No. 12-1168

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Petitioners' opening brief demonstrates that Massachusetts' 2007 Act is not a permissible regulation of the time, place, or manner of speech. It is not content-neutral, because it applies only outside abortion clinics. It is not even viewpoint-neutral, because it exempts clinic employees and agents. It is not narrowly tailored to prevent obstruction or violence, but indiscriminately criminalizes even peaceful, consensual, non-obstructive conversation and leafleting. And it does not preserve ample alternative channels for speech—particularly as applied to petitioners' calm, respectful, individualized offers of emotional and practical support, which cannot be effectively communicated by holding signs or using bullhorns from 35 or more feet away.

Massachusetts responds primarily by restating its uncontested interests in protecting public safety and preventing "the physical blocking of facility doors and driveways" (Br. 26), and then asserting that it "tried everything" but was unable to protect those interests in any less speech-restrictive way. *E.g.*, Resp. Br. 22. That assertion is neither facially plausible nor supported by the record. For example, despite regular police monitoring and video surveillance, respondents point to no evidence of even a single prosecution for nearly two decades under any of the myriad state and federal laws specifically prohibiting misconduct resulting in obstruction or interference with clinic access. Respondents protest that when areas become crowded, even peaceful speakers can block access. To the extent there is any evidence to support that concern, however, it is limited almost entirely to Saturday mornings at one clinic in Boston. Other evidence confirms that most facilities—including Boston—are usually uncrowded. Sporadic issues at one facility, which the State has *not* demonstrably sought to address with less-restrictive means, cannot justify banning speech (by non-clinic speakers) in 35-foot zones around every entrance to every abortion clinic all the time.

Recognizing that the Act at issue here goes too far scarcely leaves Massachusetts or other States powerless to protect their interests in safety and access. *Cf.* Resp. Br. 28. Indeed, government amici on both sides point to many alternative approaches that a decision for petitioners here would leave untouched. Petitioners maintain only that government measures affecting speech about abortion must be framed with the same neutrality and "precision of regulation" that is required in other contexts. *See, e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

I. THE RECORD DOES NOT SUPPORT RESPONDENTS' CLAIMS OF INTRACTABLE MISCONDUCT OR CROWDING PROBLEMS, EITHER GENERALLY OR AS APPLIED TO PETITIONERS

Respondents insist (Br. 41) that Massachusetts, facing a serious problem with obstruction and even violence at clinic entrances, "tried any number of solutions," and finally imposed broad exclusion zones only because every lesser measure "failed to keep facilities open and sidewalks safe." *See also, e.g.*, Br. 22-23. Indeed, they argue that areas near clinic entrances are routinely so "frenetic," "hectic," and "congested" that permitting even peaceful, consensual conversations or leafleting on public sidewalks within 35 feet of any clinic entrance or driveway would "inevitabl[y]" "impede patient access." Br. 21, 43, 47, 55. These claims cannot withstand scrutiny.

1. Respondents dedicate much of their brief to cataloguing an alleged history of misconduct around clinic entrances that was "widespread," "substantial," and involved "many protesters" in "many municipalities." Br. 45, 55. That alleged misconduct occurred at locations that are regularly monitored by police (JA 29-30, 67-68, 125, 188; *McCullen I* CAJA 86), clinic security (JA 105, 121), and video cameras (JA 68, 78, 105, 121). Respondents claim Massachusetts "tried everything" to address these problems, but "[n]othing worked" before the Act. Br. 41, 46. Yet, they cannot point to a single prosecution for obstruction, intimidation, harassment, violence, trespass, or violation of an

injunction outside an abortion clinic for at least seventeen years—long before the Act took effect.[1]

Respondents complain that laws directly targeting obstruction or violence (*see* Pet. Br. 36-38) are effectively unenforceable because of difficulties in determining intent or lack of consent. Resp. Br. 11, 47. It is, however, hardly novel or inappropriate to require the State to substantiate allegations of criminal misconduct with proof of guilty knowledge or intent. The United States has shown that it can effectively prove intent when enforcing its Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248.[2] And whatever problems of proof Massachusetts might encounter in marginal cases cannot explain its long-term failure to prosecute anyone at all for the sort of intractable misconduct it now suggests it faced.

