No. 12-1168

IN THE

# Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,

*Petitioners*,

—v.—

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

*Respondents*.

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

## *AMICUS* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS IN SUPPORT OF NEITHER PARTY


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## INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Massachusetts is one of its statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended the right to free speech on the public streets, and has appeared before this Court on numerous occasions in support of that principle, from *Hague v. CIO*, 307 U.S. 496 (1939), to *Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011).

At the same time, the ACLU has long been committed to preserving a woman's constitutional right to decide to end a pregnancy. The ACLU has therefore participated in every major reproductive rights case decided by this Court over the past fifty years, beginning with *Poe v. Ullman*, 367 U.S. 497 (1961), and extending through *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. We have also consistently argued in this context and in others that constitutional rights can quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation, and harassment. Accordingly, the ACLU supported passage of the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248. Likewise, we agreed with this Court's view in *Schenck v. Pro-Choice Network of*

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[1] Letters consenting to the filing of amicus briefs have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

*Western New York*, 519 U.S. 357 (1997), that specific clinic protestors who had engaged in prior unlawful conduct could be subject to a narrowly crafted injunction imposing reasonable time, place, and manner restrictions on their demonstration activity.

Based on this experience, the ACLU deeply believes that the volatile issue of abortion clinic protest must not be resolved by sacrificing either the right to access an abortion or the right to engage in peaceful political protest. Rather, the burden in each case is to arrive at a solution that accommodates both rights, and that does so in a principled way that is consistent with our constitutional tradition. This case once again poses the question of how that should be done. Its proper resolution is thus a matter of substantial interest to the ACLU and its members.

## STATEMENT OF THE CASE

In 2007, the Massachusetts legislature enacted a statute that regulates activity outside "reproductive health care facilities" within the state.[2] The statute establishes a 35-foot fixed buffer zone around entrances, exits, and driveways of reproductive health care facilities and prohibits any person from "knowingly enter[ing] or remain[ing] on a public way or sidewalk" within the 35-foot zone.[3]

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[2] The full text of the statute, Mass. Gen. Laws ch. 266, § 120E 1/2, is set forth at Pet. App. 219a–221a. "Reproductive health care facility" is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." *Id.* § 120E 1/2(a).

[3] The prohibition on entering or remaining in the buffer zone is in effect only during a reproductive health care facility's

Mass. Gen. Laws ch. 266, § 120E 1/2(b). Four categories of persons are exempted from the prohibition: "persons entering or leaving such facility," "employees or agents of such facility acting within the scope of their employment," law enforcement and other municipal employees and agents acting within the scope of their employment, and persons traveling on the public sidewalk or street "solely for the purpose of reaching a destination other than such facility." *Id.* Anyone knowingly violating the statute is subject to both civil and criminal penalties. *Id.* § 120E 1/2(d)–(f).

The 2007 statute amended an earlier Massachusetts law, enacted in 2000, that established floating 6-foot buffer zones around persons or vehicles within 18 feet of an entrance or driveway to a reproductive health care facility. An Act Relative to Reproductive Health Care Facilities, 2000 Mass. Acts 1030–31, 2000 Mass. Legis. Serv. Ch. 217 (West). Inside the designated area, no person could "knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consent[ed], for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* § 2.

The preamble to the 2000 statute makes clear that in regulating expressive activities near such facilities, the Massachusetts legislature was attempting to balance "the first amendment rights of

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business hours, and only if "the area contained within the [buffer zone] is clearly marked and posted." *Id.* § 120E 1/2(c).

persons to express their views, assemble and pray near reproductive health care facilities" against "the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm." *Id.* § 1(c). The preamble also addresses the goals of increasing public safety, maintaining traffic flow, and facilitating safe and effective medical services at abortion clinics. *Id.* § 1(a)–(b), (d).

The statute's enactment followed incidents of violence and harassment at Massachusetts clinics, including the blockading of entrances, the intimidation of staff and patients, and the murder of two clinic employees. J.A. 12–24. Employees and volunteers at Massachusetts clinics testified at legislative hearings that anti-abortion protesters impeded access to the clinics by blocking entrances and surrounding arriving cars, intimidated and harassed arriving patients, and even assaulted patients and staff. J.A. 12–24. One witness described how "patients and their escorts are subjected to a barrage of harassment, usually verbal and sometimes physical," and reported an incident at one clinic where "three protesters stood across the entrance with less than one foot between them. [A clinic employee] was forced to squeeze between them to gain entrance to the clinic." J.A. 15–17. Another clinic staff member testified that a protester pushed her into a moving car driving into the clinic's garage entrance. C.A.App. 200.[4] A patient harassment incident report submitted to the legislative committee detailed how protesters blocked the

[4] "C.A.App." refers to the Joint Appendix filed in the First Circuit.

doorway of a clinic as the patient approached and made physical contact with the patient. J.A. 23–24.

