No. 12-1168

In the Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, MARK BASHOUR, AND NANCY CLARK,

PETITIONERS

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, EL AL.,

RESPONDENTS.

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

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty law professors whose scholarship and teaching focus on constitutional law and health law.[2] Many of the *amici* have devoted much of their careers to the First Amendment, health, family, and gender issues relevant to this case. The subject matters of the courses they teach and their publications include constitutional law and theory, First Amendment law, law and religion, civil rights, family law, gender and the law, and public health law. *Amici* believe that this case presents important First Amendment issues concerning the distinction between the permissible regulation of conduct and the impermissible regulation of speech, the role of assessing legislative purpose in determining the constitutionality of a statute, and the narrow area in which the First Amendment allows free speech to yield to the government's substantial interest in public safety and protecting the exercise of a competing constitutional right.

SUMMARY OF ARGUMENT

Faced with a history of violence and obstruction at reproductive health care facilities, the Massachusetts legislature enacted a law limiting foot traffic

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[1] This brief is filed with the consent of the parties. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

[2] See Appendix A for a list of *amici curiae.*

within a 35-foot radius of facility entrances. G. L. c. 266, § 120E½ (the "Act"). Petitioners claim a constitutional right to stand within the designated entrance areas in order to urge patients entering the facilities not to terminate their pregnancies. Their claim raises important First Amendment issues concerning the distinction between the permissible regulation of conduct and the impermissible regulation of speech.

Government regulation based on the content or viewpoint of political or religious advocacy violates fundamental First Amendment principles, principles that must be applied without fear or favor of any political, religious, or interest group. Government regulation of conduct is subject to similar constraints: it must not wax and wane depending upon the righteousness of a specific speaker's beliefs, or sympathy to a particular speaker's cause, be it political, religious or moral. In this case, *amici* respectfully submit that the Act properly is viewed as a regulation of conduct that imposes incidental burdens on speech subject to review under the standard articulated in *O'Brien v. United States*, 391 U.S. 367 (1968).

First, the Act is based on an extensive evidentiary record demonstrating that it serves an important public safety purpose unrelated to the suppression of speech—protecting the constitutionally protected right of women to reproductive health care free from interference or intimidation. The fact that Petitioners devoutly wish to stand in the entrances to medical facilities in order to advocate for their religious and moral beliefs does not immunize them from generally applicable regulations of conduct enacted to address significant public safety concerns.

Second, significant differences between the Act and the statute in *Hill v. Colorado*, 530 U.S. 703

(2000)—differences ignored by Petitioners and their *amici*—make this case an unsuitable vehicle to reconsider *Hill*. Unlike the statute in *Hill*, the Act does not depend upon an assessment of the content of any person's speech or manner of expression. Would-be speakers of all viewpoints on all topics are subject to the same foot traffic regulation within a 35-foot radius of entrances to reproductive health care facilities. Whether pro-life or pro-choice (or neither), they are prohibited from entering or remaining in that designated entrance zone except for the purpose of moving from one perimeter of the zone to another (as Petitioners and all others are free to do). The Act is a non-discriminatory regulation of conduct significantly more protective of First Amendment interests than the statute upheld in *Hill*.

Finally, even if the Act is subject to strict scrutiny, it should be upheld as a narrowly tailored means of accommodating the competing public safety interest of protecting the constitutional interest of women to freely exercise their right to reproductive freedom, a regulation comparable to the polling place buffer zone upheld in *Burson v. Freeman*, 504 U.S. 191 (1992).

ARGUMENT

I. The Act Is a Content-Neutral Regulation of Conduct.

The proper starting point in discerning whether the Act regulates content or conduct is the statutory text. The Act prohibits "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" of such a facility. Mass. G.L. c. 266, § 120E½(b). Although Petitioners claim that the Act prohibits would-

be speakers from "set[ting] foot within the marked zones," *see* Petitioner's Br. 4,[3] the Act expressly allows *all* persons—including Petitioners—to freely enter the zone from one side of the perimeter in order to cross over to another side of the perimeter. *See* Mass. G.L. c. 266, § 120E½(b)(1) and (4) (exempting "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility").

The Act regulates conduct—entering and remaining within a fixed 35-foot buffer zone. Accordingly, the proper standard of review is established by *O'Brien v. United States*, 391 U.S. 367 (1968), and its progeny. *See, e.g.*, *Rumsfeld v. Forum for Academic & Constitutional Rights*, 547 U.S. 47 (2006); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (plurality). This line of cases establishes that First Amendment protection does not extend to conduct unless it is inherently expressive. *O'Brien*, 391 U.S. at 375 (upholding statute criminalizing the knowing destruction of a draft card because "there is nothing necessarily expressive about such conduct"); *Forum for Academic & Constitutional Rights*, 547 U.S. at 66 (upholding statute requiring universities to give all recruiters equal access because distinguishing between military recruiters and other recruiters is not "inherently expressive" conduct); *Pap's A.M.*, 529 U.S. at 290 (upholding ordinance banning all public nudity, "regardless of whether that nudity is accompanied by expressive activity"). As shown below, because the Act regulates conduct with only an incidental burden

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[3] *See also id.* at 27 (claiming that "the Act prohibits speakers (other than clinic agents) from entering its restricted zones at all").

on speech no greater than essential to promote a substantial government interest, it is constitutional under *O'Brien*.

