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No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,

Petitioners,

vs.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF DEMOCRATS FOR LIFE OF AMERICA AND CLERGY FOR BETTER CHOICES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. We believe that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate our opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. As pro-life Democrats, we share the party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure the equality of opportunity, a reduction in poverty, and the existence of an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

DFLA supports the provision of alternatives to women considering abortion. By far the two most common reasons for having abortions, studies show, are that the woman's life would be dramatically changed by having a child (for example, losing educational or career opportunities) and that she cannot afford a child.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties consented to the filing of this brief, and such consents have been submitted to the Court.

We believe that economic and social factors too often put pressure on women to have abortions, making the decision to abort a "choice" in name only. DFLA was a leading proponent, through its 95-10 Initiative, of reducing abortions through legislation increasing assistance for counseling and child care on college campuses; food and nutrition for pregnant women, mothers and children; adoption services; and other supports. Many such provisions were embodied in the proposed Pregnant Women Support Act, introduced in Congress in 2009, and were enacted in the Affordable Care Act of 2010.[2] Accordingly, DFLA, which supports the free speech rights of pro-life individuals and groups generally, has a special interest in supporting the rights of speakers such as Petitioners, who seek to offer compassionate alternatives to women through quiet, civil conversations, not separated by a 35-foot buffer zone.

Clergy for Better Choices is a network of pastors and church leaders based in urban communities and committed to inform clerics and community leaders about alternatives to abortions along with the health ramifications of abortion. Our mission formed because of the lack of alternative information given to women by abortion providers and the increasing detrimental psychological and physiological results among disproportionately African American women: 52% of all African American pregnancies

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2 See Pregnant Women Support Act (95-10), http://www.democratsforlife.org/index.php?option=com_content&task=view&id=48&Itemid=45f.

end in abortion; African American women make up 12.4% of the population but account for 36% of all abortions. Many of these women are poor or lower middle class and have systemically been offered fewer options, which has resulted in the crucial work of sidewalk counselors. These counselors offer alternatives so that women may make an informed decision about their pregnancy.

SUMMARY OF ARGUMENT

Petitioners are elderly sidewalk counselors, priests, and former doctors dedicated to peacefully advocating alternatives to abortion. On public sidewalks near the entrances to reproductive health clinics, Petitioners seek to engage willing clinic patrons in civil conversations about their pregnancy options. The undisputed record in this case shows that—at least in the past—Petitioners' calm and compassionate advocacy has persuaded "hundreds of women" who "d[id] not want an abortion but fe[lt] that they ha[d] no viable alternative." *See* Petitioners' Br. 9; J.A. 132-33 (McCullen).

However, because of the Massachusetts statute at issue here ("the Act"), Petitioners can no longer engage in these gentle, quiet conversations. If they wish to speak, they must shout from outside the 35-foot buffer zone around abortion-facility driveways. This exclusion imposes unconstitutional costs both on the right of Petitioners to communicate their assistance and on the right of willing women to receive it.

Academic studies, as well as record evidence,

indicate that many women would be receptive to the practical assistance and counseling that Petitioners seek to provide. First, studies indicate that women have abortions for a variety of reasons, most commonly that having a child would dramatically change their life, that they cannot afford a child, or that a partner is unsupportive. Petitioners address several of these problems by offering or informing women about financial support (including food, housing, and health care), parenting training, and other assistance.

Second, studies examining the abortion decision-making process have concluded that a significant number of women obtaining abortions experience ambivalence about doing so, even up to the point of the abortion itself. The evidence also indicates that ambivalent women who request an abortion are more likely to be driven to do so by factors such as personal finances, housing, health care, and lack of parenting training. Again, these are precisely the factors on which Petitioners offer information and support.

It is irrelevant, of course, if the percentage of women visiting the clinic who are receptive to Petitioners' assistance is a minority. Even a small share adds up to thousands of women over time. And more fundamentally, speech to receptive listeners in a public place may not be restricted simply to protect a majority that is unreceptive.

