No. 12-1168

IN THE
SUPREME COURT OF THE UNITED STATES

ELEANOR MCCULLEN, *et al.*,
Petitioners,

v.

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

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

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BRIEF OF *AMICI CURIAE* LIFE LEGAL DEFENSE FOUNDATION AND WALTER B. HOYE II IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead to seek out ways to make this expressive activity unlawful.

Amicus Walter B. Hoye II is an individual whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community through public

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation of this brief.

speaking and his web site, Rev. Hoye seeks to offer immediate assistance to women seeking abortion, a message he conveys by engaging in one-on-one conversations with them as they approach an abortion clinic in Oakland, California.

In December 2007, the city of Oakland passed an ordinance, similar to the statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), but applying only to non-hospital-affiliated abortion clinics. Rev. Hoye immediately challenged the ordinance in federal court. In 2011, the Ninth Circuit ruled that the ordinance was being enforced unconstitutionally, in that the city's enforcement policy exempted speech "facilitating access" from prosecution. However, the court upheld the ordinance on its face, despite its narrow application to abortion facilities. *Hoye v. Oakland*, 653 F.3d 855 (9th Cir. 2011).

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the ordinance. No patient or other person seeking access to the clinic complained of his conduct, nor did any purported "victim" testify against him at trial. Indeed, no "victim" was ever specified. Though the conviction was appealed (and ultimately overturned on procedural grounds), the trial court refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years. Rev. Hoye did not agree.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail.

Rev. Hoye completed his sentence.

In sum, Rev. Hoye was threatened with two years in jail and in fact went to jail for engaging in undisputedly peaceful, non-obstructive constitutionally protected speech activity on a public sidewalk. Twenty years ago, one would have wondered how that could happen. Now we know the answer: abortion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 20 years ago, this Court decided *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), upholding an injunction that imposed, *inter alia*, a 36-foot speech-free zone around the entrance to an abortion clinic. This Court employed a newly-minted test for assessing the validity for injunctive restrictions on speech: whether the restriction burdens no more speech than necessary to serve significant governmental interests.

Six years later, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a state statute creating unique restrictions on core speech activity (leafleting, picketing, and engaging in oral protest, education, or counseling) occurring in the vicinity of medical facilities. While employing the traditional time, place, and manner formulation for assessing the validity of the restrictions, this Court rejected the argument that, by limiting the application of the law to the public forum areas bordering medical facilities, the state was engaged in *de facto* content and viewpoint-discrimination against anti-abortion

speakers. The Court also for the first time approved a restriction on speech activity where it was protected speech itself, not the concomitant unprotected conduct or results, which constituted the justification of the law and the gravamen of the offense.

In the 13 years since *Hill* was decided, this Court has not reviewed any case involving free speech rights in the context of anti-abortion speech. Unfortunately, during that time *Madsen* and *Hill*, each of which was a troubling departure from this Court's earlier First Amendment jurisprudence, together have spawned a new creature, a hybrid of law and injunction that might aptly be dubbed an *injordinance*.

The injordinance is technically a law, in that it is enacted by a legislative body and is enforceable via criminal sanctions against the public at large, with certain legislatively-specified exceptions. However, it also resembles an injunction, in that its application is pinpointed to a particular site or sites and its expansive restrictions on speech are initially justified by the unlawful conduct of individuals at these particular sites. Moreover, as with an injunction, the injordinance's restrictions are only activated at the request of private parties, who in some instances are also granted the power to enforce them via civil action.

Massachusetts General Law Chapter 266, Section 120E ½ (the "Act") is the first example of an injordinance to come before this court. The net effect of the Act's provisions is that any abortion provider, but only abortion providers, can obtain a sweeping injunction, enforceable against any anti-

abortion speaker, simply by asking city employees to paint lines around its place of business.

This Court need not overrule *Madsen* and *Hill* to find the Act unconstitutional. However, amici urge this Court to grant the petition for certiorari and take this opportunity to review, reconsider, clarify and/or narrow its decisions in *Madsen* and *Hill* in light of their role in making laws like the Act -- variations of which are appearing all over the country -- even thinkable.

ARGUMENT

I. *MADSEN* AND *HILL* SET THE STAGE FOR THE ACT.

A. *Madsen* and Governmental Interests.

In *Madsen v. Women's Health Center*, this Court upheld portions of an injunction prohibiting First Amendment activity within 36 feet of the entrances to an abortion clinic. The Court found that the injunction was content-neutral: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." *Id.* at 762-63. Nonetheless, this Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Id.* at 764. For that reason, the Court held that injunctive restrictions on speech should be tested under a "somewhat more stringent" standard, namely, whether the restrictions "burden no more speech than necessary to serve a

significant governmental interest." *Id.* at 765. Applying that standard to the various provisions at issue, the Court found that the 36-foot zone around driveway entrances was constitutional.

