No. 09-

09-592 NOV 13 2009

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts has imposed a criminal prohibition on "enter[ing] or remain[ing] on a public way or sidewalk ... within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility." The law applies only at abortion clinics, not at hospitals or other medical facilities. The statute exempts passersby and municipal agents (such as law-enforcement officials). It also exempts people entering or leaving the clinic, and clinic employees acting "within the scope of their employment." For others, the statute makes it a crime to stand on the public sidewalk and display signs, distribute leaflets, pray in silence, or converse with willing listeners, even when there are no incoming patients in or near the zone.

The questions presented are:

1. Whether the First Circuit erred in holding—contrary to *Hill v. Colorado*, 530 U.S. 703 (2000), applications of *Hill* by other courts, and well-established First Amendment principles—that Massachusetts' establishment of unique speech-free zones around abortion clinics is consistent with the First and Fourteenth Amendments.

2. If *Hill* permits the establishment of such zones, whether it should be limited or overruled.

PARTIES TO THE PROCEEDING

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Rule 29.6. Respondent is listed in the caption on the cover.

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OPINIONS BELOW

The opinion of the court of appeals affirming the denial of petitioners' request for preliminary and permanent injunctive relief (App. 1a-28a) is reported at 571 F.3d 167. The order denying petitioners' petition for rehearing or rehearing en banc is included at App. 123a-124a. The opinion of the district court denying relief (App. 29a-122a) is reported at 573 F. Supp. 2d 382.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2009. Plaintiffs' petition for rehearing or rehearing en banc was denied on August 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ....

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 266, Section 120E1/2 of the Massachusetts General Laws ("the Act"), is reprinted in full at App. 125a-127a. In relevant part, Section 120E1/2 provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius

of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works 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 such facility solely for the purpose of reaching a destination other than such facility.

...

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

In 2007, Massachusetts enacted a law that creates no-speech zones on the public streets and sidewalks outside abortion clinics. For 35 feet in every direction from every entrance, exit, or driveway of an abortion clinic, the Act prohibits speakers from engaging in peaceful speech, including the distribution of leaflets, display of signs, consensual conversation, and communication with others from a normal conversational distance. Relying largely on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the First Circuit found these abortion-specific no-speech zones to be neutral, narrowly tailored, and not substantially overbroad.

1. The 2007 statute at issue in this case replaced a law enacted by the Massachusetts legislature in 2000 that restricted certain speech-related conduct on public streets and sidewalks outside abortion clinics. The statute adopted by Massachusetts in 2000 prohibited making close, physical approaches within six feet of unwilling listeners outside abortion clinics. The law was designed to address "violence and aggressive behavior" outside the clinics. *McGuire* v. *Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) (*McGuire I*) (reversing entry of preliminary injunction). The Massachusetts legislature partially modeled that law on a ban on unwanted physical approaches upheld in *Hill*. *See McGuire I*, 260 F.3d at 40.

In *Hill*, this Court upheld a Colorado statute that made it a crime to "knowingly approach another person within eight feet of such person, unless such person consents." *Hill*, 530 U.S. at 707 n.1 (quoting Colo. Rev. Stat. § 18-9-122(3)). The Court's analysis in *Hill* relied heavily on the fact that the Colorado law barred only physical *approaches* and left open other means of com-

munication. Thus the Court noted that the law's 8-foot distance "certainly can make it more difficult for a speaker to be heard," but found that (i) the 8-foot distance still allows a speaker to communicate with an unwilling listener from a "normal conversational distance," *id.* at 726-727, and (ii) that the ban on close physical approaches did not preclude stationary sign-holding, and did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 727. Because the prohibition on close, unwanted approaches applied equally at all health care facilities (not just abortion clinics), and to all speakers (not just abortion opponents), the Court found the law content- and viewpoint-neutral. *Id.* at 714, 726-727.

Relying largely on *Hill*, the First Circuit upheld the 2000 statute against a First Amendment challenge in *McGuire I*, 260 F.3d at 51, and *McGuire* v. *Reilly*, 386 F.3d 45, 65-66 (1st Cir. 2004) (*McGuire II*) (affirming constitutionality of the floating no-approach law). Massachusetts justified its *Hill*-inspired prohibition on close, unwanted approaches outside abortion clinics on the basis of the purported inadequacy of existing laws already regulating objectionable conduct on the public sidewalks outside these locations. For example, federal law makes it illegal to "obstruct[], intentionally injure[], intimidate[] or interfere[]" with access to reproductive health services. *See* 18 U.S.C. § 248. Massachusetts law separately prohibits interfering with any person's exercise of a constitutional right, G.L. c. 265, § 37, or obstructing access to any medical facility, G.L. c. 266,

§ 120E (2000).[1] The First Circuit accepted this rationale, upholding the 2000 no-approach law as a prophylactic measure because existing laws "cast wider nets" that might catch "big fish" but otherwise "would let the fingerlings through." *McGuire I*, 260 F.3d at 49.[2]

2. In 2007, Massachusetts amended its 2000 no-approach law. Although there was no evidence of a single prosecution in the preceding six years under any state, federal or local law directly targeting obstruction, intimidation, or violence at abortion clinics in Massachusetts, and although the State has never proven even a single violation of the no-approach law, the legislature heard testimony from pro-choice advocates and law enforcement officers that existing law had not solved the problem of confrontational protesters at abortion clinics, that enforcement of the no-approach zone was difficult, and that a 35-foot zone "where no protesters can go ... would be great ... [and] would make our job so much easier." App. 57a. The legisla-

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[1] Notably, when regulating activity outside all medical facilities, Massachusetts carefully focuses on outlawing only actual interference with access, expressly preserving "rights to engage in peaceful picketing which does not obstruct entry or departure." G.L. c. 266 § 120E.

