No. 09-592

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,

Respondent.

On Petition For A 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 AND THE PETITION FOR A WRIT OF CERTIORARI

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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 212 communities in the United States. More than 85,000 people participated worldwide.

MASS. GEN. LAWS ch. 266, § 120E1/2 ("the Act") will inhibit *Amicus* from carrying out its peaceful prayer vigils outside of abortion clinics in Massachusetts by creating a "pro-life speech-free zone." The Act forbids participants in 40 Days for Life campaigns from praying on public sidewalks in close proximity to abortion clinics. It prohibits *Amicus* sidewalk counselors from providing wanted and requested help to women entering abortion clinics in Massachusetts, while it explicitly allows abortion

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court. 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.

The parties were notified ten days prior to the due date of this brief of the intention to file.

clinic employees on the same public walkways to communicate with women and encourage abortion. This content-based, viewpoint discriminatory Act hinders the First Amendment and Equal Protection rights of *Amicus* and is unconstitutional. As such, *Amicus* urges this court to grant the petition for *writ of certiorari* and reverse the decision of the lower court.

SUMMARY OF ARGUMENT

In 2007, Massachusetts enacted a law to establish a "pro-life speech-free 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") 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 acting 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).

A narrowing interpretation by an enforcement authority may prove to save this facially discriminatory Act from Equal Protection challenges, but in this case the Massachusetts Attorney General's interpretation and guidance to police officers only magnifies its unconstitutionality. The Attorney General's letter of guidance undoubtedly reaches beyond the state's professed interest in public safety and clearly infringes upon First Amendment protected speech. In doing so, the State explicitly employs unequal treatment of individuals based strictly on the viewpoint expressed about abortion. The Act's exemption for abortion clinic employees and agents allows differential treatment of similarly situated individuals both on its face and, even more strikingly, when the Attorney General's interpretation impinges First Amendment speech.

This "no enter zone" for those opposing abortion is clearly marked for police to arrest and punish any person engaging in pro-life advocacy, including: speaking; praying; wearing t-shirts, hats, or buttons; displaying signs; leafleting or handbilling; making consented approaches; and peaceful conversing or demonstrating. It prohibits all methods of communication for the pro-life message, but protects abortion advocacy by permitting abortion clinic employees and agents to enter and remain in the zone.

The First Circuit failed to recognize the content- and viewpoint-basis of the Act and erred in its application of *Hill v. Colorado,* 530 U.S. 703 (2000). The Act is not a content-neutral time, place, and manner restriction deserving the First Circuit's expressed intermediate scrutiny – but seemingly rational basis – analysis and simple dismissal of all Equal Protection concerns. This Act is a content-based, viewpoint discriminatory law that warrants a much more stringent analysis under strict scrutiny. If this Court permits the First Circuit's decision to stand, it creates a dangerous and threatening precedent for First Amendment expressions and Equal Protection.

In summary, this Act is content-based, and the Attorney General's interpretation of the Act – which must be read as an express part of the Act – magnifies the unconstitutionality of the Act. The Act's exemptions for abortion clinic patrons and employees constitutes viewpoint discrimination and violates the Equal Protection clause by prohibiting all speech by pro-life advocates, while explicitly allowing speech by abortion clinic employees and patrons. This Court should grant the petition for *writ of certiorari* and review the First Circuit's decision and misapplication of *Hill*.

ARGUMENT

I. THE ACT IS CONTENT-BASED AND SHOULD BE READ AS IF THE ATTORNEY GENERAL'S INTERPRETATION AND GUIDANCE ON ENFORCEMENT IS EXPRESSLY PART OF THE ACT

The Act is clearly content-based when considered in light of the Attorney General's interpretation. The Attorney General's letter, dated January 25, 2008 – sent to law enforcement personnel and all individual abortion clinics – summarized the Act and provided guidance to assist in applying the Act's four exemptions. The letter expounded on the Act's exemptions and interpreted them to: 1) Permit "persons entering or leaving the clinic . . . to cross through the buffer zone" but to not permit "companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose"; and 2) Permit "employees or agents of the clinic acting within the scope of their employment" to enter the zone to assist patients, "but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone." The Attorney General also interpreted the third and fourth exemptions for "municipal employees" and all other "persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic" to permit entrance but prohibit them from expressing their views about abortion or

engaging in any other partisan speech within the buffer zone.