A. The Act Regulates Conduct with Only an Incidental Burden on Speech.

Regulating whether people may stand within a 35-foot radius of reproductive health care facilities is inherently a regulation of conduct, not speech. First Amendment scholar Eugene Volokh has explained that "[s]peech and conduct—or more precisely the speech and nonspeech elements of some behavior—should indeed be distinguished" and that "the nonspeech elements may be much more heavily regulated." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Unchartered Zone*, 90 CORNELL L. REV. 1277, 1284 (2005). According to Professor Volokh, the critical distinction drawn by *O'Brien* between content-neutral and content-based speech restrictions is that "[e]xpression can generally be regulated to prevent harms that flow from its noncommunicative elements (noise, traffic obstruction, and the like), but not harms that flow from what the expression expresses." *Id.* (footnote omitted).

The Massachusetts Act targets traffic obstruction, a noncommunicative element of passing through or occupying the space within 35 feet of a reproductive health facility. Nothing about this behavior, standing alone, conveys agreement or disagreement with abortion or any other issue related to reproductive health. Like destroying a draft card or denying military recruiters access to a law school campus, the act of walking by or standing outside a reproductive facility is expressive only when accompanied by speech. Because the Massachusetts Act regulates such movement regardless of whether it is engaged in

for the purpose of expressing a view, it is content neutral on its face. *O'Brien*, 391 U.S. at 375 (upholding statute because it did not punish only those who destroyed draft cards for the purpose of expressing their views); *Forum for Academic & Constitutional Rights*, 547 U.S. at 60 (statute regulated conduct not speech as it "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*") (emphasis in original).

None of this is to suggest that regulations of conduct have no effect on speech activities. The statute at issue in *O'Brien*, for example, punished the defendant for attempting to influence others to adopt his antiwar beliefs "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position." 391 U.S. at 370. The Act, too, has an incidental burden on speech. But neither the statute in *O'Brien* nor the Act in this case burdened expression to prevent "harms that flow from what the expression expresses." Volokh, *supra*, at 1284. The Act is concerned with the harms to citizens trying to access medical care that flow from traffic obstruction. Standing outside a medical facility, like burning a draft card, is "in no respect inevitably or necessarily expressive," no matter what the intentions of any particular actor. 391 U.S. at 384-385.

An incidental burden on speech is "no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Forum for Academic & Constitutional Rights*, 547 U.S. at 67. The Massachusetts Act satisfies this requirement. Ensuring safe access to reproductive health

care facilities promotes a substantial government interest in protecting public health, including treatment and prevention of sexually transmitted diseases, early detection of breast cancer and cervical cancer, prenatal care, and family planning. The record establishes that the Commonwealth's previous efforts and regulations were not successful in achieving that public health objective. The question is not whether Petitioners or their *amici* or the Court can imagine a less burdensome alternative, but rather whether, absent the regulation, the government's interest would be achieved less effectively. *Id.* That is proven to be the case.

Petitioners' challenges to the sufficiency of the record, moreover, are unpersuasive. The Commonwealth is entitled to "sufficient leeway" to justify a content-neutral law that regulates conduct, not First Amendment expression. *Pap's A.M.*, 529 U.S. at 298-299; *see also Forum for Academic & Constitutional Rights*, 547 U.S. at 67 (rejecting argument that government failed to produce evidence establishing that the law was necessary and effective). In *O'Brien*, where the statute had an undeniable effect on free speech interests, the Court did not require proof that the Selective Service System could not function without criminalizing the knowing destruction of draft cards (or that the government had no other means—such as its own books and records—to determine who was eligible and registered for the draft). 391 U.S. at 382. The legislative record in this case is well developed and entitled to no less deference.[4]

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[4] Petitioners' statement that law enforcement officials "*claimed* in testimony before the legislature that protestors outside clinics were 'breaking the [no-approach] law

B. Challenges to the Act's Alleged Purpose and Effect Lack Merit.

Petitioners and several *amici* contend that the Act is a content or viewpoint discriminatory law for two reasons. First, its *actual* purpose allegedly is to suppress, or at least disadvantage, speech on the subject of abortion, specifically anti-abortion speech. And second, by restricting speech outside the particular location of reproductive health facilities, the purported effect of the law is to burden speech on only one side of the debate, the anti-abortion side. This reasoning, reduced to essentials, urges the Court to go behind the facial neutrality of a generally applicable law and conclude that the government's interest in providing safe access to reproductive health centers is nothing more than a pretext for suppressing anti-abortion speech. Adopting this approach would contravene well-established First Amendment principles and create considerable uncertainty and confusion for states formulating laws based on those principles.