Respondents' contention (Br. 45) that they could not use civil injunctions to address "widespread" mis-

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[1] The last injunction cited by respondents (Br. 42) dates to 1997. The record indicates the last "rescue"-style clinic blockade occurred in 1992. *McCullen I* CAJA 69.

[2] *See, e.g.*, DOJ, *National Task Force on Violence Against Health Care Providers: Overview*, *available at* http://www.justice.gov/crt/about/crm/faceweb.php (noting recent prosecutions and explaining that FACE "contains fairly straightforward offense language—requiring an intentional threat of force, use of force, obstruction or damage to property") (last visited Dec. 20, 2013); National Abortion Federation, *Abortion Facts: Freedom of Access to Clinic Entrances (FACE) Act*, *available at* http://www.prochoice.org/about_abortion/facts/face_act.html (reporting consensus that FACE "is an important tool in responding to clinic violence and in deterring possible offenders" and that "[b]etween the passage of FACE in 1994 and 2005, the [DOJ] has obtained the convictions of 71 individuals in 46 criminal prosecutions for violations of FACE") (last visited Dec. 20, 2013).

conduct involving "many protesters" is equally unpersuasive—especially in light of police testimony that officers "know all the regular players down there" and "know the regular protesters" (JA 69). Under those conditions, enjoining wrongdoers should be easy. Yet, respondents do not appear to have even tried to seek or enforce injunctions since the 1990s, when they prosecuted a few criminal contempt cases to enforce privately-obtained injunctions. *See, e.g.*, *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 550 N.E.2d 1361, 1364 n.5 (Mass. 1990) (upholding injunction against several groups and 69 individuals prohibiting, *inter alia*, "blocking, or in any way obstructing access").

Respondents cannot dismiss these laws targeting actual misconduct as too "blunt," or addressing only "blatant" violations. Br. 46. They prohibit, for example, making it "unreasonably difficult" to access clinics, 18 U.S.C. § 248(e)(4), or "hinder[ing]" or "imped[ing]" access, Mass. Gen. Laws ch. 266 § 120E½(e). They provide not only for criminal punishment, but for civil enforcement by federal or state prosecutors, clinics, or any person whose right to access has been "interfered with." *Id.* § 120E½(f). They are ample, varied, flexible tools—mostly awaiting respondents' first attempt to use them.

2. Respondents also argue (Br. 43, 46-49, 55) that they must impose complete exclusion zones around all abortion clinics because access and safety problems can arise from the cumulative effects of even peaceful, individually lawful and non-obstructive speech on public sidewalks. Even if such a situation is theoretically possible, it cannot justify the Act.

First, the Act is not tailored to address any issue of inadvertent obstruction. It applies at all abortion clinics at all times, obviously burdening substantially more speech than would be necessary to address any sporadic crowding issue. *Compare* N.Y. Br. 14-15 (collecting laws requiring crowds that have become obstructive to disperse when directed by police). Conversely, it does nothing to address such episodic sidewalk crowding anywhere other than in front of abortion clinics.

Second, virtually the only evidence of large crowds or hectic conditions that respondents can point to in an effort to support restricting peaceful, non-obstructive speech relates to one place and time: Saturday mornings in Boston. *See* Resp. Br. 6-12 (crowding evidence limited to Boston); JA 125 (police testimony that second Saturday of the month is the day of "largest protests" in Boston); JA 26-27, 49, 67-73, 95-96, 101, 122-124 (cited by respondents and only concerning Boston Saturdays).[3] Indeed, the record shows that police and clinics both treat that time and place as a special case. JA 88 (clinics tell patients allegedly deterred by speakers on Saturdays to come back during the week); *McCullen I* CAJA 86 (police presence doubled or tripled on second Saturday of each month); PPLM Br. 18 (facilities claim

[3] The legislative record contains a letter from NARAL noting that six out of ten clinics surveyed described abortion speakers as a "problem." JA 54. The letter does not indicate whether the alleged problems involved crowds or misconduct (or simply the message being conveyed). Notably, four of the clinics reported no problem at all. Respondents also refer (Br. 17) to a single occasion in Worcester when a large number of Catholics said the rosary "[w]hen [the] bishop showed up" (JA 228-229) and one gathering at the Boston clinic on Good Friday (JA 185-186). They do not suggest that these groups interfered with anything, even accidentally.

to use escorts "only at the Boston Facility, and only on Saturday mornings").

