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

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE BENCH TRIAL ON PLAINTIFF'S FACIAL CHALLENGE

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Introduction

Defendant Martha Coakley, in her capacity as Attorney General of the Commonwealth of Massachusetts, respectfully requests that the Court make the following findings of fact and conclusions of law with respect to plaintiffs' claims that Mass. G.L. c. 266, § 120E1/2, as revised in November 2007, is unconstitutional on its face.

PROPOSED FINDINGS OF FACT

Introduction

1. In November 2007, the Massachusetts Legislature amended a state statute that limits access to public ways and sidewalks immediately next to entrances and driveways of reproductive health care facilities ("RHCFs" or "clinics"). See Trial Exs. 1 & 2. A copy of Mass. G.L. c. 266, § 120E1/2 (the "Act"), as revised on November 13, 2007, also appears in the addendum, below.

2. The original Act took effect in August 2000, and was subsequently upheld against claims that it was unconstitutional on its face and as applied. 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).

3. In this case, plaintiffs claim that the revised Act, as amended in November 2007, is unconstitutional both on its face and as applied. At plaintiffs' request, the Court has bifurcated its consideration of these two aspects of plaintiffs' claims, and is first considering only plaintiffs' facial challenge to the constitutionality of the revised Act. The Court conducted a bench trial on plaintiffs' facial challenge to the revised Act on May 28, 2008, based on an agreed-upon trial record.

4. The Court has received and considered the trial record submitted by stipulation of the parties, proposed findings of fact and conclusions of law submitted by each side, and the points by the parties made during closing arguments. In addition, the Court has received and

reviewed a memorandum on behalf of four amicae curiae. The Court will not, however, consider any issues raised only by the amicae, and not pressed by the plaintiffs themselves. "[N]o authority . . . allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." Lane v. First Nat. Bank of Boston, 871 F.2d 166, 175 (1st Cir. 1989); accord Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 205 n.6 (1st Cir. 1999) ("Amici cannot interject into a case issues which the litigants have chosen to ignore.").

5. The following findings of fact — regarding the Legislature's purpose in adopting the original Act and revising it in 2007, the governmental interests served by both versions of the Act, and the manner in which the exemptions in the Act have been authoritatively construed by the Massachusetts Attorney General — are based on the trial record. With respect to the original Act, the Court also takes note of the findings by the First Circuit concerning the legislative justification for the original Act, based on its evaluation of the evidentiary record in the McGuire case. The Court may take notice of such legislative facts, as they relate to the legislative justification for the statute at issue, and in any case are not challenged by these plaintiffs. See, e.g., Daggett v. Commission on Governmental Ethics and Election Practices, 205 F.3d 445, 455 - 456 & n.9 (1st Cir. 2000); Daggett v. Commission on Governmental Ethics and Election Practices, 172 F.3d 104, 112 (1st Cir. 1999) ("the ordinary limits on judicial notice hav[e] no application to legislative facts").

The Original Massachusetts Buffer Zone Statute

6. As the First Circuit has explained, "[t]he Massachusetts legislature, concerned about a history of violence outside abortion clinics and the harassment and intimidation of women attempting to use such facilities, enacted in 2000 the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws ch. 266, § 120E1/2." McGuire II, 386 F.3d at 48; see also Trial Ex. 29 (Affidavit of Richard A. Powell, ¶¶ 1-15 and exs. A-G).

7. 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. These conclusions by the First Circuit are amply supported by the record evidence in this case. See Trial Ex. 29 (Powell Aff., ¶¶ 1-6 and exs. A-F).

8. In April 1999, the state Senate held a hearing in which clinic patients and staff described how aggressive harassment by protestors immediately outside of RHCFs left them fearful and anxious. See Trial Ex. 29 (Powell Aff., ¶¶ 1-6 and exs. A-F). "The received testimony chronicled the harassment and intimidation that typically occurred outside RHCFs. In addition, numerous witnesses addressed the emotional and physical vulnerability of women seeking to avail themselves of abortion services, and gave accounts of the deleterious effects of overly aggressive demonstrations on patients and providers alike." McGuire I, 260 F.3d at 39. For example:

a. A physician who worked at the Planned Parenthood League of Massachusetts facility in Boston ("PPLM-Boston") described how when she drove to and arrived at work protestors would surround her car, press their faces to her windows, call out her first name, call her a murderer, and videotape her. See written testimony of Maureen Paul, M.D., M.P.H., in Trial Ex. 29 (Powell Aff., ex. A, 3rd ¶).

b. The clinical director for a clinic in Boston described protestors frightening patients by thrusting literature into their faces, pursuing them right up to the clinic door while yelling, and physically interfering with patients trying to enter the garage. See written testimony of Alice Verhoeven, in Trial Ex. 29 (Powell Aff., ex. B).

c. The director for a clinic in Worcester described how patients and staff trying to enter the clinic were verbally harassed and threatened (by comments like "murderer," "baby killer," "I'm watching you," and "you won't be smiling for long"), and how protestors repeatedly blocked vehicles trying to enter the clinic driveway. See written testimony of Karen Caponi, in Trial Ex. 29 (Powell Aff., ex. C).

d. A nurse who worked at a clinic in Boston described the time that protestors physically blocked her access to the parking garage, while screaming at her and making

comments about her nationality, and then prevented her from driving away by continuously circling her car and standing behind it. See written testimony of Filomena Katia Natale, in Trial Ex. 29 (Powell Aff., ex. D).

e. A volunteer at a clinic in Boston described incidents she observed in which: (i) protestors circled a car and screamed at a patient's three young children; (ii) protestors trapped a young patient and her elderly grandfather in a taxi cab, and then screamed at both and shoved the grandfather, almost knocking him down, as they went into the clinic; and (iii) a protestor tried to block a car from entering the clinic garage, banged on the car windows and screamed at the passengers, pushed the volunteer onto the car windshield as the vehicle finally was able to start moving into the garage, and finally admonished the volunteer to "watch your back" because she had just been videotaped by other protestors and "we know who you are." See written testimony of Nagim Kormi, in Trial Ex. 29 (Powell Aff., ex. E).

f. A patient trying to enter a clinic in Boston described being scared when one protestor blocked the doorway and put his hand on the patient's right shoulder, while another protestor was yelling at the patient. See December 5, 1998 harassment incident report of Boston Planned Parenthood clinic patient "Vanessa", in Trial Ex. 29 (Powell Aff., ex. F).

