No. 12-1168

In The
Supreme Court of the United States

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, AND ERIC CADIN,

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

AMICUS CURIAE BRIEF OF 40 DAYS FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae 40 Days for Life is a community-based campaign that draws attention to the harms of abortion. Set during a 40-day time period in numerous cities throughout the United States, the most visible component of 40 Days for Life is a constant prayer vigil outside locations where unborn children are aborted. Participants pray and fast outside abortion clinics 24-hours a day during that 40-day time period. The most recent 40 Days for Life campaign was conducted in 238 communities in the United States. More than 80,000 people participated worldwide. In Massachusetts, six cities and approximately 1,900 people participated. 40 Days for Life seeks to inform women seeking an abortion that there are better alternatives and to offer them support in reaching that decision. 40 Days for Life seeks to witness to the society at large that abortion is a tragic choice, one that can be avoided.

MASS. GEN. LAWS ch. 266, § 120E1/2 ("the Act"), as interpreted and applied by the First Circuit Court of Appeals, will inhibit *Amicus* from carrying out its peaceful prayer vigils outside of abortion clinics in Massachusetts by creating a "no pro-life speech zone."

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court, all parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part. No entities other than the *Amicus* or its counsel have made a monetary contribution to the preparation or submission of this Brief.

Participants in 40 Days for Life campaigns are no longer allowed to pray in close proximity to abortion clinics, or to provide wanted and requested help to women entering abortion clinics – but abortion clinic employees are explicitly allowed to communicate with women entering the clinics.

SUMMARY OF ARGUMENT

In 2007, Massachusetts enacted a law to establish a "no pro-life speech zone" surrounding all locations performing abortions across the State except those within or upon the grounds of hospitals. This 35-foot radius zone extends around abortion clinic driveways, entrances, and exits encompassing public streets and sidewalks. MASS. GEN. LAWS ch. 266, § 120E1/2 (the "Act" or the "Massachusetts Act") prohibits anyone to "enter or remain on a public way or sidewalk adjacent" to a stand-alone abortion facility, but it does not equally apply to all persons. The Act exempts four classes of individuals, permitting them to enter or remain in this designated area: (1) persons entering or leaving the abortion clinic facility; (2) employees or agents of the abortion facility acting within their scope of employment; (3) law enforcement, ambulance, fire-fighting, and other municipal agents within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to the abortion clinic solely for the purpose of reaching a destination other than the clinic. *Id.* at § 120E1/2(b).

This "no-enter zone" for those opposing abortion allows police to arrest and punish any person engaging in pro-life advocacy, including: speaking, praying, wearing t-shirts/hats/buttons, displaying signs, leafleting, making consented approaches, and peaceful conversation. It prohibits all methods of communication of the pro-life message in a prototypical public forum, but protects abortion advocacy by permitting abortion clinic employees and agents to enter and remain in the zone.

The First Circuit affirmed a district court ruling that upheld the Act against a facial challenge as a content-neutral time, place, and manner regulation. *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). (*McCullen I*). Explaining its determination that the Act met the constitutional requirement for alternative channels of communication, the First Circuit stated that, in a facial challenge, "as long as we can envision circumstances in which a 35-foot buffer zone allows adequate alternative means of expression, the challenge must fail." *McCullen I*, 571 F.3d at 180. Addressing the question in the "as applied" challenge, which was severed and stayed by the court, the First Circuit, citing itself in *McCullen I*, states that "the Constitution neither recognizes nor gives special protection to any particular conversational distance." *McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013). "To be sure, the Act curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," the First Circuit found, but

continued: "But as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication." *Id.* at 13.

Amicus urges this Court to reverse the First Circuit and strike down the Act. The restrictions placed upon pro-life speech are neither content nor viewpoint neutral, but even assuming arguendo that they are, the Act does not survive an intermediate scrutiny analysis because it fails to offer pro-life speakers such as *Amicus* "ample alternative avenues" for communication, and it is not narrowly tailored. *Amicus* wishes to draw to the Court's attention the fact that it simply cannot engage in speech if these restrictions are upheld. It is no answer, as the First Circuit seemed to think, to point out that pro-life speech may be conducted outside the zone. The question is whether the kind of speech in which *Amicus* engages – peaceful, face-to-face communication – is possible from a distance of 35 feet. While others may wish to "speak" from such a distance, with large signs or bullhorns, that is no excuse to deprive *Amicus* and others who wish to engage in face-to-face communication from doing so. Speech is not reducible to shouting.

