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 THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The *amici curiae* submitting this brief take no position on the controversial subject of abortion. The *amici* include governmental entities and individuals with a wide variety of opinions on the constitutionality and morality of abortions, as well as on the proper limits of the state's ability to regulate abortions. Consistent with the range of views across America, many state and local government office holders and attorneys are adamantly pro-life; many are pro-choice, yet all support the constitutional right of peaceful protest.

What unites these members is their recognition that in some situations—not limited to health care facilities—reasonable regulations are necessary to maintain public safety and to protect access. More fundamentally, *amici* and their members share the concern that if the Supreme Court prohibits fixed buffer zones in this case, state and local governments will no longer be able to use this administrative tool to regulate effectively in response to local conditions, in this context and many others.

SUMMARY OF THE ARGUMENT

State and local governments have an important perspective in this case, and on how its outcome will affect the validity of time/place/manner regulations in a wide variety of contexts. *Amici* and their members regularly use fixed buffer zone laws as a vital tool to protect public safety while preserving First Amendment rights. They are the experts on legislating in response to local conditions, and amending and improving laws which fail to redress an identified problem. When the Commonwealth of Massachusetts found that its original statute, the 18-foot "floating" buffer zone, failed to protect patients on their way into reproductive health care clinics, it enacted a 35-foot "fixed" buffer zone. The revised Act solved the public safety problem without stifling the protesters or their message.

If this Court strikes down the Massachusetts Act, many time/place/manner regulations are at risk of being declared unconstitutional, and the public safety interests behind these regulations will be thwarted, putting citizens at risk of bodily harm. Most regulations of the "place" of speech consist of fixed buffer zones, not fluctuating ones, and many impose a distance of greater than 35 feet, where warranted by the specific circumstances. And if this Court adopts Petitioners' novel arguments, then the three-part time/place/manner test will become unrecognizable and ineffectual.

First, Petitioners' interpretation of content- and viewpoint-neutrality would upend the well-established meaning of those terms. It is not "content-based" to impose place restrictions in response to a specific, observed public safety problem, even if the protesters who have caused that problem share an ideological

position. And it is not "viewpoint-based" to differentiate between persons who work in a targeted facility, and those who come there to protest.

Next, in contrast to Petitioners' claim, the "narrow tailoring" requirement does not prohibit governments from solving public safety problems because there are already laws on the books which have proved ineffective for that purpose. Also, this Court has long recognized that time/place/manner regulations address the cumulative effect of the speech activity regulated, and that their validity cannot be based on whether the Petitioners alone would cause excessive congestion or other harm.

Finally, by definition, speakers who challenge a time/place/manner regulation are dissatisfied with its required distance or assigned area. It is axiomatic that allowing this type of regulation entails restricting speakers from their first-choice method for delivering their message. Here, the Massachusetts Act satisfies this Court's "ample alternatives" standard because all clinic protesters can be seen and heard, and all have the opportunity to capture the attention of their intended audience. There remain many ways of initiating closer conversations, but as courts have recognized in other contexts, time/place/manner regulations are not unconstitutional because speakers are not in immediate proximity to their audience.

In sum, if this Act is struck down, and if Petitioners' arguments are embraced as new standards, state and local governments' ability to protect public safety in a variety of contexts will be greatly diminished.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS' IMPORTANT PERSPECTIVE ON THE WIDE-RANGING IMPACT OF THIS DECISION SHOULD BE CAREFULLY CONSIDERED

As frequently noted by this Court, under our federalist system, the police power to protect citizen's health, safety, and welfare belongs to the states. "[T]he structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985))). States also delegate this power to their subsidiary local governments (municipalities, counties, townships, special districts, and school districts), thus empowering these entities to protect citizens' health, safety, and welfare in response to local conditions. *See generally* DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERALIST SYSTEM 19-29 (7th ed. 2010).

State and local governments need the ability to legislate in response to specific local issues in a wide variety of familiar, recurring contexts. One of these contexts involves the particular conditions at local reproductive health care facilities, and their communities' unique approach to the many legal and political issues posed. Indeed, given the broad range of positions in this national controversy, it is an especially apt context to defer to solutions produced in the "laboratory of the states." *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 42-43 (2005) (citing *Brecht v.*

Abrahamson, 507 U.S. 619, 635 (1993)) (discussing "the role of States as laboratories"); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (originating concept, stating "one of the happy incidents of the federal system" was that a state could "serve as a laboratory . . . and try novel social and economic experiments").

Undoubtedly, it is essential for all levels of government to respect citizens' constitutional rights to freedom of speech, including through verbal protest, leafleting, and signs. But where these protected activities create public safety problems for other citizens, state and local governments must carefully balance the conflicting interests, and then be allowed to use reasonable, content-neutral regulations of the time, place, or manner of such speech.