This Court repeatedly has declined requests like Petitioners' to evaluate whether the legislature's *true* purpose is wrongful. "Inquiries into congressional motives or purposes are a hazardous matter." *O'Brien*, 391 U.S. at 383. Thus, it is a fundamental

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on a routine basis'" illustrates the point. Petitioners' Br. 7 (emphasis added). The testimony of those law enforcement officials is entitled to respect as evidence, not treated like a team line in a debating match. In this case, the evidence showed that the Act was intended to serve an important public safety interest unrelated to the suppression of speech and that, once enacted, it effectively served that interest.

principle of constitutional law that the judiciary may "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.*

Petitioners' argument suffers from the same flaw as the arguments made by the petitioner in *O'Brien*. Like Petitioners here, O'Brien argued that because the statute affected only one side of debate—the anti-war side—Congress's purpose must have been to suppress speech with which it disagreed. Giving that argument no countenance, the Court stated that the statute had "no such inevitable constitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive." 391 U.S. at 384-385. If, as *O'Brien* teaches, burning a draft card is not "inevitably or necessarily expressive," then neither is the act of standing within a 35-foot radius of a health care facility.

In *Pap's A.M.*, the Court again rejected an attack on the legislative purpose behind a content-neutral restriction on conduct. Operators of an erotic dancing establishment challenged a city ordinance proscribing nudity in public places as unconstitutional because its "actual purpose" was to prohibit the expressive activity of nude erotic dancing. 529 U.S. at 290. Although the preamble explained that the ordinance's purpose, in part, was to limit the recent increase in nude live entertainment, it stated that the ordinance aimed to combat the harmful impact of public nudity on public health, safety, and welfare. *Id.*; *see also id.* at 308 (Scalia, J., concurring in judgment, joined by Thomas, J.) (determining the ordinance to be general in its reach despite its reference to nude live entertainment). The operator's constitutional challenge, like Petitioners' argument here, was

"really an argument that the city council also had an illicit motive in enacting the ordinance." *Id.* at 292 (plurality opinion). Citing *O'Brien*, the Court reaffirmed that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.*

Rather than evaluating legislative purpose to determine whether a law is content based or content neutral, the "better formulation" is that a content-neutral law is "one that is 'justified without reference to the content of the regulated speech.'" Volokh, *supra*, at 1303 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001)). The Massachusetts Act is exactly such a law. It is justified because it protects safe access to reproductive health care. Accepting Petitioners' arguments would add considerable uncertainty and confusion to an area of well-settled law and open the door to subjective decisions by judges as to the standard of review to be applied in a given case.

C. The Act's Employee Exemption Is Not a Content-Based Regulation.

The commonsense, content-neutral exemptions provided for by the Act do not convert the regulation of conduct into the regulation of speech. The Act exempts (1) persons entering or leaving a facility; (2) clinic employees or agents acting within the scope of their employment; (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and (4) persons using the sidewalk or street right-of-way solely for the purpose of reaching a destination other than such facility. Mass. G.L. c. 266, § 120E1/2(b)(1)-(4).

Petitioners claim that exempting clinic employees and agents is a form of content-based discrim-

ination that violates their First Amendment rights. All the Act permits, however, is facility employees "acting within the scope of their employment" to freely use the egress in ingress area immediately outside their place of work. *Id.* § 120E1/2(b)(2). Recognizing that employees who work in a building have practical needs not shared by non-employees is not a form of invidious discrimination. It is why federal employees are not subject to restrictions on "public travel" on the Capital Grounds or the Supreme Court Grounds. *See* 40 U.S.C. § 5103; 40 U.S.C. § 6131. It is why an employee of the Selective Service System, but not a draftee, might lawfully destroy a draft card if acting within the scope of his or her employment. And it is why altar boys and girls are not cleared from the sidewalks in front of churches when serving a funeral mass in any of the 43 states that enforce funeral buffer zones. *See* Appendix B (listing statutes).[5] In all these cases, there is no First Amendment requirement that regulation of conduct be divorced from common sense.

II. The Constitutionality of the Act Does Not Depend on the Continued Viability of *Hill v. Colorado.*

Proof that *Hill v. Colorado* has generated significant debate in the academic community (a point made by Petitioners and their *amici*) is not a substitute for proving that the Massachusetts Act raises

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[5] *See also* Md. Code Ann., Crim. Law § 10-205 (funeral buffer zone law "does not apply to a person who conducts a funeral, burial, memorial service, or funeral procession"); N.M. Stat. Ann. § 30-20B-3 (unlawful to hinder access to funeral cite, "except that the . . . occupant of property may take lawful actions to exclude others from that property").

the same First Amendment concerns as the statute reviewed in *Hill*. *See, e.g.*, Amicus Brief of The National Hispanic Christian Leadership Conference, *et al.*; Amicus Brief of Eugene Volokh, *et al.*; Amicus Brief of Justice and Freedom Fund. A dispassionate assessment of the Act shows that it is significantly more protective of First Amendment interests than the statute reviewed in *Hill* and, moreover, reflects a legislative effort to address the concerns expressed by the *Hill* dissenters.

Hill considered a statutory ban on persons within 100 feet of the entrance to any health care facility "knowingly approach[ing]" within eight feet of another person without their consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...." Colo. Rev. Stat. § 18–9–122(3) (1999). The Massachusetts Act, in contrast, prohibits "knowingly enter[ing] or remain[ing]" within a radius of 35 feet of a reproductive facility, Mass. G.L. c. 266, § 120E½(b), while allowing *all* persons to traverse one side of the designated area for the purpose of reaching the other as they please. *See* Mass. G.L. c. 266, § 120E½(b)(4) (exempting "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility"). *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 757, 759-61 (1994) (affirming 36-foot buffer zone on a public street outside a health clinic).