9. This legislative hearing in April 1999 came after and was in response to years of continuing disturbances at clinics, including a 1994 shooting incident in which two clinic employees died and several other persons were injured, and repeated court injunctions that failed to put an end to harassing and confrontational conduct by protestors next to RHCFs. See McGuire II, 386 F.3d at 48; McGuire I, 260 F.3d at 39 & 52 (Appendix B); see also Planned Parenthood League of Massachusetts v. Bell, 424 Mass. 573 (1997) (affirming preliminary injunction prohibiting protestor from entering within 50 feet of clinic); Commonwealth v. Manning, 41 Mass. App. Ct. 696 (1996) (affirming criminal contempt conviction for violating injunction against blocking access to abortion clinic); Commonwealth v. Filos, 420 Mass. 348

(1995) (affirming criminal contempt conviction for aiding and abetting abortion clinic protesters in violation of an injunction); Planned Parenthood League of Massachusetts v. Blake, 417 Mass. 467 (1994); Commonwealth v. Cotter, 415 Mass. 183 (1993) (affirming criminal contempt conviction for violating preliminary injunction prohibiting defendant from obstructing activities of facilities that provide abortion counseling or services, and sentence of imprisonment after defendant refused to accept as a condition of probation a requirement that he not participate in unlawful activities of abortion protest groups); Commonwealth v. Brogan, 415 Mass. 169 (1993) (affirming criminal contempt conviction for violating order prohibiting defendant from obstructing activities of facilities that provide abortion counseling or services); Planned Parenthood League of Massachusetts v. Operation Rescue, 406 Mass. 701 (1990) (affirming permanent injunction barring defendants from, among other things, obstructing access to any facility in the Commonwealth that provides abortion counseling or services or using force against persons entering or leaving or working at any such facility).

10. As the First Circuit noted, "[b]y the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside RHCFs," and [c]oncerned legislators responded to these disturbances" by filing the bill that was the subject of the April 1999 hearing. McGuire I, 260 F.3d at 39.

11. 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 Massachusetts 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).

12. After the Supreme Court's decision in Hill v. Colorado, 530 U.S. 703 (2000), 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. Trial Ex. 3; Trial Ex. 29 (Powell Aff. ¶ 15 and ex. G) . The original Act included the following three provisions.

a. First, the Act as passed in 2000 made it unlawful to "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." Trial Ex. 3 (Mass. St. 2000, c. 217, § 2, ¶ (b)).

b. Second, the Legislature exempted four categories of persons from the Act's coverage:

> "(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."

Trial Ex. 3 (Mass. St. 2000, c. 217, § 2, ¶ (b)).

c. Third, the Act stated that these provisions "shall only take effect during a facility's business hours and [only] if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted." Trial Ex. 3 (Mass. St. 2000, c. 217, § 2, ¶ (c)).

13. The original Act was challenged in court by three individuals, one of whom is also a plaintiff in the current action. In November 2000, the district court (Harrington, J.)

declared the original Act to be viewpoint discriminatory and unconstitutional on its face as violative of the First Amendment to the United States Constitution, and issued a preliminary injunction against enforcement of the Act. McGuire v. Reilly, 122 F.Supp.2d 97, 104 (2000). The First Circuit reversed, holding that as a matter of law the original Act, "on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." McGuire I, 260 F.3d at 39. On remand, the district court allowed defendants' motion for summary judgment on plaintiffs' facial challenge, holding that these claims had been resolved by the First Circuit in McGuire I. See McGuire v. Reilly, 230 F.Supp.2d 189, 193 n.10 (2002). After discovery, the court also held "that the Act is not unconstitutional as-applied to the circumstances in this case," and granted defendants' motion for summary judgment on the as-applied challenge. McGuire v. Reilly, 271 F.Supp.2d 335, 343 (2003). The district court then denied plaintiffs' motion to alter or amend the judgment. McGuire v. Reilly, 285 F.Supp.2d 82 (2003). On appeal, the First Circuit affirmed the grant of summary judgment for the defendants on both the facial claim and the as-applied claim. McGuire II, 386 F.3d at 65-66.

14. During the course of the McGuire litigation, the Massachusetts Attorney General gave a limiting construction to the exemption from the original Act for "employees or agents of such facility acting within the scope of their employment," and that limiting construction was given substantial weight by the reviewing courts.

a. In November 2000, the Attorney General's office advised the police departments of Brookline and Boston, by letter, that the exemption for clinic employees and agents applied only when such persons were "acting within the scope of their employment." McGuire II, 386 F.3d at 52. In that letter, "the Attorney General noted that if escorts were to approach within six feet of a woman within the fixed buffer zone in order to 'hurl[] epithets at demonstrators,' then their actions would not be within the scope of their employment and they would not be protected by the exemption." Id. The Attorney General reiterated this guidance in training sessions provided to the Boston and Brookline police departments in July 2001. Id.

b. In February 2003, the Attorney General sent a letter to the police departments of the four municipalities with RHCFs affected by the original Act, stating that clinic employees and agents were, like everyone else, subject to the Act's restrictions on oral protest, education, or counseling, and that the exemption for clinic employees and agents did not permit such individuals to "express their views about abortion" within the restricted area. McGuire v. Reilly, 271 F.Supp.2d 335, 339-40 (2003).

c. In McGuire, the district court found, based on these letters, that "the Act has . . . been interpreted by the Attorney General so as to require evenhanded enforcement of its prohibitions, even against clinic employees and agents," and that "the Attorney General's interpretation, like the Act itself, appears to be content-neutral." McGuire, 271 F.Supp.2d at 341 & n.10. The district court added that "[t]he Attorney General's narrow interpretation of the employee and agent exemption appears to be a vigorous attempt to construe the Act in accordance with [McGuire I]," and stated that the court "looks favorably upon the Attorney General's narrowing construction of the exemption." McGuire, 271 F.Supp.2d at 342.

d. The First Circuit agreed. It stated that the Attorney General's guidance letters have "clearly construed the [clinic employee and agent] exemption to exclude pro-abortion or partisan speech from the term 'scope of their employment." McGuire II, 386 F.3d at 52 n.1. It held that "[t]he Attorney General's interpretation . . . is clearly a proper, content-neutral way of interpreting the exemption." Id. at 64.

The November 2007 Revision to the Massachusetts Buffer Zone Statute

15. The Legislature revised the Act in November 2007 "to increase forthwith public safety at reproductive health care facilities," and declared the revision "to be an emergency law, necessary for the immediate preservation of the public safety." Trial Ex. 1 (Mass. St. 2007, c. 155, emergency preamble).

16. The legislative purpose of the statutory revision 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 — [including] pedestrians travelling peacefully on Massachusetts streets and sidewalks" immediately adjacent to RHCF entrances and driveways. Complaint ¶ 17; see also Trial Ex. 20 (Senate Bill. No. 1353, preamble).

17. The 2007 revision had the effect of modifying the size and nature of the statutory buffer zone. See Trial Ex. 1 (Mass. St. 2007, c. 155). The original 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 RHCF entrance or driveway, if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," "engaging in oral protest, education or counseling." See McGuire II, 386 F.3d at 48-49; Trial Ex. 3 (Mass. St. 2000, c. 217, § 2, ¶ (b)). 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]." Trial Exs. 1 & 2 (G.L. c. 266, § 120E1/2(b)).