These familiar principles are increasingly essential in the aftermath of the Great Recession. As described in a recent report by the U.S. Department of Justice,

> In every corner of the United States, state, local, and tribal police departments are being forced to lay off officers and civilian staff, or modify their operations as a result of budget cuts. Over the last 2 years, many agencies have experienced considerable effects from budget constrictions, including mandatory furloughs and hiring freezes, which have resulted in significant reductions in staffing levels never experienced before.

U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (Oct. 2011), *available at* http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Imp

act.pdf) ("Report").[2] Not surprisingly, the corresponding change in the ratio of police to local population has resulted in steep declines in police service and ability to respond to citizen calls. *Id.* at 12-20. Further, the Report concluded that this problem is likely to last for at least the next five to 10 years, and may be a permanent structural change. *Id.* at 34.

But even before these recent troubles, as a practical matter, there are never enough police available to be on the spot to prevent public safety problems or to address each of them as they occur. According to pre-Recession data, municipal and township police departments employed an average of 2.3 full-time officers per 1,000 residents. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, NCJ 233982 (July 2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf. Accordingly, many local governments are on the low end of that average. When police are assigned to remain on site at protests or other situations creating public safety hazards, officers are less available to respond to citizens' crime reports. But where laws provide specific, objective limits on the place for certain speech activities, such clarity goes far toward preventing problems requiring police response. This reality must be taken into account in assessing whether the Massachusetts Act satisfies the applicable constitutional standard.

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[2] Note that some of these cuts were quite dramatic: during 2008-11, Flint, Michigan laid off two-thirds of its police force, and the Camden, New Jersey police force was cut in half in January 2011. *Id.* at 13.

II. THE MASSACHUSSETS ACT DEMONSTRATES HOW STATE AND LOCAL GOVERNMENTS FASHION REGULATIONS TO FIT LOCAL CONDITIONS

State and local governments understand local conditions, issues, and problems. Accordingly, they are the experts on how best to resolve local concerns by balancing important state interests such as public safety with preserving the important constitutional right to freedom of speech.

This case presents an excellent example of how one state experimented with different approaches to solve the problem of protesters interfering with access to clinics and intimidating clinic patients. The first statute Massachusetts enacted (Mass. St. 2000, ch. 217, § 2(b)) (the "2000 Act") was modeled on the law before the Court in *Hill v. Colorado,* 530 U.S. 703, 728 (2000). Like the statute approved in *Hill,* the 2000 Act required protesters to stay six feet away from patients, unless the patient consented to a closer conversation. Speakers were allowed to remain stationary, however, so that it was not a violation if it was the patient who walked within six feet of a speaker. J.A. 124.

Massachusetts' experiment with this law, however, proved completely ineffectual. Protesters simply positioned themselves next to the doors of the clinics, so that an entering patient was forced to pass through a gauntlet of sometimes hostile protesters, many waving graphic signs or pushing literature into their hands. Pet. App. 139-144a. One problem with allowing stationary handbilling is that, in contrast to the consent standard's claimed benefits, it actually allows attempts to reach unwilling listeners. Where a protester positions himself or herself by the entrance

to a clinic, holding signs or leaflets, the spatial intimacy thus created is likely to feel forced upon the patient entering the clinic. J.A. 41, 69. Moreover, the consent standard proved difficult, if not impossible, to enforce. J.A. 50, 60, 67-68. These are the facts observed on the ground by the local officials charged with protecting public safety and access to medical care.

As any legislature should do where a law completely fails to solve an identified problem, the Massachusetts legislature passed an amendment to the 2000 Act in 2007 (Mass. G.L. ch. 266, § 120E1/2(b)) (as amended, "the Act" or "the Massachusetts Act"). The revised Act prohibits protesters from coming closer than 35 feet from the clinics. This allows patients safe and unobstructed access to the clinics, while preserving the protesters' ability to be seen and heard by entering patients.

Massachusetts' fine-tuning of its statute has been successful. Protesters still are able to communicate with patients, while patients have some breathing space as they seek medical care. J.A. 125-28. The First Circuit correctly held that the Act is a reasonable, content-neutral limit on the location of speech, and thus satisfies the First Amendment. As shown next in Part III, the First Circuit's analysis is consistent with many other decisions upholding time/place/manner regulations in numerous other contexts.

