manner in] which . . . pedestrians can easily accept," *Hill*, 530 U.S. at 726-27 (internal quotation marks omitted), "classic forms of speech that lie at the heart of the First Amendment," *Schenck*, 519 U.S. at 377.

The principal argument made in support of the 2007 amendments was that it was often difficult for the police to tell whether a speaker had been given consent to approach within six feet of the person being addressed. JA 50 ("A[] problem with the existing law is the inability to discern whether a patient, her companions, or facility employees have consented to a given protestor's approach." (testimony of Mass. Attorney General Coakley)); JA 60 ("The [2000] Buffer Zone Law … makes police work harder, and has been nearly impossible to enforce due to its complexity and the vagueness of the language surrounding consent." (testimony of Dianne Luby, President and CEO, Planned Parenthood League of Mass.)). The authorities thus argued that enforcement of the prophylactic restriction contained in the 2000 Massachusetts law

would be much simpler for the police if *all* activities were barred within a large area around facility entrances and driveways. JA 67-68 ("I think clearly having a fixed buffer zone, where everyone knows the rules and nobody can go in that and protest, will make our job so much easier." (testimony of Captain William Evans, Boston Police Dep't)).

But the convenience of the authorities is not a substantial government interest that justifies forbidding free speech on public sidewalks. *See Schneider v. State*, 308 U.S. 147, 164 (1939) ("If it is said that [enforcement of criminal laws is] less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated . . . , and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."). Rather, no matter how convenient a bar on speech is to the authorities, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

There was, to be sure, some testimony to the effect that anti-abortion protestors were "blocking access to the front door of the clinic, . . . screaming at patients [and] employees inside the bubble zone, touching the arms and shoulders or backs of the patients or employees . . . , standing in front of cars and . . . block[ing] patient and employee access to the garage." JA 80. But all of that conduct was unlawful under the pre-2007 law and could have been prevented through police enforcement or court orders. Other provisions of Massachusetts law make it a criminal offense to "knowingly obstruct[] entry

to or departure from any medical facility," Mass. Gen. Laws ch. 266, § 120E (2013), and to "knowingly obstruct[], detain[], hinder[], impede[] or block[] another person's entry to or exit from a reproductive health care facility," Mass. Gen. Laws ch. 266, § 120E1/2(e). Prohibiting peaceful speech on the sidewalks surrounding the clinics simply would not materially assist the enforcement of the laws against such obstruction. Thus, prohibiting peaceful speech on the sidewalks near the clinics does not bear a sufficiently close relationship to the government interest asserted to justify enactment of the 2007 amendments.

By prohibiting *all* speech and protest activity "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," Mass. Gen. Laws ch. 266, § 120E1/2(b), the Massachusetts law amounts to "a complete ban on handbilling," and all other expressive acts, and thus burdens "substantially more speech than necessary," *Ward*, 491 U.S. at 799 n.7, to protect "the rights of persons seeking access to [reproductive health care] facilities to be free from hindrance, harassment, intimidation and harm," Reproductive Health Care Facility Act, S.B. 148, 181st Gen. Ct. § 1(d).

2. The court of appeals acknowledged that "all communicative activities (as opposed to, say, purely violent or aggressive activities) are banned within buffer zones" by the Massachusetts law, yet concluded that "'the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive'" for the law's enactment. *McCullen*, 708 F.3d at 11 (quoting *Hill*, 530 U.S. at 731). That argument completely ignores the requirement that gov-

ernment time, place, and manner regulations be not only content neutral but also narrowly tailored.

Frisby illustrates that the comprehensiveness of a prohibition on speech does not relieve the government from the First Amendment's narrow tailoring requirement. In that case, a town ordinance, on its face, seemed to prohibit all picketing in residential neighborhoods in response to repeated protests outside the home of a doctor who performed abortions. 487 U.S. at 476. While recognizing that "'[t]he State's interest in protecting the . . . privacy of the home'" is "'of the highest order,'" *id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)), the Court strongly questioned whether a blanket ban on picketing in residential neighborhoods could be considered "narrowly tailored to serve a significant government interest." *Id.* at 482 (internal quotation marks omitted). The Court thus applied "a narrowing construction that avoids constitutional difficulties" by interpreting "the ordinance [as] intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Ibid.* As this Court described, this "focused picketing" "do[es] not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . . in an especially offensive way." *Id.* at 483, 486.

In contrast, the Court made clear that "generally directed means of communication . . . may not be completely banned in residential areas," including "handbilling," "solicitation," and "marching." *Id.* at 486 (citing *Schneider*, 308 U.S. at 162-63; *Martin v. Struthers*, 319 U.S. 141 (1943); *Gregory v. Chicago*, 394 U.S. 111, 125 (1969)). *Accord Madsen*, 512 U.S. at 775 (striking down residential picketing buffer zone on authority of *Frisby*). Thus, even though Massa-

chusetts' interest "in protecting the well-being, tranquility, and privacy" of patients seeking medical care at reproductive health care facilities may be "of the highest order," *Frisby* instructs that "more generally directed means of communication . . . may not be completely banned" in a traditional public forum, 487 U.S. at 484, 486.

3. It is no answer to argue that "[t]he fixed buffer zone established by the [2007 amendments] is very similar to the buffer zones that were established by injunction and upheld in *Madsen* [*v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)] and *Schenck* [*v. Pro-Choice Network of Western New York*], 519 U.S. 357 (1997)]." Op. Cert. 15. The fact that the buffer zones in those cases "were established by injunction" against specific individuals and organizations in response to specific unlawful acts fundamentally distinguishes *Madsen* and *Schenck* from this case.

