No. 12-1168

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, AND SEVENTEEN OTHER MUNICIPALITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The *amici* are cities located across the United States that recognize the paramount importance not only of the constitutional right to speak freely, but also of the constitutional right to privacy, including the right to unfettered access to reproductive health care, free from harassment and intimidation. The *amici* have a shared interest in maintaining the authority and flexibility inherent in their police powers to balance each of these rights—and to protect the health and safety of their residents—in the manner best-suited to each of their unique circumstances, including through the enactment of "fixed buffer zone" laws similar to the Massachusetts statute at issue in this case (the "Act").

Some, but not all, of the *amici* have, in fact, promulgated laws creating fixed buffer zones outside of reproductive health care centers (the "Ordinances") (collectively with the Act, the "Fixed Buffer Zone Laws"). For example, San Francisco, California, has enacted an ordinance that makes it "unlawful for any person to enter or remain" within a 25-foot buffer zone around an entrance, exit, or driveway of a reproductive health care facility. S.F., CAL., POLICE CODE art. 43, § 4303(a). The ordinance expressly exempts individuals entering or exiting the facility; employees, agents, or volunteers of the facility; law enforcement, emergency medical, firefighting, construction, and utilities personnel; and individuals passing temporarily through the buffer zone; provided that these individuals do not engage in "demonstration activity" while in the zone. *Id.* § 4303(b).

Burlington, Vermont, has enacted an ordinance that creates a 35-foot buffer zone around the premises of a reproductive health care facility in which "[n]o person or persons shall knowingly congregate, patrol, picket or demonstrate[.]" BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-113(2). Like the Act and the San Francisco ordinance, the Burlington ordinance carves out certain necessary exceptions, including exceptions for persons entering or leaving the facility; employees or agents of the facility acting within the scope of their employment; law enforcement, ambulance, firefighting, construction, utilities, public works, and other municipal agents acting within the scope of their employment; persons using the public sidewalk or right-of-way solely for the purpose of reaching a destination other than the facility; and any person or persons on private property with the consent of the property owner. *Id.* § 21-113(2)(a).

West Palm Beach, Florida, enacted two laws in 2005 to address public health and safety concerns in the vicinity of health care facilities: a "public safety buffer zone" that made it unlawful to "engage in protesting, picketing, distributing leaflets or handbills, attempting to impede access, or engage in oral advocacy, education or counseling activities" within 20 feet of a health care facility's driveways and entrances, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425; and a "quiet zone" that made it unlawful to "shout" or produce "any amplified sound" within 100 feet of any portion of a health care facility, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. II, § 34-38. In 2006, a federal district court enjoined the city from enforcing the buffer zone ordi-

nance, leaving only the quiet zone ordinance in place. See *Halfpap* v. *City of West Palm Beach*, No. 05-80900, 2006 WL 5700261 (S.D. Fla. Apr. 12, 2006).

Harrisburg, Pennsylvania, has enacted an ordinance that creates a 20-foot buffer zone surrounding health care facilities in which persons may not "knowingly congregate, patrol, picket or demonstrate." HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A). Similar to the San Francisco and Burlington ordinances, Harrisburg's ordinance includes exceptions for "police and public safety officers, fire and rescue personnel," "emergency workers in the course of their official business," "authorized security personnel," and "employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.*

Los Angeles, California, has enacted an ordinance that prohibits intentional interference with the normal operations of a medical facility and authorizes police to create a 50-foot buffer zone when such interference occurs. L.A., CAL., MUN. CODE ch. 5, art. 6.1, § 56.45(b). Specifically, the police are authorized to order "the immediate dispersal of any congregation that . . . threatens or violates the peace or security of, a medical facility." *Id.* § 56.45(c). Once properly ordered to disperse by the police, protestors must retreat at least 50 feet from the medical facility, the facility's parking facilities, and any connecting pedestrian access, and they may not return for at least four hours, or until the police otherwise instruct. *Id.* § 56.45(d).

Although the cities of New York, Chicago, Baltimore, Boston, Minneapolis, Saint Paul, Columbus, Springfield, Austin, Denver, Boulder, Houston, and Ann Arbor have not needed to enact Fixed Buffer Zone Laws, they wish to ensure that any decision of this Court does not impede the flexibility that they historically have been afforded—in the context of anti-abortion protests and otherwise—to determine how best to respond to local conditions and concerns as they develop, including through the imposition of appropriately-tailored buffer zones. As a result, all of the *amici* have an interest in seeing the Massachusetts Act upheld.

SUMMARY OF ARGUMENT

The Fixed Buffer Zone Laws are neither novel nor unique. In exercising their police powers, state and local governments have regularly made use of fixed buffer zones at protest and demonstration sites because, in their judgment, such safety zones were the most efficient and reliable way to protect the public—not from words, but from violence, harassment, or obstruction. Massachusetts and several of the *amici* have made precisely such a judgment here. Because this Court traditionally has granted deference to the judgment of state and local governments concerning regulation of the time, place, or manner of speech—and because those same entities require the flexibility to make such judgments if they are to govern effectively and protect their residents—the Act should be upheld.

Like safety zones imposed in other contexts, the Fixed Buffer Zone Laws are content neutral. Neither the Act nor the Ordinances discriminate on their face against anti-abortion speech, or any other message. And each of these laws was promulgated for the same content-neutral reasons that state and local governments have imposed fixed buffer zones in other contexts: "to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, [and] reduce disputes and confrontations requiring law enforcement services." BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings). Of course, in this case, Massachusetts and the *amici* have an additional interest at stake—the interest in protecting the constitutional "right to seek reproductive health care services." *Id*. But that additional

interest only strengthens the justification for regulation here.

