No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *ET AL.*,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL 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 VICTIM RIGHTS LAW CENTER, RENEE DEVESTY, *ET AL.* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Victim Rights Law Center ("VRLC") is a non-profit organization dedicated to promoting a national movement seeking justice for every rape and sexual assault victim. To this end, every year VRLC provides free legal services to more than 400 adult and youth victims of rape and sexual assault in Massachusetts and Oregon. VRLC also provides training, consulting, mentoring and legal resources to thousands of legal professionals across the United States on the use of civil laws to protect and promote the rights of sexual assault survivors. VRLC was the first non-profit agency in the United States dedicated to meeting the legal needs of sexual assault survivors.

Renee DeVesty is a rape survivor. She has spoken out about her personal experience of rape and pregnancy from rape with the mission of empowering and inspiring survivors.

Amici also include thirty-eight other organizations, which are set forth in the appendix to this brief, that are committed to ending sexual violence in the United States and that provide a wide variety of services to victims of rape and other forms of sexual violence. These *amici* advocate on behalf of the interests of sexual assault survivors, promote awareness of sexual assault, and otherwise serve individuals, families, and communities that have been impacted by sexual violence.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk.

Amici have a particular interest in the outcome of this case because they understand the importance of ensuring that sexual assault victims have safe access to health care services, including reproductive health care services, in the aftermath of an assault. Based on their extensive experience advocating on behalf of victims of rape and sexual assault, *amici* know that privacy and safety are two of the primary needs of sexual assault survivors, both of which will be at risk if the Massachusetts buffer zone law is not upheld.

SUMMARY OF ARGUMENT

The buffer zone around reproductive health care facilities that Massachusetts has established is critical to protect an already traumatized and particularly vulnerable group of patients—victims of rape.

Every day, nearly 3,500 adult women in this country are raped—1.27 million each year. About one in five adult women has been a victim of rape at some point in her life. Many victims have been raped multiple times. The epidemic of rape results in more than 32,000 pregnancies each year. As startling as these estimates are, they significantly understate the problem, because they exclude the 44% of all rapes that involve girls below the age of 18.

Rape victims are among the people Massachusetts is protecting by adopting a fixed 35-foot buffer zone law that limits "entering" and "remaining" in areas that immediately surround the driveway and entrance to reproductive health care facilities. *See* Mass. G.L. c. 266, § 120E½. This protection is vital to the mental and physical health of these victims, who in the days following their assault have an urgent need for the care that the facilities offer but who are often

vulnerable and traumatized as a result of the violence they have suffered.

Victims of rape have particularly acute needs for both pregnancy- and non-pregnancy-related services including, for example, diagnosis and treatment of sexually transmitted infections. Out of concern for privacy, embarrassment, lack of money, or intense need for anonymity, victims often do not seek medical attention from their customary doctors, and instead visit reproductive health care facilities. Reproductive health care facilities thus provide critical services to rape victims and often are the best and most readily accessible place to get help.

At the same time, victims of rape are exceptionally vulnerable patients because they have suffered an extreme trauma. The severe psychological and emotional consequences of rape are obvious and well-recognized. Rape victims often feel shame and fear, suffer from post-traumatic stress disorder, panic attacks, flashbacks, and depression, and are at an increased risk of suicide. Emotional, physical and behavioral symptoms may be especially intense in minors. Collectively, these factors underscore the victims' need for the utmost privacy, physical integrity, and a sense of security regarding physical space, especially in the period immediately following an assault. Indeed, numerous other laws that the Massachusetts Legislature has enacted to protect rape victims demonstrate this well-founded concern for their unique needs.

The Massachusetts Legislature enacted this buffer zone law in response to an unfortunate history of harassment, blockading, and intimidation of individuals attempting to access reproductive health care facilities. Those precise types of intrusion pose

the greatest threat to girls and women who recently have been raped, whose trauma from sexual assault is raw and whose emotional balance is fragile. But whether those outside the clinics are hostile or respectful, loud or subdued, intimidating or pleasant, their physical proximity to the victims and the unwanted public exposure they inflict strike at the core of the victim's need for privacy, physical integrity, and personal security. Without a buffer zone, many rape victims either would not go to the clinics, thus forgoing needed medical care, or would run the gauntlet of protestors and risk worsening the traumatic injury they have suffered.

