No. 12-1168

In the Supreme Court of the United States

ELEANOR McCULLEN, *et al.*,
Petitioners,
v.
MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,
Respondents.

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

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

To protect public safety and patient access to medical care, the Massachusetts Legislature adopted a fixed buffer zone that limited "entering" or "remaining" in areas next to the entrances of reproductive healthcare facilities. *See* Mass. Gen. Laws ch. 266, § 120E½ (2012). The Legislature took this action in response to 20 years of weekly, targeted protest at facilities across Massachusetts that blocked doors and driveways and made patients, staff, and passersby feel unsafe. The solution Massachusetts adopted, after other approaches had failed, struck the right balance: permitting safe passage over short stretches of sidewalk at facility entrances, while also preserving robust communication—in all forms—between advocates and patients on the streets and sidewalks surrounding facilities.

The questions presented are:

1. Whether Massachusetts's regulation of conduct in the area immediately around facility entrances to preserve public safety and patient access constitutes a permissible time-place-manner regulation under the Free Speech Clause of the First Amendment.

2. Whether the Court should decline petitioners' invitation to review and overturn *Hill v. Colorado*, 530 U.S. 703 (2000), where this case does not present the issues unique to *Hill*.

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For more than two decades, Massachusetts has tried to address a problem: the preservation of safe access to reproductive healthcare facilities. Beginning in the late 1980s, access to these facilities was routinely blocked. *See, e.g., Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361, 1363-64 (Mass. 1990) ("*Operation Rescue*") (describing blockades of facility entranceways and lobbies). Moreover, Massachusetts "experienced repeated incidents of violence and aggressive behavior" at facilities, including a 1994 shooting in which two employees were killed and several other persons were injured. *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"); Joint Appendix ("J.A.") at 14.

To keep facility entrances clear and the surrounding streets and sidewalks safe, Massachusetts attempted several solutions, including targeted injunctions and a floating buffer zone. None worked. Finally, in 2007, Massachusetts adopted something that did work: a fixed buffer zone that kept a limited area immediately around facility entrances and driveways clear of everything but essential pedestrian traffic, ensuring safe access while also accommodating all forms of speech and expressive conduct within the hearing, sight, and presence of approaching patients.

A. History of Targeted Protest and Compromised Access at Massachusetts Reproductive Healthcare Facilities

In Massachusetts, reproductive healthcare facilities provide a wide range of important medical services to tens of thousands of patients every year, including

family planning, infertility services, mammography, treatment of sexually transmitted infections, and full gynecological care. J.A. 18, 61, 77. They also perform abortions. J.A. 77. However, more than two-thirds of patient visits are for preventive health care. J.A. 61, 77.

In the late 1980s, the streets and sidewalks around Massachusetts facilities became the focus of targeted protests.[1] *Operation Rescue*, 550 N.E.2d at 1363-64. Among other activity, individuals blocked facility entranceways and lobbies by lying on the ground or floor. *Id*. at 1363. They chained themselves to each other as well as to facility doors and property. *Id.*; *see also Commonwealth v. Filos*, 649 N.E.2d 1085, 1087 (Mass. 1995). They crowded patients seeking to enter the facilities and blocked their way. *Planned Parenthood League of Mass., Inc. v. Bell*, 677 N.E.2d 204, 206, 207 (Mass. 1997) ("*Bell*"). Indeed, the stated goal of the protests was to shut down facilities by physically blockading them. *Operation Rescue*, 550 N.E.2d at 1364.

The protests were not limited to one point of view. *Opinion of the Justices to the Senate*, 723 N.E.2d 1, 5 (Mass. 2000). Instead, advocates "on both sides of one of the nation's most divisive issues" frequently engaged

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[1] The focus of the protests were so-called "abortion clinics," that is, free-standing reproductive healthcare facilities. *Operation Rescue*, 550 N.E.2d at 1363. There is no evidence in the record that any of the protests targeted Massachusetts hospitals where abortions are also performed.

each other "in the areas immediately surrounding the State's clinics," creating "congested areas charged with anger." *Id*.

B. Massachusetts Adopts an Approach-Oriented Solution

The Massachusetts Legislature—"concerned about a history of violence" outside facilities and "the harassment and intimidation of women attempting to use such facilities"—enacted in 2000 the Massachusetts Reproductive Health Care Facilities Act ("2000 Act"). *McGuire v. Reilly*, 386 F.3d 45, 48 (1st Cir. 2004) ("*McGuire II*"). The Legislature investigated this concern "thoroughly," *McGuire I*, 260 F.3d at 44, and concluded that "existing laws did not adequately safeguard clinic staff, prospective patients, or members of the public." Pet. App. 95a. The Legislature heard consistent testimony that protesters at facilities throughout the Commonwealth regularly blocked facility access and harassed and intimidated patients and staff. The tactics used were aggressive: protesters screamed right in the faces of patients, their companions, and staff, shoved them, and even videotaped them. Among other evidence, the Legislature heard the following examples:

- A physician who worked at a Boston facility described arriving at work and being confronted daily by protesters who surrounded her car as she tried to enter through the garage, put their faces to her window, screamed her first name, called her a murderer, and videotaped her. J.A. 12.

- The clinic director for another Boston facility related the experience of one of her nurses, who tried to enter the facility garage but was blocked by protesters who stood between her and the swipe card machine that would allow her access, while two other protesters moved behind her car and prevented her from backing up. J.A. 16; *see* J.A. 20.

- Another staff member at the same facility encountered three protesters standing across the entrance with less than a foot between them. She was forced to squeeze between the protesters to gain entrance to the facility. J.A. 16-17.

- The clinic director of a Worcester facility testified that protesters caused "repeated problems" at the facility's driveway entrance. Protesters walked slowly across the driveway, sometimes standing still and blocking the entrance. J.A. 18.

- At least one car accident had occurred at the Worcester facility's driveway entrance, and the clinic director was concerned that others were "inevitable." J.A. 19.

- A volunteer described seeing a cab drive up to a Boston facility and immediately become "engulfed" by a large group of protesters. Inside was a woman in her mid-twenties and her elderly grandfather, who were trapped in the car for several minutes. They required assistance to get from the cab to the building, and the

> grandfather, who walked with a cane, was shoved and nearly fell twice. J.A. 21-22.

The 2000 Act was a so-called "floating" buffer zone or "bubble zone" law, which was modeled on the one upheld by this Court just months before in *Hill v. Colorado,* 530 U.S. 703 (2000), but restricted far less space.[2] The 2000 Act contained three main provisions. *First*, the Act permitted peaceful protest right up to the doors of reproductive healthcare facilities but prohibited certain close approaches to unwilling listeners.[3] Specifically, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside an 18-foot radius extending from facility entrances if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 130a (quoting Mass. St. 2000, ch. 217, § 2(b)).

Second, the 2000 Act exempted four categories of persons from its coverage:

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[2] The Legislature initially considered a 25-foot fixed buffer zone and sought the opinion of the state's highest court as to its constitutionality. *Opinion of the Justices*, 723 N.E.2d at 1, 6; Pet. App. 127a. While the Supreme Judicial Court concluded that the proposed fixed zone was consistent with the First Amendment, *Opinion of the Justices*, 723 N.E.2d at 6, the Legislature ultimately chose to adopt a floating buffer zone like the one that had just been upheld in *Hill*. Pet. App. 128a-129a.

[3] The 2000 Act defined "reproductive healthcare facility" as a "place, other than within a hospital, where abortions are offered or performed." Mass. St. 2000, ch. 217, § 2(a). The revised Act uses the same definition but also excludes facilities "upon the grounds of" a hospital. Mass. Gen. Laws ch. 266, § 120E½(a) (2012).

(1) persons entering or leaving such facility;

(2) employees or agents of such facility 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 public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 130a-131a.

Third, the Act stated that these provisions only took effect "during a facility's business hours" and only if the defined zone was "clearly marked and posted." Pet. App. 131a.

The 2000 Act also included a separate provision that prohibited "knowing" attempts to obstruct, detain, hinder, impede, or block facility entrances. Mass. St. 2000, ch. 217, § 2(e).

C. Access and Safety Remain Compromised

The 2000 Act—with its emphasis on protecting against unwelcome close approaches—did not do enough to protect facility access and patient safety, which remained compromised. Essentially, the 2000 Act concentrated protest in a small area right in front of facility entrances. J.A. 69 (2000 Act was ineffective because "it's such close quarters" that "everybody is in everybody's face, no matter what"). Protesters stood still in facility doorways to pass out leaflets, crowding

the entrance. J.A. 44, 67, 122, 124. Sidewalk counselors massed in doors and driveways, attempting to approach patients until the very moment they entered facilities. J.A. 72-73. And counter-protesters jockeyed for their own positions, occasionally pushing and shoving, within the same 18-foot space. J.A. 26-27, 123. Whether they intended to or not, protesters created a wall of sometimes agitated or angry people in front of facility entrances, effectively blocking them. J.A. 26-27, 95-96, 123; Dkt. No. 53 at 17. Because there was still "a significant public safety and patient access problem," the Legislature revised the Act in November 2007. Pet. App. 165a; *see also* Pet. App. 97a ("Over time, legislators became concerned that the statute had failed to achieve its desired goals.").

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature heard testimony on both sides of the issue. For example, groups such as the American Civil Liberties Union and the Defending Dissent Foundation warned against the potential speech-chilling effects of bright-line enforcement tools, such as fixed buffer zones. J.A. 38-40, 64-66. But there was also extensive testimony from law enforcement and others that facility access was still being physically blocked under the 2000 Act's floating buffer zone. Indeed, access was often blocked merely by the lawful presence of too many people, too close to facility entrances. For example:

- Boston Police Department Captain William B. Evans—who served as police liaison to a Boston facility and protesters "on both sides of the issue"—testified that it was a "misconception" that the 2000 Act "prevents protesters from

going into that buffer zone." Rather, protesters "stand up right in front of the door." As he said, "A lot of them hold signs right there. As long as they stay stationary, you know, they can stand in front of that door."[4] J.A. 67, 122.

