No. 12-1168

In The

Supreme Court of the United States

Eleanor McCullen, et al.,

Petitioners,

v.

Martha Coakley, Attorney General for the Commonwealth of Massachusetts, et al.,

Respondents.

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

Brief of Life Legal Defense Foundation and Walter B. Hoye II, as *amici curiae* in Support of Petitioners and Reversal

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INTERESTS OF *AMICI CURIAE*[*]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that 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.

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

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[*] Counsel for all parties have consented to the filing of this 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.

seeks to offer immediate assistance to women seeking abortion, a message he conveys by engaging in one-on-one conversations with them as they approach an abortion clinic in Oakland, California.

In December 2007, the city of Oakland passed an ordinance, similar to the statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), but applying only to non-hospital-affiliated abortion clinics. Rev. Hoye immediately challenged the ordinance in federal court. In 2011, the Ninth Circuit ruled that the ordinance was being enforced unconstitutionally, in that the city's enforcement policy exempted speech "facilitating access" from prosecution. However, the court upheld the ordinance on its face, despite its narrow application to abortion facilities. *Hoye v. Oakland*, 653 F.3d 835, 855 (9th Cir. 2011).

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the ordinance. No patient or other person seeking access to the clinic complained of his conduct, nor did any purported "victim" testify against him at trial. Indeed, no "victim" was ever specified. The complaining witnesses were clinic escorts and personnel.[1] Though the conviction

[1] In addition to the charges for unlawfully approaching, Rev. Hoye was charged with two counts of violating Oakland Municipal Code 8.52.030(a), for allegedly using "force, threat of force, or physical obstruction" to intimidate escorts on two different dates. See http://www.youtube.com/watch? v=dcKPndbwKsg and http://www.youtube.com/watch?v=CGzQV8JS8II for videos taken on the dates of the alleged intimidation. In each video, the escort allegedly intimidated is the one following Rev. Hoye and covering up his sign with cardboard. One of these escorts testified that Rev. Hoye made her feel uncomfortable when she stood in front of him blocking his sign. She complained of his "passive aggressive" demeanor as demonstrated by a "sense of his trying

was appealed (and ultimately overturned on procedural grounds), the trial court refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years. Rev. Hoye did not agree.

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 completed his sentence.

In sum, Rev. Hoye was threatened with two years in jail and in fact went to jail for engaging in undisputedly peaceful, non-obstructive constitutionally protected speech activity on a public sidewalk. Twenty years ago, one would have wondered how that could happen. Now we know the answer: abortion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 20 years ago, this Court decided *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), upholding an injunction that imposed, *inter alia*, a 36-foot speech-free zone around the entrance to an abortion clinic. This Court employed a newly-minted test for assessing the validity for injunctive restrictions on speech: whether the restriction burdens no more speech than necessary to serve significant governmental interests.

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to be so nice." He was acquitted of this charge; the trial court dismissed the charge relating to the other escort.

Six years later, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a state statute creating unique restrictions on core speech activity (leafleting, picketing, and engaging in oral protest, education, or counseling) occurring in the vicinity of medical facilities. While employing the traditional time, place, and manner formulation for assessing the validity of the restrictions, this Court rejected the argument that, by limiting the application of the law to the public forum areas bordering medical facilities, the state was engaged in *de facto* content and viewpoint-discrimination against anti-abortion speakers. The Court also for the first time approved a restriction on speech activity where it was protected speech itself, not the concomitant unprotected conduct or results, which constituted the justification of the law and the gravamen of the offense.

In the 13 years since *Hill* was decided, this Court has not reviewed any case involving free speech rights in the context of anti-abortion speech. Unfortunately, during that time, *Madsen* and *Hill*, each of which was a troubling departure from this Court's earlier First Amendment jurisprudence, together have spawned a new creature, a hybrid of law and injunction that might aptly be dubbed an *injordinance*.