In *Cox v. Louisiana*, this Court set a clear standard that when governmental authorities impose "pervasive restraint on freedom of discussion" through a facially neutral statute it is "not any less effective than a statue expressly permitting such selective enforcement." 379 U.S. 536, 557 (1965). Although *Cox* addressed an ordinance requiring prior permission to use the public streets, this Court in *Cox* positively laid out the principle that when a state interprets and enforces a facially neutral statute based on the content of expressions, the Act must be viewed as if the content-driven enforcement is expressly part of the statute. *Id.*

This Court reasoned that the Louisiana statute, as interpreted, allowed for impermissible convictions for innocent speech and assembly protected by the First Amendment. This Court stated,

> Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. . . . "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

Id. at 552 (quoting Chief Justice Hughes in *Stromberg v. California,* 283 U.S. 359, 369 (1931)).

Furthermore, in *Grayned v. City of Rockford*, this Court recognized an important rule of interpretation and analysis: To look toward the "'words of the ordinance itself,' to the interpretations the court below has given to analogous statutes, and perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." 408 U.S. 104, 110 (1972).

Rather than adhere to this well-established Supreme Court precedent, the First Circuit relied upon its decision in *McGuire v. Reilly,* 386 F.3d 45, 58 (1st Cir. 2004) (*McGuire II*), and explained that "a state official's interpretation of a statute, even if generally authoritative, cannot render an otherwise constitutional statute vulnerable to facial challenge." *McCullen v. Coakley*, 571 F.3d 167, 178 (1st Cir. 2009). It quoted no authority or precedent – outside itself – in this assertion, and went on to conclude, "[W]e find nothing in either the text or the legislative history of the 2007 Act that deprives the statute of content-neutral status." *Id.* In other words, the court held that the letter of interpretation and guidance from the Attorney General – the state authority charged with enforcement – had no role in a facial challenge. This conclusion is imprudent and dangerous to protected speech quintessential to the First Amendment.

Contrary to this extraordinary attempt by the First Circuit to ignore the impact of the Attorney General's letter on this Act, the Third Circuit in its recent decision in *Brown v. City of Pittsburg*

recognized that "[w]hen considering a facial challenge to a state law, 'a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.'" 2009 U.S. App. LEXIS 23979, *25 (3rd Cir. Oct. 30, 2009) (quoting *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)). In its analysis, the Third Circuit referenced the First Circuit's decision in *McGuire II*, noting that the Massachusetts Attorney General had set forth a limiting interpretation of the Act. *Id.* at 25-26. That is to say, the Third Circuit considers an interpreting instruction as if it is explicitly part of the statute.

An interpretation governing enforcement of a statute can narrow a statute to make it constitutional – as with overbreadth and vagueness issues – but it can also promulgate content-based viewpoint discrimination and subject it to strict scrutiny. The First Circuit references the Attorney General's guidance and narrowing interpretation to ward off First Amendment overbreadth claims, but then regards it as irrelevant when it comes to Equal Protection claims. The court cannot have it both ways. The Attorney General's letter does tailor and narrow the Act, and in doing so it reveals the unconstitutional intent of the State: To criminalize any expression opposing abortion – and all partisan speech for that matter – on public walkways adjacent to abortion clinics in Massachusetts.

The Act before the Court today is distinguishable from the one in *Hill v. Colorado*. First, the Colorado

statute applied to all health care facilities. *Hill*, 530 U.S. at 707. 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. In *Hill*, 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." *Id.* at 716. *Hill* affirmed that it is "constitutionally repugnant" to prohibit a discussion of particular topics, while others are allowed.

Under the applicable interpretation, it is clear that if speech – any form of expression via flyer, t-shirt, button, sign, or otherwise – pertains to abortion, it is illegal. It is not so clear as to the content prohibited as "partisan speech." "Partisan" by definition simply means a person "devoted to or

biased in support of a single party or cause."[2] The First Amendment quintessentially protects partisan speech – topics that an individual finds imperative to discuss and persuade others to see likewise. Yet "partisan speech" remains undefined within this Act with broad implications. This capacious inclusion enables public officials to determine what "partisan speech" means and whether such speech violates the Act.

