No. 12-1168

IN THE

# Supreme Court of the United States

ELEANOR MCCULLEN, *ET AL.*,
*Petitioners,*
v.
MARTHA COAKLEY, *AS* 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**

**BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, THE CENTRAL CONFERENCE OF AMERICAN RABBIS, CONGREGATION AGUDAS ACHIM, CONGREGATION DORSHEI TZEDEK, DISCIPLES FOR CHOICE, DISCIPLES JUSTICE ACTION NETWORK, INTERFAITH ALLIANCE FOUNDATION, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS, JEWISH WOMEN INTERNATIONAL, THE METHODIST FOUNDATION FOR SOCIAL ACTION, THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, THE UNION FOR REFORM JUDAISM, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF RESPONDENTS**

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## INTERESTS OF *AMICI CURIAE* [1]

The *amici curiae* are a diverse group of religious and cultural organizations that advocate for religious freedom, civil liberties, and reproductive freedom. The amici have a strong interest in this case due to their commitment to religious liberty, civil rights, and protecting access to reproductive health care facilities. The *amici* are: the Anti-Defamation League; the Central Conference of American Rabbis; Congregation Agudas Achim; Congregation Dorshei Tzedek; Disciples for Choice; Disciples Justice Action Network; Interfaith Alliance Foundation; the Jewish Council for Public Affairs; Jewish Women International; the Methodist Federation for Social Action; the Religious Coalition for Reproductive Choice; the Union for Reform Judaism; and the Women of Reform Judaism. Further interest statements of particular *amici curiae* can be found in the appendix to this brief.

## SUMMARY OF ARGUMENT

The statute at issue in this case, Mass. Gen. Laws ch. 266, § 120E½ (the "Massachusetts Act"), is not unique. It is but one of many statutes, ordinances, and injunctions that have established buffer zones and restricted picketing or demonstrating in close proximity to houses of worship, funeral services, private residences, schools, courthouses, foreign embassies, and polling places, among other locations. The *amici* respectfully submit that, in considering the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and such consents have been lodged with the Court.

Petitioners' challenge to the Massachusetts Act, the Court should take into account the broader implications of this case for these other instances where buffer zones have been created.

This brief focuses on laws that have created buffer zones and similar protections for houses of worship and funeral services. Like the Massachusetts Act, these laws typically create a neutral area near places of worship and funeral ceremonies and regulate the locations where demonstrators may congregate. Courts have upheld many of these buffer zone protections as reasonable time, place, and manner restrictions that do not unduly impinge upon free speech rights.

The judicial decisions upholding these buffer zones near houses of worship and funeral services have relied extensively on precedents and principles developed in similar cases concerning reproductive health care facilities – including this Court's decisions in *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). Significantly, this Court's analyses in *Madsen*, *Schenck*, and *Hill* form the foundation for other courts' conclusions that worship and funeral buffer zone laws are content-neutral, are adequately supported by significant government interests, are narrowly tailored, and allow ample alternative channels for communication.

Consequently, if the Court were to strike down the Massachusetts Act – a statute that is plainly supported by those precedents – that decision would also potentially undermine buffer zone protections afforded to houses of worship and funeral services. If this Court determines that the buffer zone provided by

the Massachusetts Act is constitutionally invalid, then the Court must also be willing to accept that protesters may crowd the doors of synagogues, churches, and mosques, chanting slogans at worshippers as they enter, and that picketers may mingle with the mourners at military funerals, confronting grieving parents with placards proclaiming, "Thank God for Dead Soldiers."

Considered in this broader context, it is undeniable that buffer zones – whether at reproductive health care facilities, houses of worship, or funeral services – are politically neutral. They are simply a reasonable and necessary governmental tool for preserving the constitutionally protected rights of speakers while accommodating the government's legitimate interests in protecting public safety, freedom of access, and personal privacy in a pluralistic society.

## ARGUMENT

### I. THE FEDERAL GOVERNMENT, STATES, MUNICIPALITIES, AND COURTS HAVE ESTABLISHED BUFFER ZONES FOR HOUSES OF WORSHIP AND FUNERAL SERVICES THAT ARE SIMILAR TO THE BUFFER ZONE IN THE MASSACHUSETTS ACT.

Just as the Massachusetts Act creates a buffer zone at reproductive health care facilities, there are many other statutes, ordinances, and court injunctions that have established buffer zones near houses of worship and funeral services. The reasons for demarcating these buffer zones are similar. Like reproductive health care facilities, houses of worship and funeral ceremonies have often attracted controversial and volatile protests and picketing, which can disrupt and

obstruct access to religious services and funeral ceremonies. And just as patients seeking medical advice and care have no choice but to run the gauntlet of demonstrators outside a reproductive health care facility, so too worshippers attending a religious service, or family and friends attending a funeral, cannot avoid picketers who target those ceremonies. Consequently, in response to public concern, federal, state, and local authorities have implemented and enforced buffer zones near houses of worship and funeral services. Such buffer zones aim to advance significant government interests in promoting public safety, ensuring unfettered access to places of worship and funeral ceremonies, and protecting captive audiences from unwelcome intrusion.

### A. Municipal Ordinances Have Established Buffer Zones Around Houses of Worship.

Many municipalities have enacted ordinances to delineate buffer zones near houses of worship that are similar to the provisions of the Massachusetts Act. For example, Santa Barbara, California, has enacted an ordinance that simultaneously protects both places of worship and health care facilities. The ordinance makes it unlawful to conduct any demonstration "within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship" or to "impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility." Santa Barbara, Cal., Municipal Code, § 9.99.030 (2012), *quoted in* Appendix A to *Edwards v. City of Santa*

*Barbara*, 883 F. Supp. 1379, 1396 (C.D. Cal.) (*Edwards I*), *vacated*, 70 F.3d 1277 (9th Cir. 1995).[2]

The preamble to the ordinance indicates that it was enacted because "persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them," which "interfere[d] with medical treatment" and "freedom of religion." Appendix A, *Edwards I*, 883 F. Supp. at 1394. Echoing the government interests cited by this Court in upholding a buffer zone injunction in *Madsen*, 512 U.S. at 768, the City Council recognized that "such activity near health care facilities and places of worship creates a 'captive audience' situation" because persons seeking access to health care services and religious services cannot avoid the demonstrations, and they should not be expected to "forgo medical treatment" or to refrain from exercising their freedom of religion. Appendix A, *Edwards I*, 883 F. Supp. at 1394. Therefore, while recognizing that demonstrators have a strong countervailing right of freedom of expression, the ordinance attempts to "reconcile and protect the First Amendment rights of

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[2] In addition, the Santa Barbara ordinance contained a "floating" buffer zone provision that no person engaging in demonstration activity within 100 feet of a house of worship or health care facility "shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal." *Edwards I*, 883 F. Supp. at 1395. This provision was held invalid in *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998) (*Edwards II*).

persons near health care facilities and places of worship and the rights of persons seeking to use health care facilities or places of worship" by establishing buffer zones around these locations. *Id*. at 1394-95.