The injordinance is technically a law, in that it is enacted by a legislative body and is enforceable via criminal sanctions against the public at large, with certain legislatively-specified exceptions. However, it also resembles an injunction, in that its application is pinpointed to a particular site or sites and its expansive restrictions on speech are initially justified by the alleged unlawful conduct of individuals at these

particular sites. Moreover, as with an injunction, the injordinance's restrictions are only activated at the request of private parties, who in some instances are also granted the power to enforce them via civil action.

Massachusetts General Law Chapter 266, Section 120E 1/2 (the "Act") is the first example of an injordinance to come before this Court. The net effect of the Act's provisions is that any abortion provider, but only abortion providers, can obtain a sweeping injunction, enforceable against any anti-abortion speaker, simply by asking city employees to paint lines around its place of business.

This Court need not overrule *Madsen* and *Hill* to find the Act unconstitutional. However, amici urge this Court to narrow or overturn its decisions in *Madsen* and *Hill* in light of their role in making laws like the Act—variations of which are appearing all over the country—even thinkable.

ARGUMENT

I. *MADSEN* AND *HILL* SET THE STAGE FOR THE ACT

A. *Madsen* and Governmental Interests

In *Madsen v. Women's Health Center*, this Court upheld portions of an injunction prohibiting First Amendment activity within 36 feet of the entrances to an abortion clinic. The Court found that the in-

junction was content-neutral: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." Id at. 762–63. Nonetheless, this Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." Id. at 764. For that reason, the Court held that injunctive restrictions on speech should be tested under a "somewhat more stringent" standard, namely, whether the restrictions "burden no more speech than necessary to serve a significant *governmental* interest." Id. at 765 (emphasis added). Applying that standard to the various provisions at issue, the Court found that the 36-foot zone around driveway entrances was constitutional.

In formulating the standard as it did, this Court took the first step in blurring the distinction between generally applicable laws and injunctions. This Court had correctly described the operation of an injunction:

> "An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group . . . because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation . . ."

Despite this definition, this Court decided that the measuring stick for the constitutionality of injunctive restrictions on speech should be *governmental*

interests, and particularly those governmental interests that coincide with the interests of the abortion provider plaintiff.

No governmental entity had asserted any interest in the outcome of the litigation between the abortion provider and the defendants in *Madsen*. While a governmental entity *might* assert an interest in protecting a woman's freedom to seek medical services, ensuring public safety and order, and promoting the free flow of pedestrian and vehicular traffic (id. at 767–68), it might also assert an interest in ensuring that women are informed of all options before choosing to have an abortion, protecting the free speech rights of citizens on public sidewalks, and preserving the function of unfettered speech as a safety valve for the heated emotions certain topics generate. Those interests, too, are significant governmental interests. Yet the injunctive restrictions were never measured against those latter interests. Rather, the only governmental interests invoked by this Court and passed down as precedent for lower courts to employ were those that favored the abortion provider plaintiff's efforts to restrict anti-abortion speakers.

The logical result of this Court's reliance on "governmental interests" in upholding injunctions was for courts to become less scrupulous about whether a plaintiff clinic had actually proved the elements of any particular cause of action. If a "combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction," *Madsen*, 512 U.S. at 768, there was no sense in requiring a plaintiff abortion clinic to prove trespass or some other direct but otherwise irrelevant violation of its own rights.

Moreover, trial courts would be understandably confused about why injunctions purportedly serving broad governmental interests should apply only to named parties and those acting in concert with them. This Court contributed to that confusion by making pronouncements such as "the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and "the only way to ensure access was to move *all* protesters away from the doorways." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380, 381 (1997)(original emphasis). This Court did not appear to be making any distinctions between enjoined parties and third parties, and consequently, neither did many lower courts and law enforcement personnel called on by abortion clinic plaintiffs to enforce injunctions. *See, e.g., People v. Conrad*, 55 Cal.App.4th 896, 902 (1997) (reversing conviction for violation of injunction based on anti-abortion defendants' "mutuality of purpose" with enjoined parties); *Planned Parenthood v. Garibaldi*, 197 Cal.App.4th 345, 352 (2003) (reversing judgment upholding application of speech restrictive injunction against "all persons with notice").

