No. 09-592

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,
Petitioner,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS
Respondents.

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

BRIEF IN *AMICI CURIAE* OF WALTER B. HOYE II AND LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE*

Amicus Walter B. Hoye II is an individual whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community through public speaking and his web site, Rev. Hoye seeks to offer immediate assistance to women seeking abortion, by speaking with them as they approach an abortion clinic in Oakland, California. Until he was prohibited from doing so, Rev. Hoye would attempt to begin a conversation with women entering the clinic by approaching them and saying, "Hi, my name's Walter. May I talk to you about alternatives to the clinic?"[1] Some women would stop to talk with him; others would walk on, unhindered.

In December 2007, the City of Oakland passed an ordinance prohibiting unconsented approaches within 8 feet of any person seeking to enter abortion clinics, for the purpose of "counseling, harassing, or interfering" with such person, "harassing" being defined as leafleting, displaying a sign, or engaging in "protest, education, or counseling" of such person. Oakland Municipal Code section 8.52.010 *et seq.* Rev. Hoye immediately challenged the ordinance in federal court. On August 4, 2009, the District Court for the Northern District of California granted summary judgment for the City, relying on this Court's ruling in *Hill v. Colorado*, 703 U.S. 530 (2000), as well as the First

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* Counsel for all parties have consented to the filing of this *amicus* brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation of this brief.

[1] A pro-abortion activist described Rev. Hoye's conduct—what he "always does"—as "He says, you know, some information about options or something to the effect and hands literature to them."

Circuit decisions in *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) ("*McGuire I*"), *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) ("*McGuire II*"), and the instant case. The district court held, *inter alia*, that the ordinance was content and viewpoint neutral, despite explicitly finding that the City did not enforce it against abortion activists ("escorts")[2] who approach women without consent and engage in speech to "facilitate access" to the clinics. *Hoye v. City of Oakland*, 642 F. Supp.2d 1029, 1038 (N.D. Cal. 2009). The court also upheld the City's interpretation of the ordinance as prohibiting extending one's arm to persons passing by in order to hand them a leaflet. *Id.* at 1044, 1046.

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the no-approach ordinance. No patient or other person seeking access to the clinic had complained of his conduct, nor did any purported "victim" testify against him at trial. The complaining witnesses were escorts and clinic personnel.[3] Because the district attorney did not specify any particular incident of unlawfully approaching and because the court refused defense requests for a unanimity instruction, neither Rev.

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[2] One of the escorts described their function in court testimony: "I mean, he's going—you know attempting to, you know, hand out literature and talk to them and I'm attempting to, you know, prevent him from doing so." The escorts would also carry blank pieces of cardboard to "block clients from reading what is on his sign." A video of this activity can be viewed at http://www.youtube.com/watch?v=dcKPndbwKsg. Rev. Hoye is the man dressed in black, carrying a sign reading "Jesus Loves You and Your Baby. Let Us Help You." An escort wearing an orange vest is carrying a blank piece of cardboard on a picket. To the left of the screen, another orange-vested escort is blocking a sign reading "Abortion stops a beating heart," carried by an 89-year-old woman.

[3] In addition to the charges for unlawfully approaching, Rev. Hoye was also charged with using "force, threat of force, or physical obstruction" to intimidate the escort who is seen blocking him. Oakland Municipal Code 8.52.030(a). The escort testified that Rev. Hoye made her feel uncomfortable when she stood in front of him to block his sign. She complained of his "passive aggressive" demeanor and the "sense of his trying to be so nice." He was acquitted of this charge.

Hoye, his attorney, the district attorney, or the judge can say what person or persons entering the clinic Rev. Hoye was convicted of unlawfully approaching. That conviction is on appeal; the trial court, however, refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail. Rev. Hoye has completed his sentence. He continues to go to the clinic, but always under the threat of another arrest, prosecution, conviction, and incarceration should he come too close to someone in the environs of the clinic.

Amicus Life Legal Defense Foundation (LLDF) is representing Rev. Hoye in both the criminal and civil proceedings. LLDF is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead to seek out ways to make this expressive activity unlawful. The Massachusetts Act that is the subject of this petition and the Oakland ordinance

Rev. Hoye is challenging are just two examples of the conversion of heretofore constitutionally protected speech activity into crimes.

This brief is filed with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in the instant case, Chapter 266, Section 120E1/2 of the Massachusetts General Law (the "Act"), offends the First Amendment in myriad ways, some qualitative and some quantitative. This brief will focus on two qualitative issues, both related the Act's lack of content and viewpoint neutrality.