Unlike *Hill*, "[n]o examination of the content of a speaker's message is required to determine whether an individual is [standing within a 35-foot radius of] a building." *Hill*, 530 U.S. at 766 (Kennedy, J., dissenting). The law equally applies to pro-life advocates, pro-choice advocates, opponents of birth con-

trol, and supporters of birth control. All receive the same treatment under the statute. So do those who wish to espouse any other political, religious, or commercial views, and those who wish to espouse no views on any subject whatsoever. Under these circumstances, the Act cannot fairly be described as "restrict[ing] speakers on one side of the debate: those who protest abortions," or as creating a zone where Supreme Court precedent "can be praised but not condemned." *Hill*, 530 U.S. at 768, 769 (Kennedy, J., dissenting). *See generally Madsen*, 512 U.S. at 762-63 ("There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.").

Petitioners mistakenly describe the Act as more burdensome than the *Hill* statute. They claim, for example, that *Hill* involved only an 8-foot zone while the Act applies to a 35-foot area. This argument ignores that the Colorado statute in fact created a *100-foot zone* from the entrance to any health care facility within which no person could come within eight feet of any other person entering or exiting the facility without their consent. *Hill*, 530 U.S. at 707 n.1. *See also id.* 530 U.S. at 755 (Scalia, J., dissenting) ("the State acknowledged at oral argument that the buffer zone would attach to any person within 100 feet of the entrance door of a skyscraper in which a single doctor occupied an office on the 18th floor").

Petitioners also complain that the Act creates "large painted zones" rather than invisible 8-foot floating bubbles. Petitioners' Br. 6-7. This provision of the Act, however, addresses a specific objection made to the statute at issue in *Hill*. Despite Petitioners' new-found nostalgia for *Hill*'s "floating buffer

zones," requiring protestors to run a 100-foot gauntlet at the risk of intentionally or accidentally penetrating imaginary 8-foot bubbles surrounding all persons moving in traffic around them hardly promotes free speech. As Justice Kennedy explained in critiquing the floating buffer zone in *Hill*:

> Assume persons are about to enter a building from different points and a protester is walking back and forth with a sign or attempting to hand out leaflets. If she stops to create the 8-foot zone for one pedestrian, she cannot reach other persons with her message; yet if she moves to maintain the 8-foot zone while trying to talk to one patron she may move knowingly closer to a patron attempting to enter the facility from a different direction.

530 U.S. at 773 (Kennedy, J., dissenting). From a First Amendment perspective, the Act is a significant improvement upon, and not an expansion of, the statute in *Hill*. *See generally Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 378-79 (1997) (noting constitutional problems with enforcing a floating buffer zone).

Petitioners also object that the Act does not have an exception for patients who consent to communications with them. That complaint also is born of a short memory. *See, e.g.,* Amicus Brief of Eugene Volokh, *et al.* at 8 ("many critics rebuked the Court for accepting a 'listener preclearance requirement'"). Statutes that condition speech on prior consent raise unique First Amendment concerns, another issue addressed by Justice Kennedy in *Hill*:

> [T]he statute requires a citizen to give affirmative consent before the exhibitor of a sign or the bearer of a leaflet can approach. When dealing with strangers walking fast toward a building's entrance, there is a middle ground of ambiguous answers and mixed signals in which misinterpretation can subject a good-faith speaker to criminal liability. The mere failure to give a reaction, for instance, is a failure to give consent. These elements of ambiguity compound the others.

530 U.S. at 773-74 (Kennedy, J., dissenting); *see also id.* at 758 (Scalia, J., dissenting) ("[f]ew pedestrians are likely to give their 'consent' to the approach of a handbiller").

Finally, Petitioners argue that because the Act only applies to reproductive health care clinics during business hours, it *must* be intended to suppress the speech most likely to occur outside those facilities—speech about abortion. Content-neutral regulations of conduct, however, historically have not been considered unconstitutional simply because they are narrowly focused on solving a specific public safety problem before the legislature. Nor is it unusual for conduct regulations to affect some would-be speakers more than others. *See generally O'Brien*, 391 U.S. 367. The same is true of time, place and manner restrictions. One of the dangers posed by Petitioners' argument is that lower courts would be authorized to carve out exceptions to both types of regulation based on their assessment of the importance or probity of the message a particular group wishes to convey.

One would not have thought, for example, that the lesson of *Police Department of Chicago v. Mosley*

was that a blanket ban on picketing outside schools would be unconstitutional because it would deprive unionized teachers of the most effective location to protest the terms and conditions of their employment. 408 U.S. 92, 99-100 (1976). Nor would one expect that a legislative record demonstrating a public safety need to protect young children walking into grammar schools would require the legislature to impose identical speech regulations at high schools where there were no comparable threats to student safety and well-being. The Massachusetts Act similarly was enacted to respond to a particular problem, namely violence and obstruction outside reproductive health clinics, a proven threat to public safety.

