No. 12-

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

PETITION FOR A WRIT OF CERTIORARI

EDWARD C. DUMONT
TODD C. ZUBLER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006

MARK L. RIENZI
Counsel of Record
THE CATHOLIC UNIVERSITY OF AMERICA
COLUMBUS SCHOOL OF LAW
3600 John McCormack Road, NE
Washington, DC 20064
(202) 319-5140

PHILIP D. MORAN
415 Lafayette Street
Salem, MA 01970

MICHAEL J. DEPRIMO
778 Choate Avenue
Hamden, CT 06518

Attorneys for Petitioners

QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents … acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

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

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

PARTIES TO THE PROCEEDING

All petitioners are listed in the caption. Noreen Beebe, Carmel Farrell, and Donald Golden were at one time plaintiffs in the district court but were not parties to the most recent proceeding on appeal.

In addition to respondent Coakley, the appellees below were Daniel F. Conley, in his official capacity as District Attorney for Suffolk County; Joseph D. Early, in his official capacity as District Attorney for Worcester County; and Mark G. Mastroianni, in his official capacity as District Attorney for Hampden County. Michael W. Morrissey, in his official capacity as District Attorney for Norfolk County, was at one point a defendant in the district court but was not a party to the most recent proceeding on appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Eleanor McCullen et al. respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) affirming final judgment against petitioners is not yet officially reported, but may be found at 2013 WL 85928. The opinion of the district court rejecting petitioners' as-applied challenge and entering final judgment (App. 29a-66a) is reported at 844 F. Supp. 2d 206. An interim order of the district court (App. 67a-91a) is reported at 759 F. Supp. 2d 133. The court of appeals' earlier opin-

ion rejecting petitioners' facial challenge and affirming the denial of preliminary relief (App. 93a-120a) is reported at 571 F.3d 167. The opinion of the district court on those issues (App. 121a-210a) is reported at 573 F. Supp. 2d 382.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in full at App. 219a-221a. The most relevant portion of chapter 266, Section 120E½ of the Massachusetts General Laws provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

* * *

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

Since 2007, Massachusetts has enforced selective speaker exclusion zones on the public streets and sidewalks outside abortion clinics. Speakers who are not clinic employees or agents may not set foot within marked zones extending for 35 feet in each direction from each clinic entrance, exit, or driveway, even if they are entirely peaceful and seek only to proffer leaflets or engage in wholly consensual conversations. Meanwhile, clinic employees or agents are categorically exempt from any restriction and thus free to enter, remain, and speak within the zones.

Relying largely on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the First Circuit held that these abortion-specific, speaker-specific exclusion zones are constitutionally permissible, both facially and as applied to petitioners. In particular, the court held that the zones are content-neutral, narrowly tailored, and not overbroad, and that they leave open adequate alternative channels for petitioners' speech. The holding of content-neutrality conflicts with the Ninth Circuit's decision in *Hoye* v. *City of Oakland*, 653 F.3d 835 (2011), which struck down a discriminatory enforcement policy indistinguishable from what the Massachusetts statute provides for on its face. The First Circuit's reasoning also departs from established First Amendment principles and ranges far beyond the outer limits marked by *Hill*.

1. The 2007 statute at issue here replaced a law originally adopted in 2000 restricting certain speech-related conduct outside abortion clinics. The 2000 statute prohibited speakers from approaching closer than six feet from a potential listener without consent. The law applied to only close, physical approaches to unwilling listeners, was ostensibly designed to address "violence and aggressive behavior" outside clinics, and was partially modeled on the statute upheld in *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36, 39-40 (1st Cir. 2001) (*McGuire I*).

The Colorado statute in *Hill* established zones around all health care facilities in which speakers were prohibited from "'knowingly approach[ing] another person within eight feet of such person, unless such person consents.'" *Hill*, 530 U.S. at 707 n.1. In sustaining the statute, the Court relied heavily on the fact that it barred not entry or speech but only close physical approaches to unwilling listeners. In particular, the

Court noted that (i) an 8-foot radius still allowed a speaker to communicate from a "normal conversational distance," and (ii) prohibiting physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material … which the pedestrians can easily accept." *Id.* at 726-727. Observing that the statute applied equally at all health care facilities (not just abortion clinics) and to all speakers (not just abortion opponents), the Court found it content- and viewpoint neutral. *Id.* at 725. The Court repeatedly emphasized "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication," and that the Colorado law "deal[t] only with the latter." *See, e.g.*, *id.* at 715-716.

The First Circuit relied largely on *Hill* in upholding Massachusetts' 2000 no-approach law against a First Amendment challenge. *See McGuire I*, *supra*; *McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*). In those cases, challengers pointed out that pre-existing laws already prohibited objectionable conduct outside abortion clinics. For example, federal law prohibits "obstruct[ing], intentionally injur[ing], intimidat[ing] or interfer[ing]" with access to reproductive health services. 18 U.S.C. § 248. State law separately prohibits interfering with any person's exercise of a constitutional right, G.L. c. 265, § 37, or obstructing access to any medical facility, G.L. c. 266, § 120E (2000). The First Circuit nonetheless sustained the 2000 no-approach law as a prophylactic measure, reasoning that the State could conclude existing laws "cast wider nets" that might catch "big fish" but "let the fingerlings through." *McGuire I*, 260 F.3d at 49.

In response to a petition for certiorari, the State argued, among other things, that the 2000 law "restrict[ed] only conduct" and that "whether a narrowly tailored floating buffer zone statute—restricting no speech but only non-consensual 'approaches'—violates the First Amendment" had been resolved in *Hill*. 04-939 Br. in Opp. 13-14. The State also argued that there was no evidence the case's "unique facts" were "replicated in other settings across the country." *Id.* at 13. This Court denied review. 544 U.S. 974 (2005).

