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

## REPLY BRIEF FOR PETITIONERS


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A Massachusetts criminal statute establishes different rules for different speakers on public sidewalks near abortion clinics. Petitioners, who wish to offer women alternatives to abortion, may not enter parts of public sidewalks to speak—no matter how peaceful, respectful, or consensual the speech. The State will let them walk silently past the abortion clinic to go elsewhere, but threatens prison if they so much as utter "May I help you?" while they walk. Employees and agents from abortion clinics, however, are expressly authorized to enter and speak on the same sidewalks, so long as they are conveying the abortion clinics' message.

This case presents the simple question: can Massachusetts constitutionally impose this type of selective prohibition on petitioners' peaceful speech with willing listeners in the public forum?

Both the State and the lower courts have defended this differential treatment as neutral and unproblematic under this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000). But the Massachusetts statute is not neutral and goes far beyond *Hill*. Indeed, the Ninth Circuit rejected an indistinguishable government preference for abortion-clinic speakers as "indubitably content-based" and the "epitome" of a content-based restriction. *See Hoye* v. *City of Oakland*, 653 F.3d 835, 851-852 (9th Cir. 2011).

Respondents' brief in opposition argues that this Court should deny review because (a) the Massachusetts employee exemption is statutory, rather than an enforcement policy as in *Hoye*, Opp. 1, 23-25; (b) respondents say they have "interpreted" the statute to make it neutral, claiming authority to prosecute abortion-clinic agents who speak on certain topics, Opp. 21-22; *see* Pet. App. 119a (interpreting statute to prohibit

clinic speakers from "express[ing] their views about abortion or … engag[ing] in any other partisan speech within the buffer zone"); and (c) a fixed buffer zone statute should be analyzed under injunction precedents like *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network*, 519 U.S. 357 (1997), rather than *Hill*, Opp. 1, 14-16, 26-28, 34.

These arguments fail. First, whether a State's favoritism for abortion-clinic speakers is spelled-out in statutory text (as here) or adopted as an enforcement policy (as in *Hoye*) is a distinction without a difference. The circuit conflict is over whether the favoritism itself is permissible under the First Amendment. Second, respondents cannot fix the statute's discriminatory treatment by pretending that they have the authority to prosecute speakers the statute expressly exempts. Third, the Massachusetts statute must be measured by the standard established in *Hill*, not by the specialized standards that *Madsen* and *Schenck* establish for injunctions against specific, repeat law-breakers.

Respondents' claim that "nothing has changed to make the case more deserving of review" since 2010, Opp. 13, is incorrect. In 2010, respondents argued that review was premature because the petition was interlocutory and there was no factual record "regarding the actual effects of the revised Act." No. 09-592 Opp. 34-35. Moreover, the Ninth Circuit had not yet rendered its decision in *Hoye*. All of these concerns have been resolved, and the case is now fully ready for review.

Ultimately, the opposition confirms why this Court should grant review. For more than a decade, Massachusetts and other jurisdictions have used this Court's cases as a purported license to create special speech rules near abortion clinics, criminalizing peaceful speech

with willing listeners on public sidewalks. They have done so selectively, based on impermissible government judgments about whose message is more welcome or more valuable. This Court should grant *certiorari* to resolve the conflict that now exists and make clear that *Hill* does not allow what Massachusetts has done.

## I. THE CONFLICT WITH *HOYE* WARRANTS REVIEW

Respondent denies a conflict with *Hoye* by claiming that (a) *Hoye* involved an enforcement policy, not a statutory exemption; (b) the Massachusetts exemption does not allow pro-choice speech; and (c) respondents have interpreted away any facial problem with the statute. Opp. 1, 21-23. These arguments are unavailing.

### A. The Discrimination In *Hoye* Is Indistinguishable From The Discrimination In *McCullen*

The State argues that *Hoye* struck down a discriminatory enforcement policy, rather than a law that discriminates on its face. Opp. 23-25. But Oakland's enforcement policy matches precisely the statutory distinction the State defends here: abortion-clinic speakers are able to move and speak freely on clinic business, while others can be imprisoned for offering an alternative message on the same public sidewalk.