Seven years later, the Massachusetts legislature held another set of hearings prompted by concerns that the existing floating buffer zone was not adequately protecting clinic patients and staff against harassment and intimidation. *See, e.g.*, J.A. 75–76. The evidence showed that protesters continued to crowd entrances to clinics, impede access, and harass clinic patients and staff, despite the 2000 law. J.A. 36, 41–63, 67–89. Witnesses testified that the floating buffer zone was "vague" and "difficult to enforce," resulting in frequent violations of the law but few arrests and prosecutions. *Id.* An employee of one clinic testified that since enactment of the floating buffer zone statute, "[t]he protesters are moving closer and closer to the main door [of the clinic]. They scream and block the way for the patients to get into the clinic. . . ." J.A. 44. A Boston police captain testified that the floating buffer zone statute was "very difficult for us to enforce" and that protesters continued to stand directly in front of the clinic door and "a lot of them go right up in the faces of patients entering the premises." J.A. 67–68.

In response to this testimony, the legislature in 2007 replaced the floating 6-foot buffer with the fixed 35-foot buffer in effect today. Shortly after enactment of the new statute, the Massachusetts Attorney General's office sent letters to reproductive health care facilities and law enforcement agencies in the state interpreting the law to prohibit persons permitted to enter the 35-foot zones (such as clinic employees) from "express[ing] their views about

abortion or . . . engag[ing] in any other partisan speech within the buffer zone." J.A. 90–94.

Petitioners, who describe themselves as "sidewalk counselors," brought suit soon after the new statute went into effect, complaining that its 35-foot buffer violated their First Amendment right to engage in peaceful protest and communication on the public streets. In two sets of opinions, the district court and the First Circuit denied Petitioners' request for declaratory and injunctive relief. Addressing Petitioners' facial challenge, the First Circuit held in 2009 that the statute is content-neutral. Then, applying intermediate scrutiny, the court ruled that the statute represents a narrowly tailored response to the state's significant interest in safeguarding public safety that leaves protestors with ample alternative channels for communication. The court also rejected overbreadth and vagueness challenges. *See* Pet. App. 93a–118a.

In a 2013 opinion, the First Circuit rejected Petitioners' as-applied challenge to the statute. The court concluded that application of the statute to protesters at reproductive health care facilities in Boston, Worcester, and Springfield, Massachusetts survives First Amendment challenge because the buffer zones leave open adequate alternative means of communication at those sites. *See* Pet. App. 1a–28a.

## SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the Massachusetts buffer zone statute is constitutional on its face, but in addressing Petitioners' as-applied challenge, the court gave

insufficient weight to the adequacy of alternative means of communication at two Massachusetts clinics: one in Worcester and one in Springfield. This Court should remand the case so that the court below may more fully assess the availability of alternative avenues of communication in light of the particular record of obstruction of abortion clinic entrances developed in this case.

1. As this Court has repeatedly held, the public streets are "quintessential public forums" for expressive activity. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also United States v. Grace*, 461 U.S. 171, 177 (1983). Indeed, long before public forum doctrine developed as an analytical tool in First Amendment cases, this Court famously observed that public streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515.

Thus, this Court has always reacted with skepticism to restrictions on speech in a public forum where anyone who does not want to hear the speaker's message is free to walk away. *See Cohen v. California*, 403 U.S. 15, 21 (1971) ("we are often 'captives' outside the sanctuary of the home and subject to objectionable speech") (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970)); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210–211 (1975).

At the same time, this Court has recognized that the need to protect competing rights may justify some restrictions on speech, even on the public

sidewalks, so long as the restrictions are not aimed at the suppression of ideas and do not suppress substantially more speech than necessary. For example, in *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld a state statute prohibiting electioneering within 100 feet of the entrance to a polling place, reasoning that the measure served compelling state interests in protecting the right to vote freely for the candidate of one's choice and in ensuring the integrity and reliability of elections. *Id.* at 198–99, 206. Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a restriction on "focused picketing taking place solely in front of a particular residence" as serving the state's interest in "[p]reserving the sanctity of the home" and protecting "residential privacy." *Id.* at 483–84 (alteration in original) (internal quotation marks omitted).

