No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEVADA, NEW MEXICO, OREGON, VERMONT, WASHINGTON AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature adopted a fixed buffer zone that limited "entering" or "remaining" in areas next to the entrances of reproductive healthcare facilities. See Mass. Gen. Laws ch. 266, § 120E½ (2012). The Legislature took this action in response to twenty years of weekly, targeted protest at facilities across Massachusetts that blocked doors and driveways and made patients, staff, and passersby feel unsafe. The solution Massachusetts adopted, after other approaches had failed, struck the right balance: permitting safe passage over short stretches of sidewalk at facility entrances, while also preserving robust communication—in all forms—between advocates and patients on the streets and sidewalks surrounding facilities.

The questions presented are:

1. Whether Massachusetts' regulation of conduct in the area immediately around facility entrances to preserve public safety and patient access constitutes a permissible time-place-manner regulation under the Free Speech Clause of the First Amendment.

2. Whether the Court should decline petitioners' invitation to review and overturn *Hill v. Colorado*, 530 U.S. 703 (2000), where this case does not present the issues unique to *Hill*.

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INTEREST OF THE AMICI STATES

Amici States New York, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Nevada, New Mexico, Oregon, Vermont, and Washington, and the Territory of the U.S. Virgin Islands,[1] file this brief in support of respondent Martha Coakley, Attorney General for the Commonwealth of Massachusetts. Amici States have a compelling interest in protecting their ability to legislate for the protection of the health and welfare of their citizens, including securing safe and unimpeded access to reproductive health care services. Although the challenges faced by amici States in securing this access—and the means used to do so—may vary widely, they share a common interest in preserving the flexibility to achieve this goal through a range of strategies tailored to their particular needs and circumstances. Whether legislating at the state-wide level or by permitting their municipalities to address problems at the local level as appropriate, amici States seek to preserve their ability to have at their disposal a range of options consistent with the First Amendment.

This Court has held that, in appropriate circumstances, demonstrators may be barred entirely by court-ordered injunctions from narrow fixed buffer zones around entrances to facilities providing reproductive health care services, *see Madsen v. Women's Health Care Ctr., Inc.*, 512 U.S. 753 (1994) (36 feet); *Schenck v. Pro-Choice*

[1] The Territory of the U.S. Virgin Islands is not a State, but has a strong interest in this matter similar to that of the States, and it is accordingly included in this brief's references to "Amici States."

Network of W. N.Y., 519 U.S. 357 (1997) (15 feet), and that demonstrators may be barred more generally from making close and unwanted approaches to people within a somewhat broader fixed radius, *see Hill v. Colorado*, 530 U.S. 703 (2000) (100 feet). Massachusetts tried the latter approach, found it did not work, and resorted to a law of general applicability that utilized a fixed buffer zone. Amici States urge the Court to respect a State's considered determination, informed by its own practical experience, that in order to control the traffic congestion that was obstructing access to its reproductive health care facilities, it was necessary to ban non-transitory use of the sidewalks within a narrow fixed buffer zone outside those facilities.

In establishing this buffer zone, Massachusetts made a judgment analogous to the judgments many States have made in establishing buffer zones at polling places and funeral or memorial services.[2] All of these buffer zones have been created to respond to a need for protection that is based on experience. The Court should not undermine the ability of the States to identify such needs and to fashion a workable legislative response.

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[2] *See* Brief of Michigan and 11 Other States, as Amici Curiae, at 5 n.1, 7 n.2 (collecting polling place buffer-zone laws from all 50 States, as well as funeral buffer-zone laws from 43 States and the United States). While these amici States reaffirm the importance of preserving the States' authority to impose buffer zones in different contexts (Br. at 1, 3-9), they attempt to distinguish Massachusetts' law by claiming it is not content neutral (Br. at 9-12). Once the law's content neutrality is established, however, *see infra* pp. 21-25, it merits the same respect as buffer-zone laws in other contexts.

STATEMENT OF THE CASE

Massachusetts has a decades-long history of targeted protests, harassment and violence resulting in severely compromised access to health care facilities that offer abortion services. Joint Appendix ("J.A.") 12-24. Its legislature sought to address the problem in 2000 by enacting the Massachusetts Reproductive Health Care Facilities Act. *See* 2000 Mass. Acts ch. 217, § 2 (*reproduced at* Pet. App. 130a-131a); *see also McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) (upholding facial validity of 2000 law). Modeled after the law upheld by this Court in *Hill v. Colorado*, 530 U.S. 703, the 2000 Massachusetts law similarly focused on curbing unwelcome close approaches. The law made it unlawful, within 18 feet of the entrance to a health care facility that offers abortion services, for any person (other than those specifically exempted)[3] to knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling," absent consent. Pet. App. 130a. Because laws of this nature provide a protected space that travels with an individual accessing a facility, they are known as "floating bubble" or "floating buffer" zone laws. The Massachusetts law additionally prohibited knowingly impeding or obstructing access to facility entrances. 2000 Mass. Acts ch. 217, § 2(e).

[3] The law exempted four categories of persons, namely (1) those entering or leaving the facility; (2) employees or agents of the facility acting within the scope of their employment; (3) law enforcement, emergency services providers, construction and utility workers, and other municipal agents acting within the scope of their employment; and (4) those using the public way adjacent to the facility solely for the purpose of reaching another destination. Pet. App. 130a-131a.