Other cities and towns have enacted ordinances that prohibit demonstrations within a specified buffer zone near houses of worship during services. For example, in Rockford, Illinois, "A person commits disorderly conduct when he knowingly . . . Pickets or demonstrates on a public way within 150 feet of any church, temple, synagogue or other place of worship while services are being conducted and one-half hour before services are to be conducted and one-half hour after services have been concluded." Rockford, Ill., Code of Ordinances § 19-13 (21) (2013).[3] Similarly, a number of Georgia municipalities have established ordinances that prohibit "picketing or demonstrating in front of any building in which the following are located, affecting the normal operation thereof, while the following are in use: (1) A church; (2) A fraternal order; (3) A school; (4) A hospital, nursing home or rest

[3] Other Illinois municipalities have enacted similar ordinances. *See, e.g.*, Auburn, Ill., Code of Ordinances § 18-47(a)(9) (2012); Calumet City, Ill., Code of Ordinances § 62-251(a)(12) (2003); Chicago Heights, Ill., Code of Ordinances § 30-62(j) (2013); North Riverside, Ill., Code of Ordinances, § 9.16.010(J) (2012); South Chicago Heights, Ill., Code of Ordinances § 50-2(a)(10) (2012); Cicero, Ill., Code of Ordinances § 62-6(a)(10) (2013); Naperville, Ill., Code of Ordinances § 10-2-1-1(9) (2013); Hainesville, Ill., Code of Ordinances § 9.12.010(A)(9) (2013); Round Lake Beach, Ill., Code of Ordinances § 4-7-4(A)(9) (2013); Round Lake Village, Ill., Code of Ordinances, § 9.04.050(A)(9) (2012).

home."[4] More broadly, a Kansas municipal ordinance makes it unlawful for "any person to engage in picketing . . . before or about any church in the city." Prairie Village, Kan., Municipal Code art. 9.16 (2013), *quoted in City of Prairie Village v. Hogan*, 855 P.2d 949, 952 (Kan. 1993).

In addition to these ordinances, municipalities sometimes use their police powers to establish buffer zones near houses of worship in connection with particular events. For example, in *World Wide Street Preachers' Fellowship v. Salt Lake City Corp.*, No. 2:04-CV-00279TC, slip op. at 18 (D. Utah Dec. 21, 2004), a federal court held that Salt Lake City could properly limit the areas available for demonstrations in the vicinity of the Church of Jesus Christ of Latter-Day Saints in Temple Square at certain times during the Church's semi-annual conference.

### B. Federal And State Statutes Have Created Buffer Zones Around Funeral Services.

The federal and state governments have also enacted various statutes that create buffer zones near funeral services. Most notably, in 2006, Congress passed two laws circumscribing demonstrations at funerals for deceased members of the United States Armed Services: the Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, § 2(a)(1), 120 Stat. 387 (2006) ("Fallen Heroes Act") (codified at 18 U.S.C.

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[4] Fitzgerald, Ga., Code of Ordinances § 18-84 (2013); Quitman, Ga., Code of Ordinances § 40-59 (2005); Albany, Ga., Code of Ordinances § 40-105 (2013); Seminole County, Ga., Code of Ordinances § 40-11 (2013). Although published legislative history is sparse, these types of buffer zone ordinances reflect a government interest in ensuring that worshipers and service-goers retain unfettered access to their places of worship and to allow them to pray without disturbance. *See Edwards II*, 150 F.3d at 1216.

§ 1387 (2012) and 38 U.S.C. § 2413 (2012)); and the Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, § 1(a), 120 Stat. 3480 (2006) ("Funerals Act") (codified at 18 U.S.C. § 1388 (2012)).

The Fallen Heroes Act applies to Arlington National Cemetery and other federal cemeteries under the control of the National Cemetery Administration. As subsequently amended, the Fallen Heroes Act limits demonstrations "during the period beginning 120 minutes before and ending 120 minutes after a funeral" at those cemeteries. 38 U.S.C. § 2413. During that period, it is unlawful to engage in a demonstration (1) within the boundaries of the cemetery or 300 feet of any entrance, where an individual willfully makes or assists in making any noise or diversion that is not part of the funeral and intentionally disturbs the peace or good order of such funeral; or (2) within 500 feet of the cemetery, where an individual willfully, intentionally, and without authorization impedes access or egress from the cemetery. *Id*. The Funerals Act extends similar buffer zone protections to all funerals of members or former members of the Armed Forces at other locations, such as "private cemeteries, funeral homes, and houses of worship." 152 Cong. Rec. H9198, 9199 (daily ed. Dec 8, 2006) (statement of Rep. Conyers); *see* 18 U.S.C. § 1388.

These acts were passed in response to widespread disruption of military funerals by demonstrations, especially by members of the Westboro Baptist Church. *See* 152 Cong. Rec. H2199, 2200-01 (statements of Reps. Buyer and Reyes); 152 Cong. Rec. H9198, 9199 (statement of Rep. Cannon). While recognizing the free speech rights of such protesters, Congress sought also "to protect the

sanctity of military funerals," "the privacy of grieving families as they bury their precious loved ones who died in the service of our country," and the right of "military families . . . to mourn the loss of their husbands, wives, and children in peace." 152 Cong. Rec. H2199, 2200, 2202 (statement of Rep. Buyer); *id*. at 2205 (statement of Rep. Baca). Thus, Congress sought to craft laws that are "content neutral [and are] limited in time, manner, and place to balance the constitutionally protected rights of law-abiding speakers against the legitimate competing interests of unwilling listeners who would otherwise be distracted from an important social objective, the dignified burial of our honored dead." *Id*. at 2201.