- Captain Evans described the action at facility entrances as so crowded and frenetic that it was like "a goalie's crease." J.A. 69.
- One volunteer for Planned Parenthood League of Massachusetts ("PPLM") painted a similar picture, telling the Committee that it seemed that certain protesters were "desperate to prevent people from entering the clinic." J.A. 72.
- A Boston facility volunteer agreed, testifying that the protesters were "moving closer and closer to the main door." J.A. 44.
- NARAL Pro-Choice Massachusetts submitted a survey of ten facilities located throughout the Commonwealth, including Amesbury, Lynn, Boston, Worcester, and Springfield. Six of the surveyed facilities described protesters as a "significant problem" for patients and staff, and two more reported the "semi-regular to regular presence of protesters." J.A. 54.

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[4] In addition, Captain Evans testified in this litigation that stationary protesters close to facility entrances would often "position themselves and their signs in such a way that it was difficult for anyone trying to enter or leave the facility to do so without coming into physical contact with protesters." J.A. 124.

Crowding conditions permitted under the 2000 Act were made worse by protesters willing to risk criminal prosecution under existing laws. For example:

- A patient advocate at an Attleboro facility described protesters walking back and forth across the driveway entrance. "Though prohibited from standing in the entrance of the driveway, they frequently stop there until threatened with police action." She also recalled "instances of picketers either slowing or speeding up to narrowly avoid being hit by cars driven by staff," and that patients had reported "feeling too intimidated by the pacing protesters to enter the property, and turning back." J.A. 41.

- Witnesses also described protesters sticking their heads and hands into open car windows and throwing literature into cars. J.A. 51; Pet. App. 142a.

- PPLM's security contractor described Boston protesters routinely placing four people "right on the curbstone of the buffer zone, so when people try to park there to let a patient out, they can't get out because they've got it blocked."[5] J.A. 86.

- PPLM's president told the Committee that patients' and staff members' fear of violence

[5] The problems were not limited to Boston. For example, that same PPLM security contractor testified in this litigation that a Worcester protester would "stand in the middle of the driveway and try to stop people from proceeding up the driveway to the facility." J.A. 99.

required the hiring of guards and the installation of metal detectors at its facilities. In fact, she reported, PPLM spent $300,000 a year on security. J.A. 61.

- When asked if there was any evidence of women turning away from facilities "out of fear," PPLM's security contractor replied that, "on a weekly basis," he saw at least one or two women leave a Chestnut Hill facility because protesters "block the parking lot entranceway." Others agreed, with one volunteer testifying she saw "people circling [the facility] in the same car around and around," but "they never stop." J.A. 88-89.

Finally, the Legislature heard testimony that the 2000 Act put local police in a difficult enforcement position.[6] J.A. 67-70, 77-79. On the one hand, because the 2000 Act prohibited only unconsented approaches within the 18-foot zone, peaceful, stationary protest was entirely permissible within the zone, and police attempted to be respectful of that. J.A. 29 (police preferred to "mediate" disputes about buffer-zone violations). On the other hand, police could not use the Act to keep entrances clear because the law allowed individuals to station themselves and protest right at facility entrances; nor was the law effective in

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[6] Of course, this Court anticipated difficulties in enforcing floating buffer-zone laws like the 2000 Act. *See Hill*, 530 U.S. at 740 (acknowledging that floating buffer zones may be "inherently difficult to administer") (Souter, J., concurring); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 379 n.9 (1997) ("We suspect that these floating buffer zones would also be quite difficult for the district court to enforce.").

preventing patient intimidation and harassment[7] at facility entrances because the consent requirement was unenforceable as a "practical matter." J.A. 67, 68, 70, 77, 79, 122-23. As a result, police made few arrests. J.A. 68, 69. And even those did not generally result in convictions, J.A. 69, and were often for only the most blatant attempts at harassment and intimidation of patients and facility staff, such as the two women who would dress as Boston Police officers to encourage patients to consent to their approach. J.A. 71 (women had been arrested several times, but "they're back there every day, every Saturday"). From the law-enforcement perspective of Captain Evans, the only workable solution was a "fixed zone" that made clear—and clearly enforceable—who was, and who was not, supposed to be in the area immediately outside facility entrances.[8] J.A. 69-70.

As in 2000, the problems described to the Legislature in 2007 resulted from the activities of pro-choice advocates as well. For example, in the *McGuire* litigation, Captain Evans testified about a group of pro-choice protesters who gathered on the second Saturday

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[7] *See* Mass. Stat. 2000, ch. 217, § 1 (stating purposes of 2000 Act, including prevention of "congestion" around facilities and protection of patients' right to be free from "hindrance, harassment, intimidation and harm").

[8] Petitioners quibble with the testimony that the 2000 Act was difficult to enforce, citing testimony by law-enforcement officials that violations were "clear" and "routine." Pet. Br. at 7. But, in context, the testimony's plain import is that the officials regularly saw conduct within the buffer zone that they believed the Legislature had intended to correct, but the 2000 Act just proved to be the wrong vehicle to address that conduct. J.A. 69, 70.

of every month outside a Boston facility. J.A. 26-27. He described them as "young college age kids" who regularly yelled and screamed at pro-life protesters. J.A. 26-27. In fact, the pro-choice advocates were the ones who injected noise and vulgarity into the atmosphere immediately around facility entrances. J.A. 26-27.

And in this litigation, Captain Evans cited pro-choice protesters that his officers dubbed the "Pink Group," characterizing them as "particularly disruptive." J.A. 123. According to Evans, the Pink Group would "go into the 18-foot buffer zone and they would push, shove, and step on other people's feet in order to get a good position." J.A. 123. The combined presence of pro-choice and pro-life protesters in the buffer zone around the facility entrance "would effectively block the door." J.A. 123.

Indeed, one pro-choice group, the National Organization for Women, told the Legislature in 2007 that its counter-protests at facilities were unhelpful because they impeded patient access, and that it had ended them as a result. Dkt. No. 53 at 17. According to its testimony, "[p]atients entering these buildings don't distinguish between pro-choice and anti-choice protesters[;] they just see people crowded around the doorway that they need to walk through to get to their doctor's appointment." Dkt. No. 53 at 17.

D. Massachusetts Adopts an Access-Oriented Solution

In November 2007, the Legislature revised the original Act by deleting the floating buffer-zone provision that had proven ineffective and replacing it

with a new fixed buffer zone, focused on keeping a limited area around facility entrances safe and clear of all but essential traffic. Pet. App. 2a, 97a; Mass. Gen. Laws ch. 266, § 120E½(b) (2012). The revision was intended to "increase forthwith public safety at reproductive health care facilities" and was "necessary for the immediate preservation of the public safety." Mass. St. 2007, ch. 155.

The revised Act makes it unlawful to "knowingly enter or remain on a public way or sidewalk adjacent to a [facility] within a radius of 35 feet from any portion of an entrance, exit or driveway of a [facility]." Mass. Gen. Laws ch. 266, § 120E½(b). To put it in concrete terms, that distance is just under the length of two parking spaces[9] and marks a point only seven seconds away from facility doors. *See Burson v. Freeman,* 504 U.S. 191, 210 (1992).

The other provisions of the 2000 Act were not changed. The Act continues to apply only during a facility's business hours and only if each buffer zone is "clearly marked and posted." Mass. Gen. Laws ch. 266, § 120E½(c). In addition, the same four categories of persons are still exempt: (1) persons entering or leaving the facility; (2) clinic employees or agents acting within the scope of their employment; (3) municipal agents acting within the scope of their employment; and (4) persons crossing through the buffer zone solely to

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[9] *See, e.g.,* City of Springfield Zoning Ordinance (Aug. 26, 2013), Article 7, § 7.1.41, available at http://www3.springfield-ma.gov/planning/fileadmin/Planning_files/Zoning_2013_Documents_Images/Final_5_28_13_Effective_8_26_13_JTM.pdf (parking spaces must be at least 18-feet deep, or 16-feet deep for compact cars).

reach a destination other than the facility. *Id*. § 120E½(b)(1)-(4). The statute also carried over language from the 2000 Act prohibiting "knowing" attempts to obstruct, detain, hinder, impede, or block facility entrances. *Id*. § 120E½(e).

The Massachusetts Attorney General's Office ("AGO") issued guidance to law enforcement and facility managers on the "primary provisions" of the revised Act. J.A. 91; *see also* J.A. 91-94 (sample guidance letter); Pet. App. 98a, 119a-120a. Echoing the revised Act's plain language, the AGO described it as creating fixed "no-enter" zones in defined areas immediately around facility entrances and driveways. J.A. 91.

As for the revised Act's exemptions, the AGO emphasized that they did not permit unfettered conduct within the buffer zone. J.A. 93-94; *see, e.g.*, J.A. 93 ("The first exemption—for persons entering the clinic or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic."). Rather, the exemptions simply allowed those who had to have access to the area immediately around facility entrances—patients, pedestrians, employees, contractors, utility workers and first responders—to get to where they needed to go. J.A. 93-94. But they did not allow exempted individuals to engage in the kind of conduct—*e.g.*, stopping in the buffer zone to

engage in what the Court of Appeals had earlier termed "partisan speech"[10]—that had proved obstructive in the past. J.A. 93.

For example, the AGO explained that an individual could cross the buffer zone "to reach and speak with someone outside the zone (perhaps to engage in lawful protest, other speech or prayer) or to travel on to another place altogether." J.A. 93. However, that individual could not "do anything else within the buffer zone," including stopping to "express[] their views about abortion" or to "engag[e] in other partisan speech." J.A. 93-94.