This Court also failed to explain the role the defendants' prior bad conduct played in applying its new test. After suggesting in *Madsen* that failure to obey a prior injunction was key to a finding that a broader restriction "burdened no more speech than necessary," 512 U.S. at 763, the Court disavowed that factor in *Schenck*. 519 U.S. at 382–83.

This Court's attempt to fit injunctive restrictions on speech into the "governmental interest" mold of generally applicable time, place, and manner restrictions

has led to confusion and error in other lower court decisions, including the First Circuit's decisions below.

B. *Hill* and the Interest in "Avoiding Unwanted Communication"

Although this Court in *Madsen* approved of a 36-foot speech-free zone on the public right-of-way, it struck down a provision prohibiting uninvited approaches of patients, stating unequivocally, "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and ensure access to the clinic." 512 U.S. at 774.

Six years later, in *Hill*, this Court embraced the concept it so clearly rejected in *Madsen*. Ruling on a facial challenge to a Colorado law, this Court upheld a prohibition on unconsented approaches within 8 feet of anyone within 100 feet of the entrance to a medical facility, when that approach was made for the purpose of displaying a sign, handing a leaflet, or engaging in oral protest, education, or counseling. 530 U.S. at 707, 735.

In identifying the governmental interests undergirding the law, this Court began with the general police power to protect the health and safety of their citizens, which "may justify a special focus on impeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715 (citing *Madsen*). The Court also cited the government's self-referential interest in even-handed application of the law.

Pronouncing these interests "unquestionably legitimate," the Court went on to find other interests underlying the law, ones that Colorado itself had not asserted: the interest "in avoiding unwanted communications" and the "'right to be free' from persistent 'importunity, following, and dogging' *after an offer to communicate has been declined*." *Id.* at 717, 718 (emphasis added).

This Court repeatedly stated that the statute dealt only with protecting "unwilling" listeners from "unwanted" communication after an offer to communicate has been declined. *Id.* at 708, 714, 716, 718, 721, 723, and 727.[2] However, this reading was at odds with the plain language of the statute, which prohibited all uninvited approaches ("unless such other person consents").

This Court's conflating of uninvited approaches with rejected approaches led the First (and Third[3]) Circuit to the logical conclusion that, at least in the context of speech activity outside medical facilities, all approaches are as a matter of law unwanted and intimidating, and the government has an "unquestionably legitimate" interest in prohibiting such approaches.

Well, not *all* approaches. According to this Court's reasoning and holding, the state's interest extended

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[2] Indeed, this Court implied that the statute was only triggered when the person approached took some affirmative action such as declining the offer. 530 U.S. at 734 (emphasis added) ("This statute simply *empowers* private citizens entering a health care facility with *the ability to prevent* a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear").

[3] See *Brown v. Pittsburgh*, 586 F.3d 263 (3rd Cir. 2009), discussed infra at pp. 22–23.

only to prohibiting those approaches made for the purpose of engaging in otherwise constitutionally protected speech activity. As this Court noted, approaches for the purpose of "social or random conversation" were not prohibited. Neither were approaches for the purpose of panhandling, soliciting magazine subscriptions, or raving like a lunatic. Unconsented approaches without any form of oral communication were also unaffected by the statute: one could approach without consent for the purpose of glaring, making an obscene gesture, or fingering the knife at one's side, all without violating the statute.

In sum, a police officer who witnessed an unconsented approach need simply ascertain one point: was the approach made for the purpose of engaging in core First Amendment speech activity? If so, the statute was violated. If not, there was no violation.

Despite this Court's protestations (citing *Madsen*) that the Colorado law was merely a content- and viewpoint-neutral "regulation of the places where some speech may occur," the restriction was more than that. It was not "justified without reference to content of the regulated speech." Rather, as Colorado itself had candidly admitted, speech "against certain medical procedures"[4] is an evil that government may legislate against. This Court's entire line of reasoning in *Hill* concerning the government's interest in preventing "unwanted communications" validated that viewpoint-based purpose.

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[4] Colorado Rev. Statutes § 18-9-122(1).