Even though the Attorney General acknowledges that police should arrest someone for wearing their favorite sports team t-shirt and hat through the zone, the First Circuit simply waives this issue. *McCullen*, 571 F.3d at 182. The truth of the matter is that abortion is the only partisan speech of concern to the Attorney General and the State. The attempt to broaden the subject matter to include partisan speech does not remedy its offense and in fact makes it even more problematic. This Act is not meant to suppress speech of "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Hill*, 530 U.S. at 723. The First Circuit's lack of concern for the breadth of partisan speech evidences the clear, intended purpose of this Act – to target and suppress the views of those that oppose abortion – and the court's willingness to sanction this content-based and viewpoint discriminatory Act.

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[2] THE AMERICAN HERITAGE DICTIONARY 906 (Houghton Mifflin Company, 2nd ed. 1985).

II. THE ACT'S EXEMPTIONS FOR ABORTION CLINIC EMPLOYEES, AGENTS, AND PATRONS GIVE RISE TO VIEWPOINT DISCRIMINATION

Relying on *Hill* and its own opinions in *McGuire I*[3] and *II,* the First Circuit declared the Act content-neutral and an appropriate time, place, and manner regulation. In doing so, it dismissed any argument for viewpoint discrimination. The First Circuit discussed the delicate balance between the infringed-upon freedom and the governmental interest, but then miscalibrated the scales. It identified a continuum with one end being "laws in which the government attempts to differentiate between divergent views on a singular subject; that is laws in which the government attempts to 'pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook.'" *McCullen*, 571 F.3d at 175 (citing *Berner v. Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997)). It then misplaced this Act on the opposite end of the continuum. The First Circuit acknowledged that such "viewpoint-based discrimination is highly offensive to the core values of the First Amendment, and courts are wary of such encroachments," but it failed to identify this Act for what it is – viewpoint discrimination. *Id.*

Unlike the Colorado statute in *Hill*, the 2007 Massachusetts Act falls squarely within this highly

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[3] *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) (*McGuire I*).

offensive category attempting to suppress the particular ideology opposing abortion. The Act broadly prohibits entering or remaining within the zone surrounding abortion clinics but then exempts patrons, employees, and agents of the clinic – permitting preferential treatment of abortion advocates and those engaged in business with the industry.

Under the first exemption "for persons entering or leaving the clinic," the Attorney General instructs police to permit these individuals to pass through the zone, but not permit them "to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose." According to the Attorney General, the Act does not restrict what they are wearing or carrying. It does not prohibit pro-abortion attire or speech while passing through the zone – simply to enter or remain. Women visiting the clinic, those accompanying them, delivery persons, and the like can all pass through the zone – say and wear anything – as long as they don't "stand or remain." These privileges are not extended to pro-life demonstrators or others passing through the zone to reach a destination other than the clinic. All other exempted categories are prohibited from expressing their "views about abortion or to engage in any other partisan speech within the buffer zone."

The second exemption for "employees or agents of the clinic acting within the scope of their employment" permits this exempted class to enter or remain in the zone as long as they do not express their views about abortion or engage in any other partisan

speech. This interpretation is a non sequitur. By definition, the scope of employment encapsulates and communicates a position in favor of abortion. The Attorney General's deciphering of what is criminal and what is not turns not only on the content, but the viewpoint of the person. Anyone promoting and advancing the abortion business can enter, remain, and communicate within the zone at some level.

In *Hill,* this Court found the Colorado statute placed "no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker." *Hill*, 530 U.S. at 723. The Massachusetts Act does not warrant this same distinction. For abortion clinic employees to be able to enter the zone within their scope of employment turns on viewpoint. One side of the abortion debate is represented in the zone while the other position is facially and strictly prohibited.

Under the Act, it is presumptively permissible for abortion clinic employees and agents to be within the zone, despite the fact that there can be no certainty of whether an employee is *lawfully* in the zone by client request for escort or whether the employee is simply in the zone to engage in pro-abortion advocacy. *See McGuire II,* 386 F.3d at 51-52 (referring to the evidence that clinic employees advocate a pro-abortion view in words and actions).[4] But is there really a

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[4] In *McGuire II*, the First Circuit's presentation of facts demonstrated that clinic escorts were just as disruptive to public

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distinction? For an abortion clinic employee or agent to be in the zone as an escort or to simply be in the zone is one in the same.