E. The Revised Act Has Improved Public Safety and Facility Access While Preserving Robust Opportunities for Speech Outside Facilities

Following the enactment of the fixed buffer zone, the areas immediately around facility entrances finally

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[10] The phrase "partisan speech" originated with the Court of Appeals in *McGuire II*. In reviewing the Commonwealth's enforcement policy under the 2000 Act, the court noted that the AGO's guidance letters had "clearly construed" that statute's employee exemption to "exclude pro-abortion or partisan speech from the term 'scope of their employment.'" *McGuire II*, 386 F.3d at 52 n.1. Thus, the AGO took the position as early as 2000 that the exemption did not permit employees to "engage in counter-protests, counter-education, or counter-counseling against anti-abortion views" within the buffer zone. *Id.* at 52. In 2007, the AGO used the Court of Appeals' phrase—"partisan speech"—to convey the same message with respect to the identical employee exemption in the revised Act: that it was a limitation on facility employee conduct and did not permit the same types of activities that had congested facility entrances for years.

function as they should. Patients can readily enter the facilities, by foot or by car, to access the many medical services offered there. J.A. 126 (after the Act was revised, the area around facilities is "much more orderly" and there have been "fewer confrontations"). And interested individuals can—as they have every week for more than twenty years—effectively proffer their messages outside facilities and within the sight, hearing, and presence of their target audience. Pet. App. 23a ("[t]he record makes plain that communicative activities flourish" outside facilities).

In Boston, for example, at least a dozen protesters, and sometimes many more, regularly appear outside a PPLM facility on Commonwealth Avenue. Pet. App. 6a; J.A. 129-30; *see also* J.A. 132 (Ms. McCullen engages in sidewalk counseling every Tuesday and Wednesday); J.A. 175 (Ms. Zarella protests on Saturdays and some Wednesdays); J.A. 125, 271 (on second Saturday of each month, as many as 30 to 40 protesters gather outside the Boston facility, and on Good Friday there are as many as 70). The protesters stand near the front entrance of the facility carrying signs, praying, singing, chanting, and speaking with or calling out to those who pass by and those who are entering the facility. Pet. App. 6a-7a (describing scene); Pet. App. 41a-47a (same); J.A. 300, 303-05 (photographs of protesters outside Boston facility). They often ring the buffer zone and can be seen and heard by those within it. Pet. App. 46a; J.A. 300, 304. They can even be heard from inside the facility. Pet. App. 46a-47a.

Protesters outside the Boston facility also pass out leaflets and handbills to those approaching or passing by the facility. Pet. App. 41a-42a, 43a, 46a. And they

have close, quiet conversations with individuals on the surrounding sidewalks. Pet. App. 47a (investigator observed group of three sidewalk counselors engaging young woman); J.A. 126 ("[p]rotesters continue to have close contact with patients and others approaching the clinic"); J.A. 162-63 ("not unusual" for men accompanying women to the facility to confide in protester); J.A. 306 (photograph of close conversation between protesters and patient). In fact, protesters have acknowledged repeated success in conveying their message in Boston, with one protester testifying that she convinced about 80 women not to terminate their pregnancies since the revised Act took effect in 2007. Pet. App. 7a, 41a-42a, 47a. Indeed, the record contains a photograph of that protester—petitioner Eleanor McMullen—engaging in a quiet conversation with a young woman on the sidewalk outside the buffer zone, which resulted in the woman leaving the facility in a car with her. J.A. 269-71 (describing encounter); J.A. 306 (photograph).

Protesters also effectively convey their messages at facilities in Worcester and Springfield.[11] Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). A regular group of protesters appears outside those facilities, with their numbers swelling to as many as 100 on occasions such as the semi-annual "40 Days for Life." J.A. 228, 229-30, 237-40, 263-65 (Worcester); J.A. 204, 206-13 (Springfield); J.A. 301, 309, 310 (photographs); *see also* J.A. 215 (Ms. Clark protests in Worcester two or three times per week); J.A. 198 (Dr.

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[11] While petitioners have chosen to focus on only three facilities, patient access was a state-wide problem affecting almost a dozen facilities scattered throughout the Commonwealth. J.A. 54.

Shea protests on Friday). Their preferred activity—getting as close as possible to patients until the moment they enter the facility—is proscribed by geography: the primary entrances for both facilities are reached by private driveway and parking lot. Pet. App. 51a, 60a; J.A. 114, 117. Nonetheless, protesters are able to display their signs, pass out literature, pray, sing, call out, and demonstrate, all within the sight and hearing of patients. Pet. App. 50a-57a, 59a-63a; J.A. 114-15, 117-18, 272-78. Despite the physical layout of the facilities, they even have close, quiet conversations with patients. J.A. 206, 208, 255-56, 259-61, 272-73. For example, there is a nun who regularly engages in sidewalk counseling at the Worcester facility who is particularly effective at drawing patients into quiet conversations. J.A 259-60. As a result of her work, and that of others, Worcester protesters have convinced a number of patients to leave the facility and join them at pro-life organizations like Problem Pregnancy. J.A. 259-61.

But petitioners have insisted that they need additional access to facility patients. Indeed, each petitioner has professed a need to be only a few feet from facility entrances, stating that, if the current buffer zone were lifted, they would once again take positions directly in front of facility doors or right next to driveways. *See, e.g.,* J.A. 217 (if buffer zone were lifted, Ms. Clark would stand "on the public sidewalk adjacent to the concrete walkway directly in front of the opening in the fence because this is the closest point to the main door that is public property"); J.A.

252 (with no buffer zone in place, Mr. Bashour would stand "directly in front of the main door").[12]

F. The Court of Appeals Upholds the Act

The United States Court of Appeals for the First Circuit has addressed the constitutionality of the Commonwealth's buffer-zone statutes four times, upholding the laws each time. In the first round of litigation, the court rejected both facial and as-applied challenges to the 2000 Act's "floating" buffer zone. *See McGuire I*, 260 F.3d 36; *McGuire II*, 386 F.3d 45. And this Court denied certiorari. *McGuire v. Reilly*, 544 U.S. 974 (2005).

With the Act's 2007 revision came a new round of litigation. Once again, petitioners brought both facial and as-applied challenges, which were tried separately. Pet. App. 125a. Following a bench trial on a stipulated record—which traced the extensive history of violence, harassment, and obstruction outside Massachusetts facilities, as well as the Commonwealth's efforts to address it—the District Court rejected the facial challenge. Pet. App. 123a-124a, 210a. The Court of Appeals affirmed, finding that the revised Act was a "permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety." *McCullen v. Coakley*, 571 F.3d 167,

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[12] *See also* J.A. 176 (Ms. Zarella's earlier, preferred routine, was to stand "in one place" close to the "recessed walkway leading to the clinic entrance"); J.A. 189 (Mr. Smith's earlier, preferred routine was to "stand stationary on the public walkway directly in front of the clinic entrance"); J.A. 200 (Mr. Shea would prefer to stand "a few feet" from driveway entrances).

184 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1881 (2010) ("*McCullen I*"); *see* Pet. App. 95a-98a, 118a.

Applying the traditional time-place-manner test articulated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court of Appeals concluded that the Act was content neutral because the legislative record demonstrated that it was "in service to a legitimate governmental interest unrelated to expressive activity." Pet. App. 102a, 104a-105a. The court rejected as unsupported petitioners' argument that the Legislature's neutral justifications were mere pretext. Pet. App. 102a-104a. It also rejected petitioners' argument that features of the Act—including its employee exemption—constituted content-based or viewpoint-based discrimination, reasoning that "the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference." Pet. App. 105a.

As for narrow tailoring, the Court of Appeals found that the Act did not, under *Ward*, burden substantially more speech than necessary. Pet. App. 108a-109a. The court noted that the Legislature had "labored" to balance "First Amendment concerns with public safety concerns" and had "mulled" the "advantages and disadvantages of variously configured buffer zones." Pet. App. 109a. Given that unique history and the deference traditionally afforded such legislative judgments, the court stated that it simply could not "say that the 2007 Act is substantially broader than necessary." Pet. App. 109a.

The case then returned to the District Court for a bench trial on petitioners' as-applied challenge. The District Court concluded that, with one exception, petitioners' as-applied claims were identical to those raised and resolved in the facial challenge. The exception, and the only triable issue, was whether the revised Act provided petitioners with adequate, alternative means of communication at the three PPLM facilities in Boston, Worcester, and Springfield. Pet. App. 5a. After making extensive findings of fact, the District Court concluded that it did. Pet. App. 6a. Once again, the Court of Appeals agreed, concluding that the "record makes plain that communicative activities flourish at all three places." *McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013) ("*McCullen II*"); Pet. App. 23a. At each facility, the court found, petitioners protested within the sight, hearing, and presence of their intended audience. Pet. App. 23a. Relying as much on *Madsen* and *Schenck* as it did on *Hill*, the Court of Appeals ultimately determined that the Act was a "content-neutral, narrowly tailored time-place-manner regulation that protects the rights of prospective patients and clinic employees without offending the First Amendment rights of others." Pet. App. 3a; *see Hill,* 530 U.S. 703*; Schenck,* 519 U.S. 357; *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753 (1994).

SUMMARY OF ARGUMENT

More than 20 years of experience in Massachusetts has demonstrated that the areas immediately around facility doors and driveways have been congested, and even unsafe. The revised Act is a traditional legislative response to that long-standing problem: it reduced the

traffic around facility entrances. Under the Act, only essential pedestrian traffic is allowed in these critical areas and even that traffic has to keep moving. Because the Act is justified solely by legitimate governmental interests in public safety and healthcare access, the Act is properly viewed as a neutral time-place-manner restriction on conduct that has a limited, incidental effect on petitioners' preferred method of communication. It should join the long line of similar restrictions upheld by this Court to protect polling places, schools, national parks, state fairs, and even utility poles. *See Schenck,* 519 U.S. 357 (abortion facilities)*; Madsen,* 512 U.S. 753 (same); *Burson,* 504 U.S. 191 (polling places); *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288 (1984) (national parks); *Members of the City Council of the City of L.A. v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (utility poles); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fairs); *Grayned v. City of Rockford,* 408 U.S. 104 (1972) (schools); *cf. Snyder v. Phelps,* 131 S. Ct. 1207 (2011) (indicating possible approval of military funeral buffer zones).