III. COURTS REGULARLY UPHOLD VIRTUALLY IDENTICAL PLACE RESTRICTIONS ON SPEECH IN MANY OTHER CONTEXTS, AND THIS CASE PLACES AT RISK ALL OF THESE WELL-ESTABLISHED LAWS

If the Massachusetts Act is found unconstitutional, many important and reasonable regulations will be challenged, and state and local governments are likely to lose an important tool for preventing harm. Petitioners maintain that a 35-foot "fixed" buffer zone is unconstitutional – but that sort of rule has long been upheld by many courts in an extensive array of situations. In Petitioners' view, protesters must be allowed to get closer to their intended audiences, and any distance restriction must be structured as a "floating" buffer zone, which allows protesters to stay close as a clinic patient moves, and which dissolves if protesters interpret the patient as consenting to a close-up conversation. But state and local governments much more commonly use fixed buffer zones (and not floating ones) to protect public safety, and they sometimes determine that local conditions require buffers of greater than 35 feet. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1133-35 (9th Cir. 2005). Over the years, countless courts have held such rules constitutional.

As important background, this Part provides representative examples of the many kinds of buffer zones that courts regularly uphold. The largest category of cases involves regulations directed at protecting public safety. Most frequently, this involves pedestrian and general traffic congestion, including the effects of crowds on the public's ability to enter and exit buildings safely. A second grouping

involves regulations to protect people in especially vulnerable situations: in their home, when receiving medical care, and while mourning at funerals. The two concerns are combined in the reproductive health care clinic context, so it provides an especially compelling case.[3]

A. Similar Laws Protecting Public Safety, Crowds, and Access Upheld

In many different contexts, lower courts have upheld government regulation of crowds for the purpose of protecting public safety. In the cases discussed below, courts have upheld fixed buffer zones where governments have found them necessary to protect freedom of movement on sidewalks and safe access to building entrances, and to deter the potential for physical harm caused by excessive congestion.

One typical scenario involves congested special events, where protesters want to stand on public sidewalks right near venue doors and interact with patrons as they enter or leave. *See, e.g., Defending Animal Rights Today and Tomorrow v. Washington Sports and Entertainment, LP*, 821 F. Supp. 2d 97 (D.D.C. 2011) (upholding requirement that animal rights group protesters stand 20 feet away from arena exits, given pedestrian congestion when circus ended); *Cuviello v. City of Oakland*, No. C 06–5517 MHP, 2010 WL 3063199 (N.D. Cal. Aug. 3, 2010) (upholding 10-

[3] Note that in addressing these issues, government regulations use two variations on fixed buffer zones. Some, like the Act at issue here, provide that speakers must remain a specified distance away from their target audience. Other regulations use a functionally similar approach, which is to limit speakers to specifically-designated areas.

foot buffer zone for animal rights protesters outside circus venue).

Other cases at risk involve crowded publicly-sponsored special events held on the public way, where speakers who tend to cause additional congestion are limited to designated areas. *See, e.g., Spingola v. Village of Granville*, No. 00-3957, 2002 WL 1491874 (6th Cir. July 11, 2002) (upholding ordinance that limited public speakers to designated areas during village special events); *Price v. City of Fayetteville, N.C.,* No. 5:13–CV–150–FL, 2013 WL 1751391 (E.D.N.C. Apr. 23, 2013) (upholding rule limiting plaintiff's literature distribution to a nonprofit booth and a nearby public park, given pedestrian congestion on sidewalks in crowded festival).

In addition, many courts have held that speakers who seek to draw crowds on a daily basis, such as street performers, may be subject to more general place regulations. *See, e.g., Horton v. City of St. Augustine*, 272 F.3d 1318, 133-34 (11th Cir. 2001) (upholding ordinance prohibiting street performers from performing in a four-block area within the City's historic area); *Enten v. District of Columbia*, 675 F. Supp. 2d 42 (D.D.C. 2009) (upholding rule limiting street vendors to certain assigned locations and regulating the number of vendors at any one location); *McFarlin v. District of Columbia*, 681 A.2d 440 (D.C. 1996) (upholding rule prohibiting free speech activities in Metro stations within 15 feet of any escalator, stairwell, or fare card machine).

And lower courts have recognized that sometimes state and local governments need to use more expansive location restrictions in the face of large-scale demonstrations presenting immediate public safety problems. *See, e.g., Menotti v. City of Seattle*, 409

F.3d 1113, 1133-35 (9th Cir. 2005) (upholding, in light of significant security issues, buffer zone preventing protesters from entering the several-block area covering the conference and hotel venues used by World Trade Organization delegates); *Tetaz v. D.C.,* 976 A.2d 907 (D.C. App. 2009) (upholding police lines barring anti-war protesters from coming within 100 yards of the Capitol Building, which area included public sidewalks).