This Court has recognized that important elements of speech include the opportunity to reach an intended audience, communicating the identity of the speaker, and the use of the medium that the speaker judges to be most effective. In this brief, *Amicus* seeks

especially to review the Court's holdings that have recognized the importance of this manner of speech and its protection under the First Amendment. The importance of protecting person-to-person pro-life speech is only underlined by this Court's abortion jurisprudence, which has emphasized the importance both of persuasion among citizens and of the provision of relevant information to women.

For these reasons, the decision by the First Circuit should be reversed.

ARGUMENT

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Fourteenth Amendment makes that prohibition applicable to the State of Massachusetts. As the Court has explained "the freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The Court's abortion jurisprudence, foreclosing the ability of the people to ban abortion, highlights the need for robust abortion-related speech. "Absent

the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause." *Hill v. Colo.,* 530 U.S. 703, 787-88 (2000) (Kennedy, J., dissenting). This is particularly true in the context of speech outside of abortion facilities, for there is perhaps "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time. . . ." *Hill,* 530 U.S. at 792 (Kennedy J., dissenting). The guarantees of the First Amendment are crucial here, where speech "if it is to be effective, must take place at the very time and place a grievous moral wrong, in [the speaker's] view, is about to occur." *Id*. at 792.

The Massachusetts Act's no-entry zone surrounding abortion clinics infringes on these fundamental personal rights and liberties of *Amicus*. The Act's no-entry zone is, as we will explain, actually a no-pro-life-speech zone, where no alternatives to abortion may be offered. The Act's content-based and viewpoint-based discrimination require that the Act undergo strict scrutiny review. However, the Act does not survive even intermediate scrutiny because its no-speech zone significantly impairs the ability of *Amicus* to communicate its message and is not narrowly-tailored to serve a substantial government interest.

Additionally, while the State may not itself be obligated to provide information about abortion alternatives, given the importance of the abortion decision to the health of the woman, the State should not be allowed, under the guise of exercising its police

power, to deprive pregnant women of information about abortion alternatives provided by third-party, non-state actors on the public sidewalks outside of abortion clinics.

I. THE ACT'S ABORTION CLINIC NO-PRO-LIFE-SPEECH ZONE IS DISTINGUISHABLE FROM THE STATUTE UPHELD IN *HILL* AND CONSTITUTES BOTH CONTENT-BASED AND VIEWPOINT-BASED DISCRIMINATION REQUIRING A STRICT SCRUTINY ANALYSIS.

In *Hill v. Colorado*, this Court recognized, "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colo.,* 530 U.S. 703 at 716 (2000). *Hill* affirmed that it is "constitutionally repugnant" to prohibit a discussion of particular topics, while others are allowed. *Id*. at 722-23. Relying on *Hill* and its own opinions in *McGuire I* and *II,* the First Circuit declared the Massachusetts Act content-neutral and an appropriate time, place, and manner regulation. *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). (*McCullen I*); *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013).

The Massachusetts Act is content-based and viewpoint discriminatory. It violates all boundaries on regulating constitutionally protected speech. The precedent of the First Circuit decision – if allowed to

stand – permits blatant viewpoint discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, which will have widespread and deleterious effects on the First Amendment rights of persons in every State, including *Amicus*. *See*, *e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009) (looking to the *First Circuit* decisions in its application of *Hill* and standards of review); *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029 (N.D. Cal. 2009) (heavily relying on the First Circuit's decisions in *McGuire II* and *McCullen*), aff'd in part and rev'd in part, 653 F.3d 835 (9th Cir. 2011).

A. The application of the Act's no-speech zone to public areas surrounding *only* abortion clinics demonstrates that it is content-based.

Content-based regulations of speech are presumptively invalid. *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 188 (2007). "The rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Id.* at 188 (quoting *R. A. V. v. St. Paul*, 505 U.S. 377 at 387 (1992)).

