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 *AMICI CURIAE* OF BIOETHICS DEFENSE FUND, JOHN M. THORP, JR., M.D., AND MAUREEN L. CONDIC, PH.D. IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE PRESENTED

Whether Massachusetts' thirty-five foot speech exclusion law, that effectively renders useless pamphleteering about abortion and the beginning of human life, unconstitutionally censors petitioners and screens women from receiving information that is highly relevant to the moral question underlying their abortion decision, a decision that this Court has stated should be "thoughtful and informed."

INTEREST OF *AMICI CURIAE* [1]

Bioethics Defense Fund (BDF) is a non-profit, public-interest legal and educational organization whose attorneys collaborate with leading academics, medical doctors and scientists to provide law and policy consultation, across the nation and abroad, based on the latest medical evidence and grounded in sound medical ethics that respect the dignity of the human person. BDF attorneys draft model legislation and engage in strategic litigation on issues involving abortion, biotechnology, and end of life issues, often in the context of conscience rights and the protections of the First Amendment. BDF attorneys engage in educational speaking engagements in the nation's leading law schools and medical schools, and serve as a resource for nationally syndicated writers.

BDF also files amicus briefs at all levels of state and federal courts, including several amicus briefs filed in

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk of Court. *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

this Court's cases addressing issues surrounding abortion, including *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144; *Gonzales v. Carhart*, No. 051382; and most recently in *NFIB v. Sebelius*, No. 11-398/11-398/11-400, addressing issues of religious liberty in relation to the abortion premium provisions of the Affordable Care Act.

John M. Thorp, Jr. M.D. is the McAllister Distinguished Professor of Obstetrics and Gynecology at the University of North Carolina, Chapel Hill School of Medicine. He has an active practice in obstetrics and gynecology with over 4000 patients. Dr. Thorp serves as Co-Director of the North Carolina Program for Women's Health Research. In that capacity, he has conducted research on fetal development, and the health effects of induced abortion on women's psychological and physical health. He has an extensive research history including key roles in more than 45 major funded studies that include a prospective cohort of pregnancy outcomes that is in its third cycle of federal funding. He is lead author of a major peer-reviewed study: J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OB/GYN Survey 58(1): 67-79 (2003).

Dr. Thorp is a productive author with more than 100 peer-reviewed publications, 20 commentaries, and 12 book chapters to his credit. Of note, he is an experienced editor and peer reviewer, who reviews for journals ranging from the NEW ENGLAND JOURNAL OF MEDICINE to PEDIATRIC AND PERINATAL EPIDEMIOLOGY, with a special interest in advancing the quality of the literature in women's health. He

was recently honored by the editors of OBSTETRICS AND GYNECOLOGY as among their most valued reviewers.

Maureen L. Condic, Ph.D., a research scientist, is Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine. Dr. Condic earned a doctorate degree at University of California, Berkeley, and was a postdoctoral fellow at University of California, Berkeley and University of Minnesota. Her primary research focus since 1997 has been on the development of the nervous system, and research on the regeneration of embryonic and adult neurons of animal models following spinal cord injury. Dr. Condic is a prolific author on issues addressing embryology, stem cell research, and human cloning, including a book chapter entitled *Pre-implantation stages of human development: the biological and moral status of early embryos* found in the book, IS THIS CELL A HUMAN BEING?: EXPLORING THE STATUS OF EMBRYOS, STEM CELLS AND HUMAN-ANIMAL HYBRIDS (2011) (Eds. Antoine Suarez, Joachim Huarte. Social Trends Institute Monograph Series)(Springer, New York, NY).

In 1999, Dr. Condic was awarded the Basil O'Connor Young Investigator Award for her studies of peripheral nervous system development. In 2002, she was named a McKnight Neuroscience of Brain Disorders Investigator, in recognition of her research in the field of adult spinal cord regeneration. In addition to her scientific research, Dr. Condic teaches both graduate and medical students. Her teaching focuses primarily on embryonic development. She is the author of over 50 peer-reviewed scientific studies and reviews.

