UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY A. SMITH, CARMEL FARRELL, and ERIC CADIN
Plaintiffs,

v.

MARTHA COAKLEY,
in her capacity as Attorney General for the COMMONWEALTH OF MASSACHUSETTS,
Defendant.

Civil Action No. 1:08-cv-10066-JLT

Motion for Leave to File Excess Pages Granted on February 6, 2008

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Introduction.

In November 2007, the Massachusetts Legislature amended a statute that limits access to a small part of public ways and sidewalks next to entrances and driveways of reproductive health care facilities ("RHCFs" or "clinics"). See G.L. c. 266, § 120E1/2 (the "Act") (a copy appears in the addendum, below). The original Act was twice upheld against constitutional claims very similar, if not identical, to those raised here. See McGuire v. Reilly, 260 F.3d 36, 39 (1st Cir. 2001) ("McGuire I") (reversing preliminary injunction because "the Act, on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint"); McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004), cert. denied, 544 U.S. 974 (2005) ("McGuire II") (Act held constitutional on its face and as applied). Plaintiffs' motion for preliminary injunction should be denied because, here too, plaintiffs are unlikely to succeed on the merits and because the public interest weighs against enjoining enforcement of the Act.

The Act was revised in 2007 to modify only the size and nature of the buffer zone. The prior Act upheld by the First Circuit made it unlawful to approach within six feet of someone on a public way or sidewalk inside a zone defined by an 18-foot radius from any RCHF entrance or driveway, if the approach was without the person's consent and was for the purpose of "protest, education, or counseling," passing a leaflet, or displaying a sign. See McGuire II, 386 F.3d at 48-49. The revised Act makes it unlawful to "knowingly enter or remain on a public way or sidewalk adjacent to [an RHCF] within a radius of 35 feet of any portion of an entrance, exit or driveway of [an RHCF]." G.L. c. 266, § 120E1/2(b). The buffer zone provision was changed after the Legislature learned that clinic patients were still being harassed immediately adjacent to RCHF entrances and driveways, clinic access was still being blocked, and law enforcement officials found that the "approach" element made it very hard to enforce the original Act. The purpose of the revised Act is to protect public safety and patient access to medical care.

In all other respects the buffer zone provision of the Act remains identical to the version upheld by the First Circuit. The Act continues to apply only during the clinic's business hours, and only if the limits of the buffer zone are "clearly marked and posted." G.L. c. 266, § 120E1/2(c). In addition, the same four categories of persons continue to be exempt from the buffer zone restrictions: (1) persons entering or leaving the RHCF; (2) employees or agents of the clinic acting within the scope of their employment; (3) municipal agents acting within the scope of their employment; and (4) persons crossing through the 18-foot buffer zone solely for the purpose of reaching a destination other than the clinic. Id. ¶ (b)(1)-(4).

Like the prior Act upheld in McGuire I and McGuire II, the revised Act is a lawful "time and place" regulation of who is allowed, during business hours, immediately next to clinic entrances and driveways. The Act is content-neutral, is narrowly-tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication.

Plaintiffs are highly unlikely to succeed in proving that the Act is an unconstitutional restriction of the time and place in which they may engage in public speech. Similar, as well as more onerous, restrictions on the time and place of protest within public ways and sidewalks have passed constitutional muster. The Supreme Court has upheld:

- a statute that bars solicitation of votes and display of campaign materials within 100 feet of a polling place, in Burson v. Freeman, 504 U.S. 191, 210-11 (1992);
- an injunction barring protestors from public rights-of-way within 36 feet of an RHCF's property line, in Madsen v. Women's Health Center, Inc., 512 U.S. 753, 768-770 (1994);
- an injunction barring protestors from within 15 feet of RHCF entrances and driveways, in Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 374-76 (1997); and
- a statute that established a 100-foot buffer zone around health care facility entrances, within which it was unlawful to approach within eight feet of someone without their consent in order to pass a leaflet, display a sign, or engage in oral protest, education, or counseling, in Hill v. Colorado, 530 U.S. 703 (2000).

The First Circuit, in addition to upholding the prior version of this Act in McGuire I and McGuire II, also upheld far more onerous restrictions on public protest imposed to ensure public safety during the 2004 Democratic National Convention. Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (rules confining demonstrators wishing to be heard by convention delegates to a heavily secured "pen," surrounding by fencing and mesh fabric and placed beneath rail tracks, held to be a constitutional limitation on the time, place, and manner of speech).

Plaintiffs are also highly unlikely to succeed on any of their other claims. The Supreme Court held in Hill, Schenck, and Madsen, that similar buffer zones are not unconstitutionally overbroad and do not constitute an unlawful prior restraint of speech. Plaintiffs are unlikely to succeed in proving that the Act is unconstitutional as applied next to two particular clinics, in Boston and Brookline. Plaintiffs' right to the free exercise of religion has not been violated merely because they cannot pray within a marked buffer zone during clinic business hours. The four exemptions in the Act are likely to pass constitutional muster: the First Circuit has already held that they do not violate equal protection (see McGuire I, 260 F.3d at 49-50), and the exemption allowing individuals to pass through the buffer zone in order to reach a destination other than the clinic is not unconstitutionally vague. Finally, plaintiffs are unlikely to succeed in proving that they have a constitutional right to loiter within the buffer zone.

Summary of Factual Background.

1. The Original Act Was Adopted in 2000 To Protect Public Safety and Patient Access to Medical Care at Clinics.

Before passing the original Act, "[t]he Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly. That investigation yielded solid evidence that abortion protestors are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs." McGuire I, 260 F.3d at 44. In 1999, the Legislature heard clinic patients and staff describe how aggressive harassment by protestors left

them fearful and anxious. See Affidavit of Richard A. Powell, exs. A-F (testimony describing protestors circling and banging on cars, screaming at and videotaping people trying to enter clinic parking facilities, pushing a clinic worker onto the windshield of a car, thrusting literature into people's faces, following patients and escorts right up to clinic entrances, and blocking a clinic doorway; and describing the distress such conduct caused to staff and patients). This hearing came after years of continuing disturbances at clinics and repeated court injunctions that failed to put an end to harassing and confrontational conduct by protestors next to RHCFs.[1]

In 1999, the Legislature originally considered adopting a fixed, 25-foot buffer zone around clinic entrances and driveways. McGuire I, 260 F.3d at 39. The Supreme Judicial Court advised that such a law would be content-neutral and constitutionally permissible. Opinion of the Justices to the Senate, 430 Mass. 1205, 1211-12 (2000). After the Supreme Court's decision in Hill, however, the Legislature instead adopted a 6-foot "floating" buffer zone within an 18-foot radius from any RHCF entrance or driveway, modeled after the Colorado statute. McGuire I, 260 F.3d at 40. The Governor signed this version into law on August 10, 2000. Id.