In short, accusing the Massachusetts legislature of expanding *Hill* ignores the language and effect of the Act. The Act is content and viewpoint neutral, applying not just to those who oppose or support abortion rights, but to all persons who traverse the 35-foot radius of the entrance to a reproductive health care facility. *See generally Madsen*, 512 U.S. at 764-65 (ordinances "represent a legislative choice regarding the promotion of particular societal interests" and therefore carry fewer risks of censorship and discriminatory application than do injunctions) (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.")).

III. The Act Is a Constitutional Means of Accommodating a Competing Constitutional Right Unrelated to Suppressing Speech.

Petitioners' fervent desire to advocate their religious and political beliefs at the entrances to repro-

ductive health care facilities raises important First Amendment issues, but does not by itself dictate the outcome of this case. *See Colloquium*, Professor Michael W. McConnell's Response, 28 PEPP. L. REV. 747, 747 (2001) (noting the "very serious trouble" that arises when "the Court lines up on free-speech cases according to whether they agree with the speakers or not") (quoted in Amicus Brief of Eugene Volokh, *et al.* at 7). Abortion is not the only divisive issue about which people have abiding moral, religious, or political convictions. Excusing particular groups from generally applicable and facially neutral conduct regulations based on the courts' assessment of the value of the message they seek to convey would introduce a dangerous form of reverse-discrimination analysis into settled First Amendment jurisprudence.

There is no doubt, for example, that the First Amendment does not tolerate an election-day ban on speakers "urging people to vote a certain way." *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966). Such a law violates fundamental First Amendment principles by requiring speakers to remain silent "at a time when [speech] can be most effective." *Id.*

The same speakers understandably might wish, while standing on public property, to attempt to persuade voters as they approach a polling place. Polling place advocacy is speech about "candidates, structures and forms of government, [and] the manner in which government is operated or should be operated," *i.e.*, "political speech … that is central to the meaning and purpose of the First Amendment." *Id.* at 218-19; *Citizen's United v. Federal Elections Commission*, __ U.S. __, 130 S. Ct. 876, 892 (2010). "As anyone who has engaged in political leafletting can attest, there are few better places to reach and influence voters than the area surrounding a polling site.

Everyone a campaign worker communicates with at that place and time is intending to vote and is thinking about the very issues the speaker is trying to address." Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1213 (1996).

All of this is true, yet no matter how pure and peace-loving the beliefs and intentions of an election-day speaker, the state is free to enforce a 100-foot "campaign-free zone" around polling places to prevent voter intimidation and fraud. *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality). In *Burson* (further discussed *infra*), the Court upheld the constitutionality of such a buffer-zone law that, unlike this case, expressly targeted political speech. The statute, though content-based, survived strict scrutiny largely because the government "has such a compelling interest in securing the right to vote freely and effectively." *Id.* at 208-209.

The *Burson* plurality explained its ruling in plain speaking, practical terms: "'[I]t takes approximately 15 seconds to walk 75 feet.' Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." *Id.* at 210. In the context of a polling place buffer zone, that principle could be applied "without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote." 504 U.S. at 213-14.

Burson is not a First Amendment anomaly. For example, the Court long ago rejected the idea

that the goal of "preserv[ing] judicial impartiality" allows the state to "close all channels of public expression to all matters which touch upon pending cases." *Bridges v. California*, 314 U.S. 252, 271 (1941). Accordingly, even though judges are duty-bound to decide cases solely on the evidence and the law, the First Amendment protects the right of the people to urge judges to rule for or against one side or another in a pending case. *Id.* at 272-78.

Not so, however, when the speaker is standing near a courthouse. In that setting, "the legislature has the right to recognize the danger that some judges, jurors, and other court officials will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). "[R]egardless of whether the motives of the [courthouse] demonstrators are good or bad," all that is required is a "legislative determination based on experience that such conduct inherently threatens the judicial process." *Id.* at 566.

The right to "organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine" similarly has "deep roots in our legal tradition." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, __ U.S. __, 132 S. Ct. 694, 713 (2012) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1872). Religious advocacy is protected whether the speech is "'vehement, caustic, and sometimes unpleasan[t].'" *Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1216-17, 1219 (2011) (citation omitted), or empathetic and loving, *Hill v. Colorado*, 530 U.S. 703, 757 (2000) (Scalia, J., dissenting).

The legislatures of 43 states and the United States Congress nevertheless have enacted laws restricting speech activities around funerals and burial

grounds.[6] *See* Appendix B (listing statutes). The sheer number of these statutes attests to the fact that funeral sites are considered effective locations for religious advocacy. Yet none of these laws are unconstitutional simply because they restrict speech in precisely the location where people wish to express their sincerely held beliefs. Nor could one reasonably argue that allowing funeral home employees, but not protestors, to freely traverse within the protected zones makes the laws content- or viewpoint-based speech regulations.[7] Rather, such laws are constitutional when they are content and viewpoint neutral, and are supported by a sufficient factual record demonstrating that they are needed to protect another constitutional right, as is the Massachusetts Act. *See generally Mosley*, 408 U.S. 98 ("This is not to say that all picketing must always be allowed. We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests"); *Madsen*, 512 U.S. at 772-73 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

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[6] Michigan and the other 11 States that filed an amicus brief in support of Petitioners all have statutory funeral buffer zones. *See* Appendix B (listing state and federal statutes).