States have a significant interest in protecting access to reproductive health care facilities for all patients. That interest is at its apex with regard to victims of rape, where state government may quite properly seek to ensure that victims have a clear path to reach such facilities unimpeded and without further jeopardizing their physical, psychological, and emotional health. The alternative laws that Petitioners cite as sufficient, which predate the buffer zone, criminalize only *intentional* obstruction, harassment, intimidation, and the like. The harm to rape victims, however, can occur without regard to the intent of those protesting outside the facilities. By blocking a clear path to the door, those protesters' actions inherently interfere with rape victims' access.

The Massachusetts buffer zone law prevents the harm caused by the constructive blocking of facility entrances—*i.e.*, the blocking caused by the mere presence of people in close proximity to facility entrances, whatever their intent. It keeps a small area around facility entrances clear, thereby ensuring that all patients can enter without fighting through a

crowd of protestors directly in front of the door (a prospect that could be especially distressing for women and girls recently traumatized by rape). The restriction covers only that small area, allowing protestors to engage in all forms of lawful speech outside of the zone. As such, the buffer zone law is narrowly tailored to serve the government's significant interests in ensuring that patients have unimpeded access to reproductive health care facilities, and to protect the most vulnerable of those patients, rape victims.

ARGUMENT

I. REPRODUCTIVE HEALTH CARE FACILITIES PROVIDE ESSENTIAL SERVICES TO RAPE VICTIMS

A. Rape Is Rampant in the United States and Commonly Results in Pregnancy- and Non-Pregnancy-Related Health Complications

Rape has regrettably reached epidemic proportions in the United States.[2] The Centers for Disease Control and Prevention ("CDC") estimate that nearly one in five adult women in the United States has been raped

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[2] Rape encompasses "any completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent." National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey*: *2010 Summary Report*, at 17 (August 2011) [hereinafter "CDC Report"].

at least once.[3] The CDC further estimates that 1.27 million adult women in the United States are raped each year.[4] This estimate, however, dramatically understates the number of victims, as it does not include minors (*i.e.*, those under the age of 18), who account for approximately 44% of all rape victims.[5]

Even apart from this omission, the CDC cautions that its figures likely underestimate the prevalence of rape because of limitations in the survey methodology, the nature of the crime, and the reluctance of many victims to disclose an assault.[6] With or without some adjustment for these limitations, the numbers are staggering. Rape impacts many millions of people in the United States every year, particularly adolescent and young adult women.

The more than 1.27 million rapes each year cause serious pregnancy- and non-pregnancy-related health issues for female victims. Researchers estimate that

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[3] CDC Report, *supra* note 2, at 18. It is important to recognize that sexual violence impacts everyone, including males. The CDC estimates that one in 71 adult men in the United States has been raped at least once in his lifetime. *Id*. at 19. Men and boys who have been raped also obtain services at reproductive health care facilities, such as testing for and treatment of sexually transmitted infections. Because patients of reproductive health care facilities are predominantly girls and women, this brief focuses on the protection the Massachusetts buffer zone provides for girls and women who have recently been raped and urgently need access to reproductive health care facilities.

[4] *Id*. at 18.

[5] U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, at 3 (Feb. 1997), http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf (last visited Nov. 13, 2013).

[6] CDC Report, *supra* note 2, at 85.

rape results in approximately 32,000 pregnancies each year.[7] Rape also can result in sexually transmitted infections ("STIs"). It is difficult to estimate the number of rape-related STIs,[8] but regardless of the rate of infection, many rape victims understandably fear that they have contracted an STI as a result of the assault. They appropriately seek medical attention post-assault, in many cases at affordable and accessible reproductive health care facilities.

B. Rape Victims Need Help at Reproductive Health Care Facilities

Reproductive health care facilities, such as Planned Parenthood, provide numerous pregnancy- and non-pregnancy related services that are critical for those who have recently been raped. Health authorities recommend that many of these services, including emergency contraception and STI prophylactics, be obtained within three to five days of a sexual assault.[9] It is vital that rape victims have ready access to reproductive health care facilities within days after their trauma.

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[7] Melisa M. Holmes, *et al.*, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 American Journal of Obstetrics and Gynecology 320, 320 (1996).

[8] Melisa Holmes, *Sexually Transmitted Infections in Female Rape Victims*, 13 AIDS Patient Care and STDs 703, 703-04 (1999).

[9] *See*, *e.g.*, Centers for Disease Control and Prevention, *Sexually Transmitted Diseases Treatment Guidelines*, 2010, 59 Morbidity and Mortality Weekly Report, at 91-93 (Dec. 17, 2010); U.S. Food and Drug Admin., Press Release, *FDA Approves ella Tablets for Prescription Emergency Contraception*, www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm (last visited Nov. 15, 2013).