There is no comparable record of crowds of any size at any other clinic in the State, or at the Boston clinic at any other time. *See, e.g.*, JA 275-277 (respondents' investigator observed no such crowds); *McCullen II* CA-JA 516 (same).[4] On the contrary, petitioners are regularly alone or in small groups when they counsel and speak outside other clinics, or in Boston at other times.[5] McCullen's peaceful, consensual speech on an essentially empty Boston sidewalk on a Tuesday poses no threat to any state interest simply because there might have been a crowd there 72 hours earlier. Bashour's lonely counseling efforts in Worcester on a Saturday morning pose no such threat simply because there might be a crowd in Boston, 45 miles away. Yet, respondents ask this Court to accept as "narrowly tailored" a law that prohibits peaceful speech outside all Massachusetts abortion clinics, every day, during all business hours, based on an arguable "weekly scrum" (Resp. Br. 29) that arises, if at all, at one clinic, one time of the day, one day of the week.

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[4] Indeed, Boston is the only location described in the record that even has an entrance abutting a public sidewalk. JA 293, 295, 297. Worcester and Springfield are both set back on private property and thus essentially immune from the sidewalk-crowding problems alleged throughout respondents' brief.

[5] *See, e.g.*, JA 132 (McCullen: "My usual practice is to go to the [Boston] clinic on Tuesday and Wednesday mornings, from 7 a.m. to 11 a.m. Sometimes I sidewalk counsel by myself."); JA 247 (Bashour usually alone in Worcester after 10:00 am on any given day, and often alone on Saturdays); *McCullen II* CAJA 464 (Clark alone 90% of time).

Finally, respondents cannot cure the lack of tailoring by claiming that petitioners have said that without the Act they would stand and speak "*right in facility entrances*." Resp. Br. 55 (emphasis in original). Even a cursory glance at respondents' record citations shows that that assertion is simply false. *E.g.*, JA 252 (Bashour: "If the buffer zone was not in place, … I would stand on the Pleasant Street sidewalk directly in front of the main door…. *At that location, I would be about 50 feet from the main door*." (emphasis added)); JA 200 (Shea: "I never stood in the parking lot or next to the entrance of the building. I never stood in the driveway, either."); JA 135 (McCullen: "close to the entrance").

II. THE ACT IS NOT A PERMISSIBLE TIME, PLACE, AND MANNER REGULATION

A. Neutrality

Respondents argue that the Act "regulates only conduct" (Br. 26); that it is facially neutral (Br. 30 & n.17, 38); and that it applies only at abortion clinics because that is where there were safety and access problems, not because of a state position on abortion (Br. 27, 29-35).

1. As respondents acknowledge, the Act was framed for the very purpose of moving speech about abortion off the public sidewalks outside the entrances and driveways of abortion clinics. *E.g.*, Resp. Br. 6-12, 48-49; *see also* N.Y. Br. 8 (Act allows use of sidewalks only for "reasons unrelated to expressive activities"). Restrictions on where speech may occur are restrictions on speech. *See, e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 714-715 (2000); *United States* v. *Grace*, 461 U.S. 171, 176 (1983).