Petitioners attempt to flip this constitutional interest on its head, arguing that, because the Fixed Buffer Zone Laws are tailored to protect access to reproductive health care, they have a disparate impact on anti-abortion speech; and, because of this disparate impact, they must be subject to strict scrutiny. But not only is petitioners' proposed "disparate impact" test unprecedented in this Court's First Amendment jurisprudence, it is also inconsistent with the deference historically granted to states and localities in the exercise of their police powers. Indeed, because there is a risk of "disparate impact" whenever local governments impose a time, place, or manner restriction on a protest or demonstration—and not just in this particular context—petitioners' proposed test could significantly undermine the ability of local governments to ensure public safety in a whole host of different circumstances. Because that cannot be the law, the Fixed Buffer Zone Laws are content neutral and subject only to intermediate scrutiny.

The Fixed Buffer Zone Laws also are narrowly tailored to serve significant governmental interests. Before enacting the Fixed Buffer Zone Laws, both Massachusetts and the *amici* had attempted to protect access to, and to ensure safety at, clinic sites through narrower provisions, like those endorsed by petitioners, that prohibited violence, obstruction, or harassment. But, in many locations, these laws proved both ineffective and difficult to enforce. Infractions could not be established without constant police monitoring, and even with such monitoring, it

was often difficult for police to determine whether a protestor's conduct had, in fact, violated the law. As a result of these difficulties, Massachusetts and several of the *amici* elected to implement Fixed Buffer Zone Laws, creating a bright-line rule whereby protestors can engage in any form of expression they wish well within earshot and eyeshot of reproductive health care facilities, but they cannot cross a clearly-marked, fixed line that is 35 feet or less from the clinics. Because these Fixed Buffer Zone Laws are easy to understand and enforce, they are a more efficient and reliable way to protect clinic-goers and the public from violence, obstruction, and harassment. They are also far narrower than the safety zones utilized by state and local governments—and upheld by the courts—in other contexts.

Finally, the Fixed Buffer Zone Laws leave open adequate alternative channels for petitioners and other anti-abortion protestors to make their views known. Petitioners remain free to approach and communicate face-to-face with individuals heading into or out of clinics, so long as they stay a short distance away from the clinic doors. And they remain free to share their anti-abortion message with the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora. Because the Act and the other Fixed Buffer Zone Laws advance important state and local interests and do not meaningfully impede petitioners' ability to speak freely, they are consistent with the First Amendment and should be upheld.

ARGUMENT

I. State and Local Governments May Protect Public Safety and Privacy Rights by Regulating the Time, Place, and Manner of Speech.

The use of "police powers to protect the health and safety of [ ] citizens" is "primarily, and historically, . . . [a] matter[ ] of local concern." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996) (first alteration in original) (internal quotation omitted). State and local governments "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation omitted); see also *Gibbons* v. *Ogden*, 22 U.S. 1, 203 (1824) (recognizing that the powers reserved in the Constitution for the states include "health laws of every description"). Indeed, localities have not only "[t]he power" but also "the duty . . . to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of [their] residents." *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940).

To achieve these ends, state and local governments unquestionably may regulate where, when, and by what means speech may occur on their streets and sidewalks, so long as that regulation is not unreasonably restrictive. As this Court has explained, "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the gen-

eral comfort and convenience, and in consonance with peace and good order." *Shuttlesworth* v. *City of Birmingham, Ala.*, 394 U.S. 147, 152 (1969).

The flexibility afforded to state and local governments in regulating the time, place, and manner of speech is even more critical where, as here, that regulation serves to protect other constitutional rights: "[T]he First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson* v. *Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (upholding ordinance prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance of a polling place, where purpose of ordinance was to prevent voter intimidation); see also *Frisby* v. *Schultz*, 487 U.S. 474, 484–88 (1988) (upholding ordinance restricting picketing on streets or sidewalks outside of a residence where the ordinance was intended to protect the right to privacy). As a result, this Court has given state and local governments substantial latitude in balancing the right of their residents to speak freely against the right to safely and confidentially access health care, including reproductive health care. See, e.g., *Hill* v. *Colorado*, 530 U.S. 703, 716–17 (2000) (allowing restrictions on speech outside of health care facilities because of the "recognizable privacy interest" in patients seeking medical care); cf. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994) (affording deference to court enjoining expressive activity outside of reproductive health center).

II. The Fixed Buffer Zone Laws Are a Valid Exercise of State and Local Police Powers.

"[T]his Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson*, 504 U.S. at 197 (plurality). Because the Act—and the other Fixed Buffer Zone Laws—comply with all three of these requirements, the First Circuit's decision should be upheld.