1. Non-Pregnancy-Related Services. Reproductive health care facilities provide many services unrelated to pregnancy. Most notably, reproductive health care facilities provide anonymous STI testing and treatment, which should be initiated within 72 hours after the rape.[10] Access to quick, anonymous, and affordable STI testing is critical to both the mental and physical health of these individuals. In addition, staff at reproductive health care facilities typically are trained to identify adults and minors who might have been raped. This information is used to guide patient care, and most reproductive health care facilities, including all Planned Parenthood centers, provide referrals for forensic medical examinations following a suspected rape.

2. Pregnancy-Related Services. Of course, women and girls also fear pregnancy after rape, and for many victims the concept of carrying and bearing the rapist's child is intolerable.[11] Health authorities recommend that *all* women of childbearing age be tested for

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[10] For example, the CDC recommends a prophylactic regimen for victims of sexual assault designed to prevent contraction of hepatitis B, chlamydia, gonorrhea, trichomonas, and, in some cases, human immunodeficiency virus ("HIV"), that should be initiated within 72 hours after the sexual assault. *See* CDC, *Sexually Transmitted Diseases Treatment Guidelines*, *supra* note 9, at 91-93.

[11] *See*, *e.g.*, *Blog Carnival: My Planned Parenthood Is a Mental Health Hookup*, http://anytimeyoga.wordpress.com/2011/07/06/blog-carnival-my-planned-parenthood-is-a-mental-health-hookup/ (last visited Nov. 4, 2013) ("I know it's ridiculous, but I can't shake it. Because if the tests are wrong, I am pregnant with the genetic progeny of my rapist. And my psyche cannot handle that.").

pregnancy following a rape.[12] Reproductive health care facilities provide a number of services to assist these women in understanding and managing their pregnancy. These services include, for example, counseling, pregnancy testing, emergency contraception (which has to be administered within three to five days post-assault, depending on the type of contraception[13]), genetic testing information, and abortion.

* * * *

Out of embarrassment or a clinically intense need for privacy and anonymity, many rape victims do not turn to their customary doctors. Reproductive health care facilities are often the best, most affordable[14] and most readily accessible health care resource in many communities to help rape victims. An anonymous letter to Planned Parenthood demonstrates the enormous value reproductive health care facilities provide to those who have just been raped:

> Thank you for being there after I was raped. Thank you for being calm, warm, and professional when I was emotionally fragile and alone in a city where I had no one I could trust. Thank you for

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[12] *See* U.S. Dep't of Justice, Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations*, at 115 (2d ed., Apr. 2013), www.ncjrs.gov/pdffiles1/ovw/241903.pdf (last visited Nov. 19, 2013).

[13] *See*, *e.g.*, U.S. FDA, *supra* note 9.

[14] Statistics show that poor women are more likely to be raped. *See*, *e.g.*, Michael Planty, *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Sexual Violence*, *1994-2010*, at 3 (March 2013) (females with household income less than $25,000 are almost twice as likely to be a victim of sexual assault).

providing morning-after birth control so that I did not have to bear my rapist's child. Thank you for anonymous STD testing that I could afford. Thank you for making me feel safe at a time when I thought I could never feel safe again.[15]

II. RAPE VICTIMS HAVE A PARTICULARLY STRONG PRIVACY INTEREST IN AVOIDING CLOSE PHYSICAL PROXIMITY TO STRANGERS WHEN ACCESSING REPRODUCTIVE HEALTH CARE FACILITIES

Researchers and victim service providers have documented the many physical and psychological impacts of rape. For many rape victims, privacy, physical integrity, and a sense of security regarding physical space are paramount. As a result, the absence of a buffer zone at reproductive health care facilities to limit protestors from confronting patients at close range—often within a mere *three days* of the assault—would deter many victims from accessing necessary medical care. If rape victims were forced to encounter protestors without a clear path to the entrance, the experience would potentially aggravate the psychological harm they have suffered.

A. Victims of Rape Frequently Experience Psychological Trauma That Makes Unwanted Contact and Close Confrontations Especially Difficult and Distressing

Rape is manifestly among the most severe traumas that an individual can experience. The psychological impacts of rape have been extensively researched and

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[15] http://dearplannedparenthood.tumblr.com/ (last visited Nov. 13, 2013).

are well characterized in the medical literature.[16] In 1974, researchers first described the symptoms—emotional, physical, and behavioral—that rape victims experience.[17] These symptoms include humiliation and embarrassment; self-blame and lowered self-esteem; depression; paralyzing anxiety and panic; fear of crowds and strangers; hyper-vigilance; and flashbacks.[18] Victims of rape also are at increased risk of developing psychiatric disorders, including post-traumatic stress disorder and major depression, and of committing suicide.[19] Researchers estimate that 33% of rape victims have contemplated suicide and 13% have attempted it (versus 8% and 1% for non-victims).[20]

It is difficult to convey with statistics and diagnostic terminology the intensity and severity of psychological harm that rape inflicts. Personal accounts of victims

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[16] *See*, *e.g.*, Mary P. Koss, *et al.*, *Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery*, 27 Psychology of Women Quarterly 130, 133 (2003).