II. THE ACT COMBINES THE ERRORS OF *HILL* AND *MADSEN*

The salient unconstitutional features of the Act are: 1) singling out abortion clinics for insulation from free speech; 2) exempting pro-abortion speakers from the restrictions, and 3) imposing overbroad restrictions on speech activity. The First Circuit found support for each of these features in *Madsen*, *Hill*, or both.

A. A Restriction on Speech Occurring Only at Abortion Clinics is Presumptively Content- and Viewpoint-Based

The First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its rejection of the analogous argument in *McGuire v. Reilly* (*McGuire I*), 260 F.3d 36, 44–47 (1st Cir. 2001), challenging an earlier version of the Act. *See* Appendix to Petition for Certiorari ("Pet. App.") at 105a. Citing *Madsen* and *Hill*, the First Circuit held in *McGuire I* that the Act's purpose was content-neutral, though it had the "incidental effect" of curbing speech by "some speakers and not others." Continuing to cite *Madsen* and *Hill*, the First Circuit held that the allegedly "content-neutral" purpose was the government's need to "combat" or "curb" the "deleterious secondary effects of anti-abortion protests." These "secondary effects" were established by evidence in legislative hearings that "abortion protesters are particularly aggressive and patients

particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44–46.

In non-abortion-related cases, this Court has explicitly rejected both prongs of this reasoning. First, the "secondary effects" doctrine has been employed by this 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).[5] "[L]isteners' 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

[5] 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).

> 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.[6]

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

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[6] Video evidence of the stereotypical confrontational anti-abortion protest is strangely absent from most court records. On the contrary, *see, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 642 (3rd Cir. 2009) (cases at issue "paint a picture, aided in part by DVDs submitted by each of the three plaintiffs, very different from most other abortion clinic protest cases. . . . The [city] defendants have admitted allegations in plaintiffs' complaint as to the absence of physical confrontations of the sort *that frequently accompany anti-abortion proselytizing*") (emphasis added); *Madsen v. Women's Health Center*, 512 U.S 753, 785–90 (1994) (Scalia, J., conc. and diss.) (describing in detail contents of video depicting peaceful demonstration activity; "anyone seriously interested in what this case was about must view this tape").

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 caused by those who protest such activities. Such an ordinance is as blatantly viewpoint based as if the Ordinance said on its face that it only applied to anti-abortion speech.

The First Circuit said that the legislative purpose for the pinpoint focus of the Act was to "mak[e] every effort to restrict as little speech as possible *while combating the deleterious secondary effects of anti-abortion protests*," and that therefore the Act was content-neutral. *McGuire I*, 260 F.3d at 44 (emphasis added). These are contradictory holdings, because restricting "as little speech as possible" of the general population simply enabled the legislature to restrict far more speech of an unpopular minority than would be politically tolerable if the law were more broadly imposed.[7]

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[7] See *Railway Express v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring):

> 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 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.

B. 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*. Pet. App. 105a (citing *McGuire I*, 260 F.3d at 45–47). Applying the laxest standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonitions 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) ("In the realm of private speech or expression, government regulation may not favor one *speaker* over another") (emphasis added). *See also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Instead, relying on *Hill*, the First Circuit ruled that the legislature "rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." 260 F.3d at 46. Indeed, that conclusion rationally follows from the premise that only anti-abortion speech is unwanted speech, as this Court implicitly taught in *Hill*. One would hardly expect clinic employees to engage in anti-abortion speech, the target of the Act.

As Petitioners correctly note, the Attorney General's interpretation that clinic employees are not exempt if they engage in "partisan" speech, and the First Circuit's endorsement of that interpretation, is without any legal effect. Brief for Petitioners at 33–34. However, even if the Attorney General's interpretation were amended to eliminate the blatantly content-based restriction on speech "about abortion," and even if it were incorporated into the statute, such a provision would put the police in the position of evaluating the content of speech and determining which is "partisan." The Ninth Circuit has held that it is unconstitutional to exempt clinic escorts engaging in speech "facilitating access" to an abortion clinic (such as "May I help you into the clinic?") from a law regulating speech activity in the vicinity of abortion clinics. *Hoye v. Oakland*, 653 F.3d 835, 852 (9th Cir. 2011). Under the First Circuit's decisions, however, a clinic escort or employee telling a patient not to listen to the pro-lifers is not engaging in "partisan" speech and is legitimately exempt from the Act's restrictions. *McGuire v. Reilly* (*McGuire II*), 386 F.3d at 51, 52, 64.