2. Inevitably, therefore, this Court must engage in a delicate balancing process. That process begins with determining the appropriate level of scrutiny. We agree with both courts below that intermediate scrutiny is appropriate on these facts. Neither the language of the statute nor its legislative history supports the claim that the statute was enacted to suppress particular ideas or to inhibit discussion of particular subjects. Outside the 35-foot buffer zone, both anti-choice protestors and pro-choice advocates are free to disseminate their message in whatever manner they choose. The statute places no limit on what they can say or how they can say it. Inside the buffer zone, the statute does create an asymmetry by allowing access for clinic patients, employees and agents that is denied to clinic protestors. The clinics could not function

otherwise. But that privileged access does not create a privileged forum for their abortion-related message, according to an authoritative interpretation by the Massachusetts Attorney General.

3. Applying intermediate scrutiny, the Massachusetts statute is constitutional on its face. There can be no doubt that the state has a significant, indeed compelling, interest in preserving the health and safety of clinic patients and staff, and in ensuring that women who exercise their right to end their pregnancies have unimpeded access to abortion services. And, while there is no claim that Petitioners themselves have engaged in violent protest, the state is entitled to consider the broader record of obstruction and violence directed at abortion clinics in Massachusetts and elsewhere when enacting general legislation intended to further those interests.

Under this Court's First Amendment jurisprudence, the question then becomes whether the statute on its face burdens substantially more speech than necessary to further those interests and whether it leaves open ample alternative channels of communication. It is not, in our view, a simple question. By creating a 35-foot buffer zone, the statute necessarily prevents protestors from engaging in face-to-face conversation with clinic patients and staff or from handing them a leaflet just as they are entering the abortion clinic. Precisely because they are up close and personal, those interactions have unique value and have long been recognized as essential elements of protected First Amendment expression. They can, however, take place just outside the buffer zone without violating

the statute, when patients and staff are probably no more than one minute away from the clinic entrance and when the danger of impeding access to the clinic is significantly diminished. Patients and staff who wish to accept a leaflet or engage in conversation with the protestors outside the buffer zone can, of course, do so. And there is no serious dispute that the message of anti-abortion protestors can still be seen and heard even by patients and staff who have entered the 35-foot zone.

Absent a well-known history of obstruction and violence at abortion clinics, we think even this level of intrusion on the First Amendment right to protest might well be unconstitutional. But, given that history and the actual record in this case, we agree with the lower courts that the Massachusetts statute is constitutional on its face.

4. Petitioners' as-applied challenge, on the other hand, should be sent back to the lower courts for a more thorough consideration of the distinction between clinics that are primarily accessed by pedestrians traveling along public sidewalks and clinics that are primarily accessed by cars that enter a driveway and park on private property. In the former instance, protestors can still approach patients and staff in close proximity to the clinic and attempt to initiate a conversation or hand out a leaflet. In the latter instance, that possibility is foreclosed if the buffer zone places protestors 35 feet from the driveway entrance.

This is not to say that a driveway buffer zone can never be constitutional. As in the facial challenge, there are competing equities that must be weighed. Here, the lower courts failed to give

sufficient consideration to either side of the balance. While it is surely true that "the Constitution does not ensure that [a protestor] always will be able to employ her preferred method of communication," Pet. App. 23a, the decision below did not adequately credit the importance of face-to-face communication on the public sidewalks and streets in deciding whether the ability of protestors to chant, pray, and hold up signs as cars pass by is an adequate alternative for communicating their message. And, by asserting that "it is not the buffer zones that constitute the main impediment to communicative activity" at the Worcester and Springfield clinics but the fact that most patients and staff are arriving by car, Pet. App. 24a, the decision below overlooked the impact of the buffer zone on the ability of protestors even to approach cars entering the clinic driveway.

A proper resolution of Petitioners' as-applied challenge requires weighing the loss of that First Amendment opportunity against the history of past obstruction at these and similar sites, the need to maintain traffic safety at those sites, and the effectiveness of other possible law enforcement responses. The factual elements of that assessment can and should best be addressed by the lower courts on remand.[5]

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[5] Amici's position on the issues presented in this case has evolved over time as the legal issues have shifted and the factual record has developed more fully. In 1999, the ACLU of Massachusetts submitted an amicus brief to the Supreme Judicial Court of Massachusetts (SJC) arguing, in response to the Legislature's request for an advisory opinion, that a 25-foot buffer zone outside reproductive health care facilities would be unconstitutional. The SJC unanimously concluded that the proposed buffer zone would not violate either the First