That same 20 years of experience also demonstrates that the revised Act's fixed buffer zone is the only solution that worked. Essentially, Massachusetts engaged in a lengthy period of trial and error, testing various solutions to an acknowledged public-safety problem. Nothing kept entrances clear and sidewalks safe until Massachusetts adopted the Act's fixed buffer zone. This long history is ample evidence that Massachusetts tailored its solution to fit the problem at hand, and that the revised Act is not overbroad. *See Madsen,* 512 U.S. at 768-70 (history of targeted protest and ineffective injunctions justified 36-foot buffer

zone); *Burson*, 504 U.S. at 200, 206-07 (history of voter fraud justified 100-foot buffer zone).

Moreover, the Act permits petitioners to protest at their preferred location and in the sight, hearing, and presence of their preferred audience. That is, they continue to protest outside facilities that provide abortion services, just not right in the doors. They continue to offer information and conversation to patients and passersby, just a few seconds away from those entrances. In short, there is robust speech on the topic of abortion happening every day outside Massachusetts facilities. But now, under the revised Act, patients and pedestrians have safe use of short stretches of sidewalk needed to access facilities and to get to where they are going.

Finally, this case is not *Hill v. Colorado*. In *Hill*, the State expressly restricted speech—*i.e.*, "protest," "education," and "counseling"—in areas extending 100 feet from all medical facility entrances. Unlike the law in *Hill*, the revised Act does not regulate unwelcome "approaches," and it does not shield the "unwilling listener." It does not create a protective "bubble" around listeners, and it does not guarantee personal space on public streets and sidewalks. What the Act does regulate is traffic and congestion in a much smaller area outside facility entrances to ensure public safety and patient access. Simply put, this is a different case, and it is not an appropriate vehicle for reconsidering any of the unique features of *Hill*.

ARGUMENT

I. THE FIXED BUFFER ZONE IS A CONTENT-NEUTRAL, NARROWLY TAILORED TIME-PLACE-MANNER RESTRICTION ON CONDUCT AND LEAVES OPEN AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION

The revised Act prohibits "entering or remaining" within a limited area directly in front of facility entrances and driveways. It does so to keep those entrances open and clear of all but essential foot traffic, in light of more than two decades of compromised facility access and public safety. *See Burson*, 504 U.S. at 196, 200-07 (long history of voting fraud justified 100-foot buffer zone that restricted even political speech, "the essence of self-government"); *see also Symposium*, 28 Pepp. L. Rev. 747 (2001) (Prof. Michael W. McConnell did not "dispute for a minute" that state has authority to protect those entering healthcare facilities from, among other things, "coercive activity" and "obstruction"). Because the Act is not directed at any particular message and because it is narrowly tailored to serve only recognized and significant governmental interests while permitting ample other opportunities for communication, it should join the long line of time-place-manner restrictions upheld by this Court as consistent with the First Amendment. *See generally Schenck,* 519 U.S. 357*; Madsen,* 512 U.S. 753; *see also Ward*, 491 U.S. 781; *Clark*, 468 U.S. 288; *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderly v. State of Florida*, 385 U.S. 39 (1967).

A. The Act is a Lawful Time-Place-Manner Restriction on Conduct That Compromises Patient Access and Public Safety

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *see Heffron*, 452 U.S. at 647 (same).[13] "A group of demonstrators," for example, "could not insist on the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox*, 379 U.S. at 555; *see also Cameron*, 390 U.S. at 617. This Court has long permitted laws that regulate conduct to preserve public order and safety even if the laws, like the Act, incidentally affect the time, place, or manner of protected speech.[14]

Such restrictions must survive the familiar three-part test articulated in *Ward v. Rock Against Racism*. That is, they must be 1) "justified without reference to the content of the regulated speech," 2) narrowly tailored "to serve a significant government interest," and 3) leave open "ample alternative channels for

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[13] *See also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983); *Adderly*, 385 U.S. at 47-48; *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953).

[14] *See Schenck,* 519 U.S. 357*; Madsen,* 512 U.S. 753; *Ward*, 491 U.S. 781; *Clark*, 468 U.S. 288; *Cameron*, 390 U.S. 611; *Adderly,* 385 U.S. 39.

communication of the information." *Ward*, 491 U.S. at 791. The Act satisfies all three parts of the *Ward* test.

B. The Act is Content Neutral

By its terms, the Act regulates only conduct: "entering or remaining" within a marked area in front of facility entrances during business hours. Thus, the Act incidentally regulates the place and time of protected speech. But its purpose is not to create "speech exclusion zones," as petitioners assert.[15] Pet. Br. at 19. The Act does not attempt to regulate passing leaflets or handbills, displaying signs, or "engaging in oral protest, education or counseling." *Cf. Hill*, 530 U.S. at 707 n.1. It does not protect unwilling listeners or prefer categories of speech. *Cf. id.* at 708. It does not even regulate "approaches" for the purposes of speech, as the 2000 Act did. Mass. St. 2000, ch. 217, § 2(b). The Act does not directly regulate speech because speech was not the problem the Legislature was trying to correct. Rather, the decades-long problem was the physical blocking of facility doors and driveways and compromised public safety. *See* Pet. App. 97a, 137a-149a; *see also McGuire I*, 260 F.3d at 39; *Operation Rescue*, 550 N.E.2d at 1363-64.

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[15] Quite the opposite, the Legislature was so concerned about preserving the right balance between protected First Amendment freedoms and the need for order on public streets and sidewalks that it created a private action for equitable relief under the Act for "any person whose rights to express their views, assemble or pray near a reproductive health facility have been violated or interfered with." Mass. Gen. Laws ch. 266, § 120E½(f); *see also* J.A. 37, 47, 74, 75.

With the focus firmly on protecting safety and access, the Act is content neutral. As the record establishes, the Legislature did not adopt the restrictions because it disagreed with any underlying message. *Madsen*, 512 U.S. at 763 ("principal inquiry" in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech"); *see also Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293. Rather, the Legislature's justifications were rooted in public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways. *See, e.g.,* Mass. St. 2007, ch. 155 (revision intended to "increase forthwith public safety at reproductive health care facilities"); Pet. App. 102a (finding that the law was enacted "in response to legitimate safety and law enforcement concerns").[16] And each of the concerns cited by the Legislature has been acknowledged by this Court as a significant, content-neutral justification for restrictions on the time, place, or manner of speech. *See, e.g., Schenck*, 519 U.S. at 376 ("ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights and protecting a woman's freedom to seek pregnancy-related services"

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[16] Individual legislators made plain that they were not acting because they favored any particular view on the abortion controversy, but because they were concerned about access and safety around facilities. For example, Senator Gale D. Candaras urged her colleagues "to resist the notion that this legislation is a pro- or anti-choice bill, or that it is intended to silence protesters." J.A. 47. Rather, she stated, "[t]his is a public safety measure" that is "aimed at conduct, not speech." J.A. 47; *see also* J.A. 37, 74-75, 81.

was "certainly significant enough" to justify fixed buffer zone); *Madsen*, 512 U.S. at 767-68 (same interests cited, in addition to "protecting a woman's freedom to seek lawful medical or counseling services"); *Cox*, 379 U.S. at 554-55 ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement."); *United States v. Grace*, 461 U.S. 171, 182 (1983) ("total ban" on certain expressive activity may have been justified on showing that activity "obstructed the sidewalks or access to the [b]uilding").

Petitioners themselves agree that Massachusetts has a "legitimate interest" in "clearing out the bottleneck immediately adjacent to" clinic doors and driveways. Pet. App. 178a; *see also* Pet. Br. at 35. Nonetheless, they argue that Massachusetts cannot advance its interest because that would "effectively disfavor" speech on the topic of abortion. Pet. Br. at 25. But 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. In *Heffron*, for example, Minnesota's restriction on state-fair solicitation was content neutral because it was justified by the State's interest in "managing the flow of the crowd," despite its disproportionate effect on ISKCON members and their religious practice of Sankirtan. 452 U.S. at 649-54 & n.13. Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), an ordinance prohibiting targeted residential picketing was content neutral, even though it was enacted in response to a pro-life picketing strategy. *Id.* at 476, 482. And in *Cameron*, a picketing prohibition that prevented obstruction of public buildings and property was content neutral,

despite being passed "in the context of" pickets at a county courthouse protesting racial discrimination in voter registration. 390 U.S. at 620-22.

The Act is, therefore, a legitimate legislative response to the unique record of regular, targeted protest at Massachusetts facilities, involving primarily—although not exclusively—pro-life advocates: that is, the weekly scrum in front of facility entrances, in which protesters crowded doorways, blocked driveways, surrounded cars, impersonated police officers, and jostled protesters and facility employees. *See Schenck*, 519 U.S. at 867 ("a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible"); *Madsen*, 512 U.S. at 763 ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order."). Because the record demonstrates that the Act was focused exclusively on protecting Massachusetts streets and sidewalks from the public-safety threat that arose when facility entrances became congested and impassable—rather than restricting the topic of protest, or the message of particular protesters—it is "properly analyzed as content neutral." *Boos v. Barry,* 485 U.S. 312, 320 (1988); *see also Renton v. Playtime Theatres*, 475 U.S. 41, 48-49 (1986) (same).

