No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, 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

BRIEF OF RICHARD W. GARNETT, MICHAEL STOKES PAULSEN, & EUGENE VOLOKH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

Richard W. Garnett is Associate Dean and Professor of Law at the University of Notre Dame Law School. The courses he teaches include Constitutional Law and Freedom of Speech/First Amendment. His publications include THE FIRST AMENDMENT: A READER (3d ed.) (ed., with John H. Garvey & Frederick Schauer) (forthcoming 2014), and FIRST AMENDMENT STORIES (ed., with Andrew Koppelman) (Foundation Press 2011).

Michael Stokes Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas Law School. The courses he teaches include Constitutional Law. He has published widely on constitutional theory and interpretation, including several publications on First Amendment issues.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law. He is the author of over 30 law review articles on the First Amendment,

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have consented to the filing of this brief, and their written consents have been filed with the Court. No counsel for a party authored the brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

including – most relevant to this case – *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005), reprinted in FIRST AMENDMENT LAW HANDBOOK 314 (Rodney A. Smolla ed. 2005-06). He is also the author of THE FIRST AMENDMENT AND RELATED STATUTES: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS (Foundation Press, 3d ed. 2007). Professor Volokh is counsel of record in *Scott v. St. John's Church in the Wilderness*, No. 12-1077, *cert. pending*. He joins this brief in his capacity as an academic rather than an advocate, having previously joined in a law professors' brief in support of certiorari at an earlier phase of this case. *See* Br. of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McCullen v. Coakley*, No. 09-592.

SUMMARY OF ARGUMENT

This Court granted certiorari in *Hill v. Colorado* "[b]ecause of the importance of the case." 530 U.S. 703, 714 (2000). The Court should grant certiorari in this case because of the importance of placing limits on *Hill*.

The Court does not need to overrule *Hill* to contain the damage wrought by the First Circuit's expansion of it. But the Court should contain *Hill* and thereby prevent further erosion of First Amendment protections for public-forum speech. The challenged Act prohibits stationary handbilling and conversational speech within fixed exclusion zones on public sidewalks near abortion clinics. The Act is not narrowly tailored to governmental interests in protecting unwilling listeners from close physical approaches or in preserving access to abortion clinics.

REASON FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO PLACE CLEAR LIMITS ON *HILL V. COLORADO*.

This fully developed constitutional challenge to Massachusetts' public-sidewalk exclusion zones presents an excellent vehicle for limiting *Hill v. Colorado*, 530 U.S. 703 (2000). *Hill* upheld a restriction on close physical approaches to unwilling listeners on public sidewalks outside of medical facilities. The decisions in this case expand *Hill* well beyond its approach-based rationale and provide a blueprint for future government suppression of public-forum speech.

The Act challenged in this case began as a no-approach statute modeled on Colorado's. Massachusetts later amended that speech restriction to make it easier for the police to enforce.[2] The amended version eased enforcement by making it a crime even to remain stationary and hold out literature or offer help in a normal conversational tone on public sidewalks off Boston's Commonwealth Avenue and other public ways throughout the State. Under this amended Act, Petitioners' free-speech rights had tumbled to the bottom of *Hill*'s slippery slope.

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[2] The law permitted approaches with consent and police could not always easily determine the presence or absence of consent. *See* App. 146a. ("Mainly, the police had trouble determining whether a protester had 'approached' a person within the six feet floating buffer, without that person's consent.")

By treating the ease of enforcing an existing public-forum speech prohibition as a justification for enacting an even broader speech restriction, Massachusetts adopted a "prophylaxis-upon-prophylaxis approach" condemned by this Court's First Amendment jurisprudence in other contexts. *Federal Election Comm'n v. Wisc. Right to Life*, 551 U.S. 449, 479 (2007). Yet the First Circuit upheld the challenged Act by recourse to this Court's "well-settled abortion clinic/buffer zone jurisprudence." App. 12a. This Court should prevent further expansion of the State's speech-restrictive logic by granting certiorari and holding that the challenged Act is not narrowly tailored to governmental interests in protecting unwilling listeners from close physical approaches or in preserving access to freestanding medical facilities that perform abortions.[3]

This Court has "applied the captive audience doctrine only sparingly to protect *unwilling listeners* from protected speech." *Snyder v. Phelps*, 131 S.Ct.