In formulating the standard as it did, this Court took the first step in blurring the distinction between generally applicable laws and injunctions. This Court first correctly described the operation of an injunction:

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group . . . because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation . . .

Id. at 762. Despite this definition, this Court decided that the measuring stick for the constitutionality of injunctive restrictions on speech should be *governmental* interests, and particularly those governmental interests that coincide with the interests of the abortion provider plaintiff.

No governmental entity had asserted any interest in the outcome of the litigation between the abortion provider and the defendants in *Madsen*. While a governmental entity *might* assert an interest in protecting a woman's freedom to seek medical services, ensuring public safety and order, and promoting the free flow of pedestrian and

vehicular traffic (*id.* at 767-68), it might also assert an interest in ensuring that women are informed of all options before choosing to have an abortion, protecting the free speech rights of citizens on public sidewalks, and preserving the function of unfettered speech as a safety valve for the heated emotions certain topics generate. Those interests, too, are significant governmental interests. Yet the injunctive restrictions were never measured against those latter interests. Rather, the only governmental interests invoked by this Court, and passed down as precedent for lower courts to rely on, were those that favored the abortion provider plaintiff's efforts to restrict anti-abortion speakers.

The logical result of this Court's reliance on "governmental interests" in upholding injunctions was for courts to become less scrupulous about whether a plaintiff clinic had actually proved the elements of any particular cause of action. If a "combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction," *Madsen*, 512 U.S. at 768, there was no sense in requiring a plaintiff to prove trespass or some other direct but otherwise irrelevant violation of its own rights.

Moreover, trial courts would be understandably confused about why injunctions purportedly serving broad governmental interests should apply only to named parties and those acting in concert with them. This Court contributed to that confusion by making pronouncements such as "the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and "the only way to ensure

access was to move *all* protesters away from the doorways." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380, 381 (1997)(original emphasis). This Court did not appear to be making any distinctions between enjoined parties and third parties, and consequently, neither did many lower courts and law enforcement personnel called on by abortion clinic plaintiffs to enforce injunctions. *See, e.g., People v. Conrad*, 55 Cal.App.4th 896, 902 (1997) (reversing conviction for violation of injunction based on anti-abortion defendants' "mutuality of purpose" with enjoined parties); *Planned Parenthood v. Garibaldi*, 197 Cal.App.4th 345, 352 (2003) (reversing judgment upholding application of speech restrictive injunction against "all persons with notice").

This Court also failed to explain the role the defendants' prior bad conduct played in applying its new test. After suggesting in *Madsen* that failure to obey a prior injunction was key to a finding that a broader restriction "burdened no more speech than necessary," 512 U.S. at 763, the Court disavowed that factor in *Schenck*. 519 U.S. at 382-83.

This Court's attempt to fit injunctive restrictions on speech into the "governmental interest" mold of generally applicable time, place, and manner restrictions has led to confusion and error in other lower court decisions, including the First Circuit's decisions below.

B. *Hill* and the Interest in "Avoiding Unwanted Communication."

Although this Court in *Madsen* approved of a 36-foot speech-free zone on the public right-of-way, it struck down a provision prohibiting uninvited

approaches of patients, stating unequivocally, "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and ensure access to the clinic." 512 U.S. at 774.

Six years later, in *Hill*, this Court embraced the concept it so clearly rejected in *Madsen*. Ruling on a facial challenge, this Court upheld a Colorado statute prohibiting unconsented approaches within 8 feet of anyone within 100 feet of the entrance to a medical facility, when that approach was made for the purpose of displaying a sign, handing a leaflet, or engaging in oral protest, education, or counseling. 530 U.S. at 707, 735.

In identifying the governmental interests undergirding the law, this Court began with the general police power to protect the health and safety of their citizens, which "may justify a special focus on impeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id*. at 715 (citing *Madsen*). The Court also cited the government's self-referential interest in even-handed application of the law.

Pronouncing these interests "unquestionably legitimate," the Court went on to find other interests underlying the law, ones that Colorado itself had not asserted: the interest "in avoiding unwanted communications" and the "'right to be free' from persistent 'importunity, following, and dogging' *after an offer to communicate has been declined*." *Id*. at 717, 718 (emphasis added).

This Court repeatedly stated that the statute dealt only with protecting "unwilling" listeners

from "unwanted" communication after an offer to communicate has been declined. *Id.* at 708, 714, 716, 718, 721, 723, and 727.[2] However, this reading was at odds with the plain language of the statute, which prohibited all uninvited approaches ("unless such other person consents").

This Court's conflating of uninvited approaches with rejected approaches led the court below (and the Third Circuit[3]) to the logical conclusion that, at least in the context of speech activity outside medical facilities, all approaches are as a matter of law unwanted and intimidating, and the government has an "unquestionably legitimate" interest in prohibiting such approaches.