Additionally, at least 42 states have enacted statutes that impose time and distance restrictions on demonstrations near funeral services taking place at houses of worship, cemeteries, funeral homes, and other locations.[5] Some states have enacted blended

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[5] Ala. Code § 13A-11-17 (2013); Ark. Code Ann. § 5-71-230 (2013); Cal. Penal Code § 594.37 (2013); Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3), -107(3), - 108(2), -117, -125 (2013); Conn. Gen. Stat. § 53a-183c (2013); Del. Code Ann. tit. 11, § 1303 (2013); Fla. Stat. §§ 871.01-.02 (2013); Ga. Code Ann. § 16-11-34.2 (2013); Idaho Code Ann. § 18-6409(2) (2013); 720 Ill. Comp. Stat. 5/26-6 (2013); Ind. Code §§ 35-45-1-3 to -2-1 (2013); Iowa Code § 723.5 (2013); Ky. Rev. Stat. Ann. §§ 525.055, .060, .145, .155 (2013); La. Rev. Stat. Ann. § 14:103 (2013); Me. Rev. Stat. tit. 17-A § 501-A (2012); Md. Code Ann., Crim. Law § 10-205 (2013); Mass. Gen. Laws ch. 272, § 42A (2012); Mich. Comp. Laws §§ 123.1111-.1115 (2013); Minn. Stat. § 609.501 (2013); Miss. Code Ann. § 97-35-18 (2013); Mont. Code Ann. 45-8-116 (2013); Neb. Rev. Stat. §§ 28-1320.01-.03 (2008); N.H. Rev. Stat. Ann. § 644:2-b (2013); N.J. Stat. Ann. § 2C:33-8.1 (2013); N.M. Stat. Ann. § 30-20B-1 to 30-20B-5 (2013); N.Y. Penal Law § 240.21 (2013); N.C. Gen. Stat. § 14-288.4 (2012); N.D. Cent. Code § 12.1-31-01.1 (2013); Ohio Rev. Code Ann. § 3767.30 (2013); Okla. Stat. tit. 21, § 1380 (2011);

statutes that, like the federal statute, enforce buffer zones around the location of a funeral or burial ceremony before, during, and after it takes place. For example, in Oklahoma, "[i]t is unlawful for any person to engage in picketing within one thousand (1,000) feet of the property line of any cemetery, church, mortuary or other place where any portion of a funeral service is held during the period from two (2) hours before the scheduled commencement of funeral services until two (2) hours after the actual completion of the funeral services. Okla. Stat. tit. 21, § 1380 (2011); *see also*, *e.g.*, S.D. Codified Laws §§ 22-13-17 to -20 (2006) ("No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services until one hour after the actual completion of the funeral services.").

As with their federal counterparts, state funeral statutes recognize that the government has a significant interest in "[p]rotect[ing] the privacy of the mourners during the funeral . . . and [p]reserv[ing] a funeral-site atmosphere that enhances the grieving process." *See*, *e.g.*, Colo. Rev. Stat. §§ 13-21-126(2) (2013). At the same time, state legislatures also "recognize[] that individuals have a constitutional right to free speech." *See*, *e.g.*, Neb. Rev. Stat. §§ 28-1320.01 (2008). For this reason, State funeral laws seek to "carefully balance the rights of [demonstrators]

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18 Pa. Cons. Stat. § 7517 (2013); R.I. Gen. Laws § 11-11-1 (2013); S.C. Code Ann. § 16-17-525 (2013); S.D. Codified Laws §§ 22-13-17 to -20 (2013); Tenn. Code Ann. § 39-17-317 (2013); Tex. Penal Code Ann. §§ 42.04, .055 (2011); Utah Code Ann. § 76-9-108 (2013); Vt. Stat. Ann. tit. 13, § 3771 (2013); Va. Code Ann. § 18.2-415 (2013); Wash. Rev. Code § 9A.84.030 (2013); Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6- 105 (2012).

against the privacy rights of those who may be unwilling and captive recipients of the [demonstrators'] message." *Preamble* to 2007 Mont. Laws ch. 10, (codified as Mont. Code Ann. 45-8-116 (2013)).[6]

### C. State Statutes Prohibit Willful Disruption Of Religious Services.

States have also enacted statutes that criminalize misconduct that disrupts or interferes with access to religious services. For example, the Missouri "House of Worship Protection Act" makes it unlawful to "[i]ntentionally and unreasonably disturb[] . . . any house of worship by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services." Mo. Rev. Stat. § 574.035 (3)(1) (2013). Moreover, it is unlawful to "[i]ntentionally injure[], intimidate[], or interfere[] . . . with any person lawfully exercising the right of religious freedom in or outside a house of worship or seeking to access a house of worship, whether by force, threat, or physical obstruction." *Id*. § 574.035 (3)(2).

Similarly, the District of Columbia has made it unlawful for "a person to engage in loud, threatening, or abusive language, or disruptive conduct, with the intent and effect of impeding or disrupting the orderly conduct of a lawful public gathering, or of a congregation of people engaged in any religious service

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[6] *See also* N.J. Stat. Ann. § 2C:33-8.1 (West 2013); Mont. Code Ann. 45-8-116 (2013); Neb. Rev. Stat. §§ 28-1320.01-.03 (2008); Okla. Stat. tit. 21, § 1380 (2011); 18 Pa. Cons. Stat. Ann § 7517 (2013); Ga. Code Ann. § 16-11-34.2 (2013); Colo. Rev. Stat. §§ 13-21-126 (2013).

or in worship, a funeral, or similar proceeding." D.C. Code § 22-1321(b) (2013).

These statutes and others like them are concerned with limiting disruption of religious services and ensuring unfettered access to places of worship.[7] While these laws do not expressly create buffer zones around houses of worship, they extend protection beyond the physical boundaries of houses of worship and thereby "regulate traditional public fora, such as adjacent public streets or sidewalks, used for expression." *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *22 (E.D. Mo. Apr. 19, 2013).