This point is demonstrated by comparing the holdings in *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Carlson v. California*, 310 U.S. 106 (1940), on the one hand, with the holding in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), on the other.

Thornhill and *Carlson* struck down statutes that contained blanket anti-loitering and anti-picketing provisions on First Amendment grounds, noting that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," *Thornhill*, 310 U.S. at 102. *See also Carlson*, 310 U.S. at 113 ("[P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be

regarded as within that liberty of communication which is secured to every person by the [Constitution] against abridgment by a State.").

Subsequently, in *Milk Wagon Drivers*, the Court upheld a state court injunction against all labor protest in certain relevant locations, including peaceful protest activity, where union supporters had previously engaged in extensive "window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings" in the course of a labor dispute. 312 U.S. at 292. Distinguishing the case from *Thornhill* and *Carlson*, which "involved statutes baldly forbidding all picketing near an employer's place of business," the Court held that "the law of a state may be fitted to a concrete situation through the authority given by the state to its courts," namely, through "an injunction derived from and directed towards violent misconduct." *Id.* at 297-98. In contrast to the statutory "ban[s] on all discussion . . . of a matter of public importance" struck down in *Thornhill* and *Carlson*, "[t]he injunction . . . is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation." *Id.* at 298.

In this case, the State's reliance on *Madsen* and *Schenck* to justify its blanket prohibition of speech adjacent to reproductive health care facilities confuses the rule of *Thornhill* and *Carlson* with that set forth in *Milk Wagon Drivers*. Both *Madsen* and *Schenck* – like *Milk Wagon Drivers* – involved "[a]n injunction [that] . . . applie[d] to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group" based on "the group's past actions in the context of a specific dispute between real parties." *Madsen*, 512 U.S. at 762. *See also id.* at 759 n.1 (list-

ing parties enjoined from entering buffer zone, including "all persons acting in concert or participation with [named defendants], or on their behalf"); *Schenck*, 519 U.S. at 366 n.3 (same). In other words, in both *Madsen* and *Schenck* "[t]he parties seeking the injunction assert[ed] a violation of their rights [and] the court hearing the action [wa]s charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public." *Madsen*, 512 U.S. at 762.

Like the injunction prohibiting picketing by union supporters in *Milk Wagon Drivers*, which was based on "the continuance and recurrence of flagrant violence" on and around the picket line, 312 U.S. at 292, the injunctions in *Madsen* and *Schenck* created buffer zones around clinics that applied *only* to those protesters – and those acting in concert with them – who had violated earlier court orders to refrain "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." *Madsen*, 512 U.S. at 758. *See also Schenck*, 519 U.S. at 382. In stark contrast to the law at issue in this case, the injunctions in *Madsen* and *Schenck* did *not* prohibit members of the general public from leafleting or engaging in conversations in the vicinity of the clinics, just as the injunction in *Milk Wagon Drivers* did not forbid protestors without any relation to the labor dispute at issue in that case from engaging in peaceful expressive activities outside Meadowmoor Dairy.[5]

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[5] The debate between various members of this Court over whether injunctions that impact speech "require a somewhat more stringent application of First Amendment principles" than legislative enactments, *Madsen*, 512 U.S. at 765, "should be

It is true, of course, that "a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act," such as, in the labor context, "a statute which authorize[s] the courts of [a state] to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation." *Milk Wagon Drivers*, 312 U.S. at 297-98. And, indeed, the Massachusetts legislature has enacted such a law relating to to the "[o]bstruction of [a]ccess to [m]edical [f]acilities," which criminalizes the knowing obstruction of access to such facilities, including "medical clinic[s]," and provides a mechanism for medical facilities to enjoin such obstruction and seek compensatory and exemplary damages, attorney's fees and costs. Mass. Gen. Laws ch. 266, § 120E. *See also* 18 U.S.C. § 248 (providing similar protections against interference with "[f]reedom of access to clinic entrances" under federal law). Enforcement of such laws through police action or court orders is very effective in ensuring that groups intent on illegal obstruction are not permitted to further their illegal objectives under the guise of engaging in peaceful speech.

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judged by a more lenient standard than legislation," *id.* at 778 (Stevens, J., dissenting), or "warrant[s] strict scrutiny," *id.* at 795 (Scalia, J., dissenting) is not relevant here. At issue in this case is the overbreadth of a state law that bans *all* speech by *all* speakers in a traditional public forum where the state has provided *no* justification whatsoever for the prohibition as it applies to any category of speakers other than anti-abortion protestors. That broad proscription of speech would fall under any of the standards debated in *Madsen*.

But the license for a legislature to devise such "an appropriately drawn act," *Milk Wagon Drivers*, 312 U.S. at 297, does not permit a state to prohibit *all* "protesting . . . in the vicinity of reproductive health care facilities," Mass. Gen. Laws ch. 266, § 120E1/2 (capitalization omitted), in response to "*specific incidents* of patient harassment and intimidation in the areas immediately outside [reproductive health care facilities'] entrances and driveways" by anti-abortion protestors, Op. Cert. 5 (emphasis added). "It is one thing to assume . . . that a prophylactic injunction is necessary when the specific targets of that measure have demonstrated an inability or unwillingness to engage in protected speech activity without also engaging in conduct that the Constitution clearly does not protect. It is something else to assume that all those who wish to speak . . . will similarly abuse their rights if permitted to exercise them. The First Amendment stands as a bar to exactly this type of prophylactic legislation." *Hill*, 530 U.S. at 761 (Scalia, J., dissenting).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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