Indeed, when the district court in *Hoye* upheld Oakland's discriminatory policy, it did so based on the First Circuit's analysis *in this case*. *Hoye* v. *City of Oakland*, 642 F. Supp. 2d 1029, 1038 (N.D. Cal. 2009). The Ninth Circuit's reversal of that approach as the "epitome" of a content-based distinction had nothing to do with the particular *source* of the discrimination (text or enforcement policy), and everything do to with the simple principle

that the government is not permitted to favor some private speakers over others on public sidewalks. *Hoye*, 653 F.3d at 851-852 (preference for access-facilitating speech violates *Hill*). As the Ninth Circuit explained:

> To distinguish between speech facilitating access and speech that discourages access is necessarily to distinguish on the basis of substantive content. Asking a woman "May I help you into the clinic?" facilitates access; "May I talk to you about alternatives to abortion?" discourages it.

*Id.* (holding distinction "indubitably content-based"). The First Circuit found the same discrimination constitutionally unproblematic. Pet. App. 172a.

Furthermore, the effects of this discrimination are as real in Massachusetts as they were in Oakland. While petitioners are occasionally able to reach some listeners with speech outside the zones, undisputed facts show that petitioners' ability to help women is severely curtailed by forcing them to stand outside the State's painted lines. Pet. 12-14. At the same time, abortion-clinic speakers use their statutory advantage to offer the clinics' message and discourage women from listening to petitioners. *See* Pet. 15 (*e.g.*, "don't listen to her"); C.A. Joint Appendix 241 (documenting statements by abortion-clinic speakers in buffer zones: "abortion is legal," "it's important for women to have a choice," "we have help," or "we'll help you get inside"). Respondents do not mention (let alone dispute) this evidence.[1]

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[1] Respondents' argument that petitioners should have called the police to report abortion-clinic speakers using the statutory exemption, Opp. 12 n.2, makes no sense. How and why would anyone report *legally protected* behavior to the police? *See infra* Part I.C.

This is precisely the type of favoritism correctly rejected as "indubitably content-based" in *Hoye*. The State may neither strip petitioners of their equal right to speak on the public sidewalk, nor substitute its own preferences for the right of women to determine for themselves what speech and speakers are worthy of consideration. *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("It is now well-settled that the Constitution protects the right to receive information and ideas."). Such interference with the marketplace of ideas cannot be reconciled with *Hoye*, or with a proper understanding of this Court's precedents.

### B. The Exemption Allows Abortion-Clinic Speech In The Zones

The State's effort to avoid this conflict by claiming the exemption does not permit employee speech is equally unconvincing. The statutory exemption is comprehensive: employees and agents acting for the clinic are exempt from the law for all purposes, and there is no basis for arguing that this does not include speech. *See* Mass. Gen. Laws c. 266, § 120E ½(b)(2) (Pet. App. 219a-221a). The sole limitation in the exemption—that employees or agents must be acting "within the scope of their employment" for an abortion clinic—serves only to ensure that their speech will present the clinic's point of view. For clinic agents on their employer's business, the public sidewalk outside the clinic is like any other in the nation: a place "historically associated with the free exercise of expressive activities" and therefore "considered, without more, to be [a] public forum." *United States* v. *Grace*, 461 U.S. 171, 177 (1983) (internal citations omitted). The exemption thus permits abortion clinic representatives to speak with impunity, while pe-

titioners would face prison for peacefully offering alternative choices on the same public sidewalk.

Moreover, respondents' current contention that the statute is a content-neutral time, place, and manner restriction is belied by the fact that respondents have long defended the exemption—which first appeared in the 2000 statute that was the subject of the *McGuire* cases—as a permissible "distinction[] based on the *speaker*." *See McGuire* v. *Reilly*, Reply Brief of Defendants-Appellants, *available at* 2001 WL 36026241, at *9 (arguing, before this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310, 340-341 (2010), that this Court had allowed "distinctions based on the *speaker*" where "the distinction is made for reasons other than the content of the *speaker's speech*" (emphasis added)). The speaker exemption was also justified below based on government predictions about how clinic speakers would use their speech rights, and what speech listeners would welcome. *See, e.g.*, Pet. App. 172a (legislature "could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners"); Pet. App. 169a, 170a-171a (legislature likely exempted clinic speakers "in order to make crystal clear what was already implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution").

