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

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RYAN A. SHORES
Counsel of Record
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006
(202) 955-1500

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

Lillian R. BeVier is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia Law School. The courses she teaches include First Amendment Law: Speech and Press and a seminar in First Amendment Theory. She has published widely on First Amendment issues.

Richard W. Garnett is Associate Dean and Professor of Law at the University of Notre Dame Law School. The courses he teaches include Constitutional Law and Freedom of Speech/First Amendment. His publications include THE FIRST AMENDMENT: A READER (3d ed.) (ed., with John H. Garvey & Frederick Schauer), and FIRST AMENDMENT STORIES (ed., with Andrew Koppelman) (forthcoming, Foundation Press).

Michael Stokes Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas Law School. The courses

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have consented to the filing of this brief, and their written consents have been filed with the Court. No counsel for a party authored the brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

he teaches include Constitutional Law. He has published widely on constitutional theory and interpretation, including several publications on First Amendment issues.

Lee J. Strang is Associate Professor of Law at University of Toledo College of Law. The courses he teaches include Constitutional Law and Constitutional Interpretation. He has published widely on constitutional law and interpretation.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law. He is the author of over 30 law review articles on the First Amendment, including – most relevant to this case – *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005), reprinted in FIRST AMENDMENT LAW HANDBOOK 314 (Rodney A. Smolla ed. 2005-06). He is also the author of THE FIRST AMENDMENT AND RELATED STATUTES: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS (Foundation Press, 3d ed. 2007).

Kevin C. Walsh is Assistant Professor of Law at University of Richmond School of Law. The courses he teaches include Constitutional Law.

SUMMARY OF ARGUMENT

The Court should grant certiorari to reverse the First Circuit's decision upholding against First Amendment challenge a prohibition on public-forum speech that applies only at freestanding clinics where abortions are performed, exempts clinic agents and employees, and criminalizes peaceful, non-obstructive speech, including conversation with willing listeners, stationary handbilling, and speech from a conversational distance. By granting certiorari, the Court can begin to reconstruct a consensus on free speech principles that appeared to break down in *Hill v. Colorado*, 530 U.S. 703 (2000). The Court can also prevent further erosion of First Amendment protections for public-forum speech by placing clear limits on *Hill*.

REASONS FOR GRANTING CERTIORARI

I. THE FIRST CIRCUIT'S EXPANSION OF *HILL V. COLORADO* THREATENS SERIOUS DAMAGE TO FIRST AMENDMENT JURISPRUDENCE.

This Court's decision in *Hill v. Colorado* upheld a law that prohibited close, physical approaches by anyone, without consent, at all health care facilities in Colorado. *See* 530 U.S. at 708 n.1 (setting forth text of Colorado statute). The First Circuit's decision below stretched *Hill* to uphold a Massachusetts law that creates a public-forum no-speech zone with a 35-foot radius that (i) applies only at free-standing clinics that perform abortions, (ii) does not apply to employees and agents of these clinics, and (iii) prohibits speech directed toward willing and unwilling listeners alike in a wide swath of the public forum, rather than remaining limited to a prohibition of close, unwanted physical approaches. *See* Mass. Gen. Laws ch. 266, § 120E1/2 (2007) (the "Act"). This expansion of *Hill* threatens to multiply the damage to First Amendment jurisprudence that results when free-speech decisions track ideological divides over the subject-matter of the underlying speech.

This Court's decisions in the flag-burning cases exemplify the sort of judicial agreement about First Amendment principles across ideological divides that was able to "generate nearly a decade or more of consensus about free-speech cases." Laurence Tribe, *quoted in Colloquium*, 28 PEPP. L. REV. 747, 752 (2001) (describing "the civil peace that

was brilliantly exemplified by the union of right and left in the flag burning cases"); *see also* Michael W. McConnell, *Colloquium*, 28 PEPP. L. REV. 747, 747 (2001) (considering flag-burning cases "a high point where people across the spectrum were able to agree upon a way of analyzing free-speech claims").

Since those cases, however, the "coherence of free-speech doctrine has truly broken down, and it's broken down in a way we should be extremely worried about—*Hill v. Colorado* being the centerpiece of this." McConnell, 28 PEPP. L. REV. at 747; *see also* Tribe, 28 PEPP. L. REV. at 752 (noting the possible end of consensus "as a result of the feeling of bad faith that a case like [*Hill*] generates"). Several members of this Court,[2] as well as a diverse array of legal scholars, have pointed out that *Hill* departed from the standard First Amendment analysis of restrictions on speech in a traditional public forum. For example, *Hill*:

> (i) obscured the distinction between content-neutral and content-based restrictions on speech;[3]

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[2] *See Hill*, 530 U.S. at 741-765 (Scalia, J., dissenting, joined by Justice Thomas); *id.* at 765-792 (Kennedy, J., dissenting).