Amici Bioethics Defense Fund, Dr. Thorp and Dr. Condic each have an interest in free speech that allows the disciplines of medicine and science to inform the

moral questions faced by individuals and society, especially when it is relevant to aiding women in making thoughtful and informed decisions about their pregnancies.[2]

SUMMARY OF THE ARGUMENT

Amici present an analysis that brings into focus how the challenged Massachusetts statute operates to render virtually impossible speech on abortion and the underlying question of when human life begins via pamphleteering, a venerable and time-honored form of speech that is unconstitutionally trivialized by both Massachusetts and the lower court ruling.

While alternate means of communication, such as shouting through bullhorns, waving large signs, and wearing costumes, seem to satisfy the lower court's appreciation of the First Amendment, the relegation of petitioners to such speech forms completely disregards the classically protected activity of peaceful pamphleteering.

Some of the pamphlets that petitioners' are thwarted from proffering by operation of the challenged statute highlight the profound moral issue at the heart of the abortion debate by depicting the human being at various stages of embryonic and fetal development to aid women in making an abortion decision that is "thoughtful and informed." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992).

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[2] John M. Thorp, Jr., M.D. and Maureen L. Condic, Ph.D. file as amici in their individual capacities; this brief does not represent the views or positions of the universities that employ them.

The pamphlets depict medical drawings and/or photographs of the developing unborn child at several points during the 40 weeks of gestation, accompanied by text such as the following:

> Month 2: The developing baby is now called a 'fetus,' a Latin word meaning 'little one.' She is making rapid progress developing all her external and internal organs, and by 8 weeks all her body systems are present.[3]

It is apparent that medical drawings and photographs accompanied by written information are impossible to communicate via a large sign or bullhorn at a distance of thirty-five feet or more. Yet, the lower court relegates Petitioners and other sidewalk counselors to the use of such boisterous methods of communications without regard to the protection granted to the activity of pamphleteering recognized throughout our nation's history and replete in this Court's First Amendment jurisprudence.

To the contrary, the lower court's ruling provides a classic example of the profound concerns expressed by Justices Scalia and Kennedy in their dissents in *Hill v. Colorado*, 530 U.S. 703 (2000):

> As expressed by Justice Scalia:
>
> For those who share an abiding moral or religious conviction *(or, for that matter, simply a biological appreciation) that abortion is the taking of a human life*, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur is

[3] Exhibit B-1 to the Declaration of Eleanor McCullen, First Circuit Joint Appendix (No. 12-1334) at 224-225.

> outside the entrances to abortion facilities. By upholding these restrictions on speech in this place the Court *ratifies the State's attempt to make even that task an impossible one*."

Id. at 763 (Scalia, J., dissenting)(emphasis added).

And as set forth by Justice Kennedy:

> Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. *It in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet.* The lack of care with which the Court sustains the Colorado statute reflects a most troubling abdication of our responsibility to enforce the First Amendment.

Id. at 791(Kennedy, J., dissenting)(emphasis added).

The free speech exclusion zone statute upheld in *Hill* (characterized by Justices Scalia and Kennedy as making abortion-related pamphleteering "impossible" because it relegates speakers to a "bullhorn" rather than a "peaceful, face-to-face exchange of a leaflet") imposed what seems, in the light of the Massachusetts statute, to be a quite modest eight feet.

The challenged zone in this case dwarfs the zone upheld in *Hill*. Here, the challenged statute, MASS. GEN. LAWS ch. 266, § 120E1/2 (2007), makes 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 and exempts from its scope, among others, clinic "employees or agents … acting within the scope of their employment." *Id.* In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to express a viewpoint opposed to abortion.

As discussed below, the pamphlets that petitioners are effectively prevented from proffering by operation of the Massachusetts statute are (1) protected by the First Amendment as core political speech, and (2) highly relevant to the woman's "thoughtful and informed" abortion decision, in accord with this Court's recognition of the profound moral issue at the heart of the abortion controversy.

Amici urge this Court to conclude that, especially in reference to pamphleteering, Massachusetts has unconstitutionally censored petitioners' speech and screened women from receiving relevant information that underscores the profound moral issue at the heart of the abortion debate. Under this Court's jurisprudence, the pro-life speakers, the human development photographs and information contained in their pamphlets, and the message that women deserve better than abortion cannot be disfavored as they are by Massachusetts's heavy-handed and blatant attempt at censorship.