A questionnaire distributed by the International Municipal Lawyers Association to its members (the "IMLA Questionnaire")[4] provides more evidence of the ubiquity of these types of public safety regulations. Additional examples include a Kansas City ordinance that prohibits panhandling within 20 feet of an ATM, *see* Kansas City, Missouri Mun. Code § 50-8-5, and a law in Nashua, New Hampshire that describes specific, limited location restrictions on handbill distribution, based on the "unique layout" and heavy public use of City Hall, *see* Nashua, New Hampshire Mun. Code § 231-7.

B. Similar Laws Protecting Those in Vulnerable Situations Upheld

Regulating the location of speech for the purpose of protecting individuals in particularly private and vulnerable situations has been upheld in several settings. This jurisprudence also could be at risk if the

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[4] The IMLA Questionnaire was distributed by email to IMLA members on September 4, 2013 and used the Survey Monkey program. There were insufficient responses to provide data, but it generated both (1) confirmation that the type of regulations described here are common, and (2) some helpful anecdotes that are included in this *amicus* brief. (Copies of questionnaire and responses on file with Counsel of Record.).

Massachusetts Act is held unconstitutional. This Court has recognized, for example, that the government may provide special protections restricting unwanted speech in front of a person's home. *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (upholding ordinance banning anti-abortion protests in front of private residence, targeting doctor who performed abortions, but permitting protests elsewhere in residential neighborhood, even on other parts of the block).

Local governments continue to enact laws responding to this type of individual-targeted residential protesting, including by imposing fixed buffer zones like the one at issue here. *See, e.g., Thorburn v. Austin*, 231 F.3d 1114, 1119-20 (8th Cir. 2000) (upholding ordinance prohibiting focused residential picketing within 50 feet of a targeted dwelling's lot line). In response to the IMLA Questionnaire, members described similar ordinances in Riverside, California, *see* Riverside, California Mun. Code Chap. 9.5 (protesters must stay at least 300 feet from front door of targeted residence) and Concord, North Carolina, *see* Concord, North Carolina Mun. Code § 50-251 (protesters must stay outside of a resident's "safety zone," defined as 50 feet from a targeted private residential lot or on the sidewalk across the street).

This issue is especially relevant here because there is an important parallel between targeted residential protest cases like *Frisby* and the reproductive health clinic context. In both situations, protesters are targeting one specific individual at a time, rather than focusing on reaching the public at large or a group audience sharing certain traits or interests. Any patient who is walking down the sidewalk to enter a

reproductive health clinic is likely to feel intimidated when all the demonstrators gathered in that spot focus their attention and speech on her. The Record shows that in fact this regularly occurred at the Massachusetts clinics. Pet. App. 140a, 143a; *see also* J.A. 12, 14.

In addition, this Court has recognized the special sensitivities of patients who are receiving medical care. *See NLRB v. Baptist Hospital, Inc*., 442 US. 773 (1979) (allowing hospital to prohibit union solicitation in patient care areas, despite NLRB rule generally prohibiting such bans, due to special nature of hospital setting). For reasons equally applicable to the reproductive health clinic context, the Court explained that hospital patients "often are under emotional strain" and that patients need a "restful" and "helpful" atmosphere. *Hill*, 530 U.S. at 729 (quoting *Baptist Hospital,* 442 U.S. at 783-84 n.12).

Also State and local governments throughout the country have used fixed buffer zones to protect mourners at funerals from hostile interruptions. According to a list compiled by the National Conference of State Legislatures, as of March 4, 2011, 39 states have laws requiring protesters to stand a specified distance (typically 300 feet) away from funerals.[5] These laws were enacted in response to protests by the Westboro Baptist Church, which frequently pickets military funerals, displaying signs such as "Thank God for Dead Soldiers" and "Fags Doom Nations." *See Snyder v. Phelps*, 562 U.S. __, 131 S. Ct. 1207, 1210 (2011). This Court's recent funeral

[5] NATIONAL CONFERENCE OF STATE LEGISLATURES, FUNERAL PROTEST REGULATION STATUTORY PROVISIONS (Mar. 4, 2011) (on file with Counsel of Record).

protest case held only that the First Amendment shields church members from tort liability for their hurtful speech. *Id.* at 1220. The *Snyder* opinion expressly stated that time, place, and manner restrictions raise very different issues, which the Court "had no occasion to consider." *Id.* at 1218.

Since *Snyder*, the Eighth Circuit has upheld funeral protest laws as content-neutral, reasonable regulations of the time and location of protected speech. *See Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013) (upholding the State of Missouri's statute barring protests within 300 feet of a funeral, during or within one hour before or after); *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc) (upholding City of Manchester's identical ordinance).