# ARGUMENT

## I. THE LOWER COURTS CORRECTLY HELD THAT THE MASSACHUSETTS STATUTE IS CONSTITUTIONAL ON ITS FACE.

### A. The Massachusetts Statute Is Properly Subject To Intermediate Scrutiny.

The threshold question in reviewing any restriction on speech is to determine the appropriate

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Amendment or the parallel provisions of the Massachusetts Constitution. *In re Opinion of the Justices to the Senate*, 723 N.E.2d 1205 (Mass. 2000). Despite that ruling, and as noted above, the Legislature in 2000 voted in favor of six-foot floating buffer zones around persons or vehicles within 18 feet of an entrance or driveway to a reproductive health care facility, rather than a 25-foot fixed buffer zone. The 35-foot fixed buffer zone that is now before this Court was adopted in 2007 after another round of legislative hearings. The ACLU of Massachusetts did not testify at those hearings but it did distribute a written statement asserting that an injunction directed against those who violated the law would be a more narrowly tailored response to ongoing obstruction. J.A. 64–66. In 2009, the ACLU of Massachusetts submitted an amicus brief to the First Circuit, which was then considering the facial constitutionality of the current statute. The brief did not take a position on the ultimate constitutional issue but urged the Court to carefully consider the importance of face-to-face interactions in deciding whether the 35-foot buffer zone leaves protestors with ample alternative means of communication. The brief also cautioned against an opinion that would invite overreliance on exclusionary zones and demonstration areas. This brief similarly emphasizes the importance of weighing the competing constitutional interests through a close examination of the factual record.

level of judicial scrutiny. Statutes that distinguish on the basis of content or viewpoint will be upheld only if they are narrowly tailored to advance a compelling interest. Strict scrutiny is appropriate in these circumstances because of the risk that the government is using its authority to suppress unpopular views. Content-neutral statutes do not present that same risk and are thus subject to intermediate scrutiny. Even applying intermediate scrutiny, however, the government must show that it is not burdening substantially more speech than is necessary to further a significant interest, and that it has left open ample alternative avenues of communication.

As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Judged by that standard, the Massachusetts statute is content-neutral.

Prior to enacting the statute, the legislature heard testimony detailing a history of harassment, intimidation, and obstruction of patients and staff seeking to enter Massachusetts clinics. Nothing on the face of the statute expressly refers to the content of any communication, and nothing on the face of the statute singles out speech "against" abortion as a particular concern. *Hill v. Colorado*, 530 U.S. 703, 768–70 (2000) (Kennedy, J., dissenting).[6]

[6] The statute in *Hill* made it a crime to "knowingly approach" closer than 8 feet to someone walking within 100 feet of the entrance to a health care facility if the purpose of the approach

By prohibiting entering or remaining within a 35-foot buffer zone that the statute creates around abortion clinics, its operative language is directed at behavior, not speech. Likewise, the four exceptions to the general prohibition that appear on the face of the statute, *see* p.3, *supra*, make no reference to expressive activities.

Because one of those exceptions applies to clinic employees and agents, Petitioners argue that the statute favors the speech of pro-choice advocates over the speech of anti-choice protestors. That argument proves too much. First, the statute could not have been written without an exception for clinic employees and agents if the clinics are to remain open and functioning. Second, the Massachusetts Attorney General has construed the statute to prohibit clinic employees and agents within the buffer zone from "express[ing] their views about abortion."[7] J.A. 93.

It is abundantly clear that the Attorney General's interpretation was designed to ensure

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was to engage in "oral protest, education, or counseling," without consent. The ACLU submitted an amicus brief in *Hill* arguing that the statute was content-based because it specifically identified prohibited categories of speech. This Court disagreed.

[7] "[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (first alteration added) (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)). *Accord Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

viewpoint-neutrality and not to suppress unpopular ideas. Protestors and clinic staff are therefore in an equivalent First Amendment position under the statute. Neither may express their views about abortion inside the buffer zone; both may freely do so outside the buffer zone.

It is, of course, true that a content-neutral statute can be selectively enforced. Such selective enforcement would raise serious First Amendment concerns, but those concerns would not be attributable to the statute itself on a facial challenge. To the extent Petitioners complain that clinic escorts are improperly expressing opinions about abortion while standing in or walking through the buffer zones, both courts below held that Petitioners failed to plead sufficient facts to allege that police enforced the statute in a viewpoint-discriminatory way. Pet. App. 14a–17a, 85a–86a.