2. The Act Was Revised in November 2007 To Address Continuing Public Safety Problems at Clinic Entrances and Driveways.

The original Act failed to stem the confrontational conduct by protestors immediately in front of clinic entrances and driveways. For example, at the Boston facility of the Planned Parenthood League of Massachusetts ("PPLM-Boston"), a Boston police captain often observed protestors standing right by the front door, positioning themselves and their signs so it was difficult for anyone entering or leaving the clinic to do so without coming into very close proximity and even physical contact with protesters. Affidavit of William B. Evans, ¶ 11; see

[1] See Planned Parenthood League of Massachusetts v. Bell, 424 Mass. 573 (1997); Commonwealth v. Filos, 420 Mass. 348 (1995); Planned Parenthood League of Massachusetts v. Blake, 417 Mass. 467 (1994); Planned Parenthood League of Massachusetts v. Operation Rescue, 406 Mass. 701 (1990); Commonwealth v. Carlton, 36 Mass. App. Ct. 137 (1994).

also Affidavit of Michael T. Baniukiewicz, ¶¶ 17-18. "There were frequent disturbances, including physical jostling, outside of the facility." Evans Aff. ¶ 8. Protestors would speak to or yell at patients and their companions from distances of much less than six feet, in a manner that often prompted angry reactions. Baniukiewicz Aff. ¶¶ 17-20. Protestors also stationed themselves at the rear garage entrance to the facility, yelling from close range at cars entering the garage. Evans Aff. ¶ 13; Baniukiewicz Aff. ¶¶ 25. Sometimes the protestors at the back of the facility would dress in Boston Police shirts and hats, walk right up to and yell at cars trying to enter the clinic's garage, and videotape and take still photographs of patients and staff from close range. Evans Aff. ¶¶ 12-13. Similar conduct occurred at the Women's Health Services clinic in Brookline, where protestors dressed in a manner suggesting they were police officers, stood near an entrance to the parking lot, and tricked patients into supplying them with their names, addresses, and telephone numbers. Baniukiewicz Aff. ¶ 29. Patients were frightened and upset when they learned that the protestors were not police. Id.

The Legislature heard about these and other problems with the original Act at a public hearing before the Joint Committee on Public Safety and Homeland Security in May 2007. See Affidavit of Adam T. Martignetti, Exs. B-G (copies of written testimony by clinic staff, volunteers, and representatives, and by Attorney General Martha Coakley); Affidavit of Vineeth Narayanan, ex. C at 14-27, 39-49 (transcript of oral testimony by Attorney General Martha Coakley, Undersecretary for Criminal Justice Mary Beth Heffernan, Norfolk District Attorney William Keating, Boston Police Capt. William Evans, and clinic volunteers and staff).

Witnesses described for the Legislature how protestors continued to obstruct clinic entrances and driveways on a regular basis. Martignetti Aff. exs. B, C, & E. Because the old law allowed protesters to stand as close to a clinic entrance as they wished, so long as they did not "approach" within six feet of others without their consent, protesters could and did crowd

RHCF entrances, surround patients, staff, and volunteers, and shout from very close range such things as "baby killers" and "murderers." Id, exs. C, D (p.3) & F (p.2); Narayanan Aff. ex. C at 40. At some clinics, protestors would block the driveway entrances to parking lots. Martignetti Aff. exs. B & E; Narayanan Aff. ex. C at 51. Patients who were forced to pass a few feet from hostile protesters were subjected to substantial stress, and often scared by the encounters. Martignetti Aff. exs. B & C; Narayanan Aff. ex. C at 16, 40, 43.

Law enforcement representatives told the Legislature that it was very difficult to enforce the original Act, even when a protestor was very close to a clinic visitor or staffer inside the 18-foot radius, because it was hard to determine whether a protester had "approached" someone else without their consent. Martignetti Aff. ex. D, at 3-4 (Attorney General Coakley's written testimony); Evans Aff. ex. A at 25-27 (oral testimony by Boston Police Capt. Evans); accord Evans Aff. ¶¶ 7-11; Affidavit of Detective Arthur O'Connell, ¶ 8. Under the old law, as Capt. Evans explained, protestors could and did stand immediately next to or even in front of a clinic entrance, well within the 18-foot zone, and force anyone entering or leaving the clinic to pass immediately next to (and far less than six feet away from) them. Evans Aff. ex. C at 25-26, 33-34. In response to a question, Capt. Evans compared the 18-foot buffer zone area to a "goalie's crease," where "everybody is in everybody's face," which "makes it very difficult" for the police to determine whether an unlawful "approach" had been made within the buffer zone. Id. at 34. This made it very hard to keep patients safe immediately next to clinic entrances. Id. at 34-35. Capt. Evans urged the Legislature to adopt a fixed, 35-foot buffer zone:

> I think clearly having a fixed buffer zone where everyone knows the rules and nobody can go in . . . will make our job so much easier. I think you've seen the video; you see what we have to deal with. You know, it's a very difficult rule to enforce . . . . So I encourage the committee and the legislators to support this bill. Not only will it safeguard the patients going in there but it will also make public safety official's job a lot easier. So I welcome the 35-foot buffer zone.

Id. at 26-27. The Legislature did so in November 2007. Martignetti Aff. ¶¶ 7-12

On November 13, 2007, the Governor signed Senate Bill No. 1353 into law, and the fixed 35-foot buffer zone took effect immediately. Martignetti Aff. ¶ 12.

3. The Revised Act Has Been Successful in Protecting Public Safety and Clinic Access, and Has Been Construed and Applied in a Content-Neutral Manner.

The Legislature revised the Act in 2007 "to increase forthwith public safety at reproductive health care facilities." Complaint ex. 1 (St. 2007, c. 155, emergency preamble). The legislative purpose was "to comply with the [Commonwealth's] fundamental obligation to preserve public safety by creating clearly defined boundaries to improve the ability of safety officials to protect the public — specifically pedestrians travelling peacefully on Massachusetts streets and sidewalks" immediately adjacent to RHCF entrances and driveways. Complaint ¶ 17 (paraphrasing Senate Bill No. 1353). In sum, "[j]ust like the Colorado statute [upheld] in Hill, 530 U.S. at 719-20, the statute here has content-neutral purposes: protecting safety and access to medical care." McGuire II, 386 F.3d at 57.

The revised Act has substantially reduced the number of confrontations between protestors and patients or their companions, consistent with the legislative purpose. O'Connell Aff. ¶ 9; Baniukiewicz Aff. ¶ 23.

On January 25, 2008, the Attorney General's Office sent a guidance letter to all clinics the office had identified in Massachusetts as being subject to the Act, to the local police department of each municipality containing one of these clinics, and to each District Attorney's office with jurisdiction over at least one of those municipalities. Narayanan Aff. ¶ 2. The letters reminded the recipients of the key provisions of the Act. Id. exs. A & B. Each letter also included specific guidance from the Attorney General regarding how each of the four exemptions to the buffer zone provision is to be interpreted and applied. Narayanan Aff. ¶ 5 &

exs. A & B. Among other things, the guidance letters make clear that "[t]he second exemption — for employees or agents of the clinic acting within the scope of their employment —allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone." Id. The Boston and Brookline Police Departments received and are following this guidance. See O'Connell Aff. ¶ 19; Affidavit of William McDermott, ¶ 18.

The Boston and Brookline Police Departments continue to give warnings to violators, and do not arrest or charge someone unless they persist in violating the law after being warned. O'Connell Aff. ¶¶ 15-16; McDermott Aff. ¶ 9. To date no one has been arrested for or charged with violating the revised Act. O'Connell Aff. ¶ 17; McDermott Aff. ¶ 8.

4. Protestors Can and Do Still Engage In a Full Range of Public Expression at RHCFs, Including at the Clinics in Boston and Brookline.

The revised Act leaves open to protestors at PPLM-Boston and Women's Health Services ample avenues to communicate with patients and others.