The Eighth Circuit reasoned that, like those affected in *Hill* and *Frisby*, mourners are unusually vulnerable, and they too need unimpeded access to the funeral. *Manchester*, 697 F.3d at 692. Moreover, church members remain free to protest at any other location, including just outside the 300-foot fixed buffer zone. *Id.* at 694; *see also Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (upholding similar Ohio statute using same analysis).

C. Similar Laws Protecting Both Public Safety and Vulnerable Persons at Clinics Upheld

Using buffer zones around reproductive health clinics is especially compelling given that both types of state interests are present. Fixed buffer zones have been held constitutional when reviewed by this Court. *See Schenck v. Pro-Choice Network of W. New York,* 519 U.S. 357 (1997) (upholding that part of an injunction which imposed a fixed 15-foot buffer zone around

clinic); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding an injunction imposing a fixed 36-foot buffer zone around clinic's entrances and driveways).

State and local governments continue to rely on fixed buffer zones around clinics to protect patients as they access medical services, and recent lower court cases have upheld such laws. *Brown v. City of Pittsburgh*, 586 F.3d 263, 281 (3d Cir. 2009) (holding that combination of two buffer zones, one a "floating" 8-foot and the other a fixed 15-foot was not narrowly tailored, and stating that the fixed, 15-foot rule best accomplishes the government's interest in "protecting patient access and preventing harassment"); *Clift v. City of Burlington, Vermont,* 925 F. Supp. 2d 614 (D. Vt. 2013) (upholding a fixed 35-foot buffer zone).

IV. PRECEDENT FROM A WIDE RANGE OF LESS-CONTROVERSIAL CONTEXTS DEMONSTRATES THAT THE MASSACHUSETTS ACT IS A CONSTITUTIONAL "PLACE" REGULATION

Based on how this Court has described and applied the time/place/manner test thus far, the Massachusetts Act easily satisfies its three requirements. As set forth in *Ward v. Rock Against Racism*, "even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the 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."

491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)) (brackets added).

As shown below, if Petitioners' views on these requirements prevail, not only will Massachusetts lose its effective statute, many existing time/place/manner laws are likely to be struck down. A doctrine reshaped to Petitioners' model would be of little use to state and local governments.

A. The Act is Content- and Viewpoint-Neutral

1. Regulating in Response to a Specific Problem is not "Content-Based"

As explained by this Court in *Ward*, "the principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech *because of disagreement with the message* it conveys." *Id.* at 791 (emphasis added). The Massachusetts statute was enacted not because of disagreement with the pro-life message, but in response to the harmful impact of the protesters' conduct. Nor is it content-based because it was passed to address problems caused by those particular protesters. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Id.*

In assessing time/place/manner regulations, courts regularly dismiss the claim that a regulation is content-based because it was motivated by the problems caused by one or more speakers with a particular message. For example, if animal rights activists were the only speakers who protested outside of a dog racing track, and they regularly caused unsafe

congestion there, using a fixed buffer zone to protect public safety would not be deemed content-based. *See, e.g., Ross v. Early*, 758 F. Supp. 2d 313, 320-21 (D. Md. 2010) (that the location restriction was motivated in response to the conduct of one ideological group – there, animal rights protesters outside the circus – or had an incidental effect on some speakers more than others, did not make it content-based, so long as the government's purpose was "to confront the undesirable secondary effects of the protests – namely, traffic and pedestrian congestion"); *Spingola v. Village of Granville*, 2002 WL 1491874, at *1 (after a self-described "confrontational Evangelist" drew significant crowds of observers using signs and props, thus creating a traffic congestion problem at a village festival, adopting a generally-applicable festival location restriction in response did not make the law content-based).

Logically, it cannot be that a law is content-based simply because it was enacted to address harms caused by speakers with similar messages. Consider the impact. If this Court were to hold that governments could not respond to a public safety problem unless it was caused by speakers on a range of topics, or by groups espousing different viewpoints on the same issue, then no time/place/manner restriction would stand. Legislatures pass laws in response to observed problems. To do so cannot be deemed to mean that they are targeting the content or views of those whose conduct has created the problem triggering the law.

2. Exempting Functionally-Distinguishable Categories of Persons is not "Viewpoint-Based"

Neither does the fact that the Act allows clinic employees and agents to assist patients who are on their way into the clinic for medical treatment make it content-based or viewpoint-discriminatory. Respondents' Brief addresses the main points of Petitioners' arguments on this issue.