### C. The Exemption Cannot Be Interpreted Away

Finally, respondents cannot fix the Act by resurrecting their litigation-driven "interpretation" of the employee exemption. They claim the law is neutral because the Attorney General issued "guidance" purporting to limit the permissible topics for clinic speech. Opp. 21; Pet. App. 119a (clinic speakers may not express "views about

abortion" or other "partisan speech"). This argument implicitly acknowledges, but cannot cure, the statute's obvious constitutional infirmity.

The proposed "interpretation" is plainly unenforceable. The government could never indict or convict a clinic speaker for talking about disfavored topics in violation of the Attorney General's guidance. The speaker has been given a complete defense both by the legislature (in the form of an unambiguous statutory exemption) and by the First Amendment (which forbids such patently content-based regulations of speech). Indeed, respondents themselves told the First Circuit there was no evidence "that any police department or official enforced the Act any differently because of the January 2008 guidance letter." Appellee C.A. Br. 42. This makes sense: while a prosecutor may at times offer a *narrowing* interpretation of a law in an attempt to preserve its constitutionality, respondents here assert an ability to *broaden* the scope of a criminal prohibition. Prosecutorial discretion does not include the power to prosecute people whom the legislature protected from liability. *Cf.* Pet. App. 169a, 170a-171a (legislature likely exempted clinic speakers "in order to make crystal clear what was already implicit in the Act: that those who work to secure peaceful access to [clinics] need not fear prosecution").[2]

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[2] Even on its own terms, respondents' "interpretation" is hopelessly overbroad and content-based, as it purports to regulate even the content of speech of people legally walking through the zones to go elsewhere. In oral argument below, for example, they conceded that on their view it could be unlawful to wear a Cleveland Indians shirt while walking through the zone. *See* 2009 WL 1346643, at *9 (admitting an Indians fan could "possibly" be arrested for wearing the shirt). The trial court found, with more certainty, that the Act and interpretation "clearly" prohibit the wear-

The only possible reason the State would resort to such an obviously unenforceable "interpretation" is to try to fix the law's glaring constitutional infirmity. The attempt is therefore "pertinent only as an implicit acknowledgment" of the obvious "constitutional problems with a more natural reading." *United States* v. *Stevens*, 130 S. Ct. 1577, 1590-1592 (2010).

## II. THIS CASE IS AN IDEAL VEHICLE FOR CLARIFYING THE SCOPE OF *HILL*

Respondents' opposition shows why this case is a good vehicle for clarifying the scope of *Hill*. Respondents argue, for example, that *Hill* does not even apply here because this case presents a fixed buffer zone, rather than a "no-approach" floating buffer zone, and that this case therefore should be decided under injunction cases like *Madsen* and *Schenck*. Opp. 1, 14-16, 26-28, 34. That argument is plainly wrong, and respondents' attempt to rely upon it shows that, thirteen years after *Hill*, the Court needs to clarify and reinforce *Hill*'s core limitations. Opp. 33-34.

*Hill* remains the appropriate framework for decision here. Indeed, respondents originally argued that the Act modified "only the size and nature of the buffer zone … [but in] all other respects … remained identical" to the no-approach floating buffer laws. Dist. Ct. Opp. To Prelim. Inj. 1-2. Moreover, both lower courts relied heavily *Hill* (both directly and through their earlier *McGuire* decisions). Pet. App. 99a-115a, 159a-191a.

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ing of shirts "with abortion-related" messages while passing through the zones. Pet. App. 205a-206a. Likewise, the First Circuit explained that while the "guidance" may be somewhat vague, petitioners "must know" that their "anti-abortion" message "falls within the hard core of the proscriptions spelled out in the guidance letter." Pet. App. 117a.

As set forth in the petition, however, *Hill* cannot support the Act, because *Hill* carefully preserved speakers' rights to speak with willing listeners, to distribute handbills, and to address even unwilling listeners from a "normal conversational distance." Pet. 29 (citing *Hill*, 530 U.S. at 726-727). Moreover, *Hill* emphasized that reduced scrutiny applied only because the law broadly covered all medical facilities (not merely abortion clinics) and because it applied equally to all speakers. The Act violates each of these principles. Pet. 15.