For years following enactment of the 2000 law, physical ingress and egress to reproductive health care facilities throughout Massachusetts remained severely compromised. A legislative hearing revealed that, among other problems, the law did little to reduce the crowds that routinely congregated in the immediate vicinity of facility entrances and driveways for the purpose of engaging in lawful protest activities (on both sides of the abortion issue) from a relatively stationary position. S*ee, e.g.*, J.A. 62, 67, 78, 80, 85-86, 88-89. At one clinic, protesters routinely moved ever closer to the entrance, even vying with each other by pushing and shoving for the most desirable positions in front of that entrance. J.A. 44, 85, 123.[4] At the same time, the risk of prosecution under the 2000 law proved insufficient to deter repeated violations of the law, as many protesters remained willing to flout the law's requirements. J.A. 31, 36, 41, 60, 67-71,

[4] *See also* J.A. 50-51, 62, 96, 124 (protesters sometimes position or space themselves so as to force patients to squeeze by); J.A. 44, 85 (concentration of protesters in zone holding large umbrellas during rainy weather caused escorts to nearly be hit in the eye or fall while trying to avoid being poked); J.A. 50 (protesters "regularly crowd" and stand "right at the entrance" of Boston clinic which has a recessed door); J.A. 41 (protesters' large signs and parked cars obstruct motorists' views, resulting in accidents); J.A. 51, 55 (presence of protesters impeded normal flow of traffic and created dangerous conditions and serious safety risks for anyone trying to use the public ways); J.A. 69 (police captain describing atmosphere as "a goalie's crease" because "everybody is in everybody's face"); J.A. 86 (clinic security director stating "the safety issue is scary" and it is "a terrible situation safety-wise for everybody on the street," including patients, employees, pedestrians, and protesters themselves); J.A. 123 (combined presence of pro-choice and anti-abortion protesters "around the front entrance would effectively block the door").

78-79, 95-96, 123-24. Thus the law did not in fact relieve the concentration of protest activities, both lawful and unlawful, that continued to occur right up in front of facility entrances and block access.

In 2007, the State responded with a new approach. After further deliberations and legislative findings, the Massachusetts Legislature revised the 2000 law by deleting the ban on close unwanted approaches within 18 feet of the entrance, and replacing it with the law challenged here—a ban on non-transitory presence within 35 feet of the entrance. 2007 Mass. Acts ch. 155 (*codified as amended at* Mass. Gen. Laws ch. 266, § 120E½(b) (2012), and *reproduced at* Pet. App. 219a-221a).

The new law establishes a 35-foot fixed buffer zone around the driveways and entrances of health care facilities (other than hospitals) where abortions are offered or performed. Under the law, no person can knowingly enter or remain in the buffer zone of such a facility during business hours, with the exception of four classes of persons whose transient presence is permitted as necessary: (1) those entering or leaving the facility; (2) employees or agents of the facility acting within the scope of their employment; (3) law enforcement, emergency services providers, construction and utility workers, and municipal agents acting within the scope of their employment; and (4) those using the public way adjacent to the facility solely for the purpose of reaching another destination. Mass. Gen. Laws ch. 266, § 120E½(b).[5] The record establishes that the revised law is working. It has moved the crowds back from the

[5] The other provisions of the 2000 law remained unchanged.

immediate vicinity of facility entrances and doorways, and thus facilitated access, while still permitting protesters to engage in a wide range of expressive activities near facility entrances—including leafleting and engaging in close quiet conversations with others—just outside the buffer zone. *See, e.g.*, J.A. 97-98, 102, 114-18, 125-30, 204-13, 228-40, 255-65.

Alleging that the revised law violates their First Amendment rights, petitioners challenged the law both on its face and as applied at three facilities in the State, one in Boston, one in Springfield, and one in Worcester. Petitioners' facial and as-applied challenges were tried separately. Both challenges were rejected by the courts below. In *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1881 (2010) (*reproduced at* Pet. App. 93a-120a), the Court of Appeals held that, on its face, the law was a valid time-place-manner restriction because it was both content and viewpoint neutral; served a valid public safety purpose; was not overbroad; and left open adequate alternative channels of communication notwithstanding a diminution in particular types of expressive activities. And in *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013) (*reproduced at* Pet. App. 1a-28a), the Court of Appeals held that application of the law to petitioners' activities at the subject three facilities did not violate petitioners' rights because the buffer zones left open adequate alternative means of communication.

SUMMARY OF ARGUMENT

1. States and municipalities across the Nation have been called upon to address a range of concerns implicating access to health care facilities that provide

abortion services. These concerns, expressly recognized by this Court as significant, include "protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being [are] threatened." *Schenck,* 519 U.S. at 372; *see also id.* at 375-76 (explaining these concerns). At the same time, States must balance these concerns against the First Amendment rights of their citizens to engage in a range of expressive activities, including protests or demonstrations on either side of the divisive issue of abortion. And they must have the flexibility to do so in the manner they deem most appropriate for their particular circumstances, consistent with the First Amendment.

This Court has thus far approved a variety of regulatory measures fashioned by States and their municipalities to address their particular challenges. These include the floating bubble-zone law upheld in *Hill,* 530 U.S. 703, and the court-ordered injunctions approved in *Madsen*, 512 U.S. 753, and *Schenck,* 519 U.S. 357, precluding named parties from entering fixed buffer zones outside reproductive health care facilities. But after many years of experience with targeted injunctions and a floating bubble-zone law, Massachusetts concluded that neither of these measures could effectively resolve the intractable problem it faced throughout the State of blocked physical access at health care facilities that offer abortion services. Massachusetts finally addressed that problem by establishing a 35-foot fixed buffer zone around the entrances and driveways of those facilities. The lack of success Massachusetts experienced with the alternative

methods it tried demonstrates the need for States to have sufficient flexibility to address their particular challenges in the manner they deem most appropriate.