At PPLM-Boston, groups of protestors can and do continue to stand near the front entrance and rear garage entrance, outside of the marked areas, bearing large signs, offering leaflets or handbills, praying, singing, chanting, and speaking with or calling out to passersby and persons entering the clinic. O'Connell Aff. ¶¶ 6-7, 10-14; Affidavit of Nicholas P. Paras, ¶ 8 & exs. F-K; Baniukiewicz Aff. ¶ 21. "Protestors continue to have close contact with patients and others approaching the clinic." O'Connell Aff. ¶ 11. Protestors still walk down the sidewalk with and try to hand literature to patients and others approaching the facility on foot, though they now stop at the edge of the marked buffer zone. O'Connell Aff. ¶¶ 11, 13; Baniukiewicz Aff. ¶ 24. They also continue to communicate verbally to the patients from outside of the buffer zone with patients who have entered into the buffer zone. O'Connell Aff. ¶ 11. Protestors in front of

the clinic can easily be heard from 40-50 feet away during a typical Saturday protest. Paras Aff. ¶ 8.g. Plus, the effective buffer zone around the front entrance to PPLM-Boston is much smaller than a reading of the revised Act would suggest. The sidewalk in front of the facility is roughly 25 feet wide, and the front door of PPLM-Boston is set back approximately 12 feet from the public sidewalk and is recessed into an open foyer inside the building. Id. ¶¶ 6-7.a. As a result, the curved buffer zone marking lies less than 23 feet from the intersection of the entrance-way and the sidewalk, and leaves ample room for protesters to congregate on the sidewalk in front of, and near the front of, the facility. Id. ¶¶ 7.a-c. Although the buffer zone marking lies only about two feet from the curb at the point immediately opposite the clinic entrance, because it is an arc curving back to the clinic property line it leaves plenty of room on the sidewalk for large groups of protestors to be seen and heard by persons entering the clinic. Id. & exs. G-I (photos).

At Women's Health Services in Brookline, "protestors continue to protest and to express their opinions in essentially the same manner and in essentially the same locations as they did under the prior version of the law." McDermott Aff. ¶ 12. The clinic is in a multi-use office building located at 822 Boylston St. (Route 9); its parking lot is accessed from Reservoir Road, a small side street. Affidavit of Eric W. Funk, ¶¶ 3-5 & exs. A-C; Baniukiewicz Aff. ¶ 8. Patients typically "drive their cars into the office parking lot, park, and enter the building without walking on or near the public sidewalk." Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("Ps' PI Memo") at 27. Cars turning into the parking lot are generally driving too fast to stop. McDermott Aff. ¶ 14. Even before the Act was revised protestors would communicate with visitors to the clinic by standing on a portion of the public sidewalk that today is still outside the revised buffer zone, and hold signs, call out to and ask to speak with people walking in the parking lot, and offer them leaflets. McDermott Aff. ¶ 12. Today, under the revised Act, protestors continue to engage in the same activities from the same part of the public

sidewalk. Id.; Funk Aff. ¶ 7 & exs. C, E & F. They also continue to affix large signs to cars they park across the street. McDermott Aff. ¶ 13. Both before and since the revised Act took effect, people in the parking lot not infrequently respond to protestors by walking toward them, speaking with them, and taking their literature. McDermott Aff. ¶ 12; Funk Aff. ¶ 7.

Argument.

"To obtain preliminary injunctive relief, plaintiffs ha[ve] the burden of showing (1) a likelihood of success on the merits; (2) that they would suffer irreparable injury if injunctive relief were not issued; (3) that such injury outweighs any harm that would stem from granting injunctive relief; and (4) that the public interest weighs in their favor." Largess v. Supreme Judicial Court for State of Massachusetts, 373 F.3d 219, 224 n.2 (1st Cir. 2004).

"The first inquiry is the most important element of the preliminary injunction assessment: '[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.'" United States v. Weikert, 504 F.3d 1, 5 (1st Cir. 2007) (reversing preliminary injunction) (quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir.2002)). Since plaintiffs have no likelihood of success on the merits, as shown in Section I below, their motion for preliminary injunction must be denied. E.g., McGuire I, 260 F.3d at 51 (reversing preliminary injunction against prior version of the Act, because plaintiffs were unlikely to succeed on their constitutional challenges). Furthermore, as shown in Section II, the public interest weighs against issuing any preliminary injunction.

I. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Act Is a Lawful "Time and Place" Regulation of Who Is Allowed, During Business Hours, Next to Clinic Entrances and Driveways.

The Act has the effect of imposing reasonable restrictions on the time and place of speech in small areas around clinic entrances and driveways. Because those restrictions "are justified without reference to the content of the regulated speech, . . . are narrowly-tailored to serve a

significant governmental interest, and . . . leave open ample alternative channels for communication of the information," as shown below, they do not violate the First Amendment. Bl(a)ck Tea Society, 378 F.3d at 12 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Since the Act is a "content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality [must] be assessed under the standard set forth in Ward . . . ." Madsen, 512 U.S. at 765; accord Hill, 530 U.S. at 731. A buffer-zone statute of general application is subject to a less stringent standard than an injunction imposing buffer-zone restrictions only on certain individuals. Hill, 530 U.S. at 731; Madsen, 512 U.S. at 764-65.

Plaintiffs are highly unlikely to succeed on the claim in their First Cause of Action that the Act is not a valid, content-neutral regulation of the time and place of expressive activity. See Complaint ¶¶ 75-84. Although plaintiffs assert in one paragraph that the Act is unconstitutional as applied next to two clinics, see Ps' PI Memo at 30-31, the rest of their 54-page memorandum argues that the Act is facially unconstitutional. "[A] party who mounts a facial challenge to [the constitutionality of] a statute must carry a significantly heavier burden than one who seeks merely to sidetrack a particular application of the law." McGuire I, 260 F.3d at 46-47. "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." McGuire II, 386 F.3d at 57 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Plaintiffs have not met that burden.

1. The Act Is Content Neutral.

a. The Act Does Not Ban Speech, Applies to All Expressive Conduct, and Is Justified Without Reference to Content.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Hill, 530 U.S. at 719 (quoting

Ward, 491 U.S. at 791). Like the criminal buffer zone statute upheld in Hill, the revised Act passes the test for content neutrality "for three independent reasons." Hill, 530 U.S. at 719.

"First, [the Act] is not a 'regulation of speech.' Rather it is a regulation of the places where some speech may occur." Hill, 530 U.S. at 719. The Act "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." Hill, 530 U.S. at 731.

"Second, it was not adopted 'because of disagreement with the message it conveys.'" Hill, 530 U.S. at 719. To the contrary, the Act's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Id. (quoting Ward, 491 U.S. at 791).[2] Plaintiffs concede that the Act bars expressive activity of all kinds, and does not target speech about abortion or by abortion opponents. See Ps' PI Memo at 28-29, 32-33. Plaintiffs specifically note that "[t]he Act applies to all speakers . . . and precludes all speech in the zone . . . ." Id. at 1.