Well, not *all* approaches. According to this Court's reasoning and holding, the state's interest extended only to prohibiting those approaches made for the purpose of engaging in otherwise constitutionally protected speech activity. As this Court noted, approaches for the purpose of "social or random conversation" were not prohibited. Neither were approaches for the purpose of panhandling, soliciting magazine subscriptions, or raving like a lunatic. Unconsented approaches without any form of oral communication were also unaffected by the statute: one could approach

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[2] Indeed, this Court implied that the statute was only triggered when the person approached took some affirmative action such as declining the offer. 530 U.S. at 734 (emphasis added) ("This statute simply **empowers** private citizens entering a health care facility with **the ability to prevent** a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear").

[3] See *Brown v. Pittsburgh*, 586 F.3d 263 (3rd Cir. 2009), discussed *infra* at 23.

without consent for the purpose of glaring, making an obscene gesture, or fingering the knife at one's side, all without violating the statute.

In sum, a police officer who witnessed an unconsented approach need simply ascertain one point: was the approach made for the purpose of engaging in core First Amendment speech activity? If so, the statute was violated. If not, there was no violation.

Despite this Court's protestations (citing *Madsen*) that the Colorado law was merely a content- and viewpoint-neutral "regulation of the places where some speech may occur," the restriction was more than that. It was not "justified without reference to content of the regulated speech." Rather, as Colorado itself had candidly admitted, speech "against certain medical procedures" [4] is an evil that government may legislate against. This Court's entire line of reasoning in *Hill* concerning the government's interest in preventing "unwanted communications" validated that viewpoint-based purpose.

II. THE ACT COMBINES THE ERRORS OF *HILL* AND *MADSEN*.

The salient unconstitutional features of the Act are: 1) singling out abortion clinics for insulation from free speech; 2) exempting pro-abortion speakers from the restrictions, and 3) imposing overbroad restrictions on speech activity.

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[4] Colorado Rev. Statutes §18-9-122(1).

The First Circuit found support for each of these features in *Madsen*, *Hill*, or both.

A. Restriction on Speech Occurring Only at Abortion Clinics is Presumptively Content- and Viewpoint-Based.

The First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its rejection of the analogous argument in *McGuire v. Reilly*, 260 F.3d 36, 44–47 (2001), challenging an earlier version of the Act. *See* Appendix to Petition for Certiorari ("Pet. App.") at 105a. Citing *Madsen* and *Hill*, the First Circuit held in *McGuire I* that the Act's purpose was content-neutral, though it had the "incidental effect" of curbing speech by "some speakers and not others." Continuing to cite *Madsen* and *Hill*, the First Circuit held that the allegedly "content-neutral" purpose was the government's need to "combat" or "curb" the "deleterious secondary effects of anti-abortion protests." These "secondary effects" were established by evidence in legislative hearings that "abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44 - 46.

In non-abortion-related cases, this Court has explicitly disapproved both prongs of this reasoning. First, the "secondary effects" doctrine has been employed by this Court and most of the Circuits exclusively in the context of sexually oriented businesses. *See Renton v. Playtime*

Theatres, Inc., 475 U.S. 41 (1986).[5] "[L]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (striking down restriction on picketing in front of foreign embassies). "The emotive impact of speech on its audience is not a 'secondary effect.' " *Id.* at 321. Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, this Court has rejected the attempt to justify speech restrictions based on generalizations about subject matter:

> "Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an

[5] Justice Kennedy has acknowledged that the "secondary effects" test, allowing restrictions on sexually oriented businesses, is "something of a fiction," although a tolerable one in the context of zoning restrictions which have a "built-in legitimate rationale." *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448–49 (2002) (plurality) (Kennedy, J., concurring). Apparently the First Circuit believes that what it terms this Court's "well-settled abortion clinic/buffer zone jurisprudence" (Pet. App. 12a) endorses lumping anti-abortion speech in with pornography and lap dancing.

> individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis."

Police Department of Chicago v. Mosley, 408 U.S. 92, 100–101 (1972) (emphasis added). Indeed, it would be a soft foundation for free speech and equal protection that would permit the government to restrict speech activity on a hotly debated issue, and, worse, of one side of that issue, based on wholesale stereotyping of that side.[6]

A restriction may be content neutral if it is "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*). As is

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[6] Video evidence of the stereotypical confrontational anti-abortion protest is strangely absent from court records. On the contrary, *see, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 642 (3rd Cir. 2009) (video evidence "paint[s] a picture . . . very different from most other abortion clinic protest cases. . . . The [city] defendants have admitted allegations in plaintiffs' complaint as to the absence of physical confrontations of the sort **that frequently accompany anti-abortion proselytizing**") (emphasis added); *Madsen v. Women's Health Center*, 512 U.S 753, 785-90 (1994) (Scalia, J., conc. and diss.) (describing in detail contents of video depicting peaceful demonstration activity; "anyone seriously interested in what this case was about must view this tape").