2. By 2007, Massachusetts had not proven a single violation of the 2000 no-approach law. There was also no evidence of a single prosecution during that period under any state, federal or local law directly targeting violence, obstruction, intimidation, trespass, or harassment at abortion clinics in Massachusetts. Nonetheless, the legislature heard testimony from abortion advocates and law enforcement officers that confrontational protests occurred at abortion clinics, that enforcement of the no-approach zone was difficult, and that a 35-foot zone "where no protesters can go … would be great … [and] would make our job so much easier." App. 148a. It decided to amend the law over the objection of, among others, the American Civil Liberties Union of Massachusetts, which opposed the changes "mainly on overbreadth grounds." App. 149a.

The 2007 legislation changed the no-unconsented-approach zone into a no-entry zone—at least, for some speakers. As amended, the Act (reprinted at App. 219a-221a) establishes zones on the public streets and sidewalks extending 35 feet in all directions from each "entrance, exit or driveway of a reproductive health care facility." § 120E½(b). The Act makes it illegal to "enter or remain" in these portions of public streets and

sidewalks, providing for prison terms of up to 30 months and criminal fines of up to $5,000. § 120E½(d).

Unlike the Colorado law sustained by this Court in *Hill*, the Act does not apply to all health care facilities. It applies only to non-hospital locations "where abortions are offered or performed." § 120E½(a). Also unlike the law in *Hill*, the Act does not apply to all speakers. In addition to passers-by and "municipal agents" (such as police and firefighters), the Act specifically exempts from its prohibitions all "persons entering or leaving" an abortion clinic and, separately, all "employees or agents of [a clinic] acting within the scope of their employment." § 120E½(b)(1)-(2).

Finally, unlike the law in *Hill*, which prohibited only close, unwanted approaches to unwilling listeners, the Act prohibits non-exempt speakers from entering the zones to offer leaflets, display signs, or speak or offer to speak with others at normal conversational distances. Non-exempt speakers may not position themselves in non-obstructive ways and then simply remain stationary on public streets or sidewalks inside the zone. *Compare Hill*, 530 U.S. at 726-727. In the State's exclusion zone, even peaceful conversation with willing listeners is outlawed. § 120E½(b).

3. Petitioners are individuals who regularly station themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. In January 2008, petitioners sued to enjoin enforcement of the Act under the First and Fourteenth Amendments. The district court had jurisdiction under 28 U.S.C. § 1331.

Less than two weeks later, respondent sent a letter to law enforcement personnel providing "guidance to assist you in applying the four exemptions" under the

Act. App. 4a, 119a-120a. Respondent's "guidance" indicated that, despite the Act's facially absolute exemption, clinic employees and agents were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." App. 119a. Similarly, respondent instructed that persons crossing through the zone as mere passers-by were criminally prohibited from "expressing their views about abortion or engaging in other partisan speech." App. 119a-120a.

The district court bifurcated the proceeding, first addressing petitioners' facial challenge and request for preliminary relief. The court held a bench trial on a stipulated record, and in August 2008 upheld the Act as a content-neutral time, place, and manner regulation. App. 121a-210a.

4. a. The court of appeals affirmed. App. 93a-120a (*McCullen I*). To begin with, it reasoned that objections to the Act's exclusive focus on abortion clinics (as opposed to all health care facilities) had been addressed and rejected in its *McGuire* decisions. App. 105a (citing *McGuire I*, 260 F.3d at 44-47, and *McGuire II*, 386 F.3d at 56-59). Although it recognized that Massachusetts "was plainly moved to enact the statute by the secondary effects of anti-abortion protests," App. 113a, the court concluded that any disparate impact on abortion-related speech did not result from "a content-based preference." App. 105a.

The court likewise held that *McGuire I* had already "squarely repulsed" the argument that the Act's exemption for clinic employees and agents made it not viewpoint-neutral. App. 105a (citing 260 F.3d at 45-47). In *McGuire I*, the court held that the previous Act's prohibition on close, unconsented approaches was fa-

cially neutral despite the employee exemption because the law as a whole had public-safety goals (260 F.3d at 44); the exemption for clinic employees was "neutral on its face, drawing no distinction between different ideologies" (*id.* at 48; *see also id.* at 45-46); and the court could "envision at least one legitimate reason for including the employee exemption," which was "to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution" (*id.* at 47). Thus, because "the legislature rationally could have concluded that clinic employees are less likely to engage in directing unwanted speech toward captive listeners," the court upheld the law as neutral. *Id.* at 46.

The court adhered to these views in the context of the new speaker-exclusion zones. The "decisive question in a facial challenge," in the court's view, was only "whether a court can glean legitimate reasons" for a particular regulation. App. 106a. Here, the court concluded, the exemption for clinic agents and employees was "reasonably related to the legislature's legitimate public-safety objectives," *id.*, and therefore raised no concern about content- or viewpoint-neutrality.

Having deemed the Act content-neutral, the court further concluded that, on its face, the Act was narrowly tailored, not overbroad, and left open ample alternative channels of communication. App. 108a-112a. Dismissing petitioners' objection that the Act outlaws peaceful leafletting on public sidewalks and restricts petitioners from speaking to willing listeners at the "conversational distance" discussed in *Hill*, the court reasoned that "the Constitution neither recognizes nor gives special protection to any particular conversational distance" and that "handbilling is not specially protected." App. 110a. It relied on *Hill* for the proposition

that time, place, and manner restrictions "routinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels, the court expressed the view that "as long as [the court could] envision circumstances in which a 35-foot buffer zone allow[ed] adequate alternative means of expression, [a facial] challenge must fail." App. 111a. Under that standard the court saw ample alternative channels because petitioners could go outside the exclusion zones if they wished to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and "[a]ny willing listener [was] at liberty to leave the zone [and] approach those outside it." *Id.*

