No. 12-1168

In the Supreme Court of the United States

ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY, as Attorney General for the Commonwealth of Massachusetts, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature limited access during business hours to public ways and sidewalks within a fixed "buffer zone" immediately next to entrances and driveways of reproductive health care facilities. In 2009, the United States Court of Appeals for the First Circuit held that the statute is constitutional on its face and this Court denied review. Upon remand, the district court rejected Petitioners' claim that the statute is unconstitutional as applied at three discrete locations and the court of appeals affirmed.

The question presented is:

Whether the court of appeals correctly applied this Court's cases holding that statutes regulating the time, place, or manner of communicative activities in public fora are constitutional so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

LIST OF PARTIES

Petitioners: ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN.

Respondents: MARTHA COAKLEY, as Attorney General for the Commonwealth of Massachusetts; DANIEL F. CONLEY, as District Attorney for Suffolk County; MARK G. MASTROIANNI, as District Attorney for Hampden County, and JOSEPH D. EARLY, JR., as District Attorney for Worcester County.

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BRIEF FOR RESPONDENTS IN OPPOSITION

In this case the First Circuit applied the Court's well-settled law governing time, place and manner restrictions on speech to uphold the Act on its face and, after remand and a trial in district court, as applied at three discrete locations. The main feature of the Act – a "buffer zone" at clinic entrances and driveways – is nearly identical to the restriction upheld in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). As such, the case does not implicate a significant question for review.

Petitioners contend that review is warranted for two main reasons, each of which lacks merit. Petitioners assert that the Act discriminates in permitting clinic employees to enter the buffer zone to assist and protect patients. The First Circuit correctly rejected this claim because the employee exemption furthers the content-neutral, public-safety goals of the Act; the exemption does not permit pro-choice (or any other) advocacy by employees in the buffer zone. Petitioners are also wrong to urge that *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) is in conflict with the decision below. Both decisions upheld, on their face, laws imposing zone restrictions outside the entrances to reproductive health care facilities. The courts differed in assessing the laws as applied, but only because of a dispositive difference in the facts. In Oakland, the police admitted to a policy of discriminatory enforcement, freely permitting clinic employees to counsel patients inside the restricted areas. In the decision below, the court of appeals found that Petitioners failed even to allege a lack of evenhanded police enforcement.

Finally, this case is not a vehicle for the Court to reconsider its holding in *Hill v. Colorado*, which Petitioners and their *amici* also urge. *Hill* upheld a Colorado law imposing a floating no-approach zone around persons within 100 feet of medical facilities; the Massachusetts Act creates a fixed buffer zone immediately next to clinic entrances and driveways, smaller than a similar restriction upheld in *Madsen*. Any criticism that *Hill* might have generated among commentators is, for the most part, inapplicable to the buffer zone law in Massachusetts.

STATEMENT OF THE CASE

This case concerns a 2007 amendment to a Massachusetts statute that creates a protective "buffer zone" around the entrances and driveways to reproductive health care facilities ("RHCFs"). In 2009, the United States Court of Appeals for the First Circuit held that "the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face." Pet. App. 118a. Following a bench trial in 2011, the district court rejected Petitioners' claims that the Act is unconstitutional as applied at three specific locations and the court of appeals affirmed. Pet. App. 1a-28a.

(1) Statutory Background.

(a) The Original Act.

The Massachusetts Legislature enacted the original Reproductive Health Care Facilities Act in 2000. Pet. App. 129a. Based on a history of violence outside clinics and ongoing harassment and intimidation of women attempting to obtain medical services at such facilities, the Legislature concluded that existing laws did not adequately protect public safety immediately next to RHCFs. *Id*. 95a-96a.

The 2000 Act was modeled on the law upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), and included the following provisions. *First*, similar to the statute in *Hill*, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside a zone defined by an 18-foot radius from any RHCF entrance or driveway, or within a six-feet wide rectangle extending from clinic entrances to the street, if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 130a (quoting Mass. St. 2000, c. 217, § 2(b)).

Second, the Legislature exempted the following four categories of persons from the Act's restrictions:

> (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.

Pet. App. 130a-131a (quoting Mass. St. 2000, c. 217, § 2(b)).

Third, the Act stated that its provisions "shall only take effect during a facility's business hours and [only] if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted." *Id*.

The original Act was challenged in federal court on constitutional grounds. Pet. App. 133a-134a. The First Circuit reversed a preliminary injunction against enforcement, holding that the Act, "on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"). In particular, the court found that the clinic-employee exemption advanced the content-neutral, public-safety purposes of the Act by permitting employees to "assist in protecting patients and ensuring their safe passage" as they approached clinics. *Id*. at 45-46.

On remand, the district court held that the 2000 Act was constitutional on its face and as applied at clinics

in Boston and Brookline. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (facial challenge); *McGuire v. Reilly*, 271 F. Supp. 2d 335, 343 (D. Mass. 2003) (as applied). The First Circuit affirmed both rulings. *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) ("*McGuire* II). This Court denied certiorari. 544 U.S. 974 (2005).

(b) Public Safety Was Still Threatened.

The Massachusetts Legislature revised the Act in November 2007 because "there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 165a; *see also id.* 97a, 135a-149a. The purpose of the 2007 revision was "to increase forthwith public safety at reproductive health care facilities." *Id.* 153a (quoting Mass. St. 2007, c. 155).