clear from the First Circuit's decision in *McGuire I*, relied on in the instant case, the putatively "content neutral" justification for the statute is the alleged upsetting and disruptive nature of anti-abortion protests. There is nothing content or viewpoint neutral about a restriction on speech directed at particular locations defined by the activity that occurs there, and justified by means of a "broad classification" as to the level of disruptiveness caused by those who protest such activities. Such an ordinance is as blatantly content-based as if the Ordinance said on its face that it is intended to curb anti-abortion speech, whether it applies to other speakers or not.

The First Circuit said that it was "required" to find that the legislative purpose for the pinpoint focus of the Act was to "mak[e] every effort to restrict as little speech as possible *while combating the deleterious secondary effects of anti-abortion protests*," and that therefore the Act was content-neutral. *McGuire I*, 260 F.3d at 44 (emphasis added). These are contradictory holdings. Restricting "as little speech as possible" of the general population simply enabled the legislature to restrict far more speech of an unpopular minority than would be politically tolerable if the law were more broadly imposed.[7]

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[7] See *Railway Express v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

B. The Exemption for Clinic Employees and Agents Renders the Statute Content- and Viewpoint-Based.

As with the argument about the Act's focus on abortion clinics, the First Circuit also rejected Petitioners' challenge to the Act's exemption for clinic agents by citing its treatment of the analogous argument in *McGuire I*. Pet.App. 105a (citing *McGuire I*, 260 F.3d at 45–47). Applying the laxest standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonitions that, like viewpoint-based restrictions, speaker-based restrictions in a public forum are constitutionally impermissible. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another") (emphasis added). *See also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Instead, relying on *Hill*, the First Circuit ruled that the legislature "rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." Indeed, that conclusion does

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> Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

rationally follow; it follows from the premise that only anti-abortion speech is unwanted speech, as this Court taught in *Hill*. After all, one would hardly expect clinic employees to engage in anti-abortion speech, the "evil" targeted by the Act.

As Petitioners correctly note, the Attorney General's interpretation that clinic employees are not exempt if they engage in "partisan" speech, and the First Circuit's endorsement of that interpretation, is without any legal effect. Petition for Certiorari at 20, n.5. However, even if the Attorney General's interpretation were amended to eliminate the blatantly content-based restriction on speech "about abortion," and even if it were incorporated into the statute, such a provision would put the police in the position of evaluating the content of speech and determining which such speech is "partisan." The Ninth Circuit has held that it is unconstitutional to exempt clinic escorts engaging in speech "facilitating access" to an abortion clinic (such as "May I help you into the clinic?") from a law regulating speech activity in the vicinity of abortion clinics. *Hoye v. Oakland*, 653 F.3d 835, 852 (9th Cir. 2011). Under the First Circuit's decisions, however, a clinic escort or employee telling a patient not to listen to the pro-lifers is not engaging in "partisan" speech and is legitimately exempt from the Act's restrictions. *McGuire v. Reilly,* 386 F.3d 45, 52, 64-65 (1st Cir. 2004).

When an escort or clinic employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," the First Circuit holds that such speech is neutral and non-partisan. The peaceful

pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently. So does the Ninth Circuit.

The Attorney General's interpretation also echoes the inversion of First Amendment values first sanctioned by this Court in *Hill*, where core First Amendment speech on matters of public interest is forbidden under the exact same conditions that "incidental" or "everyday" speech is permitted. *Cf. Hoye*, 663 F.3d at 851, n. 13 ("even if the distinction between purposive and incidental speech could coherently be made, we have said that privileging the latter over the former 'turns the First Amendment on its head.' *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998)").

This Court's First Amendment jurisprudence has never recognized the concept of a justifiable or acceptable amount of content and viewpoint discrimination. Content and viewpoint discrimination are not subject to a balancing test wherein a court need only "envision at least one legitimate reason" (*McGuire I*, *supra*, 260 F.3d at 48) for creating the distinction to render it constitutional. Rather, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen v. Women's Health Center*, 512 U.S. 753, 794 (Scalia, J., concurring in part and dissenting in part). For that reason, the only "legitimate reason" for a content-based distinction is a compelling state interest, which has never been asserted in this

case. A viewpoint-based distinction is simply impermissible.

The Court should grant the petition to prevent further erosion of the First Amendment's most fundamental guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

C. The Act's Speech-Free Zone Is Grossly Overbroad for Serving Any Legitimate Governmental Interest.

In upholding the Act, the First Circuit noted that the 35-foot fixed buffer zone was slightly smaller than the zone upheld in *Madsen* "under a standard stricter than that which is applicable here." *McCullen v. Coakley* (*McCullen I*) (Pet. App. 111a). The court's *a fortiori* conclusion neglected to note that that zone in *Madsen* would be enforced only against persons who had been found to have interfered with clinic access in the past.