In concluding its opinion, the court noted "the very heavy burden that plaintiffs must carry in mounting a facial challenge to a state statute." App. 118a. It indicated that nothing in its opinion "foreclose[d] the possibility that, on a better-developed record, this legislative solution may prove problematic in particular applications." *Id.*

b. In November 2009, petitioners asked this Court to review the First Circuit's rejection of their facial challenge. *McCullen* v. *Coakley*, No. 09-592. In opposing review, the State argued, among other things, that the decision was interlocutory; the parties had "not yet been able to conduct discovery, present a full case, or cross-examine" witnesses; and it "would not be appropriate for the Court to review these questions without the benefit of fact finding based on a full evidentiary record." 09-592 Br. in Opp. 35. In response to petitioners' argument that the *McGuire* and *McCullen*

decisions had already been invoked by the district court in *Hoye* v. *City of Oakland*, 642 F. Supp. 2d 1029 (N.D. Cal. 2009), the State argued that "there [was] no reason to assume the Ninth Circuit, faced with facts similar to those here, would reach a result different from the First Circuit's decision below." 09-592 Br. in Opp. 30. This Court denied review. 130 S. Ct. 1881 (2010).

5. On remand, the district court declined to revisit petitioners' facial claims in light of intervening decisions of this Court. App. 70a-80a. It further held that the First Circuit's decision sustaining the Act on its face also foreclosed almost all of petitioners' as-applied claims. App. 81a-88a. The court permitted petitioners to advance only a claim that the Act, as applied, did not leave petitioners with adequate alternative means of communication. App. 88a. As to that issue, the court permitted discovery and then held a bench trial based on written testimony and factual submissions from the parties.

Petitioners testified that they seek to engage women who may be seeking abortions in close, kind, personal communication, with a calm voice, caring demeanor, and eye contact.[1] They explained that this kind of communication is essential to their ability to effectively convey their message of love and support. And they testified, without rebuttal, that application of the Act to their activities at specific locations in Boston, Worcester, and Springfield virtually destroys their ability to communicate this message effectively to the special audience they need to reach—pregnant women on the

[1] This recitation of the evidence is taken largely from petitioners' opening brief in the court of appeals, which provides detailed citations to record materials included in the appendix filed in that court.

verge of a potentially unnecessary abortion who might welcome and benefit from an offer of alternative help.

Undisputed evidence showed that women often have abortions because of financial or other pressures, including pressure from husbands or boyfriends. Indeed, most women that petitioner McCullen succeeds in speaking with tell her they do not want an abortion but feel they have no real alternative. Academic studies confirm that women often seek abortions because they feel they cannot afford a baby, are having relationship problems, or are being pressured to have an abortion. *See, e.g.*, Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 113 (2005) (reasons given for abortion: "Can't afford a baby now" [73%]; "Not sure about relationship" [19%]; "Husband or partner wants me to have an abortion" [14%]).[2]

Petitioners thus have a firm basis for believing that a woman seeking an abortion may welcome speech that can offer both moral support and more concrete assistance. Petitioners who seek to offer such assistance testified, however, that in order to be effective, their messages must be conveyed in a friendly, gentle manner, with eye contact, from a conversational distance. In particular, shouting from a distance is ineffective or counter-productive. Likewise, most people will not make the effort to accept proffered literature unless it can be placed near their hands.

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[2] *See* http://www.guttmacher.org/pubs/journals/3711005.pdf. This Court has observed that providing information about abortion and its alternatives "ensure[s] an informed choice" and helps "reduce[] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 882-883 (1992).

For example, petitioner McCullen is a 74-year-old grandmother who offers help outside of a Boston Planned Parenthood clinic on Tuesdays and Wednesdays. Over the 5 years before her testimony, McCullen and her husband spent over $50,000 of their own money to pay for baby showers, living quarters, furniture, household items, heating oil, electricity, water, telephone, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else was needed by women who wanted help to effectuate their choice to avoid abortion. In McCullen's experience, it is, as a practical matter, impossible to make women aware that such help is available without close personal contact and an opportunity for confidential discussion.

Similarly, one of the State's witnesses testified that, in her investigations at Planned Parenthood, she observed only one person respond to attempts at communication: a young woman with whom the pro-life counselors spoke at close range and with eye contact. When the only available communication was a pro-life sign or shout, people just "walked on by."

The evidence confirmed that the Act, by keeping petitioners at least 35 feet from all entry points, prevents petitioners from engaging in effective communication by identifying women headed there and extending non-confrontational offers to speak with them. It also forces any conversation that may be initiated to stop at the boundary line of the buffer zone. In Boston, for example, the exclusion zone includes all but one foot of the public sidewalk and on one side extends four feet into the street, making it impossible for petitioners even to stand at the edge of the zone. (Pictures of the Boston, Worcester, and Springfield exclusion zones from the trial record are reproduced at App. 211a-218a.) Meanwhile, clinic employees or agents are free

to remain in the zone and to approach and speak with anyone within it.

Petitioner McCullen testified that she attempts to speak with women outside the zone, but that the Act frequently makes such discussions impossible. For example, there are many times when McCullen sees a woman approaching the clinic from the opposite side of the zone, and cannot move around the zone herself quickly enough to try to begin a conversation or put literature near the woman's hands before she enters the zone.

Notably, when McCullen is able to reach her intended audience, her outreach is effective. She estimates, for example, that the information and offers of assistance she has managed to provide even under the 2007 Act's restrictions have helped some 80 women effectuate their own choice to pursue an alternative to abortion. The Act's exclusion zones have, however, drastically reduced her ability to communicate her message. She testified that the Act has prevented her from speaking at all with at least 5-6 people per day of outreach activity, or 480-586 people per year. At that rate, the Act has prevented McCullen from speaking with between 2,160 and 2,637 people. Even when she is able to make an initial contact, McCullen testified that the Act's restrictions change the nature of her conversations, making them shorter and less effective because she is forced to speak hurriedly, sometimes speak louder, and stop walking at the painted exclusion line.

For similar reasons, Plaintiff Zarrella—an 85-year-old grandmother who offers help on Saturdays and some Wednesdays—testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful inter-

action with an incoming woman since the Act took effect—after more than 100 successful interactions before the Act.