Petitioners note that the buffer zone in *Hill* applied to all health care facilities while the buffer zone in this case applies only to reproductive health care facilities as evidence that the Massachusetts statute is content-based. Pet.Br. 23–24. The First Amendment does not require the legislature to adopt a regulation on speech that applies everywhere if the problem it is addressing is more acute in some places than others, *see* n.8, *infra*, so long as its interests are unrelated to the suppression of ideas. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312 (1988) (partially upholding statutory restriction on picketing outside foreign embassies because of unique security problems). Petitioners' reliance on *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), is also misplaced. Pet.Br. 24. Amici agree that a law can be content-based in

purpose and effect even if the language of the statute does not expressly draw content-based distinctions on speech. On its face, however, this law does not run afoul of that principle for the reasons stated above.

### B. The Massachusetts Statute Is A Facially Valid Time, Place, And Manner Regulation.

As a content-neutral time, place, and manner regulation, the 35-foot buffer zone must be narrowly tailored to advance a significant governmental interest and must leave open ample alternative avenues of communication. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The narrow tailoring requirement of intermediate scrutiny does not require the state to pursue its goals through the least restrictive alternative. But, a statute that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored. *Ward*, 491 U.S. at 799.

In this case, the state's purposes are openly declared in the preamble to the predecessor statute enacted in 2000. It states, in its entirety:

> The purpose of this act is to:—
>
> (a) increase the public safety in and around reproductive health care facilities;
>
> (b) maintain the flow of traffic and prevent congestion around reproductive health care facilities;

> (c) enact reasonable time, place and manner restrictions to reconcile and protect both the first amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm; and
>
> (d) create an environment in and around reproductive health care facilities which is conducive to safe and effective medical services, including surgical procedures, for patients.

2000 Mass. Acts 1030, 2000 Mass. Legis. Serv. Ch. 217 (West).

This Court has repeatedly acknowledged the importance of those interests. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 767–68 (1994)) (recognizing state's legitimate interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); *Hill*, 530 U.S. at 715–16 (recognizing state's legitimate interest in facilitating "unimpeded access to health care facilities" and recognizing that "'[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests'" (alteration in original)).

Enactment of the Massachusetts statute followed incidents of violence and harassment at clinics in the state, including blockades of clinic entrances, intimidation of staff and patients, and the murder of two clinic employees. J.A. 12–24.[8] While the 2007 statute did not include a separate preamble, proponents of the bill reiterated the original purposes of the law at the hearing on the 35-foot buffer proposal. *See, e.g.*, J.A. 74–76, 81. These purposes do not evince hostility to anti-abortion protesters' message and, in fact, at the 2007 hearing legislators repeatedly remarked on the importance of safeguarding protesters' ability to communicate their message. *See, e.g.*, J.A. 74–76.

The 35-foot buffer zone clearly advances the law's stated purposes while leaving abortion protestors with significant opportunities to convey their message to persons entering and leaving an abortion clinic. Outside the 35-foot buffer zone, Petitioners' speech activities are unrestricted in any

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[8] This record explains the state legislature's decision to single out abortion clinics for special protection. It is not a problem unique to Massachusetts. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (city can consider the experience of other jurisdictions in assessing the need for a time, place, and manner regulation). Over the last 35 years, clinics across the nation have been subject to more than 200 arsons and bombings, more than 600 anthrax threats, and many more obstructions, including protestors who have chained themselves to doors. Nat'l Abortion Federation, NAF Violence and Disruption Statistics (2011), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2011.pdf (last visited Sept. 12, 2013); *see also, e.g.*, *United States v. Unterburger*, 97 F.3d 1413, 1415 (11th Cir. 1996) (upholding conviction under FACE Act of protesters who chained themselves to clinic door).

way by the statute. They may chant, pray, carry signs or hold a silent vigil within easy sight and sound of their target audience.

It is nonetheless true, as Petitioners argue, that even a 35-foot buffer zone carries a First Amendment cost. Most significantly, Petitioners may not approach clinic patients or staff within the buffer zone in the hope of engaging them in a face-to-face conversation or handing them a leaflet. Those rights matter. This Court has described leafleting as "the essence of First Amendment expression," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). That is true generally, and it is true with regard to the ongoing public debate about abortion. As this Court observed in *Schenck*, "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." 519 U.S. at 377. *See also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 769 (1994); *United States v. Grace*, 461 U.S. 171, 176–77 (1983); *Schneider v. State of New Jersey* (*Town of Irvington*), 308 U.S. 147, 162–63 (1939).