1. That the Act Protects Access Only to Facilities Does Not Make It Content- or Viewpoint-Based

The fact that the Act protects access only to facilities does not change the analysis. Pet. Br. at 23-27. The Legislature had more than twenty years of

evidence that the problem it was seeking to correct—compromised access and public safety—only occurred outside freestanding facilities that provide abortions, and only during their business hours.[17] Petitioners cite no evidence that similar problems existed elsewhere, *e.g.*, outside Massachusetts hospitals that provide abortion-related services. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson*, 504 U.S. at 207 (rejecting argument that buffer-zone statute was underinclusive); *Renton*, 475 U.S. at 52-53 (similar); *see also Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

Petitioners object to the Legislature's "targeted" approach, arguing that it burdens only the topic of abortion. Pet. Br. at 24-25. But again, this objection ignores the record. The conduct that the Legislature sought to regulate occurred only outside facilities. And it was that conduct—the physical obstruction of facility entrances—and not any particular topic or viewpoint that the Legislature excluded from the buffer zone.[18]

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[17] This does not mean, of course, that the only expressive activity that could conceivably occur outside facilities would be abortion-related. For example, a labor union seeking to organize facility employees would "typically" seek to communicate with the employees "immediately outside their workplace." Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* at 5-6.

[18] That is the crucial distinction here. In the cases cited by petitioners, the plain language of the relevant laws gave explicit

Ward, 491 U.S. at 791; *cf. Boos*, 485 U.S. at 320; *Renton*, 475 U.S. at 48-49. It would be odd, indeed, if the First Amendment were read to render government helpless to address effectively a recurrent public-safety problem because it occurred only at a specific category of "place." *See Madsen*, 512 U.S. at 762-64 (rejecting similar argument); *see also Snyder*, 131 S. Ct. at 1218 ("[w]e have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral").

Moreover, petitioners argue that the Act must be overinclusive to be content neutral. Pet. Br. at 23-24. To be even-handed, they contend, the Legislature should have restricted more speech and established buffer zones at all healthcare facilities, despite the lack of any record showing similar problems at hospitals or other medical offices. Putting aside the obvious tension that this would create with the narrow-tailoring prong of the *Ward* test, the petitioners themselves note that

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preference to one topic over another. Pet. Br. at 25; *see Carey v. Brown*, 447 U.S. 455, 465 (1980) (statute prohibited residential picketing, except "peaceful labor picketing"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (ordinance prohibited pickets or demonstrations within 150 feet of schools except "peaceful picketing of any school involved in a labor dispute"). It was the preference that made the statutes unconstitutional, not the fact that picketing was being regulated outside a specific "place." *See Mosley*, 408 U.S. at 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 government interests."); *see also Frisby*, 487 U.S. 474 (upholding ban on targeted residential picketing).

Massachusetts does protect access to other health facilities. Pet. Br. at 36 & n.10 (citing Mass. Gen. Laws ch. 266, § 120E). However, that law is somewhat less protective than the Act: requiring notice to the alleged perpetrator that his or her conduct is unlawful. Mass. Gen. Laws ch. 266, § 120E. And that makes sense: there is no evidence that hospitals have encountered the same kind of access problems as facilities. Taking the statutory scheme as a whole, therefore, it is clear that Massachusetts is simply being responsive to different problems in different places.[19]

Moreover, federal, state, and local governments have traditionally been permitted to exercise their police powers to address issues of public safety and welfare that arise in specific "places." They have determined, for example, that schools could not function properly if disruptive demonstrations were permitted outside their doors during school hours. *Grayned*, 408 U.S. at 116, 119 ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.'"). They have also decided that hospital patients require a calm environment in which to recuperate and heal. *Madsen*, 512 U.S. at 772 (citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 &

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[19] To the extent that petitioners offer the argument as evidence of a "discriminatory governmental motive," it is unavailing. *Hill*, 530 U.S. at 731. The courts below have already rejected the implication that the Legislature's stated justifications for the Act were pretextual, finding that it was "unsupported by any record evidence." Pet. App. 167a-168a. Moreover, this Court does not generally search for pretext, particularly where, as here, the purpose of the law is clearly stated and supported by the record. *See, e.g., Cameron*, 390 U.S. at 620-21.

n.12 (1979)). Polling places must be kept clear to avoid potential voter fraud. *Burson*, 504 U.S. 191. And traffic at crowded state fairs must be kept moving. *Heffron*, 452 U.S. 640. Moreover, governments must continue to have the flexibility to address new concerns that arise at specific locations or events. *Cf. Snyder*, 131 S. Ct. at 1227-28 ("the real significance" of new military funeral buffer zones is that "their enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order") (Alito, J., dissenting). It would be a significant incursion on traditional police powers to require government to curb its peace-keeping efforts simply because a particular group of protesters insisted on using only a specific "place"—here, the entrances to reproductive healthcare facilities—to communicate the group's message.[20]

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[20] Relying on *United States v. O'Brien*, 391 U.S. 367 (1968), petitioners claim that the Act is content based because "[t]he 'inevitable effect' of [its] targeted approach is that virtually all of the speech burdened by the Act will be speech about abortion." Pet. Br. at 24. *O'Brien* does not support their proposition. Rather, *O'Brien* holds that, while an alleged illicit legislative motive is not a proper basis for voiding an otherwise constitutional statute, that principle is simply not implicated in cases where "the inevitable effect of a statute *on its face* . . . render[s] it unconstitutional." 391 U.S. at 384 (emphasis added). Petitioners' other citations are similarly flawed. Contrary to their characterizations, for example, both *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), involved direct speech restrictions that facially discriminated against certain topics of speech and against certain speakers. *See Sorrell*, 131 S. Ct. at 2663 ("On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."); *R.A.V.*, 505 U.S. at 391 ("terms" of ordinance "[made] clear that [it] applie[d] only to 'fighting words'

In essence, petitioners ask that this Court adopt a kind of "reverse" content discrimination. That is, petitioners contend that Massachusetts cannot exercise its police power to regulate conduct near abortion clinics because they only want to protest at abortion-clinic entrances. However, the Commonwealth's traditional, content-neutral interest in secure sidewalks and safe access to healthcare does not shift based on place. And petitioners' interest in speaking on a specific topic at a specific place does not trump that interest. *Madsen*, 512 U.S. at 762; *Burson*, 504 U.S. at 194; *Heffron*, 452 U.S. at 653-54. The Court has never embraced petitioners' view that a law serving important purposes unrelated to the content of expression must yield where challenged by speakers who claim a special need to protest at a particular place.[21] Such a rule would require courts to weigh the relative importance of the message particular protesters wish to convey—and their need to convey it in a specific place—and invalidate laws based on the weight the court assigns to the speaker's interest. This would, of course, "create preferences that threaten

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that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'").

[21] In *Heffron,* for example, the Court rejected the petitioners' claim of preferred speech rights: "None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize." 452 U.S. at 652-53.

First Amendment values to an even greater extent than the problems they are designed to solve." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 81 (1987).

2. The Facility Employee Exemption Is Not Viewpoint Discrimination

The statutory exemption for facility employees and agents does not undermine the content neutrality of the Act. Mass. Gen. Laws ch. 266, § 120E½(b)(2). That exemption does not favor any particular speaker or topic of speech. Pet. Br. at 27-32. Indeed, none of the four exemptions—for patients, passers-by, employees, and contractors and first responders—favors any speech whatsoever. Rather, the exemptions are focused on conduct.

To begin with, some kind of exemption was required for individuals needing to enter or leave facilities. The Act categorically prohibits "entering" or "remaining" in the buffer zone. Thus, the Act had to make clear that employees—and patients, pedestrians, contractors, utility workers, and first responders—could cross the buffer zone to get to where they needed to go. Mass. Gen. Laws ch. 266, § 120E½(b)(1)-(4). This is, of course, entirely consistent with the Act's purpose of keeping traffic flowing in the areas immediately around facilities.

But the Act also makes clear—on its face—that even exempted individuals cannot engage in the kind of conduct that previously resulted in congestion and compromised facility access. So, for example, pedestrians using the sidewalk are permitted to cross through the buffer zone but "solely for the purpose of

reaching a destination other than [the] facility." *Id.* § 120E½(b)(4). Essentially, the Act requires pedestrians to keep moving and not stop in the buffer zone to engage with anyone inside or outside the zone. Otherwise, they are not "solely" proceeding to a "destination other than such facility." *Id*. The same is true of patients and others "entering or leaving" the building. *Id.* § 120E½(b)(1). That is all they are permitted to do in the buffer zone, enter or leave. Like pedestrians, they have to keep moving.

Similarly, the Act permits facility employees, municipal agents, and tradespeople to physically cross and remain in the buffer zone. *Id.* § 120E½(b)(2)-(3). But again, the Act limits their conduct. They can only do so when acting "within the scope of their employment." *Id*. That is, the Act permits them to get on with their jobs. But it does not permit them to engage with protesters or conduct their own counter-protests in the buffer zone, which would have the effect of blocking facility access.[22] The limitation that such employees act "within the scope of their employment" reflects the Legislature's judgment that it cannot be their job—and, incidentally, would likely be

[22] Petitioners' allegations about facility employee conduct—which were insufficient to sustain their as-applied viewpoint-discrimination challenge, *see* Pet. App. 86a—center on expressive conduct taking place *outside* the buffer zone. Pet. Br. at 14 (asserting that escorts "surround" patients to prevent them from communicating with petitioners, and that they "raise and lower their arms" to prevent petitioners from offering literature). Of course, anyone—advocates, employees, and passersby—can engage in all forms of lawful expressive activity outside the buffer zone.

counterproductive to their employer's interest—to engage in conduct that is either obstructive or unsafe.[23]

The same judgment is echoed in the AGO's guidance letters to law enforcement and facility officials: the exemptions permit only limited conduct within the buffer zone. J.A. 93-94; *see, e.g.*, J.A. 93 ("The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic."). The reference to "partisan speech" in the letters did not transform the conduct-oriented exemptions into message-oriented exemptions. Pet. Br. at 33. When the AGO warned that facility employees and others could not stop in the buffer zone to engage in "partisan speech," it was intended to address the kind of conduct that had proved obstructive at facility entrances in the past. *See McGuire II*, 386 F.3d at 52 & n.1 (under identical provision of the 2000 Act, AGO consistently interpreted employee exemption to exclude what the court termed "partisan speech" activities, such "as counter-protests,

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[23] It is worth noting that the Supreme Judicial Court has not yet had an opportunity to construe the Act's "scope of employment" requirement. Petitioners paint an extreme picture of escorts actively engaging in counter-counseling while they are in the buffer zone. Pet. Br. at 28. As the record stands, however, no court has found that to be true, *see* Pet. App. 86a, and no court has determined that such activity would actually be within the escort's "scope of employment." *See, e.g., McGuire II*, 386 F.3d at 52 (noting that AGO had construed 2000 Act to prohibit this kind of activity by facility employees); Pet. App. 173a (same). Nonetheless, if an authoritative construction of the Act from the Commonwealth's highest court would avoid a constitutional violation, this Court should certify the question. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-96 (1988).

counter-education or counter-counseling against anti-abortion views"). That is, employees could enter and remain in the buffer zones to do their jobs—escorts could help patients access the facility, and nurses could wheel patients to waiting cars, because their conduct would facilitate patient safety and health—but they could not stop and add to the congestion that had blocked facility entrances for years. J.A. 93 (exemption permits employees "to assist in protecting patients and ensuring their safe access").