The buffer-zone statute is unconstitutional because, among other things, the alternative channels of communications it permits—shouts, loudspeakers, and signs from a distance—are utterly inadequate for Petitioners' message of care

and support. Petitioners' unrebutted testimony shows that they are able to speak with far fewer women now, and their speech is far less effective in reaching women, than before the Act imposed the buffer zones. Moreover, speech from outside the buffer zones is inadequate not simply because it is less effective. Petitioners and others like them wish to speak on this sensitive matter in gentle, civil, personal conversations. The manner of speech is crucial to their message of caring assistance. They should not be forced into a different mold—in many ways, a stereotyped mold—of a shouting protester.

ARGUMENT

I. INTRODUCTION

The Act challenged here bars Petitioners from engaging in the "close, kind, personal communication" (Petitioners' Br. 9) that is essential to their message of presenting caring alternatives to women seeking abortions. The Act makes it a crime for Petitioners to "knowingly enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility," while exempting all "employees or agents of such facility acting within the scope of their employment." Mass. Gen. Laws, ch. 266, § 120E½. The Act effectively presumes that Petitioners' speech offering abortion alternatives is unwelcome and unwanted—indeed, positively harmful—precisely in the public setting where that speech has proven most effective. Lower courts likewise assumed, in upholding the Act against facial and as-applied challenges, that clinic

patrons have no interest in receiving information about abortion alternatives.[3]

This *amicus* brief dramatizes the extent to which the lower courts erred. The Act skews discussion of this sensitive issue precisely where advocacy and information can have the most impact. A number of well-reputed academic studies confirm that—given the variety of reasons leading women to have abortions—many women would willingly discuss pregnancy options with advocates like Petitioners and, moreover, would benefit from the practical assistance and counseling that Petitioners provide. This evidence confirms the unrebutted testimony in this case that, before the Act, Petitioners were able to persuade a significant number of women to choose the practical assistance they offered instead of abortion.

As Petitioners' brief explains, the Act violates the First Amendment by discriminating on the basis of viewpoint, in a core public forum, without any pretense of narrow tailoring, and forcing Petitioners into inadequate alternative channels of communications such as shouting from outside the buffer zone. *See* Petitioners' Br. 21-52.

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[3] *See, e.g.,* Pet. App. 172a (holding that the Act's exemption for clinic employees was viewpoint neutral because "'the legislature could have concluded that clinic employees are less likely to engage in directing of *unwanted speech* toward captive listeners'") (quoting *McGuire v. Reilly*, 260 F.3d 36, 46 (1st Cir. 2001)); Pet. App. at 49-50a (holding that Petitioners have adequate alternative channels because the fact "that more people don't accept Plaintiffs' offers . . . shows that many members of Plaintiffs' audience are simply *unreceptive* to Plaintiffs' message") (emphases added).

We add that the Act also restricts the ability of willing listeners to exercise their fundamental right to receive information. More than forty years ago, this Court explained that such a right is "fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Bd. of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U.S. 853, 867 (1982) ("the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of . . . political freedom") (emphasis in original). The Act seriously and unjustifiably impedes not only petitioners' right to effectively convey information, but women's right to receive it.

II. ACADEMIC STUDIES, AS WELL AS RECORD EVIDENCE, SUGGEST THAT MANY WOMEN WOULD BE RECEPTIVE TO THE ADVICE AND ASSISTANCE PETITIONERS SEEK TO PROVIDE.

A. Women Have Abortions for a Variety of Reasons, Many of Which Are Addressed by Petitioners' Assistance.

Academic studies show that women have abortions for many interrelated reasons.[4] The variety of reasons undermines any presumption that women seeking abortions are simply unreceptive to the assistance and alternatives that Petitioners offer.

[4] *See* Rachel K. Jones et al., *More Than Poverty: Disruptive Events Among Women Having Abortions in the USA*, 39 J. Fam. Reprod. Health Care 36 (2012) ("Women have abortions for a myriad of reasons").

A leading study of why women have abortions, conducted in 2004 by Lawrence B. Finer and others at the Guttmacher Institute, surveyed 1,209 abortion patients at 11 large reproductive facilities across the country. In the study, the two most common reasons women cited for abortion were that having a child would dramatically alter their lives (74%) and they "could not afford to have a baby now" (73%).[5] Within the first group, 38% said having a baby would interfere with their education, while another 38% said it would interfere with their current career plans.