2. The Act singles out for regulation speech about one particular topic: abortion. Pet. Br. 23-27. While this is objectively true without any inquiry into legislative motivation, it is not an accident. Massachusetts sought to address what it saw as bad effects of "anti-abortion protests," but otherwise to "restrict as little speech as possible." Pet. App. 166a. A restriction of this kind, directed at and overwhelmingly affecting speech about one topic, cannot properly be subjected to reduced First Amendment scrutiny on the theory that it is "justified without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

Respondents seek support from cases upholding other "place"-related restrictions. Br. 30-31; *cf.* U.S. Br. 19-20. In *Burson* v. *Freeman*, 504 U.S. 191, 197-198 (1991) (plurality opinion), however, the plurality reasoned that a regulation targeting one type of speech was subject to strict scrutiny—which respondents do not claim the Act could pass. In *Hill*, the Court specifically relied on the fact that the law was drawn to apply outside all healthcare facilities, not just abortion clinics. 530 U.S. at 723-724, 731; Pet. Br. 23-24. None of respondents' cases considered restrictions applicable only to public-forum speech at specific locations where one particular often-protested activity occurs. *See, e.g.*, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643-645 & nn.4-5 (1981) (state fair attracting 1,400 exhibitors, including varied "charitable, religious, and other non-commercial organizations"); *Ward*, 491 U.S. at 784-786 (bandshell hosting diverse performances); *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (county courthouses).

Respondents argue that sidewalks near abortion clinic entrances could "conceivably" be used for speech

unrelated to abortion (Br. 30 n.17), and that the Act by its terms does not turn on "what [speakers] are saying" (Br. 38). Yet, despite repeated invocations of "20 years of experience" (Br. 21) and admonitions that "history matters" (U.S. Br. 18), respondents and their amici unsurprisingly point to no evidence, before the legislature or the courts, that speakers come to abortion clinics to discuss topics other than abortion.

Speech restrictions that are targeted in this way violate the central principle underlying the test of "content neutrality." Truly neutral time, place, and manner restrictions may safely be subjected to lesser judicial scrutiny "in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring and dissenting in part); *see also* Pet. Br. 22-23; *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Hill*, 530 U.S. at 731; Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. 413, 495-496 (1996) ("The breadth of [generally applicable] laws makes them poor vehicles for censorial design; they are instruments too blunt for effecting, or even reflecting, ideological disapproval.").

In sharp contrast, "[l]aws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." *Turner*, 512 U.S. at 676 (opinion of O'Connor, J.); *see also Hill*, 530 U.S. at 767 (Kennedy, J., dissenting) ("Clever content-based restrictions are no less offensive than censoring on the basis of content."). Thus, even "a facially general law that operates [in practice] to restrict only

speech of a particular kind ought to confront the strictest review." Kagan, 63 U. Chi. L. Rev. at 517 n.238. A law that applies only outside abortion clinics lacks the generality upon which the time, place, and manner doctrine rests.

Respondents argue (Br. 27) that a speech regulation is "content neutral" so long as it serves a purpose unrelated to disagreement with particular speech. That overstates the point. Many content-based laws also serve some non-censorial purpose. *See, e.g.*, *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972). A law banning all antiwar rallies would serve interests in crowd control and avoiding litter. The question is whether a law's service of those ends is truly independent of the content and viewpoint of the affected speech. *See, e.g.*, *United States* v. *Eichman*, 496 U.S. 310, 315-318 (1990) (facially neutral prohibition on flag destruction was content-based because asserted state interest was only threatened by burnings with particular message); *see also Hill*, 530 U.S. at 746-747 (Scalia, J., dissenting). Here, the Act is based on legislative conclusions or assumptions about the likely behavior of *speakers about abortion*. *See, e.g.*, Resp. Br. 10-12 (citing evidence about conduct of speakers on both sides of abortion issue). Such a law may be *viewpoint*-neutral (although this one is not), but it is not *content*-neutral.[6]

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[6] Moreover, the content-based assumption underlying the State's use of purported crowding problems at one location to justify a statewide Act—that speech about abortion would be obstructive and dangerous at any clinic location—is something this Court has disapproved before. "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Mosley*, 408 U.S. at 100-101; *see also Boos* v. *Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., con-