Given both the Act's plain language and the AGO's conduct-oriented interpretation, enforcement of the Act is focused on what individuals are *doing*, not what they are *saying*. For example, if a pro-life advocate walked across the buffer zone to engage in sidewalk counseling with a person located on the other side, that conduct would be permitted under the Act. J.A. 93 (guidance states that "an individual may cross through the buffer zone to reach and speak with someone outside the zone"); J.A. 128 (testimony of Boston Police officer, enforcing the Act pursuant to the AGO's guidance letters). However, if that same advocate—or for that matter, a pro-choice advocate—repeatedly walked back and forth across the buffer zone, with no obvious destination on the other side, that act would be prohibited. And it would be prohibited even if the advocate was just walking and not engaging in any type of expressive activity. The same would be true if multiple advocates criss-crossed the zone, effectively blocking it, or if advocates put themselves in the path of entering patients while ostensibly trying to reach the other side of the zone.

In short, the entire Act, even its exemptions, is focused on conduct, not speech. And the plain language of the Act makes clear that no one—not employees, not pedestrians, not protesters—can block access to facilities or impede traffic on the sidewalks. Thus, the Act is an even-handed, content-neutral solution to a long-standing and previously intractable problem.

3. The Facility Employee Exemption Is Severable

Petitioners sought certiorari largely based on the facility employee exemption, which they claimed created "selective speaker exclusion zones." Pet. at 3. Of course, as discussed above, the employee exemption does nothing of the kind. Nonetheless, any constitutional deficiency caused by the exemption should not result in invalidation of the entire Act. Instead, were this Court to conclude that the employee exemption made the Act infirm, the case should be remanded for the lower courts to determine whether the exemption can be severed from the remaining provisions of the Act. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem.").

Whether a provision is severable is a question of state law, *Virginia v. Hicks*, 539 U.S. 113, 121 (2003); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and in Massachusetts the Legislature has declared a presumption in favor of severability: "The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not

affect other valid parts thereof." Mass. Gen. Laws ch. 4, § 6, Eleventh. This instruction inserts "a severability clause into every Massachusetts statute." *Mass. Wholesalers of Malt Beverages, Inc. v. Commonwealth*, 609 N.E.2d 67, 72 n.15 (Mass. 1993). As a result, when part of a statute is found to be unconstitutional, Massachusetts courts will "as far as possible, . . . hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." *Peterson v. Comm'r of Revenue*, 825 N.E.2d 1029, 1037 (Mass. 2005) (quotations omitted).

The employee exemption is not "so entwined" with the remaining provisions of the Act that it can be said that, without it, the Legislature would prefer that the Act have no effect at all. Again, the exemption, a carryover from the 2000 Act, does no more than allow employees to get on with their jobs; it is peripheral to the Act's central objective of improving public safety at facilities. *See* Mass. St. 2007, ch. 155. So even if the exemption is severed, the Act can still function effectively. Employees could still enter and exit the facilities under the first exemption (which petitioners do not challenge), and the remainder of the Act would continue on unaffected.

C. The Act is Narrowly Tailored to Address Massachusetts's Significant Interests in Protecting Public Safety and Patient Access

The Act's 35-foot fixed buffer zone was tailored to resolve the decades-long problem of keeping facility

entrances clear and safe. *Ward*, 491 U.S. at 796 (restriction must be "'narrowly tailored to serve a significant governmental interest'") (quoting *Clark*, 468 U.S. at 293). Regardless of whether Massachusetts was under any obligation to adopt a lengthy trial-and-error period, that is effectively what happened. Over the years, Massachusetts attempted multiple solutions. It tried injunctions. It tried a floating buffer zone. It tried other laws already on the books. Nothing worked. With its options virtually exhausted, the Legislature determined that the Act's fixed buffer zone—focused on the immediate area around facility doors and driveways—was the narrowest effective solution. *See* Pet. App. 109a. Given the extensive history in Massachusetts, the Legislature was entitled to make that decision. *See, e.g., Madsen*, 512 U.S. at 768-70 (on similar showing, decision to impose 36-foot buffer zone was entitled to deference); *Burson*, 504 U.S. at 200 ("evolution of election reform" demonstrated "necessity of restricted areas in or around polling places"); *Grace*, 461 U.S. at 182 ("total ban" on certain expressive activity may have been justified on showing that activity "obstructed the sidewalks or access to the [b]uilding").

1. The Act is Based on 20 Years of Experience Addressing Patient Access and Public Safety at Facilities

Petitioners' narrow-tailoring challenge ignores the record. Massachusetts has tried any number of solutions, including virtually all the alternatives suggested by petitioners. But they have all failed to keep facilities open and sidewalks safe. In light of this history, the Act's 35-foot fixed buffer zone—which, in

concrete terms, is less than the length of two parking spaces in busy urban areas such as Worcester and Washington, D.C.[24]—is "narrowly tailored to serve a significant governmental interest."[25]

In response to routine blockades that started in the late 1980s, facilities first sought injunctions. *See, e.g., Operation Rescue,* 550 N.E.2d at 1364 & n.5. But the injunctions did not solve the problem. Many of the enjoined individuals and organizations simply violated the orders. *See, e.g., Bell*, 677 N.E.2d at 207 (defendant "repeatedly and knowingly" violated multiple injunctions); J.A. 69 (police captain told Legislature, "We back up the stay-away orders and nothing seems to work down there."); *see also Madsen*, 512 U.S. at 770 (failure of initial order to "accomplish its purpose may be taken into consideration in evaluating the constitutionality" of broader order). Moreover, given the extent of the problem, which involved multiple municipalities and hundreds of protesters, individual injunctions were not an effective or efficient solution.

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[24] *See, e.g.,* City of Worcester Zoning Ordinance (Feb. 6, 2007), Article IV, § 7.A.5 & Table 4.4 (Note 3), available at http://www.worcesterma.gov/uploads/0e/4b/0e4beb7808380006ee7a7d4c7986fd0e/zoning-ord-2607.pdf (parking spaces must be 18 feet, or 16 feet for compact cars); D.C. Municipal Regulations (Mar. 22, 2002), Title 11, §§ 11-2115.1, 11-2115.3, available at http://dcoz.dc.gov/info/reg.shtm (spaces must be 19 feet, or 16 feet for compact cars).

[25] Again, petitioners do not contest the "general legitimacy" of the governmental interests served by the revised Act, public safety and access to healthcare. Pet. Br. at 35.

The 2000 Act, although a step in the right direction because of its general application, was no more effective. Its 18-foot floating buffer zone permitted too much activity near facility entrances. Individuals continued to block driveways and entrances, often by their mere physical presence in the buffer zone. J.A. 51-52, 123. Moreover, protesters would stop and stand in the middle of driveways, refusing to move. J.A. 41. They would speed up or slow down while walking across driveways to narrowly avoid being hit by cars. J.A. 41. They would take up stationary positions a few feet apart, forcing patients to "pass very close to them" on their way to the door. J.A. 96. And with the buffer zone permitting approaches within six feet, the activity was so frenetic right in front of facility doors that Captain Evans compared it to a "goalie's crease." J.A. 69. That kind of hectic activity right at facility doors—even as part of peaceful protest—continued to block facility doors and to intimidate patients.

In over 20 years of experience, the only solution that worked was the revised Act's 35-foot fixed buffer zone, which kept a limited area immediately around facility entrances and driveways clear, ensuring safe access while also accommodating all forms of speech and expressive conduct within the hearing, sight, and presence of approaching patients. Again, Massachusetts may not have been required to engage in a decades-long trial-and-error process before settling on the narrowest effective solution. *See Ward*, 491 U.S. at 797 (government does not have to "sift[]" through "all the available or imagined" alternatives to find the narrowest possible solution); *Clark*, 468 U.S. at 297 (camping regulation was "valuable, but perhaps imperfect" means of protecting park). But the fact is

that it did. And petitioners cannot ignore that history. *See generally Madsen*, 512 U.S. 753 (history of repeatedly blocked facilities demonstrated need to keep protesters out of 36-foot area and across street, especially where there were "few other options" and prior injunction had proven ineffective); *Burson*, 504 U.S. at 206 (history demonstrated "some restricted zone" was necessary); *United States v. Kokinda*, 497 U.S. 720, 735 (1990) (speech restriction justified by Postal Service's long experience with solicitation on its property) (plurality opinion).