A. The Fixed Buffer Zone Laws Are Not Content-Based.

The Fixed Buffer Zone Laws are content-neutral time, place, and manner restrictions. This Court has explained that a statute violates the principle of content neutrality if, "[o]n its face, [it] accords preferential treatment to the expression of views on one particular subject." *Carey* v. *Brown*, 447 U.S. 455, 460–61 (1980). But the Fixed Buffer Zone Laws do no such thing. They preclude *all* persons from entering or exiting a small area of land unless they are doing so for a few, exempt purposes unrelated to expression.[1] Of course, where "the government has adopted

[1] Unlike the other Fixed Buffer Zone Laws, the Harrisburg ordinance does preclude a particular type of speech—that involving "picket[ing] or demonstrat[ing]." HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A); see also WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425(a) (2005) (enjoined version of ordinance prohibiting "oral advocacy, education or counseling" within fixed buffer zone). But this is precisely the type

a regulation of speech *because of* disagreement with the message it conveys," that regulation may be subject to strict scrutiny even if it does not discriminate on its face. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added). But the express purposes—and the actual purposes—of both the Act and the Ordinances are content neutral. These laws were not enacted in order to preclude abortion-related speech; they were enacted in order to ensure safety and order on public streets and sidewalks outside of reproductive health care clinics, and to protect the rights of individuals to access those facilities.[2]

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of language that this Court deemed content neutral in *Hill*. See 530 U.S. at 720–25.

[2] See, e.g., 2007 MASS. ACTS ch. 155 (stating that the purpose of the Massachusetts Act is, among other things, "to increase forthwith public safety at reproductive health care facilities"); S.F., CAL., POLICE CODE art. 43, §4301 (providing that ordinance was enacted for purpose of preventing "obstruction, delay, and deterrence of patients, and diversion of reproductive health care facilities' staff and resources" and promoting "the City's interest in maintaining the public health, safety, and welfare, and in preserving its residents' constitutional right to privacy"); BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings) (providing that ordinance was enacted "to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, reduce disputes and confrontations requiring law enforcement services, protect property rights, protect First Amendment freedoms of speech and expression and secure a person's right to seek reproductive health care services"); West Palm Beach, Fla., Ordinance No. 3875-05 (Sept. 26, 2005) (providing that ordinance was intended to promote, among other things, "the right of its citizens to privacy and the right to have safe access to and from all health care facilities," as well as "the City's interests in promoting public safety and order, the free flow of

Petitioners nonetheless argue that the Act should be deemed content-based because, "as a practical matter [it] affects speech on only one issue—and, indeed, on only one side of that issue." Pet. Br. 23. In essence, petitioners suggest that the Act has a disparate impact on anti-abortion speech,[3] and that, as a result of this disparate impact, it must be subject to strict scrutiny. But there is no disparate impact test in this Court's First Amendment jurisprudence. To the contrary, this Court has made clear time and again that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791; accord *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (holding that ordinance restricting location of adult film theaters was content neutral).[4]

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traffic on public streets and sidewalks, and protecting the property rights of its citizens").

[3] It is also not clear from the record that the Act does, in fact, disproportionately impact anti-abortion speech. To the contrary, the record confirms that pro-choice groups also congregate outside of clinics to express their views, and the Act has the same impact on speech by these pro-choice demonstrators as it does on speech by anti-abortion groups. See JA at 26–28 (noting that pro-choice demonstrators congregate outside clinic on the second Saturday of each month); *id.* at 123 (discussing pro-choice group causing disturbance outside clinic).

[4] Petitioners also suggest, at least implicitly, that the Act must be content-based because it was motivated by the conduct of one particular group—anti-abortion protestors. Pet. Br. 25 (criticizing the act for its "targeted burdening of speech outside abortion clinics"); *id.* at 26 (arguing that the Act is not content neutral because its "focused effect on speech about abortion is de-

This rule, announced in *Ward*, is indispensable to local governance. Localities are routinely required to address public safety concerns surrounding speech—not just in the abortion context, but in the context of all different types of protests, marches, and demonstrations. They must be able to respond quickly and appropriately to safety risks posed not only by anti-abortion protestors at clinics, but also by political activists at conferences or conventions, animal rights activists at race tracks, union employees at workplaces, and military protestors at parades and funerals. If petitioners were correct—and decisions made by local governments were subject to strict scrutiny whenever they had a disparate impact on the speech of one particular group or one particular message—it would be virtually impossible for the *amici* and other cities to ensure the safety of their inhabitants during such public gatherings.

Take the example of a city hosting the Republican National Convention. As a practical matter, any safety barriers or "no protest" zones that a city might choose to implement at the convention site would disproportionately impact speech by protestors seeking to convey an anti-Republican message. Under

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liberate"). But that argument is inconsistent with this Court's decision in *Frisby*, in which the Court held that an ordinance prohibiting picketing in front of a residence was content neutral, despite the fact that it was unequivocally prompted by the conduct of anti-abortion protestors picketing the home of a physician who performed pregnancy terminations. *Frisby*, 487 U.S. at 481–82; see also *Hill*, 530 U.S. at 724 (citing *Frisby* for the notion that a law is not content or "'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate").

the test proposed by petitioners, that fact alone would subject the city's decision to strict scrutiny—"the most demanding test known to constitutional law," Pet. Br. 52 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997))—and the safety barriers would only be permissible if the city could establish that they were, in fact, the least restrictive means of protecting convention attendees. This would leave municipal administrators and police in a conundrum: How are they to know in advance exactly how large of a barrier is big enough—but absolutely no larger than necessary—to ensure the safety of those attending the convention (and of protestors and other passersby)? If they err on the side of creating too small a safety zone, then there is a significant risk that people will get hurt. But if they err on the side of creating a zone that a court might find to be even slightly larger than necessary, then implementation of the safety zone could be enjoined, and the risks could be even greater. This dilemma would paralyze local governments, making it all but impossible for them to effectively exercise their police powers.