Finally, respondents complain that Massachusetts should not be required to address "'problems that do not exist'" or to be "overinclusive to be content neutral." Br. 30, 31. In the passage the State quotes, however, the *Burson* plurality explained that if a State decides to address what it perceives as an isolated problem by "distinguishing among types of speech," then its approach will be "subjected to strict scrutiny." 504 U.S. at 207. Likewise, when the State addresses a perceived issue in a way that burdens speech, it is not "overinclusive" to treat all speakers and all topics the same way. If the State wants its law to receive less-than-strict scrutiny, the question is not whether "the coverage of a statute is broader than the specific concern that led to its enactment," but whether the legislature has truly made a "general policy choice." *Hill*, 530 U.S. at 730-731. A law that created no-standing zones around the entrances to any building might pass that test. An Act that applies only outside abortion clinics does not.

3. The Act is also not viewpoint-neutral, because of its employee exemption. Pet. Br. 27-32. Respondents struggle to portray the exemption entirely in terms of "conduct" (Br. 35-39), but they nowhere refute petitioners' simple point (Pet. Br. 33-34) that any clinic agent prosecuted for speaking in the buffer zone within the scope of his or her employment (so, the speech would have to express a clinic viewpoint) would have a categorical statutory defense. Moreover, even if there

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curring) ("Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech [citing *Mosley*], requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects.").

were some basis for respondents' suggested "conduct-oriented" limitations (Resp. Br. 38), that would not cure the problem. The State may not allow clinic agents to use a public forum to "help patients access [an abortion] facility" (*id.*) while forbidding petitioners from using the same area to offer alternative help. "[D]istinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction." *Hoye* v. *City of Oakland*, 653 F.3d 835, 851 (9th Cir. 2011).[7]

B. Narrow Tailoring And Overbreadth

1. In defending the Act in this Court, respondents conspicuously ignore or seek to distinguish *Hill*—despite the court of appeals' heavy reliance on that decision in upholding the Act. *See* Pet. Br. 5-6, 18-19. In particular, respondents make no effort to address *Hill*'s extensive discussion of how a statute may be narrowly tailored to serve interests in access and safety. *Hill*, 530 U.S. at 726-730. The omission is telling because, as petitioners have explained, *Hill* sustained Colorado's law only because it carefully protected (1) speech with willing listeners, (2) leafleting, and (3) communicating from a "normal conversational distance." *Id.* at 712. The Act lacks all of those safeguards. Pet. Br. 39-44.

Respondents try to suggest (Br. 57-58) that the Act is "narrower" (and thus less problematic) than the law in *Hill*, restricting "only" entering or remaining to

[7] Respondents cannot salvage the Act by inviting severance of the employee exemption. Br. 39-40. They offer no authority for the proposition that courts could properly strike an exemption from a criminal statute, authorizing punishment for conduct the legislature expressly exempted from criminal sanctions.

speak, rather than restricting unwelcome approaches or seeking to shield unwilling listeners. That is backwards. Restricting *more* speech, including *consensual* speech, is not a virtue. *See Hill*, 530 U.S. at 726-730; *id.* at 738 (Souter, J., concurring) ("The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching.").

The logic of respondents' position—that prohibiting all speech ought to be treated as *more* tailored than prohibiting only a subset of unwanted approaches—would invite future legislative efforts to curtail peaceful speech on public sidewalks, potentially on a diverse array of topics of public concern. *See, e.g.*, AFL-CIO Br. 1, 5-6 (labor relations). As the ACLU put the point before its views "evolved" in this Court (ACLU Br. 11 n.5), the Act "is not a restriction which is 'narrowly tailored' in any meaningful sense and, as a result, could provide a legal justification for future restrictions on the speech and assembly rights of groups such as trade unions, anti-war and environmental activists, and others." JA 66.

Nor is the Act narrowly tailored to the State's asserted interest in protecting public safety or minimizing congestion merely because, as respondents imply, it has eliminated crowds where prior measures did not. *See, e.g.*, Resp. Br. 22, 41, 43, 47. As discussed above (at 6-7), the historical premise of that claim is at best overstated. But even if there were a record of persistent, obstructive crowding at all clinics, a statute is only narrowly tailored "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). Respondents repeatedly identify that evil as undue crowding in the

area "immediately adjacent" to clinic entrances. Br. i, 1, 3, 11, 12, 14, 15, 21, 30, 35, 43, 45, 49, 50. A 35-foot no-speech zone is manifestly not narrowly tailored to address that concern.