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature had learned that—despite the original Act—clinic access was still being physically blocked, patients were still being harassed as they tried to enter clinics, and the "approach" element of the floating buffer zone made it very hard for law enforcement officials to enforce the original Act. Pet. App. 137a-149a. It "heard testimony from RHCF staff, volunteers and law enforcement personnel regarding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways." *Id*. 139a.

Witnesses described how protesters regularly barred access to clinics by physically blocking doors and driveways, and screamed from close range and

from immediately next to doorways or driveway entrances at patients trying to enter clinics. Pet. App. 139a-144a. They testified that these confrontations "terrified" patients; that some patients "reported feeling too intimidated by the pacing protesters to enter the property, and turning back;" and that women trying to drive to a clinic would regularly turn away because protesters were blocking the driveway. Pet. App. 140a, 143a. Attorney General Coakley summarized the ongoing history of interference with clinic access, and explained why it constituted an important public safety problem. Pet. App. 137a-139a.

In addition, law enforcement representatives told the Legislature that: (i) it was very difficult to enforce the original Act because it was hard to determine whether a protester had "approached" someone else without their consent within the restricted area; and (ii) creating a fixed and clearly defined buffer zone around RHCF entrances was needed to ensure public safety. Pet. App. 144a-149a. Capt. Evans compared the 18-foot restricted area near clinic entrances to a "goalie's crease," where "everybody is in everybody's face," which "makes it very difficult" for the police to determine whether an unlawful "approach" had been made within the buffer zone. *Id*. 147a-148a. He explained that this made it very hard to keep patients safe immediately next to clinic entrances. *Id*. 148a.

(c) The 2007 Amendment.

In November 2007 the Legislature deleted the floating buffer zone provision of the original Act and replaced it with a new fixed buffer zone provision that makes it unlawful to "knowingly enter or remain on a

public way or sidewalk adjacent to [an RHCF] within a radius of 35 feet of any portion of an entrance, exit or driveway of [an RHCF]." Pet. App. 154a (quoting Mass. G.L. c. 266, § 120E1/2(b)).

In all other substantive respects the buffer zone provision of the Act remains identical to the version previously upheld in *McGuire I* and *McGuire II*. The Act continues to apply only during a clinic's business hours, and only if the buffer zone limits are "clearly marked and posted." Pet. App. 155a (quoting Mass. G.L. c. 266, § 120E1/2(c)). In addition, the same four categories of persons are exempt from the buffer zone restrictions. Pet. App. 154a.

(2) Factual and Procedural Background.

Petitioners filed this action in January 2008, claiming that the 2007 Act is unconstitutional on its face and as applied. Pet. App. 4a, 98a. Petitioners have not been arrested or threatened with arrest for violating the revised Act, and there is no indication in the record that anyone else has either. At Petitioners' request, the district court bifurcated trial of the facial challenge from trial of the as-applied challenge. *Id*. 98a-99a, 123a.

(a) Facial Challenge.

Petitioners' facial challenge was decided after a bench trial on an agreed-upon factual record. Pet. App. 30a-33a, 123a. In August 2008 the district court held that the 2007 Act is constitutional on its face, and denied Petitioners' request for injunctive relief. Pet. App. 121a-210a. Petitioners appealed this

interlocutory order under 28 U.S.C. § 1292(a)(1). *Id*. 99a.

The court of appeals held that the revised Act is constitutional on its face. Pet. App. 93a-120a. It found that the law is content neutral because it "was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech." *Id*. 102a. Petitioners had conceded before the district court that, in Petitioners' words, "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "[clear] out the bottleneck . . . immediately adjacent to" clinic doors and driveways, and that each of these goals is "a legitimate interest of the government." Pet. App. 178a. The court of appeals explained that the exemption that permitted clinic employees to enter the buffer zone to protect and assist patients is also content neutral because it "remains [in the amended Act] reasonably related to the legislature's legitimate public safety objectives." Pet. 106a.

The court "proceeded, therefore, with intermediate scrutiny," *id*. 107a, following the well-established standard that applies to "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur," *id*. 101a. Applying the next prong of this test, the court of appeals found that the law is narrowly tailored to serve a substantial governmental interest in enhancing public safety around RHCF entrances, without burdening substantially more speech than necessary. *Id*. 107a-110a. With respect to the third prong, the court held that the 2007 Act leaves open ample

alternative channels of communication, because it "places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone," and, on its face, the size of the zone was not unreasonable. *Id*. 110a-111a. Following the court of appeals' decision upholding the 2007 Act on its face, this Court denied review. 130 S.Ct. 1881 (2010).

(b) As-applied Challenge.

When the case returned to the district court, Petitioners again sought to challenge the Act on its face, which claim the district court found barred by the law of the case doctrine. Pet. App. 70a. The district court also dismissed Petitioners' as applied claim that the clinic employee exemption resulted in unconstitutional viewpoint discrimination, finding that Petitioners failed to allege any facts that would support the claim (for example, that "police knowingly let clinic employees engage in pro-choice advocacy within a buffer zone"). Pet. App. 86a. Petitioners also challenged the Act as applied at clinic locations in Boston, Worcester and Springfield. With respect to these claims, the court held that the only issue remaining to be decided was "whether the statute as applied at the clinics specified in the complaint leaves open adequate alternative channels of communication." Pet. App. 88a.[1]

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[1] The district court so limited the issues because the facts asserted by Petitioners with respect to content neutrality and narrow tailoring in support of their as-applied challenge "repeat in relevant part the same fact patterns envisioned in [the] adjudication of their failed facial challenge." Pet App. 21a.