[3] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1127 (2005) (pointing out that in *Hill* "one must necessarily examine the content of a person's speech to determine if it constitutes 'education, protest or counseling'"); Heidi Kitrosser, *From Marshall McLuhan to*

(ii) inverted ordinary First Amendment principles by imposing a "listener preclearance requirement";[4]

(iii) created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places";[5]

Anthropomorphic Cows: Communicative Manner and the First Amendment, 96 NW. U. L. REV. 1339, 1400-1406 (2002) (conducting thorough inquiry into why statute in *Hill* was content-based); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."); McConnell, 28 PEPP. L. REV. at 748 ("You cannot tell, other than by the content of what I say, whether the law [in *Hill*] is being violated or not. Now if that is not content-based, I just do not know what 'content-based' could possibly mean."); *cf.* Erwin Chemerinsky, *Colloquium*, 28 PEPP. L. REV. 747, 752-753 (2001) (agreeing with the result in *Hill* but disagreeing with the Court's rationale: "Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. . . . [and] this case further adds to the confusion . . . . ").

[4] Sullivan, 28 PEPP. L. REV. at 737 ("*Hill* is unusual . . . with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); McConnell, 28 PEPP. L. REV. at 748 (agreeing that "one of the ways in which *Hill v. Colorado* inverted ordinary free-speech principles" was "by rejecting the principle that it is the person—it's the unwilling listener—who has the burden of action, and not the speaker").

[5] Clark LeBlanc & Jamin B. Raskin, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *The Vanishing Public Forum*

> (iv) illustrated "how far the Court has allowed overbreadth to drift from its central premises";[6] and
>
> (v) recognized "a public 'right to be let alone' [that] is in tension with literally decades of First Amendment jurisprudence."[7]

For these reasons, among others, *Hill* has been condemned by both progressive and conservative scholars, including one prominent jurist who has described the case as "slam-dunk simple and slam-dunk wrong." Tribe, 28 PEPP. L. REV. at 750.

Hill has also resulted in divisions among the lower courts over First Amendment analysis of public-forum speech restrictions, divisions deepened by the First Circuit's decision below.[8] Additionally, the First Circuit's expansion of *Hill* has already underwritten the contraction of First Amendment protections from Pittsburgh, Pennsylvania to Oakland, California in the short time since it was handed down.[9]

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and the Need for an Objective Speech Discrimination Test, 51 AM. U. L. REV. 179, 182 (2001).

[6] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 72 (2003).

[7] Timothy Zick, FREE SPEECH OUT OF DOORS 101 (University of Cambridge Press, 2008).

[8] *See* Petn. 28-31 (identifying split involving First, Third, Eighth, and Ninth Circuits regarding whether and how governments may establish speech-free buffer zones); Petn. 31-32 (identifying four-to-two circuit split on how to analyze complete bans of speech).

[9] *See Brown v. City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (relying on "the First Circuit's recent decision in

The Court granted certiorari in *Hill* "[b]ecause of the importance of the case." 530 U.S. at 714. The First Circuit's expansive application of *Hill*, and the spread of the First Circuit's logic, reveal a need for this Court's intervention to clarify the ground rules for speech restrictions targeting speakers in various public fora. The Court should grant certiorari to restore First Amendment protection to speakers in traditional public fora, to prevent additional courts from following the First Circuit's expansion of *Hill*, and to address the divisions the First Circuit has deepened.

II. THE FIRST CIRCUIT'S DECISION REVEALS THE IMPORTANCE OF PLACING CLEAR LIMITS ON *HILL V. COLORADO.*

The First Circuit's decision provides legislatures and courts with a blueprint for enacting targeted public-forum speech restrictions to eliminate disfavored speech without triggering strict scrutiny. This case presents the opportunity to place clear limits on *Hill v. Colorado* with respect to narrow tailoring analysis and content- and viewpoint-neutrality determinations.

McCullen v. Coakley" in upholding the validity of a 15-foot no-speech zone); *id.* at 281 n.19 (approvingly invoking the lower court opinions in *McCullen* for identifying the government's "easier enforcement task" as an advantage of a no-speech zone over a no-approach zone); *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029, 1044 (N.D. Cal. 2009) (citing *McCullen* for the proposition that a speaker "has no right to communicate at a polite (i.e. close) distance," in the course of upholding Oakland's municipal buffer-zone ordinance).

First, the Court can make clear that a prohibition on public-forum speech that encompasses within its prohibition (i) approaches to consenting listeners, (ii) stationary handbilling, and (iii) speech from a normal conversational distance, is not narrowly tailored to a government interest in protecting unwilling listeners from close, physical approaches.