[17] *See* Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 American Journal of Psychiatry 981, (1974).

[18] *See*, *e.g.*, Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature*, 29 Clinical Psychology Review 431, 432 (July 2009); Koss *et al.*, *supra* note 16, at 133; Burgess *et al.*, *supra* note 17, at 983.

[19] *See*, *e.g.*, Koss *et al.*, *supra* note 16, at 133; Barbara Olasov Rothbaum, *et al.*, *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 Journal of Traumatic Stress 455 (1992).

[20] *See* Dean G. Kilpatrick *et al.*, National Victim Center and Medical University of South Carolina, *Rape in America: A Report to the Nation*, at 7 (Apr. 23, 1992).

can provide some insight into how these clinical symptoms affect the victims' lives and how important unimpeded access to medical and counseling services can be. The story of one such victim, *amicus* Renee DeVesty, paints a vivid picture of these clinical symptoms, and of the importance of unimpeded access to a range of medical and counseling services:

> After that night, my mind turned against me. Poisonous thoughts seeped into every crevice and I had nightmares of faceless strangers chasing me every night in my dreams. I did not trust anyone. I blamed myself. I believed that I would never be able to cleanse the filth off my body. I never pressed charges, because at 19 years old (and this was 30 years ago), I wasn't even sure if this was legally a crime, since I knew the men who raped me.
>
> But just when I thought the horror couldn't escalate any further, things got worse: My period never came. At first, I assumed it was due to the stress and anxiety, so I waited. I waited and waited, and fear swarmed in my mind.
>
> Eight weeks after I was raped, Planned Parenthood gave me the confirmation: I was pregnant. The woman who worked there tried to tell me about my options, but I ran. I threw up in the parking lot. I drove around for hours praying this was all a dream.
>
> . . .
>
> I was mentally, emotionally and spiritually broken, and the thought of what had resulted from this vile act took my self-hatred into another dimension. I wanted no memory of that night, would do anything possible to erase it in the hope

> that it would somehow ease the sick, disgusting feeling I got every time I looked in the mirror. I realized that in order to maintain what little sanity I had left, I had to terminate the pregnancy.
>
> Six months after the rape, I dropped out of college and developed an eating disorder. I collapsed into alcohol abuse and had abusive relationships. It took me 12 years of trying to kill myself before I could actually verbalize to a trusted counselor what happened to me. I spent the next eight years trying to reverse the damage that was done.
>
> Twenty years of serving time for a crime I didn't commit.[21]

As this account reflects, the trauma of rape, especially when it causes pregnancy, cannot be overstated. The Massachusetts fixed 35-foot buffer zone addresses two manifestations of this trauma—the need for privacy and the need for safe, unimpeded access to reproductive health care facilities.

1. The Need for Privacy. While every rape victim is unique, victims of rape consistently report feeling humiliated and embarrassed about their assault.[22] Victims often do not report rape to legal authorities[23]

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[21] Renee DeVesty, *I Got Pregnant From Rape*, Salon.com, available at www.salon.com/2012/08/22/i_got_pregnant_from_rape/ (last visited Nov. 11, 2013). Ms. DeVesty joins the *amici* in this brief and has confirmed that she supports quoting her article in this brief.

[22] See Kilpatrick *et al*., *supra* note 20, at 9; Burgess *et al*., *supra* note 17, at 983.

[23] *See* Planty *et al*., *supra* note 14, at 7 (finding that 64% of female rape and sexual assault victims did not report rape or sexual assault to the police).

or even to their own families.[24] Many rape victims do not disclose the rape because they are ashamed, because they are concerned that their credibility will be questioned, or because they fear they will be blamed for what happened to them.[25] These feelings, however unfortunate, are real. Rape is extraordinarily invasive, robbing victims of their dignity, bodily integrity, and personal autonomy.[26] The stigma often associated with an assault compounds these harms. It is not surprising, then, that victims of rape commonly express a consuming need for privacy.[27]

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[24] *See* Kilpatrick *et al*., *supra* note 20, at 9 (finding that rape victims reported concerns about their family knowing that they have been sexually assaulted).