### D. Courts Have Issued Injunctions To Create Buffer Zones Around Houses Of Worship.

Courts have also issued injunctions creating buffer zones around houses of worship and related locations in response to specific instances of picketing. In *St. David's Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821 (Kan. Ct. App. 1996), for example, the Kansas Court of Appeals upheld a temporary injunction prohibiting members of the Westboro Baptist Church "[f]rom engaging in focused picketing of the plaintiff on public property within 36 feet to the east, within 36 feet to the west, within 36 feet to the north and within 215 feet to the south of the church

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[7] Other statutes include: Idaho Code § 18-6409 (2013); Fla. Stat. § 871.01 (2013); Mass. Gen. Laws ch. 272, § 38 (2012); Mich. Comp. Laws § 752.525 (2012); N.C. Gen. Stat. § 14-288.4 (2012); Nev. Rev. Stat. Ann. § 201.270 (2013); N.M. Stat. Ann. § 30-13-1 (2013); N.Y. Penal Law § 240.21 (2013); S.C. Code Ann. § 16-17-520 (2013); Okla. Stat. tit. 21, § 915 (2011); Wash. Rev. Code § 9A.84.030 (2013); R.I. Gen. Laws § 11-11-1 (2013); VA Code Ann. § 18.2-415 (2013); W. Va. Code § 61-6-13 (2013).

property owned and used for religious purposes by St. David's . . . from a period beginning one-half hour before and ending one-half hour after a religious event." *Id*. at 825. A Kansas court issued the injunction after Westboro members had conducted picketing for over a year at the Topeka intersection where St. David's was located. *Id*. at 824. As discussed further below, the Kansas Court of Appeals held that the injunction was justified by the threat of violence posed by encounters between the Westboro picketers and St. David's congregants and by the demonstrators' interference with the latter group's free exercise of religion. *Id*. at 829-30.

## II. RELYING ON THIS COURT'S PRECEDENTS IN *MADSEN*, *SCHENCK*, AND *HILL*, COURTS HAVE UPHELD BUFFER ZONE PROTECTION FOR HOUSES OF WORSHIP AND FUNERAL SERVICES AS REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS.

### A. In *Madsen*, *Schenck*, *Hill*, And Other Cases, This Court Has Held That Buffer Zones Are Constitutionally Permissible As Content-Neutral Time, Place, And Manner Restrictions That Are Narrowly Tailored To Serve Significant Government Interests.

As this Court recently observed in *Snyder v. Phelps*, even on public streets and sidewalks, the "choice of where and when to conduct . . . picketing is not beyond the Government's regulatory reach – it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents." 131 S. Ct. 1207, 1218 (2011) (quoting *Clark v. Community for Creative Non-*

*Violence*, 468 U.S. 288, 293 (1984)). Such restrictions are constitutionally permissible provided that they "'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark*, 468 U.S. at 293).

In accord with these standards, this Court has upheld the creation of buffer zones in a variety of circumstances including – most significantly for this case – situations involving reproductive health care facilities and/or anti-abortion protests. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding an ordinance prohibiting picketing "before or about" a private residence, in a case where demonstrators were targeting the home of a doctor who performed abortions); *Madsen*, 512 U.S. at 757 (upholding an injunction barring demonstrators from a 36-foot fixed buffer zone around the entrances and driveways at a health clinic that performed abortions); *Schenck*, 519 U.S. at 367, 376, 385 (upholding an injunction barring demonstrators from a 15-foot fixed buffer zone around entrances and driveways at medical clinics that provided abortions among other medical services); *Hill*, 530 U.S. at 707-08, 735 (upholding a statute that, within 100 feet of the entrance to any health care facility, makes it unlawful to knowingly approach within eight feet of another person, without that person's consent, to pass a leaflet, display a sign, or engage in oral protest, education, or counseling with such other person); *see also Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding a statute prohibiting picketing near a courthouse with intent to interfere with administration of justice); *Boos v. Barry*, 485 U.S. 312

(1988) (upholding 500-foot buffer zone around foreign embassies in which congregating was prohibited); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a statute creating a 100-foot buffer zone around the entrance to polling places on election day).

Several key points have emerged from the Court's decisions in these cases, particularly *Madsen*, *Schenck*, and *Hill*, which have in turn provided the foundation for subsequent judicial decisions upholding buffer zones protecting houses of worship and funeral services.

First, the Court has held that buffer zones are content-neutral because they do not regulate the content or viewpoint of permissible speech, but merely its location. *See*, *e.g.*, *Hill*, 530 U.S. at 719 (holding that a Colorado buffer zone statute was content-neutral because it was "not a 'regulation of speech,'" but only "a regulation of the places where some speech may occur"; because it was not adopted due to disagreement with the message of that speech; and because it involved state interests unrelated to the content of the demonstrators' speech).[8]

Second, the Court has recognized that there are significant government interests that justify buffer zones. In *Madsen*, for example, the Court identified three principal government interests that supported the buffer zone injunction in that case: ensuring

[8] One exception is *Burson v. Freeman*, where the Court held that a Tennessee statute barring campaign-related speech near polling places on election days was not content-neutral because it explicitly suppressed political speech; the Court nevertheless upheld the statute under strict scrutiny because it served a compelling government interest in securing the right to vote free from intimidation. 504 U.S. at 196-97, 208-11.

public safety, order, and free traffic flow; protecting a woman's freedom to seek medical or counseling advice in connection with her pregnancy; and the privacy interests of persons targeted by the picketing, who constituted a "captive" audience as they entered the clinic. 512 U.S. at 767-68. The Court concluded that these interests were "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.* at 768. In *Schenck*, the Court held that a buffer zone injunction protecting clinic entrances and driveways was justified by the government's interests in ensuring public safety, order, and free traffic flow and protecting a woman's freedom to seek pregnancy-related services. 519 U.S. at 376. And in *Hill*, the Court held that a Colorado buffer zone statute was justified by the government's interest in protecting "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests," and the privacy interest of unwilling listeners in situations where the degree of captivity makes it impractical to avoid exposure. 530 U.S. at 715, 718.

Finally, the Court has held that the buffer zones in these cases were, for the most part, narrowly tailored and left open ample alternative channels for communication or, under the stricter test for injunctions, burdened no more speech than necessary.[9] *See Madsen*, 512 U.S. at 769-75 (upholding fixed 36-foot buffer zone near entrances to clinic and its

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[9] In *Madsen* and *Schenck*, which involved buffer zones created by injunctions rather than by statutes, the Court applied a "somewhat more stringent" test, asking "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; *see also Schenck*, 519 U.S. at 374.

parking lot, because protesters could still be seen and heard, but striking other buffer zone provisions as broader than necessary); *Schenck*, 519 U.S. at 376-82 (upholding fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances as not overly burdensome, but striking floating buffer zones around people and vehicles entering and leaving clinics); *Hill*, 530 U.S. at 725-28 (upholding 8-foot buffer zone around persons within 100 feet of the entrance of any health care facility as narrowly tailored and allowing ample alternative communication, where speakers could still communicate through signs, conversational speech, and proffered handbills).