The Act is clearly distinguishable from the one in *Hill* in ways that the Court found significant for determining that the Colorado "no approach" statute was content-neutral. First, the Colorado statute applied to all health care facilities. *Hill,* 530 U.S. at

708. Second, it encompassed a few subject matters of possible protest. *Id.* at 723. Third, the Colorado statute was a "no approach" law, still permitting engagement on the pro-life message with willing listeners. *Id.* at 708. And fourth, the 8-foot zone still allowed for a "normal conversational distance" between a potential listener and the messenger. *Id.* at 726-27 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)).

The Massachusetts Act is quite different. It prohibits all communication of pro-life messages within the designated 35-foot radial (70-foot in diameter) zone around *only* abortion clinics. The Act specifically excludes hospitals, defining "reproductive health facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Act § 120E1/2(a). The State has expressly preserved the right to peaceful, non-obstructive speech and expressive conduct *at all other healthcare facilities*. *See* MASS. GEN. LAWS ch. 266 § 120E (outlawing obstruction of access and impeding medical services but expressly preserving the "right[ ] to engage in peaceful picketing which does not obstruct entry or departure.")

In *Hill* the Court found it was "precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in [*Ward v. Rock Against Racism*], rather than a more strict standard." *Hill*, 530 U.S. at 731 (citing *Ward*, 491 U.S. 781, 791 (1989)). The Court in *Hill* explained that "[w]hat is important is

that all persons entering or leaving health care facilities share the interests served by the statute." *Hill,* 530 U.S. at 731. Creating a no-speech zone around abortion clinics, and *only* abortion clinics, is entirely different. It is not a "general policy choice" governing all health care facilities. It is aimed solely at abortion clinics. As such, it is not content-neutral.

B. The Act's exemption for patrons, employees and agents of the abortion clinic constitutes viewpoint discrimination.

The government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). Nor may the government "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Important to the Court's finding that the "no approach" statute in *Hill* was viewpoint neutral was that it applied to "all" speakers: "That is the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725.

The Massachusetts Act fails this constitutional requirement. Rather, it attempts to suppress the pro-life views of those opposed to abortion. Though the Act broadly prohibits entering or remaining within the zone surrounding abortion clinics, it ***exempts patrons, employees, and agents of the clinic***. Act

§ 120E1/2(b)(1) and (2). Thus, the Act grants preferential treatment for abortion advocates and those engaged in business with the industry. It prefers the speech of those in favor of abortion over the speech of those opposed thereto. As such, it is not viewpoint neutral.

One side of the abortion debate is represented in the zone while the other position is strictly prohibited. While the pro-life person may not wear into the "no pro-life speech zone" a vest, button, or any attire that identifies her position, the abortion clinic employee may do so. This Act permits abortion clinic employees and volunteers – dressed in brightly colored vests explicitly expressing their pro-choice position – to enter the zone, meet a clinic customer, and escort her into the clinic for an abortion appointment. This action speaks louder than any word in advocacy for abortion. Yet the Act makes it a crime for a pro-life advocate to approach a willing listener considering abortion and escort her outside the zone to discuss abortion alternatives. Within the zone, the pro-life advocate is not permitted to communicate while the advocates for abortion may speak loud and clear by leading women through the abortion clinic doors.

In addition, the Act allows clinic employees to make verbal statements that are forbidden of anyone wishing to communicate a pro-life message. For example, in fulfilling their "duty" to bring women into the clinic, clinic employees can grab a woman by the arm, guide her into the clinic, all the while saying,

"Don't worry. I can help you. Just follow me. . . ." – whether that communication is consented to by the woman or not.[2] The exact same phrase from a pro-life demonstrator is forbidden under the Act, even if a woman requests help from that pro-life demonstrator.

Through these various preferences, the Act essentially converts the public sidewalk into private property for the abortion facility.

II. THE ACT DOES NOT SURVIVE EVEN INTERMEDIATE SCRUTINY BECAUSE ITS NO-PRO-LIFE-SPEECH ZONE DOES NOT PROVIDE AMPLE ALTERNATIVE MEANS FOR *AMICUS* TO COMMUNICATE ITS MESSAGE AND IS NOT NARROWLY-TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST.