2. Existing Laws Do Not Make the Act Unnecessary

Less-restrictive-alternative analysis "has never been a part of the inquiry into the validity of a time, place and manner regulation." *Ward*, 491 U.S. at 797*; see also Burson,* 504 U.S. at 213 (Kennedy, J., concurring) (in time, place, and manner cases, "we do not apply as strict a requirement of narrow tailoring as in other contexts"). Nonetheless, petitioners contend that other, existing laws are the solution to the decades of crowding and congestion outside facility entrances and make the Act unnecessary. Pet. Br. at 34-38. They are incorrect.

To begin with, government is not limited to a single solution to any problem. *See*, *e.g.*, *O'Brien,* 391 U.S. at 380 ("it has never been suggested that there is anything improper" about "providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest"). And government is entitled to adopt different laws to protect "overlapping but not identical governmental interests." *Id*. Therefore, it is of no constitutional

import that both the federal government and Massachusetts have adopted other laws that could be used to address facility obstruction, through injunctions or otherwise. Pet. Br. at 36 (citing 18 U.S.C. § 248(c)(1), Mass. Gen. Laws ch. 266, § 120E,[26] and Mass. Gen. Laws ch. 12, § 11H). Moreover, although petitioners would seemingly prefer the "targeted" injunctions permitted by these laws, the experience in Massachusetts has shown that they do not work in this context: the conduct has been too widespread, involving too many protesters in too many municipalities, to make individual injunctions practicable.

Nor does it matter, given the record, that the Act itself also prohibits knowingly obstructing, detaining, hindering, impeding, or blocking facility entrances. Mass. Gen. Laws ch. 266, § 120E½(e); s*ee Schenck,* 519 U.S. at 381-82 (explicitly rejecting argument—because it "ignore[d] the record"—that prohibitions on "blocking, impeding or obstructing access" made buffer zone unnecessary). The 2000 Act contained the same language. Mass. St. 2000, ch. 217, §2(e). But again, experience proved that the solution was not the arrest and prosecution of individual protesters who engaged

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[26] Sections 120E and 120E½ of Massachusetts General Laws chapter 266 represent a sliding scale of legislative response to problems of different severity. Pet. Br. at 36 & n.10. Section 120E prohibits the knowing obstruction of medical facilities, but only after notice. Section 120E½, by contrast, includes no such notice requirement. Section 120E½, therefore, represents the Legislature's considered judgment, based on an extensive showing, that reproductive healthcare facilities need an extra layer of immediately available protection not required at hospitals generally.

in knowing obstruction. *See* J.A. 69 (Captain Evans testified, "We've tried everything, honestly," including individual prosecutions). Moreover, a significant portion of the problem was the simple massing of protesters within an 18-foot area right outside facility entrances. The mere physical presence of protesters—even without the specific intent to obstruct, hinder, or impede—blocked the entrances. Thus, the only effective solution was to keep a small area around facility entrances clear. *See Burson,* 504 U.S at 206, 220 (plurality rejected dissent's argument that regulating inside of polling places made 100-foot buffer zone unnecessary).

Petitioners also contend that Massachusetts's interests would be "amply served" by the federal law prohibiting facility obstruction by "using force" or "threat of force," and by Massachusetts laws prohibiting assault and battery and impersonation of a police officer. Pet. Br. at 36 & n.9. But these blunt enforcement tools "deal with only the most blatant and specific attempts" to block facility access. *Burson*, 504 U.S. at 206-07. And the problem at Massachusetts facilities included the massing of individuals in doors and driveways that impeded access, even if that was not the intent of individual protesters. *See, e.g.*, Dkt. No. 53 at 17 (NOW testimony that "counterprotests" were unhelpful because patients only saw crowd around door); *see also Schenck*, 519 U.S. at 382 (existing laws did not render buffer zone overinclusive). In any event, these laws, too, did not work. For example, police repeatedly arrested two protesters for impersonating Boston police officers. But as Captain Evans testified, it did not matter: "they're back there every day, every Saturday." J.A. 71.

The situation is likely to be different under the Act, assuming that arrests ever prove necessary. The difficulty in enforcing other laws in the protest context has always been proving intent. Did the defendant intend to "approach" a passer-by without the requisite consent under the 2000 Act? J.A. 67-68, 122-23. Did the defendant intend to physically block or obstruct the facility, or merely engage in lawful protest or counseling? J.A. 67-68, 122-23. It will be far less difficult to prove that a defendant intended to cross a marked yellow line to "enter" or "remain" in the buffer zone, making the Act a more effective enforcement tool and a better deterrent to conduct that has proven obstructive over the years.

3. The Act Permissibly Prohibits Even Peaceful Protesters from Blocking Facilities

Finally, petitioners appear to argue that a buffer zone can never be narrowly tailored unless it makes some provision for "peaceful protest." Pet. Br. at 38-44, 47. That is, the zone itself must permit activities such as leafleting and consensual conversation at intimate distances. Pet. Br. at 38-44. Of course, this argument ignores the fact that petitioners do leaflet outside Massachusetts facilities and do engage in close, quiet conversations with facility patients despite the Act's restrictions. *See infra* at 50 to 54; J.A. 306 (photograph of Ms. McCullen counseling young woman outside buffer zone).

But petitioners' argument also ignores both the law and Massachusetts's prior experience under the 2000 Act. Massachusetts is entitled to adopt time-place-manner restrictions based on the cumulative impact of

all conduct at facilities, not just the peaceful activities in which petitioners would like to engage. *Heffron*, 452 U.S. at 654 (inquiry must involve "not only ISKCON, but also all other organizations that would be entitled to distribute, sell or solicit"); *see also Ward*, 491 U.S. at 801 ("the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case"). And the record demonstrates that protesters—on both sides of the divisive abortion issue—have engaged in aggressive and harassing conduct that has left patients and staff intimidated and, in some cases, unwilling to enter facilities. *See, e.g.*, J.A. 21-22 (woman and her elderly grandfather engulfed by protesters, trapped in cab, and shoved on way into building); J.A. 88 (patients turn away from facilities "out of fear" on a weekly basis); J.A. 123 ("Pink Group" of pro-choice protesters pushed, shoved, and stepped on people's feet for good position within buffer zone).

Moreover, Massachusetts has already experimented with preserving peaceful protest right up to facility doors, and the experiment was a failure. The 2000 Act permitted a full array of peaceful protest within its 18-foot buffer zone. Advocates could leaflet, for example, particularly if they stood in one place and offered literature to those who approached. J.A. 44, 67, 122, 124. The 2000 Act also permitted advocates to engage passersby in conversation, so long as they had consent to approach closer than six feet. But even the peaceful protest permitted by the 2000 Act had the effect of blocking facilities. Protesters stood a short distance apart within the zone, so that patients "were forced to pass very close to them" to access the facility. J.A. 96.

They also took up positions right by facility entrances, so the doors and driveways were either actually blocked or perceived by patients to be blocked. J.A. 55, 67, 122; Dkt. No. 53 at 17. The sheer amount of activity within the 18-foot space was so overwhelming that patients were intimidated and left. J.A. 88-89. Thus, Massachusetts properly considered the cumulative effect of conduct by all protesters—the law-abiding and the law-breaking—and narrowly tailored its response to fit the actual problem outside its facilities. *See, e.g., Grayned*, 408 U.S. at 121 ("[m]odest restriction on some peaceful picketing" represented "a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place").

D. The Act Leaves Open Ample Alternative Channels of Communication

Finally, the revised Act also satisfies the third prong of the *Ward* test: it leaves open "ample alternative channels of communication." 491 U.S. at 791.[27] It is true that the Act keeps a limited area immediately around facility entrances and driveways clear of all but essential traffic during office hours. But outside that limited area, all forms of lawful

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[27] Petitioners suggest that adequacy of alternative communication should be judged by the means available *within* the area regulated by a time-place-manner restriction. Pet. Br. at 47. That is illogical. The *Ward* test requires the Court to look at "alternatives." Thus, the question is: what means of communication are available *despite* the time-place-manner restriction. *See, e.g.*, *Madsen*, 512 U.S. at 769-70 (36-foot buffer zone upheld after consideration of communication available *outside* zone).

communication can—and do—take place within the sight, hearing, and presence of petitioner's preferred audience: facility patients. Petitioners offer leaflets, hold signs, pray, speak face-to-face with willing listeners, and approach others at a normal conversational distance. And petitioners can—and do—protest in their preferred location: the streets and sidewalks outside facilities. But because it has proved otherwise impossible to keep facility entrances open and safe, they just cannot do it right in facility doors and next to driveways. *See Heffron*, 452 U.S. at 647 ("First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"); *Adderly*, 385 U.S. at 47-48 (same); *Cox*, 379 U.S. at 554 (same). This is entirely permissible under the First Amendment. *See Burson*, 504 U.S. at 210 (state's choice that voters' "last 15 seconds" before entering polling place "should be their own, as free from interference as possible" was not "an unconstitutional choice"); *Schenck,* 519 U.S. at 375-76*; Madsen,* 512 U.S. at 768-70.

1. The Record Demonstrates That Petitioners Have Adequate Alternatives to Communicate Their Message

In *Burson*, this Court accepted the calculation of a lower court that it takes only 15 seconds to cross a distance of 75 feet. 504 U.S. at 210. That means it takes only about seven seconds to cross the Act's 35-foot buffer zone. So, except for those seven seconds immediately outside facility entrances, a patient on a public sidewalk is fully immersed in whatever expressive activity in which petitioners would like to

engage. And even that last seven seconds is not expression-free. Petitioners can still be seen and heard as a patient takes her last steps toward the facility door. Thus, petitioners have a more than ample opportunity to direct their message to their preferred audience at their preferred location. Pet. App. 23a ("[t]he record makes plain that communicative activities flourish" outside facilities).