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[3] By granting certiorari in this case, the Court can also clarify the criteria for assessing content- and viewpoint-neutrality under *Hill*. As the petition for certiorari observes, the Act's singling out of abortion protesters for special speech rules is impossible to ignore given that its exclusion zones (i) apply only at freestanding clinics that perform abortions, and (ii) do not apply to the activities of clinic employees and agents. By contrast, the Colorado law upheld in *Hill* applied at all medical facilities, *see Hill*, 530 U.S. at 708 n.1, and applied equally to "all 'protest,' to all 'counseling,' and to all demonstrators . . . whether they oppose or support the woman who has made an abortion decision." *Id.* at 725. Whether *Hill* permits Massachusetts' abortion- and speaker-specific speech restrictions to stand without enduring strict scrutiny raises a significant question that warrants this Court's review.

1207, 1220 (2011) (emphasis added). But the First Circuit's decisions below have expanded the doctrine to encompass even *willing listeners*. The well-developed record in this case shows that many women have accepted petitioners' conversational offers of help outside of the covered abortion clinics. Yet the Act here contains no consent provision that allows petitioners to enter or remain in an exclusion zone while communicating with a willing listener. Instead, petitioners must communicate from outside the painted lines that mark the exclusion zones' boundaries.[4] This "bright-line rule" violates the First Amendment, for the Act is not narrowly tailored to the governmental interest in protecting unwilling listeners from close physical approaches recognized in *Hill*. *See Hill*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").

This Court recognized in *Hill* that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and [that] to do so there must be opportunity to win their attention.'" 530 U.S. at 728 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The statute in *Hill* explicitly permitted a speaker to approach another person within 8 feet for

[4] Massachusetts' expansion of its speech limits has had a profound effect on petitioners' speech. For example, "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 interaction with an incoming woman since the Act took effect—after more than 100 successful interactions before the Act." Petn. at 14-15.

the purpose of communicating if the "other person consents" to the approach. Colo. Rev. Stat. § 18-9-122(3). Although the challenged statute inhibited a speaker's ability to reach *unwilling listeners*, the statute preserved a speaker's ability to reach *willing listeners*, and the Court emphasized the importance of this distinction to the disposition of the case.[5]

Even if the State believed that enforcement difficulties associated with a consent-based approach system could justify a ban on approaching people with their consent outside of abortion clinics, it would suffice to require speakers to remain stationary. To draw zones that exclude pro-life speakers completely is not a narrowly tailored response. A requirement to remain stationary while speaking or handbilling would prevent unwanted approaches. And a rule prohibiting obstruction would ensure unfettered access. Indeed, well before Massachusetts enacted either the challenged Act or its abortion-facility-specific predecessor, the State

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[5] The Court framed the question as "whether the Colorado statute reflects an acceptable balance between constitutionally protected rights of law-abiding speakers and *the interests of unwilling listeners*." *Hill*, 530 U.S. at 714 (emphasis added). The Court emphasized: "It is also important when conducting this interest analysis to recognize the *significant difference* between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. *This statute deals only with the latter*." *Id.* at 715-716 (emphases added). Moreover, in considering whether the statute was "narrowly tailored," the Court thought that it was "worth reiterating that only attempts to address *unwilling listeners* are affected" by the statute. *Id.* at 727 (emphasis added). With respect to citizens' rights to "reach the minds of willing listeners," the Court concluded that the "Colorado statute adequately protects those rights." *Id.*

already had on its books a more general rule prohibiting obstruction of access to medical facilities. *See* Mass. G.L. C. 266, § 120E (prohibiting obstruction of "entry to or departure from any medical facility"). Unlike its abortion-facility-specific counterpart, that law expressly preserves speakers' "rights to engage in peaceful picketing which does not obstruct entry or departure." *Id.*