Amici refer to these issues as qualitative rather than quantitative because this Court's jurisprudence has never recognized a justifiable or acceptable level of content or viewpoint discrimination. Unlike overbreadth, narrow tailoring, ample alternative channels of communication, or vagueness, all of which are matters of degree, this Court's precedents make clear that a content-based restriction on speech is unconstitutional in the absence of a compelling state interest (which has not been asserted here), and viewpoint-based speech restrictions are simply impermissible. Thus, a finding that the statute in the instant case is content or viewpoint based—no matter how minimally or benevolently intended—compels its invalidation.

In the instant case, the viewpoint-based nature of the Massachusetts statute, far from being minimal or accidental, permeates it to the core. By limiting the application of the statute to sites specifically associated with speech of a certain content (abortion), and by justifying this limitation by reference to the purported "secondary effects"

of speech of a certain viewpoint (anti-abortion), the Legislature rendered the law content and viewpoint based.

The Act also violates the First Amendment and the Equal Protection Clause by exempting clinic employees and agents, i.e., persons who are indisputably aligned with one side of the abortion issue. By exempting these private speakers from the reach of the Act, the government is not just putting its finger on one side of the ideological scale; it is upending the scale in order to favor expression intended to encourage a woman to enter an abortion clinic, while suppressing speech intended to encourage her to think twice about entering.

ARGUMENT

I. A RESTRICTION ON SPEECH OCCURRING AT ABORTION CLINICS IS PRESUMPTIVELY CONTENT AND VIEWPOINT BASED.

In the instant case, the First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its earlier rejection of the analogous argument in *McGuire I*, *supra*, 260 F.3d at 44–47. *See* Appendix to Petition for Certiorari ("App.") 13a.

The First Circuit's holding in *McGuire I* was premised on a misuse of this Court's "secondary effects" doctrine, a doctrine employed by the Court, and most of the Circuits, exclusively in the context of sexually oriented businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[4]

[4] Justice Kennedy has acknowledged that the "secondary effects" test, allowing restrictions on sexually oriented businesses, is "something of a fiction," although a tolerable one in the context of zoning restrictions which have a "built-in legitimate rationale." *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448–49 (2002) (plurality) (Kennedy, J., concurring).

The First Circuit located the allegedly harmful secondary effects in the "evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44. The court repeatedly invoked the government's need to "combat" or "curb" these "deleterious secondary effects of anti-abortion protests" as a content neutral justification for singling out anti-abortion speech for regulation. *Id.* at 44–46.

This Court has explicitly disapproved both prongs of this reasoning. First, "listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (striking down restriction on picketing in front of foreign embassies). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 321. Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, this Court has rejected the attempt to justify speech restrictions based on generalizations about subject matter:

> Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. **Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.**

Police Department of Chicago v. Mosley, 408 U.S. 92, 100–101 (1972) (emphasis added). Indeed, it would be a soft foundation for free speech and equal protection that would permit the government to restrict speech activity on a hotly debated issue, and, worse, of one side of that issue, based on wholesale stereotyping of that side.

A restriction may be content neutral if it is "**justified** without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original emphasis) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).) As is clear from the First Circuit's decision in *McGuire I*, relied on in the instant case, the putatively "content neutral" justification for the statute is the alleged upsetting and disruptive nature of anti-abortion protests. There is nothing content or viewpoint neutral about a restriction on speech that is directed at particular locations defined by the activity that occurs there, and **justified** by means of a "broad classification" as to the level of disruptiveness of these protest activities.[5] Such an ordinance is as blatantly viewpoint based as if the Ordinance said on its face that it only applied to anti-abortion speech.

Sixty years ago, Justice Robert Jackson trenchantly observed:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must

[5] By contrast, consider an ordinance restricting speech activity within 15 feet of the entrance to abortion clinics, which the government justified because emergency medical personnel were frequently summoned to abortion clinics and needed immediate access to the entrances. Such a law, while vulnerable for overbreadth and lack of narrow tailoring, would at least be justified without reference to the content of the regulated speech.

> be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express v. New York, 336 U.S. 106, 112–113 (1949) (Jackson, J., concurring.).

Although the context of Justice Jackson's observation was an equal protection challenge, it is, if anything, even more relevant in the context of a speech-restrictive law like the Act. There is nothing praiseworthy in a legislative body "making every effort to restrict as little speech as possible" (*McGuire I*, 260 F.3d at 44) when this narrow focus enables the government to impose more stringent restrictions on the speech of an unpopular minority than would be politically tolerable if the law were more generally imposed.

This Court should grant the petition in this case to correct the First Circuit's abuse of the "secondary effects" doctrine, an abuse that is now being replicated in other jurisdictions. *See, e.g.*, *Brown v. City of Pittsburgh*, 2009 WL 348938 at *11 n.17 (3d Cir. Oct. 30, 2009) ("in secondary effects cases such as this," citing *McCullen*); *Hoye*, *supra*, 642 F. Supp. 2d at 1035 (citing *McGuire I* to justify specific application of speech restrictive ordinance to abortion clinics).