With good reason, this is not the law. Numerous courts have considered the constitutionality of precisely this type of "no protest" zone outside of political convention sites and, uniformly, have examined the propriety of such measures under intermediate scrutiny. See, e.g., *Marcavage* v. *City of New York*, 689 F.3d 98, 106 (2d Cir. 2012) (upholding a "no-demonstration zone" spanning two full New York City blocks surrounding a political convention); *Bl(a)ck Tea Soc'y* v. *City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004) (affirming denial of injunction against designated protest zones during political convention);

Am. Civil Liberties Union of Colo. v. *City & Cnty. of Denver*, 569 F. Supp. 2d 1142, 1184 (D. Colo. 2008) (upholding "Public/Demonstration Zone" outside political convention).

Political conventions are not the only context in which petitioners' proposed disparate impact test would wreak havoc on municipal governance. By definition, *every* protest, march, or demonstration concerns speech on a particular topic and from a particular viewpoint. So, under petitioners' proposed test, virtually *every* municipal act limiting the time, place, or manner of such gatherings would be subject to strict scrutiny.[5] This would hold true even if the

[5] To borrow an example from the *amici* states supporting petitioners, 43 states and the federal government have enacted laws that create buffer zones around funeral sites in order to ensure the privacy and tranquility of such proceedings. See Br. of *Amici* State of Michigan and 11 Other States, at 7 n.2 (listing statutes). Many of these laws were enacted to cabin protests at military funerals by one particular group—the Westboro Baptist Church—seeking to convey one particular message—that God hates the United States for its tolerance of homosexuality. Without a doubt, then, these laws disproportionately impact this particular group and this particular message. Nonetheless, several Circuit Courts have held (and this Court has at least suggested) that these statutes are content-neutral time, place, and manner restrictions subject only to intermediate scrutiny. See *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011) (suggesting in dicta that laws imposing restrictions on funeral picketing are content neutral and may be considered "reasonable time, place, or manner restrictions"); *Phelps-Roper* v. *Koster*, 713 F.3d 942, 951, 954 (8th Cir. 2013); *Phelps-Roper* v. *City of Manchester, Mo.*, 697 F.3d 678, 683, 695 (8th Cir. 2012) (upholding city ordinance limiting funeral protests as a reasonable time, place, and manner restriction); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 358, 373 (6th Cir. 2008) (upholding state statute prohibit-

decision were made for reasons entirely independent of the protests: Each temporary closure of the sidewalks in front of a reproductive health center for street or utility repairs would be subject to strict scrutiny. The test would also extend to ordinances having nothing to do with protests or demonstrations. For example, several cities have laws prohibiting pedestrians from loitering on medians or other select areas of the streets or sidewalks.[6] Such laws are intended to promote public safety, but because they disproportionately impact panhandling, they would be subject to strict scrutiny under petitioners' proposed test. In short, were this Court to adopt a disparate impact standard for time, place, and manner regulations, it would effectively tie the hands of local governments, making it impossible for them to carry out their "duty . . . to take adequate steps to preserve the peace and to protect . . . [their] residents." *Thornhill*, 310 U.S. at 105.

Petitioners and their *amici* attempt to distinguish the Act from other protest safety zones, arguing that

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ing picketing or protesting within 300 feet of a funeral or burial service).

[6] See, e.g., PORTLAND, ME., CITY CODE ch. 25, art. II, § 25-17(b) (prohibiting standing, sitting, staying, driving, and parking in medians, with an exception for pedestrians who are using the median as they cross from one side of the street to the other); WORCESTER, MASS., REV. ORDINANCES OF 2008, as amended through Oct. 22, 2013 ch. 13, § 77(a) (prohibiting standing or walking on a traffic island or roadway except for limited purposes, including crossing at an intersection or crosswalk); S.F., CAL., POLICE CODE art. 2, § 168 (prohibiting sitting or lying on sidewalks between 7 a.m. and 11 p.m.); LAGUNA HILLS, CAL., MUN. CODE ch. 12, § 42.030 (prohibiting pedestrians from "stepping, standing, sitting, or lying upon any median island").

the Act is not even-handed because it allows clinic employees, acting within the scope of their employment, to enter the buffer zone.[7] They suggest that, even if the Act were not otherwise content-based, this exception necessarily makes it so. Pet. Br. 28. But this same argument could be made whenever states or localities create safety zones. Returning to the Republican National Convention example, Republican delegates and other party members attending or working at a convention naturally are permitted within the safety zone so that they can access the event site. And, once within the safety zone, they are free to express themselves in any manner they choose. That disparity is a necessary consequence of using safety barriers to protect the public. It is not a basis for subjecting all such barriers to strict scrutiny.

Petitioners' proposed disparate impact test not only would undermine the ability of states and localities to exercise their police powers, it would also undermine the very First Amendment principles that petitioners purport to defend. To avoid strict scrutiny, state and local governments would have no choice but to enact broader, prophylactic regulations that limit the time, place, or manner of speech at all protests, marches, or demonstrations—irrespective of the historical behavior of the group protesting or otherwise speaking, and irrespective of the size, location, timing, duration, and expected noise level of the

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[7] See, e.g., Pet. Br. 27–28; Br. of *Amicus* 40 Days for Life, at 10–12; Br. of *Amici* 12 Women Who Attest to the Importance of Free Speech in their Abortion Decisions, at 11; Br. of *Amici* Legal Life Defense Foundation & Walter B. Hoye II, at 16–18.

gathering. Because of the broad applicability of such an ordinance, it would not have a disparate impact on any particular group or message, and so would not be subject to strict scrutiny. But it would impose a greater burden on an even wider range of expression, and it would be completely out of line with how local governments have been exercising their police powers for hundreds of years.