But it is worth showing here that in fashioning place limitations on speech for public safety reasons in other contexts, governments frequently allow entry for certain people because of their role; doing so does not make the regulation content- or viewpoint-based. For example, during a NATO conference, the City of Colorado Springs established a security zone where protesters and most other persons were not allowed. Even though the policy allowed some categories of persons (delivery and repair persons, and social guests of residents living in that area) to enter and leave the security zone at will, the Tenth Circuit found the policy content-neutral. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1218 (10th Cir. 2007); *see also Pahls v. Thomas,* 718 F.3d 1210, 1234-35 (10th Cir. 2013) (holding that policy banning demonstration activities within a defined geographic area in advance of a presidential visit that permitted residents, but not demonstrators, to remain within that area did "not call into question the content or viewpoint neutrality of [that] policy"); *Mahoney v. United States Marshals Service*, 454 F. Supp. 2d 21 (D.D.C. 2006) (holding that policy of closing downtown blocks to protesters and other speakers on the day of Red Mass, but allowing the media and attendees to enter, was content- and viewpoint-neutral).

An example from the IMLA Questionnaire is helpful here. Tulsa, Oklahoma's ordinance imposing a "quiet zone" around hospitals, schools, and churches makes an exception for loud activities that are conducted by the hospitals, schools, and churches whose quiet is protected by the ordinance. *See* Tulsa, Oklahoma Mun. Code § 1400. Looking at a simple example, a noisy school fair conducted by school employees, shows that this kind of ordinance exemption is content-neutral. It merely reflects the fact that the purpose of the quiet zone – protection of the school's function and those served by it – is not implicated when it is school employees (along with volunteers) who engage in the loud speech.

B. The Act Is Narrowly Tailored

1. Especially Where Other Laws Have Proved Unworkable, State and Local Governments are Allowed and Expected to Create New Solutions

Petitioners assert that the Act burdens substantially more speech than necessary because other laws already prohibit abusive behavior outside of clinics. If true, most time/place/manner restrictions would be invalid. But this Court already has firmly rejected this argument in the context of fixed buffer zones around polling places.

Burson v. Freeman held that a law proscribing campaigning within 100 feet of polling place entrances complied with the First Amendment. 504 U.S. 191, 206-08 (1992). The Court acknowledged that voter "intimidation and interference laws" already were in place, but they had proved inadequate because such laws "deal with only the most blatant and specific attempts" to impede elections. *Id.* at 207. In a clear

parallel to this case, the Court observed: "undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.* (quoted in *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 382 (1997)).

While it is true that prior to passage of the Act, other laws made it illegal to use or threaten force against patients and to hinder or impede their access to clinics, these prior existing legal tools had proved unworkable. *See* Pet. App. 95a. And just like the situation described in *Burson*, a woman who is on her way into a clinic to obtain private medical services, and who is first forced to pass closely by a group of protesters, easily could feel intimidated. J.A. 23-24. Even more so than in the polling place context, that patient could be driven away from exercising her right to reproductive health care "before remedial action can be taken." *See* Pet. App. 140a, 143a (showing that this in fact occurred here).

Local and state authorities are in the position to recognize such unresolved harms, and they are charged with the responsibility of creating a better regulatory scheme. Now, the Act's 35-foot fixed buffer zone is clear and enforceable, and it prevents the problems that police cannot address at the moment they occur.[6]

The floating buffer zone first tried by Respondents also had additional, unique problems. Using a "consent" standard – in volatile circumstances on the

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[6] From an administrative perspective, an objective rule also allows governments to devote less police time to this one type of public safety issue. Clear rules like this one are essential for state and local governments with limited resources, including reduced police forces (as described above in Part I).

public way – puts state and local governments in an untenable situation. First, it is seldom possible to prove or disprove a patient's "consent" to a close-up conversation with a protester. J.A. 31, 50. Moreover, attempting to enforce such a subjective standard may lead to new problems: claims of unconstitutional enforcement. J.A. 60.

Here, the Record shows that many times, unless a patient was adamant in communicating her desire to be left alone, sometime a look or a mumbled phrase was enough for some sidewalk counselors to assume consent.[7] Without a clear-cut rule, entering patients are not assured unimpeded access, and protesters and police may disagree on whether consent was given or the law was broken.