This Court gave no guidance in *Madsen* or *Schenck* as to how much weight to give the defendants' past unlawful behavior when applying the test for whether an injunctive restriction "burdens no more speech than necessary to serve significant governmental interests." This Court did say that this test was "somewhat more stringent" than the "narrowly tailored" standard. So the test for injunctive restrictions on speech is more stringent, but it also is applied only when the enjoined persons have "violated or imminently will violate, some provision of statutory or common law." *Madsen*, 512 U.S. at 765, n.3.

Lower courts are thus put in the position of comparing apples and oranges: speech restrictions

against those who have violated the law are evaluated under a "more stringent" standard while speech restrictions against even the most law-abiding speakers are evaluated under a less stringent standard. It is not surprising that lower courts, including the First Circuit, faced with this contradiction would latch onto this Court's suggestion in *Hill* that anti-abortion speech as a class is "unwanted." This presumption of unwantedness would justify finding unprecedented restrictions on speech on public sidewalks to be "narrowly tailored" to serve the governmental interests in assisting people to avoid "unwanted" speech.

A second problem with the First Circuit's *a fortiori* reasoning from *Madsen* is that the trial court in *Madsen* fashioned the buffer zone to deal with the "narrow confines" around the plaintiff clinic. *Madsen*, 512 U.S. at 769. Once again, the mismatch between the standards for injunctions and for generally applicable laws is manifest: while a trial court can fashion a buffer zone around a particular site with great precision to make it "burden no more speech than necessary," a statute or ordinance will – at least in theory – apply to many sites with various geographical configurations. Everyday experience tells us that 35-foot buffer zones around entrances and driveways are going to have widely different effects at different locations.

The incompatibility between narrow tailoring and statutory speech-free zones is seen most strikingly in the First Circuit's treatment of the Petitioners' as-applied challenge. The First

Circuit collapsed the narrow tailoring inquiry into the ample alternatives inquiry, following, it asserted, this Court's analytical method in *Hill*. Pet. App. 22a. At two of the three locations at issue, patients never walk on the public sidewalk but instead drive into private parking lots behind the clinics. Therefore, the First Circuit held, the law was narrowly tailored because the demonstrators never had the opportunity to engage in person-to-person communication anyway. Pet. App. 24a-25a.

However, if one considers narrow tailoring properly as a separate element, it defies common sense to hold that pushing speakers 35 feet away from driveway entrances is "narrowly tailored" to ensure access. Cars don't drive on sidewalks. If no one is standing in the driveway or roadway, a car can drive into a clinic parking lot without any impediment at all. A person standing on the sidewalk three feet from the driveway entrance will not interfere with the car's access. [8]

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[8] On the other hand, if the interest served by the zones is to allow patients to avoid (i.e., be insulated from) unwanted (i.e., anti-abortion) communications, and if there is no separate narrow tailoring prong, then the choice of distance is completely arbitrary. In applying its combined narrow tailoring/ample alternative inquiry in *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) (*McCullen I*), the First Circuit stated:

> "[T]he 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals

But what if someone ***is*** standing in the roadway blocking the street? Or what if some anti-abortion person standing on the sidewalk is throwing literature at patients by tying it to rocks and hurling the rocks at their passing cars? Wouldn't a 35-foot zone be narrowly tailored to serve the governmental interests there?

Unfortunately, in *Hill*, *Schenck*, and *Madsen* this Court endorsed the use of "bright line prophylactic rules" for dealing with anti-abortion demonstrations, although, on other topics, "[b]road prophylactic rules in the are of free speech are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). This Court set a pattern of unquestioning deference to the findings (or presumed findings) of legislatures and trials court, based on the representations of abortion providers, that various factors make the obvious and less speech-restrictive solution, i.e., enforcement of existing laws or injunctions, impracticable. Thus, narrow tailoring ends up being measured against the conduct of some "worst case protester" who (they say) cannot be restrained any other way.

> entering, departing, or within the buffer zone. Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

McCullen I, Pet.App. 111a. The same could be said of a 35-yard zone or a 3-mile zone.