[25] *See* CDC Report, *supra* note 2, at 4 ("Survivors may be reluctant to disclose their victimization for a variety of reasons including shame, embarrassment, fear of retribution from perpetrators, or a belief that they may not receive support from law enforcement. Laws may also not be enforced adequately or consistently and perpetrators may become more dangerous after their victims report these crimes."); Koss *et al*., *supra* note 16, at 137 ("A second obstacle to reaching out for help is that survivors of male violence fear their credibility will be questioned or they will be partly blamed for what happened to them. For example, most rape survivors who had contacted legal or medical services had two or more experiences that left them feeling revictimized.").

[26] *See*, *e.g*., Victim Rights Law Center, Inc., *Beyond the Criminal Justice System: Using the Law to Help Restore the Lives of Sexual Assault Victims*, at 48 (2d ed. 2012) ("A sexual assault victim's fear of others finding out about the assault is a natural part of the trauma reaction; sexual violation is humiliating, degrading, and undermines a victim's sense of autonomy and dignity.").

[27] *See*, *e.g*., Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. Tex. L. Rev. 695, 713 (2007) ("The first need of rape victims, both personal and legal, is privacy."); Oriana

The Massachusetts Legislature, like other legislative bodies across the United States, recognized the obvious: victims of rape have a unique need for privacy against unwanted public attention, inquisition, and approach. Accordingly, Massachusetts has enacted numerous safeguards to protect the privacy of victims of rape and sexual assault, including: (i) a prohibition on publishing the names of rape victims in the media, Mass. G.L. c. 265, § 24(c); (ii) evidentiary limitations regarding cross-examination of rape victims regarding the victims' sexual history (*i.e.*, rape shield laws), Mass. G.L. c. 233, § 21B[28], (iii) a Victim Bill of Rights requiring separate and secure waiting areas in courthouses for victims, Mass. G.L. c. 258B, § 3(i); (iv) recognition of the privileged nature of communications between victims and sexual assault advocates, Mass. G.L. c. 233, § 20J, and (v) a

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Mazza, *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 St. John's L. Rev. 763, 776 (2008) ("It was not long ago that rape victims were practically treated as criminals by society and there still remain some similar negative attitudes today. . . . In making the rape victim feel comfortable about bringing [criminal] charges, the right to privacy is paramount.").

[28] Almost every state has adopted some form of rape shield law. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-86f (West 2010) (evidence of the sexual conduct of the victim is inadmissible); Ga. Code Ann. § 24-2-3 (West 2010) (evidence relating to the past sexual behavior of the complaining witness is inadmissible); 725 Ill. Comp. Stat. Ann. 5/115-7 (West 2010) (prior sexual activity and the reputation of the alleged victim are inadmissible); Mich. Comp. Laws Ann. § 750.520 (West 2010) (opinion and reputation evidence of the victim's sexual conduct and evidence of specific instances of the victim's sexual conduct are inadmissible); Utah Code Ann. § 412 (West 2010) (evidence offered to prove that victim engaged in other sexual activities or to prove a victim's sexual predisposition is inadmissible).

prohibition on the disclosure of the names of rape victims or any other identifying information by medical providers to criminal authorities, Mass. G.L. c. 112, § 12A½.

2. The Need for Physical Distance. Many rape victims also report fear of crowds, strangers, and physical contact and proximity.[29] Research describes rape victims as "quite apprehensive when they had to be in crowds" and "fearful of people walking behind them."[30] One victim reported: "I can't stand to have someone behind me. When I feel someone is behind me, my heart starts pounding. Last week I turned on a guy that was walking in back of me and waited till he walked by. I just couldn't stand it."[31]

In part, rape victims' need for physical space results from a desire to avoid situations and stimuli that remind them of the rape itself. As one victim rights organization summarizes: "Rape victims may experience uncontrollable intrusive thoughts about the rape, essentially unable to stop remembering the incident. . . . [V]ictims may relive the event through flashbacks, during which victims experience the traumatic event as if it was happening now. Additionally, victims are distressed by any event that symbolizes the trauma of rape. Victims avoid talking about the event and will avoid any stimuli or situations which remind them of the rape."[32]

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[29] *See* Burgess *et al*., *supra* note 17, at 984; Vickerman *et al*., *supra* note 18, at 432 (collecting studies).

[30] Burgess *et al*., *supra* note 17, at 984.

[31] *Id.*

[32] New York City Alliance Against Sexual Assault, Factsheet, *Rape-Related Posttraumatic Stress Disorder*, www.svfreenyc.org/ survivors_ factsheet_43.html (last visited Nov. 13, 2013).