The Court recognized in *Hill* that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and [that] to do so there must be opportunity to win their attention.'" 530 U.S. at 728 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The statute in *Hill* explicitly permitted speech with willing listeners: specifically, it permitted a speaker to approach another person within 8 feet for the purpose of communicating if the "other person consents" to the approach. Colo. Rev. Stat. § 18-9-122(3). Throughout its opinion, the Court stressed the fact that, although the buffer-zone statute inhibited a speaker's ability to reach *unwilling listeners*, the statute preserved a speaker's ability to reach *willing listeners*, and the Court emphasized the importance of this distinction to the disposition of the case.[10]

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[10] The Court framed the question as "whether the Colorado statute reflects an acceptable balance between constitutionally protected rights of law-abiding speakers and *the interests of unwilling listeners*." *Hill*, 530 U.S. at 714 (emphasis added). The Court emphasized: "It is also important when conducting this interest analysis to recognize the *significant difference* between state restrictions on a speaker's right to address a

By contrast, the Act here prohibits all communication, not only speech aimed at unwilling listeners but also conversations between a speaker and a willing listener. Although the statute does contain exemptions from its categorical prohibition on entering or remaining in the no-speech zone for four categories of speakers, *see* Mass. Gen. Laws ch. 266, § 120E1/2(b)(1)-(4), there is no "consent" exemption that allows a person to enter the public way or sidewalk and communicate with a willing listener. Consequently, this Act is not "narrowly tailored" to the governmental interest in protecting unwilling listeners recognized in *Hill*. *See Hill*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").

The Court in *Hill* also emphasized in its narrow tailoring analysis that the 8-foot no-approach zone at issue permitted both speech from a normal conversational distance and stationary handbilling.[11]

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willing audience and those that protect listeners from unwanted communication. *This statute deals only with the latter*." *Id.* at 715-716 (emphases added). Moreover, in considering whether the statute was "narrowly tailored," the Court thought that "it was worth reiterating that only attempts to address *unwilling listeners* are affected" by the statute, *id.* at 727 (emphasis added), including "the ability of a leafletter to deliver handbills to some unwilling recipients," *id.*, and the "ability to communicate with unwilling readers," *id.* at 728. With respect to citizens' rights to "reach the minds of willing listeners," the Court concluded that, because of the exception for consensual approaches, the "Colorado statute adequately protects those rights." *Id.*

[11] *See Hill*, 530 U.S. at 726-727 (stating that "this 8-foot zone allows the speaker to communicate at a 'normal conversational distance'" (quoting *Schenk v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)); *id.* at 727 ("T]he statute does

This focus also appeared in Justice Souter's concurring opinion, which Justices O'Connor, Ginsburg, and Breyer joined.[12] These opinions' emphasis on the preservation of stationary handbilling and speech from a normal conversational distance was presaged in questioning by multiple Justices from the *Hill* majority at oral argument.[13]

The categorical prohibition of the Act here prevents both stationary handbilling and speech from a conversational distance. Notwithstanding *Hill*, the First Circuit asserted that "the Constitution

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not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept."); *id.* ("The statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute.").

[12] *See Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*") (emphasis added); *id.* (stating that "[t]he fact that *speech by a stationary speaker is untouched* by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching") (emphasis added).

[13] *See* Oral Arg., *Hill v. Colorado*, No. 98-1856, 2000 WL 72054, at *2 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *6 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully."); *id.* at *7 (Breyer, J.) ("What's the problem if I can stand still, hand [out a leaflet] just like this, and she'd have to walk around in order to avoid taking it, but she's free to walk around under this statute?"); *id.* at *9 (Stevens, J.) ("I'm concentrating on the leafleting now because, it seems to me, that's your strongest argument.").

neither recognizes nor gives special protection to any particular conversational distance," App. 18a, and that "handbilling is not specially protected," *id.* By granting certiorari, the Court can ensure that the First Circuit's misapplication of the narrow tailoring analysis of *Hill* does not spread.

The Court can also clarify the criteria for assessing content- and viewpoint-neutrality under *Hill*. As the petition for certiorari observes, the Massachusetts legislature's singling out of abortion protesters for special speech rules is impossible to ignore given that the Act's no-speech zones (i) apply only at freestanding clinics that perform abortions, and (ii) do not apply to the activities of clinic employees and agents. By contrast, the Colorado law upheld in *Hill* applied at all medical facilities,[14] and applied equally to "all 'protest,' to all 'counseling,' and to all demonstrators . . . whether they oppose or support the woman who has made an abortion decision."[15] Whether *Hill* permits Massachusetts' abortion- and speaker-specific speech restrictions to stand without enduring strict scrutiny raises a significant question that warrants this Court's review.

[14] *See Hill*, 530 U.S. at 708 n.1.

[15] *Id.* at 725.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

Ryan A. Shores
Counsel of Record
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006
(202) 955-1500

January 4, 2010

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