Similarly, this Court has recognized the importance of safeguarding the opportunity to engage in face-to-face communication with willing listeners on public sidewalks. *Hill*, 530 U.S. at 726–27 (noting approvingly that the buffer zone at issue "allows the speaker to communicate at a 'normal conversational distance'"); *Schenck*, 519 U.S. at 377 (striking down floating buffer zone around people and vehicles entering clinic in part because it prevented the petitioners "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").

Engaging with a passerby at close range and in conversational tones creates a qualitatively different—and often more effective—interaction than shouting or chanting at that passerby across a distance. *See* J.A. 133, 161–62, 179, 201, 216, 248. Although an unwilling listener need not stop to converse with or even listen to the protester, the First Amendment generally requires that protesters on a public sidewalk be given an opportunity to initiate conversation.

This would be a very different case, therefore, if the Massachusetts statute, by its very terms, eliminated any meaningful opportunity for abortion protestors to engage in conversation with people entering or leaving an abortion clinic, or to hand them a leaflet. It does not. And the difference between exercising that opportunity at the clinic's doorstep or 35 feet away is not readily apparent. That distance does not inherently prevent protestors from identifying their target audience. It does not suffer from vagueness that might chill speech that the statute was not even intended to cover. *See Schenck*, 519 U.S. at 378. Nor does it shield persons on the public street in a protective bubble that enables them to "avoid unpopular speech in a public forum." *Hill*, 530 U.S. at 771 (Kennedy, J., dissenting).

This would also be a different case if there were not competing constitutional rights on the other side of the scale, but there are. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 851 (1992)

(the right to obtain an abortion is "central to the liberty protected by the Fourteenth Amendment"); *see also Burson v. Freeman*, 504 U.S. 191 (1992) (upholding restriction on electioneering outside polling places); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 128 (1991) (Kennedy, J., concurring) (noting that one of the "questions we cannot avoid" deciding in First Amendment cases is "whether some other constitutional right is impaired").

Of course, this is not the first time that the Court has been asked to balance the rights of abortion protestors with the rights of women seeking an abortion. It has upheld some protest restrictions, including a prohibition on knowingly approaching within eight feet of a patient absent consent in *Hill*, 530 U.S. at 726–30, a 15-foot fixed buffer around entrances in *Schenck*, 519 U.S. at 380–85, and a 36-foot fixed buffer as applied to a clinic's entrances and parking lot in *Madsen*, 512 U.S. at 768–71. It has struck down others, including a 15-foot floating buffer around people and vehicles entering a clinic in *Schenck*, 519 U.S. at 377–80, and a ban on "uninvited" approaches within 300 feet in *Madsen*, 512 U.S. at 773–74.

The 35-foot buffer zone that has been challenged in this case not only allows more speech than restrictions that this Court has struck down, it allows more speech than restrictions that this Court has upheld. In particular, it offers a greater opportunity for face-to-face interaction than the

floating buffer in *Hill* and at least as much speech as the fixed buffer in *Madsen*.[9]

Viewed in this context, and given the record of obstruction, harassment, and violence at Massachusetts abortion clinics over many years, the First Circuit correctly concluded that the Massachusetts statute does not violate the First Amendment on its face.

## II. PETITIONERS' AS-APPLIED CHALLENGE SHOULD BE REMANDED FOR FULLER CONSIDERATION AND, IF NECESSARY, FURTHER FACTFINDING REGARDING THE WORCESTER AND SPRINGFIELD FACILITIES.

Three reproductive health care facilities, located in Boston, Worcester, and Springfield, Massachusetts, are at issue in Petitioners' as-applied challenge. The court below concluded that adequate alternative channels of communication remain available to Petitioners at all three clinics, but its cursory analysis failed to account for the importance of ensuring an opportunity to initiate face-to-face interaction or distribute literature at clinics where

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[9] The buffers in *Madsen* and *Schenck* were imposed by injunction rather than statute. They were therefore directed against specific defendants who had engaged in prior misconduct. One might have concluded that the targeted nature of an injunction action reduced the risk to First Amendment values. This Court reached the opposite conclusion, holding that the fact that injunctions do not have universal application eliminates an important safeguard against overreaching and requires "a somewhat more stringent application of general First Amendment principles." 512 U.S. at 765.

most patients enter by car, or to assess whether record evidence of obstruction of clinic driveways justifies the restriction.

The layouts of the three clinics are important to assessing the as-applied challenges.[10] The Boston clinic occupies a free-standing building on Commonwealth Avenue in the Brighton section of Boston. The buffer zone, marked by a painted arc, covers all but a small sliver of the sidewalk in front of the entrance and, in one direction, extends several feet around the corner of the building onto the sidewalk bordering a side street. As drawn, this buffer zone extends less than 35 feet in any direction from the front entrance: approximately 22 feet from the entrance to the easternmost edge of the arc, 26 feet to the westernmost edge, and 25 feet to the southernmost edge.[11] A second buffer zone with a 35-foot radius surrounds a rear garage entrance on a side street. J.A. 293–94.