18. In all other substantive respects the buffer zone provision of the Act remains identical to the version upheld by the First Circuit.

a. First, 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." Trial Ex. 2 (Mass. G.L. c. 266, § 120E1/2(c)). This portion of the Act was not changed by the 2007 revision. Under this provision, if no buffer zone is marked and posted at a particular clinic, the Act has no effect in that location. Similarly, if a buffer zone of less than 35 feet in radius is marked and posted at a particular clinic, the revised Act will be enforceable only to the limits of the buffer zone that has actually been marked, and not to the full 35 feet permitted by the revised Act.

b. Second, 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. Trial Ex. 2 (Mass. G.L. c. 266, § 120E1/2(b)(1)-(4)). This portion of the Act was also left unchanged by the 2007 revision.

19. The Act was revised in November 2007 after the Massachusetts Legislature learned, in particular through a public hearing before the Joint Committee on Public Safety and Homeland Security on May 16, 2007, that clinic patients were still being harassed immediately adjacent to RHCF entrances and driveways, clinic access was still being blocked, and law enforcement officials found that the "approach" element of the original buffer zone statute made it very hard to enforce the original Act. See Trial Ex. 24 (Affidavit of Adam T. Martignetti, exs. B-G) (containing copies of written testimony by clinic staff, volunteers, and representatives, and by Attorney General Martha Coakley); Trial Ex. 26 (Affidavit of Vineeth Narayanan, ex. C at 14-27, 39-49) (containing 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).

20. The testimony received by the Legislature at the May 2007 hearing demonstrated that, under the original Act, harassment and intimidation of patients and staff continued to occur immediately outside RHCF entrances and driveways, and that as a result public safety continued to be threatened in those locations and clinic access continued to be blocked by protestors positioning themselves very close to clinic entrances and driveways. For example:

a. A patient advocate at a clinic in Attleboro provided written testimony that protestors frequently paced across (and thereby blocked access to) the clinic driveway, and physically impeded access to clinic doors. See written testimony of Melissa Conroy, in Trial Ex. 24 (Martignetti Aff., ex. B).

b. Attorney General Coakley played for the legislative committee a video recording of protests taking place outside of the PPLM-Boston facility. Attorney General Coakley directed the Committee's attention to one protestor pictured in the video

following a woman into the entranceway of the clinic, and to another protestor in the video who approached and placed her head inside of a car outside of the clinic. See Oral testimony of Attorney General Coakley, in Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript at 18-19).

c. A volunteer at a Boston clinic reported that over time protestors had moved closer and closer to the main door, where they would scream and block the way for patients trying to enter the clinic, that on rainy days clinic volunteers have been hit by the umbrellas of protestors standing very close to the front door, and that protestors within 18 feet of the clinic entrance tried to hand brochures to patients even after the patient asked them to stay away. See written testimony of Gail Kaplan, in Trial Ex. 24 (Martignetti Aff., ex. C); oral testimony of Gail Kaplan, in Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript at 39-40).

d. Another volunteer at a Boston clinic reported that protestors physically blocked access to the clinic by standing in front of the door, that protestors pushed pamphlets through open windows of cars stopped at the garage entrance, and that protestors continued to scream at patients who asked not to be spoken to. See written testimony of Liz McMahon, in Trial Ex. 24 (Martignetti Aff., ex. F).

e. The president of Planned Parenthood League of Massachusetts reported that she had personally observed protestors stand immediately adjacent to the clinic doorway and scream at patients and employees, protestors photograph and film the license plates and people inside patients' and employees' cars, protestors block access to the clinic garage so they could throw pamphlets into cars stopped while trying to enter the garage, and protestors wear Boston Police t-shirts and hats and try to collect patient contact information. See written testimony of Diane Luby, in Trial Ex. 24 (Martignetti Aff., ex. G).

f. The Committee was shown photos of a protestor wearing a shirt that said "Boston Police," standing immediately next to a car trying to enter a clinic garage, and

were told by Capt. Evans that protestors "wearing police hats and police uniforms" would not infrequently impersonate police officers as a way to get patients and others trying to enter the PPLM-Boston facility to consent to the protestor's approach. See oral testimony of Capt. Evans, in Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript at 35-37).

g. An individual in charge of security at several clinics reported that on a regular basis women trying to drive to a clinic would turn away because protestors were blocking the driveway. See oral testimony of Michael Baniukiewicz, in Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript at 50-51).

h. Attorney General Martha Coakley informed the Legislature that "[d]emonstrators regularly crowd facility entrances and surround women, facility employees and volunteers with graphic and discomfiting pictures of aborted fetuses, and shout at and taunt them calling them 'baby killers' and 'murderers'." See written testimony of Attorney General Coakley, 3rd page, in Trial Ex. 24 (Martignetti Aff., ex. D). She further explained that:

> Protestors also stand and block cars as patients and employees attempt to enter the driveway or garage entrance to these facilities. Other times, protestors circle cars and put their faces against, or in close proximity to, the car windows to scream at and sometimes videotape people in cars. In some case, protestors throw anti-abortion literature and leaflets into people's cars as they enter or exit the facilities. Even more egregious are the protestors who dress as Boston Police Department officers and approach women and their companions at close distance, pretending that they are escorting them to the clinic's entrance, only to taunt them or force leaflets into their hands as they make their way to and from the healthcare facilities.

Id., 4th-5th pages.

21. Additional sworn testimony presented to this Court confirmed that, after passage of the original Act, confrontational conduct by protestors continued to occur immediately in front of clinic entrances and driveways.

a. For example, at 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. Trial Ex. 22 (Affidavit of [Captain] William B. Evans, ¶ 11); see also Trial Ex. 21 (Affidavit of Michael T. Baniukiewicz, ¶¶ 17-18).

b. "There were frequent disturbances, including physical jostling, outside of the facility." Trial Ex. 22 (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, leading to confrontations between protestors and the male companions of patients trying to enter a clinic. Trial Ex. 27 (O'Connell Aff. ¶ 13); Trial Ex. 21 (Baniukiewicz Aff. ¶¶ 17-20).

c. On 10 or more occasions, physical confrontations between pro-choice and pro-life protestors led to disturbances inside the 18-foot zone immediately outside the entrance to the PPLM-Boston facility. Trial Ex. 22 (Evans Aff. ¶ 9). For a period of time a particular group of pro-abortion demonstrators would show up at the time of the regular Saturday protests by anti-abortion demonstrators, and try to push aside anti-abortion protestors who had positioned themselves within the 18-foot buffer zone. Id. The combined presence of all the protestors inside the 18-foot region would effectively block the door to the clinic. Id.

d. Protestors also stationed themselves at the rear garage entrance to the facility, yelling from close range at cars entering the garage. Trial Ex. 22 (Evans Aff. ¶ 13); Trial Ex. 21 (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. Trial Ex. 22 (Evans Aff. ¶¶ 12-13).

e. 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. Trial Ex. 21 (Baniukiewicz Aff. ¶ 29). Patients were frightened and upset when they learned that the protestors were not police. Id.

22. At the legislative hearing, two state representatives stood approximately 35 feet apart, the size of the proposed new buffer zone, and demonstrated that they could speak to and be heard by each other. See hearing transcript at 8-9, in Trial Ex. 26 (Narayanan Aff., ex. C).