The district court held a bench trial on Petitioners' as-applied claims. Pet. App. 32a. Again, the parties stipulated as to the factual record, which was gleaned from depositions of the parties and other discovery. Pet. App. 37a. After setting out its findings in detail, the district court concluded that Petitioners have ample opportunities to communicate with clinic patients outside the RCHF locations in Boston, Worcester and Springfield. Pet. App. 37a-66a.

At Planned Parenthood's Greater Boston Health Center, located on Commonwealth Avenue at the corner of Alcorn Street, all patients enter the clinic from the front sidewalk. "[Petitioners] and others who wish to communicate with clinic patrons may do so while standing: (1) on the wide sidewalk to the east of the Commonwealth Avenue entrance; (2) in the fairly narrow strip between the top of the buffer zone and Commonwealth Avenue; and (3) while standing on the sidewalk across Alcorn Street." Pet. App. 40a. When large numbers of protesters are expected, the Boston Police Department places barriers several feet into Commonwealth Avenue to provide additional space for those wishing to engage in communications aimed at clinic patients. *Id.* Petitioners testified that they regularly speak with clinic patients and hand out literature outside the Boston clinic. Eleanor McCullen, who engages in "sidewalk counseling" outside the clinic twice per week, estimates that after the revised buffer zone law went into effect (in the period November 2007 to May 2011), she was able to persuade eighty women not to have abortions. Pet. App. 7a, 42a.

Planned Parenthood's Central Massachusetts Health Center is located at 470 Pleasant Street in

Worcester, near the intersection with Dewey Street. Protesters there may communicate with clinic patients from a number of locations around the clinic, including: (1) along Pleasant Street on either side of the buffer zone; (2) directly across Pleasant Street from the clinic entrance; and (3) across narrow Dewey Street where cars turn into the clinic parking lot. Pet. App. 51a-57a. People standing in these locations can be seen and heard by clinic patients driving into the parking lot and approaching the clinic entrance. Pet. App. 56a-57a. At the Worcester clinic, petitioners Nancy Clark and Mark Bashour speak to Worcester clinic patients and distribute pamphlets. Pet. App. 53a. On some days Clark holds a sign that says "Face It, Abortion Kills", which patients and passersby notice and respond to "in both positive and negative ways." *Id.* Ms. Clark estimates that she has convinced four or five women to go to a nearby pro-life center, instead of into the clinic. *Id.*

Planned Parenthood's Western Massachusetts Health Center is located in Springfield, within a three-building medical complex at the corner of Main Street and Wason Avenue. Pet. App. 59a-60a, 218a. The complex is set back from both Main Street and Wason Avenue. *Id.* 60a. The entrances to two of the seven driveways leading into the private parking area for the complex have marked and posted buffer zones. *Id.* 8a-9a, 60a, 217a-218a. Petitioner Cyril Shea protests on the sidewalk outside the Springfield clinic wearing a large sign that reads "They're Killing Babies Here." *Id.* 61a-62a. People often react both positively and negatively to his sign. *Id.* 62a. Dr. Shea observes others counseling women outside the clinic and, on occasion, has been called over to offer his medical

perspective. *Id.* Based on this and other detailed evidence of Petitioners' activities the district court held that Petitioners have ample alternative avenues of communication at the three sites. Pet. App. 66a.

The court of appeals affirmed the district court's decision after remand. Pet. App. 1a-28a. The court first rejected Petitioners' effort to again challenge the Act on its face, finding its earlier decision the law of the case. Pet. App. 9a-14a. The court upheld the district court's ruling that Petitioners had failed to allege facts to support a claim that, by virtue of the clinic employee exemption, the Act, as applied, discriminated against their anti-abortion viewpoint. The court explained that (i) on its face, the exemption "does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others," and (ii) Petitioners had not alleged that improper behavior by clinic escorts – such as "using their exempt status . . . to advocate a particular point of view"– "has been sanctioned by the state." Pet. App. 15a, 17a.[2]

The court also held, on the extensive trial record, that Petitioners have adequate alternative avenues of communication at each of the three facilities. "The record makes plain that communicative activities flourish at all three places." Pet. App. 23a. All of the Petitioners actively engage in protest or sidewalk counseling at one of the three sites. *Id*. 6a. In addition, as the court summarized, "the plaintiffs and

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[2] Indeed, Petitioners did not report having even complained to police officers or state authorities about the behavior of clinic escorts in the buffer zone. Pet. App. 17a.

their placards are visible to their intended audience. Through their signs and demonstrations, the plaintiffs disseminate their message and elicit audience reactions. Their voices are audible. They have the option (which they sometimes have exercised) of using sound amplification equipment. [They also] congregate in groups outside a clinic, engage in spoken prayer, employ symbols (such as crucifixes and baby caskets), and wear evocative garments." Pet. App. 23a. Each petitioner "has an opportunity to reach her intended audience." Pet. App. 23a.