In short, states and localities must have substantial flexibility to respond to unique local circumstances in real time. The disparate impact test endorsed by petitioners would make this impossible by prohibiting localities from enacting reasonable time, place, or manner restrictions in response to legitimate concerns about the conduct of protestors—in the abortion context or any other. That cannot be the law.

B. The Fixed Buffer Zone Laws Are Narrowly Tailored.

Not only are the Fixed Buffer Zone Laws content neutral, they also are narrowly tailored to serve the significant government interests of ensuring public safety and protecting access to reproductive health care.

Where a law regulating speech is content neutral, it "need not be the least restrictive or least intrusive means" of protecting the legitimate interests at stake. *Ward*, 491 U.S. at 798. To the contrary, courts must "defer to the [state's or] city's reasonable determination" concerning the precise nature, scope, and extent of restriction required. *Id.* at 800. Thus, in *Ward*, "[t]he Court of Appeals erred in failing to

defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician." *Id.* And in *Hill*, this Court granted "deference to the judgment of the Colorado Legislature" in determining "whether or not the 8-foot [floating buffer zone] [wa]s the best possible accommodation of the competing interests at stake." 530 U.S. at 727; cf. *Madsen*, 512 U.S. at 769–70 ("The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to [the regulating entity's] familiarity with the facts and [relevant] background[.]"); *Burson*, 504 U.S. at 210 ("We simply do not view the question whether the 100-foot boundary line [around polling places] could be somewhat tighter as a question of 'constitutional dimension.' ").

Applying this precedent, courts around the country have granted deference to local governments concerning the need for—and the nature, size, and scope of—fixed buffer zones. And, in so doing, they have upheld buffer zones that were far more restrictive than the Act and the Ordinances. For example, in *Marcavage* v. *City of New York*, the Second Circuit upheld a "no-demonstration zone" surrounding a political convention that spanned two full New York City blocks. 689 F.3d at 106. The court observed that "[i]t may be . . . that a no-standing zone or no-large-sign zone would have been a less restrictive alternative, but 'narrowly tailored' does not mean the 'least restrictive or least intrusive means.' " *Id.* (quoting *Ward*, 491 U.S. at 798). Similarly, in examining the security protocol for a North Atlantic Treaty Organization conference, the Tenth Circuit upheld

the creation of a "security zone" that closed off to protesters "several blocks in all directions" from the conference. *Citizens for Peace in Space* v. *City of Colorado Springs*, 477 F.3d 1212, 1217–18 (10th Cir. 2007). The court rejected appellant's contention that it was unnecessary to completely exclude protestors from the security zone because, among other things, the complete exclusion promoted the city's legitimate interest in decreasing the burden on its police force. *Id.* at 1223. And in *Menotti* v. *City of Seattle*, the Ninth Circuit upheld an order prohibiting all persons, with limited exceptions, from entering a portion of downtown Seattle during a World Trade Organization conference. 409 F.3d 1113, 1118, 1125 (9th Cir. 2005). The court concluded that the order was narrowly tailored, despite observing that only a small number of "violent protestors were breaking the law amidst throngs of lawful protestors." *Id.* at 1132, 1137.

The *amici* supporting petitioners have argued that cases such as these are distinguishable because they concerned restrictions that were more limited in time than the Fixed Buffer Zone Laws.[8] But in those cases, as here, the timeframe of the restriction corresponded to the expected timeframe of the protests. If anything, the fact that anti-abortion protests are often perpetual makes the use of narrowly tailored, prophylactic regulation all the more appropriate. As acknowledged by this Court in *Schenck* v. *Pro-Choice Network of Western New York*, because anti-abortion "protests [a]re constant," they are also more likely to

[8] See, e.g., Br. of *Amici* State of Michigan and 11 Other States, at 4, 7–9.

"overwhelm[ ] police resources"—creating an even greater need for preventative measures. 519 U.S. 357, 363–64 (1997).

This Court also has repeatedly recognized—in other contexts and in this one—that general laws prohibiting violence and obstruction are not always adequate to protect the public's safety or the ability of individuals to exercise their constitutional rights. For example, in *Burson*, this Court rejected the argument that "restricted zones [outside polling places] are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor . . . to use violence or intimidation to prevent voting." 504 U.S. at 206. The Court explained that such a statute would ban only the most "blatant and specific attempts" to interfere with an individual's ability to exercise his or her constitutional right to vote, while "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."[9] *Id.* at 207. Similarly, this Court acknowledged in *Hill* "the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior." 530 U.S. at 729.

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[9] Notably, because the statute at issue in *Burson* was content-based, this Court examined it under strict scrutiny and nonetheless held that the 100-foot buffer zone was the "least restrictive means to serve the State's interests." 504 U.S. at 195, 211 (plurality). In other words, the Court concluded that a statute restricting "violence or intimidation" necessarily would be insufficient to protect the constitutional right to vote.