Among those pointing to inability to afford a child, the Finer study found, "[t]he most common subreason given was that the woman could not afford a baby now because she was unmarried," cited by 42% of respondents.[6] Of the women citing financial concerns, "34% said they could not afford a child because they were students or were planning to study"; 28% were unable to afford a baby and child care; 23% were unable to afford the basic needs of life; 22% said they were unemployed; and 21% reported that they were unable to quit their job to take care of a baby.[7]

Moreover, a 2012 study conducted by Rachel K. Jones of the Guttmacher Institute and others explored the increasing number of poor women who

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[5] Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110, 110 (2005).

[6] *Id.* at 112.

[7] *Id.*

have abortions in the United States. The Jones study—based on qualitative data from a nationally representative sample of 9,493 women who obtained abortions in 2008—concluded that "many abortion patients make decisions about their pregnancies in the midst of complex life circumstances."[8] The study noted that "[p]oor women are over-represented among abortion patients, and this has been increasing over time. Abortions among poor women accounted for 42% of the 1.21 million procedures performed in 2008, up from 27% of 1.31 million abortions performed in 2000."[9] The Jones study confirms that both financial difficulties and reduced access to health care can "increase . . . women's motivations to terminate [unintended pregnancies]."[10]

Petitioners commonly address such needs with financial support, including food, housing, and health care, and information about such support. For example, Eleanor McCullen and the organizations to which she refers women "offer parenting classes, we offer financial assistance, we help the young women get . . . a WIC,"[11] and "[w]e

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[8] Jones et al., *supra*, at 36.

[9] *Id.*

[10] *Id.* at 37.

[11] WIC is the "Special Supplemental Nutrition Program for Women, Infants, and Children," which "provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk." U.S. Dept. of Agriculture, Woman, Infants, and Children (WIC),

try to help with apartments." J.A. 141. McCullen and her husband have "spent over $50,000 of [their] own money to pay for baby showers, living quarters, furniture, household items, heating oil, electricity, water, telephone, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else was needed by a woman who chose to give birth rather than abort her baby." J.A. 132. Petitioner Jean Zarrella likewise refers women to the same organizations providing access to medical care and housing and other assistance. J.A. 180, 182.

These resources are also relevant to a third major reason why women have abortions: relationship concerns and the desire to avoid single motherhood. Nearly half (48%) of the participants in the Finer 2004 study cited "relationship problems or a desire to avoid single motherhood" as their primary reason for obtaining an abortion. Of those 557 women, 19% said they were not sure about their relationship; 12% said they cannot or do not want to marry their partner; 11% said they were not in a relationship at the time they were pregnant; and another 11% cited the fact that the relationship or marriage may break up soon.[12] Furthermore, the Jones study indicates that 16.2% of the 9,493 participants separated from their partner or husband within a year of deciding to have an abortion,[13] providing corroborating support for the results in the Finer study that a

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http://www.fns.usda.gov/wic.

[12] Finer et al., *supra*, at 113.

[13] Jones et al., *supra*, at 38.

significant number of women have abortions because of relationship difficulties and lack of partner support.

Finally, the results of the Finer study confirm that health concerns, parental influence, rape, and incest account for only a minority of the reasons why women have abortions. According to his survey, possible problems affecting the health of the fetus or the mother were cited as reasons by 14% and 13% of women, respectively. Furthermore, only 6% of respondents cited parental influence, and even fewer—less than 1.5%—identified rape or incest.[14]

B. Studies Suggest that a Significant Share of Women Would Be Receptive to the Practical Assistance and Counseling that Petitioners Provide.

Studies of women's decision-making, as well as the testimony in this case, indicate that a substantial number of women are receptive to the practical assistance and counseling that petitioners provide.