23. In addition, law enforcement representatives told the Legislature that: (i) creating a fixed and clearly defined buffer zone around RHCF entrances and clinics was needed to address an important public safety issue; and (ii) 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. See written testimony of Attorney General Martha Coakley, 3rd-4th pages, in Trial Ex. 24 (Martignetti Aff., ex. D); oral testimony by Boston Police Capt. Evans, in Trial Ex. 22 (Evans Aff., ex. A at 25-27); accord Trial Ex. 22 (Evans Aff. ¶¶ 7-11); Trial Ex. 27 (Affidavit of Detective Arthur O'Connell, ¶ 8).

24. As Capt. Evans explained to the Legislature, under the original Act 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. Trial Ex. 22 (Evans Aff., ex. A at 25-26, 33-34 (oral testimony to Legislature)). In response to a question from the legislative committee, 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. He explained that this made it very hard to keep patients safe immediately next to clinic entrances. Id. at 34-35.

25. Capt. Evans urged the Legislature to adopt a fixed, 35-foot buffer zone, stating:

> 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. Trial Ex. 24 (Martignetti Aff. ¶¶ 7-12).

26. In sum, there were ample grounds for and solid evidence supporting the Legislature's findings in 2007 that it needed to revise the statute in order to ensure that access to clinics was not blocked and that patients and staff could enter and exit clinics safely.

27. On November 13, 2007, the Governor signed Senate Bill No. 1353 into law, and the fixed 35-foot buffer zone took effect immediately. Trial Ex. 24 (Martignetti Aff., ¶ 12).

The Attorney General's January 2008 Guidance Letters

28. 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. Trial Ex. 26 (Narayanan Aff. ¶ 2 and exs. A & B). The letters reminded the recipients of the key provisions of the Act. Id.

29. Each letter also included guidance from the Attorney General regarding how each of the four exemptions to the buffer zone provision is to be interpreted and applied. Trial Ex. 26 (Narayanan Aff., ¶ 5 & exs. A & B). Specifically, each letter included the following four paragraphs:

> 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. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.
>
> The 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.
>
> Similarly, the third exemption — for municipal employees or agents acting within the scope of their employment — does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.
>
> Finally, the fourth exemption — for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic — applies 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. 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.

30. The Attorney General's discussion in these guidance letters of the second exemption, for clinic employees and agents, merely reiterates the interpretation previously given this same provision by the First Circuit. In McGuire I, the First Circuit held that this exemption was content-neutral and reasonably related to the public safety objectives of the Act, "because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs." 260 F.3d at 46. In McGuire II, the First Circuit noted with approval that the Attorney General "has clearly construed the exemption to exclude pro-abortion or partisan speech from the term 'scope of their employment,'" 386 F.3d at 52 n.1, and held that this interpretation "is clearly a proper, content-neutral way of interpreting the exemption," id. at 64.

31. Thus, the paragraph in the Attorney General's latest guidance letter regarding the scope of the "clinic employee and agents exemption" properly reflects salient aspects of the First Circuit's prior holdings that the exemption was constitutionally permissible.

The Revised Act Has Improved Public Safety While Allowing For Continued Protests and Other Communicative Activities Next to Clinics

32. Since plaintiffs' facial challenges to the Act's constitutionality have been bifurcated and tried separately, the Court does not at this time make findings with respect to plaintiffs' as-applied challenges; nor does it have before it a complete record upon which it could make such findings concerning the as-applied claims. However, the record evidence regarding the manner in which the revised Act has been implemented to date is relevant to the issues of whether the revised Act is narrowly tailored to address significant government interests, and the extent to which the revised Act leaves open ample alternative channels for communication with patients and staff of RHCFs.

33. The revised Act has substantially reduced the number of confrontations between protestors and patients or their companions, consistent with the legislative purpose. Trial Ex. 27 (O'Connell Aff., ¶ 9); Trial Ex. 21 (Baniukiewicz Aff., ¶ 23). 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. Trial Ex. 27 (O'Connell Aff. ¶¶ 15-16); Trial Ex. 25 (Affidavit of [Detective] William McDermott, ¶ 9). To date no one has been arrested for or charged with violating the revised Act. Trial Ex. 27 (O'Connell Aff. ¶ 17); Trial Ex. 25 (McDermott Aff. ¶ 8).

34. At PPLM-Boston, groups of protestors can and do continue to stand near the front entrance and rear garage entrance, outside of the marked buffer zones, bearing large signs, offering leaflets or handbills, praying, singing, chanting, and speaking with or calling out to passersby and persons entering the clinic, sometimes using amplification devices. Trial Ex. 27 (O'Connell Aff. ¶¶ 6-7, 10-14); Trial Ex. 28 (Affidavit of Nicholas P. Paras, ¶ 8 & exs. F-K); Trial Ex. 21 (Baniukiewicz Aff. ¶ 21). "Protestors continue to have close contact with patients and others approaching the clinic." Trial Ex. 27 (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. Trial Ex. 27 (O'Connell Aff. ¶¶ 11, 13); Trial Ex. 21 (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. Trial Ex. 27 (O'Connell Aff. ¶ 11). Protestors in front of the clinic can be heard from 40-50 feet away during a typical Saturday protest. Trial Ex. 28 (Paras Aff. ¶ 8.g).

35. 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." Trial Ex. 25 (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. Trial Ex. 23 (Affidavit of Eric W. Funk, ¶¶ 3-5 & exs. A-C); Trial Ex. 21 (Baniukiewicz Aff. ¶ 8). Patients usually arrive by car, and enter the

parking lot by one of two driveways. Trial Ex. 25 (McDermott Aff., ¶ 4). Cars turning into the parking lot are generally driving too fast to stop. Trial Ex. 25 (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. Trial Ex. 25 (McDermott Aff. ¶ 12). Today, under the revised Act, protestors continue to engage in the same activities from the same part of the public sidewalk. Trial Ex. 25 (McDermott Aff. ¶ 12); Trial Ex. 23 (Funk Aff. ¶ 7 & exs. C, E & F). They also continue to affix large signs to cars they park across the street. Trial Ex. 25 (McDermott Aff. ¶ 13). From the public sidewalk where the protestors stand, the edge of the parking lot is only a few feet away, across a grassy median. Trial Ex. 23 (Funk Aff., exs. C, E & F). 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. Trial Ex. 25 (McDermott Aff. ¶ 12); Trial Ex. 23 (Funk Aff. ¶ 7).

PROPOSED CONCLUSIONS OF LAW

36. For the reasons set forth below, the Court finds that plaintiffs have failed to meet their heavy burden of proving that the revised Act violates the First Amendment, or is otherwise unconstitutional, on its face.