Petitioners also testified that clinic agents regularly use their statutory exemption to interfere with petitioners' attempts to communicate. For example, clinic speakers surround and walk with women approaching the clinic, sometimes yelling, making noise, chattering and/or talking loudly, saying things such as "you don't have to listen to her," or "don't pay any attention to her," or "don't listen to her," or "she is crazy." Clinic speakers also raise and lower their arms to prevent petitioners from placing literature near the hands of recipients. These actions of course make it more difficult for petitioners to communicate their message.

Petitioners presented similar evidence regarding clinics in Worcester and Springfield. In Worcester, for example, zones around the clinic property's pedestrian and driveway entrances both extend far into the street. Petitioners Clark and Bashour are forced to stand behind a fence 75-100 feet away from the clinic doorway, or 35 feet away from the driveway entrance. Unsurprisingly, virtually no one responds to offers of help shouted over such distances, and petitioners have almost no ability to offer leaflets to persons arriving by car. In Springfield, zone lines are painted around all five driveways into the private parking areas surrounding a clinic. Petitioner Shea testified that before the 2007 Act, he would stand a few feet from the driveways and offer literature to occupants of entering vehicles. Since the Act took effect, he has not succeeded in distributing literature to anyone arriving by car.

Despite this evidence, in February 2012, the district court ruled that the Act, as applied, leaves peti-

tioners with ample alternative means to communicate their message. App. 65a-66a.

6. The court of appeals affirmed. App. 1a-28a.[3]

First, the court rejected petitioners' request that it revisit its previous rulings that the 2007 Act is content- and viewpoint-neutral and constitutional on its face. App. 9a-14a. In the court of appeals' view, nothing in this Court's recent First Amendment cases involved any "retreat from [the Court's] well-settled abortion clinic/buffer zone jurisprudence." App. 12a (citing *Hill* and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

Next, the court sustained the district court's grant of judgment on the pleadings as to most of petitioners' as-applied claims. App. 14a-20a. In that regard, the court, among other points, reiterated its holding that the Act is "viewpoint-neutral" despite its exemption for clinic employees and agents. App. 15a. It asserted, without explanation, that the exemption—which simply states that the Act's prohibition on entry into exclusion zones "shall not apply" to "employees or agents of such facility acting within the scope of their employment," § 120E½(b)(2)—"does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." App. 15a; *see also* App. 17a (reasoning that if clinic agents use their presence in exclusion zones, specifically permitted by state law, "to advocate a particular point of view or to drown out the plaintiffs' message," they "are not state actors"

[3] Although Judges Boudin, Selya, and Stahl heard oral argument, the court's opinion was issued by Judges Selya and Stahl "pursuant to 28 U.S.C. § 46(d)." App. 1a n.*. The court offered no explanation for Judge Boudin's withdrawal.

and "there is no allegation that such behavior has been sanctioned by the state").

Finally, the court affirmed the rejection of petitioners' as-applied challenge. App. 20a-26a. Again proceeding on the premises that the Act is content-neutral and narrowly tailored to serve an adequate state interest, the court viewed the "pivotal question" as "whether the Act, as applied, leaves open adequate alternative means of communication." App. 22a. The court acknowledged that the Act "curtails [petitioners'] ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," App. 23a, relegating them instead to "shorter, louder, and less personal exchanges," App. 22a. The court thought this difference insignificant, however, because petitioners retained the ability to engage, outside the exclusion zones, in "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," and these activities made it "readily apparent" that the Act leaves petitioners with "adequate communicative channels." App. 23a, 26a.

REASONS FOR GRANTING THE PETITION

This case presents an important First Amendment question: May the government permit individuals who seek to facilitate access to abortion to enter and speak in public areas near abortion clinics, while forbidding entry to individuals who seek to engage in peaceful, non-obstructive speech offering information about and help in pursuing other choices? The First Circuit upheld such a government preference for clinic speakers,

while the Ninth Circuit rejected it as "the epitome of a content-based restriction." *Hoye*, 653 F.3d at 851.

The First Circuit also erred in upholding a law that goes far beyond the outer limits on speech restriction marked out by this Court *Hill* v. *Colorado*, 530 U.S. 703. *Hill* relied on three critical safeguards: equal applicability to all healthcare facilities, equal applicability to all speakers, and narrow-tailored application only to close, unwanted physical approaches. All are absent here. Massachusetts' 2007 Act applies only at abortion clinics; permits speech by clinic agents while excluding speakers who advocate alternatives to abortion; and completely excludes disfavored speakers from otherwise public areas, banning even consensual speech with willing listeners. Moreover, in addressing petitioners' as-applied challenge the First Circuit, unlike this Court in *Hill*, gave no weight at all to petitioners' right to offer leaflets within a normal reach and to engage listeners from a normal conversational distance. No decision of this Court has ever permitted so absolute a prohibition of speech in the public forum.[4]

[4] When the Court denied review in *McCullen I*, the First Circuit had rejected petitioners' facial challenge but remanded the case for as-applied proceedings. *See* App. 118a ("Nothing that we have said forecloses the possibility" of eventual relief "on a better-developed record."). The as-applied proceedings have now concluded—and the Ninth Circuit has decided *Hoye*. The matter is fully ripe for review. *Cf. Mt. Soledad Mem. Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of certiorari in light of interlocutory posture).

I. THE DECISION BELOW SUSTAINING MASSACHUSETTS' LAW AS CONTENT-NEUTRAL CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *HOYE*

A. The Massachusetts Act Creates Zones In Which Speech Facilitating Abortion Access Is Permitted While Speech About Alternatives Is Banned

1. Massachusetts' 2007 Act restricts speech on public streets and sidewalks by creating no-entry zones around entrances to abortion clinics. It then specifically permits entry into the zones by, among others, "employees or agents of [a clinic] acting within the scope of their employment." § 120E½(b)(2). Accordingly, while petitioners face prison if they use public sidewalks in the zone to engage in peaceful, non-confrontational speech about alternatives to abortion, clinic agents may enter and speak with impunity so long as they are there on clinic business. This exemption, with its scope-of-employment limitation, is inescapably viewpoint-based. The speech it permits within the exclusion zone will *necessarily* express the clinic's view.