Several academic studies exploring the abortion decision-making process holistically have concluded that a significant number of women obtaining abortions experience ambivalence about doing so, even up to the point of the abortion itself. A 2008 study by Sam Rowlands found that "[a]bout one-quarter of women who undergo abortion have experienced some degree of ambivalence during the

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[14] Finer, et al., at 112-13.

decision-making process."[15] The article continues:

> It is well known that women requesting abortion do change their mind. Change of mind is correlated with the degree of ambivalence. All abortion providers see occasional cases of women backing out at the last moment, even in the anaesthetic room. In a Swedish study of 1,419 women who requested abortion, 1,285 (88%) subsequently went through with an abortion. The remaining 134 chose to continue the pregnancy."[16]

These studies indicate not only the receptivity of some women to reconsidering abortion, but also the factors that might change their decision. For example, the Swedish study just referenced includes the "surprising finding" that women who decided to continue pregnancy were more likely to have cited "partner does not want the baby" as an initial reason for abortion than were those who went through with the abortion.[17] The authors suggest that this result reflects that some women decided to continue pregnancy after the "mandatory pre-abortion clinical interview, where applicants are offered help in solving any social, medical or economic problems they may have"; "[i]t

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[15] Sam Rowlands, *The Decision to Opt for Abortion*, 34 J. Fam. Reprod. Health Care 175, 176 (2008).

[16] *Id.*

[17] Hanna Soderberg et al., *Continued Pregnancy Among Abortion Applicants: A Study of Women Having a Change of Mind*, 76 Acta Obstetricia et Gynecologica Scandinavica 942, 946 (1997).

is possible that the support the counselling is intended to provide may have inspired the women to continue the wanted pregnancy despite the lack of support from the partner."[18]

Likewise, a Danish study of 339 women who were scheduled to receive an abortion within two days found that 30% were still "ambivalent," that is, "still in doubt as to whether their decision to seek an abortion was right for them."[19] The study found that "ambivalent women differ from those without ambivalence with regards to their reason for choosing abortion and their decision-making process": "personal finances and housing conditions influenced the decision significantly more frequently among ambivalent women."[20] Indeed, among ambivalent women who had not previously received information about financial support for mothers and children—unfortunately, nearly half the group—19% said they would have benefitted from such information.[21] And 47% of the ambivalent group said their decision might have changed "if personal circumstances were different"—in most cases, "if the partner had wanted the baby or if personal finances had been better."[22]

These studies belie the district court's

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[18] *Id.*

[19] Charlotte Husfeldt et al., *Ambivalence among Woman Applying for Abortion*, 74 Acta Obstetricia et Gynecologica Scandinavica 813, 814 (1995).

[20] *Id.* at 816, 814.

[21] *Id.* at 815.

[22] *Id.*

suggestion that women are simply unreceptive to Petitioners' assistance and counseling. The studies confirm the importance of allowing open channels of communication during the decision-making process, even at late stages. Even the Rowlands article, which opposes government-mandated counseling and argues that many women make their decision early, concludes that "[a]ll women need evidence-guided information in order to make a fully informed decision," as well as "a sympathetic and supportive milieu" when debating whether to undergo abortion.[23]

Preserving opportunities to receive information is important for the emotional health of a significant subset of women. The Danish study, citing other surveys, notes that "[i]t has been found that ambivalent women run a greater risk of suffering negative emotional sequelae, such as depression and guilt," after an abortion.[24] This case involves simply private speech providing information about abortion alternatives, but this Court's statement concerning state-mandated information is relevant: Information about alternatives "ensure[s] an informed choice" and helps "reduc[e] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood v. Casey*, 505 U.S. 833, 882-83 (1992).

As we have already noted, Petitioners provide the kind of alternatives and support to which some

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[23] Rowlands, *supra*, at 178.

[24] Husfeldt et al., *supra*, at 813.

women, especially those ambivalent about the decision to abort, are receptive. Petitioners provide information about assistance with personal finances, housing, nutrition, health care, and parenting training, in addition to providing some of this support directly themselves. See *supra* pp. 9-10. They go to great lengths to provide their assistance in a compassionate way. For example, McCullen includes a card with her home phone number as part of the literature she distributes. Women call her home frequently and, in a caring, non-judgmental manner, she talks to them and listens to "whatever they want to speak about." J.A. 136, 143.

It may be conceded that many women, even a significant majority, are not seeking alternatives to abortion by the time they visit a clinic.[25] But for several reasons, that is no reason to conclude that Petitioners' speech is not being burdened, or that burdening their speech is permissible.