The Massachusetts buffer zone law is designed to create the physical space that rape victims so desperately need when they seek to enter a reproductive health care facility. It keeps a small area around facility entrances free and clear, thereby ensuring that patients can access the facility without having to fight through a crowd of protestors to do so. This protection is important for all patients, but is especially critical for girls and women who have recently been raped, who likely are terrified of crowds and strangers, and who are more likely than most not to enter the facility rather than encounter a crowd of strangers directly in front of the facility entrance.

B. Many Victims of Rape Are Minors, A Particularly Vulnerable Population

The majority of rape victims are between the ages of twelve and twenty-four, and approximately 44% are under the age of 18.[33] As described above, rape harms nearly all victims psychologically, regardless of age, in ways that make unwanted contact and confrontation particularly distressing. Minors, however, are a particularly vulnerable population and manifest the trauma of rape even more acutely, have an even greater craving for privacy and physical space, and need help even more.[34]

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[33] *See* U.S. Dep't of Justice, *supra* note 5, at 3.

[34] *See*, *e.g.*, Bob Roehr, *Bullying Doubles, Rape More Than Triples Risk for Teen Suicide* (Nov. 15, 2010), www.medscape.com/viewarticle/732519 (last visited Nov. 13, 2013) (finding that "young women who reported a history of being raped were 3.350 times more likely to have attempted suicide"); Allison E. Croysdale, *et al.*, *Correlates of Victimization in a Juvenile Justice Population*, 17 Journal of Aggression, Maltreatment & Trauma 103 (2008) (finding that adolescent females in juvenile justice facilities who reported having

C. Rape Victims Have A Strong Privacy Interest In Avoiding Unwanted Proximity of Protestors

This Court has repeatedly recognized a privacy interest in avoiding unwanted communication. *See*, e.g., *Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases."); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (recognizing a privacy interest in avoiding unwanted speech in the home and surrounding areas); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."). Accordingly, this Court has held that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, 530 U.S. at 716 (citing *Frisby*, 487 U.S. at 487).

The "privacy interest in avoiding unwanted communication varies widely in different settings," and is particularly strong in the health care context. *Id*. In this respect, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994). Thus, this Court upheld state statutes designed "to protect those who wish to enter health care facilities, many of whom may be under

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experienced sexual abuse were almost twice as likely to have a history of suicide attempts (59% versus 33%)); Dean G. Kilpatrick, *et al*., *Violence and Risk of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results From the National Survey of Adolescents*, 71 Journal of Consulting and Clinical Psychology 692 (2003).

special physical or emotional stress, from close physical approaches by demonstrators." *Hill*, 530 U.S. at 729. In this setting, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11, n.6 (1975) (citation and brackets omitted).

Especially given that the clinically intense need for privacy is a demonstrated psychological consequence of rape, victims are entitled to be spared unwanted physical and verbal confrontations in seeking to enter reproductive health care facilities. These victims epitomize the vulnerable patient under special physical and emotional stress, as identified in *Hill* and *Madsen*, who should be able to seek medical attention without Herculean efforts to escape people blocking their way or confronting them. *Madsen*, 512 U.S. at 772-73. Renee DeVesty's experience again highlights how harmful such contacts can be. After learning that one of her assailants had impregnated her, she ran out to the parking lot and vomited. It is abhorrent to imagine Ms. DeVesty, or the many other girls and women who find themselves in a similar physical and psychological condition, having to press through a crowd of protestors to enter or exit the facility.

Hill recognized that the strength of one's privacy interest depends on the circumstances. Protecting a rape victim seeking to avoid unwanted confrontation and public attention at a reproductive health care facility, whether in the immediate aftermath of the assault or weeks or months after the assault when the victim is still suffering from the trauma, is particularly compelling. Massachusetts is entitled to honor that privacy interest and afford that protection.

III. THE BUFFER ZONE LAW IS NARROWLY TAILORED TO ADDRESS MASSACHUSETTS' SIGNIFICANT INTERESTS IN PROTECTING THE HEALTH AND SAFETY OF RAPE VICTIMS AND ENSURING THEIR UNIMPEDED ACCESS TO REPRODUCTIVE HEALTH CARE FACILITIES

Massachusetts enacted the fixed 35-foot buffer zone law because preexisting laws did not prevent the crowding of protestors directly outside of the facilities that deters patients in general, and victims of rape in particular, from access. The buffer zone law is narrowly tailored and effective in addressing the state interest in protecting the health and safety of rape victims and ensuring their access to reproductive health care facilities.