II. THE EXEMPTION FOR CLINIC EMPLOYEES AND AGENTS RENDERS THE STATUTE CONTENT AND VIEWPOINT BASED.

As with the argument about the Act's focus on abortion clinics, the First Circuit also rejected Petitioners' challenge to the Act's exemption for clinic agents by citing its treatment of the analogous argument in *McGuire I*. App. 14a (citing *McGuire I*, 260 F.3d at 45–47). Applying the most lax standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonition that, like viewpoint-based restrictions, speaker-based restrictions in a public forum are constitutionally impermissible. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Other principles follow from this precept. In the realm of private speech or expression, government regulation **may not favor one speaker over another**") (emphasis added).

In *McGuire I*, the First Circuit reached the staggeringly counterintuitive conclusion that "the employee exemption [] is neutral on its face, drawing no distinction between different ideologies." *Id.* at 48. The only explanation for the court's facile assumption that employees or agents of an abortion clinic are not the ideological opponents of persons counseling against abortion is that it assumes that these employees and agents are motivated simply by their paycheck, not their beliefs.

Assuming *arguendo* that this is the case, the employee exemption runs afoul of still another First Amendment principle, namely, that restrictions on speech may not favor commercial speech over noncommercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981). Employees

and agents of the clinic "acting in the scope of their employment," i.e., urging and assisting women to enter the clinic and obtain abortions, are engaging in commercial speech, "expression related solely to the economic interests of the speaker and its audience." *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (citing *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). A clinic employee whose job is to tell women, "We have help," and "Don't listen to the demonstrators,"[6] is no different for this purpose than someone wearing a sandwich board sign reading, "A lunch at Joe's Eatery is just what you need. Accept no substitutes."

In practice, as shown in *Hoye v. Oakland*, *supra*, 642 F.Supp. 2d 1029, an exemption for clinic employees or fellow travelers "acting within the scope of their employment" provides ample room for getting across an ideological message. In *Hoye*, the district court held that volunteer "escorts" were exempt from the ordinance as long as they were "acting as escorts" rather than engaging in "pro-abortion advocacy"—thus begging the question of whether "acting as escorts" (like "acting in the scope of their employment") itself encompasses engaging in pro-abortion advocacy. "Acting as escorts" includes telling women not to listen to the pro-lifers, not to take their literature, that the literature is inaccurate, that the pro-lifers are only there to harass the women, and that the women will only be safe with the escorts. *Id.* at 1037–38. The district court did not consider any of this speech to be "pro-abortion advocacy." *Id.* at 1038–39.

Moreover, the holdings of both the district court and the First Circuit that clinic employees, agents, or escorts only violate the respective clinic laws when they engage in "pro-abortion" speech puts the police in the position of

[6] The First Circuit has held both these statements to be permissible under the employee exemption. *McGuire II*, *supra*, 386 F.3d at 64–65.

determining what is "pro-abortion" speech, a determination that requires far more than a merely "cursory examination" of the utterance. *Cf. Hill*, *supra* 530 U.S. at 722. Before these decisions, a reasonable person might have thought that a clinic escort or employee telling a patient not to listen to the pro-lifers or take their information would merit being called "pro-abortion" speech. But these courts say otherwise.

When an escort or employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," these courts would undoubtedly hold that such speech was neutral and non-ideological. The peaceful pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently.

As noted above, this Court's First Amendment jurisprudence has never recognized the concept of a justifiable or acceptable amount of content and viewpoint discrimination. Content and viewpoint discrimination are not subject to a balancing test wherein a court need only "envision at least one legitimate reason" for creating the distinction to render it constitutional. *McGuire I*, *supra*, 260 F.3d at 48. "The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen v. Women's Health Center*, 512 U.S. 753, 794 (Scalia, J., concurring in part and dissenting in part). For that reason, the only "legitimate reason" for a content-based distinction is a compelling state interest, which has never been asserted here. A viewpoint-based distinction is simply impermissible.

The Court should grant the petition to prevent further erosion of the First Amendment's most fundamen-

tal guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

CONCLUSION

The First Circuit's decisions in *McGuire I* and *II* and *McCullen* represent a radical departure from this Court's jurisprudence in the area of secondary effects and speaker-based discrimination in public fora. By providing a rationale for blatant viewpoint discrimination, *McCullen* and its predecessors are already undermining the raison d'être of the First Amendment: preventing government suppression of disfavored speech. These decisions invite legislatures in other jurisdictions hostile to pro-life speech to enact these and other creative restrictions on speech, secure in the knowledge that they will "escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express*, *supra*, 336 U.S. at 112.

Amici respectfully request this Court to grant the Petition.

Respectfully submitted,

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