First, even a minority of receptive women amounts to a large number over time and multiple locations. Massachusetts had approximately 23,000 to 24,000 abortions per year in 2008 and

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[25] *See, e.g.*, Ann M. Moore et al., *What Women Want from Abortion Counseling in the United States: A Qualitative Study of Abortion Patients in 2008*, 50 Social Work in Health Care 424, 431-32 (2008) ("45 of the 49 respondents [92 percent] reported that they had made up their mind to have the abortion before they called the clinic where they were getting their procedure"); *see also* Rowlands, *supra*, at 175 ("A small study of Californian women having a pregnancy test showed that 78% had already decided on the outcome of a pregnancy, if this were to be confirmed.").

2009, the most recent years for available data.[26] If 30 percent of those women were still ambivalent just before the abortion, as in the Danish study—and were particularly open to hearing information about financial support—Petitioners and others like them might reach as many as 7,000 receptive women a year in Massachusetts alone. If the number is 12% (the number in the Swedish study who requested an abortion but decided at the last minute to continue the pregnancy), or even as low as 8% (see studies *supra* n.25), Petitioners and others like them could still reach 1,800 to 2,800 receptive women yearly in the state. Such estimates fit the experience of Petitioners. Zarrella testified that she had successful interactions with more than 100 women before the Act (J.A. 175, 180); McCullen testified that many women told her "they do not want an abortion but feel they have no viable alternative," and before the Act she persuaded one woman a week on average to go with her to receive assistance (J.A. 132-33, 140). Extrapolating across the nation, where 1.21 million abortions were performed in 2008 (the most recent reliable data), even an 8% figure would amount to 96,000 women who were unsure about their decision to obtain an abortion and may have

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[26] Karen Pazol, PhD, *et al.*, Centers for Disease Control, Abortion Surveillance – United States, 2009, Table 3 (Nov. 23, 2012), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm?s_cid=ss6108a1_w (22,945 abortions reported in 2009) (last visited Sept. 11, 2013); Guttmacher Institute, State Facts About Abortion: Massachusetts (July 2013), available at http://www.guttmacher.org/pubs/sfaa/massachusetts.html (24,900 abortions in 2008) (last visited Sept. 11, 2013).

benefitted from additional education or consultation.

More fundamentally, whether or not women who are unsure or receptive constitute a minority is legally irrelevant. The government cannot restrict speech to a receptive minority in a public place such as a sidewalk in order to shield an unreceptive majority from the speech. To allow such a basis for restriction would create a blueprint for marginalizing unpopular speech. *See, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971) (government may not "shut off discourse solely to protect others from hearing it" unless "substantial privacy interests are being invaded in an essentially intolerable manner"). The restriction may only be upheld when it is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves the speaker ample alternative means of communication. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). We agree with Petitioners not only that the Act violates content-neutrality and narrow tailoring, but also that speaking from outside the 35-foot buffer zone is an utterly inadequate alternative channel.

Petitioners' unrebutted testimony shows that they are able to speak with far fewer women now than before the Act imposed buffer zones, and that their speech is less effective in reaching women. *See* Petitioners' Br. 11-13 (summarizing evidence). This evidence fits with the common-sense recognition that "direct one-on-one communication" is "the most effective [and] fundamental . . . avenue of political discourse."

Meyer v. Grant, 486 U.S. 414, 424 (1988).

Finally, speech from outside the buffer zone is inadequate not simply because it is less effective. Petitioners and others like them wish to speak on this sensitive matter in quiet, civil conversations, "with a kind, gentle voice, and with eye contact." J.A. 133 (McCullen). Quite apart from their ultimate results, loudspeakers and shouts generally, as Jean Zarrella put it, "are not conducive to conveying my message of kindness, love, hope, and help." J.A. 179. Petitioners' own understanding of their role makes their manner of speech important. They should not be forced into a different mold—in many ways, a stereotyped mold—of a shouting protester.

CONCLUSION

All studies show that the decision to have an abortion is not one that is taken lightly or made without thoughtful consideration. The practical assistance that Petitioners provide to clinic patrons helps ensure that women make this decision with knowledge of all the resources and information available to them. The Act's free-speech exclusion zone harms willing listeners by depriving them of the opportunity to speak with Petitioners and with others offering assistance.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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