Both the record in this case and the legislative records supporting the Ordinances confirm that the government interests at stake here could not be sufficiently protected through laws prohibiting violence and obstruction. Before enacting the Fixed Buffer Zone Laws, Massachusetts and several of the *amici* had laws in effect that prohibited violent, abusive, or obstructionist conduct outside of reproductive health centers.[10] But those laws proved inadequate to ensure public safety at clinic sites and to protect access to reproductive health care.[11]

For example, before the passage of the Act, Massachusetts had laws in effect that precluded violence and obstruction at reproductive health care facilities. See MASS. GEN. LAWS ch. 266, § 120E½(e). It also had a "floating buffer zone" law similar to that addressed by this Court in *Hill*. See *McGuire* v. *Reilly*, 260 F.3d 36, 40–41 (1st Cir. 2001). But in spite of

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[10] See, e.g., MASS. GEN. LAWS ch. 266, § 120E½(e) (making it unlawful to obstruct entry to a reproductive health care facility); CAL. PENAL CODE § 423.2(c) (making it unlawful to interfere with reproductive health services client, provider, or assistant); VT. STAT. ANN. tit. 13, § 1026 (making it unlawful to obstruct vehicular or pedestrian traffic); PA. CONS. STAT. tit. 18, § 5507(a) (making it unlawful to intentionally obstruct any sidewalk or other public passage).

[11] As described in more detail by other *amici* supporting the respondents, there is a long history in this country of violence, obstruction, and intimidation at reproductive health care facilities. See, e.g., NATIONAL ABORTION FEDERATION, NATIONAL ABORTION FEDERATION VIOLENCE AND DISRUPTION STATISTICS, *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2011.pdf (showing incidents of violence and disruption against abortion providers from 1977 through 2010).

these laws, women and men seeking to enter reproductive health centers still could not gain access without enduring verbal harassment, having literature and leaflets thrown at them, and being videotaped and photographed against their will. JA at 44–45, 49–51, 60–63. This situation created public safety hazards, as described in detail by the clinic security officers and Boston Police. *Id.* at 95–103, 122–28. Police and other law enforcement officials also had difficulty enforcing these prior laws, and, even when arrests were made, it was difficult to obtain convictions. *Id.* at 31, 33, 67–71, 126.

Several of the *amici* faced similar obstacles prior to enacting Fixed Buffer Zone Laws. For instance, San Francisco's prior ordinance—like the prior Massachusetts statute—included a "floating buffer zone" similar to that upheld by this Court in *Hill*.[12] But,

[12] Several cities, including Denver and Boulder, currently have "floating buffer zone" ordinances similar to the statute upheld in *Hill*. See, e.g., DENVER, COLO., CODE OF ORDINANCES ch. 38, art. IV, § 38-114; BOULDER, COLO., REV. CODE tit. 5, § 5-3-10; PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. 1, § 623.01. Accordingly, petitioners' request that this Court reconsider its decision in *Hill* is inappropriate not only for the reasons set forth in respondents' brief, but also because the doctrine of *stare decisis* is intended to protect such state and local regulation, enacted in reliance on the precedent of this Court. See, e.g., *Johnson* v. *Texas*, 509 U.S. 350, 366–67 (1993) (explaining that "[t]he interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command"); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854–55 (1992) (observing that this Court must consider "the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application").

notwithstanding that the ordinance prohibited "harassment, within 100 feet of an exterior wall of a health care facility," protestors still were able to successfully block the sidewalks adjacent to the clinic and the clinic entrances and exits.[13] Moreover, San Francisco encountered difficulty enforcing its prior ordinance because each violation was short-lived and, thus, difficult to establish absent direct police observation. And even when police were on the scene and could observe the protestors' conduct, it was often too difficult to measure whether, in fact, a protestor had entered the floating buffer zone.[14]

Similarly, in Burlington, prior to the enactment of the Fixed Buffer Zone Law the police department found it difficult to prevent harassment and obstruction in the areas surrounding reproductive health centers. Although obstruction of pedestrian traffic was prohibited by state law, that statute was difficult to enforce, and it did not prohibit other forms of harassment.[15] As explained by a member of the Bur-

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[13] See S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), *available at* http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=164&clip_id=17316, at 23:40; see also S.F., CAL., POLICE CODE art. 43, § 4301 (2013) ("Due to the density and space constraints of the City's urban landscape, [the previous ordinance in San Francisco] has not adequately prevented harassment, delay, and deterrence of patients seeking vital health care services.").

[14] See, e.g., S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), at 22:25.

[15] See Burlington, Vt., City Council Mtg. (May 21, 2012), *available at* http://www.cctv.org/watch-tv/programs/burlington-city-council-214, at 32:04 (describing protestors "verbally assaulting and physically blocking" women from entering clinic).

lington Police Department, individuals who had to push through a wall of protestors in order to gain entry to the clinic often did not report that fact to the police. And when such conduct was reported, it was difficult to determine and prove whether, in fact, pedestrian traffic had been obstructed, and, if so, who was responsible.[16]

In West Palm Beach, just two months before the City enacted its fixed buffer zone ordinance, a reproductive health care center within city limits had been subjected to arson—the third such clinic fire in Florida in two years.[17] Even before the fire, however, the clinic's director had been petitioning city officials to consider imposing a fixed buffer zone because of complaints that anti-abortion protesters were regularly intimidating, obstructing, and harassing patients.[18]

Despite this persistence of violence and obstruction, petitioners nonetheless suggest that the then-existing laws prohibiting such conduct in Massachusetts sufficed to protect public safety and access to reproductive health care because "government agen-

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[16] Burlington, Vt., City Council Ordinance Comm. Mtg. (June 27, 2012), *available at* http://www.cctv.org/watch-tv/programs/ordinance-committee-part-1, at 38:10 & 39:20.

