No. 12-1168

In The Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,
Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).[2] One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the constitutional right of citizens to engage in freedom of speech, expression, and assembly on the nation's public sidewalks.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

Once again, this Court is confronted with an abortion "buffer zone" statute that evinces a sweeping disregard for the constitutional rights of Petitioners and their intended audience, and goes far beyond what this Court has previously held to be permissible regulation. In this case, the State of Massachusetts has made it a crime – with a punishment of up to two-and-one-half years' incarceration[3] – for individuals to "enter or remain on a public way or sidewalk" within 35 feet of the entrance, exit, or driveway of a "reproductive health care facility."[4] Mass. Gen. Laws ch. 266, § 120E½(b). Respondents' purported justification for the 2007 Statute is that it is necessary to protect the State's interest in ensuring unimpeded and harassment- and intimidation-free access to abortion clinics. When the history leading up to the enactment of the 2007 Statute is examined, however, Respondents' position crumbles, as the record contains little to no evidence that individuals attending abortion clinics

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[3] Mass. Gen. Laws ch. 266, § 120E½(d).

[4] Massachusetts enacted Mass. Gen. Laws ch. 266, § 120E½ (the "2007 Statute") in 2007, having previously enacted a less restrictive "no-approach" statue – one that created 18-foot buffer zones around abortion clinic entrances, inside which speakers were prohibited from approaching within six feet of a potential listener without consent – in 2000. *See* Br. of Pet'rs, *McCullen v. Coakley*, No. 12-1168, at 4. Significantly, the U.S. Court of Appeals for the First Circuit found that the 2000 law "clearly affect[ed] anti-abortion protestors more than other groups" and that it had targeted "anti-abortion protests." *McGuire v. Reilly*, 260 F.3d 36, 44 (1st Cir. 2001).

were harassed, intimidated, or impeded. Even if there was evidence that Petitioners or other pro-life activists were impeding access to abortion clinics and harassing or intimidating women, Massachusetts could have enforced its interests through a multitude of readily-available legal remedies, none of which would have infringed on Petitioners' First and Fourteenth Amendment rights. Given the absence of evidence to justify the 2007 Statute, *Amicus* submits that a more nefarious purpose undergirds the 2007 Statute and similar statutes throughout the nation: the silencing of Petitioners' viewpoint.

ARGUMENT

I. The 2007 Statute Strikes At The Heart Of The First Amendment As To Both The Content Of Expression Affected And The Place Where Such Expression May Occur

Freedom of expression must be particularly well-guarded when, as here, the controversial or impassioned nature of the speaker's message has the potential to stir emotions and trigger attempts to suppress that message. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating prohibitions on desecrating the U.S. flag). The issue of abortion is undoubtedly one of the most important ones of our times and, as such, is entitled to "special protection" under the First Amendment. *Snyder*, 131 S. Ct. at 1219. Such protection exists even if the speech has the potential to be upsetting. *Id.*

Moreover, the government may not infringe upon that protection on the presumption that the speech and expression will be unduly disturbing or disruptive. In *Johnson*, for example, this Court rejected the state's claim that a ban on flag-burning was justified by its forecast that such activity would cause breaches of the peace. A mere assumption that particular expression will result in the kind of disruption the government may regulate is insufficient to justify restrictions on expression and related activities. *Johnson*, 491 U.S. at 408. As this Court has written:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is not room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949).

Petitioners have pointed out the utter paucity of evidence supporting the need (or even wisdom) for the exclusion zones imposed by the 2007 Statute. *See* Br. for Pet'rs at 7-8. Plainly, Commonwealth

lawmakers improperly assumed, based on evidence that is anecdotal at best, that Petitioners and other pro-life advocates were engaged in overbearing and obstructionist activities at abortion facilities. Such cavalier assumptions are manifestly insufficient to warrant regulations that drastically limit – and effectively silence – speech on a matter of serious national concern.

Not only is the expression at issue here on a subject of national significance at the heart of the First Amendment's special protection, Petitioners are prohibited from engaging in this expression on public sidewalks – the quintessential public forum. As such, "the government's ability to permissibly restrict expressive conduct is *very limited*[.]" *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added).

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 45 (1983)); *see also Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997) ("[S]peech in public areas is at its most protected on *public sidewalks*, a prototypical example of a traditional public forum") (emphasis added).

The fact that an abortion clinic is located by a public sidewalk is of no matter, as "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 481. Therefore, whether judged as a content-based or content-neutral regulation, the 2007 Statute impermissibly curtails Petitioners' First Amendment rights. That it does so on a topic of national significance – the most protected form of speech – and in the most protected arena – the public sidewalk – only serves to illustrate its egregiousness.