REASONS FOR DENYING THE PETITION

The decision below is consistent with the Court's well-established standard for evaluating the constitutionality of restrictions on the time or place for engaging in expressive activity in public fora, and does not raise any important but unresolved federal question. Nor does it conflict with decisions of other courts of appeals. There is, moreover, no reason for the Court to review the fact-bound question of whether Petitioners have adequate alternative avenues of communication at three dissimilar clinic locations.

The Court declined to review this case in 2010 after the court of appeals upheld the Act on its face. 130 S.Ct. 1881 (2010). The current petition is again focused, almost entirely, on the facial aspect of Petitioners' challenge. *See* Pet. 19-31. Because nothing has changed since 2010 to make the case any more deserving of review, the Court should again deny the petition.

I. The Decision Below Is Consistent with the Court's Prior Buffer Zone Cases.

The First Circuit's holding that the Act is constitutional on its face is consistent with *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Hill v. Colorado*, 530 U.S. 703 (2000). *Madsen* upheld an injunction barring protesters from public rights-of-way within thirty-six feet of the property line of a particular RHCF. *See* 512 U.S. at 768-70. *Schenck* upheld an injunction barring protesters from demonstrating within fifteen feet of entrances and driveways of any RHCF in the Western District of New York. 519 U.S. at 366 n.3, 374-76, 380-82.[3] *Hill* upheld a Colorado statute that made it unlawful, within 100 feet of health care facility entrances, to approach closer than eight feet of someone without their consent in order to pass a

[3] Though *Schenck* involved two different 15-foot buffer zones, Petitioners fail to distinguish them. *Cf.* Pet. 29. The Court upheld "the fixed buffer zones around the doorways, driveways, and driveway entrances," because they "are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Schenck*, 519 U.S. at 380-82. It struck down the "floating" portion of the injunction—which required all protesters to stay at least 15 feet away from any person or vehicle seeking access to or leaving a clinic, no matter where the person or vehicle was located—because "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" and thus created a "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 377-78.

leaflet, display a sign, or engage in oral protest, education, or counseling. 530 U.S. at 714-35.

The fixed buffer zone established by the 2007 Act is very similar to the buffer zones that were established by injunction and upheld in *Madsen* and *Schenck*. Since the buffer zone established by the revised Act (with a 35-foot radius around each clinic entrance or driveway) is substantially smaller than the one upheld in *Madsen* (with a 36-foot radius around the clinic's property line), and since the injunctions in *Madsen* and *Schenck* passed muster under a more stringent standard of review than applies here,[4] it was entirely consistent for the court of appeals to hold that the revised Act is constitutional on its face.[5]

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[4] If this case involved an injunction that restricts speech, rather than a statute of general application, the lower courts would have been required to apply "a somewhat more stringent application of general First Amendment principles" and determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765 (reviewing buffer zone injunction). But since the 2007 Act is a law of general application reflecting "a general policy choice" by the Massachusetts Legislature, the court of appeals correctly assessed the Act "under the constitutional standard set forth in *Ward* [*v. Rock Against Racism*, 491 U.S. 781, 791 (1989)], rather than a more strict standard." *Hill*, 530 U.S. at 731 (reviewing buffer zone statute). *See* Pet. App. 108a.

[5] The same is true of the Third Circuit's decision to uphold a similar buffer zone against constitutional challenge. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3d Cir. 2009) (upholding ordinance creating 15-foot buffer zone around entrances to hospitals and health care facilities).

Despite the obvious relevance of this precedent, Petitioners do not discuss *Madsen* and only cite *Schenck* with respect to the portion of the decision that struck down the floating buffer zone. Pet. 29. By ignoring these decisions affirming fixed buffer zones so similar to the 2007 Act, Petitioners tacitly concede there is no inconsistency between them and the decision of the court of appeals that would support certiorari review.

Consistent with *Hill*, the First Circuit ruled that the revised Act falls into the category of "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur." Pet. App. 5a, 101a. Thus, the court of appeals' application of the "intermediate scrutiny" standard that governs whether such regulations violate the Free Speech Clause is consistent with long standing precedent of this Court. *Hill*, 530 U.S. at 731. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The First Circuit correctly held that "[r]egulations of this type will be upheld as long as 'they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" Pet. App. 101a (quoting *Ward*, 491 U.S. at 791).

The Act "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." *Hill*, 530 U.S. at 731. Petitioners remain free to engage in any kind of speech (including close personal conversations) and to offer

any type of information they wish, so long as they do not do so within a clearly marked and posted buffer zone during clinic business hours. Pet. App. 37a-38a. As the district court found:

> [A]s long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.

Pet. App. 35a-36a; *accord id.* 110a-111a (court of appeals). Plainly, the Act does not "destroy [Petitioners'] ability to convey their particular message." *Cf.* Pet. 32.

Petitioners' disagreement with the decision below reduces to a contention that the court of appeals misapplied well-settled law addressing fixed buffer zones and time-place-manner restrictions. Because the court of appeals applied the correct and guiding standards of this Court, certiorari review is not warranted to consider Petitioners' claims of error in this case.