That is, if it is measured at all. The Third Circuit, evaluating a 15-foot buffer zone around clinics (with an exception for clinic personnel), adopted the First Circuit's "secondary effects" reasoning and decided that it was not necessary for the legislature to prove any record of bad conduct before deciding to keep anti-abortion protesters at a distance from clinic entrances. *Brown v. Pittsburgh*, 586 F. 3d 263, 279 n. 17 (3rd Cir. 2009) ("in secondary effects cases such as this, . . . legislatures may look outside of their own regional jurisdiction for evidence substantiating the problem to which a given regulation is addressed"). Having absolved the Pittsburgh city council from the need to establish that a problem existed, the Third Circuit then employed the same argument as did the First Circuit in *McCullen*: because a larger zone was constitutional under the more exacting standard of *Madsen*, "the smaller zone established by the Ordinance is *a fortiori* constitutionally valid." *Id*. at 276. *See also Clift v. City of Burlington*, 2013 U.S. Dist. LEXIS 21888 at *6, *63 (February 19, 2013) (citing *Madsen* and *Hill* and finding 35-foot buffer zone around abortion clinic entrances and driveways to be narrowly tailored, despite the fact that zone at issue extends over a 228-foot stretch of public sidewalk).

Such an approach is the antithesis of narrow tailoring.

III. CIVIL CAUSES OF ACTION: THE INJORDINANCE COMES FULL CIRCLE.

Section (f) of the Act establishes a private cause of action for equitable relief by any abortion provider whose right to provide services has been violated or interfered with by a violation of the Act. Presumably the equitable relief would take the form of an injunction in the same (or broader) terms as the Act. Such an injunction would place in the abortion provider's hands the ability to selectively and discriminatorily enforce violations of the Act through a contempt action.

A proposed San Francisco ordinance, currently co-sponsored by nine members of the eleven-member Board of Supervisors, takes the private remedy concept a step further. Like the Act, this proposed law allows for the establishment of 25-foot buffer zones on public streets and sidewalks around the entrances and driveways of reproductive health care facilities at the request of the facility. The act makes it unlawful to "enter or remain" in these buffer zones. Four categories of persons (the same categories found in the Act) are exempt, as long as they do not engage in "demonstration activity."[9] Appendix at 6A – 9A.

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[9] The exemption for persons passing through the zone has an interesting twist. If an individual passes through the zone five or more times in an hour, that is prima facie evidence of a violation. The individual can rebut the presumption by "presenting evidence that he or she has a legitimate personal or business, non demonstration activity purpose for passing through the zone." Appendix at 8-A – 9-A. Recall that this law is being proposed in the United States of America.

Section 4304(b) of the proposed ordinance creates a civil cause of action in favor of a reproductive health care facility against any person who violates the ordinance. Appendix at 10-A. A person found to have violated the ordinance in such action "shall be liable to the aggrieved [facility] for special and general damages, but in no case less than $1000 plus attorney's fees and costs of the action."

When this proposed ordinance passes – and if the First Circuit's decision is allowed to stand -- the city could decline to prosecute anyone, leaving it to abortion providers to pick and choose whom to sue. Clinic escorts could encourage women to obtain abortion services and clinic supporters could hold rallies in front of the clinic, without being sued. But anti-abortion speakers would be on notice that any incursion into the zone would be met with a lawsuit that will cost them thousands of dollars.

In sum, this ordinance, which would be evaluated under the less stringent standard for "generally applicable" laws, would create a process by which an abortion provider could be granted, over the counter at city hall, a speech-restrictive injunction that it could discriminatorily enforce against any anti-abortion speaker.

CONCLUSION

Amici respectfully request the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted this 25th day of April 2013,

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APPENDIX

FILE NO. 130262 ORDINANCE NO.

[Police Code - Access to Reproductive Health Care Facilities]

Ordinance amending the Police Code, Article 43, Sections 4301, 4302, 4303, and 4304, to replace the existing eight-foot bubble zone around individuals entering, exiting, and seeking services at health care facilities with a fixed buffer zone around the entrances, exits, and driveways of reproductive health care facilities; and to prohibit any person from entering or remaining in that buffer zone, with certain exceptions; and making environmental findings.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Planning Department has determined that the actions contemplated in this ordinance comply with the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.). Said determination is on file with the Clerk of the Board of Supervisors in File No. _____ and is incorporated herein by reference.

Section 2. The Police Code is hereby amended by amending the title of Article 43 and Sections 4301, 4302, 4303, and 4304, to read as follows:

ARTICLE 43: ACCESS TO REPRODUCTIVE HEALTH CARE FACILITIES

SEC. 4301. FINDINGS

Every person in the City and County of San Francisco ("City") has a fundamental right to privacy protected not only by the United States Constitution, but also explicitly guaranteed in Article I,Section 1 of the California Constitution. This right to privacy includes the right to access all legal health care services, including reproductive health care services.