Respondent has implicitly acknowledged this obvious problem with the Act. Less than two weeks after petitioners filed this case, she sent a letter to state law-enforcement personnel with "guidance" indicating that, despite the Act's facially absolute exemption, clinic employees and agents were actually prohibited from "express[ing] their views about abortion" or "engag[ing] in any other partisan speech within the buffer zone." App. 119a. The State's perceived need for this "guidance" is telling, but such "guidance" cannot change the plainly discriminatory terms of the Act, and the court

of appeals did not rely on it in holding the Act content-neutral. *See* App. 5a.[5]

Exactly how the First Circuit *did* reach that holding is, frankly, difficult to discern. In its most recent opinion, the court primarily referred back to previous decisions. *See, e.g.*, App. 5a, 9a, 13a, 15a. The only further analysis it offered was the proposition that the employee exemption "does not purport to allow … advocacy by an exempt person," and a suggestion that there was "no allegation that such [advocacy] has been sanctioned by the state." App. 15a, 17a. This makes no sense. The State obviously "allow[s]" and "sanction[s]" particular speech when it permits specified speakers, "acting within the scope of their employment," free access to portions of public sidewalks that speakers with a different message are forbidden to enter. This differential treatment—shown starkly by the photograph at App. 211a—is a classic First Amendment violation. *See Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

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[5] Prosecutors have a practical ability to *narrow* the scope of a criminal statute through administrative construction and the exercise of prosecutorial discretion. They have no ability to *broaden* a statute so it can be applied to individuals exempted by the legislature. Any clinic employee prosecuted for speech in an exclusion zone would have an absolute defense on the face of the statute itself. Moreover, if the Attorney General's "guidance" could be given legal effect, its prohibition on otherwise-exempt persons entering the zone "to express their views about abortion or to engage in any other partisan speech," App. 119a, is expressly content-based, and thus would itself be presumptively unconstitutional. *See, e.g.*, *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533-34 (1980).

As to the earlier opinions on which the First Circuit relied, in *McGuire I* the court said the employee exemption is "neutral on its face" because it "draw[s] no distinction between different ideologies." 260 F.3d at 48; *see* App. 15a (citing *McCullen I*, 571 F.3d at 178 & n.2); App. 9a (cited portion of *McCullen I*, in turn relying on *McGuire I*). This statement apparently rested on the premise that, without a factual record, no one could predict whether speech by clinic agents or employees would favor or oppose abortion. *See* 260 F.3d at 45-46. That reasoning is unsound as a matter of common sense, but in any event, it ignores the statutory requirement that any in-zone speech by clinic agents be "within the scope of their employment." That requirement affirmatively dictates the viewpoint of the permitted speech.

Nor can the law plausibly be declared neutral based on the government's desire to make "crystal clear" that speakers who facilitate access need not fear prosecution, or its assumption that women will want to hear from clinic speakers but not from speakers offering alternatives. *See* App. 169a-172a. The First Circuit's acknowledgement of such government motivations confirms, rather than rebuts, the charge of content-discrimination.

The First Circuit's difficult-to-trace arguments do not refute petitioners' simple point that the exclusion zones Massachusetts has created outside abortion clinics are discriminatory on their face. The Act permits entry into and speech in those zones by clinic agents or employees who seek to facilitate access to abortion. It bans any entry into the same, otherwise public zones by petitioners or others who seek to offer peaceful, non-confrontational speech and assistance

concerning potential alternatives. That is not a neutral regulation of the time, place, or manner of speech.

2. Throughout the *McGuire* and *McCullen* cases, the First Circuit has insisted that its analysis of content neutrality flows from this Court's decision in *Hill* v. *Colorado*. *See, e.g.*, App. 105a (citing *McGuire I*, 260 F.3d at 44-47). On the contrary, however, the Massachusetts Act lacks the basic indicia of neutrality that this Court stressed in *Hill*.

First, the statute in *Hill* applied at all health care facilities. This Court emphasized that "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." 530 U.S. at 731. Indeed, the Court explained that it was "precisely because the Colorado Legislature made a general policy choice that the statute [was properly] assessed under the constitutional standard" for time, place and manner restrictions, rather than a stricter standard. *Id.* (emphasis added). Here, in sharp contrast, the Massachusetts Act applies only to locations "where abortions are offered or performed." Act § 120E1/2(a)-(b) (App. 219a).[6]

Second, *Hill* underscored that Colorado's no-approach law applied equally to all speakers:

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[6] At other medical facilities, Massachusetts expressly *protects* peaceful, nonobstructive speech. *See* Mass. G.L. c. 266, § 120E (forbidding obstructing access or impeding medical services, but safeguarding the "right[] to engage in peaceful picketing which does not obstruct entry or departure"). Thus, at general service facilities where speakers might address any number of issues (labor disputes, animal testing, etc.), the State properly focuses on objectionable conduct. Where speakers are likely to address only abortion, it criminalizes peaceful, non-obstructive speech.

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion .... It applies to all "protest," to all "counseling," and to all demonstrators[,] ... whether they oppose or support ... [the] abortion decision. *That is the level of neutrality that the Constitution demands*.