Standard of Review

37. "[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)); accord, e.g., Pharmaceutical Care Management Ass'n v. Rowe, 429 F.3d 294, 307 (1st Cir. 2005). "In the First Amendment context, this means that a plaintiff who challenges a statute on its face ordinarily must show

either that the law admits of no valid application or that, even if one or more valid application exists, the law's reach nevertheless is so elongated that it threatens to inhibit constitutionally protected speech." McGuire I, 260 F.3d at 47; accord, e.g., Naser Jewelers, Inc. v. City of Concord, N.H., 513 F.3d 27, 33 (1st Cir. 2008) (affirming denial of preliminary injunction in First Amendment challenge to local ordinance prohibiting all signs that display electronically changeable messages).

38. The Court is not writing on a blank slate in deciding plaintiffs' facial challenge to the revised Act. It recognizes that similar, as well as more onerous, restrictions protest within public ways and sidewalks have passed muster as constitutional limitations on the time, place, and manner of speech in public fora. For example, the Supreme Court, the First Circuit, and in the last instance the Ninth Circuit have 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);
- 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);
- a Massachusetts statute establishing an 18-foot buffer zone around RHCF entrances, within which it was unlawful to approach within six feet of someone without their consent in order to pass a leaflet, display a sign, or engage in oral protest, education, or counseling, in McGuire I, 260 F.3d 36 (1st Cir. 2001), and McGuire II, 386 F.3d 45 (1st Cir. 2004);
- rules confining demonstrators wishing to be heard by 2004 Democratic National Convention delegates in downtown Boston to a heavily secured "pen," surrounded by fencing and mesh fabric and placed beneath rail tracks, in Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004); and

- an ordinance barring most persons from a very large part of downtown Seattle during World Trade Organization meeting, in Menotti v. City of Seattle, 409 F.3d 1113, 1125, 1128-42 (9th Cir. 2005).

39. As discussed below, the buffer zone at issue here is narrower than the fixed buffer zones previously upheld in Burson, Madsen, Bl(a)ck Tea Society, and Menotti, and not materially different than the fixed 15-foot buffer zone upheld in Schenck.

Plaintiffs' Causes of Action

I. First Cause of Action: The Act Is a Lawful "Time and Place" Regulation of Who Is Allowed, During Business Hours, Next to Clinic Entrances and Driveways.

40. Like the original Act upheld in McGuire I and McGuire II, the revised Act is a lawful regulation of who is allowed, during business hours, immediately next to clinic entrances and driveways. It has the effect of imposing reasonable restrictions on the time and place of speech around clinic entrances and driveways.

41. "Reasonable restrictions as to the time, place, and manner of speech in public fora are permissible, provided that those restrictions [1] 'are justified without reference to the content of the regulated speech, . . . [2] are narrowly tailored to serve a significant governmental interest, and . . . [3] leave open ample alternative channels for communication of the information.'" Bl(a)ck Tea Society, 378 F.3d at 12 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

42. As explained below, the revised Act meets these three requirements of the Ward test. Thus, there is no merit to plaintiffs' claim that on its face the Act is not a valid, content-neutral regulation of the time and place of expressive activity. See Complaint ¶¶ 75-84.

43. This case involves a facial constitutional challenge to a law of general application, not a request by law enforcement officials for injunctive relief against specific protestors. Such a statute reflects "a legislative choice regarding the promotion of particular societal interests." Madsen, 512 U.S. at 764. "Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree," and "carry greater risks of censorship and discriminatory application than do general ordinances." Id.

44. This difference matters here, because a buffer-zone statute of general application is subject to a less stringent standard of review than an injunction imposing buffer-zone restrictions only on certain individuals. Hill, 530 U.S. at 731; Madsen, 512 U.S. at 764-65. If this case were a request for a targeted injunction, then the Court would have to apply "a somewhat more stringent application of general First Amendment principles." Madsen, 512 U.S. at 765 (reviewing buffer zone injunction). But since the revised Act is a law of general application reflecting "a general policy choice" by the Massachusetts Legislature, it "is assessed under the constitutional standard set forth in Ward, 491 U.S. at 791, rather than a more strict standard." Hill, 530 U.S. at 731 (reviewing buffer zone statute).

A. The Act Is Content Neutral.

1. The Revised Act Still Has a Content-Neutral Purpose.

45. The First Circuit held that the original Act was content neutral. McGuire I, 260 F.3d at 43-45; McGuire II, 386 F.3d at 57-59. The Legislature's 2007 revision to the physical area to which the Act may be applied does not undermine the content neutrality of the statute.

46. Because the revised Act is content neutral, as discussed below, it "enjoy[s] a presumption of constitutionality." Naser Jewelers, 513 F.3d at 33.

47. "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; accord McGuire I, 260 F.3d at 44.

a. "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 revised Act, like the buffer zone statute upheld in Hill, "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. Under the revised Act, plaintiffs and

others are free to engage in any kind of speech they wish, so long as they do not do so within a clearly marked and posted buffer zone during clinic business hours. The Act imposes no limits on the content of opinions or information that may be offered or provided near RHCFs.

b. "Second, [the Act] 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). The Act does not target speech about abortion or by abortion opponents.

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

48. In finding the original Act to be content neutral, the First Circuit emphasized the third of these points. It explained that "the core inquiry for determining content neutrality is . . . whether the legislative reason for the law is content neutral." McGuire II, 386 F.3d at 57. "As long as a regulation serves a legitimate purpose unrelated to expressive content, it is deemed content-neutral, even if it has an incidental effect on some speakers and not others." McGuire I, 260 F.3d at 44 (citing Ward, 491 U.S. at 791). The First Circuit "conclude[d], without much question, that the Act's stated goals" — including "public safety" and "affording safe access to medical services" — "justify its application to RHCFs." Id.

49. The stated goal of the revised Act is essentially unchanged. As noted above, the legislative purpose of the statutory revision 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 — [including] pedestrians travelling peacefully on Massachusetts streets and sidewalks" immediately adjacent to RHCF entrances and driveways. Complaint ¶ 17; see also Trial Ex. 20 (Senate Bill. No. 1353, preamble).

50. Thus, it remains true that, "considered as a whole, the Act provides a neutral justification — unrelated to the content of speech — for differential treatment" within compared to outside of a clearly marked and posted buffer zone. McGuire I, 260 F.3d at 45.

51. Because "the legislative reason for the law is content neutral," I find that the revised Act meets the constitutional standard for content neutrality. See McGuire II, 386 F.3d at 57. Just like the original Act, "the statute here has content-neutral purposes: protecting safety and access to medical care." Id.

52. 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 instead 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. The Court 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, excludes all non-exempt individuals from a clearly marked and posted buffer zone, without regard to whether they are engaged any particular kind of speech or communicative activity. The concerns of the Hill dissenters regarding content neutrality thus do not apply here.

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

53. It was constitutionally permissible for the Legislature to restrict the revised buffer zone to the areas immediately adjacent to clinic entrances and driveways, since that is where the

Legislature found that there was a continuing public safety problem. As the First Circuit found with respect to the original Act, "[j]ust 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.