II. The Court of Appeals Correctly Applied This Court's Precedent in Holding that the Act is Content Neutral.

"Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *accord Hill*, 530 U.S. at 720; *Madsen*, 512 U.S. at 763. In this case, "[t]he Act is justified by 'conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services,' without *any* reference to content." Pet. App. 165a (emphasis in original) (quoting *McGuire I*, 260 F.3d at 44); *see also* Pet. App. 102a-105a.

Application to Clinics. Petitioners insist that, because the Act was narrowly tailored to apply only outside RHCFs, it is an "abortion-specific" restriction. Pet. 4, 26, 31. The mere fact that the statute in *Hill* applied to all medical facilities, while the Massachusetts statute applies only to RHCFs where abortions are offered or performed, does not mean that the court of appeals' decision "conflicts with *Hill's* content-neutrality analysis." Pet. 28. A legislature may ensure that a content-neutral time, place, or manner restriction is narrowly tailored by confining its application to "the place where the restriction is most needed." *Hill*, 530 U.S. at 730. That is what the Massachusetts Legislature did here.

The revised Act safeguards RHCF entrances and driveways because that is where protesters regularly

undermined public safety and threatened and intimidated patients and staff. Pet. App. 109a, 164a-165a. "[T]he [Legislature's] investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 165a. The legislative record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *Id*. 168a. But nothing in the record supports Petitioners' suggestion that the "same problem" exists at other health care facilities that are not covered by the Act. *Cf*. Pet. 28.

Petitioners' argument that the revised Act is too narrowly tailored echoes one rejected in *Hill*. There, the Court rejected an assertion that the Colorado statute was not content neutral because it protected only the entrances of medical facilities and did not apply more broadly, and held that a time, place, or manner regulation is not "unconstitutionally content based" merely because it applies to specific locations and not others. *Hill*, 530 U.S. at 724. For example, "[a] statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports . . . ." *Id*. Similarly, the Massachusetts statute is not content-based merely because it applies to RHCFs and not other medical facilities. Pet. App. 28a; *McGuire I*, 260 F.3d at 44.[6]

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[6] The Ninth Circuit reached the same conclusion in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) regarding a buffer zone ordinance that similarly applies only outside of RHCFs. Like the

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. Because the Act is content neutral on its face and serves content-neutral purposes, it is content neutral even if it was passed to solve problems created by "the conduct of the partisans on one side of a debate," *Hill*, 530 U.S. at 724-25. "The [Massachusetts] statute is not limited to those who oppose abortion. It applies . . . to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id*. at 725.

Exemption Permitting Clinic Employees to Protect Patient Safety. The Act permits clinic employees or agents to be present in the buffer zone if "acting within the scope of their employment." Pet. 220a. The legislative history of the original Act shows that "clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs," including protecting them from "physical altercations" with protesters. *McGuire I*, 260 F.3d at 46 (cited at Pet. App. 171a-172a). "As the record reflects, the same is true today." Pet. App. 172a. As a result, this exemption furthers the legislative goal of ensuring the safety of patients

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Massachusetts statute, the Oakland ordinance does not apply at medical facilities generally, or even at hospitals where reproductive health care services are provided. *Id*. at 845. *Hoye* rejected the argument that the ordinance is content-based on its face merely because it applies only to the specific locations where it is most needed. *Id.* (citing *Hill*, 530 U.S. at 719-25).

seeking access to RHCFs. Pet. App. 106a. *See Hill*, 530 U.S. at 719-720 (goal of protecting access to health care facility is content-neutral).[7]

The exemption for clinic employees acting within the scope of their employment does not "create[] zones in which speech facilitating abortion access is permitted while speech about alternatives is banned." *Cf*. Pet. 19. "On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone." Pet. App. 173a. *See* Pet. App. 15a. The Massachusetts Attorney General informed law enforcement personnel that this exemption only allows "clinic personnel to assist in protecting patients and ensuring their safe access to clinics," and does not allow them to engage in the sort of pro-choice speech that Petitioners say would destroy the Act's viewpoint neutrality. *Id*. 173a-174a. Thus, the exemption does not convert the statute into a viewpoint-based regulation of speech. Pet. App. 105a-107a; 168a-174a; *McGuire I*, 260 F.3d at 45-47; *McGuire II*, 386 F.3d at 52 & n.1, 64.

The court below properly took cognizance of the Attorney General's content-neutral interpretation of the exemption. Pet. App. 119a. *See Ward*, 491 U.S. at 795-96 ("[i]n evaluating a facial challenge to a state

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[7] In this way the clinic employee exemption serves the same neutral purposes as the exemption in subsection (b)(3) of the Act for police officers. *See* Pet. App. 154a. Petitioners do not challenge the police officer exemption as viewpoint-based.

law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered"), quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc*, 455 U.S. 489, 494 n.5 (1982). *Accord, Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 456 (2008). Petitioners, however, ask the Court to ignore the Attorney General's guidance and construe the exemption to invite, not avoid, constitutional difficulties. Pet. 19-21. The Court should not accept this case on Petitioners' terms, which urge an "unnecessary pronouncement" on a constitutional issue and deprive the State of the opportunity to "implement [the exemption] in a manner consistent with the Constitution." *Wash. State Grange,* 552 U.S. at 450-51 (citations omitted). *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (warnings against "premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law . . . not yet reviewed by the State's highest court").