Although the Act is both content and viewpoint-based and should be subjected to strict scrutiny, it

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[2] In *McGuire II*, a case that upheld a "no approach" statute enacted by Massachusetts in 2000, the First Circuit acknowledged that "escorts sometimes tell patients things to the effect that they do not need to listen to the pro-life protestors. . . . [E]scorts sometimes 'ask[ ]' or 'suggest[ ]' that patients give them any anti-abortion leaflets they have received from protestors. For example, they say things like: 'Do you want me to take that from you,' or 'You know, you don't need that.'" *McGuire v. Reilly*, 386 F.3d 45, 54 (1st Cir. 2004). The 2007 Massachusetts Act that is before the Court in the present case expressly allows this continued communication by abortion clinic employees, but prohibits the exact same conduct by pro-life demonstrators.

fails to satisfy even the lesser demands of intermediate scrutiny applied to content and viewpoint neutral restrictions. Content-neutral restrictions (*i.e.*, restrictions on time, place or manner of speech or expressive conduct) are only permissible if they are narrowly tailored to serve a substantial government interest and leave open ample alternative channels for communicating this information. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

The First Amendment "protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Hill,* 530 U.S. at 728. (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

A. The Act's no-pro-life-speech zone does not provide ample alternative means for pro-life communication as required by intermediate scrutiny.

Content-neutral time, place, or manner restrictions on expression (whether oral, written, or symbolized by conduct) must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468

U.S. 288 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). The Court has held that First Amendment concerns are not satisfied simply because another type or location of speech is available. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). By limiting the availability of a particular means of communication, even content-neutral restrictions can significantly impair the ability of individuals to communicate their message. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

In the present case, adopting the First Circuit's analysis (that it is sufficient that petitioners are "visible" while standing outside the 35-foot zone) would render the constitutional requirement for "ample alternative channels" practically meaningless. The First Circuit's finding that "communicative activities flourish" outside the Act's speech-free zone (*McCullen*, 708 F.3d at 13) is constitutionally-irrelevant. The question is whether the pro-life speech of speakers such as *Amicus* is infringed, not whether others are content to use bullhorns or shouting outside the zone.

1. Peaceful speech and prayer outside abortion facilities is central to the mission of *Amicus*.

40 Days for Life is a community-based, pro-life campaign "with a vision to access God's power through prayer, fasting, and peaceful vigil to end abortion." *About 40 Days for Life*, 40 DAYS FOR LIFE, http://www.40daysforlife.com (last visited Sept. 9, 2013). *Amicus* states on its website that the mission of its campaign is "to bring together the body of Christ in a spirit of unity during a focused 40 day campaign of prayer, fasting, and peaceful activism. . . ." *Id.*

To officially participate in 40 Days for Life, *Amicus* requires the completion of an application process. A campaign coordinator must pledge to conduct his or herself and the 40 Days for Life campaign "in a positive manner with respect, professionalism and a compassionate, Christ-like attitude." *See Application for September 25-November 3, 2013 campaign*, 40 DAYS FOR LIFE, *available at* https://www.surveymonkey.com/s/40dfl-application (last visited Sept. 10, 2013). Coordinators also pledge that their campaigns will be conducted "in a peaceful, law-abiding manner and to obey the instructions of law enforcement officials." *Id*. In addition, they explicitly pledge "to avoid speaking or acting in a way that is intended to harm, intimidate, frighten, antagonize or insult others." *Id*. Six cities in Massachusetts are approved to participate in the 40 Days for Life 2013 campaign, which will take place from September 25

to November 3: Attleboro, Boston, Haverill, Lynn, Springfield, and Worcester.

The visible, public centerpiece of 40 Days for Life is a peaceful vigil. *Amicus* explains on its website that this vigil is "a focused, 40-day, non-stop, round-the-clock prayer vigil outside a single Planned Parenthood center or other abortion facility in your community." 40 DAYS FOR LIFE, *supra*. Campaign coordinators must pledge to "commit to strive for peaceful vigil coverage of a minimum of 12 hours per day, each day [of the 40 day campaign]." *Application, supra*. (Due to safety concerns at some locations, particularly inner-city locations, some campaigns are allowed to hold their vigils for only 12 hours per day, if needed.)