A. Massachusetts Has A Strong Interest In Ensuring That Rape Victims Have Unimpeded Access To Reproductive Health Care Facilities

Massachusetts' interest in ensuring that patients have safe, unimpeded access to reproductive health care facilities is especially strong with respect to girls and women who have been raped (often in the immediately preceding few days). As described above, these individuals urgently need access to reproductive health services, but also are the most likely to be traumatized and impeded from accessing such services because of crowding and confrontational protests directly outside of the facilities.

Massachusetts has a strong interest in ensuring that all of its citizens have unimpeded access to reproductive health care facilities. Thus, this Court has held that "ensuring public safety and order,

promoting the free flow of traffic on streets and sidewalks, . . . and protecting a woman's freedom to seek pregnancy-related services" were "certainly significant enough" to justify government action "to secure unimpeded physical access to [reproductive health] clinics." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997); *see also Madsen*, 512 U.S. at 767-68 ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

As particularly relevant to rape victims, however, Massachusetts also has a recognized interest in protecting the health and safety of patients visiting reproductive health care facilities and in encouraging victims to seek medical care post-assault. *See Hill*, 530 U.S. at 729 ("Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions."); *id*. at 737 (Souter, J., concurring) ("No one disputes the substantiality of the government's interest in protecting people already tense or distressed in anticipation of medical attention (whether an abortion or some other procedure) from the unwanted intrusion or close personal importunity by strangers.").[35] The Commonwealth's interest extends beyond physical health to mental and

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[35] *See also Madsen*, 512 U.S. at 772 ("'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'") (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84, n.12 (1979)).

emotional health. *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (holding that the psychotherapist privilege "serves the public interest" because "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance").

Protestors blocking the entrances to reproductive health care facilities and confronting patients who try to enter without any effective limitation not only inhibits access but also can cause real psychological harm. *See*, *e.g.*, *Madsen*, 512 U.S. at 768 ("[T]argeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance.") (internal citation omitted). Girls and women who have just been raped are particularly likely to suffer psychological trauma from protestors intentionally or unintentionally blocking their access to reproductive health care facilities. Accordingly, Massachusetts' recognized interest in protecting the health and safety of its citizenry, and particularly the health and safety of the subset of its citizenry that has been victimized by rape, "justif[ies] a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Hill*, 530 U.S. at 715 (internal citations omitted).

B. Pre-Existing Laws Are Inadequate Alternatives To Ensure Rape Victims' Safe Access To Reproductive Health Care Facilities

Petitioners contend that existing Massachusetts and federal laws are sufficient to address the decades-long problem of obstruction, harassment, and intimidation outside of reproductive health care facilities in Massachusetts. Pet. Br. at 34-38. This is

incorrect as a general matter, and palpably wrong with respect to rape victims. Put simply, even with the suggested alternatives, protestors may still crowd in front of the facility entrances. That means patients, including rape victims, are forced to push through the crowd without a clear path to the entrance of the facility. In many cases, a rape victim may choose to forego such critical and urgent services altogether rather than run the gauntlet of protestors. As a result, without the 35-foot buffer zone law, the government cannot ensure these victims' safe access to important health services.

The legislative record for the buffer zone law demonstrates that pre-existing laws simply have not worked to ensure safe and unimpeded access to reproductive health care facilities in Massachusetts, and the difficulties identified are especially severe for rape victims. Prior to enactment of the floating buffer zone law in 2000 (which preceded the current 35-foot fixed buffer zone law), harassment and intimidation outside reproductive health care facilities in Massachusetts were prevalent. The record contains testimony regarding several incidents of close approach and intimidation, each of which underscores why rape victims would find such encounters intolerable:

- At one Massachusetts clinic, three protestors stood across the entrance with less than a foot between them, forcing an individual to squeeze between them to gain access to the facility. J.A. 17.
- The clinic director for a Boston facility testified that a woman had tried to enter the facility garage but was blocked by protestors from accessing the swipe card machine. Two other

protestors moved behind the woman's car and prevented her from backing up. J.A. 16, 20.

- A physician who worked at a Boston facility was confronted every day by protestors who surrounded her car as she tried to enter the garage, put their faces to her window, screamed her first name, called her a murderer, and videotaped her. J.A. 12.

Subjecting rape victims to the types of entrapment, menacing hostility, and in-your-face videotaping described above would be cruel. Massachusetts has a legitimate interest in protecting rape victims from such conduct.