The Act certainly does not prevent petitioners and other advocates from protesting at facilities. Each week, interested individuals gather outside the three facilities that are the subject of petitioners' suit. In Boston, for example, at least a dozen protesters, and sometimes many more, appear weekly outside a facility on Commonwealth Avenue. Pet. App. 6a; J.A. 129-30; *see also* J.A. 125, 271 (on second Saturday of each month, as many as 30 to 40 protesters gather outside the Boston facility, and on Good Friday there as many as 70). The situation is much the same at facilities in Worcester and Springfield. Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). Again, a regular group of protesters appears weekly, with their numbers swelling to as many as 100 on occasions such as the semi-annual "40 Days for Life." J.A. 228, 229-30, 237-40, 263-65 (Worcester); J.A. 204, 206-13 (Springfield); J.A. 301, 309, 310 (photographs).

At each of the three facilities, petitioners and others protest in the manner they see fit. In Boston, for example, advocates stand near the facility's front entrance—often ringing the buffer zone—holding signs, praying, singing, chanting, and speaking with or calling out to those who pass by and those who are entering the facility. Pet. App. 6a-7a (describing

scene); Pet. App. 41a-47a (same); J.A. 300, 303-05 (photographs). They also pass out leaflets and handbills close to the hands of those approaching or passing by the facility. Pet. App. 41a-42a, 43a, 46a. And they have close, quiet conversations with individuals on the surrounding sidewalks. Pet. App. 47a (investigator observed group of three sidewalk counselors engaging young woman, who got into a car with them and drove away); J.A. 126 ("[p]rotesters continue to have close contact with patients and others approaching the clinic"); J.A. 162-63 ("not unusual" for men accompanying women to the facility to confide in protester); J.A. 306 (photograph of close conversation between protesters and patient). Moreover, they can be seen and heard from within the buffer zone, and they are often heard even inside the facility itself. J.A. 113 (protesters can be heard from inside the building praying and calling out to patients). In fact, Boston protesters have acknowledged repeated success in conveying their message, with petitioner Eleanor McCullen convincing about 80 women not to terminate their pregnancies. Pet. App. 7a, 41a-42a, 47a.

The same is true at the Worcester and Springfield sites, although petitioners' desire to get as close as possible to patients as they enter the facilities is proscribed by geography: the primary entrances are reached by private parking lots and walkways. Pet. App. 7a-9a (describing the scene); Pet. App. 50a-57a, 59a-63a (same). Nonetheless, there are public sidewalks within sight and sound of the facilities, and petitioners are using them to disseminate their messages in a wide variety of ways. J.A. 114-15 (children brought to protest outside Worcester facility, and their singing could be heard inside). Petitioners

and others are able to display their signs, pass out literature, pray, sing, call out, and demonstrate, all within the sight and hearing of patients. Pet. App. 50a-57a, 59a-63a; J.A. 114-15, 117-18, 272-78. They even have close, quiet conversations with patients. J.A. 206-07, 208, 255-56, 259-61, 272-73 (among other things, describing a Worcester nun effective at drawing patients into quiet conversations).

And despite the physical layout of the facilities in Worcester and Springfield, petitioners' messages are still received by their target audience. Because petitioners can be seen and heard from their positions outside the buffer zone, patients, pedestrians, and passersby react and respond to them. J.A. 116. In both locations, petitioners and others have been successful in persuading women to stop, talk, and even leave the facility entirely. J.A. 208 (Springfield advocates persuaded women to leave facility and go to Bethlehem House, a pro-life organization); J.A. 258-59 (Worcester advocates persuaded women to go to Problem Pregnancy). For example, Worcester protester Mark Bashour recalled a woman seeking him out from across the private parking lot because she "genuinely wanted an alternative." J.A. 256-57. Mr. Bashour has been similarly approached by the boyfriends of patients, who cross that same parking lot for information that they presumably share with patients. J.A. 255. Springfield protester Dr. Cyril Shea recalled a man coming across that facility's private parking lot to engage with him on the sidewalk. J.A. 202-04. The man responded negatively to Dr. Shea's message, but nonetheless he responded. J.A. 204 ("The person was angry with me and wanted to express anger."); *see also* J.A. 202-03, 301 (Dr. Shea's "They're killing babies here" sign elicits

various reactions, some "quite favorable," some negative, some "totally neutral").

2. Petitioners Are Not Entitled to the Most Effective Speech Possible

Petitioners complain that the Act does not let them engage in the most effective speech possible, which they define as close, quiet conversations as close as possible to facility doors and driveways.[28] Pet. Br. at 49-52. Of course, this ignores the evidence that petitioners do, in fact, engage in close, quiet conversations with patients before they enter facilities. And it ignores the law, which does not guarantee protesters the form of expressive activity they deem most effective. *See Heffron*, 452 U.S. at 647; *Adderly*, 385 U.S. at 47-48; *Cox*, 379 U.S. at 554.

More fundamentally, it also ignores the reality of protesting on busy urban streets. It is not possible, for example, to safely approach a moving car. It is dangerous, for both protesters and passengers, to stand right at the edges of a busy driveway as cars turn into and out of a parking lot. In fact, certain time-honored forms of protest, such as leafleting, are just not compatible with modern vehicular traffic. While leafleting to pedestrians remains a vibrant form of protest, it is impossible to safely pass a pamphlet "close to the hands" of a driver, whose hands are—or at least

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[28] This definition contrasts with the position taken by the *McGuire* plaintiffs, including petitioner Jean Zarrella. In *McGuire*, plaintiffs maintained that they attempted to engage with facility patients "as far away from the clinic" as possible "in order to maximize the opportunity to engage in conversation." *McGuire II*, 386 F.3d at 51-52 (stating Zarrella's preference).

should be—firmly clamped to the steering wheel. *Compare* J.A. 141 (Ms. McCullen hands out 15 to 20 pamphlets to pedestrians every morning that she protests on Boston sidewalks), *with* J.A. 257 (Mr. Bashour hands out literature "a couple of times a week" in Worcester, which is reached primarily by car). And attempts to do so would likely recreate the hazardous situation that existed under the 2000 Act, in which protesters stuck their heads and hands into open car windows and threw literature inside, whether the driver wanted it or not. J.A. 51; Pet. App. 142a.

Finally, petitioners' argument ignores the inevitable effect of their preferred mode of communication. Each petitioner has stated that, given an unfettered choice, they would engage with patients *right in facility entrances*. *See* J.A. 252 (with no buffer zone in place, Mr. Bashour would stand "directly in front of the main door"); *see also* J.A. 135, 175, 189, 200, 217, 252. No matter how peaceful petitioners' protest and no matter how welcome their message, 20 years of experience demonstrates that they would block the entrances. Even if they just stood still at facility entrances to offer leaflets and conversation, they would impede patient access. And Massachusetts would be right back to where it started 20 years ago, with no solution to a substantial public-safety problem.

II. THE ACT IS NOT OVERBROAD

Petitioners' overbreadth challenge is based on a misreading of the Act. The Act does not "outlaw[] all communicative activity" on public sidewalks, such as "'talking and reading, or the wearing of campaign buttons or symbolic clothing.'" Pet. Br. at 45 (quoting *Board of Airport Comm'rs of L.A. v. Jews for Jesus,*

Inc., 482 U.S. 569, 575 (1987)). Unlike the law at issue in *Jews for Jesus*, the Act, on its face, does not prohibit expressive activity at all. It restricts only the physical conduct of "entering" or "remaining" in the buffer zone without a legitimate employment purpose or destination on the other side. So people who are properly crossing through the zone *can* engage in communicative activity as long as they keep moving. Conversely, people cannot stand stationary in the zone and refuse to move, even if they are not saying anything. Thus, far from creating "speech-free zones," Pet. Br. at 45, the Act regulates conduct without any reference to what people are saying (or are not saying).[29]

Properly construed, the Act is not susceptible to a facial challenge based on overbreadth. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The party claiming overbreadth therefore has the burden to "demonstrate from the text of [the law] and from actual fact, that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *N.Y. State Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,

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[29] Petitioners' contrary reading is inconsistent with the plain language of the Act, which makes no mention of speech or other expressive activity. Moreover, the Court of Appeals found that petitioners waived any overbreadth challenge based on that reading because they did not raise it either in the district court or in their briefs on appeal. Pet. App. 114a-115a.

449 n.6 (2008) ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.").

Petitioners have failed to meet that burden. They have not identified any instances where the Act's impact on the conduct of third parties will differ in any material way from the impact on their own activities. *See Taxpayers for Vincent*, 466 U.S. at 802 ("inappropriate" to entertain overbreadth challenge in absence of "realistic danger" that law would "significantly compromise recognized First Amendment protections of individuals not before the Court"). As applied to all people, the Act only reaches conduct that can create problems such as blocked sidewalks and traffic congestion. Petitioners concede that the Act is constitutional as applied to that type of conduct. Pet. Br. at 45. Thus, just as petitioners' activities fall within the Act's "legitimate sweep" for all the reasons stated above, so too do the activities of third parties not before the Court. *See Taxpayers for Vincent*, 466 U.S. at 801-03.

III. THIS CASE IS NOT A VEHICLE FOR REVISITING *HILL*

As is obvious from the above argument and from petitioners' own brief—which relegates the discussion to its last few pages—this case is not a vehicle for reconsidering *Hill*. In *Hill*, the State expressly restricted "protest," "education," and "counseling" in a 100-foot area surrounding the entrances of all medical facilities, creating "floating" buffer zones around patients. The Massachusetts Act is different and narrower. It restricts only the acts of "entering" or

"remaining," limits that restriction to a much smaller, fixed area, and applies only to places where there has been a demonstrated problem with access and safety. The Act is therefore much more akin to the fixed buffer zones upheld in *Madsen* and *Schenck*. In addition, the more unique aspects of *Hill* are not present here. For example, the Act does not restrict unwelcome "approaches," it does not shield the "unwilling listener," and it does not guarantee "floating" personal space on public streets and sidewalks. Thus, to the extent that petitioners wish to challenge *Hill*, they have picked the wrong case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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