"Third, the [Commonwealth's] interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech." Hill, 530 U.S. at 719-20. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" Burson, 504 U.S. at 212 (Kennedy, J., concurring) (quoting Ward, 491 U.S. at 791) (emphasis in original); accord Hill,

[2] Indeed, the revised Act meets this standard even more easily than did the original Act upheld in McGuire I and McGuire II and the statute upheld in Hill. The three Hill dissenters argued that the Colorado statute was content-based because it did not exclude all speakers from the buffer zone, but rather only constrained messages of "protest, education, or counseling." See Hill, 530 U.S. at 742-749 (Scalia, J., dissenting, with Thomas, J.), and 530 U.S. at 765-770 (Kennedy, J., dissenting). The Hill majority disagreed, holding that this did not mean the statute was a content-based regulation of speech. Hill, 530 U.S. at 720-25. Defendant notes, however, that while the original Act was modeled on the Hill statute, the revised Act substitutes a simpler buffer zone that, as plaintiffs concede, "precludes all speech in the zone." Ps' PI Memo at 1. The concerns of the Hill dissenters regarding content neutrality thus do not apply here.

530 U.S. at 720. This is "the core inquiry for determining content neutrality." McGuire II, 386 F.3d at 57. "Just like the Colorado statute in Hill, . . . the statute here has content-neutral purposes: protecting safety and access to medical care." Id.

b. The Fact that the Act Protects Small Areas Adjacent to Clinics Does Not Make It Content- or Viewpoint-Based.

The revised buffer zone is properly restricted to the areas immediately adjacent to clinic entrances and driveways because that is where there was a continuing public safety problem. See pages 4-7, above. "Just as targeting medical centers did not render Colorado's counterpart statute content-based, Hill, 530 U.S. at 722-23, so too the Act's targeting of RHCFs fails to undermine its status as a content-neutral regulation." McGuire I, 260 F.3d at 44.

The First Circuit has already rejected plaintiffs' assertions that, because the Act limits access only to sidewalks adjacent to RHCFs, it constitutes viewpoint discrimination and the content-neutral justifications for the Act are "pretextual." Compare Ps' PI Memo at 41, 53, with McGuire II, 386 F.3d at 57 (no viewpoint discrimination), and McGuire I, 260 F.3d at 44-45 (no pretext). Plaintiffs' claim "that the statute in practice has a tendency to burden pro-life speech more than it burdens pro-choice [or other] speech [is] irrelevant to the statute's content (or viewpoint) neutrality." McGuire II, 386 F.3d at 57. "[A] law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." McGuire I, 260 F.3d at 43; accord Madsen, 512 U.S. at 763 (buffer zone injunction around clinic entrance was content- and viewpoint-neutral even though it "covered people with a particular viewpoint").

c. The Exemption Allowing Clinic Employees To Be Within the Zone When Acting Within the Scope of Their Employment Is Not Viewpoint Discrimination.

The statutory exemption for "employees or agents of [the RHCF] acting within the scope of their employment," see G.L. c. 266, § 120E1/2(b)(2), does not constitute impermissible

viewpoint discrimination, as the First Circuit has already held. See McGuire II, 386 F.3d at 58-59; McGuire I, 260 F.3d at 45-48. This exemption was established in the original Act, and not changed by the 2007 amendment. Plaintiffs are unlikely to succeed in repeating a claim that has already been rejected by the First Circuit. Cf. Ps' PI Memo at 40-45.

"[S]o long as a reviewing court can 'envision at least one legitimate reason for including the employee exemption in the Act,' the law is not facially unconstitutional." McGuire II, 386 F.3d at 58 (quoting McGuire I, 260 F.3d at 47). There are "likely explanations for the exemption other than the desire to favor pro-abortion speech over anti-abortion speech: 'For example, the legislature may have exempted clinic workers — just as it exempted police officers — in order to make crystal clear . . . that those who work to secure peaceful access to RHCFs need not fear prosecution.'" McGuire II, 386 F.3d at 58 (quoting McGuire I, 260 F.3d at 47). "For this reason . . . the viewpoint facial attack fails, now as then." McGuire II, 386 F.3d at 58.

Furthermore, there is no merit to plaintiffs' assertion that this statutory exemption allows clinic employees or agents "to display signs, distribute literature," or "engage in all types of expressive activities, pro-choice or not" within the buffer zone. Ps' PI Memo at 45. To the contrary, Attorney General Coakley has provided clear guidance — distributed to law enforcement personnel and to clinics — that although this exemption "allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics," it "does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone." Narayanan Aff. ¶ 5. This matches the guidance provided by the Attorney General regarding the identical exemption in the original Act. See McGuire II, 386 F.3d at 52 & n.1; McGuire v. Reilly, 271 F.Supp.2d 335, 339-40 (2003), aff'd, McGuire II. It "is clearly a proper, content-neutral way of interpreting the exemption." McGuire II, 386 F.3d at 64. It continues to be entitled to great weight in determining whether the Act on its face is constitutional. See

McGuire II, 386 F.3d at 55, 58. "In evaluating a facial challenge to a state law" on grounds of alleged vagueness or overbreadth, "a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.5 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)); accord, e.g., McGuire II, 386 F.3d at 58. "Any inadequacy on the face of the [Act] would have been more than remedied by the [Attorney General's] narrowing construction." Ward, 491 U.S. at 796; accord McGuire II, 386 F.3d at 64.

In sum, plaintiffs have no likelihood of succeeding on the "viewpoint discrimination" claim in their Fifth Cause of Action. See Complaint ¶¶ 114-119.

2. The Act Is Narrowly Tailored To Address the Significant Government Interests in Protecting Public Safety and Clinic Access.

a. The Act Was Revised In Response to Substantial Problems That Arose Under the Original Act.

Since the Legislature was once again presented with "solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs[,]" . . . "targeting these sites furthers conventional objectives of the state's police power — promoting public health, preserving personal security, and affording safe access to medical services." McGuire I, 260 F.3d at 44. The Legislature received evidence that, under the original Act, protestors would cluster and position themselves immediately in front of or next to clinic entrances and driveways, and from that position would yell at patients and staff who were trying only to obtain or provide medical care at a clinic. See pages 4-7, above. Because the original Act allowed protestors to stand as close as they wished to clinic entrances so long as they did not "approach" anyone without their consent, it was very difficult for the police to keep patients safe and to keep the path to clinic entrances clear. Id. Protestors continued to obstruct clinic entrances and driveways on a regular basis. Id. Patients were upset and scared by their close-

quarter confrontations with protestors. Id. By creating a fixed 35-foot buffer zone, the revised Act eliminated these problems. See pages 7-8, above.

Thus, it was reasonable for the Legislature "to conclude . . . that the only way to ensure access was to move all protesters away from the doorways" and driveways. Schenck, 519 U.S. at 381 (upholding injunction with fixed buffer zone) (emphasis in original). The revised Act furthers significant government interests in "protecting public health, maintaining public safety, and preserving access to medical facilities." See McGuire I, 260 F.3d at 38. It promotes "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." Hill, 530 U.S. at 715. These significant interests more than satisfy the second prong of the Ward test. See McGuire I, 260 F.3d at 44-46.

The written and oral testimony regarding the problems experienced under the original Act, by clinic patients and staff in trying to get past protestors, belies plaintiffs' erroneous assertion that "[t]he evidentiary record [before the Legislature] was stale." Ps' PI Memo at 48. In any case, the Legislature may "us[e] past experience to plan for future events," in determining whether the requirements of public safety weigh in favor of reasonable limitations on the time and place of public protest within traditional public fora. Bl(a)ck Tea Society, 378 F.3d at 13; accord, e.g., Hill, 530 U.S. at 728-29 (relying in part on past experience to find time-place-manner restrictions narrowly tailored); Ward, 491 U.S. at 796-97 (upholding restrictions enacted on the basis of earlier experiences with noise pollution in Central Park). "The question is not whether the government may make use of past experience — it most assuredly can — but the degree to which inferences drawn from past experience are plausible." Bl(a)ck Tea Society, 378 F.3d at 14. The Legislature's conclusion that the revised Act was required to protect public safety and ensure access to medical care must be respected. See McGuire I, 260 F.3d at 44-46; cf. Burson, 504 U.S. at 210 (same re choice of 100 foot buffer zone to protect polling places).

b. The Buffer Zone Established in the Revised Act Need Not Be the Least Restrictive Possible Solution.