2. Massachusetts' state-wide fixed buffer-zone law should be upheld as a facially valid time-place-manner restriction on speech. (For the response to the as-applied challenge, amici States defer to Massachusetts' factual analysis.)

Massachusetts' law is content neutral on its face, because it does not single out any particular message or speaker, or indeed address expressive activity at all. It simply excludes all persons from the zone except those who need to pass through for reasons unrelated to expressive activities. The law's justification is also content neutral. It simply moves the crowds that have been plaguing Massachusetts' reproductive health care facilities back from the immediate vicinity of facility entrances and driveways in order to provide a safe corridor for those wishing access. Although Massachusetts previously enacted a bubble-zone law forbidding close unwanted approaches near facility entrances, like the one upheld in *Hill,* that law proved inadequate for this purpose. Among other things, it did not at all address the crowding caused by individuals engaged in peaceful expressive activities from a stationary position or upon a consensual approach. Massachusetts' current law thus does not aim at the suppression of speech at all, but rather at the secondary effects of that speech—unacceptable crowding conditions that blocked physical access. And because it serves purposes unrelated to the content of expression, its content neutrality is not vitiated by either the fact that the law may disproportionately burden the speech

of those with anti-abortion views, like petitioners, or that it only applies at health care facilities that offer abortion services; those locations are the only places where the problem existed.

Nor does the fact that the law permits facility employees and agents acting within the scope of their employment to pass within the zone undermine the content neutrality of the law. This exemption is entirely consistent with the law's intended purpose of relieving congestion at facility entrances and keeping pedestrian traffic moving. Facility employees act within the scope of their employment when they escort patients into the facility. Their presence is transient—like the presence of the patients themselves—and the purpose of their presence is to help patients into the facility, and not to communicate or express anything. The transient presence of these employees is necessary for the proper functioning of the facility; they may not, however, remain in the zone except as necessary to perform their job duties.

Moreover, the plain language of the statute is easily read to permit *any* exempt individual—including petitioners if they are passing through the zone to reach a destination on the other side—to engage in expressive activities on their way through the zone. Read this way, the statute does not prohibit any expression by exempt persons, whether advocates or facility agents and employees, while moving lawfully through the zone, but it does prevent them from adding to congestion by stopping or lingering in the zone to engage in such expression. Because the statute does not on its face prohibit—or even reference—expressive activity, it is content neutral.

As a content-neutral time-place-manner restriction, Massachusetts' buffer-zone law is subject to intermediate scrutiny, and it easily meets that test. There is no dispute about Massachusetts' significant, indeed compelling, interest in ensuring safe and secure access to health care facilities, particularly when the constitutionally recognized right to reproductive freedom is implicated. The law is narrowly tailored to this interest because it directly and effectively addresses the long-standing problem that Massachusetts faced, namely, crowds of protesters routinely congregating directly in front of facility access points, by moving those crowds back 35 feet to clear obstructed pathways. Indeed, the 2007 law has actually worked to keep entrances clear and traffic moving. Neither the size of the buffer zone nor the fact that Massachusetts could hypothetically have devised some still narrower means to address its particular problem makes the statute unconstitutional because the means chosen to achieve Massachusetts' significant interest need not be the least restrictive. And the statute leaves open ample alternative means of communication. Although petitioners cannot stand directly in front of facility entrances, they may continue to engage in their preferred communication activities within the sight, hearing, and presence of their target audience just outside the buffer zone.

3. Finally, this case presents no occasion to consider either the scope or continuing vitality of this Court's holding in *Hill*, 530 U.S. 703, in view of the substantial differences between the Massachusetts law and the Colorado law at issue in *Hill*. The Massachusetts fixed buffer-zone law is quite different from the Colorado law. It applies only to those health care facilities that offer abortion services, because it was only at such facilities

that Massachusetts for years experienced the crowding conditions that blocked facility access. It restricts activities only within a 35-foot radius of the facilities covered, as opposed to the wider 100-foot radius in which Colorado's bubble-zone law applied. And within this more modest radius, it precludes physical presence altogether, with the limited exceptions previously discussed, because it is designed to address crowding, and not merely unwanted close approaches. The Massachusetts law thus requires no examination of the content of a speaker's communication to determine whether the speaker's conduct is prohibited. The content of a speaker's message is irrelevant.

Because the two statutes are so different in both purpose and effect, they do not stand or fall together. It would be possible to have doubts about the Colorado law and still uphold the Massachusetts law, and the reverse is true as well. The Massachusetts law is properly analyzed—and validated—under this Court's long-standing time-place-manner jurisprudence that substantially predates *Hill*. There is therefore no reason to revisit *Hill*.

ARGUMENT

I. States must have flexibility to protect access to health care facilities by methods that respond to local conditions.

This Court has long recognized the States' strong interest in protecting the health and welfare of their citizens. To that end, States have been accorded "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" because such matters are "primarily, and

historically . . . matter[s] of local concern." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (ellipsis and alteration in original) (internal quotation marks omitted). In particular, this Court has long recognized "the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *accord Hill v. Colorado*, 530 U.S. at 728-29. And the Court has recognized that the States' interest in their citizens' health and welfare "may justify a special focus on unimpeded access to health care facilities." *Hill*, 530 U.S. at 715 (*citing Madsen*, 512 U.S. 753).