The Worcester clinic also occupies its own free-standing building. More than 85 percent of patients arrive by car, turning from Dewey Street into a private parking lot adjacent to the building and entering through a back entrance on private property. Patients arriving on foot enter through the main entrance via a private walkway, which extends 54 feet from the nearest public sidewalk on Pleasant Street. Painted arcs with radii of approximately 35 feet surround the points where the front walkway

[10] The buffer zones at each site can most easily be observed using Google maps.

[11] The painted buffer is thus smaller than the statutorily authorized zone.

and the parking lot driveway intersect with the public sidewalks. At the front entrance, the arc extends across most of the public street, and covers the public sidewalk to the left and right of the clinic entrance. At the driveway entrance, the arc extends across the entire public street and several feet into the sidewalk across the street. J.A. 295–96.

The Springfield clinic is located in a multi-tenant commercial building housing seven other medical offices. The building is set back from the adjacent streets by approximately 316 and 206 feet, and is surrounded on three sides by private parking lots and another building, with the fourth side abutting unused land running along a railroad track. Approximately 90 percent of patients arrive by car and park in one of the private lots adjacent to the clinic. There are five driveways by which patients can enter the parking lots bordering the clinic, two of which are surrounded by painted and posted arcs with radii of 35 feet.[12] Patients arriving on foot must walk through or next to the parking lots to reach the building entrance. J.A. 297–99.

In contrast to the clinics in Worcester and Springfield, "all prospective patients" at the Boston clinic "must traverse a public sidewalk to gain entry." Pet. App. 24a. Because all patients arrive at the Boston clinic on foot via public sidewalks, Petitioners can communicate their message through any means, including face-to-face discussions and leafleting,

[12] The other three driveway entrances are also surrounded by painted arcs, but are not posted with signs as required by the statute. Those buffer zones therefore "have no legal effect." Pet. App. 8a–9a.

before the patients cross into the buffer zone. Other means of communication, such as holding signs, chanting, and praying, can be seen and heard by patients when they are both inside and outside of the buffer zone.

Petitioners' concern that they cannot continue their face-to-face sidewalk counseling efforts up to the front door of the clinic, as they desire, is certainly relevant to the analysis. But on this factual record, including the history of obstruction of entrances to clinics in Boston and elsewhere in the state, Massachusetts's content-neutral time, place, and manner regulation leaves ample alternative means of communication at the Boston clinic.

The First Circuit's analysis with respect to the Worcester and Springfield clinics is more problematic. The court wrote:

> The analysis is somewhat different with respect to Worcester and Springfield. At these sites, it is not the buffer zones that constitute the main impediment to communicative activity; instead, it is the prospective patients' unwillingness to venture off the clinics' private property. Most prospective patients arrive by car, park in private lots, and use non-public walkways to enter the facility. The fact that these patients are not readily accessible to the plaintiffs is more a function of the physical characteristics of the sites than of the operation of the Act.

> This is a critically important datum. The law does not require that a patient run a public-sidewalk gauntlet before entering an abortion clinic. That patients choose to stay on private property or not to stop their cars on approach is a matter of patient volition, not an invidious effect of the Act. First Amendment rights do not guarantee to the plaintiffs (or anyone else, for that matter) an interested, attentive, and receptive audience, available at close-range.

Pet. App. 24a.

The court of appeals is plainly correct that the First Amendment does not require unwilling listeners to leave private property to engage more closely with protesters, but that observation does not adequately address whether the 35-foot buffer zone leaves open sufficient alternative means of communication. Petitioners do not seek to enter private property to engage in protest activities, nor would striking down the statute permit them to do so. Rather, they seek to be able to stand on public sidewalks, at the driveway entrances to the private parking lots of the Worcester and Springfield clinics, in order to attempt to speak with and provide literature to drivers and passengers of cars entering those driveways. J.A. 200, 219, 245, 254. Petitioners complain that when they must stand 35 feet from the driveway entrances, they are unable to effectively converse with or offer literature to patients and others arriving by car. J.A. 200, 218–19, 245, 253.