Significantly, reaching consensus on what happened in these circumstances may not even be possible. This is demonstrated by a fascinating recent experiment. It was designed to test individuals' perceptions of key facts relevant to distinguishing constitutionally protected "speech" from unprotected "conduct." *See* Dan M. Kahan et al., "*They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012). After being shown video of an actual political protest, subjects disagreed sharply

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[7] *See, e.g., McGuire v. Reilly*, 573 F. Supp. 2d 382, 395 n.81 (D. Mass. 2002) (quoting Martha Coakley Written Testimony at 4-6) (One problem with enforcing the 2000 Act was "the inability to discern whether a patient, her companions, or facility employees have consented to a given protester's approach. Some protesters have said that they believed that a patient 'consented' because of the way she made eye contact or because a patient uttered a statement in response to a protester's comment (even if that statement was not one of consent).").

on the key "facts" – including whether the protesters obstructed and threatened pedestrians. *Id.*

Moreover, requiring use of the subjective "consent" standard puts governments at risk of ongoing constitutional litigation and money damages. It is an essential First Amendment principle that government officials may not have discretion regarding whether to limit particular speech or in choosing among speakers. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (upholding park district event permit system where officials could only deny permits based on listed, objective factors); *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008) (upholding city ordinance requiring those who wish to picket on public ways to provide the city with prior notice of intent on the grounds that it did not give municipal officials any discretion to grant, deny, or set conditions on permission to demonstrate). The 35-foot fixed buffer zone both guides police and protects protesters by clarifying what constitutes a violation.

When governments enact time/place/manner regulations, inherent in their decision is a determination that – whatever other laws are on the books – the identified problem has not been solved. If the prior existence of ineffective laws makes such regulations unconstitutional, few will survive.

2. Cumulative Impact is What Matters: No Time/Place/Manner Regulation is Unconstitutional Because Some Individual Speakers, Standing Alone, May Not Cause Harm

Petitioners also assert that the Act is not narrowly tailored because it applies to their own ostensibly harmless, polite, consensual speech. The Act, of course,

was passed to solve problems caused by the broad spectrum of clinic protesters.

This Court previously rejected the reasoning put forth here by Petitioners. *See Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981). In evaluating a challenged time/place/manner rule, *Heffron* established, the inquiry is not whether there would be public safety problems if *only Petitioners* were allowed to speak at the restricted location. *Id.* at 652. Rather, courts must evaluate the negative impact if *all* persons who wish to speak at the relevant location were allowed to do so, and then ask whether the law is narrowly tailored to address that comprehensive set of problems. *See id*. ("the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the . . . rule may not be enforced with respect to ISKCON"). In *Heffon*, the Court held that requiring solicitations to be permitted everywhere on the Minnesota State Fair grounds, not only by the International Society for Krishna Consciousness (ISKCON) but also by all other nonprofit groups, "would prevent the State from furthering its important concern with managing the flow of the crowd." *Id.* at 654.

A sample case applying *Heffron* involved a security arrangement for an annual mass for government dignitaries, where demonstrators and other speakers were barred from entering a multiple-block area around the church. *See Mahoney v. United States Marshals Service*, 454 F. Supp. 2d 21 (D.D.C. 2006). There, plaintiffs argued that they themselves posed no threat to anyone's safety, and that it would make little marginal difference if they were allowed to stand where they wanted to on the south Rhode Island

Street sidewalk. The court stated that a time, place, and manner restriction "'should not be measured by the disorder that would result from granting an exemption solely to'" the complainant; rather, courts must look to what would happen if every individual to which a restriction applies were freed of its limitations. *Id.* at 37 (quoting *Heffron*, 452 U.S. at 652-54).

It may be true that some, or even most, patients do not feel unsafe or intimidated by contact with the very nicest of demonstrators, those like the Petitioners, who politely ask if they can describe the options and support available if a woman decides against abortion. *See* Pet. App. 11 (describing Petitioners' conduct). But they are just one subset of those who congregate outside reproductive health clinics to protest and counsel against abortion. J.A. 111, 114. There is extensive evidence that in this case, like all other clinic buffer zone cases, many protesters aggressively harass women, yelling, intimidating, wielding large graphic signs, and even causing fear of physical violence. *McCullen v. Coakley*, 573 F. Supp. 2d 382, 392 (D. Mass. 2008). This is the public safety problem which state and local governments must be allowed to address. Adopting Petitioners' approach would preclude effective time/place/manner restrictions in many circumstances.

C. The Act Leaves Ample Alternatives for Communication: Speakers are Not Entitled to Their First-Choice Method of Addressing a Potential Audience

Petitioners here assert that if they are prohibited from approaching women up close and speaking in conversational tones, they are "far less likely to reach persons who would not deliberately seek out the

information petitioners offer." Pet. App. 47. They argue that the Act does not leave open ample alternative channels for communication because it leaves them with "less effective" means for communicating their message of alternatives to abortion. Pet. Br. 46.