Safeguarding access to health care facilities that provide abortion services has posed a special challenge to States and municipalities. Organized efforts to obstruct such access implicate the States' interests in "protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being [are] threatened." *Schenck*, 519 U.S. at 372; *see also id.* at 375-76 (describing these interests as "significant"). Efforts to ensure this access, however, may also implicate the right to freedom of speech guaranteed by the First Amendment, including the right to engage in expressive activities aimed at influencing women's decisions about how to exercise their reproductive freedom. States and municipalities, when regulating in this area, must therefore be ever sensitive to the potential tension between these important rights. Due to differences among States (and among municipalities within States)—differences that may be related to their size and geographic location, population

characteristics, governmental resources, and their own unique reproductive rights history—not every State or municipality will confront identical problems or tackle problems in the same way. They may arrive at their most appropriate and effective solutions by way of trial and error. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

In the forty years since the Court in *Roe v. Wade*, 410 U.S. 113 (1973), first recognized a woman's constitutional right to reproductive freedom, amici States have formulated a variety of measures to address their myriad concerns in this area. These measures include:

- laws of general applicability enforced by civil proceedings for injunctive relief and/or criminal sanctions that prohibit harassment, threats, or the use of force outside facilities, property damage, and/or the intentional obstruction of or interference with pedestrian or vehicular access;[6]

[6] *E.g.*, Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248; Cal. Penal Code § 423; D.C. Code § 22-1314.02; Kan. Stat. Ann. § 21-5808; N.C. Gen. Stat. § 14-277.4; Md. Code Ann. Crim. Law § 10-204(c); Mich. Comp. Laws Ann. § 333.20198; Minn. Stat. § 609.7495; Nev. Rev. Stat. § 449.760; N.Y. Penal Law §§ 240.70 to 240.71, N.Y. Civil Rights Law § 79-m; Or. Rev. Stat. § 164.365(1)(E); Wash. Rev. Code § 9A.50.020; Wisc. Stat. § 943.145.

- fixed buffer-zone laws that exclude all unnecessary presence within a specified distance of facility entrances and driveways;[7]

- floating bubble-zone laws that provide a protective space around individuals accessing facilities within a certain distance of those facilities and within which approaches by others are allowed only upon consent;[8]

- modified buffer-zone laws that require protesters to withdraw a fixed distance away from a facility entrance upon the request of someone entering or exiting the building;[9]

- laws requiring assembled persons obstructing access or threatening the peace outside a facility to disperse when directed by police and prohibiting

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[7] *E.g.*, Mass. Gen. Law ch. 266, § 120E½ (35-foot zone); Burlington, Vt., City Ordinance §§ 21-111 to 21-115 (35-foot zone); Pittsburgh, Pa., Code of Ordinances § 623.04 (15-foot zone); Portland, Me., City Code § 17-110 (as amended November 18, 2013) (39-foot zone); San Francisco, Cal., Police Code, §§ 4302-4303 (25-foot zone); Santa Barbara, Cal., City Ordinance § 9.99.020 (8-foot zone).

[8] *E.g.*, Colo. Rev. Stat. § 18-9-122(3) (8-foot bubble within 100-foot radius); Mont. Code Ann. § 45-8-110 (8-foot bubble within 36-foot radius); Chicago, Ill., Code of Ordinances § 8-4-010(k) (8-foot bubble within 50-foot radius); Oakland, Cal., Code of Ordinances § 8.52.030 (8-foot bubble within 100-foot radius); Sacramento, Cal., City Code § 12.96.020 (same); San Jose, Cal., Code of Ordinances § 10.08.030 (same).

[9] *E.g.,* San Diego, Cal., Mun. Code § 52.1001 (15-foot zone).

such persons from congregating again within a certain distance of the facility for a certain period of time;[10]

- and other laws prohibiting specific conduct such as creating excessive noise outside facilities, telephone harassment of facility staff, or the possession of a weapon during demonstrations outside a facility.[11]

Indeed, a single State may use a number of these methods in combination. For example, in response to a wave of violence and intimidation at reproductive health care facilities in the 1990s, including the murder of a New York physician who performed abortions, New York enacted legislation that, much like the federal Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248, prohibits threats of violence or the use of force outside such facilities, and also bars the knowing obstruction of pedestrian or vehicular access. New York Clinic Access Act, 1999 N.Y. Laws ch. 635, § 2 (*codified at* N.Y. Penal Law §§ 240.70 to 240.71 (McKinney 2008 and Supp. 2013) and N.Y. Civil Rights Law § 79-m (McKinney 2009)); *see also* 1999 N.Y. Legis. Ann., at 373 (describing history that led to enactment); *Schenck*, 519 U.S. 357 (same). New

[10] *E.g.,* Concord, N.H., Code of Ordinances §§ 4-9-1 to 4-9-3 (no reassembly within 50 feet of facility before morning of following day); Los Angeles, Cal., Mun. Code § 56.45(b) (no reassembly within 50 feet of facility for four hours).

[11] *E.g.*, D.C. Code § 22-1314.02(a)(2), (4) (noise and phone harassment); Me. Rev. Stat. tit. 5 § 4684-B(2) (noise intended to jeopardize health of patients and phone harassment); N.C. Gen. Stat. § 14-277.2 (possession of weapon); Wash. Rev. Code § 9A.50.020(2), (4) (noise and phone harassment).

York's law is usually enforced by permanent injunctions secured by the State (or sometimes private parties) that create fixed buffer zones precluding the activities of particularly virulent protesters on a case-by-case basis. *See, e.g.*, *Schenck*, 519 U.S. 357; *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184 (2d Cir. 2001).