530 U.S. at 725 (emphasis added); see also *id.* at 731. This discussion reflects the axiomatic point that the government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger* v. *Rector*, 515 U.S. 819, 829 (1995); *see also Mosley*, 408 U.S. at 96. Again, however, Massachusetts has departed from this basic precept, establishing exclusion zones that apply to speakers who counsel against abortion while exempting clinic agents acting in the course of their employment. Such a statute finds no support in *Hill*. Rather, as this Court has recognized, "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

B. The First Circuit's Decision Conflicts With *Hoye*

The First Circuit's decision sustaining the Massachusetts Act as content-neutral directly conflicts with the Ninth Circuit's decision in *Hoye*. There, Oakland enacted a no-approach zone similar to the one upheld by this Court in *Hill*. In response to an initial legal challenge, the city amended its ordinance so that, on its face, it did not discriminate among speakers. *Hoye*, 653 F.3d at 841-842. By policy, however, the city did not *enforce* the law against individuals who sought to *facilitate* access to abortion clinics. *Id.* at 849-851, 856. In other words, Oakland's enforcement policy was the same as Massachusetts' statutory exemption for clinic "employees or agents."

The Ninth Circuit sustained Oakland's statute on its face, but invalidated the city's policy of differential enforcement. In a decision written by Judge Berzon for herself, Judge Reinhardt, and the late Judge Pollak, the court squarely held that "[t]he City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral." 653 F.3d at 851. Indeed, the court recognized the policy as "the epitome of a content-based speech restriction." *Id.*

Looking to *Hill*, the Ninth Circuit recognized that this Court had accepted Colorado's close-unconsented-approach statute as content-neutral precisely because it applied to all speakers "whether they oppose or support the woman who has made an abortion decision." 653 F.3d at 851-852 (quoting *Hill* 530 U.S. at 725). Oakland's enforcement policy, in contrast, "d[id] not meet this level of neutrality," because "[t]o distinguish between speech facilitating access and speech that dis-

courages access is necessarily to distinguish on the basis of substantive content." *Id.* at 852. "Asking a woman 'May I help you into the clinic?' facilitates access; 'May I talk to you about alternatives to abortion?' discourages it." *Id.* An enforcement policy that permits one question but not the other is "indubitably content-based." *Id.*

The First Circuit's reasoning and holding in this case are directly contrary to the Ninth Circuit's reasoning and holding in *Hoye*. *Compare also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 274-275 (3d Cir. 2009) (holding exclusion-zone law content-neutral only after construing it to prohibit in-zone advocacy by exempted clinic agents). The issue involves core First Amendment rights to exchange information in the public forum about topics of immense importance to both the individuals involved and society at large. This Court should grant review to resolve the conflict and to correct the First Circuit's departure from guideposts clearly established by this Court in *Hill*.

II. THE DECISION BELOW GOES FAR BEYOND WHAT THIS COURT SUSTAINED IN *HILL*

Since it was decided more than ten years ago, this Court's decision in *Hill* has figured prominently in lower court decisions addressing speech restrictions both in the abortion context and more broadly.[7] Proper un-

[7] As to abortion, in addition to the *McCullen/McGuire* cases and *Hoye*, *see, e.g.*, *Brown*, 586 F.3d at 269-273. In other contexts *see, e.g.*, *Menotti* v. *City of Seattle*, 409 F.3d 1113, 1124-1125, 1141 n.52 (9th Cir. 2005) (sustaining restrictions designed to cover exact time and perimeter of trade organization meeting); *Shuger* v. *State*, 859 N.E.2d 1226, 1232-1233 (Ind. App. 2007), *transfer denied*, 869 N.E.2d 454 (Ind. 2007) (sustaining Indiana Hunter Harassment Act); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 361 (6th

derstanding and application of *Hill* is thus a matter of considerable importance.

In its latest decision, for example, the court of appeals rejected petitioners' reliance on a number of this Court's recent First Amendment decisions[8] with the observation that this Court had not "retreat[ed] from its well-settled abortion clinic/buffer zone jurisprudence." App. 12a (citing *Hill* and *Madsen*). The threshold question is not, however, whether this Court has "retreat[ed]" from *Hill*, but whether *Hill* provides any basis for sustaining the abortion-specific, speaker-specific, complete-exclusion zones established by Massachusetts in the 2007 Act. It does not—or, if it does, then a retreat is in order.[9]

Cir. 2008) (sustaining restrictions limited to funerals). This broad use of *Hill* was predicted when the case was before the Court. *See, e.g.*, *Hill*, AFL-CIO Amicus Br., 1999 WL 1034471; PETA Amicus Br., 1999 WL 1032802; ACLU Amicus Br., 1999 WL 1045141.

[8] *E.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010) ("restrictions distinguishing among different speakers, allowing speech by some but not others" are "prohibited"); *Sorrell* v. *IMS Health*, 131 S. Ct. 2653, 2663-2664 (2011) (rejecting "content- and speaker-based restrictions" that "burden disfavored speech by disfavored speakers"); *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219-1220 (2011) (rejecting tort liability where other speakers "would not have been subject to liability").

[9] *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* has been "condemned by progressive and conservative legal scholars alike"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 734-738 (2001) (critiquing *Hill*'s First Amendment analysis); Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001) (quoting Laurence Tribe's description of *Hill* as

In upholding Colorado's no-unconsented-approach law in *Hill*, the Court expressly relied on three critical safeguards: equal applicability to all medical facilities; equal applicability to all speakers; and a narrowly tailored focus on the exact evil to be avoided (close, unwanted physical approaches) that preserved the practical ability both to proffer leaflets and to reach willing listeners from a conversational distance. The First Circuit's application of *Hill* in the absence of those safeguards dramatically expands the decision's reach. And its departure from core First Amendment principles has been influential, both in the abortion context[10] and beyond.[11]

"slam-dunk simple and slam-dunk wrong"); *id.* at 747-750 (quoting Prof. McConnell's critique of *Hill*); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001) ("Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest facade of neutrality.").

[10] *See, e.g.*, *Clift* v. *City of Burlington, Vt.*, 2013 WL 609180, at *18 (D. Vt. Feb. 19, 2013) (relying on *McCullen I* and *McGuire I* to sustain buffer-zone exemptions for abortion clinic speakers); *Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I*, *McGuire II*, and this case to uphold no-approach buffer zone that applies only at abortion clinics and exempts clinic speakers), *rev'd*, 653 F.3d 835, 849 (9th Cir. 2011); *Brown*, 586 F.3d at 269, 271, 274-276, 283 n.22 (citing *McGuire I*, *McGuire II*, and *McCullen I* in upholding 15-foot no-entry zone with exception for clinic employees).