In contrast, the Act presents a presumption against the pro-life advocate. Thus, the charging orders from the face of the statute and the Attorney General's interpretation are to arrest anyone present to peacefully pray, leaflet, handbill, counsel, educate, demonstrate, or simply speak out against abortion if she enters or remains in the zone, but permit abortion advocates to enter and remain as they please.

In *Police Dep't of the City of Chicago v. Mosley*, this Court looked to the Equal Protection Clause of the Fourteenth Amendment to hold a Chicago city ordinance unconstitutional because it treated some picketing differently from others. 408 U.S. 92, 94-95 (1972). The Court recognized the intertwining of First Amendment interests with the Equal Protection Clause of the Fourteenth Amendment and found it problematic for Chicago to determine permissible picketing based on its content. Likewise, while the pro-life person may not wear into the "pro-life speech-free

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safety (if not more so) than pro-life demonstrators. *See McGuire II*, 386 F.3d at 53. The First Circuit acknowledged that clinic escorts were warned about being overly aggressive toward pro-life demonstrators and in getting patients into the building. *Id.* This acknowledgement of the escort's overly aggressive behavior further exemplifies the content-based, viewpoint discriminatory nature of the Act. It was the State's intent to silence pro-lifers while ignoring court-documented aggression and disturbances by clinic escorts.

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-abortion 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. This reality constitutes viewpoint discrimination.

In addition, the Act also 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.[5] The exact same phrase from a

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[5] In *McGuire II*, 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

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pro-life demonstrator is forbidden under the Act, even if a woman requests help from that pro-life demonstrator. This result was intended by the State, and it is clearly viewpoint discriminatory.

III. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND DOES NOT WITHSTAND STRICT SCRUTINY

The Fourteenth Amendment to the United States Constitution states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In *Carey v. Brown*, this Court declared an Illinois statute prohibiting picketing unconstitutional on Equal Protection grounds because "under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home." 447 U.S. 455, 462 (1980).[6]

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you,' or 'You know, you don't need that.'" *Id.* at 54. The 2007 Act expressly allows this continued communication by abortion clinic employees, but prohibits the exact same conduct by pro-life demonstrators.

[6] In *Carey,* the Court found the preferential treatment accorded to labor disputes while prohibiting the discussion of all other issues impermissible. The Court noted, "It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions

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Likewise, Massachusetts, under the guise of preserving public safety, flatly prohibits pro-life advocacy within the 35-foot radius of abortion clinics while permitting pro-abortion advocacy equally likely to cause public safety concerns. The First Circuit refused to recognize that the Attorney General's authoritative guidance to police invokes the First Amendment and Equal Protection clause of the Fourteenth Amendment. The Act must meet strict scrutiny.

It is apparent that the State's interest does not survive strict scrutiny and the First Circuit erred in applying more of a rational basis analysis. After declaring the Act content-neutral, the First Circuit claimed to proceed under "intermediate scrutiny, recognizing that the constitutionality of the 2007 Act turns on whether it is narrowly tailored and allows sufficient alternative means of communication." *McCullen*, 571 F.3d at 178. But – despite First Amendment implications – it concluded that the decision to exempt employees and agents of the abortion clinics is "reasonably related to the legislature's legitimate public safety objectives." *Id.*

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on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Carey*, 447 U.S. at 462 n.6 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). Similarly, the attempt by Massachusetts to bar public discussion of abortion outside abortion clinics is unconstitutional on its face, and it also fails under the Equal Protection clause by preferring the pro-abortion position and criminalizing the opposing pro-life view.

Massachusetts professes to exercise the traditional police powers for public safety and abortion access. These are not legitimate interests warranting the Act's chilling effect on protected speech. Nor is it a legitimate interest for the State to enact a sweeping "pro-life viewpoint free" zone because it is easier to enforce than a "no approach" zone.[7] A state's "public safety objectives" could be cited for any forum of public debate when an issue draws passionate responses from both sides. "Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against." *Hill*, 530 U.S. at 787 (Kennedy, J., dissenting). "Nowhere is the speech more important than at the time and place where the act is about to occur." *Id.* at 788. For pro-life advocates and demonstrators, the 70-foot diameter "zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." *Id.* at 789.[8]

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[7] *McCullen*, 571 F.3d at 176 (discussing how the law was enacted in response to public safety and police concerns in enforcing the 2000 "no approach" law).