Moreover, rather than proscribing obstructive or unsafe conduct, the Act proceeds (and the State defends it) on the premise that it is better to ban "all [speakers]—the law-abiding and the law-breaking." Resp. Br. 49. That conscious forsaking of any effort to distinguish between peaceful speech that many potential listeners would welcome (*see* JA 132-133, 269-271, 284-286) and misconduct that could be "an appropriately targeted evil" (*Frisby*, 487 U.S. at 485-486) is the antithesis of narrow tailoring. A law that criminalizes even a quiet offer of information to a consenting adult on a public sidewalk—at any abortion clinic, every day, regardless of circumstances—is not narrowly tailored.

2. For the same reasons that it is not narrowly tailored, the Act is also impermissibly overbroad. Restricting all speech at every abortion clinic is precisely the sort of approach this Court has historically condemned on that basis. *See, e.g., Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940) (invalidating anti-picketing law which "does not aim specifically at serious encroachments").

Respondents argue that petitioners' overbreadth challenge rests on a "misreading of the Act," which "does not prohibit expressive activity at all." Br. 55, 56. "[P]eople who are properly crossing through the zone," the State now maintains, "*can* engage in communicative activity as long as they keep moving." Br 56 (emphasis in original).

The premise that there is no prohibition of expression is hard to take seriously. Indeed, even respond-

ents cannot keep the point straight. In trying to recast the statute, and the Attorney General's contemporaneous "guidance" letter, as about "conduct," they argue that the letter "used the … phrase—'partisan speech'—to convey … a limitation on facility employee conduct," and that its references to "counter-protests, counter-education, or counter-counseling" were likewise about "conduct," not speech. Resp. Br. 15 n.10. But when they turn to arguing that "this case is not *Hill v. Colorado*," they cite Colorado's use of the same terms—"*i.e.*, 'protest,' 'education,' and 'counseling'"—in arguing that the law at issue there "expressly restricted speech." Br. 23. Respondents cannot have it both ways.

In any event, petitioners' "misreading" of the Act was also *the State's* reading until its most recent brief, proffered by the Attorney General in formal guidance to law enforcement and defended by respondents in the courts below. *See, e.g.*, JA 93-94; Pet. App. 173a; Pet. Br. 33 n.8. That may be why it is also advanced by respondents' amicus, the United States. U.S. Br. 20 (the Act "does not permit political discussion or expression of personal views inside a buffer zone by anyone"). Regardless, under either interpretation, as to the vast majority of speakers not covered by an exemption, the Act clearly "create[s] a virtual 'First Amendment Free Zone'" on public sidewalks near abortion clinics. *Board of Airport Comm'rs of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). As this Court has made clear, even in a *non*-public forum, "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

C. Ample Alternative Channels

Finally, respondents' approach to the "ample alternative channels" inquiry under *Ward* (Br. 49-55) would

effectively replace "ample" with "any." Indeed, in the State's view the remaining channels are "more than ample" simply because "[p]etitioners can still be seen and heard" from inside the exclusion zone, and the Act "certainly does not prevent petitioners and other advocates from protesting." Br. 51.

Whether the Act leaves excluded persons any opportunity to speak somewhere near the clinics is not the relevant question. *See Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). The State must show that remaining channels provide a "practical substitute" for the extinguished one, and permit speakers to reach their audience "nearly as well." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 57 (1994). Shouting and holding large signs readable from 35 feet or more away are not adequate alternatives for face-to-face conversations at normal distance, or for offering handbills or leaflets near the hands of passers-by. Pet. Br. 11-16.

The inadequacy of the channels left open by the Act is confirmed by the evidence of petitioners' experiences, especially in Worcester and Springfield. Pet. Br. 49-52. Respondents point to occasional instances in which petitioners were able to communicate with willing listeners at these locations (Resp. Br. 52-53), but the record demonstrates that such occasions have become rare under the Act. Pet. Br. 15-16; JA 200, 217-218, 224, 250, 255-256.