Realizing that *Hill* cannot support the Act, respondents seek refuge in injunction cases like *Madsen* and *Schenck*. Opp. 14-16, 25-28, 34. They seize on language in *Madsen* suggesting that injunctions, because of their targeted nature, require greater scrutiny than statutes to guard against impermissible discrimination (Opp. 15), suggesting that this means any speech restriction is necessarily permissible if it is less onerous than one approved for an injunction against specific past violators. *Id.*; *see also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (fifteen foot zone "a fortiori" permissible as a statute because of *Madsen* and *Schenck*; "This conclusion is bolstered by the First Circuit's recent decision in *McCullen*[.]").

Respondents' argument proves far too much. That courts are particularly cautious about imposing speech-restrictive injunctions does not mean that a State may impose on all citizens by statute any restriction that a court could constitutionally tailor to an individual based on proof of particular past misbehavior. Indeed, if respondents' analysis were correct, statutes requiring all speakers to remain at least 100 feet away from actress Halle Berry, and at least ten feet from all Church of Scientology buildings, would also be constitutional, because injunctions against particular individuals have

issued with those terms. *See* AP, *Celebrity Obsession*, Chicago Trib., Mar. 8, 2005, *available at* 2005 WLNR 23471400; Sommer, *Scientology Opponent Faces Battery Charge*, Tampa Trib., Jan. 15, 2000, *available at* 2000 WLNR 67940. Similarly, *Hill* would have been an open-and-shut case unworthy of review, because its 8-foot separation zone is far less than the 36 feet approved in *Madsen*. Obviously, *Madsen* required no such result. *Cf. Madsen*, 512 U.S. at 778 (Stevens, J., concurring and dissenting in part) ("a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment"). Far from trumping *Hill*, *Madsen* and *Schenck* are largely inapposite. They concerned targeted equitable relief on "extraordinary" records to prevent specific prior lawbreakers from future violations. *See Schenck*, 519 U.S. at 380-383; *Madsen*, 512 U.S. 766 n.3.[3]

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[3] Respondents' reliance on *Burson* v. *Freeman* is likewise misplaced. *Burson* upheld a 100-foot buffer zone around polling places, but the speech restriction was even-handed and not viewpoint-based like the Massachusetts statute: it did not focus on particular issues and applied equally to anyone campaigning or soliciting votes without exceptions for preferred speakers. 504 U.S. 191, 193-194 (1992). Furthermore, *Burson* subjected the restriction to strict scrutiny, and the restriction survived only because the plurality believed it narrowly tailored to "compelling interests in preventing voter intimidation and election fraud." *Id.* at 210-211. The State has never tried to justify the Massachusetts statute under strict scrutiny, and indeed, the State's only alleged justification for the law—alleged but unproven difficulties with enforcing the prior no-approach floating buffer zone law (Pet. 6)—would never survive strict scrutiny, particularly in light of the State's failure to identify any similar inability to enforce laws directly targeting interference with access. *See, e.g.*, *NAACP* v. *Claiborne Hardware*, 485 U.S. 886, 888, 916-917 (1982) (noting protest included "elements of criminality and elements of majesty" and that the First Amendment "demand[s]" "precision of regulation" to sort between the two);

This case remains an ideal vehicle for clarifying or reinforcing *Hill*'s core limitations—the focus on only unwilling listeners, the broad application at all medical facilities and not just abortion clinics, and universal application to all speakers. Massachusetts abandoned all those limits here. And the fact that governments in Massachusetts, California (*Hoye*), and Vermont (*Clift* v. *City of Burlington*, 2013 U.S. Dist. LEXIS 21888 (D. Vt. Feb. 19, 2013)) have all read *Hill* to permit dramatically more severe restrictions on speech confirms the need for this Court to clarify and strengthen this area of the law.[4]

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*Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011) (government "bears the risk of uncertainty" and "ambiguous proof will not suffice"). In the end, respondents remain unable to cite a single case from this Court approving a statute remotely like the one it now defends.

[4] *See also Ross* v. *Early*, 758 F. Supp. 2d 313, 322 (D. Md. 2010) ("There is, therefore, no constitutional requirement that speakers be permitted to distribute leaflets provided that they are afforded other avenues to express their message." (citing *McCullen* v. *Coakley*, 571 F.3d 167, 180 (1st Cir. 2009) ("[H]andbilling is not specially protected."))).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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