[17] See NATIONAL ABORTION FEDERATION, HISTORY OF VIOLENCE/ARSONS AND BOMBINGS, *available at* http://www.prochoice.org/about_abortion/violence/arsons.asp; *New Limits Set For Abortion Protesters*, MIAMI HERALD, Sept. 28, 2005, at B11.

[18] See, e.g., Peter Franceschina, *Women's Clinic Reopens Five Weeks After Holiday Fire*, SUN SENTINEL, Aug. 11, 2005, at B13, *available at* http://articles.sun-sentinel.com/2005-08-11/news/0508101546_1_clinic-fire-abortion-clinic-womancare-center.

cies, medical facilities, and individuals [could] seek injunctive and other civil relief against persistent offenders." Pet. Br. 36. This argument is specious: State and local "[l]egislatures [are] permitted to respond to potential [impairments of constitutional rights] with foresight rather than reactively." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195 (1986); see also *Hill*, 530 U.S. at 729 ("[T]he statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior.").

Moreover, the injunction is an inadequate tool to protect the significant rights and interests at stake: Injunctions bind particular individuals only; as a practical matter, they are available only after one or more violations *already* have occurred; they take significant time and resources to obtain; they are left to the discretion of the courts and, thus, cannot replace the authority of state and local legislatures to make law; and, as this Court has repeatedly recognized, they are available only upon a heightened showing, beyond that required to defend content-neutral time, place, and manner regulations. *Schenck*, 519 U.S. at 372 (holding that injunctions must "burden no more speech than necessary to serve a significant governmental interest"); accord *Madsen*, 512 U.S. at 765.

As evidenced by the facts and circumstances of the *Schenck* case, these differences between prophylactic lawmaking and retroactive injunctions are significant. In *Schenck*, doctors and health care clinics filed a private-party suit seeking an injunction against anti-abortion protestors who had repeatedly violated the existing laws prohibiting violence and

obstruction at clinic sites. Before seeking relief from the courts, "the clinics [had been] subjected to numerous large-scale blockades" and "consistent[ ] attempt[s] to stop or disrupt clinic operations." 519 U.S. at 362. The initial attempts made by "sidewalk counselors" to "persuade [women] not to get an abortion," if rebuffed, "often devolved into 'in your face' yelling, and sometimes into pushing, shoving, and grabbing," and "the local police had been 'unable to respond effectively' to the protests, for a number of reasons," including that "the protests were constant, overwhelming police resources; when the police arrived, the protesters simply dispersed and returned later; prosecution of arrested protesters was difficult because patients were often reluctant to cooperate for fear of making their identity public; and those who were convicted were not deterred from returning to engage in unlawful conduct." *Id.* at 363–64. The clinics were left with no choice but to spend their own resources pursuing litigation. In the 17 months between the filing of the complaint and the issuance of the preliminary injunction in *Schenck*, the protestors continued to engage in "sidewalk counseling" and "constructive blockades [which] consisted of 'demonstrating and picketing around the entrances of the clinics, and . . . harassing patients and staff entering and leaving the clinics.' " *Id.* at 365 (alteration in original). Although the district court ultimately issued the requested injunction, it held 39 days of hearings before doing so. *Id.* at 365–66. The case then continued for another five years before this Court struck down a portion of the injunction for failure to meet the heightened showing applicable only to injunctive relief. And, of course, the portion of the injunction that was left intact could be en-

forced only by the particular clinics that brought suit, and only against the particular individuals who had been named in the complaint six years earlier. Certainly, petitioners cannot be suggesting that such injunctive relief is sufficient to ensure the safety and wellbeing of clinic patients, staff, and the public—or that state and local governments are somehow precluded by the First Amendment from taking any additional steps to protect their residents.

Petitioners' argument also ignores the practical realities faced by local governments. Cities, towns, and counties often do not have sufficient resources to post police officers outside of reproductive health centers every day during business hours—let alone to pursue and enforce injunctions like that addressed by this Court in *Schenck*. Because Fixed Buffer Zone Laws provide clear, bright-line rules for *all* persons in the vicinity of a reproductive health care facility, such laws decrease the need for a police presence and judicial intervention. And because the preservation of such scarce municipal resources is itself a legitimate governmental interest, the Fixed Buffer Zone Laws are narrowly tailored. See, e.g., *Citizens for Peace in Space*, 477 F.3d at 1223 (upholding security zone, because, among other things, the complete exclusion promoted the city's legitimate interest in decreasing the burden on its police force).

C. The Fixed Buffer Zone Laws Leave Open Adequate Alternative Channels for Communication.

Petitioners argue that the Act fails to leave open adequate alternative channels of communication because it impedes their ability to speak at a "conver-

sational distance" with a "unique audience"—women visiting a reproductive health care facility for the purpose of terminating a pregnancy—about perhaps the most fundamentally private decision a woman can make—whether to have an abortion. Pet. Br. 22, 43–44. But the First Amendment does not guarantee anyone the right to have a face-to-face conversation with a particular individual in all places at all times. Instead, it guarantees the right of all individuals to be able to share their message on matters of public concern. And because the Fixed Buffer Zone Laws permit delivery of petitioners' anti-abortion message to the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora, they unquestionably leave open adequate alternative channels of communication.