ARGUMENT

I. THE MASSACHUSETTS SPEECH EXCLUSION LAW RENDERS USELESS THE PROTECTED ACTIVITY OF PAMPHLETEERING, TRIVIALIZING BOTH THE FIRST AMENDMENT AND THIS COURT'S UNDERSTANDING THAT AT THE HEART OF THE ABORTION DECISION IS A PROFOUND MORAL QUESTION

A. Petitioners' Activity of Pamphleteering About Abortion and When Human Life Begins is Protected by the First Amendment and, of All the Speech Activities Undertaken, the Most Impacted by the Speech Exclusion Zone

1. Speech on abortion lies at the core of the First Amendment

Speech on abortion is one of the most basic moral and political issues in all of contemporary discourse, and pamphleteering is arguably the most venerable and time-honored form of speech in American history. The challenged statute's thirty-five foot speech exclusion zone effectively forecloses the petitioners' activity of offering pamphlets containing depictions and information on prenatal human development – information that is critical to a woman's "thoughtful and informed" decision.[4]

This Court has repeatedly recognized that speech on the great political issues of the day lies at the core of the First Amendment.[5] It cannot be denied that over

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[4] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992).

[5] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976).

the last forty years the issue of abortion has dominated the political life of the nation like few others. The question of legalized abortion in all of its constitutive elements – constitutional, political, social, medical and moral – has impacted the country in such myriad and profound ways that seemingly no aspect of our common life has been left untouched. Speech on abortion is, therefore, so quintessentially political that it must necessarily elicit the greatest protection offered by the First Amendment.

Consequently, the Massachusetts's statute at issue here, which creates a *cordon sanitaire* that effectively excludes any meaningful pro-life speech, must trigger the highest judicial scrutiny. *See* Petitioners' Brief at 21-32. Without meaningful judicial review, Massachusetts' censorship of disfavored viewpoints and contents will simply fester under the cover of "reasonableness."

2. Pamphleteering is arguably the most venerable and time-honored form of speech in American history; its exclusion by Massachusetts is no trivial infringement

In this age of electronic wizardry, the seemingly outdated pamphlet is still arguably one of the most venerable and time-honored forms of communication in American history. "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.'"[6]

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[6] *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 910 (1982)(*quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419(1971)(*citing Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147, (1930); *Lovell v. Griffin*, 303 U.S. 444 (1938)).

Indeed, absent the unimpeded distribution of political pamphlets throughout the colonies, the American Revolution and the Constitution it birthed might never have occurred.

As Harvard professor emeritus Bernard Bailyn has written in his magisterial study on pre-Revolutionary America:

> It was in this form – as pamphlets – that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. *Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form*.
>
> Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, at 2 (Belknap Press of Harvard University Press, 1967)(emphasis added).

Professor Bailyn further points out that it was in the pamphlet form, "that the best thought of the day expressed itself; it was *in this form that the solid framework of constitutional thought was developed*; it was in this form that the basic elements of American political thought of the Revolutionary period appeared first." *Id*. at 3 (internal citations omitted)(emphasis added).[7]

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[7] Bailyn adds that in the period before the American Revolution was found "the most creative period in the history of American political thought. Everything that followed assumed and built upon its results. In the *pamphlets* published before Independence may be found the fullest expressions of this creative effort. There were other media of communication; but, everything essential to the discussion of those years appeared, if

In light of the essential role of pamphlets in American political and constitutional history, and in light of the thirty-five foot prolife speech exclusion zone at issue here, it is the very definition of irony that Massachusetts and the lower court find no constitutional problem in effectively rendering useless any possible pamphleteering by petitioners or other prolife speakers. Rendering utterly ineffectual today the venerable form of communication that led a majority of Americans in the late eighteenth century to declare independence and eventually adopt the Constitution by appealing to the Constitution is a disregard of history and, more importantly, a fundamental misapplication of key First Amendment principles.