Whether obtained under the federal FACE Act or New York's Clinic Access Act, however, such injunctions are not always effective. Because injunctions bind only the individuals or groups named, they may be circumvented if named parties are able to find others to take their places. *See, e.g.*, *New York ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64 (2d Cir. 1996). And if the physical layout of facilities is changed, through renovation or expansion projects, for example, further judicial proceedings may be required to modify the precise fixed buffer zones previously obtained. *See, e.g.*, *New York ex rel. Schneiderman v. Kraeger*, 914 F. Supp. 2d 223 (N.D.N.Y. 2012). Thus, New York City—after legislative findings that other laws did not adequately safeguard facility patients and staff—enacted enhanced local protections that, among other things, prohibit protesters from following and harassing anyone within a 15-foot buffer zone around entrances to reproductive health care facilities. Access to Reproductive Health Care Act, N.Y.C. Admin. Code §§ 8-801 to 8-807 (2013); *see also* 2009 N.Y.C. Legis. Ann., at 118-25 (explaining continuing problems and 2009 amendments); *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457 (S.D.N.Y. 2006) (describing continued violence, threats, and atmosphere of danger outside Manhattan facility).

State and local legislation in this context, while protecting significant state interests on behalf of some of its citizens, may implicate the First Amendment rights of others. Indeed, health care facilities providing abortion services have long been a focal point for a range of expressive activities on both sides of the abortion debate. As happened in Massachusetts and some other States, these activities may become harassing, threatening, assaultive, or physically obstructive. When that happens, state and local governments must impose some reasonable time-place-manner restrictions in order to balance the need to protect the health and safety of their citizens with the sometimes competing interests of those who seek to engage in expressive activities on public ways. By approving a range of regulatory measures, the Court has thus far afforded the States sufficient flexibility to address the particular challenges they face in the manner they deem most appropriate, despite incidental burdens on protected speech.

For example, in *Hill v. Colorado,* 530 U.S. 703, Colorado established a pattern of harassment, intimidation, and assaults of abortion clinic patients, as well as a link between that unwelcome conduct and the efficacy of the medical care ultimately received. As a result, the Court upheld a floating bubble-zone law that prohibited close unwanted approaches near facility entrances, as a valid time-place-manner restriction. And in two other cases implicating access to reproductive health care facilities, the Court upheld States' use of content-neutral injunctions that, among other things, precluded named parties from entering fixed buffer zones outside such facilities. *See Madsen*, 512 U.S. 753; *Schenck*, 519 U.S. 357. In *Madsen,* the buffer zone extended 36 feet from a designated facility,

and in *Schenck*, it extended 15 feet from several regional facilities.[12] These decisions have thus already validated the use of prophylactic buffer zones, both floating and fixed, to assure access to health care facilities.[13]

But neither the use of injunctions obtained on a case-by-case basis, nor the 2000 floating bubble-zone law modeled after the one at issue in *Hill*, effectively resolved Massachusetts' continuing problem of blocked physical access to reproductive health care facilities throughout the State. Under such circumstances, Massachusetts,

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[12] The *Schenck* Court also invalidated the injunction's 15-foot floating buffer zone around "any person or vehicle seeking access to or leaving" a facility (presumably at any distance from the facility). 519 U.S. at 377. The Court nevertheless foreshadowed its decision in *Hill* by expressly reserving the possibility that government interests could in the appropriate case "justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two." *Id.*

[13] Relying on this Court's guidance in these cases, federal courts have thus far overwhelmingly approved similar buffer-zone laws as constitutional on their face. *See Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) (ordinance establishing *Hill*-type bubble zone facially valid but city's admittedly selective enforcement policy was unconstitutional); *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009) (holding that city may constitutionally impose either a 15-foot fixed buffer zone or a *Hill*-type bubble zone, but not both); *Clift v. City of Burlington*, 925 F. Supp. 2d 614 (D. Vt. 2013) (holding 35-foot fixed buffer zone facially valid), *appeal pending* (2nd Cir.); *see also Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998) (pre-*Hill* case upholding 8-foot fixed buffer zone, but striking provision creating floating bubble zone). *But see Halfpap v. City of W. Palm Beach*, No. 05-80900-CIV, 2006 WL 5700261 (S.D. Fl. 2006) (invaliding 20-foot fixed buffer zone where record did not establish history of blocked facility access).

or any other State so situated, should not be limited to remedies previously tried and found insufficient. Rather, because its state-wide fixed buffer zone is content neutral, and satisfies the intermediate scrutiny to which such laws are subject, it should be upheld as a reasonable solution to Massachusetts' otherwise intractable problem of blocked access. *See Turner Broad. Sys., Inc. v. FCC* (*"Turner II"*), 520 U.S. 180, 213-14 (content-neutral restrictions "afford[ ] the government latitude" in designing solutions and it "may employ the means of its choosing").

II. The Massachusetts fixed buffer-zone law is a facially valid time-place-manner restriction that reasonably addresses the distinctive history of congestion at health care facility entrances in that State.