### B. Other Courts Have Relied On This Court's Precedents In *Madsen*, *Schenck*, And *Hill* In Upholding Buffer Zones Around Houses Of Worship And Funeral Services.

Building on the foundation of this Court's buffer zone jurisprudence, other courts have developed a substantial body of case law upholding laws and injunctions creating buffer zones around houses of worship and funeral services as constitutionally permissible time, place, and manner restrictions. In particular, courts have analogized the buffer zone protections for houses of worship and funeral services to the buffer zone protections upheld in the abortion-protest cases. As in *Madsen*, *Schenck*, and *Hill*, courts have concluded that worship and funeral buffer zone laws and injunctions are content-neutral; serve the government's significant interests in ensuring public order, maintaining freedom of access, and protecting privacy; are narrowly tailored; and leave open ample alternative channels for communication.

**1. Buffer zone laws are content-neutral.**

Courts have held that buffer zone restrictions protecting houses of worship and funeral services, like the buffer zones in the abortion-protest cases, are content- and viewpoint-neutral because these restrictions are "'not a regulation of speech,' but rather 'a regulation of the places where some speech may occur,'" which applies equally to all demonstrators, regardless of viewpoint. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (quoting *Hill*, 530 U.S. at 719).

In *Phelps-Roper v. Strickland*, the Sixth Circuit upheld an Ohio statute that prohibited "picketing or other protest activities" taking place within "three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place." *Id*. at 358 (citing Ohio Rev. Code Ann. § 3767.30 (West 2006)). The statute was challenged by a member of the Westboro Baptist Church, a group that has picketed funerals of American soldiers with signs bearing messages such as "Thank God for IEDs," and "Thank God for Dead Soldiers," to publicize its belief that God is punishing America for its tolerance of homosexuality. *Phelps-Roper v. Strickland*, 539 F.3d at 359.

In concluding that the statute was content-neutral, the court focused on three points, closely following the analysis in *Hill*: 1) the statute only regulated where demonstrators could stand, not what they could say; 2) the restrictions applied equally to all demonstrators; and 3) the state's purpose was only to prevent disruption of funeral services, regardless of the viewpoint or the content of the speech involved. *Id*. at

361 (citing *Hill*, 530 U.S. at 719-20). The Eighth Circuit later reached similar conclusions in *Phelps-Roper v. City of Manchester*, upholding a city ordinance[10] that substantially mirrored the statute at issue in *Phelps-Roper v. Strickland. See* 697 F.3d 678, 688-89 (8th Cir. 2012) (citing both *Hill* and *Strickland* in concluding that the ordinance was content-neutral).

Courts considering buffer zones for houses of worship have also held that those laws were content-neutral for similar reasons. In *World Wide Street Preachers' Fellowship v. Salt Lake City Corp.*, No. 2:04-CV-00279TC (D. Utah Dec. 21, 2004), a federal district court upheld Salt Lake City's establishment of "demonstration zones" and other restrictions at the semi-annual conference held by the Church of Jesus Christ of Latter-Day Saints ("LDS"). Under the city's plan, demonstrations by pro- and anti-LDS demonstrators were required to take place within designated zones at certain times of day, and standing still was prohibited in specified areas at certain times. The district court held that these restrictions were content-neutral because, like the Colorado statute in *Hill*, they "clearly limited where protesters could stand or walk when addressing others," but "did not 'place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas,'" and applied "equally to all demonstrators, and regulate[d]

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[10] Manchester Code § 210.264 provides that "no person shall picket or engage in other protest activities . . . within three hundred (300) feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral of burial service." Appendix to *Phelps-Roper v. City of Manchester*, 697 F.3d at 695-96.

only where speech may occur, not the speech itself." *Id*., slip op. at 12-13.

And in *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998) (*Edwards II*), where the Ninth Circuit upheld an ordinance creating a fixed buffer zone at driveway entrances to houses of worship and health care facilities, the court concluded that the law was content-neutral because it barred "all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed." *Id*. at 1215.[11]

**2. Significant government interests justify buffer zone laws.**

Courts have also held that buffer zone restrictions protecting houses of worship and funeral services are supported by the same government interests identified in *Madsen*, *Schenck*, and *Hill*. A principal interest often cited is the government's traditional concern for "ensuring the public safety and order, . . . promoting the free flow of traffic on public streets and sidewalks, and . . . protecting the property rights of all . . . citizens." *St. David's Episcopal Church*, 921 P.2d at 829-30 (citing *Madsen*, 512 U.S. at 767). In that case, for example, where the Kansas Court of Appeals upheld an injunction creating a buffer zone around an Episcopal church targeted for demonstrations by

[11] The Ninth Circuit affirmed the district court's injunction preventing enforcement of a separate provision for a "floating buffer zone" in the Santa Barbara ordinance, which permitted people within one hundred feet of entrances to medical clinics or houses of worship to request that anyone approaching them withdraw to a distance of eight feet. *Edwards II*, 150 F.3d at 1217. In at least some respects, however, that provision resembles the floating buffer zone in the Colorado statute later upheld in *Hill*. *See* 530 U.S. at 707, 712-14, 735.

members of the Westboro Baptist Church,[12] the express purpose of the injunction was to prevent violence between the members of the two churches. *See id*.

Other courts upholding buffer zones for houses of worship and funeral services have similarly pointed to the importance of these zones in maintaining order and preventing violence. In *World Wide Street Preachers' Fellowship v. Salt Lake City Corp*., for example, the court cited the City's "broad interest in public safety" in upholding its use of demonstration zones at the LDS conference, noting that there had been previous incidents of violence between attendees and demonstrators. No. 2:04-CV-00279TC, slip op. at 16; *see also Edwards II*, 150 F.3d at 1216 (citing "the City's interest in public safety and prevent[ing] direct 'face to face' confrontations that could escalate into violence by physically separating demonstrators from persons entering the driveway areas").

Courts have also reasoned that, just as this Court has held in abortion-protest cases that government has significant interests in protecting patients' freedom of access and privacy, so the government also has significant interests in protecting freedom of access and privacy for persons attending religious services and funerals.

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[12] As noted above, the injunction prohibited members of the Westboro Baptist Church (1) from engaging in focused picketing within 36 feet on three sides and 215 feet on the fourth side of the church property, from one half hour before until one half hour after a religious event and (2) from "making any noise by si[ng]ing, chanting, shouting or yelling, that can be heard through the walls of the church during any religious event." 921 P.2d at 825.