The message intended by *Amicus* for its vigil is "a peaceful and educational presence." *Id. Amicus* intends that "[t]hose who are called to stand witness during this 24-hour-a-day presence send a powerful message to the community about the tragic reality of abortion." *Id.* The peaceful vigil conducted by *Amicus* outside abortion facilities "also serves as a call to repentance for those who work at the abortion center and those who patronize the facility." *Id.*

The nature of the speech *Amicus* intends to communicate, and *Amicus'* commitment to ensuring its campaigns communicate its intended message, is demonstrated both by the application campaign coordinators are required to submit and by the "Statement of Peace" each individual participating in a 40 Days

for Life campaign must sign. *See Statement of Peace*, 40 DAYS FOR LIFE, *available at* http://www.40daysforlife.com/docs/fall2013/statement_of_peace.doc (last visited Sept. 10, 2013). Each volunteer testifies that she will "show compassion and reflect Christ's love to all (abortion facility or Planned Parenthood) employees, volunteers, and customers." *Id*. Volunteers likewise promise to "not obstruct the driveways or sidewalks," "not threaten, physically contact, or verbally abuse (abortion facility or Planned Parenthood) employees, volunteers or customers," "not damage private property," and "cooperate with local authorities." *Id*.

The guarantees of the First Amendment are crucial for *Amicus* because speech meant to persuade against abortion "if it is to be effective, must take place at the very time and place a grievous moral wrong, in [the speaker's] view, is about to occur." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting). There is perhaps "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time. . . ." *Id*. at 792.

Amicus recognizes that not everyone welcomes its message. However, as the Court noted in *Hill,* "leafleting, sign displays, and oral communications are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection." *Hill,* 530 U.S. at 715.

2. The Act's no-pro-life-speech zone makes it impossible for *Amicus* to engage in such speech.

The Act's no-speech zone changes the voice, the tone, and thus the identity and message of a speaker wishing to offer alternatives to abortion. The Act dictates the use of a raised voice or a large sign for anyone opposing abortion. The Act forces anyone speaking in favor of alternatives to abortion to scream or be silent, to be loud or be absent. For *Amicus*, the Act's restrictions "will necessarily impede, rather than assist, the speaker's efforts to communicate their message." *Hill*, 530 U.S. 727.

a. The First Amendment protects *Amicus*' right to select what it believes to be the most effective means for communication.

The First Amendment does not merely protect the right to advocate a cause; it protects the right "to select what [the speaker believes] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

In *Meyer* the Court noted that the mere existence of alternative means of communication was not sufficient. "That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424. The law at issue in *Meyer* prohibited what the Court described as

"access to the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* at 424. "[T]hat it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Id.* at 424 (quoting *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). *Cf. Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296, 299 (1981)).

In the present case, *Amicus* is not permitted to select what it believes to be the most effective means to advocate its cause. *Amicus* is no longer allowed to pray in close proximity outside abortion clinics or to provide requested help to women entering those clinics.

b. The Act fails to allow *Amicus* to engage in speech with its intended audience from a "normal conversational distance."

The value of direct, face-to-face, personal communication in attempts to persuade a speaker's intended audience is a thread that runs deeply throughout this Court's First Amendment cases. The unconstitutional law at issue in *Meyer v. Grant* prohibited "direct one-on-one communication," which the Court described as "access to the most effective, fundamental . . . avenue of political discourse" *Meyer,* 486 U.S. at 424.

Notably, in another abortion-related speech case, this Court struck down a 15-foot floating buffer zone

because it would have prohibited anti-abortion protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are on public sidewalks." *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). The Court in *Hill* agreed as to the importance of ensuring speech can occur from a "normal conversational distance." *Hill,* 530 U.S. 726-27.[3]

The Court has recognized the importance of personal, face-to-face, direct communication even in the context of lesser-protected commercial speech. In *Edenfield v. Fane*, the Court found a violation of the free speech guarantees of the First and Fourteenth Amendments by a State rule that prohibited a certified public accountant (CPA) from "direct, in-person, uninvited solicitation." 507 U.S. 761 (1993). The fact

[3] Whether the 8-foot zone upheld in *Hill,* in fact, affords a "normal conversational distance" is something the Court may want to reconsider. The majority in *Hill* concedes, at least, that "the distance certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention." *Hill*, 530 U.S. at 726. Considering the context of this speech – a public sidewalk, and a conversation between unfamiliar persons, "background noise" is not the only factor that may make the required separation an abnormal distance for conversation. ("I have certainly held conversations at a distance of eight feet seated in the quiet of my chambers, but I have never walked along the public sidewalk – and have not seen others do so – 'conversing' at an 8-foot remove." *Hill*, 530 U.S. at 756 (Scalia, J., dissenting).)

that the State rule prohibited face-to-face speech was of crucial importance. "Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller." *Id.* at 766.