[11] *See, e.g.*, *Spingola* v. *Village of Granville*, 39 F. App'x 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to uphold ordinance outlawing public speaking at permitted events unless speech occurs in "designated speaking areas," deeming law facially constitutional because "there is at least one legitimate reason for the Ordinance, crowd control"); *Ross* v. *Early*, 758 F. Supp. 2d 313, 322

A. The Massachusetts Act Is Not Neutral

As explained above, the Colorado no-unconsented-approach law upheld in *Hill* applied broadly at all health care facilities on the theory that patients of all kinds might be "in particularly vulnerable physical and emotional conditions." 530 U.S. at 729. In contrast, Massachusetts has created exclusion zones only "where abortions are offered or performed." § 120E1/2(a)-(b). The First Circuit viewed this narrow focus as a virtue: "combating the deleterious secondary effects of anti-abortion protests" while otherwise "restrict[ing] as little speech as possible." *McGuire I*, 260 F.3d at 44; App. 104a-105a (incorporating analysis).

This Court in *Hill*, however, emphasized the danger of such a narrow focus. "The *comprehensiveness* of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." 530 U.S. at 731 (emphasis added). As *Hill* explained, a speech-restrictive statute "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Id.* at 723.

Moreover, the Massachusetts Act, unlike the Colorado statute, is not viewpoint-neutral but expressly distinguishes between those who work for an abortion clinic from those who do not. Speaking the language of rational basis scrutiny, the First Circuit has permitted such distinctions as "rational" and "legitimate" based on a legislative desire to prefer speech that facilitates

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(D. Md. 2010) (relying on *McCullen I* in holding there is "no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message.").

abortion, and a legislative prediction that women prefer hearing speech from clinic speakers. *McGuire I*, 260 F.3d at 44, App. 166a. As explained above, this is not "the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725.

B. The Act Is Far More Restrictive Than The Law Sustained In *Hill*

Hill relied heavily on the fact that Colorado's law barred only close, unwanted physical approaches. The Court observed, for example, that the law did "not affect demonstrators with signs who remain in place," or prevent a leafletter from pre-positioning herself inside the zone "near the path of oncoming pedestrians and proffering … material … which the pedestrians can easily accept." 530 U.S. at 726-727. These features of the law helped preserve "the right of every citizen to 'reach the minds of willing listeners,'" *id.* at 728, in part because they "allow[ed] the speaker to communicate at a 'normal conversational distance,'" *id.* at 726-727. In that regard, the Court specifically contrasted the 8-foot floating no-approach zone upheld in *Hill* with the 15-foot floating separation zone rejected in *Schenck* v. *Pro-Choice Network*, 519 U.S. 357, 377 (1997). *See* 530 U.S. at 726-727. Under these circumstances, the Court accepted the restrictions as narrowly tailored to the State's interest in protecting potentially vulnerable incoming patients from non-consensual encounters. *Id.* at 729.

In sharp contrast to *Hill*, the Massachusetts Act creates flat no-entry zones forbidding public forum speech for more than 70 feet (35 in all directions) around each entrance to an abortion clinic.[12] These

[12] In practice, most zones are much closer to 100 feet. App. 52a, 60a.

zones remain open for exempt speakers, but for petitioners, any entry to speak is criminal, no matter how peaceful or welcome, and regardless of whether any incoming women are in the zone at all. Gone is the right preserved in *Hill* to address willing listeners.[13] Gone is the right to stand still on the sidewalk holding a sign.[14] Gone is the right to distribute leaflets.[15] Gone is the right to offer help at a normal conversational distance.[16] In their place, Massachusetts and the court of appeals offer the ability to stand outside the exclusion zone and shout (their "voices are audible" and can "elicit audience reaction"), "us[e] sound amplification equipment," hold signs ("placards are visible"), or "wear evocative garments … dressing up as, say, the Grim Reaper." App. 23a.

Petitioners' suit, however, is not about the right to "dress[] up as … the Grim Reaper"—as the court of appeals might have recognized if it had taken seriously the evidence supporting petitioners' as-applied chal-

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[13] *See, e.g.*, *Berger* v. *City of Seattle*, 569 F.3d 1029, 1056 (9th Cir. 2009) (en banc) (invalidating as overbroad a rule prohibiting "'speech activities' within thirty feet of a 'captive audience,'" in part because it applied to "both welcome and unwelcome communications").

[14] *See, e.g.*, *Berger*, 569 F.3d at 1056.

[15] *See, e.g.*, *Hill*, 530 U.S. at 727; *Madsen*, 512 U.S. at 769 ("handbilling and solicitation" cannot be "completely banned in public places").

[16] *See, e.g.*, *New York ex rel. Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 204 (2d Cir. 2001) ("The zone imposes a severe burden on First Amendment rights by effectively preventing protestors from picketing and communicating from a normal conversational distance."); *Sabelko* v. *City of Phoenix*, 120 F.3d 161, 165 (9th Cir. 1997) (First Amendment protects ability to speak from normal conversational distance).

lenge. Petitioners seek to engage their fellow citizens in peaceful, consensual, normal conversation, like civilized adults, on public sidewalks.[17] This is core protected First Amendment activity. *See, e.g., McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression … [and] no form of speech is entitled to greater constitutional protection"). As a matter of basic First Amendment law, the government cannot foreclose leafleting and civilized, consensual conversation simply because it would be possible to get attention with more bombastic approaches. Rather, narrow tailoring requires the government to focus only on "appropriately targeted evil[s]." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988); *see also Board of Airport Comm'rs* v. *Jews for Jesus*, 482 U.S. 569, 575 (1987) ("no conceivable government interest" can support a complete prohibition on First Amendment activity in even a limited public forum). Petitioners cannot "have the exercise of [their] liberty of expression in appropriate places abridged on the plea that it may be exercised," less civilly, "in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

In short, unless *Hill* is read to upend longstanding First Amendment principles, it cannot be used to force petitioners to shout, wear costumes, or chase women around the painted lines in place of engaging in civilized consensual conversation. Alternatively, if *Hill* does permit abortion-specific, speaker-specific criminalization of peaceful speech with willing listeners and peace-

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[17] Petitioners' evidence showed that their message of love and help is very different from the individual seen in costume at the Worcester clinic, who is not involved in this case. App. 22a.

ful leafleting on a public sidewalk, it should be revisited and overruled.