"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so." Hill, 530 U.S. at 726 n.32 (quoting Ward, 491 U.S. at 798). "Put another way, the validity of time, place, or manner regulations is not subject to 'a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.'" Bl(a)ck Tea Society, 378 F.3d at 12 (quoting Ward, 491 U.S. at 800). "[T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 799; accord Burson, 504 U.S. at 210-11.

In Schenck, the Court said it should not "quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access," and deferred to the district court's injunction around clinics entrances and driveways. Schenck, 519 U.S. at 381. Here, since we are dealing with a law of general application, the Legislature's judgment is entitled to even greater deference. Hill, 530 U.S. at 731; Madsen, 512 U.S. at 764-65. The Act regulates conduct where public safety problems and frightening confrontations had been regularly observed under the prior version of the statute. See pages 4-7. Law enforcement officials urged the Legislature to adopt a 35-foot buffer zone in order to ensure public safety. Id. Under these circumstances, the zone chosen by the Legislature is sufficiently narrowly tailored. See Burson, 504 U.S. at 210-11 (upholding statute establishing 100-foot buffer zone around polling places, and rejecting as not of "constitutional dimension" the question whether zone could have been smaller); Madsen, 512 U.S. at 768-770 (upholding injunction imposing 36-foot buffer zone around RHCF property).

c. Whether These Particular Plaintiffs Are Law Abiding Is Not Relevant to Whether the Act Is Constitutional.

The Commonwealth was not required to rely solely upon laws aimed at specific threatening behavior, such as assault and battery or knowingly obstructing entry to a health care facility. McGuire I, 260 F.3d at 48-49; accord Burson, 504 U.S. at 206-7; Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981). Other existing laws "deal with only the most blatant and specific attempts" to impede access to an RHCF. Cf. Burson, 504 U.S. at 207 (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976)). The Legislature could constitutionally enact a fixed buffer zone to prevent "undetected or less than blatant acts" that would nonetheless threaten public safety and unfairly burden patients who merely want to enter a clinic to obtain medical care. Id.; accord McGuire I, 250 F.3d at 49. Plaintiffs' assertion to the contrary is incorrect as a matter of law. Cf. Ps' PI Memo at 13-14, 37-38.

The Legislature may enact a buffer zone that "takes a prophylactic approach" to protect patients from protestors in the immediate proximity of clinic entrances. Hill, 530 U.S. at 729. "Persons who are attempting to enter health care facilities — for any purpose — are often in particularly vulnerable physical and emotional conditions." Id. The Act's "prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior." Id. "A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." Id.

Thus, plaintiffs' complaint that the Act applies to people who have not previously broken the law is of no constitutional moment. Cf. Ps' PI Memo at 1-2, 25-26 & n.6. The Act is a law of general application, not a remedy for unlawful conduct by specific individuals. A buffer-zone

statute is subject to a less stringent constitutional standard than an injunction imposing buffer-zone restrictions only on certain individuals. Hill, 530 U.S. at 731; Madsen, 512 U.S. at 764-65.

3. The Act Leaves Open Ample Alternative Channels of Communication.

a. The Act Places No Limit On Expressive Activity Outside Buffer Zones.

As in Hill, the Act does not "ban" any expressive activity, but instead "merely regulates the places where communications may occur" during clinic business hours. Hill, 530 U.S. at 731. Plaintiffs suggestion that under the Act "leafleting and solicitation [are] completely banned from public places" is incorrect. Ps' PI Memo at 26. Plaintiffs, and everyone else, may continue to hold signs, pray, sing, chant, leaflet, converse, and engage in any other kind of lawful speech so long as they do so from outside any buffer zone. Plaintiffs may engage in expressive activity that can be seen and heard not only by people approaching the buffer zone, but also by people inside the zone. Anyone who wants to speak with or obtain a handbill from a protestor standing near a buffer zone may do so.

It is constitutionally permissible to protect public safety by imposing a reasonable buffer zone that excludes protestors, but allows for unfettered speech from outside the zone and thereby leaves open ample alternative means of communication. See Burson, 504 U.S. at 210-11 (100-foot buffer zone around polling places); Madsen, 512 U.S. at 768-770 (36-foot buffer zone around RHCF property); Schenck, 519 U.S. at 374-376 (15-foot buffer zone around RHCF entrances and driveways); Hill, 530 U.S. 703 (100-foot buffer zone around RHCF entrances, within which approaches closer than 8 feet are barred absent consent); McGuire I and McGuire II (18-foot buffer zone around RHCF entrances, within which approaches closer than 6 feet were barred absent consent); Bl(a)ck Tea Society, 378 F.3d 8 (rules confining demonstrators wishing to be heard by 2004 Democratic National Convention delegates to a heavily secured "pen,"

surrounding by fencing and mesh fabric and placed beneath rail tracks); Menotti v. City of Seattle, 409 F.3d 1113, 1125, 1128-42 (9th Cir. 2005) (ordinance barring most persons from a very large part of the downtown during World Trade Organization meeting upheld as valid time, place, and manner regulation of speech in public fora). The buffer zone at issue here is narrower than the zones previously upheld in Burson, Madsen, Bl(a)ck Tea Society, and Menotti. It leaves open ample means for plaintiffs to express their views and communicate with others near clinics.

b. The Act Is Lawful As Applied in Boston and Brookline.

Plaintiffs are also highly unlikely to succeed on their claim that the Act is unconstitutional as applied in two clinic locations. Cf. Ps' PI Memo at 30-31. The revised Act has not interfered with the ability of protestors to engage in the same kind and range of expressive behavior at PPLM-Boston and at Women's Health Services in Brookline that they did prior to November 2007. See pages 8 et seq., above. At the Boston clinic, protestors continue — from just beyond the buffer zone — to stand near the pedestrian entrance in front and the garage entrance in back, where they hold large signs, offer leaflets or handbills, pray, sing, chant, and speak with or call out to passersby and persons entering the clinic. Id. Protestors still walk down the sidewalk with, try to hand literature to, and have close contact with patients and others approaching the facility. Id. At the Brookline clinic, protestors continue to engage in the same kind of expressive behavior from essentially the same locations as they did under the prior law. Id. They continue to hold signs, engage in conversation with, and offer and pass literature to people who have exited their cars and are walking through the parking lot. Id.

Since protestors "can still be seen and heard" as one approaches the Boston clinic and "from the clinic parking lot" in Brookline, plaintiffs are highly unlikely to succeed on their claim that they can no longer communicate with others at these locations. See Madsen, 512 U.S. at 770 (same re injunction imposing 36-foot buffer zone around RHCF property). In any case,

even if successful, plaintiffs' "as applied" challenges would merit only "a limiting construction rather than a facial invalidation" of the Act, and thus could not support a preliminary injunction barring enforcement of the Act. See Burson, 504 U.S. at 210 n.13.

c. Plaintiffs Have No Constitutional Right to Approach Within a Few Feet of All Strangers in All Locations.