When an escort or employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," the First Circuit holds that such speech is neutral and non-partisan. The peaceful pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently. So does the Ninth Circuit.

The Attorney General's interpretation also echoes the inversion of First Amendment values first sanctioned by this Court in *Hill*, where core First Amend-

ment speech on matters of public interest is forbidden under the exact same conditions that "incidental" or "everyday" speech is permitted. *Cf. Hoye*, 663 F.3d at 851, n. 13 ("even if the distinction between purposive and incidental speech could coherently be made, we have said that privileging the latter over the former 'turns the First Amendment on its head.' *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998)").

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" (*McGuire I*, *supra*, 260 F.3d at 48) for creating the distinction to render it constitutional. Rather, "[t]he 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 in this case. A viewpoint-based distinction is simply impermissible.

The Court should reverse the ongoing erosion in abortion-related cases of the First Amendment's most fundamental guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

C. The Act's Speech-Free Zone Is Grossly Overbroad for Serving Any Legitimate Governmental Interest

In upholding the Act, the First Circuit noted that the 35-foot fixed buffer zone was slightly smaller than the zone upheld in *Madsen* "under a standard stricter than that which is applicable here." *McCullen v. Coakley* (*McCullen I*)(Pet. App. 111a). The court's *a fortiori* conclusion neglected to note that that zone in *Madsen* would be enforced only against persons who had been found to have interfered with clinic access in the past.

This Court gave no guidance in *Madsen* or *Schenck* as to how much weight to give the defendants' past unlawful behavior when applying the test for whether an injunctive restriction "burdens no more speech than necessary to serve significant governmental interests." This Court did say that this test was "somewhat more stringent" than the "narrowly tailored" standard. So the test for injunctive restrictions on speech is more stringent, but it also is applied only when the enjoined persons have "violated or imminently will violate, some provision of statutory or common law." *Madsen*, 512 U.S. at 765, n.3.

Lower courts are thus put in the position of comparing apples and oranges: speech restrictions against those who have violated the law are evaluated under a "more stringent" standard while speech restrictions against even the most law-abiding speakers are evaluated under a less stringent standard. It is not surprising that courts faced with this conundrum would seize onto this Court's suggestion in *Hill* that anti-

abortion speech in general causes problems, in order to justify finding unprecedented restrictions on speech on public sidewalks to be "narrowly tailored" to serve the governmental interests opposed to allowing such speech.

A second problem with the First Circuit's *a fortiori* reasoning from *Madsen* is that the trial court in *Madsen* fashioned the buffer zone to deal with the specific configuration of the plaintiff clinic and the "narrow confines" around it. *Madsen*, 512 U.S. at 769. Once again, the mismatch between the standards for injunctions and for generally applicable laws is manifest: while a trial court can fashion a buffer zone around a particular site with great precision to make it "burden no more speech than necessary," a statute or ordinance will—at least in theory—apply to numerous sites with various geographical configurations. Everyday experience tells us that a 35-foot buffer zones around entrances and driveways are going to have widely different effects on free speech at different locations.

The incompatibility between narrow tailoring and statutory speech-free zones is seen most strikingly in the First Circuit's treatment of the Petitioners' as-applied challenge. The First Circuit collapsed the narrow tailoring inquiry into the ample alternatives inquiry, following, it asserted, this Court's analytical method in *Hill*. Pet. App. 22a. At two of the three locations at issue, patients never walk on the public sidewalk but instead drive into private parking lots behind the clinics. Therefore, the First Circuit held, the law was narrowly tailored because the demonstra-

tors never had the opportunity to engage in person-to-person communication anyway. Pet. App. 24a–25a.