II. The 2007 Statute is an Impermissible Content-Based Regulation

Prior to the enactment of the 2007 Statute, Petitioners expressed their constitutionally enshrined rights by reaching out to women at abortion clinics and attempted to persuade them not to proceed with an abortion. Indeed, the record illustrates that Petitioners successfully persuaded

many women to change their minds and not go ahead with the procedure. *See, e.g.*, JA 180 (Petitioner Zarrella made approximately 100 successful interactions before the enactment of the 2007 Statute). Moreover, at the time Massachusetts enacted the 2007 Statute, there was no evidence of a single conviction during the preceding period under any state, federal, or local law relating to violence, obstruction, intimidation, trespass, or harassment at an abortion clinic in the state. *See id.* at 68-69. This is hardly surprising given the peaceful nature of Petitioners' activities. *See, e.g.*, *id.* at 132 (describing how Petitioner McCullen and her husband have donated over $50,000 of their own money to help women who have decided not to go ahead with abortions); *id.* at 175 (describing Petitioner Zarrella as an 85-year-old grandmother who offers counseling at the Boston clinic); *id.* at 188-89 (describing Petitioner Smith as a 77-year-old grandfather who prays the rosary in front of the Boston clinic on Saturday mornings).

Despite this, and the availability of the 2000 "no-approach" statute – along with a multitude of other federal and state laws, both criminal and civil – to ensure that its purported interests were protected, Massachusetts went far beyond the outer bounds of the 8-foot buffer zone around *all* healthcare facilities that this Court upheld in *Hill v. Colorado*, 530 U.S 703 (2000).[5] Undoubtedly

[5] Troublingly, and perhaps reflective of a growing trend of the evisceration of constitutional rights in this arena, after this Court granted *certiorari*, the city of Portland, Maine announced that it was weighing a proposal to

concerned that outright targeted legislation would raise the suspicions of the courts, the Massachusetts General Assembly – and later Respondent Coakley[6] – attempted to give the 2007 Statute a veneer of constitutionality by attempting to frame it in content-neutral terms, while at the same time affording themselves "a convenient tool" to prosecute "'particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940)).

Notwithstanding the absence of any patent regulation of expressive content or discrimination against viewpoint in the text of the 2007 Statute, it still may be found to be content-based or viewpoint discriminatory in light of its effects. As this Court wrote in the context of closely analogous religious freedoms:

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create a similar 35-foot buffer zone around a Planned Parenthood clinic. *See Another New England state considers buffer zone law around abortion clinic*, 22 News, July 31, 2013, http://www.wwlp.com/news/massachusetts/another-new-england-state-considers-buffer-zone-law-around-abortion-clinic (last visited Sept. 12, 2013).

[6] *See* JA 92 (referencing a letter from Attorney General Coakley to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the 2007 Statute, sent less than two weeks after Petitioners sought to enjoin enforcement of the 2007 Statute in January 2008). Respondent Coakley's *post hoc* actions further serve to illustrate the facial invalidity of the 2007 Statute.

> We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States,* 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy,* [476 U.S. 693, 703 (1986)] (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993).

For a content-based regulation to satisfy strict scrutiny, the government must "show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Frisby*, 487 U.S. at 481 (internal quotation marks and citation omitted). Here, the 2007 Statute falls woefully short of this standard. Indeed, the absence of content-neutrality is readily apparent from the 2007 statute's language. By exempting employees or agents of the clinic acting within the scope of their

employment, the 2007 Statute specifically permits speech on one side of the debate. This creates a "scheme of disfavored-speech zones on public streets and sidewalks," and "opinion[s] validating them, are antithetical to our entire First Amendment tradition." *Hill*, 530 U.S. at 768 (Kennedy, J., dissenting). Even accepting Respondents' interest in securing unimpeded and intimidation- and harassment-free access to abortion clinics, the 2007 Statute is not even remotely close to being narrowly drawn to achieve that interest, especially because regulation of speech activity in public fora is "subject to the highest scrutiny." *ISKCON v. Lee*, 505 U.S. 672, 678 (1992).

Here, the 35-foot buffer zones go way beyond what this Court held permissible in *Hill* and therefore burden significantly more speech than is necessary to protect Respondents' interest. This is particularly troubling here, as Respondents did not present any evidence of criminal convictions of the more limited 2000 "no-approach" law. *See* JA 68-69. On the contrary, the record is replete with exactly the opposite facts: Petitioners' expressive activity was frequently well-received by women attending abortion clinics.[7] *See, e.g.*, JA 136 (Petitioner McCullen: "Over the years, hundreds of women have accepted my offers of help."); JA 180 (Petitioner

[7] The 2007 Statute therefore not only violates Petitioners' First Amendment rights, but also violates the rights of women who would be receptive to Petitioners' message. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Calif.*, 475 U.S. 1, 8 (1986) (noting that the First Amendment "protects the public's interest in receiving information").

Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the [2007 Statute] took effect[.]") That some women (or, more likely, the abortion clinics) do not wish to receive Petitioners' message is irrelevant, as "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted). Finally, assuming *arguendo* that Petitioners or other pro-life individuals had impeded access to, or harassed or intimidated women outside of, abortion clinics, Massachusetts had – and has – at its disposal a variety of federal and state laws, in both the criminal and civil context, to enforce its interest.[8] Tellingly, Respondents did not (because they cannot) point to any deficiencies in then-existing legislation

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

that made the 2007 Statute necessary to enforce its interests. Given this, it should properly be viewed as "a speech regulation directed against the opponents of abortion," which the lower courts improperly afforded "the benefit of the 'ad hoc nullification machine'" that exists to squelch speech seeking to limit abortions. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting). As such, this Court should reverse the trend of upholding speech regulations around abortion clinics by overruling *Hill*, and invalidating the 2007 Statute, as both "contradict[] more than a half century of well-established First Amendment principles." *Id.* at 765 (Kennedy, J., dissenting).

III. Even if the 2007 Statute is Content-Neutral and Judged as a Time, Place, and Manner Regulation, it Fails to Pass Muster

The U.S. Court of Appeals for the First Circuit upheld the 2007 Statute as a limited time, place, and manner statutory restriction on speech in a public forum. *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013). Even if judged under a time, place, and manner standard, however, the 2007 Statute fails. Under an intermediate scrutiny standard, the 2007 Statute must be: (i) content neutral, (ii) narrowly tailored, (iii) serve a significant governmental interest, and (iv) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 785 (1989). Although the time, place, and manner "fit" between the governmental

interest and the breadth of regulation is subject to the less demanding intermediate level of scrutiny, the Court must "focus[] on the evils the [Government] seeks to eliminate" and ask whether the regulation at issue "significantly restrict[s] a substantial quantity of speech that does not create the same evils." *Id.* at 799 n.7.

As discussed *infra*, the absence of evidence justifying the 2007 Statute provides compelling support for the conclusion that it is a content-based and viewpoint-based regulation, designed to silence Petitioners. Even assuming *arguendo* that the 2007 Statute is content-neutral, it fails the remaining three prongs of *Ward*. *First*, the narrow tailoring requirement is designed to prevent legislation that "burdens substantially more speech than is necessary to further the government's legitimate interests . . . ." *Id.* at 791. Here, there is no justification for a 35-foot buffer zone when the previous statute – with its smaller buffer zone – readily satisfied Respondents' interests. Consequently, the 2007 Statute prevents Petitioners from effectively engaging in their chosen form of expression, while simultaneously failing to further Massachusetts' interests. Moreover, because the 2007 Statute operates at the core of the rights to freedom of speech, it was the duty of the Massachusetts General Assembly to craft its restrictions with particular care to safeguard these "delicate and vulnerable, as well as supremely precious" freedoms. *NAACP v. Button*, 371 U.S. 415, 433 (1963). This the Commonwealth failed to do. Put simply, the 2007 Statute does "not aim specifically at evils within the allowable area of

[Massachusetts'] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech . . . ." *Thornhill*, 310 U.S. at 97. Indeed, such an overbroad regulation is the very antithesis of the "narrow tailoring" the First Amendment's time, place, and manner standard requires. Because the 2007 statute thus regulates expression "in such manner that a substantial portion of the burden on speech does *not* serve to advance the [regulatory] goals" it should be invalidated on this ground alone. *Ward*, 491 U.S. at 799 (emphasis added).

Second, as discussed herein, the governmental interest is illusory and can be met with tools already readily available to Massachusetts. *See* Section II, *infra*, at n.8. The 2007 Statute should likewise be invalidated on this ground.

Third, the 2007 Statute does not leave open ample alternative means of communication. As the record demonstrates, Petitioners' message may only be delivered with any degree of effectiveness by in-person communication – something a 35-foot buffer zone completely prevents. *See, e.g.*, JA 180 (Zarrella: "[A]lthough I would estimate that, over the years, approximately 100 women have decided to have their babies as a result of my efforts, to my knowledge none have done so since the [2007 Statute] took effect[.]") Whatever the meaning of "ample alternative channels of communication," the constitutional principle is well-established: "the streets are natural and proper places for the dissemination of information and opinion; and one is

not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 160-61 (1939). Forcing Petitioners to express their message from a distance of at least 35 feet from their intended audience is incompatible with this requirement, especially because "[t]he First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

CONCLUSION

For the reasons set forth above, *Amicus* respectfully asks this Court to invalidate the 2007 Statute and overrule *Hill*.

Respectfully submitted,

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