3. The thirty-five foot speech exclusion zone renders useless the protected activity of pamphleteering about the moral issue at the heart of the abortion debate; and, if this Court's decision in *Hill v. Colorado* permits this, *Hill* should be limited or overruled

Whether the issue addressed in a pamphlet is the wisdom of going to war, the morality of the death penalty, the definition of marriage, or, as here, the morality of abortion, thirty-five feet cannot be considered to be a reasonable time, place, or manner restriction when it comes to the constitutionally protected practice of pamphleteering.

To visualize the expansive distance imposed by the challenged statute, one need only imagine a person attempting to offer a pamphlet while standing in the

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not originally then as reprints, in pamphlet form." *Id.* at p. 21 (emphasis added).

window of a three story building, where each story is a typical 10 feet.

In this case where the pamphlets depict the intricacies of human prenatal development, it simply defies logic to conclude that such information can be effectively communicated via the signs, costumes or bullhorns that the lower court relegates to petitioners by way of reasoning that seems to mock collectively speakers who espouse a pro-life viewpoint.[8]

As this Court has recognized, "the sensitive and emotional nature of the abortion controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." *Roe v. Wade*, 410 U.S. 113, 116 (1973). This Court's abortion jurisprudence is replete with the understanding that the practice of human abortion has "profound moral and spiritual implications," *Planned Parenthood v. Casey*, 505 U.S. at 850, and that "men and women of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." *Id.*

Indeed, this Court has recognized that "reasonable people" will differ as to the morality of abortion, *id*. at 853, and that "there are common and respectable

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[8] *See, e.g., McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013) ("Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. When they and their cohorts deem it useful to do so, they congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments. They sometimes don costumes (dressing up as, say, the Grim Reaper).").

reasons for opposing it." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

Given this Court's recognition of the reasonable yet divisive nature of the abortion debate, speech in general, and pamphlets in particular, must certainly be given the greatest protection under the First Amendment. In the present case, the prenatal development information set forth in pamphlets proffered by petitioners is core political speech that is effectively denied to women seeking abortions. In effect, Massachusetts has deprived women seeking abortion of "the right and privilege to determine for [themselves] what speech and speakers are worthy of consideration." *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 899 (2010).

"The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* Therefore, the pro-life speakers, the human development information contained in their pamphlets, and the message that women deserve better than abortion cannot be disfavored as they are by the challenged statute.

For the reasons set forth more fully below, *Amici* urge this Court to adopt, in full or in part, the reasoning in the dissenting opinions of *Hill v. Colorado*, 530 U.S. 703 (2000). If *Hill*'s approval of an eight-foot speech exclusion zone "reflects a most troubling abdication of our responsibility to enforce the First Amendment,"[9] the Massachusetts thirty-five foot zone is flagrantly unconstitutional.

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[9] 530 U.S. at 764 (Scalia, J., dissenting)("bullhorns and screaming from eight feet away will serve the[] purposes well [of those intent on bullying or frightening women]. But those who would accomplish their moral and religious objectives by peaceful and civil means, by trying to persuade individual women of the

B. Massachusetts, by effectively censoring pamphleteering, undermines a key element of this Court's abortion jurisprudence: that the government may not screen information designed to inform women regarding the profound moral issue at the heart of the abortion decision

As explained by Justice Kennedy, this Court's majority opinion in *Planned Parenthood v. Casey* "considered the woman's liberty interest and principles of *stare decisis*, but took care to recognize the gravity of the personal decision."[10] Indeed, Justice Kennedy recognizes that *Casey* stands for the proposition that:

> '[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.'[11]

Justice Kennedy opined that *Hill's* approval of an eight-foot speech exclusion zone "in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-

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rightness of their cause, will be deterred; and that is not a good thing in a democracy.")

[10] *Id.* at 792. (Kennedy, J., dissenting).

[11] *Id.* (quoting *Casey*, 505 U.S. at 852).

foot distance as it can through a peaceful, face-to-face exchange of a leaflet."[12]

1. Petitioners' Pamphlets are Highly Relevant to an Abortion Decision that is "Thoughtful and Informed"

Pamplets that depict prenatal human development present issues that go to the heart of the abortion controversy. That controversy involves a *fact* question of when human life begins as a matter of biology, which is designed to inform a separate but profoundly important *moral* question: whether civilized society should allow the destruction of human beings at the prenatal stages of human life.[13]

Here, the challenged statute operates impermissibly to render useless petitioners' activity of offering pamphlets that address the fact question so that an individual woman can make a meaningful moral judgment that is "thoughtful and informed." *Casey*, 505 U.S. at 872.