C. As Applied to Petitioners, The Act Does Not Leave Open Ample Alternatives

Finally, as to the lone issue upon which the courts below permitted a factual trial—whether the Act allows adequate alternatives for petitioners' speech, *see* App. 5a-6a, 20a—the evidence confirmed that petitioners' alternatives are wholly inadequate.

As the Ninth Circuit recognized in *Hoye*, "an alternative is not ample if the speaker is not permitted to reach the intended audience." 653 F.3d at 858 (internal quotation marks and alterations omitted). Here, petitioners made a compelling showing that completely excluding them from large portions of public sidewalk near abortion clinics virtually destroys their ability to convey their particular message.

As described at pp. 11-14 above, in the district court petitioners explained and supported their view that women often have abortions because of financial or other pressures, feeling they have no real alternative. Petitioners seek to reach this unique audience with a message of love and support and offers of concrete assistance. They testified, however, that in order to be effective these messages must be conveyed through personal communication from a conversational distance, with a calm voice, caring demeanor, and eye contact. In particular, shouting from a distance is ineffective and counter-productive. Likewise, even potential listeners who would in fact welcome a message about alternatives to abortion will not make the effort to accept proffered literature bearing that message unless it can be placed near their hands in a peaceful, non-threatening manner.

Thus, for example, petitioners testified without contradiction that in their experience close, personal, peaceful communication with women approaching an abortion clinic can be very effective, while shouting or holding up a sign from a distance is not. Respondents offered nothing to rebut petitioners' evidence that, for example, the 2007 Act has prevented petitioner McCullen from having more than 2,000 conversations that she could likely have initiated except for the Act's fixed exclusion zones. Similarly, petitioner Zarrella made more than 100 successful offers of help before the Act went into effect, but has been unable to make a single successful offer since.

Respondents likewise offered nothing to rebut petitioners' evidence showing that, even when they can begin conversations, those conversations are shorter, louder and have different content than when petitioners are permitted to speak without the restrictions imposed by the Act's exclusion zones. They offered nothing to rebut testimony from petitioners Bashour and Clark about how far away petitioners are forced to stand in Worcester, or how petitioners are now effectively unable to distribute any literature to incoming cars. And they offered nothing to rebut testimony from petitioner Shea about his inability to distribute literature or begin conversations while avoiding the five exclusion lines painted around all public entrances at the Springfield clinic. To the contrary, respondents' own witnesses confirmed that the only effective communication they witnessed on the streets and sidewalks around abortion clinics was the sort of personal conversation that the Act severely restricts.[18]

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[18] The court of appeals erred in suggesting that an as-applied challenge cannot be based on how the Act's requirements interact

These demonstrated circumstances make clear that, as to petitioners, the option of shouting from a distance or chasing women around the outside of painted exclusionary zones is not a reasonable alternative to calm, kind, civilized, non-confrontational offers to converse made by one adult to another on a public sidewalk. And that situation brings this case squarely within the reasoning of this Court's decision in *City of Ladue* v. *Gilleo*, which invalidated a restriction on certain residential lawn signs.

In *Ladue*, the city argued that it remained possible to convey a message by many other means, such as "*hand-held* signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." 512 U.S. at 56 (citing city's brief). The Court rejected the proposition that these other means were adequate alternatives under the particular circumstances of the case:

> [A] sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' … Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an

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with the characteristics of a particular clinic location. App. 24a; *compare Hill*, 530 U.S. at 730 ("Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied."); *Hoye*, 653 F.3d at 858-859 (as-applied question is based on "particular facts" and "actual circumstances," and "the factual predicate of an as-applied challenge does not need to be created by the State").

> audience that *could not be reached nearly as well by other means*.

Id. at 56-57 (emphasis added).

Here, too, there are certainly ways in which petitioners may communicate outside the Act's exclusion zones: standing outside the lines and shouting, carrying signs, waving leaflets at women from a distance, or even occasionally engaging an approaching woman in a hurried conversation before she crosses the painted boundary of the zone and the speaker must stop short. On this record, however, undisputed evidence from both sides confirms that these alternatives do not give petitioners an effective chance to reach their audience at the locations at issue. Rather, calm, peaceful, personal communication of the sort the Act renders almost impossible "carries a message quite distinct from," and provides "information about the identity of the speaker" quite unlike what can be conveyed by a sign, a shout, or a hurried half-conversation carried on while keeping one eye out to be sure to stop outside the State's exclusion line. *Ladue*, 512 U.S. at 56. Here, as in *Ladue*, the particular audience cannot "be reached nearly as well by other means." *Id.* at 57. The First Circuit therefore erred in holding that the Act leaves open adequate alternative channels for petitioners' speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWARD C. DUMONT
TODD C. ZUBLER
WILMER CUTLER
PICKERING HALE AND
DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006

MARK L. RIENZI
Counsel of Record
THE CATHOLIC UNIVERSITY
OF AMERICA
COLUMBUS SCHOOL OF LAW
3600 John McCormack Road, NE
Washington, DC 20064
(202) 319-5140

PHILIP D. MORAN
415 Lafayette Street
Salem, MA 01970

MICHAEL J. DEPRIMO
778 Choate Avenue
Hamden, CT 06518

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