Plaintiffs have no absolute right under the First Amendment "to communicate with their intended audience from a normal conversational distance" or to approach close enough to hand out leaflets to anyone in every public place. Cf. Ps' PI Memo at 25-26. The Act permits plaintiffs to approach whomever they want, as closely as they want, outside the buffer zone. That they may not do so within the zone does not render the Act facially unconstitutional. See Bl(a)ck Tea Society, 378 F.3d at 13-15. By comparison, the much more expansive buffer zone imposed at the 2004 Democratic National Convention "allowed no opportunity for physical interaction (such as the distribution of leaflets) and severely curtailed any chance for one-on-one conversation." Bl(a)ck Tea Society, 378 F.3d at 13. Yet the First Circuit nonetheless held that the security measures were a constitutional regulation of the time, place, and manner of speech. Id. at 13-15. "Although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access." Id. at 14.

The Supreme Court has repeatedly upheld fixed buffer zones that have the effect of limiting normal conversation or leafleting within the zone. Burson, 504 U.S. at 210-11 (100-foot buffer zone around polling places); Madsen, 512 U.S. at 768-770 (36-foot fixed buffer zone around RHCF property); Schenck, 519 U.S. at 374-376 (15-foot fixed buffer zone around RHCF entrances and driveways). Quite simply, "the First Amendment does not guarantee the right to

employ every conceivable method of communication at all times and in all places…." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984); accord, e.g., Heffron, 452 U.S. at 647 ("the 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").

B. Plaintiffs' Other Free Speech Claims Are Without Merit.

1. The Act Is Not Unconstitutionally Overbroad.

Plaintiffs are unlikely to succeed on the "overbreadth" claim in their Second Cause of Action. See Complaint ¶¶ 85-91. Indeed, the Supreme Court has rejected an almost identical overbreadth challenge to a clinic buffer zone statute. See Hill, 530 U.S. at 730-32. Plaintiffs describe at some length examples of different activities that under the Act must take place outside of any buffer zone, and assert that this proves the Act is "substantially overbroad." Ps' PI Memo at 31-35. In fact, however, plaintiffs have merely demonstrated that the Act is content-neutral, not that it is unconstitutionally overbroad. Hill, 530 U.S. at 730-31. "The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute." Id. at 730-31. Indeed, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." Id. at 731. Since plaintiffs cannot show "that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling," they cannot show that the Act is "overly broad." Id. at 732.

Like the statute in Hill, the Act "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." Hill, 530 U.S. at 731. A content-neutral buffer zone statute "may satisfy the [narrow] tailoring requirement even though it is not the least restrictive or least

intrusive means of serving the statutory goal." Id. at 726. Since the buffer zone is narrowly tailored to the size reasonably deemed by the Legislature necessary to protect public safety and egress to RHCFs, it is not overbroad merely because it affects conduct other than that which prompted the Legislature to act. Id. at 731-32.

2. The Act Imposes No Prior Restraint on Speech.

Since the Commonwealth "has not sought to prevent speech, but, rather, to regulate the place and [time] of its expression," as a matter of law the Act does not constitute "a prior restraint on speech." Bl(a)ck Tea Society, 378 F.3d at 12; accord, e.g., Sullivan v. City of Augusta, 511 F.3d 16, 32 (1st Cir. 2007) (parade permit ordinance was not a "prior restraint"). Plaintiffs' argument to the contrary is without merit. Cf. Ps' PI Memo at 36-38.

"The Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner restrictions as prior restraints, . . . and those cases are controlling here." Bl(a)ck Tea Society, 378 F.3d at 12 (citing Hill, 530 U.S. at 733-34; Schenck, 519 U.S. at 374 n. 6; Madsen, 512 U.S. at 763 n. 2). "If content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in the time-place-manner jurisprudence would be eviscerated." Id. Thus, plaintiffs have no likelihood of succeeding on the "prior restraint" claim in their Third Cause of Action. See Complaint ¶¶ 92-104.

C. Plaintiffs Are Unlikely to Succeed in Proving that the Act Violates the Free Exercise of Religion By Not Allowing Individuals to Pray In the Buffer Zone.

1. Since the Act is a Law of General Applicability and Does Not Discriminate Against Religious Practice, It Does Not Violate the Free Exercise of Religion Even If It Has an Incidental Impact on Prayer.

The Act does not ban prayer on public sidewalks near an RHCF; it merely has the effect of requiring that, during clinic business hours, any such prayer take place outside of a clearly marked and posted buffer zone established by the Act. Plaintiffs acknowledge that the Act does not discriminate against a particular religion or religious practice, but instead bars all non-exempt

persons from the buffer zone. Cf. Ps' PI Memo at 28-29, 32. Plaintiffs are therefore highly unlikely to succeed in proving that the Act violates their right to the free exercise of religion merely because it has an incidental effect on the asserted desire by two plaintiffs to pray on public sidewalks within the buffer zone, rather than a few feet away. Cf. Ps' PI Memo at 38.

"[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F.3d 25, 35 (1st Cir. 2001) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)); accord, e.g., Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-80 (1990). Indeed, plaintiffs concede that "[l]aws of general applicability that [allegedly] infringe free exercise of religion, standing alone, are reviewed under the rational basis test." Ps' PI Memo at 39. And plaintiffs further acknowledge that "the interest of the State in safeguarding women seeking reproductive health services is legitimate." Id. at 34. Thus, as a matter of law, plaintiffs "cannot rewardingly invoke the Free Exercise Clause in their attack on the [Act]." Knights of Columbus, 272 F.3d at 35 (upholding ordinance that barred unattended structures from Lexington's Battle Green, and thus had incidental effect of barring religious display of a crèche around Christmas time).

2. Plaintiffs' Assertion of a "Hybrid" Free Exercise/Free Speech Claim Adds Nothing to Their Separate Constitutional Claims.

a. The Act Is Not Subject to Heightened Scrutiny on the Theory That Plaintiffs Have a "Hybrid" Constitutional Claim.

There is no merit to plaintiffs' assertion that, though the Act is a neutral law of general applicability with only incidental effects on sidewalk prayer, it is subject to heightened scrutiny because plaintiffs assert a "hybrid" claim under both the free exercise and the free speech clauses of the First Amendment. Plaintiffs rely on dicta in Smith, 494 U.S. at 882. See Ps' PI Memo

at 39. "Smith described such hybrid situations as involving free exercise claims brought in conjunction with other claims of violations of constitutional protections." Parker v. Hurley, ___ F.3d ___, 2008 WL 250375, *7 (1st Cir. 2008). The First Circuit has not yet determined "whether Smith created a new hybrid rights doctrine, or whether in discussing 'hybrid situations' the Court was merely noting in descriptive terms that it was not overruling certain [prior] cases. . . ." Id. The First Circuit has never held that state action challenged by such a "hybrid" claim is subject to strict scrutiny. See id.; cf. Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 539 (1st Cir. 1995) (holding that no hybrid claim was presented); Gary S. v. Manchester School Dist., 374 F.3d 15, 18 (1st Cir. 2004) (same). Indeed, "[n]o published circuit court opinion. . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." Parker, 2008 WL 250375, *7 (emphasis added).