This claim misstates the applicable standard,[8] and ignores the rationale for the time/place/manner principle. It is *always* the case that plaintiffs believe the method they have chosen to deliver their message is the most effective, and that the challenged regulation leaves them with a less effective option. The point is that 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." *Heffron,* 452 U.S. at 647. Rather, it protects the right of every citizen to "reach the minds of willing listeners; . . . there must be *opportunity to win their attention*." *Hill,* 530 U.S. at 728 (emphasis added). "Speakers are not entitled to their ideal means of communication." *Ross v. Early*, 758 F. Supp. 2d 313, 322-23 (D. Md. 2010).

The principle is clearly illustrated in *Heffron,* where a Hare Krishna group (ISKCON) wanted to solicit funds while proselytizing at the Minnesota State Fair. The Court observed: "In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for

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[8] Tellingly, as their source for the "less effective" standard, Petitioners rely on an inapposite residential sign case. *Id.* (quoting *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (holding unconstitutional a law prohibiting residents from displaying "for sale" signs on their lawns).

literature." 452 U.S. at 653. Nonetheless, the Court upheld the rule limiting all solicitation to rented booths, noting that ISKON still was able to solicit both from a booth and from outside the fair grounds. Despite ISKON's strong belief to the contrary, the Court deemed these alternatives adequate. *Id.* at 654.

This is the usual approach in all the countless court decisions upholding time/place/manner regulations. In a very relevant recent case, the Seventh Circuit specifically rejected the claim that a place restriction failed the "ample alternative" test because it made close "one-on-one" conversations more difficult. In *Marcavage v. City of Chicago*, the court upheld the City's restrictions on a religious group's "outreach activities" during the "Gay Games," an annual homosexual athletic and cultural event. 659 F.3d 626 (7th Cir. 2011). There was significant pedestrian traffic congestion on the sidewalks surrounding the events, and police directed plaintiffs to keep moving or move to adjacent areas if they wanted to stand and approach people or distribute handbills. At the Soldier Field event, plaintiffs were directed to a gravel area next to the sidewalk. *Id.* at 629.

The plaintiffs in *Marcavage* argued that the designated area was not an adequate alternative because standing there "prevented them from engaging attendees in a 'one-on-one' presentation" of their Gospel message and caused them "difficulty handing out Gospel tracts from their position on the gravel." *Id.*

Applying the standard used for all challenges to time/place/manner regulations, the Seventh Circuit stated: "the fact that the permissible locations were not the plaintiffs' preferred venues does not render them inadequate." Because the alternate locations

were "*within view and earshot* of those traveling to the Games," *id.* at 631 (emphasis added), the court held that "the plaintiffs had ample opportunity to capture the attention of the Games attendees and supporters . . . ." *Id.* (relying on *Hill v. Colorado*, 530 U.S. at 728).

In contrast, when courts do find that a location restriction fails to provide ample alternatives, the limits typically are quite burdensome – ones that virtually ensure speakers will not be heard by their intended audience. For example, the Ninth Circuit struck down a rule restricting animal-rights protesters to a few "free expression zones" because these areas were located at the outside perimeter of a large parking lot, far from stadium entrances, and even far from most of the attendees' parked cars. *Kuba v. I-A Agricultural Assoc.*, 387 F.3d 850 (9th Cir. 2004); *see also Operation Save America v. City of Jackson, WY*, 275 P.3d 438 (Wyo. 2012) (holding unconstitutional a TRO against anti-abortion protesters in part due to its excessive geographical scope: protesters were barred not only from the festival's town square location, but also from streets and sidewalks two blocks in each direction).

Here, the Massachusetts Act leaves available many ways to communicate the pro-life message, including Petitioners' particular message of support and alternatives to abortion. Protesters still may stand right next to an approaching patient and talk to her while she is walking down a sidewalk that leads to the clinic, but which is still outside the 35-foot buffer zone. J.A. 32, 34, 125. Also, 35 feet is not a very large distance. In fact, it is less than the distance from the typical home's front door to the sidewalk, and certainly many neighborly conversations are initiated from that

position. Moreover, if Petitioners are concerned about the volume required to speak from 35 feet away, they retain good options to politely convey their supportive message. For example, they could display non-confrontational signs which convey a person's or organization's offer of help, as well as the immediate availability of informative leaflets and supportive conversation. J.A. 34. This kind of outreach would effectively invite willing listeners to participate in the kind of civilized conversation Petitioners seek. On the other hand, acceding to Petitioners' characterizations of the "ample alternatives" and other parts of the time/place/manner test would unravel this long-established constitutional framework.

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If the fixed buffer zone used in the Massachusetts Act is held unconstitutional, the impact will be far-reaching: state and local governments will lose their primary tool for addressing public safety issues while respecting First Amendment speech rights.

CONCLUSION

We respectfully request this Court to affirm the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

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