For example, in *St. David's Episcopal Church*, the court compared the government's interest in protecting the privacy of worshippers attending religious services with its interests in protecting the privacy of individuals in their homes, as in *Frisby*, and of clinic patients, as in *Madsen*: "in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well. . . . [T]he right of free exercise [of religion] would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party." 921 P.2d at 830.

Likewise, in *Survivors Network*, where a federal district court upheld a Missouri statute prohibiting conduct that disturbs a house of worship or interferes with those seeking access to a house of worship,[13] the court reasoned that just as the government has significant interests in protecting the privacy of individuals in their homes and patients entering medical facilities, so the state also has "a significant interest in protecting individuals' right to peaceably assemble and to exercise their religious freedom." No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *23-24 (E.D. Mo. Apr. 19, 2013). In that case, the

[13] The statute makes it a crime to disrupt a house of worship intentionally and unreasonably "by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship services" or by intentionally injuring, intimidating, or interfering with "any person lawfully exercising the right of religious freedom in or outside of a house of worship or seeking access to a house of worship, whether by force, threat, or physical obstruction," or attempting to do so. Mo. Rev. Stat. § 574.035 (2012).

constitutionality of the Missouri statute was challenged by organizations that engaged in peaceful protest activities, including leafleting and holding signs, on public sidewalks outside churches to highlight allegations that clergy had sexually abused children, or to advocate for the rights of women and gay, lesbian, bisexual, and transgender people, and for racial justice. *Survivors Network*, No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *4-6. While recognizing that these activities were clearly afforded First Amendment protection, and could "not be restricted simply because the speaker's message may offend his audience," the court also noted that "this right is not absolute; the government may curtail disruptive and unwelcome speech to protect unwilling listeners when other important interests and values are implicated." *Id*. at *14 (citing *Hill*, 530 U.S. at 716, and *Phelps-Roper v. City of Manchester*, 697 F.3d at 686).

Similarly, in cases involving buffer zones for funeral services, courts have held that "mourners attending a funeral or burial share a privacy interest analogous to those which the Supreme Court has recognized for individuals in their homes . . . and for patients entering a medical facility." *Phelps-Roper v. City of Manchester*, 697 F.3d at 692 (citing *Frisby*, 487 U.S. at 484-85; *Hill*, 530 U.S. at 717; and *Madsen*, 512 U.S. at 767-68). As the United States Court of Appeals for the Eighth Circuit explained:

> Mourners are similarly situated because they must also be in a certain place at a certain time to participate in a funeral or burial and are therefore unable to avoid unwelcome speech at that place and time. A significant governmental interest exists in protecting

> their privacy because mourners are in a vulnerable emotional condition and in need of 'unimpeded access' to a funeral or burial, quite like the patients entering medical facilities protected in *Hill*. . . .

*Id*. (internal citation omitted); *see also Phelps-Roper v. Strickland*, 539 F.3d at 364-65 ("Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility."); *id*. at 366 ("[J]ust as 'persons who attempt to enter health care facilities . . . are often in particularly vulnerable physical and emotion conditions,' . . . it goes without saying that funeral attendees are also emotionally vulnerable.") (quoting *Hill*, 530 U.S. at 729) (internal brackets and citation omitted). As Justice Alito also observed in his dissent in *Snyder v. Phelps*, the enactment of laws creating buffer zones around funeral services "dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order" because "the emotional well-being of bereaved relatives is particularly vulnerable." 131 S. Ct. at 1227 (Alito, J., dissenting).

As these excerpts show, courts have recognized that, like patients entering a clinic, worshippers attending a religious service and mourners attending a funeral merit some measure of protection because they are captive audiences in a confrontational setting, who cannot avoid the intrusiveness of unwanted speech. *See Phelps-Roper v. Strickland*, 539 F.3d at 362 (discussing decisions holding that "funeral attendees are a captive audience [for] unwanted speech, and the state has a significant interest in their protection"); *Phelps-Roper v. City of Manchester*, 697 F.3d at 693 ("It is unreasonable to expect a family or friend of the

deceased to reschedule or forgo attending the funeral so as to avoid offensive picketing."); *see generally Hill*, 530 U.S. at 717-18 ("The right to avoid unwelcome speech . . . can also be protected in confrontational settings. . . . [O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'") (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

**3. Buffer zone laws are narrowly tailored and allow alternative channels for communication.**

Finally, courts have followed *Madsen*, *Schenck*, and *Hill* in generally holding that buffer zones protecting houses of worship and funeral services are narrowly tailored and allow ample alternative channels of communication, or burden no more speech than necessary.

In *Edwards II*, for example, the Ninth Circuit held that Santa Barbara's eight-foot buffer zone around driveways of places of worship and health care facilities was narrowly tailored to serve the city's purpose and permitted ample alternative channels of communication because it was smaller than the buffer zones approved in *Madsen* and *Schenck* and provided a "clear, easily enforced zone of protection for the driveway entrances; facilitate[d] the free flow of traffic by preventing protesters from blocking entrances; and futher[ed] the City's interest in public safety and prevent[ing] . . . violence." 150 F.3d at 1216. The court observed that the ordinance was "narrowly tailored to the City's interest in ensuring access to religious worship" and "permit[ted] ample alternative avenues of communication, by placing no limit on

speech or expressive activity outside a narrow zone." *Id*. at 1217.

In *Survivor's Network*, the court held that the Missouri statute protecting houses of worship was narrowly tailored and left open alternative channels of communication because protesters could still stand on the sidewalks near worship facilities as long as they did not block ingress and egress, and they could also contact their target audiences by phone, mail, or internet, or by publishing editorials in the local newspaper. No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *26-27.

Courts have also held that buffer zones can be much larger than those authorized in *Madsen* and *Schenck* and still be narrowly tailored. In *Phelps-Roper v. Strickland*, for example, the Sixth Circuit upheld a statute creating a 300-foot buffer zone around funeral services. The court reasoned that "*Frisby*, *Hill*, and *Madsen*, read together, establish that the size of the buffer zone is context-sensitive, and that in this case, the 300-foot buffer zone is not too broad." 539 F.3d at 368. "Given that numerous mourners usually attend a funeral or burial service, the size of a buffer zone necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence, or a single individual entering a medical clinic." *Id*. at 371; *see also Phelps-Roper v. City of Manchester*, 697 F.3d at 694 (holding that 300-foot buffer zone protecting funeral services was sufficiently narrowly tailored, comparing it to the 500-foot buffer zone upheld in *Boos* and the 100-foot buffer zone upheld in *Hill*, and noting that "[p]icketers can still reasonably

communicate their message to funeral attendees and others").[14]

## III. INVALIDATION OF THE MASSACHUSETTS ACT COULD POTENTIALLY UNDERMINE OTHER BUFFER ZONE PROTECTIONS FOR HOUSES OF WORSHIP AND FUNERAL SERVICES.