Maintaining access to reproductive health care services is a matter of critical importance not only to individuals, but also to the health, safety, and welfare of all residents of the City. Efforts to harass, obstruct, or otherwise interfere with individuals seeking reproductive health care services may deter, delay, and even prevent individuals from obtaining necessary reproductive health care services. These efforts, which often include forcing patients to run a gauntlet of demonstrators near the entrances, exits, and driveways of reproductive health care facilities, or to confront intimidating demonstrators stationed at or near those entrances, exits, and driveways, also disrupt the ability of staff at reproductive health care facilities to devote their full efforts to providing health care services and divert valuable facility resources away from patients. Actions that result in such obstruction, delay, and deterrence of patients, and diversion of reproductive health care facilities' staff and resources, undermine the City's interest in maintaining the public health, safety,

and welfare, and in preserving its residents' constitutional right to privacy.

Standing on equal footing with the right to access health care services, including reproductive health care services, are the free speech and assembly rights of those who would gather and raise their voices on matters of public concern. Under this Article, the Board of Supervisors previously attempted to balance these rights by prohibiting harassment, within 100 feet of an exterior wall of a health care facility, of individuals entering, exiting, or seeking services at a health care facility, with harassment defined as "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." That prohibition has proven ineffective. Due to the density and space constraints of the City's urban landscape, that prohibition has not adequately prevented harassment, delay, and deterrence of patients seeking vital health care services, and in particular reproductive health care services, nor adequately prevented distraction and diversion of health care providers from their core mission of providing services in a safe and supportive environment.

The Board of Supervisors hereby finds that the creation of a buffer zone, as defined in Police Code Section 4302 as amended by Ordinance No. _____, and a prohibition on entering or remaining in that buffer zone as specified in Police Code Section 4303 as amended by Ordinance No.

_____, with certain exceptions, is necessary to promote the full exercise of the right to privacy by patients seeking vital reproductive health care services and is also necessary to maintain public health, safety, and welfare within the City. The Board of Supervisors further finds that this Article strikes a lawful and appropriate accommodation between the right to privacy and to access reproductive health care services and the needs of public health, safety, and welfare, on the one hand, and the rights of free speech and association, on the other.

Article 43, as amended by Ordinance No. _____, applies only to reproductive health care facilities, no health care facilities generally. In addition, Article 43, as amended by Ordinance No. _____, does not apply to licensed hospitals or to reproductive health care facilities owned or operated by licensed hospitals. This scope ensures the Article is narrowly tailored to address the significant governmental interests it serves, and leaves other health care facilities and locations available for speech. Individuals attempting to access reproductive health care facilities to obtain reproductive health care services have been subjected to harassing or intimidating activity from extremely close proximity, tending to hamper, delay or deter their access to those facilities and services and thus subverting their legal rights to seek and obtain legal health care services. The Board finds that reproductive health care facilities that are not part of a licensed hospital, and not owned or operated by a licensed hospital, are more vulnerable to such subversion of their patients'

rights on account of the layout and design of their facilities and parking areas as well as their staff resources and deployment. Further, reproductive health care facilities not affiliated with hospitals commonly possess fewer resources for providing adequate security and safety to individuals seeking access to reproductive health care services. Thus, Article 43, as amended by Ordinance No. _____, imposes narrowly tailored, content-neutral restrictions where they are most necessary to further the significant government interests the Article serves.

The Board finds that the modest scope of the buffer zone is sufficient to ensure that patients may gain safe and unimpeded access to reproductive health care services, while allowing speakers to effectively communicate their messages to their intended audience.

The Board further finds that obstructions and demonstrations around the entrances, exits and driveways of reproductive health care facilities can impede pedestrian and vehicle traffic and create safety hazards on the sidewalks and roadways, and that this buffer zone will help promote safe and effective pedestrian and vehicle traffic flow around reproductive health care facilities. In addition, the buffer zone will reduce disputes and confrontations requiring law enforcement services, and will protect property rights.

The Board further finds that harassing and intimidating activities conducted around the entrances, exits and driveways of reproductive health care facilities can adversely affect the

physical and emotional health and well-being of patients seeking services at a reproductive health care facility. The Board finds that this buffer zone will provide a protective space for patients and thereby help avoid those adverse health consequences.

The Board finds that this Article imposes content-neutral time, place, and manner restrictions on speech and association, which are narrowly tailored to serve significant government interests and leave ample alternative channels of communication.

This Article is not intended to create any limited, designated or general public fora. Rather it is intended to protect those who seek access to reproductive health care from conduct that violates their rights.

SEC. 4302. DEFINITIONS.

For purposes of this Article:

"Buffer zone" refers to the area encompassed by both of the following:

(1) the area on a public way or sidewalk encompassed by a radius of 25 feet from any portion of an entrance, exit, or driveway of a reproductive health care facility; and

(2) the area encompassed by extending the outside boundaries of any entrance, exit, or driveway of a health care facility in straight lines to the point where those lines intersect the sideline of the street or the property line of the reproductive health care facility.

"Demonstration activity" refers to any activity involving expressive or symbolic content,

including but not limited to the following: protesting; demonstrating; picketing; displaying or distributing pictures, literature, or other materials; and engaging in education or counseling activities.