In conducting its "adequate alternative channel" analysis, this Court need look no further than its prior decision in *Frisby*. In *Frisby*, the Court upheld a municipal ordinance prohibiting the picketing of a particular residence or dwelling. The ordinance was precipitated by targeted picketing outside the home of a physician that was intended to "force [that] doctor to cease performing abortions." 487 U.S. at 487. The Court held that, because the ordinance applied to "picketing [ ] narrowly directed at the household, not the public," it was "virtually self-evident that ample alternatives remain[ed]" for public expression. *Id.* at 483, 486. Put differently, because the ordinance did not impede "the more general dissemination of [the petitioners' anti-abortion] message," *id.* at 483, it was of no moment that the ordinance

might, in fact, make it substantially more difficult for the picketers to reach their target audience.

So, too, here, petitioners assert the right to target a particular audience—women visiting reproductive health care centers for the purpose of terminating a pregnancy—at a location where the target audience necessarily *must* go to exercise a constitutionally-protected right, and where that audience has a strong expectation of privacy.[19] Petitioners contend that, because the Act does not leave open adequate alternative channels for them to speak directly—and up close—with this particular target audience at this particular location, it does not pass constitutional muster. But this argument misses the mark: The relevant question is not whether the regulation

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[19] As this Court suggested in *Madsen*, "the State's strong interest in residential privacy, acknowledged in *Frisby* v. *Schultz*, applie[s] by analogy to medical privacy[:] . . . while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted 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." 512 U.S. at 768 (citations omitted). Of course, the Act and the other Fixed Buffer Zone Laws are not intended solely for the purpose of promoting "medical privacy"—they are also intended to protect the constitutional right of clinic-goers to access reproductive medical information and care, and to protect the safety of all individuals using the public streets and sidewalks. Thus, the question addressed at length by the dissenters in *Hill*—whether individuals have a "right to be left alone" that can ever justify restrictions on speech outside of the residential context, see 530 U.S. at 750–54 (Scalia, J., dissenting); *id.* at 771–72 (Kennedy, J., dissenting)—is not presented here. Moreover, resolution of that question is wholly unnecessary to address the entirely separate question of whether adequate alternative channels of communication exist.

leaves open adequate alternative channels for particular speakers to have one-on-one conversations with particular individuals whom they choose to target. It is whether that law impedes "the more general dissemination of a message." *Frisby*, 487 U.S. at 483. Because petitioners—like all other speakers—are free to share their message through any means or method desired, so long as they are 35-feet from the entrances to a reproductive health care facility, the Act—and the other Fixed Buffer Zone Laws—unquestionably pass this test.

To be sure, proximity to a particular location may sometimes be significant to protesters seeking to convey a particular message. Those protesting a political convention or an international conference have an interest in securing a site for their protest that is reasonably proximate to that event. But reasonable proximity does not mean a conversational distance. See, e.g., *Marcavage* v. *City of Chicago*, 659 F.3d 626, 629, 631 (7th Cir. 2011) (rejecting argument that First Amendment required City of Chicago to allow plaintiffs to situate themselves on the main thoroughfare of the Gay Games in order to make "one-on-one presentation[s] of the Gospel of Jesus" to Games attendees, and holding instead that the alternate locations available to plaintiffs were more than adequate because they "were within view and earshot of those traveling to the Games"); see also *Marcavage* v. *City of New York*, 689 F.3d at 108 (rejecting convention protesters' argument that an adequate alternative channel for communication must be within "sight and sound" of the convention and upholding restriction that required protestors to remain a block or more away from convention site); *Menotti*, 409

F.3d at 1138–39, 1141 (rejecting argument that the First Amendment required the City of Seattle to allow protestors to "communicat[e] with WTO delegates at close range," and holding that protestors restricted from the portion of downtown Seattle where the WTO conference was being held nonetheless had adequate alternative channels available to them because they were permitted to demonstrate across the street from some of the conference locations); *Bl(a)ck Tea Soc'y*, 378 F.3d at 14 (rejecting convention protesters' argument that an adequate alternative channel for communication must be within "sight and sound" of the convention, and observing that, "[a]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access").

In any event, even accepting that anti-abortion protestors have an interest in situating themselves within reasonable proximity to locations where abortions are performed, that interest is not impeded here. The Fixed Buffer Zone Laws unquestionably permit petitioners and other anti-abortion advocates to speak freely within sight and sound of reproductive health care centers. And they unquestionably permit petitioners and other anti-abortion advocates to engage in face-to-face conversations with clinic patients and staff, so long as those conversations take place before the clinic-goers enter the buffer zone or after they leave it. In Massachusetts, for example, petitioners can—and do—position themselves on

public sidewalks just 35 feet from clinic entrances—well within both earshot and eyeshot of the clinics. And from that position petitioners can—and do—engage in any form of expression they wish. They can approach passersby (including individuals heading to or from the facility), they can leaflet, they can call out to individuals entering and exiting the facility, they can picket, they can display signs, and they can pray.

In short, the Act and the other Fixed Buffer Zone Laws do not "limit the range of information and ideas to which the public is exposed," as petitioners contend. Pet. Br. 32 (internal quotation marks and alteration omitted). Instead, they appropriately protect clinic patients, clinic employees, and passersby from the harassment, intimidation, and violence that historically have plagued such facilities, while still leaving open ample alternative channels for petitioners and other anti-abortion advocates to spread their message.

CONCLUSION

Because the Act and the other Fixed Buffer Zone Laws epitomize precisely the type of content-neutral time, place, and manner restrictions that state and local governments must have at their disposal to deal with uniquely local concerns and to protect the significant rights and interests of their residents, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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