The grounds on which the Petitioners seek to invalidate the Massachusetts Act are also potentially applicable to many of the buffer zone restrictions protecting houses of worship and funeral services. Petitioners' arguments should be rejected because they are inconsistent with this Court's precedents, as the United States Court of Appeals for the First Circuit twice held in *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) (*McCullen I*), *cert. denied*, 559 U.S. 1005 (2010), and *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013) (*McCullen II*), *cert. granted*, 133 S. Ct. 2857 (2013). But if the Court were to accept those arguments and strike down the Massachusetts Act, then that decision could also call into question the worship and funeral buffer zone laws discussed above.

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[14] In a later decision, *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013), the Eighth Circuit also upheld the fixed buffer zone provisions of a Missouri statute prohibiting picketing within 300 feet of any location where a funeral is held, Mo. Rev. Stat. § 578.502 (2006), but severed as unconstitutional a provision that extended that protection to funeral processions. The court also invalidated a broader statute outlawing picketing about any location at which a funeral is held, Mo. Rev. Stat. § 578.501 (2006), because the court concluded that the statute failed to define the limits of the area where disruptive speech is prohibited.

### A. Buffer Zone Laws Can Be Content- And Viewpoint-Neutral Even Though They Target Particular Locations Or Events.

The Petitioners argue that the Massachusetts Act is not content- or viewpoint-neutral because it only applies to reproductive health care facilities where abortions are performed and exempts clinic employees. Petitioners contend that because the Massachusetts Act only targets these clinics, "virtually all of the speech burdened by the Act will be speech about abortion." Pet'rs' Br. at 24. Petitioners also assert that the Act is not viewpoint-neutral because it exempts clinic employees as they enter or exit the facility. *Id*. at 27.

Similar arguments can be made about the worship and funeral buffer zone laws discussed above. Buffer zones prohibiting demonstrations near houses of worship, for example, will likely impact protests against a denomination's policies, teachings, or practices. And because these protective regulations necessarily permit access by those attending the religious or funeral service, as well as those employed in providing those services – indeed, that is their goal – it could be argued that they also favor the attendees' viewpoint over that of demonstrators. If the Massachusetts Act is invalid because it focuses on reproductive health care facilities and protects access to those facilities for patients and employees, then the buffer zone laws protecting places of worship and funeral services would be equally at risk.[15]

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[15] In the brief of *amici curiae* State of Michigan and 11 Other States filed in support of Petitioners, the *amici* contend that the Massachusetts Act is not content- and viewpoint-neutral because it permits employees of the reproductive health care facility to

However, the mere fact that a law indirectly affects one particular group of protesters more than another does not mean that it is content-based or discriminates against one point of view. *See Madsen*, 512 U.S. at 763 ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Edwards II*, 150 F.3d at 1216 n.3 ("The fact that a majority of those prosecuted under the [buffer zone] ordinance have been anti-abortion protesters does not permit an automatic inference of discriminatory purpose in its adoption."). It is striking, for example, that four of the cases discussed above all involved the Westboro Baptist Church; yet the courts did not conclude that the buffer zone restrictions in those cases were content-based or discriminated against a particular viewpoint. *See Phelps-Roper v. Koster*, 713 F.3d 942, 950 (8th Cir. 2013); *Phelps-Roper v. City of Manchester*, 697 F.3d at 689; *Phelps-Roper v. Strickland*, 539 F.3d at 361; *St. David's Episcopal Church*, 921 P.2d at 829.

The proper test for content- and viewpoint-neutrality, as Justice Souter pointed out in his concurrence in *Hill*, is "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Hill*, 530 U.S. at 737 (quoting *Ward*, 491 U.S. at 791). As the First Circuit held with regard to the Massachusetts Act, *see McCullen I*, 571 F.3d at 176, and as numerous other courts have held regarding other buffer zone restrictions, as discussed above, these laws are

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enter the buffer zone. Mich. Br. at 12. By the same token, a buffer zone protecting a house of worship or funeral service would be labeled discriminatory for permitting access by a rabbi, priest, or minister who performs the service.

content-neutral because they do not regulate speech, but only the places where speech may occur, and because they were enacted for legitimate government purposes, such as ensuring public safety.

### B. Buffer Zone Laws Can Be Narrowly Tailored Even Though They Limit Direct Personal Contact.

Petitioners also argue that the Massachusetts Act is not narrowly tailored, is overbroad, and does not leave open sufficient ample alternative channels of communication because it limits opportunities for direct personal conversations and leafleting within the prescribed buffer zone. Pet'rs' Br. at 40-52.

Again, similar arguments can be made about the buffer zone laws protecting houses of worship and funeral services. Like the Massachusetts Act, many of these laws establish a fixed buffer zone around the entrance to a house of worship or to a place where a funeral service is being conducted. Particularly in the case of the funeral service statutes, the range of these buffer zones is often much larger than the 35-foot radius prescribed in the Massachusetts Act. Such laws naturally make it difficult for protesters to converse directly with or hand leaflets to attendees at religious or funeral services within the buffer zone. If the Massachusetts Act could be invalidated on that ground, then so could many other worship and funeral buffer zone laws discussed above.

Notably, however, courts considering worship and funeral buffer zone restrictions have rejected the argument that these laws are invalid because they do not permit adequate direct contact between protesters and their target audience. The Sixth and Eighth Circuits have held that even 300-foot buffer zones for

funerals are narrowly tailored and allow ample alternative communication. As the court observed in *Phelps-Roper v. City of Manchester*, even with a 300-foot buffer zone, "[p]icketers can still reasonably communicate their message to funeral attendees and others. Other than the narrow time and place restrictions in the ordinance, no limit is placed 'on the number of speakers or the noise level, including the use of amplification equipment' or 'on the number, size, text, or images of placards.'" 697 F.3d at 694 (quoting *Phelps-Roper v. Strickland*, 539 F.3d at 371); *see also Phelps-Roper v. Strickland*, 539 F.3d at 371-73. If these 300-foot buffer zones permit adequate alternative communication, then *a fortiori* the 35-foot buffer zone in the Massachusetts Act cannot be unduly burdensome.