However, if one considers narrow tailoring properly as a separate element, it defies common sense to hold that pushing speakers 35 feet away from driveway entrances is "narrowly tailored" to ensure access. Cars don't drive on sidewalks. If no one is standing in the driveway or roadway, a car can drive into a clinic parking lot without any impediment at all. A person standing on the sidewalk three feet from the driveway entrance will not interfere with the car's access.[8]

But what if someone *is* standing in the roadway blocking the street? Or what if some anti-abortion person standing on the sidewalk is throwing literature at patients by tying it to rocks and hurling the rocks at their passing cars? Wouldn't a 35-foot zone

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[8] On the other hand, if the interest served by the zones is to allow patients to avoid (i.e., be insulated from) unwanted (i.e., anti-abortion) communications, then the choice of distance is completely arbitrary. In applying its combined narrow tailoring/ample alternative inquiry in *McCullen I*, the First Circuit stated:

> "[T]he 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone. Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

McCullen I, Pet. App. 111a. The same could be said of a 35-yard zone or a 3-mile zone.

be narrowly tailored to serve the governmental interests there?

The answer is, obviously, no, this restriction is not narrowly tailored to address such unlawful conduct. Unfortunately, however, in *Hill*, *Schenck*, and *Madsen* this Court endorsed the use of "bright line prophylactic rules" for dealing with anti-abortion demonstrations, accepting the representations of abortion providers and legislatures that various factors make the obvious and less speech-restrictive solutions, i.e., enforcement of existing laws or injunctions, impracticable.[9] Thus, narrow tailoring ends up being measured against the conduct of some "worst case protester" who (they say) cannot be restrained any other way.

That is, if it is measured at all. The Third Circuit, evaluating a 15-foot buffer zone around clinics (with an exception for clinic personnel), adopted the First Circuit's "secondary effects" reasoning and decided that it was not necessary for the legislature to prove any record of bad conduct before deciding to keep anti-abortion protesters at a distance from clinic entrances. *Brown v. Pittsburgh*, 586 F. 3d 263, 279 n. 17 (3rd Cir. 2009) ("in secondary effects cases such as this, . . . legislatures may look outside of their own regional jurisdiction for evidence substantiating the problem to which a given regulation is addressed"). Having absolved the Pittsburgh city council from the need to establish that a problem existed, the Third Circuit then employed the same argument as did the First Circuit in *McCullen*: because a larger zone was

[9] These claims of the impractibility of enforcement should be immediately suspect in this age of ubiquitous videorecording.

constitutional under the more exacting standard of *Madsen*, "the smaller zone established by the Ordinance is *a fortiori* constitutionally valid." *Id.* at 276. *See also Clift v. City of Burlington*, 2013 U.S. Dist. LEXIS 21888 at *6, *63 (February 15, 2013) (citing *Madsen* and *Hill* and finding 35-foot buffer zone around abortion clinic entrances and driveways to be narrowly tailored, despite the fact that zone at issue extends over a 228-foot stretch of public sidewalk).

Such an approach is the antithesis of narrow tailoring.

III. THIS COURT SHOULD REJECT ABORTION EXCEPTIONALISM

As suggested by the foregoing, simply reversing the First Circuit's holding that a 35-foot *cordon sanitaire* around abortion clinics is narrowly tailored will not fix the current problems with the Court's First Amendment jurisprudence in the area of abortion clinic protests. Indeed, the problem rests with the very fact that this Court has, or is quite reasonably perceived to have, a specific "well-settled abortion clinic/buffer zone jurisprudence." Pet. App. at 12a, 14a. The Ninth Circuit, citing *Hill*, has joined the First Circuit in explicitly approving the concept of speech restrictions applicable only in the vicinity of abortion clinics. *Hoye* 653 F.3d. at 845. Though the statute at issue in *Brown v. Pittsburgh* applied to all medical facilities, the Third Circuit followed the First Circuit's "secondary effects" reasoning in finding a buffer zone reasonable, thus implicitly approv-

ing speech restrictions that apply only around abortion clinics. *Brown*, supra, 586 F.3d at 279, n.17.