54. The First Circuit has already rejected plaintiffs' assertions that, because the Act limits access only to areas immediately adjacent to RHCF entrances and driveways, it constitutes viewpoint discrimination and the content-neutral justifications for the Act are "pretextual." 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").

55. For the same reasons, the content-neutral justifications for the revised Act are not pretextual either. Plaintiffs' similar assertion that the statutory exemption for clinic employees or agents constitutes viewpoint discrimination is addressed in connection with plaintiffs' Fifth Cause of Action, below.

3. The Attorney General's Guidance Letters Do Not Undermine the Content-Neutrality of the Act.

56. There is no merit to plaintiffs' argument that Attorney General Coakley's letters construing the exemptions in the Act render the statute as a whole content-based. Indeed, this argument is foreclosed by the First Circuit's contrary holding in McGuire II.

57. The First Circuit observed that guidance letters issued by the Attorney General's office in 2003 "clearly construed the [clinic employee and agent] exemption to exclude pro-abortion or partisan speech from the term 'scope of their employment," and held that "[t]he

Attorney General's interpretation . . . is clearly a proper, content-neutral way of interpreting the exemption." McGuire II, 386 F.3d at 52 n.1 & 64.

58. Neither the language of the statutory exemptions nor the Attorney General's interpretation of the exemptions has changed since both were found by the First Circuit to be content-neutral. In January 2008, the Attorney General's office issued guidance letters once again explaining that the statutory exemptions do not permit anyone to enter a buffer zone in order "to express their views about abortion or to engage in any other partisan speech within the buffer zone." Trial Ex. 26 (Narayanan Aff., ¶ 5 & exs. A & B). This guidance merely paraphrases the language quoted above from footnote 1 of the McGuire II opinion.

59. Since the First Circuit has held that such guidance is content-neutral as a matter of law, plaintiffs' claim that a reiteration of the same guidance should be treated as content-based fails as a matter of law.

60. Plaintiffs' assertion that the Act "targets" abortion-related speech is unavailing. What the revised Act does is exclude everyone from a clearly marked and posted buffer zone during a clinic's business hours, except for individuals who fall within one of the four statutory exemptions. The exemptions have been carefully construed by the Attorney General in a content-neutral manner, consistent with the First Circuit's McGuire decisions. The revised Act, like the original Act upheld in McGuire I and McGuire II, may have the effect of restricting the time and place of speech near clinic entrances and driveways, but that effect is content-neutral.

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

1. The Act Was Revised To Solve Substantial Problems That Arose Under the Original Act.

61. The revised Act is narrowly tailored to serve significant governmental interests, specifically the protection of public safety at clinic entrances and driveways, and patient access to medical services at RHCFs. Like the original Act, 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.

62. 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 15-foot buffer zone on this basis) (emphasis in original). The Legislature was presented in May 2007 with evidence, including testimony by law enforcement officials, that under the original Act regular protests immediately outside of clinic entrances and driveways continued to block access to RHCFs and to threaten the safety of patients, staff, and others trying to enter those facilities. See Trial Ex. 24 (Martignetti Aff., exs. B-G, written testimony); Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript).

63. The Legislature received evidence that, after passage of 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 to obtain or provide medical care at a clinic. 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. Protestors continued to obstruct clinic entrances and driveways on a regular basis. Patients were upset and scared by their close-quarter confrontations with protestors. By creating a fixed 35-foot buffer zone, the revised Act eliminated these public safety problems.

64. In sum, 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.

65. The written and oral testimony presented to the Legislature in May 2007 regarding the continue public safety problems experienced by clinic patients and staff in trying to get past protestors, all under the original Act, belies plaintiffs' assertion that the evidentiary record before the Legislature was stale. 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.

66. Here, it was entirely plausible for the Legislature to infer from the evidence of ongoing problems immediately outside of clinic entrances that there would be continuing problems with public safety without passage of the revised Act. The Legislature did not merely rely on the evidence of historic problems that had been presented at the 1999 legislative hearing. Instead, it conducted a new evidentiary hearing in May 2007 so it could ascertain whether recent experience under the original Act demonstrated that there was a continuing public safety problem immediately outside of RHCF entrances and driveways. See Trial Ex. 24 (Martignetti Aff., exs. B-G, written testimony); Trial Ex. 26 (Narayanan Aff., ex. C, hearing transcript).

67. 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).

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

68. "[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); accord Naser Jewelers, 513 F.3d at 34-35.

69. The Legislature's determination that the original Act proved insufficient to protect access to RHCFs, and that a fixed, 35-foot buffer zone around clinic entrances and driveways was needed to protect public safety in these locations, is entitled to deference. See Madsen, 512 U.S. at 769-70, 114 S.Ct. at 2527 (court's determination that much narrower injunction had failed to protect access to clinic, and that fixed buffer of 36 feet around clinic's entire property line was needed instead, was entitled to deference and was sufficient to demonstrate that buffer zone was narrowly tailored "to accomplish the governmental interest at stake").

70. It is not appropriate for this Court to question whether the Legislature could have accomplished its public safety objectives by adopting a smaller fixed buffer zone (such as the 15-foot fixed buffer zone around clinic entrances that was upheld as constitutional in Schenck), or whether the evidence presented to the Legislature really warranted a larger fixed buffer zone (such as the 36-foot fixed buffer zone measured from an RHCF's property line, rather than from its entrances and driveways, that was upheld in Madsen).

71. "[T]he 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 800; accord Burson, 504 U.S. at 210-11; Naser Jewelers, 513 F.3d at 35.

72. Indeed, the Supreme Court has rejected as not of "constitutional dimension" the question whether a statutory buffer zone could have been smaller. Burson, 504 U.S. at 210-11 (upholding statute establishing a fixed, 100-foot buffer zone around polling places). Similarly, 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.

73. The buffer zone in the revised Act is substantially smaller than the buffer zone that the Supreme Court held was narrowly tailored in Madsen. Madsen involved an injunction that barred protestors from being any closer than "36 feet of the property line of the clinic as a way of ensuring access to the clinic." Madsen, 512 U.S. at 768, 114 S.Ct. at 2526. The Court held that buffer zone was narrowly tailored to accomplish the purpose of protecting clinic access. 512 U.S. at 770, 114 S.Ct. at 2527. The Madsen buffer zone, with a radius of 36 feet around a clinic's entire property line, was substantially larger than the largest buffer zone allowed by the revised Act, with a radius of 35 feet around a clinic's entrance or driveway.

74. The Act regulates conduct where public safety problems and frightening confrontations had been regularly observed under the prior version of the statute. Law enforcement officials urged the Legislature to adopt a 35-foot buffer zone in order to ensure public safety. Under these circumstances, the zone chosen by the Legislature is sufficiently narrowly tailored. See Burson, 504 U.S. at 210-11 (upholding statute establishing a fixed, 100-foot buffer zone around polling places); Madsen, 512 U.S. at 768-770 (upholding injunction imposing a fixed, 36-foot buffer zone around RHCF property); Schenck, 519 U.S. at 381 (upholding portion of injunction imposing a fixed, 15-foot buffer zone around RHCF entrances and driveways).