"Person" refers to any individual, firm, partnership, joint venture, company, corporation, association, social club, fraternal organization, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit except the United States of America, the State of California, and any political subdivision of either.

"Reproductive health care facility" refers to a clinic licensed under Chapter 1 (commencing with Section 1200) of Division 2 of the Health and Safety Code, or any other facility or business that provides reproductive health care services, exclusively or in addition to other health care services. Reproductive health care facility does not include a licensed hospital or a clinic or other facility owned or operated by a licensed hospital.

"Reproductive health care services" refers to all medical, surgical, counseling, referral, and informational services related to the human reproductive system.

SEC. 4303. ENTERING OR REMAINING IN BUFFER ZONE AT REPRODUCTIVE HEALTH CARE FACILITIES PROHIBITED; EXEMPTIONS.

(a) Prohibition. Except as specified in Section 4303(b), it shall be unlawful for any person to enter or remain within a buffer zone

(b) Exemptions. Section 4303(a) shall not apply to the following:

(1) Individuals entering or exiting the reproductive health care facility. This exemption allows individuals to enter and pass through the buffer zone only while entering or exiting the reproductive health care facility, and does not permit those individuals to stop or remain in the buffer zone for any purpose, including but not limited to demonstration activity, or to engage in demonstration activity while entering or exiting the reproductive health care facility.

(2) Employees, agents, or volunteers of the reproductive health care facility, acting within the scope of their employment, agency, or volunteer service. This exemption does not allow these employees, agents or volunteers to engage in demonstration activity within the buffer zone, even if that demonstration activity is within the scope of their employment, agency, or volunteer service.

(3) Law enforcement, emergency medical, firefighting, construction, and utilities personnel and federal, state, and municipal employees, acting within the scope of their employment. This exemption does not allow these individuals to engage in demonstration activity within the buffer zone.

(4) Individuals passing temporarily through the buffer zone to reach a destination within or on the other side of the buffer zone. This exemption applies to individuals who enter or pass through the buffer zone, without stopping, either to enter a residence or a business within the buffer zone other than the reproductive health care facility or to

reach a destination on the other side of the buffer zone. This exemption does not allow these individuals to engage in demonstration activity while within or passing through the buffer zone. If an individual not subject to the exemptions in subsection (b)(1), (2), or (3) passes through the buffer zone five or more times in an hour, such activity will constitute prima facie evidence that the individual has violated Section 4303(a). The individual may rebut that presumption by presenting evidence that he or she has a legitimate personal or business, non demonstration activity purpose for passing through the buffer zone.

(c) Business Hours. Section 4303(a) applies only during a reproductive health care facility's posted business hours.

(d) Marking and Written Notice. Section 4303(a) applies only if the buffer zone is marked by the Department of Public Works ("DPW") and a notice prepared by DPW is posted conspicuously near the buffer zone. A reproductive health care facility that wants its buffer zone marked and a notice posted shall submit a written request to the Department of Public Works ("DPW"). DPW shall measure and mark the buffer zone within 14 calendar days of the request. The DPW Director or designee shall prepare signs to provide to reproductive health care facilities, upon request, for posting. The signs shall provide notice regarding the prohibitions under this Article. The DPW Director or designee may adopt rules and regulations after a public hearing to set

standards for marking and posting a notice at a buffer zone.

(e) Other Laws. Nothing in this Article shall preclude the enforcement of other state, federal, or municipal laws inside or outside of the buffer zone, including but not limited to those related to sidewalk obstruction.

SEC. 4304. ENFORCEMENT.

(a) Criminal Enforcement. Any person who violates Section 4303 of this Article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by incarceration in the County Jail, fine, or both. Upon a first conviction for violation of Section 4303, the person shall be incarcerated in the County Jail for up to three months, or fined up to $500, or both. Upon a subsequent conviction for violation of Section 4303, the person shall be incarcerated in the County Jail for up to six months, or fined up to $1000, or both.

(b) Civil Enforcement. An aggrieved person may enforce the provisions of this Article by means of a civil action. An aggrieved person includes any reproductive health care facility whose buffer zone is the site of a violation of this Article. Any person who violates any of the provisions of this Article or who aids in the violation of this Article shall be liable to the aggrieved person for special and general damages, but in no case less than $1,000 plus attorneys' fees and the costs of the action. In addition, punitive damages may be awarded in a proper case.

(c) Other Enforcement. Nothing in this Article shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

Section 3. Effective Date. This ordinance shall become effective 30 days from the date of passage.

Section 4. Scope of Ordinance. In enacting this Ordinance, the Board intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Police Code that are explicitly shown in this Ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the Ordinance.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
ERIN BERNSTEIN
Deputy City Attorney