In large part, the pre-existing laws have proven to be inadequate because they target only intentional blockading, harassment, intimidation, and the like. *See*, *e.g.*, Mass. Gen. Laws c. 266, § 120E½(e) (prohibiting knowingly obstructing, detaining, hindering, impeding, or blocking facility entrances); *id.* § 120E (prohibiting knowing obstruction of entrances to a medical facility); 18 U.S.C. § 248(a)(1) (prohibiting using force, threat of force, or physical obstruction to injure, intimidate, or interfere with any person obtaining or providing reproductive health services). For rape victims, however, it is not only the intentional conduct that is problematic. The massing of individuals in doors, driveways, and entryways can also be upsetting and likely to cause a victim to decline to seek necessary medical assistance at the facility.

The *Hill*-style floating buffer zone law that the Massachusetts Legislature enacted in 2000 failed to ensure safe, unimpeded access to reproductive health care facilities for this same reason. Protestors continued to block access to the entrances of

reproductive health care facilities and to intimidate patients. For example, Boston Police Department Captain William B. Evans testified that protestors "stand up right in front of the door" and "[a] lot of them hold signs right there." J.A. 67, 122. Protestors took up stationary positions a few feet apart, forcing patients to "pass very close to them" on their way to the door. J.A. 96. Captain Evans further described the activity at the facility entrances as so frenetic that it was like "a goalie's crease," and the sheer amount of protestor activity caused many patients to leave the facility rather than fight through the masses of protestors. J.A. 69, 88-89.

Quite apart from any speech, the conduct of these protestors intimidated many patients and deterred them from entering the facility. This type of protestor activity is especially noxious for those dealing with the traumatic effects of rape. The archetypal symptoms experienced by rape victims—the fear of crowds, the revulsion to physical proximity or contact, the intense need for privacy—are precisely the sensitivities that are assaulted when protestors block entrances, swarm cars, and scream at staff and patients from close distances. Whereas this conduct is problem enough for the ordinary patient, it poses a seemingly insurmountable hurdle for a girl or woman who has been raped.

The fixed 35-foot buffer zone law corrects the inadequacy of prior laws by prohibiting people from gathering in close proximity to facility entrances. By keeping a small area around the facility entrances clear, the buffer zone law ensures that patients can access the facility while still allowing protestors to engage in all forms of lawful communication outside of the zone. The buffer zone law is narrowly tailored

to ensure important governmental interests—unimpeded access to reproductive health care facilities for patients in general and rape victims in particular—and should be upheld.

CONCLUSION

For the reasons discussed herein and in the brief for respondents, the Court should affirm the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici Curiae*

Boston Area Rape Crisis Center (BARCC)

California Coalition Against Sexual Assault (CALCASA)

Chicago Alliance Against Sexual Exploitation (CAASE)

Connecticut Sexual Assault Crisis Services (CONNSACS)

Florida Council Against Sexual Violence

Idaho Coalition Against Sexual Assault & Domestic Violence

Illinois Coalition Against Sexual Assault (ICASA)

Iowa Coalition Against Sexual Assault (IowaCASA)

Jane Doe Inc. (JDI)

Legal Momentum

Legal Voice (formerly the Northwest Women's Law Center)

Maine Coalition Against Sexual Assault (MECASA)

Maryland Coalition Against Sexual Assault (MCASA)

Michigan Coalition to End Domestic and Sexual Violence

Minnesota Coalition Against Sexual Assault (MNCASA)

National Alliance to End Sexual Violence (NAESV)

National Center for Victims of Crime (NCVC)

National Crime Victim Law Institute (NCVLI)

National Sexual Violence Resource Center (NSVRC)

New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)

New Jersey Coalition Against Sexual Assault (NJCASA)

New Mexico Coalition of Sexual Assault Programs, Inc.

New York State Coalition Against Sexual Violence (NYSCASA)

North Carolina Coalition Against Sexual Assault (NCCASA)

Oregon Attorney General's Sexual Assault Task Force (SATF)

Oregon Coalition Against Domestic and Sexual Violence (OCADSV)

Pathways for Change, Inc.

Pennsylvania Coalition Against Rape (PCAR)

Renee DeVesty, Founder & Executive Director of The Clean Slate Diaries

Sexual Violence Law Center (SVLC)

Solace Crisis Treatment Center

Surge Northwest

Texas Association Against Sexual Assault (TAASA)

The Voices and Faces Project

Vermont Network Against Domestic and Sexual Violence (VNADSV)

Victim Rights Law Center (VRLC)

Washington State Coalition of Sexual Assault Programs

West Virginia Foundation for Rape Information and Services (FRIS)

Wisconsin Coalition Against Sexual Assault, Inc. (WCASA)

Women's Law Project