[7] *See* n.5, *supra.*

IV. The Act Is Narrowly Tailored to Safeguard the Exercise of a Competing Constitutional Right.

There is "narrow area" in which the First Amendment "permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, 504 U.S. at 213 (Kennedy, J., concurring). Although neither Petitioners nor 16 of their 18 *amici* cited *Burson* in their briefs, the case upheld a content-based buffer zone prohibiting political speech in "quintessential public forums." 504 U.S. at 196-97.[8] *Burson* compels the

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[8] *See* Amicus Brief of Center for Constitutional Jurisprudence ("CCJ Br.") at 15-16; Amicus Brief of Michigan and 11 Other States ("Mich. Br.") at 3-5. Both briefs failed to distinguish *Burson*. Michigan argued that the polling place buffer zone in *Burson* imposed only a "minor geographic limitation" on First Amendment rights—*i.e.*, 100 feet, almost three times larger than the 35-foot zone established by the Act. Mich. Br. at 4. Both briefs praised polling place buffer zones for applying only on election days, *id.*; CCJ Br. at 16—ignoring that those "citizens who claim First Amendment protection [at polling places] seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting). The CCJ lauded polling place buffer zones for "only prohibit[ing] active campaigning"—a paradigm example of a content-based speech regulation. CCJ Br. at 15. And both relied on evidence from the Nineteenth Century as supporting the need for polling place buffer zones—a need supplanted by the country's embrace of the secret ballot one hundred years earlier. *Id.* at 15-16; Mich. Br. at 4-5. *See generally Doe v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 2836 (2010) (Scalia, J., concurring).

conclusion that the Massachusetts Act survives strict scrutiny.

The statute in *Burson* banned within 100 feet of polling places "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position." *Id.* at 193-94. The *Burson* plurality nevertheless held that the state's interest in "protecting the right of its citizens to vote freely for the candidates of their choice," and preventing voter intimidation and fraud were "compelling" state interests. *Id.* at 198-99, 206.[9] These interests justified imposing, in effect, a gag order on speech uttered during a campaign for political office, speech to which the First Amendment "has its fullest and most urgent application." *Id.* at 196 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

In *Burson*, as here, opponents argued that the law was not sufficiently narrowly tailored because the state simply could have outlawed intimidation and violence outside of polling places. The statute, after all, prohibited the "act of (shudder!) [soliciting votes] within [100 feet]" of a polling place, even if the voters are a "300–pound, male, and unpregnant truck drivers[.]" *Hill*, 530 U.S. at 762 n.5 (Scalia, J., dissenting). The Court was "not persuaded," reasoning that absent a polling place buffer zone, "many acts of interference would go undetected," and that "[v]oter

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[9] Justice Scalia concurred in the judgment, concluding that the buffer zone did not restrict speech in a traditional public forum and that the "exacting scrutiny" applied by the plurality therefore did not apply. 504 U.S. at 214 (Scalia, J., concurring in the judgment).

intimidation and election fraud are successful precisely because they are difficult to detect." *Burson,* 504 U.S. at 206-207, 208.

Burson also rejected the argument that a buffer zone must be supported by evidence of recent instances of intimidation or abuse (the election abuses cited by the Court occurred in the 19th Century before the widespread adoption of the secret ballot, *id.* at 200-205), or by empirical evidence that the zone effectively achieved the statute's intended purpose. *Id.* at 208-209.

> Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."

Id. at 209 (citation omitted).

Making specific findings about the effect of a no-speech zone within 35 feet of a healthcare facility is no less difficult than the task faced in *Burson*, and the remedy for infringing upon a woman's exercise of her constitutional right to reproductive freedom is similarly "imperfect." As Justice Blackmun stated in an analogous context: "Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where pa-

tients and relatives alike often are under emotional strain and worry ... [and] need a restful, uncluttered, relaxing and helpful atmosphere." *Madsen*, 512 U.S. at 772 (quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring).

This case presents a detailed record developed by the legislature establishing the factual basis for and non-discriminatory purpose of the Act. Accordingly, even if the Act's regulation of conduct were treated as a *Burson*-type content regulation, the Commonwealth "has asserted that the exercise of free speech rights conflicts with another fundamental right, the right [to reproductive choice] free from the taint of intimidation and fraud." 504 U.S. at 211. Viewed under the *Burson* lens, the issue is whether Massachusetts made an "unconstitutional choice" when it decided, based on extensive legislative findings, that the last seven seconds it takes a woman to walk into a medical facility to exercise a constitutional right "should be [her] own, as free from interference as possible." 504 U.S. at 210. "Given the conflict between these two rights, [the Court should] hold that requiring solicitors to stand [35] feet from the entrances to [clinics] does not constitute an unconstitutional compromise." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