The abortion debate is perceived as thorny and confusing, in large part because of the widespread misperception that we do not or cannot know when human life begins. This line of thought commonly claims that the question is a matter of faith or religion,

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[12] *Id.*

[13] Establishing by clear scientific evidence the precise moment at which a human life begins is not the end of bioethics debates. On the contrary, the scientific classification of the subject as a human being is the point from which the debate can and should begin. Richard John Neuhaus, Forward to the white paper authored by *Amici* Maureen L. Condic, Ph.D., *When Does Human Life Begin? A Scientific Perspective*, Westchester Institute (October 2008), at v, *available at* http://www.bdfund.org/white papers (last visited September 12, 2013).

rather than a matter that can be answered by the science of human biology.

The confusion often experienced by women and society in general has its roots in this Court's majority opinion in *Roe v. Wade*, 410 U.S. 113, 159 (1973). That opinion concluded that the Court "need not resolve the difficult question of when life begins," entangling the fact question of human biology with the values question concerning the moral value of unborn human beings:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[14]

Adding to the confusion are misrepresentations often made to women seeking abortion who may be told that pregnancy termination is simply a matter of removing a "clump of cells."[15]

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[14] *Id.*; as recently as the 2000 *Carhart* decision, this Court again seemed to combine the fact and values questions, concluding that "[m]illions of Americans *believe* that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child," *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (emphasis added). As discussed below, the biological humanity of the unborn child is a matter of fact, not subjective belief.

[15] "Before her abortion while three months pregnant, Julie Engel recalls asking an abortion counselor: 'What does a three month fetus look like?' 'Just a clump of cells', she answered matter of factly. Years later she saw some pictures of fetal development. 'When I saw that a three month old 'clump of cells' had fingers and toes and was a tiny, perfectly formed baby, I became really hysterical. I'd been lied to and misled." Monte Harris Liebman, M.D., *Fetal Development Information: An*

The current cultural confusion highlights the importance of the prenatal information pamplets such as those reproduced in the record.[16] By effectively screening the information that can be offered in the speech exclusion zone, Massachusetts and the lower court pay no heed to this Court's recognition that "the woman [may come to] discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood v. Casey*, 505 U.S. at 882.[17]

Essential Element of Informed Consent, Association for Interdisciplinary Research in Values and Social Change, ABORTION DECISION MAKING, 3(1) (Spring 1990)(*available at* http://lifeissues.net/writers/air/air_vol3no1_1990.html)(last visited September 10, 2013).

[16] *See, e.g.*, Exhibit B-1 to the Declaration of Eleanor McCullen, First Circuit Joint Appendix (No. 12-1334) at 224-225.

[17] This Court's concern is validated by a meta-analysis conducted by a research team led by Dr. John M. Thorp, *amicus* herein, concluding that "induced abortion increased the risks for both a subsequent preterm delivery and mood disorders substantial enough to provoke attempts of self-harm. Preterm delivery and depression are important conditions in women's health and avoidance of induced abortion has potential as a strategy to reduce their prevalence." J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OB/GYN Survey 58(1): 67-79 (2003).

See also, M. Gissler, et al, *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, EUR. J. PUBLIC HEALTH, 15(5): 459-463 (October 2005), reporting that women who have aborted their pregnancy have a six times increased risk of suicide compared to women who had a live birth within one year of pregnancy termination (31.9 per 100,000 suicide rate after abortion; 5.0 per 100,000 suicide rate after live birth) such that "elevated risk after a terminated pregnancy needs to be recognized in the provision of health care and social services." *Id.*

Amici urge this Court to take particular note of the fact that decades earlier, Massachusetts had enacted a pre-*Casey* informed consent law that included a 24-hour reflection period, as well as the requirement that the woman acknowledge receipt of an informational document that included "a description of the stage of development of the unborn child." That law, MASS. GEN. LAWS ch. 112, § 12S (1980), was enjoined by *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1981) and no attorney general has sought to re-open the injunction.