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

75. Plaintiffs' argument that the revised Act restricts previously lawful conduct, and that in recent years neither they nor others have been arrested for breaking the law while engaged in communicative activity outside a clinic, also misses the mark. This case does not involve a request for injunctive relief, which could only be granted to remedy unlawful behavior. Rather, the Court is considering a facial challenge to a statute of general application. The Massachusetts

Legislature is generally free to pass laws restricting previously lawful conduct that threatens public health or safety, so long it does so in a constitutionally permissible way. Cf., e.g., Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944) (affirming convictions for violating Massachusetts's child labor laws); Mile Road Corp. v. City of Boston, 345 Mass. 379, 382, 187 N.E.2d 826, 829 (1963) ("The decision as to what measures are necessary for the preservation of life, health, and morals is in the first place a matter for the Legislature, and every presumption must be made in favor of the validity of statutes enacted to further those objectives.") (upholding application of state statute prohibiting dumping of refuse or trash in an area of Boston).

76. In McGuire I, the First Circuit found "unconvincing" arguments by the plaintiffs that existing laws are sufficient to bar violent or threatening conduct, and that therefore a buffer zone statute that in addition limits "peaceful discourse" could not be considered to be narrowly tailored. McGuire I, 260 F.3d at 48-49. Plaintiffs' similar arguments here are also unavailing.

77. The constitutional test of "narrow tailoring" does not require a Legislature to rely solely upon laws aimed at specific threatening behavior, such as assault and battery or knowingly obstructing entry to a health care facility, to remedy threats to public safety and clinic access from repeated conduct immediately outside of RHCF entrances and driveways. 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.

78. 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.

79. A fixed buffer zone need not be enforced only against particular individuals who have previously engaged in threatening behavior. In Schenck, for example, the Court upheld a fixed 15-foot buffer zone around clinic entrances that applied to "all protestors." 519 U.S. at 381, 117 S.Ct. at 868. It held that this was an appropriate response to a history of protestors hindering people trying to enter or leave various clinics. Id., 519 U.S. at 380, 117 S.Ct. at 868. The record in Schenck showed that clinic protestors used "aggressive techniques, with varying levels of belligerence," that included "getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics;" and sometimes "remain[ing] in the doorways after the patients had entered the clinics, blocking others from entering and existing." Id. 519 U.S. at 363, 117 S.Ct. at 860. Just as that record justified injunctive relief against all protestors, so here the Legislature could exercise its discretion to enact prophylactic legislation of general application to protect public safety and clinic access.

80. Thus, plaintiffs' complaint that the Act applies to people who have not previously broken the law is of no constitutional moment. 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.

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

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

81. Though the revised Act restricts who may enter a clearly marked and posted buffer zone, and thereby has the effect of limiting the time and place of speech near RHCF entrances and driveways, it leaves open ample alternative channels for communication with people going into or leaving a clinic. In Madsen, the Court held that the injunction against "congregating, picketing, patrolling, demonstrating or entering" within 36 feet of the clinic's property line left open adequate alternative means of communication, because protestors could still stand as close as "10 to 12 feet from cars approaching and leaving the clinic," and could "still be seen and heard from the clinic parking lots." 514 U.S. at 768, 770, 114 S.Ct. at 2526-27. Here, the revised Act leaves open a far broader range of ways to communicate with plaintiffs' target audience.

82. 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.

83. Under the revised Act, plaintiffs and everyone else may and do continue to hold signs, pray, sing, or chant just outside of RHCFs, and may and do offer literature to, converse with, or call out to persons approaching or leaving clinics. Individuals wishing to communicate with clinic patients or staff may engage in any kind of lawful speech they wish so long as, during a clinic's business hours, they do so from outside any clearly marked and posted buffer zone. Plaintiffs and others may and do 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.

84. Similarly, the revised Act does not prevent anyone from obtaining information that they seek. For example, anyone who wants to speak with or obtain literature from a protestor or counselor standing near a buffer zone may do so.

85. 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).

86. 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.

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

87. Plaintiffs' claim that they have an 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, is foreclosed by the First Circuit's holding in Bl(a)ck Tea Society that "there is no constitutional requirement that demonstrators be granted that sort of particularized access." 378 F.3d at 14.

a. 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.

b. 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.

88. 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"). The First Circuit "has upheld in other contexts alternative means of communication" as sufficient under the third prong of the Ward test, "despite diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience." Sullivan v. City of Augusta, 511 F.3d 16, 44 (1st Cir. 2007) (emphasis added, citations omitted).

89. There is no merit to plaintiffs' argument that Schenck struck down a 15-foot floating buffer zone (not to be confused with the 15-foot fixed buffer zone upheld by the Court in the same decision) because that portion of the injunction did not permit communication from a normal conversational distance. It is true that the Court observed that the 15-foot floating buffer zone "prevent[ed] defendants . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on public sidewalks." Schenck, 519 U.S. at 377, 117 S.Ct. at 867. But the Court expressly declined to "decide whether the governmental interests involved would ever justify some sort of zone of

separation between individuals entering the clinics and protesters, measured by the distance between the two." Id. Instead, the Court held merely "that because this broad prohibition on speech 'floats', it cannot be sustained on this record," primarily because "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction." Id. 519 U.S. at 377-78, 117 S.Ct. at 867. The "floating" portion of the injunction required all protesters to stay at least 15 feet away from any person or vehicle seeking access to or leaving a clinic, no matter where in the world the person or vehicle was located. Id., 519 U.S. at 366 n.3, 117 S.Ct. at 861 n.3. In contrast, Schenck upheld a fixed 15-foot buffer zone restriction around clinic entrances and driveways, even though within its range it had the same effect on normal conversation and leafleting as the floating 15-foot buffer zone. 519 U.S. at 380-83, 117 S.Ct. at 868-69.

90. 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).

91. The revised Act allows for normal conversation and leafleting outside of any clearly marked and posted buffer zone. As the Court found above, at PPLM-Boston, for example, protestors continue to have close contact with patients and others approaching the clinic. Trial Ex. 27 (O'Connell Aff. ¶ 11). Protestors at the Boston clinic still can and do 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. Id. (¶¶ 11, 13). Similarly, at the RHCF in Brookline, protestors on the public sidewalk continue to call out to and ask to speak with people walking in the parking lot, and people in the parking lot not infrequently respond by walking toward the protestors, speaking with them, and taking their literature. Tr. Ex. 25 (McDermott Aff. ¶ 12).

92. The case law cited above establishes that there is no constitutional requirement that plaintiffs be allowed to engage in such behavior while standing inside a buffer zone that has been clearly marked and posted in accord with the revised Act.

93. In sum, the Court holds that the revised Act, on its face, is a reasonable, content-neutral, narrowly tailored restriction on the time and place of speech in public fora that leaves open ample alternative channels for communication immediately outside of RHCFs.