This Court should reject plaintiffs' invitation to apply strict scrutiny here. "[I]n the context of claims involving free exercise and free speech, . . . Smith's 'language relating to hybrid claims is dicta and not binding on this court.'" Leebaert v. Harrington, 332 F.3d 134, 143 (2nd Cir. 2003) (quoting Knight v. Connecticut Dept. of Public Health, 275 F.3d 156, 167 (2nd Cir. 2001)); accord Berry v. Dept. of Social Services, 447 F.3d 642, 649 n.5 (9th Cir. 2006). Indeed, the Supreme Court recognized that its discussion of "hybrid situations" was dicta. See Smith, 494 U.S. at 882 ("The present case does not present such a hybrid situation[.]").

Other circuits have rejected the notion that "hybrid" free exercise claims trigger stricter scrutiny. "The allegation that a state action that regulates public conduct infringes more than one of [plaintiffs'] constitutional rights does not warrant more heightened scrutiny than each claim would warrant when viewed separately." Knight, 275 F.3d at 167; accord Leebaert, 332 F.3d at 144 (there is "no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated"); Henderson v. Kennedy, 253

F.3d 12, 19 (D.C. Cir. 2001) (rejecting contention that a "regulation should receive some heightened scrutiny because [plaintiffs] are presenting some sort of 'hybrid claim' resting on both the Free Exercise Clause and the Free Speech Clause of the First Amendment"); Kissinger v. Bd. of Trustees of Ohio State Univ., College of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993) (the notion that "the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights . . . is completely illogical").

As Justice Souter has observed, the distinction made in the Smith dicta is "ultimately untenable." Church of the Lukumi Babalu Aye, 508 U.S. at 567 (Souter, J., concurring).

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule [allowing neutral laws of general applicability that incidentally burden some religious practice], and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. The reasoning of Justice Souter in Church of the Lukumi Babalu Aye — and of three other Circuits in Leebaert, Kissinger, and Henderson — is compelling. The Court should reject Plaintiffs' assertion that by raising a "hybrid" free exercise and free speech claim they can subject the Act to heightened scrutiny. Alternatively, the Court should find that plaintiffs have no likelihood of success on their "hybrid" claim because they are unlikely to establish that the Act violates either the free speech clause or the free exercise clause, as shown in the next section.

b. Since Plaintiffs Have No Colorable Free Speech Claim and No Colorable Free Exercise Claim, They Cannot Succeed On Their "Hybrid" Theory.

The likelihood that plaintiffs free speech claims will fail (see Sections I.A and I.B, at pages 10-23, above) is fatal to any "hybrid" free exercise/free speech claim. Even if a "hybrid" free exercise claim could, in theory, trigger heightened scrutiny, it cannot survive where

plaintiffs have no colorable claim with a fair likelihood of success that the Act violates some independent constitutional right. See Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006); Harper v. Poway Unified School Dist., 445 F.3d 1166, 1187 (9th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-65 (7th Cir. 2003); Hot, Sexy and Safer, 68 F.3d at 539.

Similarly, a "hybrid" free exercise claim also cannot succeed without proof that the challenged state action "substantially burdens" a religious practice or belief. Hot, Sexy and Safer, 68 F.3d at 539; accord Harper, 445 F.3d at 1188. "[I]n free exercise jurisprudence," the "standard constitutional threshold question" is "whether the plaintiff's free exercise is interfered with at all." Parker, 2008 WL 250375, *8 (1st Cir. 2008) (citation omitted) ; accord, e.g., Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999) ("the free exercise inquiry [asks] 'whether government has placed a substantial burden on the observation of a central belief or practice'") (emphasis in opinion) (quoting Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989)). Plaintiffs make no attempt to show that the Act substantially burdens their free exercise of religion. See Ps' PI Memo at 39-40. The Act allows plaintiffs to pray most anywhere they wish so long as it is not in a marked buffer zone during a clinic's business hours. As a matter of law, that is not a substantial burden on the free exercise of religion. See Knights of Columbus, 272 F.3d at 35 (ordinance that had effect of barring permanent crèche from Lexington's Battle Green, but allowed crèche to be displayed on adjacent private property, did not violate right to free exercise of religion). Since plaintiffs are unlikely to succeed on their free exercise claim standing alone, they are also unlikely to succeed on a "hybrid" free exercise/free speech claim.

For all of these reasons, plaintiffs have no likelihood of succeeding on the "free exercise hybrid" claim in their Fourth Cause of Action. See Complaint ¶¶105-113.

D. Plaintiffs' Other Challenges to the Act's Exemptions Are Highly Unlikely To Succeed.

1. The "Employees or Agents" Exemption Does Not Violate Equal Protection.

Plaintiffs' equal protection claim adds nothing to their free speech claims. Cf. Ps' PI Memo at 42-45. The First Circuit has already held that the Act's exemption for clinic employees and agents does not undermine the Act's content neutrality. McGuire II, 386 F.3d at 58-59; McGuire I, 260 F.3d at 45-48; see also Section I.A.1.c (pages 13-15, above). For the same reason, as a matter of law the exemption does not violate equal protection.

"[W]here the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily passes the rational basis test employed under the Equal Protection Clause." McGuire I, 260 F.3d at 49-50. "So it is here: the Act passes muster under the Equal Protection Clause for the same reasons that it passes muster under the First Amendment." Id. at 50. Thus, plaintiffs are highly unlikely to succeed on the equal protection claim in their Eighth Cause of Action. See Complaint, ¶¶ 138-146.

Plaintiffs' attempt to invoke "strict scrutiny" is misplaced. Cf. Ps' PI Memo at 42. A content-neutral regulation of the time, place, or manner in which expressive activity may occur is not subject to strict scrutiny, but instead is evaluated under the Ward test discussed in Section I.A, at pages 10-22, above. See Sullivan, 511 F.3d at 33; accord, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 244 (1990) (White, J., concurring in part and dissenting in part) ("Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication.").

2. The Exemption for Crossing Through the Buffer Zone Does Not Render the Act Unconstitutionally Vague.

Plaintiffs are also highly unlikely to succeed on the "void for vagueness" claim in their Sixth Cause of Action. See Complaint ¶¶ 120-131. Plaintiffs claim they are confused by the statutory provision stating that the buffer zone requirements "shall not apply to … persons using the public sidewalk of street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." G.L. c. 266, § 120E1/2(b)(4); see Ps' PI Memo at 46-48. In accord with a common sense reading of the statutory language, Attorney General Coakley has directed local law enforcement officials to construe this exemption to apply "to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through." Narayanan Aff. ¶ 5. As she explained:

> For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).

Id. Police in Brookline and Boston are enforcing the Act consistent with the guidance provided by the Attorney General. See O'Connell Aff. ¶¶ 18-19; McDermott Aff. ¶¶ 16, 18. Even if the Act were not sufficiently clear standing alone, which it is, the reasonable and authoritative construction by the Attorney General eliminates the claimed ambiguity. As so construed, the exemption gives "people 'of ordinary intelligence . . . a reasonable opportunity to know what is prohibited.'" Schenck, 519 U.S. at 383 (quoting Grayned, 408 U.S. at 108).

"The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague." United States v. Lachman, 387 F.3d 42, 56 (1st Cir. 2004). So long as the statute as interpreted by the Attorney General is not impermissibly vague, then this claim

fails as a matter of law. "The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute." Wainwright v. Stone, 414 U.S. 21, 22 (1973); see also Village of Hoffman Estates, 455 U.S. at 495 n.5 ("[i]n evaluating a facial challenge to a state law" on grounds of alleged vagueness, "a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered"); McGuire II, 386 F.3d at 58 (same).