This concept of "abortion exceptionalism" lies at the heart of the problem. As long as governments are permitted to single out sidewalks around abortion clinics as special enclaves in which speech can be restricted, this Court can expect to see an endless stream of restrictions testing the limits of the First Amendment, as well as making a mockery out of that Amendment's guarantee of governmental neutrality in the marketplace of ideas.

The First Circuit justified the singling out of abortion clinics by citing legislative findings showing that "abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire I*, 260 F.3d at 44. As discussed above, both of these prongs are impermissible grounds for singling out abortion-related speech and speakers for special restrictions. See Section II(A), supra, pp. 12–14.

The speech activity that takes place outside abortion facilities does indeed differ significantly from similar speech activities at other locations in several ways, but primarily in the challenges that speakers face in communicating their message to their intended audience.

First, the contact between the speaker and his or her intended audience is very brief, even fleeting, unless the listener decides to stop. A sidewalk counselor will ordinarily have only about 5 to 10 seconds from the time the woman gets out of a car, emerges from a parking lot onto the sidewalk, or otherwise enters the ambit of the clinic, to communicate a message before

the woman enters the clinic. Sometimes it will be less time, and frequently, where there is on-site parking, there is no opportunity at all for person-to-person contact. Far from being a captive audience, the woman is an audience in constant motion toward a destination, unless she decides to stop. Any action on the part of the sidewalk counselors that inhibits her movement such as to delay her for, e.g., 10 more seconds, could be prosecuted under federal and numerous state laws and incur harsh penalties—unlike similar actions in other settings. See, e.g., 28 U.S.C. § 248(b)(penalty for making ingress to abortion clinic "unreasonably difficult" is $10,000 fine and/or six months imprisonment).

Second, the message is extremely time-sensitive and personal. The sidewalk counselor's message is not about the "issue" of abortion. While some pro-life advocates use the public streets and sidewalks to engage in education campaigns directed to the general public, the sidewalk counselor's goal is not to hand out hundreds of pamphlets about abortion. Rather, she stands for hours outside an abortion clinic, waiting for the opportunity to speak to the fifteen, twenty, or twenty-five women who will arrive there, scheduled to have an abortion that day. Her message for them frequently takes the form of an invitation to a dialogue: How can I help you? Can I tell you some things that might make you change your mind about what you are about to do? Can I tell you my story, and then, if you want, you can tell me yours?

While there may be some speech settings that present similar aspects of urgency in the face of irrevocability (e.g., standing outside a military recruiting

center, attempting to persuade young people not to enlist), as a general matter, the speech activity outside an abortion clinic is uniquely personal and immediate; if it is not delivered to that woman at that time, it is too late.

Third, unlike in other settings, the woman is often accompanied by—or propelled by, or compelled by—others who have a strong personal interest in her *not* hearing the message and *not* being deflected from her current course. No other speech setting presents the equivalent of highly-motivated parents and boyfriends doing their best to create a barrier to communication with the intended audience.

Fourth, few other settings have the equivalent of clinic escorts who deliberately disrupt and prevent communication between anti-abortion speakers and women patients and who will manipulate any speech restriction to achieve this end.[10] For example, under

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[10] During the criminal proceedings against Rev. Hoye, one of the clinic 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 coordinator of the clinic escorts testified that escorts are trained not to allow the sidewalk counselors' literature to be taken into the clinic, and that they should "explain" to the women that it is "inaccurate, that it is invasive of their privacy, and it is intended to prevent them from exercising their right to reproductive health services."

The escorts would also carry blank pieces of cardboard to, as an escort testified, "block clients from reading what is on his sign." Videos of this activity can be viewed at http://www.youtube.com/watch?v=dcKPndbwKsg and http://www.youtube.com/watch?v=CGzQV8JS8II Rev. Hoye is the man dressed in black, carrying a sign reading "Jesus Loves You and Your Baby. Let Us Help You." The escorts are wearing orange vests and carrying blank pieces of cardboard. To the left of the screen on

the purportedly "exceedingly modest restriction" approved by the Court in *Hill*, the only practical way for sidewalk counselors to hand out leaflets to persons entering the clinic is, as this Court indicated, to "stand[] near the path of oncoming pedestrians and proffer[] his or her material . . ." *Hill*, 530 U.S. at 727. However, while the sidewalk counselors stand still, escorts can surround the women and/or stand directly in front of the sidewalk counselors, making it sufficiently difficult for the women to reach around the escorts for the proffered leaflets, presuming they see the leaflets at all, that most will not make the effort to do so.