II. Second Cause of Action: The Act Is Not Unconstitutionally Overbroad.

94. Nor is there any merit to plaintiffs' claim that the revised Act is overbroad. 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.

95. The fact that the revised Act has the effect of requiring many kinds of communicative activity to take place from outside a clearly marked and posted buffer zone merely demonstrates 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.

96. 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.

97. Since the buffer zone permitted under the revised Act is narrowly tailored to the size reasonably deemed by the Legislature necessary to protect public safety and egress to RHCFs, as a matter of law it is not overbroad merely because it affects conduct other than that which prompted the Legislature to act. Hill, 530 U.S. at 731-32.

III. Third Cause of Action: The Act Imposes No Prior Restraint on Speech.

98. Plaintiffs' claim that the buffer zone constitutes an unlawful prior restraint on speech, see Complaint ¶¶ 92-104, is also foreclosed by Bl(a)ck Tea Society.

99. 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, 511 F.3d at 32 (parade permit ordinance was not a "prior restraint"). Plaintiffs' argument to the contrary is without merit.

100. "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.

101. "Here [plaintiffs] are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the [35]-foot buffer zone." Hill, 512 U.S. at 763 n.2, 114 S.Ct. at 2524 n.2. Thus, as a matter of law the revised Act is not an unconstitutional "prior restraint" on speech. Id.

IV. Fourth Cause of Action: The Act Does Not Violate the Free Exercise of Religion.

A. 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 Where One May Pray.

102. 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. The Act does not discriminate against a particular religion or religious practice, but instead bars all non-exempt persons from the buffer zone. There is no merit to plaintiffs' claim 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. See Complaint ¶¶ 105-113.

103. "[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 have conceded that "[l]aws of general applicability that [allegedly] infringe free exercise of religion, standing alone, are reviewed under the rational basis test." Plaintiffs' Preliminary Injunction 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.

104. 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).

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

105. 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. "Smith described such hybrid situations as involving free exercise claims brought in conjunction

with other claims of violations of constitutional protections." Parker v. Hurley, 514 F.3d 87, 97 (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, 514 F.3d at 98 (emphasis added).

106. The Court rejects 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[.]").

107. 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").

108. 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.

109. 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 holds that there is no merit to Plaintiffs' assertion that by raising a "hybrid" free exercise and free speech claim they can subject the Act to heightened scrutiny.

C. Since Plaintiffs Have Not Proved That the Act On Its Face Violates Constitutional Protections Either of Free Speech or of the Free Exercise of Religion, They Could Not Succeed On a "Hybrid" Theory Even If Such a Thing Existed Under First Amendment Doctrine.

110. In any case, even if a "hybrid" free exercise claim could, in theory, trigger heightened scrutiny, it cannot succeed where, as here, plaintiffs cannot prove 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. The Court found above that plaintiffs failed to prove that the Act violates their constitutional free speech rights. Thus, even if there were such a thing as a "hybrid" free exercise/free speech claim in theory, plaintiffs have failed to prove such a "hybrid" facial violation here.

111. Similarly, a "hybrid" free exercise claim also could not 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]in free exercise jurisprudence," the "standard constitutional threshold question" is "whether the plaintiff's free exercise is interfered with at all." Parker, 514 F.3d at 99 (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)).

112. Plaintiffs have failed to prove that the Act substantially burdens their free exercise of religion. 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).

V. Fifth Cause of Action: The Statutory Exemptions Do Not Constitute Unconstitutional Viewpoint Discrimination.

113. There is also no merit to plaintiffs' claim that the Act constitutes unconstitutional viewpoint discrimination. See Complaint ¶¶ 114-119. The sole ground put forward by plaintiffs in support of this claim is their assertion that the statutory exemption for clinic employees and agents acting within the scope of their employment necessarily makes the statute viewpoint discriminatory on its face. This argument is foreclosed by the First Circuit's contrary holding in McGuire.

114. 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.

115. "[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.

116. For much the same reason, even if the four individuals who filed a memorandum as amicae curiae could raise a substantive claim not pressed by the plaintiffs themselves, which they may not, the exemption for persons entering or leaving a clinic would also survive any facial challenge on the ground of alleged viewpoint discrimination. This exemption was included, to state the obvious, because without it patients, staff, and others with a legitimate reason to enter a clinic would not be able to do so. Since there is an obviously "legitimate reason" for the exemption, it is not facially unconstitutional. McGuire II, 386 F.3d at 58; McGuire I, 260 F.3d at 47.

117. Turning back to the exemption for clinic employees or agents, there is no merit to plaintiffs' assertion that this statutory exemption allows clinic employees or agents to display signs, distribute literature, or engage in other expressive activities within the buffer zone. 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." Trial Ex. 26 (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.

118. As the First Circuit held, reading this exemption so as not to allow employees to engage in partisan speech within a buffer zone "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.

VI. Sixth Cause of Action: The Exemption for Crossing Through a Buffer Zone Does Not Render the Act Unconstitutionally Vague.

119. Plaintiffs have also failed to prove that the Act is unconstitutionally vague on its face. 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). 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." Trial Ex. 26 (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. Thus, Attorney General Coakley has reasonably construed this statutory exemption to allow, among other things, a protestor to walk through the buffer zone in order to reach a patient approaching a clinic entrance from the other side of the buffer zone.

120. Police in Brookline and Boston are enforcing the Act consistent with the guidance provided by the Attorney General. See Trial Ex. 27 (O'Connell Aff. ¶¶ 18-19); Trial Ex. 25 (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).

121. "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). Since the statute as interpreted by the Attorney General is not impermissibly vague, plaintiffs have not met their heavy burden of proving that the revised Act on its face is unconstitutionally vague. "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).

122. "[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.

123. Plaintiffs "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)).

124. 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). "[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.

VII. Seventh Cause of Action: Plaintiffs Have No Right to Loiter in All Public Places at All Times.

125. Plaintiffs have also failed to prove that the Act on its face violates their "freedom to loiter for innocent purposes." See Complaint ¶ 135. Plaintiffs appear to 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. As the plurality in Morales made clear, however, the reference to a "freedom to loiter for innocent purposes" was dictum, 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").

126. 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. . . .").

127. 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.

VIII. Eighth Cause of Action: The "Employees or Agents" Exemption Does Not Violate Equal Protection.

128. Finally, Plaintiffs' equal protection claim adds nothing to their free speech claims. Cf. Complaint ¶¶ 138-146. 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. For the same reason, as a matter of law the exemption does not violate equal protection.

129. "[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.

130. Plaintiffs' attempt to invoke "strict scrutiny" is misplaced. 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 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.").

Conclusion

In sum, the Court holds that the revised Act lawfully regulates the time and place of speech without discriminating based on content or viewpoint, and that plaintiffs have not met their heavy burden of proving that the Act is unconstitutional on its face. Judgment will enter in favor of the defendant on plaintiffs' claims that the revised Act is unconstitutional on its face.

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May 14, 2008

Certificate of Service

I hereby certify that this document was 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 May 15, 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.