The finding below that the clinic employee exemption is viewpoint neutral on its face does not conflict with *Hill*, where no similar issue was present. And it is consistent with *Madsen*, which held that an injunction that applied a buffer zone only against anti-abortion protesters, but not against clinic employees, agents, or anyone else, was not viewpoint based. 512 U.S. at 762-63. Nor does the petition otherwise present a question concerning content neutrality that merits review.

III. There Is No Conflict in the Circuits Concerning the Act's Content-Neutrality.

Petitioners incorrectly portray the decision below as in conflict with *Hoye v. City of Oakland,* 653 F.3d 835 (9th Cir. 2011). Pet. 4, 24-25. The cases do not conflict and, to the extent that their outcomes differ, it is only because the operative facts differ. Both courts upheld, against facial challenges, a buffer-zone law that applied only at freestanding reproductive health facilities. But *Hoye* granted relief because the City conceded it discriminated in favor of clinic escorts in enforcement of the law. Here, Petitioners failed even to allege a lack of evenhanded enforcement, so no as-applied violation was found. Pet. App. 16a.

Hoye involved an Oakland ordinance similar to the floating buffer zone statute at issue in *Hill*. The Ninth Circuit held that the ordinance is content-neutral and constitutional on its face because it applies equally to "pro-abortion and anti-abortion advocacy." 653 F.3d at 845-849. The Massachusetts statute similarly makes no distinction based on the content of speech. In particular, the statutory exemption for RHCF employees and agents "does not permit advocacy of any kind in the zone" and does not allow "escorts with pro-choice viewpoints to express their views in the zone." Pet. App. 173a. *Accord McGuire I*, 260 F.3d at 45-48. The "[employee] exemption does not purport to allow either advocacy by an exempt person or interference by an exempt person with the advocacy of others." Pet. App. 15a.

In *Hoye*, the court held that the Oakland ordinance was being applied in an unlawfully discriminatory

manner because local police were deliberately letting clinic employees or agents violate the law while barring pro-life protesters from doing so. 653 F.3d at 851-854. The city admitted that it consciously "enforces the ordinance in a content-discriminatory manner." *Id*. at 850. Here, in contrast, Petitioners "have not pleaded any facts that might suffice to ground a claim of uneven enforcement." Pet. App. 16a. There is no allegation that police were aware of and failed to act in the face of impermissible conduct by clinic employees or agents, or that the State has sanctioned conduct by employees or agents who abused their "exempt status . . . to advocate a particular point of view . . . ." Pet. App. 17a. The lower courts correctly held that *Hoye* is distinguishable on its facts. Pet. App. 16a-17a, 48a n.98.

Hoye itself explains that there is no conflict even though the First and Ninth Circuits take a "slightly different path" when considering a claim that a content-neutral law is being enforced in a discriminatory manner. 653 F.3d at 855. The First Circuit analyzes it as an "as applied" challenge to the law; the Ninth Circuit views it as a claim of "selective enforcement" under an equal protection analysis. *Id*. But "[a]ny difference between these two approaches is, at least in this case, semantic rather than substantive[,]" because under both "a plaintiff must show that a municipality's content discriminatory enforcement of an ordinance is the result of an intentional policy or practice." *Id*. (citing, *inter alia*, *McGuire II*, 386 F.3d at 63-64, and *Brown*, 586 F.3d at 292). In *Hoye*, that proof was "the City's own pronouncements," which "definitively articulate[d] a content discriminatory enforcement policy." *Id*. at 856.

"That policy is unconstitutional, no matter [which circuit's] analytical approach taken." *Id*.

The decision below is also consistent with the one other court of appeals decision addressing an "employee" exemption in a buffer zone ordinance. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3d Cir. 2009). *Brown* concerned a Pittsburgh ordinance that establishes a 15-foot buffer zone around entrances to hospitals and health care facilities. 586 F.3d at 266. The ordinance exempts "authorized security personnel employees or agents of the hospital, medical office, or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.* at 273-74. The City construed the exemption as only applying where clinic employees or agents are actually engaged in providing such assistance, but not as allowing an exempt person in the buffer zone to engage in "demonstrations or oral protest, education, or counseling with other individuals, including patients or other protesters." *Id*. at 274. The Third Circuit held that, especially with this construction, the provision is content-neutral. *Id*. at 274-75.

Thus, Petitioners do not identify any conflict in the lower courts concerning the Act's content-neutrality.

IV. That the Decision Below Addressed a Fixed (Rather than Floating) Buffer Zone Does Not Create a Conflict with *Hill v. Colorado*.

Petitioners and their *amici* have a heightened focus on this Court's decision in *Hill v. Colorado*. They argue (wrongly) that the decision below conflicts with *Hill* because the Massachusetts statute differs from the

Colorado statute upheld in that case. Pet. 7, 18, 22-23, 25-31. Review is not appropriate merely because the Massachusetts statute was revised to establish a fixed buffer zone very similar to the injunctions upheld in *Madsen* and *Schenck*, and to delete the floating buffer zone provision that had been modeled on the statute upheld in *Hill*.