Moreover, courts have given short shrift to the argument that a buffer zone is overbroad simply because it prohibits protesters from reaching their intended audience through direct contact, be it conversation or leafleting, within its confines. For example, in *Survivors Network*, the Court rejected the plaintiffs' argument that "allowing them to picket or distribute leaflets at a more remote location or time would not give Plaintiffs enough opportunity to direct their intended message at their intended recipients." No. 4:12CV1501-ERW, 2013 U.S. Dist. LEXIS 56337, at *26; *see also World Wide Street Preachers' Fellowship*, No. 2:04-CV-00279TC, slip op. at 17 (rejecting plaintiffs' argument that, "by prohibiting them from using [certain prime areas], the City has prevented them from reaching their intended audience").

### C. Invalidating The Massachusetts Act Could Undermine The Legal Basis Supporting Buffer Zones Around Houses Of Worship And Funeral Services.

As discussed above, courts that have upheld buffer zones around houses of worship and funerals have relied on this Court's foundational decisions upholding buffer zones around reproductive health facilities. As the courts have recognized, all three situations involve similar characteristics: they are confrontational settings where the public sphere intersects with the private, and where the right to free speech may collide with other rights, such as the right to free exercise of religion, the right of survivors to honor the dead with dignity and in privacy, and the right of women to seek medical or counseling services. Accordingly, the Court's decision in this case will have far-reaching implications for buffer zone laws and injunctions protecting houses of worship and funeral services.

Therefore, in considering Petitioners' challenge to the Massachusetts Act, the Court should also consider how it would view Petitioners' arguments as they might be applied to other buffer zone laws in other contexts. If, as Petitioners contend, the Massachusetts Act is not content-neutral because it targets reproductive health care facilities, then buffer zones for houses of worship and funeral services, especially military services, arguably share the same infirmity. If, as Petitioners contend, the Massachusetts Act is not narrowly tailored and is overbroad because it restricts conversational speech and leafleting within the buffer zone, then by the same token the buffer zone protections for houses of worship and funeral services are also arguably overly restrictive. But then the Court must be

willing to contemplate that government cannot protect worshippers from having to run a gauntlet of aggressive protesters, who thrust handbills at them or harangue them about their denomination's shortcomings, just to attend services. Then the Court must also contemplate that government cannot restrict protesters from joining mourners at military funerals on public ground and confronting grieving families with signs telling them to "Thank God for Dead Soldiers."

The same constitutional analysis that supports buffer zones for houses of worship and for funeral services also supports the Massachusetts Act. This Court cannot strike down the Act without potentially triggering a jurisprudential domino effect that could ultimately topple the statutes, ordinances, and injunctions creating buffer zones around houses of worship and funeral services as well.

## CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

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# APPENDIX

## APPENDIX

## FURTHER STATEMENTS OF INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League ("ADL") is a human relations organization founded 100 years ago "to secure justice and fair treatment to all citizens alike." ADL is committed to safeguarding principles of religious and individual liberty, including freedom of speech and association, the right to privacy, and reproductive freedom. The right to abortion, and the right to oppose abortion, raise sharp, conflicting, and competing interests, which must be accommodated. ADL believes that the statute at issue, which creates a 35-foot buffer zone around reproductive health care facilities, respects the rights of individuals to voice their opinions and, at the same time, protects the ability of other individuals to exercise their constitutional rights. In support of these principles, ADL has filed briefs in this Court in such cases as *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

* * *

Congregation Agudas Achim, a Reconstructionist Jewish congregation in Attleboro, Massachusetts, and Congregation Dorshei Tzedek, a Reconstructionist Jewish congregation in West Newton, Massachusetts, are deeply concerned with the health and well-being of all people, and affirm the importance of access to reproductive health services for all women in need, in accordance with their own conscience and the best

advice of their health care providers. We believe in the importance of women's access to reproductive services without fear of harassment or other obstacles to attaining care.

* * *

Disciples for Choice is an unapologetically pro-choice organization within the Christian Church (Disciples of Christ). We believe that a woman should have full control over her own body and therefore over all decisions related to reproduction. We oppose any restrictions on these basic rights as violations of religious liberty and attacks on God-given agency of women; and we stand ready to stand alongside any and all people of faith and conscience who work to defend and preserve these rights.

* * *

Disciples Justice Action Network is a network of individuals, congregations, and organizations within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, freedom, and inclusion in both church and society. Our mission is to promote a passion for justice in our churches, provide prophetic Disciples leadership to ecumenical and interfaith coalitions, and work together with all people of good will to build the Beloved Community envisioned by Dr. Martin Luther King, Jr. As a justice action network, we are committed to reproductive justice for all women and for the availability of the full range of options in reproductive health care.

* * *

Interfaith Alliance Foundation is a 501(c)(3) non-profit organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance

Foundation. Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

* * *

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 15 national and 125 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. The JCPA believes that reproductive health decisions are best made by individuals in consultation with their families and health care professionals based on personal religious beliefs; and, that restrictions on the right to choose and lack of access to reproductive health services threaten a constitutionally-protected individual right.

* * *

Jewish Women International ("JWI"), with 50,000 members and supporters across the country, is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize the full potential of their strength. In 1968, five years before *Roe v. Wade*, JWI (formally B'nai B'rith Women) called for laws that would protect

women from having to seek often life-threatening illegal abortions, a right that the organization has reaffirmed multiple times through the years. Since the landmark 1973 Supreme Court decision in *Roe v. Wade,* we have been an unwavering Jewish voice for comprehensive reproductive health services. JWI continues to advocate for access to reproductive health information and services, which build a foundation for healthier families and communities, and believes that women deserve to be able to make private health decisions according to the dictates of their own faith and conscience.

* * *

Founded in 1907, the Methodist Federation for Social Action ("MFSA") is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing and advocacy. For MFSA, reproductive justice means that every child should be a wanted child, one supported by adequate prenatal, perinatal, maternal, and child care; further, access to family planning, adequate nutrition, medical, spiritual, emotional and psychological care and meaningful employment to support oneself and one's family should be readily available to all the people of the world.

* * *

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political

means to experience the sacred gift of sexuality with health and wholeness.

* * *

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, affirm the importance of ensuring appropriate resources and measures, including buffer zones, exist to protect providers, patients, and premises of reproductive care facilities.