[8] The First Circuit looked to *Hill* and applied the *Ward* standard in *McCullen*. "The principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the

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In *McGuire II,* relying on *McGuire I,* the First Circuit dismissed the discriminatory viewpoint argument under the standard that "so long as a reviewing court can 'envision at least one legitimate reason for including the employee exemption in the Act,' the law is not facially unconstitutional." *McGuire II*, 386 F.3d at 58. The First Circuit set this low standard and

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message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A complete prohibition on pro-life expressions in a 70-foot diameter zone around abortion clinics "suppress[es] a great quantity of speech that does not cause the evils that [the State] seeks to eliminate." *Id.* at 800 n.7. The misapplication of the *Ward* standard to this Act permits the unconstitutional curtailing of protected speech and unequal treatment of similarly situated individuals – those advocating for and against abortion.

In his dissent in *Hill*, Justice Scalia argued that the Court makes too much of the statement in *Ward*, stating, "There comes a point – and the Court's opinion today passes it – at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself." *Hill*, 530 U.S. at 745 (Scalia, J., dissenting). If not the Colorado statute in *Hill*, then surely this Massachusetts Act crosses this point by prohibiting the mere presence of anyone that may silently and peacefully express a view opposing abortion.

Citizens involved in a moral public debate can make great headway if they can reach those within the proximity of where the moral injustice is occurring, and abortion advocates understand this. The State – in conjunction with the pro-abortion lobby – does not present any evidence of public health and safety threats warranting a sweeping ban on all pro-life expressions of speech within the 35-foot radius. The Act is not prohibiting a criminal act. It is not prohibiting disruptive protests. It is not prohibiting obstruction. It is not prohibiting unwelcomed approaches. *It is* prohibiting the presence and with it all forms of effective communication of the pro-life message.

exercised its imagination to pronounce the state's interest in the employee exception legitimate. The court "envisioned" the possible explanation: "[T]o make crystal clear . . . that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." *Id.* (quoting *McGuire I*, 260 F.3d at 47). In reality, what the State is making "crystal clear" is that anyone opposing abortion *need fear prosecution*.

This Court must not allow the First Circuit to proceed with this permissive standard applied in *McCullen*. The First Circuit considered this standard appropriate and settled under *Hill*. Yet this Court has indicated no such "envision" standard with statutes implicating the First Amendment. In application, this First Circuit rule defeats any Equal Protection claim.

Moreover, the First Circuit relied on its former analysis of the 2000 Act despite the significant changes in the law. *See McCullen*, 571 F.3d at 177-78 (stating the employee exception "was squarely raised and squarely repulsed in *McGuire I*" and belittling any difference between a six-foot "no approach" zone and a 70-foot diameter "no enter or remain" zone). The 2000 Act reviewed in *McGuire I* and *II* permitted all persons to access the zone but prohibited unconsented approaches from a distance of six feet. The State construed the 2000 Act to equally apply to all persons, including abortion clinic employees and agents. *McGuire II*, 386 F.3d at 64.

It is not the same with this Act. The 2007 Act prohibits consented approaches for leafleting and

handbilling; it prohibits "natural conversational distances" between sidewalk counselors and women seeking abortions; it prohibits the mere presence of all pro-life advocates whether to peacefully pray, hold a sign, or wear a button. The Act unnecessarily permits abortion clinic employees and agents to enter and remain in the zone, but bans pro-life advocates and virtually all other persons because of what they "might" do or say. This employee/agent exemption promotes a particular side of the abortion debate – the pro-abortion view. The State's interests in public safety, abortion access, and ease of enforcement are not legitimate. They do not satisfy strict scrutiny and do not ward off the First Amendment infringements and Equal Protection violations.

* * *

This Act is content-based and viewpoint discriminatory. It pushes all boundaries on regulating constitutionally protected speech. The precedent of this First Circuit decision – if allowed to stand – permits blatant viewpoint discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, which will drastically affect the First Amendment rights of persons in every state, including *Amicus*. Other courts have already begun to follow the First Circuit's misapplication of *Hill*, and the Circuit Courts of Appeal need clear direction from this Court. *See, e.g.*, *Brown v. City of Pittsburgh*, 2009 U.S. App. LEXIS 23979 (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*).

CONCLUSION

For the reasons stated herein, the Court should grant the petition for a *writ of certiorari* and reverse the court below.

Respectfully submitted,

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