Massachusetts made a carefully considered choice about the best way to clear the crowds that were physically blocking access to those health care facilities that offer abortion services, without unduly burdening the First Amendment rights of those on both sides of the abortion debate. Its solution was to enact a modest fixed buffer zone in which only essential and transient pedestrian traffic is permitted. This law is a reasonable content-neutral solution to the specific public health and safety issue that has plagued Massachusetts for decades and should be upheld as a valid time-place-manner restriction under *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

While speech on public streets and sidewalks is traditionally subject to a high degree of protection, *see Frisby v. Schultz*, 487 U.S. 474, 480 (1988), this Court has long upheld reasonable time-place-manner restrictions on

speech in order to prevent disruption, preserve the public peace, or protect ingress and egress to certain buildings. In *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a rule confining sales, solicitations, and distribution of literature to a fixed location at a state fair in order to maintain the flow and orderly movement of fair crowds. In *Cameron v. Johnson*, 390 U.S. 611 (1968), the Court upheld a law precluding picketing that interfered with ingress to or egress from public buildings or traffic on adjacent streets and sidewalks. *Id.* at 617. And in *Boos v. Barry*, 485 U.S. 312 (1988), the Court upheld a law prohibiting protesters from remaining within 500 feet of an embassy if the police reasonably believed the embassy's security or peace was threatened. *Id.* at 330.

As the Court has since explained, restrictions on the time, place or manner of speech are valid if they (1) are content neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication. *See Ward*, 491 U.S. at 790-91. Moreover, restrictions aimed at the secondary effects of speech—even a particular category of speech—such as congestion or interference with ingress to or egress from particular buildings, are viewed as content neutral as long as they "do not aim at the suppression of free expression." *Boos v. Barry*, 485 U.S. at 320 (discussing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). While a time-place-manner restriction should not "burden substantially more speech than necessary to further the government's legitimate interests," it need not be the least restrictive means of furthering those interests. *Ward*, 491 U.S. at 799-800. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes

a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 800 (ellipsis in original) (internal quotation marks omitted).

The Massachusetts law, which seeks only to assure adequate ingress to and egress from reproductive health care facilities, should similarly be upheld as a facially valid time-place-manner restriction. Massachusetts has tried alternatives that permitted more expressive conduct within 35 feet of facility entrances and driveways, but they proved ineffective at ensuring access to the facilities. Given this history, Massachusetts could reasonably conclude that its 35-foot buffer zone was necessary to achieve its goal.

A. The Massachusetts fixed buffer-zone law is content neutral.

1. Petitioners claim that the Massachusetts law is not content neutral (Pet. Br. at 22-34), but they are mistaken. As the Court has explained, in determining content neutrality, the first question is whether the challenged provision on its face distinguishes between messages or speakers, and the next question is whether the law's purpose or justification makes such a distinction. *Turner Broad. Sys., Inc. v. FCC* ("*Turner I*"), 512 U.S. 622, 645 (1994). The "'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Id.* at 642 (ellipsis and alteration in original) (quoting *Ward*, 491 U.S. at 791). The Massachusetts fixed buffer-zone law is content neutral in both respects.

The law is neutral on its face, because it does not single out any particular message or speaker.[14] Indeed, on its face, it does not address expressive activity at all. Individuals who are not expressly exempt from the law may not "knowingly enter or remain" in the buffer zone, whether or not they are engaged in expressive activity. Mass. Gen. Laws ch. 266, § 120E½(b). Thus individuals—including those on either side of the abortion debate and also spectators with no interest in the debate—are prohibited from crowding the zone, even if they are engaged in no expressive activity at all.

The Massachusetts fixed buffer-zone law is also neutral in justification. The purpose of the law is crowd control. Despite the enactment of a bubble-zone law in 2000, the Massachusetts Legislature heard ample evidence that crowds of people routinely gathered directly in front of entrances to reproductive health care facilities throughout the State, blocking ingress and egress by their mere physical presence. *See supra* pp. 4-5 and n.4 (collecting record cites). The 2007 law was designed to move these crowds back from facility entrances 35 feet—or less than the length of two average-sized cars—to assure unobstructed access. Because the law does not "aim at the suppression of free expression" and indeed has "nothing to do with [the] content" of the message sought to be conveyed by petitioners or any other persons or groups, it is content neutral. *Boos v. Barry*, 485 U.S. at 320; *see also Turner I*, 512 U.S. at 643 (laws that "impose

[14] Although speakers near health care facilities that offer abortion services are treated differently from speakers in other locations, all of the former category of speakers are treated exactly the same, regardless of the message, if any, they might wish to convey.

burdens on speech without reference to the ideas or views expressed are in most instances content-neutral").

Petitioners claim (Pet. Br. at 22, 25-27) that the law imposes a disproportionate burden on those who, like themselves, wish to express anti-abortion views. Even if that were true, and as we explain below it is not, that would not render the law content based. It is well settled that a regulation "that serves purposes unrelated to the content of expression" will nevertheless be "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

2. The content neutrality of the Massachusetts fixed buffer-zone law is not vitiated by the fact that the law exempts facility employees and agents acting within the scope of their employment. Petitioners focus on this exemption as evidence of non-neutrality (Pet. Br. at 27-32), but in fact such employees and agents—like everyone else exempted from the ban—need to pass through the zone for reasons unrelated to any expressive activities. Patients, health care providers, and others entering or leaving the facility necessarily must pass through the zone simply to get where they are going. Passers-by may similarly require access to the public sidewalks in front of facilities to reach destinations on the other side. And municipal agents and facility employees and agents need to do their jobs, for example, maintaining the peace and assisting patients and their families as needed. As the Massachusetts Attorney General explains (Resp. Br. at 35-37), the transient presence of these exempted individuals in the buffer zone is thus necessary either for the proper functioning of the facility or simply to permit people to get where they need to go, and it is entirely consistent with the law's intended purpose of relieving

congestion at facility entrances and keeping pedestrian traffic moving.[15]

Indeed, even as to these exempted individuals, the statute is reasonably read to limit their continued presence in the buffer zone. Passers-by and those entering or leaving the facility are permitted to remain in the zone only for the time necessary to accomplish the purpose that requires their exemption, namely reaching their respective destinations. And facility employees and agents, municipal workers, and other service personnel may remain in the zone only to the extent necessary to perform their jobs.