"[T]he Due Process Clause of the Fourteenth Amendment 'requires that statutes or regulations be sufficiently specific to provide fair notice of what they proscribe.'" Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 50 (1st Cir. 2003) (quoting Brasslett v. Cota, 761 F.2d 827, 838 (1st Cir.1985)). The Act meets that standard. When the Act "is read as a whole," the meaning of the disputed exemption is sufficiently clear. Schenck, 519 U.S. at 383 (term "demonstrating" not vague when buffer zone injunction was read as a whole); see also Hill, 530 U.S. at 732 (use of undefined terms "protest, education, or counseling," "consent," and "approaching" did not make criminal buffer zone statute unconstitutionally vague). It permits persons to cross through a buffer zone in order to reach a destination other than the clinic.

Plaintiffs — with their metaphysical worries about how to classify someone who is "strolling or jogging" through a buffer zone without aiming to reach a particular destination, or who crosses a buffer zone to reach a destination other than a clinic but has "a secondary purpose" like wanting to buy groceries, see Ps' PI Memo at 47 — "proffer hypertechnical theories as to what the statute covers . . . ." Hill, 530 U.S. at 733. But a criminal statute is not unduly vague merely because "imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question." Id. (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950)). "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid

'in the vast majority of its intended applications.'" Hill, 530 U.S. at 733 (quoting United States v. Raines, 362 U.S. 17, 23 (1960)).

Similarly, the mere fact that "enforcement requires the exercise of some degree of police judgment" does not mean that a criminal statute fails to provide fair notice of what conduct it prohibits. Hill, 530 U.S. at 733 (quoting Grayned, 408 U.S. at 114); cf. Ps' PI Memo at 47-48. "[B]ecause we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'" Hill, 530 U.S. at 733 (quoting Grayned, 408 U.S. at 110). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward, 491 U.S. at 794.

E. Plaintiffs Have No Right to Loiter in All Public Places at All Times.

Plaintiffs are also unlikely to succeed on the claim that the revised Act violates their "freedom to loiter for innocent purposes," in their Seventh Cause of Action. See Complaint ¶ 135. Plaintiffs base this claim on a statement by the three-justice plurality in City of Chicago v Morales, 527 U.S. 41, 53 (1999), which concerned a city-wide anti-loitering ordinance. See Ps' PI Memo at 33. As the plurality made clear, the reference to a "freedom to loiter for innocent purposes" was dicta, since the Court struck down the ordinance because it was unconstitutionally vague. See Morales, 527 U.S. at 55 & 64 n.35; see also Lofton v. Secretary of Dept. of Children and Family Services, 377 F.3d 1275, 1312 n.57 (11th Cir. 2004) (in Morales, "the Court never reached the issue of whether the city had violated a liberty interest in loitering").

The Morales dictum regarding freedom to loiter, "while perhaps some support for the general right to intrastate travel, cannot be read as the Supreme Court's mandating that a right to loiter in all places deemed 'public' is a fundamental liberty interest." Doe v. City of Lafayette, Indiana, 377 F.3d 757, 772 (7th Cir. 2004) (affirming city order banning convicted sex offender from city's parks) (emphasis in original). Whatever interest plaintiffs may have in public

loitering, the Commonwealth retains the right to protect public safety by barring protesters from clearly defined buffer zones where doing so satisfies the requirements for content-neutral restrictions on the freedom of expression. See, e.g., Menotti, 409 F.3d at 1156 ("While respecting the liberty of protestors, a city must be permitted to act reasonably, within the bounds of the Constitution, to fulfill its responsibilities of providing physical security and the maintenance of order. . . ."). A state or municipality "may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes . . . and may even forbid altogether such use of some of its facilities." Hudgens v. N.L.R.B., 424 U.S. 507, 520 (1976) (citations omitted). Plaintiffs have no "constitutional right" to engage in protest or the public expression of their views "whenever and however and wherever they please." Adderley v. Florida, 385 U.S. 39, 48 (1966) (upholding conviction for criminal trespass of protestors who were blocking driveway to jail entrance); accord, e.g., Heffron, 452 U.S. at 647.

II. THE PUBLIC INTEREST WEIGHS AGAINST, AND THE BALANCE OF THE EQUITIES DOES NOT WEIGH IN FAVOR OF, GRANTING THE PRELIMINARY INJUNCTION.

Since plaintiffs cannot establish that they are likely to succeed on the merits, the Court "need go no further" to deny the motion for preliminary injunction. McGuire I, 260 F.3d at 51 (reversing preliminary injunction against original Act, on ground that plaintiffs were unlikely to succeed on any of their claims).

In addition, however, the public interest weighs heavily against granting the preliminary injunction sought here by plaintiffs. It is undisputed that the purpose of the revised Act, just like the original Act upheld by the First Circuit, is to "protect[] safety and access to medical care." McGuire II, 386 F.3d at 57. The revised Act has put an end to repeated physical confrontations between protestors and clinic patients, staff, or volunteers immediately in front of clinic

entrances and driveways. See pages 7-8, above. Establishing clear buffer zones around RHCF entrances and driveways "furthers conventional objectives of the state's police power — promoting public health, preserving personal security, and affording safe access to medical services." McGuire I, 260 F.3d at 44. Plaintiffs concede this important fact. See Complaint ¶ 17. They do not dispute "that the Act was designed to protect the health and safety of women seeking reproductive health care services." Ps' PI Memo at 34. In Madsen, the Supreme Court held that the combination of the state's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," and its "strong interest in ensuring the public safety and order, [and] in promoting the free flow of traffic on public streets and sidewalks," was "quite sufficient to justify" an injunction requiring protestors to stay outside a fixed, 36-foot buffer zone around the clinic's entire property. Madsen, 512 U.S. at 767-68. Similarly, the public interest in continued enforcement of the Act is "quite sufficient" to justify denial of the preliminary injunction sought here by plaintiffs.

The balance of equities does not weigh in favor of the requested injunction. Cf. Ps' PI Memo at 10-15. Defendant recognizes that "[a] burden on protected speech always causes some degree of irreparable harm," and that "freedom of expression, especially freedom of political expression, is vital to the health of our democracy." Bl(a)ck Tea Society, 378 F.3d at 15. It is equally true, however, that "the safety, security, and logistical concerns" that caused the Legislature to revise the Act are very real; "making public safety a reality and ensuring that" patients and staff may enter clinics without running a narrow, hostile gauntlet are also vitally important. Id. Plaintiffs' expressed interest in unregulated freedom of expression immediately next to RHCF entrances and driveways does not trump the strong public interest in public safety and reasonable access to medical care. See Madsen, 512 U.S. at 767-68.

Conclusion.

For the reasons stated, the court should deny the motion for a preliminary injunction.

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February 20, 2008

Certificate of Service

I hereby certify that this document and the affidavits cited herein were filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent to those indicated on the NEF as non registered participants on or before February 21, 2008.

/s/ Kenneth W. Salinger .

Statutory Addendum.

G.L. c. 266, § 120E1/2 (as amended November 13, 2007)

(a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.

(b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:--

(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.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff, deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 nor more than $5,000 or not more than two and one-half years in a jail or house of correction, or by both such fine and imprisonment. A person who knowingly violates this provision may be arrested without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care

facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

G.L. c. 266, § 120E 1/2, ¶ (b) (as in effect prior to November 13, 2007)

(b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway. This subsection shall not apply to the following:--

(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.