The Massachusetts Act's 35-foot no-speech zone clearly prohibits *Amicus* from engaging with its intended audience, which includes those who work at the abortion center and those who patronize the facility, from a "normal conversational distance."

Notably, the First Circuit opines that those wishing to reach an audience within the no-speech zone "have the option (which they sometimes have exercised) of using sound amplification equipment." *McCullen*, 708 F.3d at 13. That is precisely what is wrong with the Act. It prohibits the normal conversation essential to *Amicus*' speech. The shouting-match envisioned by the First Circuit eviscerates *Amicus*' ability to be heard by the women whom it seeks to engage in a normal conversation. Speech is not reducible to shouting.

c. *Amicus*' identity is interwoven with the location of its speech and is an important component of its attempts to persuade.

As noted, *Amicus* is not a shouter. Rather it engages in peaceful, personal interaction with women approaching abortion clinics. It cannot "speak" if it is forced to go elsewhere (*i.e.*, outside the 35-foot zone).

The importance of the location where speech occurs and of its intersection with the speaker's identity has been recognized by this Court. For example, in *City of Ladue v. Gilleo*, the Court found that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." 512 U.S. 43 at 56. The Court explained that "[p]recisely because of their location, such signs provide information about the identity of the 'speaker.'" *Id.* at 56.

The Court noted: "A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *Id.* at 56-57.

In the present case, barring *Amicus* from speaking within a 35-foot radius of an abortion facility alters the identity of *Amicus* and its intended message of peacefully offering, in a personal interaction, alternatives to abortion. The Act forces *Amicus* off public sidewalks, which is what the Court has recognized as "the prototypical example of a traditional public forum," where speech is "at its most protected." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377

(1997) (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988); *United States v. Grace*, 461 U.S. 171, 180 (1983)).

B. The Act's prohibition of peaceful speech by *Amicus* with willing listeners is not narrowly tailored to further a substantial government interest.

Even assuming, arguendo, a substantial government interest in public safety, the Act's abortion-specific no-speech zone is not narrowly tailored to that interest. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. The Massachusetts Act is vastly over-inclusive; criminalizing the peaceful speech and prayer of *Amicus* on a public sidewalk, regardless of whether there are willing listeners or no listeners at all, does not advance the government's stated interest in public safety.

In *Madsen v. Women's Health Ctr.,* striking down part of an injunction against abortion protestors, the Court found "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech

than necessary to prevent intimidation and to ensure access to the clinic." 512 U.S. 753, 774 (1994). The Court concluded that "absent evidence that the protesters' speech is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the provision prohibiting petitioners, within 300 feet of the clinic, from approaching any person seeking services of the clinic unless the person indicates a desire to communicate] cannot stand." *Id.* at 774.

The Court in *Hill* emphasized that central to its analysis was that the "no approach" Colorado statute still permitted *consensual* speech – "The regulations in this case, however, only apply if a pedestrian does not consent to the approach." *Hill*, 530 U.S. at 734. The Court in *Hill* stressed that it was "important" to recognize the "significant difference" between the statute before it and restrictions on "a speaker's right to address a willing audience." *Id.* at 715-16.

The Massachusetts Act is significantly different from the law upheld in *Hill*. It is over-inclusive by restricting all speech, including that with a willing audience. That *Amicus* has experienced success in its speech and prayer outside of abortion facilities demonstrates that there is a willing audience that is impacted and persuaded. Since 2007, there have been 12 nationally-coordinated 40 Days for Life campaigns. Over 2,480 individual local campaigns have taken place in 501 cities. 40 DAYS FOR LIFE, *supra*. More than 575,000 people have joined together in a display

of unity to pray and fast for an end to abortion. *Id.* Reports document that 7,536 lives have been spared. Those are "just the ones [*Amicus*] know[s] about." *Id*. 83 abortion workers have quit their jobs and walked away from the abortion industry. *Id.* Many people with past abortion experiences have "stepped forward to begin post-abortion healing and recovery." *Id.*