Petitioners argue (Pet. Br. at 19, 27-28) that the scope of employment for facility employees and agents will invariably include expressive activities, and thus that the statute effectively creates "speech exclusion zones" for all persons except facility employees and agents. But there is simply no such asymmetry. In fact, the plain language of the statute is easily read to treat all individuals alike with respect to expression: it appears to permit *any* exempt individual—including petitioners if they are passing through the zone to reach a destination on the other side—to engage in expressive activities while moving lawfully through the zone. But it prohibits exempt persons, including facility agents and employees, from adding to

[15] Amici Michigan and the other States (Br. at 10) incorrectly identify the exemption for facility patrons as further evidence that the law is content based. But a facility could provide no medical services at all if its patrons were banned from its entrances. The exemption for patrons is just another aspect of what is effectively a general exemption for those who need to pass through the zone for reasons unrelated to expressive activities.

congestion by stopping or lingering in the zone to engage in expressive activities or for any other purpose. *See* Resp. Br. at 37-38, 56 (indicating that statute should be so read).[16] Because the statute does not on its face prohibit—or even reference—expressive activity, it is content neutral.

3. The content neutrality of the Massachusetts fixed buffer-zone law is similarly not vitiated merely because it applies only at those health care facilities within the State that offer abortion services. The Massachusetts Legislature had before it evidence of a long history of congestion and compromised access at health care facilities that offer abortion services; it had no such history as to other health care facilities or, for that matter, other commercial entities more generally. Consequently, it reasonably sought to address only the problem at hand. States may "adopt laws to address the problems that confront them," and "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992). It would be anomalous, to say the least, if Massachusetts were found to have infringed on First Amendment rights because it declined to impose restrictions where none were needed.

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[16] Petitioners read (Pet. Br. at 32-33) the interpretative guidance letter issued by the Massachusetts Attorney General (J.A. 93-94) to mean that the statute prohibits facility employees and agents (and, for that matter, other exempt persons as well) from expressing their views about abortion or engaging in any partisan speech at all while otherwise lawfully in the zone. *See also* Pet. App. 205a-206a (district court read interpretative guidance in same manner). On that reading, the statute would still be content neutral, because it would permit no one to engage in expressive activities while in the buffer zone.

B. The Massachusetts fixed buffer-zone law satisfies the intermediate scrutiny to which content-neutral laws are subject.

1. The Massachusetts law is narrowly tailored to serve significant government interests. There is no dispute (Pet. Br. at 35, 45) about the significance of the State's interests in protecting the public from harm and assuring unobstructed access to health care facilities. *See supra* pp. 11-12 (identifying interests). Massachusetts also has a significant interest in protecting the ability of women in the State to exercise their constitutional right to reproductive freedom. *See Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 851 (1992). And the Massachusetts law is narrowly tailored to advance these interests because it directly addresses the particular problem Massachusetts faced—crowds of protesters routinely congregating directly in front of entrances to reproductive health care facilities throughout the State and thereby physically obstructing access—by moving those crowds back a modest 35 feet to clear obstructed pathways to facility entrance points.

The 2007 law was enacted after a long history of obstruction, congestion and impeded access to facilities. These problems persisted even after Massachusetts tried other solutions. The floating bubble-zone law that Massachusetts enacted in 2000 did not solve these problems. With its focus on prohibiting close unwelcome and even assaultive approaches, the 2000 law was ineffective at clearing blocked entrances to facilities. Instead, the record shows that crowds of protesters continued to congregate directly in front of facility entrances for a whole host of expressive activities, only

a fraction of which were even potentially covered by the 2000 law. *See supra* pp. 4-5 and n.4 (collecting record cites). The 35-foot fixed buffer-zone law, in contrast, addresses Massachusetts' problem of blocked access directly by moving crowds back from facility entrances a reasonable distance, and Massachusetts reports that the law has actually worked to keep entrances clear and traffic moving. The law thus serves Massachusetts' interests "in a direct and effective way." *Ward*, 491 U.S. at 800; c*f. Burson v. Freeman*, 504 U.S. at 206 (examination of long history of two persistent election-time evils demonstrated that "some restricted zone" was necessary to serve the State's interests).

This Court has long recognized that the means chosen by the government to regulate the time, place or manner of speech need not be the least restrictive means possible. *See Ward*, 491 U.S. at 800. The remedy Massachusetts chose thus does not fail merely because Massachusetts might have been able to devise some "imaginable alternative that might be less burdensome on speech," beyond those it had already tried. *Id.* at 797. Indeed, the Court has time and again confirmed that it will not invalidate a legislature's preferred remedial scheme simply because "some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner II*, 520 U.S. at 217-18. [17]

[17] Petitioners mistakenly suggest (Pet. Br. at 38-44, 47) that this fixed buffer-zone law cannot be narrowly tailored because it makes no provision for consensual speech. A consensual speech exception would make little sense in a statute like this one, designed, not to protect patients from unwanted speech, but to address a State's long-standing history of blocked facility access by keeping the zone clear of all standing traffic during business hours.