On remand from the Ninth Circuit, the District Court in *Hoye v. Oakland* upheld the City's interpretation of "approach" to include extending a hand or arm toward a passer-by. Thus a sidewalk counselor must extend his or her arm with a leaflet *before* a woman gets within eight feet, and then stand motionless like a scarecrow until the woman passes. Moving one's arm around a blocking escort could lead to a violation of the eight-foot rule, and a prosecution as politically motivated and vindictive as that brought against Rev. Hoye. See Interests of Amici, supra, pp. 1–3.

Moreover, the clinic escorts do not act alone in taking advantage of the "content neutral" laws passed to favor them. They are supported by the actions of the clinics. As set forth above, in *Hoye v. Oakland*

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the first video, another orange-vested escort is blocking a sign reading "Abortion stops a beating heart," carried by an 89-year-old woman. Note that this activity was going on with an 8-foot no-approach law in effect.

the Ninth Circuit held that Oakland's enforcement policy was unconstitutionally content-based because it allowed the escorts to approach patients without consent for the purpose of engaging in speech to "facilitate access." 653 F. 3d at 852. In response, Oakland revealed in the proceedings on remand that the abortion clinic at issue had initiated a policy of requiring every patient to agree to be approached by escorts before being able to make an appointment. Thus, to safeguard an ordinance purporting to serve the governmental interest in "ensuring access" to abortion clinics, the clinic denies access to women unless they consent to be approached by persons who will tell them not to listen to the sidewalk counselors.[11]

The Oakland abortion clinic's reaction to a simple requirement of evenhanded enforcement of the law between pro-abortion and anti-abortion speakers outside its clinic illustrates the lengths to which clinics will go to suppress a contrary message. It is easy to foresee that any other "exceedingly modest restrictions" on speech that are enacted by cities or states at the behest of abortion providers will be manipulated wherever possible to favor pro-abortion escorts and

[11] Rather than women entering clinics being a "captive audience" to anti-abortion speakers, they are better characterized as captives to the escorts' efforts prevent them from hearing speech. For example, in a case in federal district court in Kentucky, an escort testified how she and her fellow escorts would form what they termed a "scrum" around patients by surrounding them in a circle of four to eight escorts with interlocked arms. They discontinued the practice after deciding it was "disempowering the client and their companion and making them perhaps feel more afraid than they needed to." *Holder v. Hamilton*, No. 3:10CV-759-C (W.D. Ky) (deposition testimony of Jane Fitts).

to further diminish the opportunities for anti-abortion speakers.

In sum, while there are indisputably unique aspects to the free speech activity that takes place outside abortion clinics, those aspects, rather than justifying special restrictions on speech, should make courts particularly conscious of how even a seemingly "modest" restriction can create substantial, even insuperable, obstacles to effective, timely communication.

Courts should also be leery of claims that generally applicable laws prohibiting trespass, assault, obstruction, and the like are insufficient to deal with intimidating conduct solely in the vicinity of abortion clinics. If a record shows multiple convictions of anti-abortion protesters under existing laws, with no abatement of the alleged problems, a court might justifiably conclude that stronger medicine was needed for the individuals responsible. However, when the record shows few or no convictions under existing laws, it is more likely that the problems have been exaggerated by ideological foes than that the sidewalk counselors routinely create intolerably intimidating conditions without ever crossing the line into illegality.

CONCLUSION

Amici respectfully request the Court to reverse the decision below and, in particular, to reject the lower court's holding that laws restricting speech only in the vicinity of abortion facilities or medical facilities are constitutionally permissible.

Respectfully submitted this 16th day of September 2013,

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