LIST OF AMICI

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APPENDIX B

LIST OF FUNERAL BUFFER-ZONE STATUTES

38 U.S.C. §§ 2413(a) (regulating demonstrations at cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery or within 300 feet of a road, pathway, or other route of ingress to or egress from such cemetery)

Ala. Code § 13A-II-17 (unlawful to "[e]ngag[e] in a protest, including, but not limited to, protest with or without using an electric sound amplification device, that involves singing, chanting, whistling, yelling, or honking a motor vehicle horn within 1,000 feet of the entrance to a facility being used for a funeral or memorial service")

Ark. Code Ann. § 5-71-230 (unlawful within 300 feet of a funeral to knowingly picket for the purpose of interfering with the funeral)

Cal. Penal Code § 594.35(d) (unlawful to "[d]istur[b], obstruct[t], … or interfer[e] with any person carrying or accompanying human remains to a cemetery or funeral establishment, or engaged in a funeral service, or an interment")

Colo. Rev. Stat. §§ 13-21-126 ("unlawful for a person to knowingly engage in funeral picketing within one hundred feet of the funeral site")

Conn. Gen. Stat. § 53a-183c (unlawful to within one hundred fifty feet of route of ingress to or egress from the location of a funeral "wilfully mak[e] or assis[t] in the making of any noise or diversion that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral with the intent [to do so]"; or within three hundred feet of the boundary of the location of such funeral "wilfully and without proper authorization

imped[e] the ingress to or egress from such location" with the intent to do so)

Del. Code Ann. Ti. II, §1303 (unlawful to "[d]isturb or disrupt [a] funeral, memorial service, funeral procession, or burial" within 300 feet of building in which it is held)

Fla. Stat. § 721.02 ("A person may not knowingly engage in protest activities or knowingly cause protest activities to occur within 500 feet of the property line of a residence, cemetery, funeral home, house of worship, or other location during or within 1 hour before or 1 hour after the conducting of a funeral or burial at that place")

Ga. Code Ann. § 16-11-34.2 ("It shall be unlawful to engage in any disorderly or disruptive conduct with the intent to impede, disrupt, disturb, or interfere with the orderly conduct of any funeral or memorial service")

Idaho Code Ann. § 18-6409 ("Every person who maliciously and willfully disturbs the dignity or reverential nature of any funeral, memorial service, funeral procession, burial ceremony or viewing of a deceased person is guilty of a misdemeanor")

Ill. Comp. Stat. 5/26-6(c)(1) (prohibiting "loud singing, playing of music, chanting, whistling, yelling, or noisemaking with, or without, noise amplification including, but not limited to, bullhorns, auto horns, and microphones within 300 feet of any ingress or egress of [a] funeral site")

Ind. Code §§ 35-45-1-3 (unlawful to disrupt a lawful assembly of persons within 500 feet of a funeral)

Iowa Code Ann. § 723.5 (unlawful to disturb or disrupt a funeral within five hundred feet of the building in which it is held)

Ky. Rev. Stat. Ann. §§ 525.155 (person who "blocks, impedes, inhibits, or in any other manner ob-

structs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted" is guilty of "interference with a funeral")

La. Rev. Stat. Ann. § 14:103 (disturbing the peace includes "[i]ntentionally engaging in any act or any utterance, gesture, or display designed to disrupt a funeral, funeral route, or burial of a deceased person during the period beginning one hundred twenty minutes before and ending one hundred twenty minutes after the funeral or burial, within three hundred feet of the funeral or burial" or "[i]ntentionally blocking, impeding, inhibiting, or in any other manner obstructing or interfering, within five hundred feet, with access into or from any building or parking lot of a building in which a funeral or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral or burial is being conducted, during the period beginning one hundred twenty minutes before and ending one hundred twenty minutes after the funeral or burial")

Me. Stat. 17-A § 501-A (disorderly conduct occurs when, "[i]n a private or public place on or near property where a funeral, burial or memorial service is being held, the person knowingly accosts, insults, taunts or challenges any person in mourning and in attendance at the funeral, burial or memorial service with unwanted, obtrusive communications by way of offensive, derisive or annoying words, or by gestures or other physical conduct, that would in fact have a direct tendency to cause a violent response by an ordinary person in mourning and in attendance at a funeral, burial or memorial service")

M.G.L.A. 272 § 42A ("Whoever pickets, loiters or otherwise creates a disturbance within five hundred feet of a funeral home, church or temple or other building where funeral services are being held, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year in a house of correction, or both.")

Md. Code Ann., Crim. Law § 10-205(c) ("A person may not engage in picketing activity within 500 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession")

Mich. Camp. Laws §§ 123.1111 ("A local unit of government may pass such ordinances as it considers necessary to protect and preserve the peace and respect toward those attending or conducting a funeral or memorial service")

Minn. Stat. § 609.501 (unlawful to "with intent to disrupt a funeral ceremony, graveside service, or memorial service, protes[t] or picke[t] within 500 feet of the burial site or the entrance to a facility or location being used for the service or ceremony, within one hour prior to, during, or one hour following the service or ceremony")

Miss. Code Ann. § 97-35-18 (unlawful to "[w]ith intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protes[t] or picke[t] within 1,000 feet of the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony")

Mo. Rev. Stat. §§ 578.501 ("It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the com-

mencement of any funeral, and until one hour following the cessation of any funeral.")