On the contrary, the Court generally gives "substantial deference" to legislative choices and predictive judgments, declining to substitute its own judgment for that of a legislative body that has "drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195, 224-25. Thus in *Hill,* the Court deferred to Colorado's judgment that a bubble-zone law was "the best possible accommodation of the competing interests at stake." 530 U.S. at 727. And in *Madsen,* the Court deferred to a state court's determination that a fixed buffer zone was necessary as a remedial matter. *See* 512 U.S. at 769-70.

Massachusetts' decision to enact a fixed buffer zone is entitled to the same deference. And its decision to establish the zone at 35 feet, rather than some lesser number, does not raise a "question of constitutional dimension." *Burson,* 504 U.S. at 210 (internal quotation marks omitted). In *Burson*, the Court described a 100-foot zone as a "minor geographic limitation" and specifically rejected the state supreme court's decision that 25 feet would suffice. *Id.* And the Massachusetts buffer zone is comparable in size to the 36-foot buffer zone upheld in *Madsen.* 512 U.S. 753. While petitioners may "quibble about whether [35] feet is too great or too small a distance if the goal is to ensure access," deference is due to Massachusetts' "reasonable assessment of the number of feet necessary to keep the entrances clear." *Schenck*, 519 U.S. at 381.

2. The Massachusetts fixed buffer-zone law leaves open ample alternative channels for substantial and meaningful communication with persons entering and leaving the facilities. Although petitioners cannot stand directly in front of facility entrances, where their physical presence may block access, they may continue to speak, leaflet, or

demonstrate within the sight, hearing and presence of their target audience only a short distance away. *See supra* pp. 5-6 (collecting record cites).[18] They may, for example, hold large signs suggesting that women do in fact have a choice and inviting women to come speak with them for help and assistance, away from the crush of facility entrances. Indeed, as amicus American Civil Liberties Union concludes (A.C.L.U. Br. at 21-22), the Massachusetts law may well facilitate "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*."

III. This case presents no occasion to revisit the Court's holding in *Hill v. Colorado*.

This case provides no occasion to consider either the scope or continuing vitality of this Court's holding in *Hill v. Colorado*, 530 U.S. 703, in view of the substantial differences between the Massachusetts law and the law at issue in *Hill*.

The Colorado law at issue in *Hill* targeted close physical approaches in the interest of protecting those seeking medical treatment from unwelcome communication that might result in physical or emotional harm. 530 U.S. at 707-10 and 728-29. The law imposed a floating bubble zone of eight feet within a larger 100-foot

[18] Amicus American Civil Liberties Union agrees (A.C.L.U. Br. at 20) that the statute has not "eliminated any meaningful opportunity for abortion protesters to engage in conversation with people entering or leaving an abortion clinic, or to hand out leaflets" and that "the difference between exercising that opportunity at the clinic's doorstep or 35 feet away is not readily apparent."

radius of any health care facility, whether or not abortions were performed there. *Id.* at 707-08. Specifically, within that radius, the law prohibited approaching within eight feet of another, without consent, for the purpose of passing out leaflets, displaying signs, or engaging in oral protest, education or counseling. *Id.* at 707 n.1. The law did not prohibit any particular message, nor did it prohibit leafleting, protesting, counseling, or any other form of communication from a stationary position. What it prohibited was *close approaches* for the purpose of certain types of nonconsensual communication.

The Massachusetts fixed buffer-zone law is different in three important respects. First, it does not apply to all health care facilities, but only to those that offer abortion services, because it was only at such facilities that Massachusetts for years experienced the crowding conditions that blocked facility access. Second, the restrictions of the Massachusetts law apply only within a 35-foot radius of covered facilities, as opposed to the 100-foot radius in which activities were restricted in *Hill*. Thus, unlike the Colorado law, the Massachusetts law does not restrict any close approaches, whether consensual or nonconsensual, in the area ranging from 35 to 100 feet from the entrances of covered facilities. Finally, within its more modest 35-foot buffer zone, the Massachusetts law does not single out close approaches, but precludes physical presence altogether, except for those exempted individuals whose transient presence is necessary for nonexpressive purposes, such as the proper functioning of the facility or to permit people to get where they need to go.

The Massachusetts law is thus quite different from the Colorado law. The Massachusetts law is not directed at unwelcome close approaches. It addresses a different problem entirely: the physical obstruction of access to health care facilities throughout the State that offer abortion services caused by the high concentration of protesting activities that routinely take place directly in front of facility entrances and driveways. And because it does not single out close approaches for the particular communicative purposes of protest, education, or counseling, it has the distinct advantage of requiring no inquiry into the communicative purpose of the actor. *See Hill*, 530 U.S. at 766-67 (Kennedy, J., dissenting); *see also id.* at 742-46 (Scalia, J., dissenting). Under the Massachusetts law, the content of a message is irrelevant. Indeed, the law precludes an individual's physical presence in the zone even if the individual engages in no expressive activity at all. The Massachusetts law is thus more like the laws at issue in cases such as *Frisby v. Schultz*, 487 U.S. 474, where "[n]o examination of the content of a speaker's message [would be] required to determine whether an individual [was] picketing, or distributing a leaflet, or impeding free access to a building." *Hill*, 530 U.S. at 766 (Kennedy J., dissenting).

Because the two statutes are so different in both purpose and effect, they do not stand or fall together. It would be possible to have doubts about the Colorado law and still uphold the Massachusetts law, and the reverse is true as well. The Massachusetts law is properly analyzed—and validated—under this Court's long-standing time-place-manner jurisprudence that substantially predates *Hill*. *See supra* pp. 19-29. There is therefore no reason to revisit *Hill*.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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