Given that Massachusetts does not have in effect a "Woman's Right to Know" informed consent for abortion law,[18] the last and perhaps only chance for women seeking abortion in Massachusetts to inform their moral decision with the facts of biological human development may well be "outside the entrances of abortion facilities."[19]

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[18] "Women's Right to Know" laws are in effect in twenty-five states: AL, AZ, AR, GA, ID, IN, KS, KY, LA, MI, MN, MS, MO, NE, ND, OH, OK, PA, SC, SD, TX, UT, VA, WV, and WI. These laws require abortion providers to provide a pamphlet that informs the woman of fetal development, medical risks and abortion alternatives, accompanied by a reflection period. Seven states require informed consent with no reflection period: AK, CA, CT, FL, ME, NV, and RI. *Informed Consent Laws: Protecting a Woman's Right to Know*, AUL DEFENDING LIFE 2013, *available at* http://www.aul.org/wp-content/uploads/2013/04/Abortion-2_Informed-Consent.pdf (last visited September 10, 2013).

[19] "For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur is outside the entrances to

2. Pamphlets Addressing the Beginning of Human Life are Consistent with Science

Notwithstanding the pluralism of moral judgments about abortion, modern embryology has removed any subjective belief from the fact question of whether an unborn child is a human being. It is this information that petitioners seek to distribute to women via pamphlets that are impermissibly censored by the challenged statute.

The established medical fact that "a unique individual" begins his or her life "at fertilization" is the factual foundation of the petitioners' pamphlets. As stated in one of the most definitive texts used in United States medical schools on the subject of clinical embryology:

> *Human development begins at fertilization* when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to produce a single cell – a zygote. This highly specialized, totipotent cell marked the *beginning of each of us as a unique individual*.[20]

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abortion facilities." *Hill v. Colorado*, 530 U.S. at 763 (Scalia, J., dissenting).

[20] Keith L. Moore and T.V.N. Persuad, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 16 (7th ed. 2003) (emphasis added).

See also, M.L. Condic, *Chapter 3: Pre-implantation stages of human development: the biological and moral status of early embryos*, IS THIS CELL A HUMAN BEING?: EXPLORING THE STATUS OF EMBRYOS, STEM CELLS AND HUMAN-ANIMAL HYBRIDS (2011)(Eds. Antoine Suarez, Joachim Huarte. Social Trends Institute Monograph Series)(Springer, New York, NY):

Of special note is a recent federal district court opinion that expressly relied on a declaration by Maureen L. Condic, Ph.D., *amicus* herein, to find that a required informed consent for abortion statement was based on embryology, and not "ideology":

> Plaintiffs argue that classifying the fertilized egg and subsequent organism as a "human physical life" is an ideological statement that goes to the heart of the abortion debate and is thus impermissible compelled speech. The Commissioner disagrees, framing the statement as a biological truth conveying the fact that post-fertilization, the existing living organism is indeed a 'human physical life.' The Commissioner has some support for its position. Specifically, Maureen L. Condic, Ph.D, a Professor of Neurobiology and Anatomy at the University Of Utah School of Medicine whose primary research focus has been the development and regeneration of the nervous system, testified as follows:
>
> > The unique behavior and molecular composition of embryos, from their initiation at sperm-egg fusion onward, can be readily

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The life of a human being (*i.e.* a human organism) begins at a scientifically well-define moment; the fusion of sperm and egg. Sperm-egg fusion produces a one-cell embryo, the zygote, that is distinct from the gametes in terms of both its molecular composition and its pattern of development. From the instant of sperm-egg fusion onward, the embryo acts in a coordinated, organismal manner to produce and to regulate its own development. All of the actions of the embryo are directed towards producing the structures and relationships required for the ongoing life and health of the embryo as a whole. At no time does the embryo even remotely resemble a mere human cell or collection of human cells.