"They made a difference in my life," writes Abby Johnson, former Director of a Planned Parenthood in Bryan, Texas. David Bereit & Shawn Carney, 40 DAYS FOR LIFE 9 (Capella Books 2013). Noting that she "watched from inside the Planned Parenthood abortion center I managed while the first-ever 40 Days for Life Campaign took place," Ms. Johnson describes the impact that 40 Days for Life campaigns had over the years: "Was it working? Yes. Clients were walking away from our Planned Parenthood facility and accepting information about alternatives from the volunteers." *Id*. at 9.

As noted above, the impact of 40 Days for Life's presence outside the abortion clinic extends beyond women entering the clinics to clinic employees. As Ms. Johnson notes, "I couldn't stop thinking about the 40 Days volunteers in front of our facility who, every day, told me they were praying for me. That, too, was working, although I didn't realize it yet." *Id*. at 9. Ms. Johnson explains, "Five years after the first 40 Days for Life Campaign started, I found myself convicted to leave my job. It had taken eight years of prayer and outreach to me, a Planned Parenthood regional Employee of the Year." *Id*. at 9.

The speech-free zone of the Massachusetts Act does not "simply empower private citizens" to avoid an unwanted approach. Instead, the Act essentially converts a public sidewalk, a quintessential public forum, into private property for the abortion facility, and it imposes criminal penalties on anyone who would peacefully offer arguments against, or alternatives to, abortion.

III. By prohibiting speech about abortion alternatives, the Act denies women the opportunity to receive information on which to base their decisions.

This Court has noted that each State has an interest from the on-set of pregnancy in protecting the health of the woman. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Paradoxically, in this case, the State of Massachusetts seeks to deny this interest.

As this Court noted in *Gonzales v. Carhart*, "whether to have an abortion requires a difficult and painful moral decision . . . [I]t seems unexceptionable to conclude some women come to regret their choice to abort. . . . Severe depression and loss of esteem can follow." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007) (internal citations omitted).

Given that the decision whether to abort is necessarily "a decision so fraught with emotional consequence" (*Gonzales*, 505 U.S. at 159), a pregnant woman needs the opportunity to consider all relevant

information in order to make that decision, including information about alternatives to abortion. Surely it is not within the State's power to deny a pregnant woman this very opportunity to receive information, information which she may accept or reject but which is offered, peacefully and gently, by *Amicus* on the sidewalks outside abortion clinics. *Amicus* is there to offer the woman information about abortion alternatives. Some women may not wish to receive such information, but as explained in part II above, many do. (And none are forced to receive it.) Yet, Massachusetts denies its interest in the health of the pregnant woman by denying her the *opportunity* to consider the information about abortion alternatives by banning *Amicus* from the area outside abortion clinics. This is the last place – and the last opportunity – for a pregnant woman to receive information relevant to this "decision so fraught with emotional consequence." To deny her this opportunity is further evidence of the Act's bias against speech opposing abortion and offering alternatives, underscoring its infirmity under the First Amendment.

CONCLUSION

The Act's relegation of speakers such as *Amicus* to an area beyond 35 feet from abortion clinics effectively deprives *Amicus* and others like it of the opportunity to speak at all. *Amicus* seeks to engage women approaching abortion clinics in personal, face-to-face, peaceful dialogue. In this encounter, the identity of

the speaker as one who speaks quietly and lovingly is important. Amplified sound and large signs are not adequate substitutes. Speech is not reducible to shouting, and this Court's jurisprudence protects communication within a normal conversational distance. As noted, there is a willing audience for *Amicus*' speech. Over many years, many pregnant women have joined in the conversational opportunity offered by *Amicus* on the sidewalks outside abortion clinics.

In foreclosing the possibility of such speech, the Act demonstrates that it is neither content-neutral nor viewpoint-neutral. Further it does not survive even the demands of intermediate scrutiny because it fails to provide ample alternative means of communication and is not narrowly tailored to serve a substantial governmental interest.

For the foregoing reasons, the decision of the First Circuit should be reversed.

Respectfully submitted,

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