Mont. Code Ann. § 45-8-116 ("A person commits the offense of funeral picketing if the person knowingly engages in picketing within 1,500 feet of any property boundary entrance to or exit from a funeral site during the period from 1 hour before the scheduled commencement of the funeral services until 1 hour after the actual completion of the funeral services.")

Neb. Rev. Stat. § 28-1320.03 (" A person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.")

N.H. Rev. Stat. § 644:2-b ("unlawful for any person to engage in picketing or other protest activities at any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral, if such picketing or other protest activities … (a) Take place within 150 feet of a road, pathway, or other route of ingress to or egress from cemetery property and include, as part of such activities, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or (b) Are within 300 feet of such cemetery and impede the access to or egress from such cemetery.")

N.J. Stat. Ann. § 2C:33-8.1 (person who "engages in demonstration activities within 500 feet of the funeral, the funeral procession, the funeral home, church, synagogue, temple or other place of public worship or other location at which a funeral takes place and makes or assists in the making of noise, diversions, or threatening gestures, or engages in any

other disruptive conduct, that disrupts or tends to disrupt the peace or good order of the funeral" is guilty of disrupting a funeral)

N.M. Stat. Ann. § 30-20B-3 (unlawful to "engage in any loud singing, playing of music, chanting, whistling, yelling or noisemaking with or without noise amplification, including bullhorns, auto horns and microphones within five hundred feet of any ingress or egress of that funeral site, when the volume of such singing, music, chanting, whistling, yelling or noisemaking is audible at and disturbing to the peace and good order of a funeral at that funeral site" or "knowingly obstruct, hinder, impede or block another person's access to or egress from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property")

N.Y. Penal Law § 240.21 ("A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within three hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof")

N.C. Gen. Stat. Ann. § 14-288.4 (outlawing "singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral" or "[a]ttempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial")

N.D. Cent. Code § 12.1-31-01.1 (disorderly conduct if a person "[e]ngages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling, or noisemaking within one thousand feet [300.48 meters] of any in-

gress or egress of that funeral site if the volume of the singing, music, chanting, whistling, yelling, or noisemaking is likely to be audible at and disturbing to the funeral site")

Ohio Rev. Code Ann. § 3767.30 ("No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any funeral procession.")

Okla. Stat. T. 21, § 1380 ("It 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")

Pa. Cons. Stat. Ann. § 7517 ("A person commits a misdemeanor of the third degree if the person engages in demonstration activities within 500 feet of any cemetery, mortuary, church or other location being utilized for the purposes of a commemorative service within one hour prior to, during and one hour following the commemorative service.")

R.I. Gen. Laws § 11-11-1 (unlawful to "willfully interrupt or disturb any … assembly of people met for religious worship, any military funeral or memorial service")

S.C. Code Ann. § 16-17-525 ("unlawful for a person to wilfully, knowingly, or maliciously disturb or interrupt a funeral service" if within one thousand feet of the funeral service")

S.D. Codified Laws §§ 22-13-17 ("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 un-

til one hour after the actual completion of the funeral services.")

Tenn. Code Ann. § 39-17-317 (person "making any utterance, gesture, or display in a manner offensive to the sensibilities of an ordinary person" if "within five hundred feet … of a funeral" commits the offense of interfering with a funeral)

Tex. Penal Code Ann. §§ 42.055 ("A person commits an offense if, during the period beginning three hours before the service begins and ending three hours after the service is completed, the person engages in picketing within 1,000 feet of a facility or cemetery being used for a funeral service")

Utah Code Ann. § 76-9-108 (outlawing "the distribution of any handbill, pamphlet, leaflet, or other written material or other item that is not part of the memorial service")

Va. Code Ann. § 18.2-415 (unlawful to "[w]illfully … disrup[t] any funeral … if the disruption (i) prevents or interferes with the orderly conduct of the funeral")

Vt. Stat. Ann. Ti. 13, § 3771 ("No person shall disturb or attempt to disturb a funeral service by engaging in picketing within 100 feet of the service within one hour prior to and two hours following the publicly announced time of the commencement of the service")

Wash. Rev. Code Ann. §9A.84.030 (unlawful to make "unreasonable noise" within five hundred feet of a funeral or burial)

Wis. Stat. §947.01 and §947.011 (outlawing "boisterous, unreasonably loud or otherwise disorderly conduct" within 500 feet of any entrance to a facility being used for a funeral service with the intent to disrupt the service)

Wyo. Stat. Ann. § 6-6-105 ("A person commits a misdemeanor punishable by imprisonment for not

more than six (6) months, a fine of not more than seven hundred fifty dollars ($750.00), or both, if he protests, pickets, or otherwise causes a breach of the peace within nine hundred (900) feet of a cemetery, church, building or other facility at which a funeral or memorial service is being conducted, and if the protest, picket or other action occurs within one (1) hour prior to, during or within one (1) hour after the funeral or memorial service and the protest, picket, or breach of the peace is directed at the funeral or memorial service")