A. *Hill* Does Not Foreclose a Fixed Buffer Zone Next to Clinic Entrances.

Petitioners incorrectly cite *Hill* for the proposition that the First Amendment bars any time, place, or manner regulation that has the effect of limiting communications with willing listeners. Pet. 5, 18, 27, 29-30. Because the Colorado statute, in certain circumstances, made it unlawful to approach within eight feet of another person without her consent, *Hill* addressed whether "the protection the statute provides for the unwilling listener" violated "the First Amendment rights of the speaker." *See* 530 U.S. at 708. The Massachusetts statute no longer has comparable restrictions on approaching listeners without their consent. But that difference from *Hill* does not raise a federal question that would warrant review.

The Court has repeatedly held that an appropriately tailored law may constitutionally bar protesters from approaching willing and unwilling listeners alike inside a fixed buffer zone, where there is ample opportunity to communicate from outside the zone. *See Schenck*, 519 U.S. at 374-76, 380-82 (15-foot buffer zone around RHCF entrances and driveways); *Madsen*, 512 U.S. at 768-70 (36-foot buffer zone around entire RHCF

property); *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (plurality upholding content-based statute that bars solicitation of votes and display of campaign materials within 100 feet of polling place); *id*. at 214-16 (Scalia, J., concurring on ground that statute was reasonable, viewpoint-neutral regulation of nonpublic forum).

The 2007 Act allows Petitioners to approach whomever they want, as closely as they want, and for any lawful purpose, so long as they do so outside the buffer zone. Pet. App. 38a, 110a-111a, 185a-186a. In addition, "[a]ny willing listener is at liberty to leave the zone, approach those outside it, and request more information." *Id*. 111a. That Petitioners and others may not enter the buffer zone – whether to approach willing or unwilling listeners – is a reasonable "place" restriction under *Ward*. It does not mean that the decision below conflicts with *Hill* or that it raises an important issue that would merit review.

B. *Hill* Does Not Establish an Absolute Right to Communicate From a "Normal Conversational Distance."

Nor did *Hill* recognize any absolute constitutional right to communicate from a "normal conversational distance" at all times or in all places within a public forum. Pet. 5, 7, 9, 29-31. It is true that *Hill* upheld Colorado's unusual 8-foot limit on unwelcome approaches within 100 feet of clinic entrances in part because it did not interfere with normal conversation. *Hill*, 530 U.S. at 726-27. But *Schenck*, *Madsen*, and *Burson* all upheld fixed buffer zones that had the effect

of limiting or precluding normal conversation within the zone.

That the Act may prevent Petitioners from engaging in close, personal conversations with clinic patients in the buffer zone does not undermine its validity. The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (upholding state fair rule barring sale or distribution of leaflets and literature, except from fixed location). The Court has long made clear that legislatures may enact content-neutral laws that restrict the time, place, or manner of speech in public fora in order to protect the public health, safety, or convenience. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). Such laws "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798).

Petitioners conceded below that "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to clear out "the bottleneck . . . immediately adjacent to the doors and to the driveways [of clinics]," and that these are both "legitimate interest[s]." Pet. App. 178a; *accord Hill*, 530 U.S. at 715. Because the Act protects only the clinic entrances and driveways where there was a history of physical obstruction, close-quarter confrontations, and other public safety problems, it does not burden substantially more speech than necessary. Pet. App. 108a-109a, 179a-181a. The fact

that the Act limits or forecloses Petitioners' ability to speak to prospective patients at a conversational distance while at the entrances to RHCFs does not implicate an issue that warrants this Court's review.

V. There is No Reason for this Court to Review the Fact-Bound Question of Whether Petitioners Have Adequate Alternative Channels of Communication at Three Dissimilar Clinic Sites.

Following a bench trial, the district court issued extensive, detailed findings upon which it concluded that the revised Act leaves open ample alternative channels of communication for Petitioners at clinics in Boston, Worcester and Springfield. Pet. App. 39a-66a. After reviewing that determination *de novo*, the court of appeals affirmed. Pet. App. 20a-26a. The petition does not identify an important federal question arising out of the court of appeals' fact-bound consideration of the adequacy of alternative avenues of communication at each clinic site.

A State's regulation of the time, place or manner of expression must "leave open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Such a law does not fail for lack of adequate alternatives if there are avenues for "the general dissemination of a message." *Frisby*, 487 U.S. at 483-84 (upholding ban on picketing before any particular residence where protesters could enter neighborhoods to "march," "go door-to-door," "distribute literature" in person or by mail, or "contact residents by telephone").

That a law "may reduce to some degree the potential audience for [Petitioners'] speech is of no consequence" if, as in this case, "there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 491 U.S. at 802.

On its face, the revised Act does not prohibit any manner of speech, and leaves open ample alternatives. *Cf.* Pet. 31. Petitioners and others may hold signs, pray, sing, or chant just outside of RHCFs, and may converse with or offer literature to persons approaching or leaving clinics. Pet. App. 110a-111a. They may engage in a full range of expressive activity that can be seen and heard by people approaching, and inside, the buffer zone. Pet. App. 110a-111a. Pet. App. 110a-111a.[8]

Moreover, the evidence demonstrates that Petitioners, in fact, do share their message with their intended audience—women seeking abortions—while standing outside the Boston, Worcester, and Springfield clinics.