> observed and manipulated in the laboratory using the scientific method. *Thus, the conclusion that a human zygote is a human being (i.e. a human organism) is not a matter of religious belief, societal convention or emotional reaction. It is a matter of observable, objective, scientific fact.*[21]

In further confirmation that petitioners' pamphlets on fetal development comprise speech on "one of the most basic moral and political issues in all of contemporary discourse,"[22] a group of scientists, developmental biologists, and other prominent scholars likewise found it necessary to make the following statement to affirm the conclusion that a human embryo is indeed a *human being*:

> The embryo is a being; that is to say, it is an integral whole with actual existence. The being is human; it will not articulate itself into some other kind of animal. Any *being* that is *human* is a human being. If it is objected that, at five days or fifteen days, the embryo does not look like a human being, it must be pointed out that this is precisely what a human being looks like – and what each of us looked like – at five or fifteen days of development. Clarity of language is essential to clarity of thought.[23]

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[21] *Planned Parenthood of Ind. v. Comm'r*, 794 F. Supp.2d 892, 916–17 (S.D. Ind. 2011) (emphasis added), *aff'd* 699 F.3d 962 (7th Cir. 2012), *cert. denied*, __ U.S. __, 2013 WL 655224 (May 28, 2013).

[22] *Hill v. Colorado*, 530 U.S. at 768 (Kennedy, J., dissenting).

[23] Ramsey Colloquium, *The Inhuman Use of Human Beings: A Statement on Embryo Research*, 49 FIRST THINGS 17, 18 (1995),

Consistent with our nation's growing understanding of the unchanging science of human embryology, this Court's recent jurisprudence has likewise eschewed its former "potential life" terminology that is often repeated today in the context of the abortion debate.[24]

Indeed, this Court has recognized a state's interest in "protecting the health of the woman and the *life of the fetus*." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. at 846)(emphasis added).

In fact, the *Gonzales* majority used unequivocal language in recognizing that abortion destroys a separate human life when it stated: "It is, however, precisely this lack of information concerning the way in which the *fetus will be killed* that is of legitimate concern to the State." *Id.* at 159 (emphasis added).

And of particular relevance is this quote from this Court's majority in *Gonzales*:

> The Act also recognizes that respect for human life finds an ultimate expression in a mother's love for her *child*. Whether to have an abortion requires a difficult and painful moral decision, *Casey*, 505 U.S., at 852-853, which some women come to regret.
>
> In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.*, at 873. The State's interest in respect for life is advanced by the dialogue that better

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available at http://www.firstthings.com/article/2008/08/001-the-inhuman-use-of-human-beings-23 (last visited Sept. 13, 2013).

[24] *See* n.14, *supra*.

> informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a[n] [] abortion.

Gonzales v. Carhart, 550 U.S. at 159 (emphasis added).

3. The Challenged Statute is Analogous to an Undue Burden on a Woman's Right to Choose

Under this Court's abortion jurisprudence,[25] the Massachusetts law is analogous to an undue burden on a woman's right "to choose to have an abortion . . . without undue interference from the State." *Casey*, 505 U.S. at 846. A right to choose necessarily encompasses the option to forgo the abortion and all of its moral and medical consequences. "And a statute which, while furthering the interest in potential life *or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's *choice* cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877 (emphasis added).

Here, the thirty-five foot exclusion zone operates to hinder a woman's "thoughtful and informed" choice by effectively screening and censoring the information that women could receive from petitioners' pamphlets.

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[25] *Amici* respectfully disagree that abortion is a federal constitutional right. However, to the extent that this Court adheres to the *Casey* undue burden standard, this Court's own language indicates that it must apply equally to all state regulations that relate to a woman's ability to make a thoughtful and informed abortion decision.

While the "undue burden" test is usually applied in the review of legislation where the State aims to protect unborn children, it must be equally applied to "other valid state interest[s]," *id.*, such as Massachusetts's purported interest in peaceful access to "reproductive health clinics." Under the *Casey* standard, the challenged statute's thirty-five foot speech exclusion zone is simply not "a permissible means of serving its legitimate ends." *Id.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the judgment below; furthermore, if this Court's decision in *Hill v. Colorado* permits Massachusetts to censor and screen petitioners' pamphlets, then *Hill* should be limited or overruled.

Respectfully submitted,

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