Respondents attempt to dismiss these difficulties as a product of facility layouts and the fact that most visitors enter the Worcester and Springfield facilities by car. Br. 52-54. But it is the Act that prevents peti-

tioners and other speakers from stationary speech on public sidewalks within 35 feet of clinic driveways—making leafleting, for example, virtually impossible. The State's response—that "certain time-honored forms of protest, such as leafleting, are just not compatible with modern vehicular traffic" (Br. 54)—is startlingly broad. And it does not explain why, in that case, respondents have chosen to ban such allegedly anachronistic and dangerous speech near the driveways to abortion clinics, but nowhere else.

III. Having Abandoned *Hill*, Respondents Have Found No Better Support Elsewhere

Unable or unwilling to address *Hill*—the only public forum case in which this Court has used the *Ward* test to uphold a law even remotely like the Act—respondents and their amici seek to rely instead on an assortment of cases that are easily distinguishable and, to the extent they are relevant, serve mostly to demonstrate the "precision of regulation" that is absent in the Act.

1. Respondents' reliance on *Madsen* and *Schenck* is misplaced. Both involved injunctions—precisely the type of misconduct-based, individually-tailored remedy that respondents claim to be impossible here. In each, this Court relied on a proven history of misconduct by the enjoined parties. *See, e.g.*, *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 381-382 (1997). "An injunction, by its very nature, applies only to a particular group (or individuals)" and does so "because of the group's past actions in the context of a specific dispute between real parties." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (contrasting injunction with "a statute addressed to the general public"). On an appropriate record, a court may enjoin particular

past law-breakers from continuing to obstruct access to particular places; but it cannot be assumed that every valid order against prior law-breakers can be extended by statute to law-abiding citizens. The State may not restrict speech based on assumptions about whole categories of speakers, or extrapolations from the proven misconduct of a few to the expected conduct of all. *Mosley*, 408 U.S. at 101.

Respondents and their amici also rely on cases involving speech regulations *outside* public forums. *See, e.g.*, *United States* v. *Kokinda*, 497 U.S. 720, 727-730 (1990) (plurality opinion) (sidewalk on postal service property); *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 680 (1992) (airport terminals); *Heffron*, 452 U.S. at 655 (state fairgrounds, "a limited public forum"). Under this Court's precedents, governments justifiably have more leeway to regulate expressive conduct outside the traditional public forum. *See, e.g., Kokinda*, 497 U.S. at 730 (regulation in non-public forum need only be "reasonable" and not viewpoint-based). Notably, however, even the regulations at issue in respondents' non-public-forum cases demonstrate far more tailoring, and allowed for far more speech, than does the Act. *See, e.g.*, *id.* (solicitation of in-person gifts banned, but speakers were "permitted to leaflet, speak, and picket"); *Heffron*, 452 U.S. at 655 (transitory leafleting during state fair prohibited, but speakers could "mingle with the crowd and orally propagate their views").

Finally, respondents seek support in cases upholding laws that prohibit only actual misconduct, without broadly prohibiting peaceful, consensual speech or leafleting. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 330 (1988) (dispersal law applied only when "police reasonably believe that a threat to the security or peace of the em-

bassy is present," not to peaceful demonstrations); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (prohibiting "making of any noise or diversion which disturbs … the peace or good order of such school"); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968) (prohibiting "'picketing … in such a manner as to obstruct or unreasonably interfere with free ingress or egress'"); *Adderley* v. *Florida*, 385 U.S. 39, 40 (1966) (trespass statute); *Cox*, 379 U.S. at 560 (prohibiting picketing with intent to interfere with or obstruct court administration). Such laws are narrowly tailored precisely because they target no more than a perceived evil that the government permissibly seeks to redress. *See, e.g.*, *Boos*, 485 U.S. at 331-332 (focus on violent demonstrations "prevent[s] the congregation clause from reaching a substantial amount of constitutionally protected conduct and make[s] the clause consistent with the First Amendment"); *Grayned*, 408 U.S. at 119 ("Far from having an impermissibly broad prophylactic ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities." (footnote omitted)). The same cannot be said of the Act.