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[8] Petitioners are mistaken when they argue that *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), shows that alternatives at the three sites are lacking. Pet. 34-35. *Gilleo* struck down a municipal ordinance that banned residential signs after considering "the peculiar characteristics of home-lawn signs and the 'special respect for individual liberty in the home.'" Pet. App. 25a (discussing *Gilleo*, 512 U.S. at 56-58). The Court contrasted this unique interest with "the government's need to mediate among various competing uses, including expressive ones, for public streets, which is constant and unavoidable." *Gilleo*, 512 U.S. at 58. The present case falls squarely in the latter context.

At the Boston clinic, petitioners McCullen and Cadin continue to succeed in convincing pregnant women that they meet outside the buffer zone not to have abortions. Pet. App. 41a-42a, 45a-46a. They and Ms. Zarella share their pro-life views through close personal contact and conversation, and by handing literature to, people approaching the clinic. Pet. App. 41a-46a. Other anti-abortion protesters and counselors communicate with clinic patients by displaying signs, calling out to passersby, engaging willing listeners in conversation, and participating in group prayer and demonstrations on the sidewalk near the clinic entrance. Pet. App. 41a-50a.

At the Worcester and Springfield clinics, the "main impediment to communicative activity" is not the application of the Act, but rather the "physical characteristics of the sites." Pet. App. 24a. Most patients at these clinics arrive by car and park in private lots with direct access, over non-public walkways, to the clinic entrance. *Id*. "That patients choose to stay on private property or not to stop their cars on approach is a matter of patient volition, not an invidious effect of the Act." *Id*. Even if there were no buffer zone, Petitioners would generally not have an opportunity to engage in close, personal conversations with patients who arrive at these clinics by car and park in private lots with direct clinic access.

Nonetheless, Petitioners Bashour and Clark can and do share their pro-life views at the Worcester clinic by offering conversation and literature, and clinic patients on clinic property can hear those offers. Pet. App. 52a-57a. Despite the buffer zone, Bashour and Clark have been able to convince women not to have an

abortion or to go to a nearby pro-life center. Pet. App. 52a-56a. Other anti-abortion protesters at the Worcester clinic communicate with patients from outside the two buffer zones by using signs, calling out to people entering or leaving the RHCF, engaging in group prayer and demonstrations, and even dressing as the "Grim Reaper." Pet. App. 52a-57a.

At the Springfield clinic, petitioner Shea walks on the sidewalk wearing a sign saying "They're Killing Babies Here," which people see and react to. Pet. App. 61a-62a. Other anti-abortion protesters also hold signs and offer literature from the sidewalk near the clinic's driveway. Pet. App. 62a-63a. Dr. Shea also testified that some people who park in the private lot walk out to the sidewalk to speak with or take literature from a pro-life counselor. Pet. App. 62a.

In sum, the evidence makes clear that Petitioners can and do share their message with RHCF patients at the clinics in Boston, Worcester and Springfield. The petition identifies no pressing federal question respecting the availability of adequate alternative avenues of communication; it merely asks the Court to reconsider fact-specific determinations by the lower courts involving these three sites. Accordingly, review is unwarranted.

VI. This Case is Not a Vehicle For Revisiting *Hill*.

The Court should also reject Petitioners' and *amici*'s invitations to take this case in order to revisit and overrule *Hill*. Pet. 26 and Brief of Richard W. Garnet, et al. as Amici Curiae 4-11. There is no reason to reconsider *Hill* and, in any event, this case does not provide a vehicle for doing so.

First, and foremost, there are important differences between the Massachusetts Act and the Colorado law reviewed in *Hill*. While the original Massachusetts Act was modeled on the *Hill* statute, the 2007 Act substitutes a 35-foot fixed buffer zone at the clinic entrances that excludes all non-exempt individuals, without regard to whether they are engaged in any kind of speech or communicative activity. The law reviewed in *Hill* created a 100-foot restricted area outside the entrances to all health care facilities; within this area a floating, 8-foot buffer zone protected individuals from unconsented approaches by others for the purposes of "protest, education, or counseling." 530 U.S. at 707-08. These differences would preclude meaningful reconsideration of *Hill* in the present case.

In particular, this case provides no opportunity to reconsider one of the main issues that divided the Court in *Hill*: whether the Colorado statute was content-based because it restricts certain kinds of communications ("protest, education or counseling") but not others. *See Hill*, 530 U.S. at 720-25 (majority), 742-749 (Scalia, J., dissenting, with Thomas, J.), and 765-770 (Kennedy, J., dissenting). The Massachusetts Act is a traditional time-place-manner regulation that

does not restrict any particular message or any mode of communication; it merely sets a small area near clinic entrances and driveways that non-exempt persons may not enter during business hours. Pet. App. 37a-38a.

Finally, it would make no sense to grant the petition in order to reconsider *Hill*, because the Massachusetts Act can, in any event, be upheld under the Court's fixed buffer zone cases, *Madsen* and *Schenck*, and time-place-manner cases, such as *Ward*. Petitioners do not question the vitality of these cases, which continue strongly to support the Act's validity. *See, e.g., Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) (citing *Madsen* as a situation where "the location of targeted picketing can be regulated" under content neutral provisions that "requir[e] a buffer zone between protesters and an abortion clinic entrance").

In sum, the Court should not reconsider *Hill* and, even if that were warranted, this case would not provide the opportunity.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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