Even if the challenged Act's criminalization of consented-to approaches on public sidewalks is thought to be consistent with the First Amendment's freedom of speech, the Act nevertheless fails *Hill*'s narrow tailoring requirement because it prohibits stationary handbilling and conversational speech in the exclusion zones. The Court's opinion in *Hill* noted that Colorado's challenged "8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-27 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)). The Court further observed that "the statute does not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept." *Id.* at 727.[6] Justice Souter's concurring opinion in *Hill*, which Justices O'Connor, Ginsburg, and Breyer joined, singled out the statute's preservation of similar speech freedoms. Justice Souter explained that "the fact that *speech by a stationary speaker is untouched* by this statute shows that the reason for its restriction on

[6] *See also id.* ("The statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute.").

approaches goes to the approaches, not to the content of the speech of those approaching." 530 U.S. at 738 (emphasis added).[7] These opinions' emphasis on the preservation of stationary handbilling and speech from a normal conversational distance was presaged in questioning by multiple Justices from the *Hill* majority at oral argument.[8]

Legal scholars from across a broad ideological spectrum have criticized *Hill* for ratcheting down standard First Amendment analysis of public-forum speech restrictions. One scholar has pithily described the decision as "slam-dunk simple and slam-dunk wrong." Laurence Tribe, *quoted in Colloquium*, 28 Pepp. L. Rev. 747, 750 (2001). Others have criticized *Hill* on the grounds that it:

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[7] *See also Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*.") (emphasis added)..

[8] *See* Oral Arg., *Hill v. Colorado*, No. 98-1856, 2000 WL 72054, at *2 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *6 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully."); *id.* at *7 (Breyer, J.) ("What's the problem if I can stand still, hand [out a leaflet] just like this, and she'd have to walk around in order to avoid taking it, but she's free to walk around under this statute?"); *id.* at *9 (Stevens, J.) ("I'm concentrating on the leafleting now because, it seems to me, that's your strongest argument.").

(i) obscured the distinction between content-neutral and content-based restrictions on speech;[9]

(ii) inverted ordinary First Amendment principles by imposing a "listener preclearance requirement";[10]

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[9] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1127 (2005) (pointing out that in *Hill* "one must necessarily examine the content of a person's speech to determine if it constitutes 'education, protest or counseling'"); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1400-1406 (2002) (conducting thorough inquiry into why statute in *Hill* was content-based); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."); McConnell, 28 PEPP. L. REV. at 748 ("You cannot tell, other than by the content of what I say, whether the law [in *Hill*] is being violated or not. Now if that is not content-based, I just do not know what 'content-based' could possibly mean."); *cf.* Erwin Chemerinsky, *Colloquium*, 28 PEPP. L. REV. 747, 752-753 (2001) (agreeing with the result in *Hill* but disagreeing with the Court's rationale: "Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. . . . [and] this case further adds to the confusion . . . . ").

[10] Sullivan, 28 PEPP. L. REV. at 737 ("*Hill* is unusual . . . with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that,

> (iii) illustrated "how far the Court has allowed overbreadth to drift from its central premises";[11] and
>
> (iv) recognized "a public 'right to be let alone' [that] is in tension with literally decades of First Amendment jurisprudence."[12]

More important than what these scholars have said about *Hill* is what lower courts have done with it. *See* Petn. at 25-27. And the decisions in this case show how *Hill* created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places."[13] This Court should grant certiorari to place clear limits on *Hill*.

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in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); McConnell, 28 PEPP. L. REV. at 748 (agreeing that "one of the ways in which *Hill v. Colorado* inverted ordinary free-speech principles" was "by rejecting the principle that it is the person—it's the unwilling listener—who has the burden of action, and not the speaker").

[11] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 72 (2003).

[12] TIMOTHY ZICK, FREE SPEECH OUT OF DOORS 101 (University of Cambridge Press, 2008).

[13] Clark LeBlanc & Jamin B. Raskin, *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).

CONCLUSION

Amici respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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