Respondents can point to just one case from this Court sustaining a statutory restriction on public forum speech: the plurality decision in *Burson* v. *Freeman*. Notably, the electioneering restriction in *Burson* applied equally to all polling places (not, for example, just those with particular issues on the ballot), and to all speakers. *See* 504 U.S. at 193-194. Nevertheless, the plurality upheld the statute only after subjecting it to strict scrutiny. *Id.* at 197-198, 207. It concluded that a prophylactic no-electioneering zone was "[t]he only way to preserve the secrecy of the ballot"; every state had adopted the same approach; and law enforcement officers were "barred from the vicinity of the polls," making

it likely that misconduct prohibited by other laws "would go undetected." *Id.* at 207-208.

Burson cannot support the Act. First, respondents have staked their case on surviving the limited scrutiny accorded to content-neutral time, place, and manner restrictions; they make no claim that the Act could pass strict scrutiny. *See* Pet. Br. 52-53 (unrebutted argument that the Act fails strict scrutiny). Second, here, unlike in *Burson*, there is no long or widespread history of similar laws in other States, and no inability to use monitoring by police, clinic security, and video cameras to identify and remedy violations of less speech-restrictive laws. *See supra* pp. 3-5. And third, *Burson*'s fifth vote was provided by Justice Scalia, on the different theory that the relevant sidewalks were *not* a public forum. 504 U.S. at 215 (Scalia, J., concurring in the judgment).

2. Several of respondents' amici write in support of alternative laws that not only would not be endangered by a decision striking down the Act, but help to illustrate the Act's lack of tailoring. For example, the United States cites the federal Freedom of Access to Clinic Entrances Act. U.S. Br. 1-2. That law, widely lauded for its effectiveness in enhancing order and safety at clinics, prohibits only problematic conduct, such as obstruction and intimidation. *See* 18 U.S.C. § 248. Similarly, the federal military funeral protest law (U.S. Br. 19) focuses on "disruption," "disturbing the peace," or "impeding access." *See* 18 U.S.C. § 1388; *see also* Michigan Br. 6-8 (distinguishing funeral buffer-zone laws).

Amicus New York writes in support of a state law that prohibits only threats of violence, use of force, or knowing obstruction of pedestrian access. N.Y. Br. 15. It usefully describes the experience of New York City,

which, when it decided that it needed more stringent protections, additionally prohibited "following and harassing" an unwilling listener within a 15-foot buffer zone—without restricting peaceful, consensual speech. N.Y. Br. 16. These laws illustrate some of the many ways to address problematic conduct with the "precision of regulation" the Constitution requires. Set against these far narrower and more carefully tailored alternatives, Massachusetts' fixed, 35-foot exclusion zone outside of all clinic entrances becomes even more difficult to defend.

* * *

Massachusetts' 2007 Act contains none of the careful safeguards this Court relied on in *Hill*. Indeed, the State has now disclaimed (Br. 58) any interest in protecting unwilling listeners from unwanted speech or "approaches" on the public sidewalks and driveways near abortion clinics. If this Court reviews the Act in light of *Hill*, the Act must surely be struck down.

As petitioners have suggested, however, the Court might also wish to take this opportunity to revisit *Hill*. *See* Pet. Br. 53-56. Notwithstanding respondents' protestations to the contrary (Br. 57-58), it was *Hill* that led the court of appeals to uphold the Act. *See*, *e.g.*, Pet. Br. 5-6, 16-17. As petitioners have explained (Br. 53), if any plausible reading of *Hill* might suggest that result, the decision should be substantially clarified, narrowed, or overruled. Moreover, *Hill* has also led to a number of other legislative efforts and judicial decisions in deep tension with the First Amendment's normally robust protection of peaceful speech in the public forum. Pet. Br. 55-56. Given the confusion and error it has caused in this and other cases, the decision may be ripe for reconsideration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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