The court below concluded that "adequate communicative channels remain available to the plaintiffs, including oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, and prayer alone and in groups." Pet. App. 26a. But the court appears to have ignored the practical effect of the statute on Petitioners' ability to converse with or proffer literature to people approaching the Worcester and Springfield clinics. Because 85 to 90 percent of patients enter those clinics' private parking lots by car, Petitioners have a realistic opportunity to initiate conversation with, or distribute literature to, only the small proportion of patients entering the buffer zones on foot.

As explained above, *see* Point I, *supra*, leafleting and engaging in face-to-face communication on public sidewalks are "classic forms of speech that lie at the heart of the First Amendment." *Schenck*, 519 U.S. at 377. Petitioners' opportunity to converse with or offer literature to persons approaching the clinics is thus an important factor in assessing whether adequate means of communication remain available. For the majority of patients arriving by car, Petitioners' opportunity to converse or distribute literature is sharply circumscribed. Were they able to stand on the public sidewalk near the driveway's edge, Petitioners might at least attempt to engage with vehicle occupants as they turned into the parking lots.

The court of appeals failed adequately to consider that possibility in evaluating Petitioners' as-applied challenge. *See Burson v. Freeman*, 504 U.S.

at 210 n.13 (claim that 100-foot ban on electioneering activity may place some protestors across a highway at some polling places should be addressed in an as-applied challenge). That failure is significant and justifies a remand for fuller consideration of the record and, if necessary, further fact-finding.

As the burden on Petitioner's First Amendment rights grows, the burden on the state to justify restrictions on those rights grows correspondingly. If Petitioners are left with ample alternative avenues of communication, the injury to their First Amendment rights is minimal. If Petitioners' ability to deliver their message is substantially diminished because the opportunity to engage in face-to-face communication and leafleting is essentially foreclosed, then a more searching inquiry is required.

Here, there is evidence in the record that clinic driveways as well as doorways have been blocked in the past, evidence that can and should appropriately factor into the analysis of whether the statute is constitutional as applied to Worcester and Springfield. *See, e.g.*, J.A. 18 (Testimony of Karen Caponi, Clinic Director, Planned Parenthood of Worcester, April 15, 1999) ("Our facility has a driveway into our parking lot, which has been the site of repeated problems with protesters."). But the frequency with which this problem occurred is also relevant in weighing the constitutionality of the measure as applied. The court of appeals never engaged in that inquiry because it did not treat the intrusion on Petitioners' First Amendment right to engage in face-to-face communication as significant.

In addition, the court of appeals should consider on remand whether the police could reasonably have used other available means at their disposable to ensure both access to the Worcester and Springfield clinics and the ability of protestors to adequately communicate their message.[13] While there was evidence in the record relating to the practical difficulties of enforcing the floating buffer zone adopted in 2000, *see* J.A. 67–68 (Testimony of William Evans, Captain, Boston Police Department, May 16, 2007) (noting inherent ambiguity of no-approach rule); J.A. 70, 76–79 (Testimony of Martha Coakley, Attorney General, May 16, 2007) (same), the court of appeals never considered whether those or other enforcement problems are relevant to maintaining the safety and security of clinic driveways. *See Madsen*, 512 U.S. at 769 ("The state court seems to have had few other options to protect access given the narrow confines around the clinic."). This consideration should also be part of the analysis on remand.[14]

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[13] *See* Mass. Gen. Laws ch. 266, § 120E ("Whoever knowingly obstructs entry to or departure from any medical facility . . . after notice to refrain from such obstruction or interference, shall be punished [with criminal or civil sanctions]."); *id.* § 120E 1/2(e) ("Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished . . . . A person who knowingly violates this section may be arrested without a warrant . . . ."). In addition, general traffic safety laws may apply in this circumstance, and trespass laws may come into play if protestors enter upon private property.

[14] While the location of some clinics may present idiosyncratic issues that need to be addressed separately, this balancing of interests can generally proceed in a more categorical fashion that eliminates the need to litigate the constitutionality of the

Accordingly, Petitioners' as-applied challenge should be remanded with instructions for the court below to address these factors based on the record before it (or to remand to the district court for further factfinding, if necessary). The statute may still be upheld as applied to the driveway entrances given an adequate showing in the record, but the First Circuit's treatment of this issue so far is insufficient to support its conclusion.

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statute as applied to every clinic. For example, the problems presented by driveway entrances—both for those seeking access to the clinic and for those seeking to protest—will often be the same. In balancing these competing interests, similarly configured clinics can be treated similarly.

## CONCLUSION

The judgment of the Court of Appeals that the Massachusetts statute is constitutional on its face should be upheld. The judgment that that statute is constitutional as applied should be vacated and remanded for further proceedings.

Respectfully Submitted,

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