[2] In response to a petition for certiorari, the State argued, among other things, that the 2000 law "restrict[ed] only conduct" and that "whether a narrowly tailored floating buffer zone statute—restricting no speech but only non-consensual 'approaches'—violates the First Amendment" had been resolved in *Hill*. 04-939 Br. in Opp. 13-14. The State also argued that review was "particularly unwarranted" because there was no evidence that the "unique facts" concerning the 2000 Act were "replicated in other settings across the country." *Id.* at 13. This Court denied review. 544 U.S. 974 (2005).

ture adopted the amendments over the opposition of, among others, the American Civil Liberties Union of Massachusetts, which opposed the law "mainly on overbreadth grounds." App. 58a.

The new legislation changed the no-unconsented-approach zone around abortion clinics into a no-entry-to-speak zone. Now the Act establishes a zone on the public streets and sidewalks extending 35 feet in all directions from "any portion of an entrance, exit or driveway of a reproductive health care facility." Act § 120E1/2(b) (App. 125a). The Act makes it illegal to "enter or remain" in this part of public streets and sidewalks, and provides for prison terms of up to 30 months, criminal fines of up to $5,000, and equitable relief. Act § 120E1/2(d) and (f) (App. 125a-127a).

Unlike the statute sustained by this Court in *Hill*, the revised Act does not apply to all health care facilities. Indeed, it does not apply to hospitals at all. Rather, the Act defines a protected "reproductive health care facility" as "a place, *other than* within or upon the grounds of a hospital, where abortions are offered or performed." Act § 120E1/2(a) (emphasis added) (App. 125a).

Also unlike the statute in *Hill*, the Act does not apply to all speakers. In addition to passersby and "municipal agents" (such as police and firefighters), the Act specifically exempts from its prohibitions all "persons entering or leaving" an abortion clinic and, separately, all "employees or agents of [a clinic] acting within the scope of their employment." Act § 120E1/2(b)(1)-(2) (App. 125a).

Finally, unlike the statute in *Hill*, which focused exclusively on close, unwanted approaches toward unwilling listeners, the Act prohibits non-exempt persons

from entering and remaining in the zone for any purpose. Act § 120E1/2(b) (App. 125a). Non-exempt speakers are prohibited from offering leaflets, displaying signs, engaging in conversation with even willing listeners, speaking with others at a "normal conversational distance," or even merely remaining stationary and silently holding signs on public streets and sidewalks anywhere inside the zone. *Compare Hill*, 530 U.S. at 726-727. Indeed, the Act prohibits all such activity even if there are no listeners in the zone at all. Act § 120E1/2(b) (App. 125a).

3. Petitioners regularly station themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. On January 16, 2008, petitioners sued to enjoin enforcement of the Act, arguing that it violates the First and Fourteenth Amendments. Jurisdiction was invoked under 28 U.S.C. § 1331.

4. On May 14, 2008, the district court held a bench trial on a stipulated record relating to petitioners' facial challenges.[3] In an opinion issued on August 22, 2008, it upheld the Act as a content-neutral time, place, and manner regulation. App. 29a-122a.

5. The court of appeals affirmed. App. 1a-28a. It began by stating that petitioners' arguments about the Act's exclusive focus on abortion clinics "were ad-

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[3] The Court severed and stayed the Petitioners' "as-applied" challenge. None of the plaintiffs has violated or been arrested or threatened with arrest for violating the Act. The "as-applied" challenge, therefore, focuses simply on the impact of the Act on particular clinics in light of, for example, the width of certain sidewalks, the usual placement of snow piles during inclement weather, and other clinic-specific issues.

dressed in our earlier decisions ... [which] render superfluous any exegetic discussion." App. 13a (citing *McGuire I*, 260 F.3d at 44-47 and *McGuire II*, 386 F.3d at 56-59). Thus, although it recognized that the legislature "was plainly moved to enact the statute by *the secondary effects of anti-abortion protests*," App. 21a (emphasis added), the court found any disparate impact on abortion speech did not result from "a content-based preference." App. 13a.

The court likewise concluded it is not discriminatory to permit speakers associated with the abortion clinics free use of the sidewalks, stating that argument "was squarely raised and squarely repulsed" in *McGuire I*. App. 13a (citing *McGuire I*, 260 F.3d at 45-47); *see also* App. 14a ("The decisive question in a facial challenge is not whether a regulation is necessary to achieve the legislature's stated goal, but, rather, whether a court can glean legitimate reasons for its existence."). Finding the employee exception "reasonably related" to legitimate government public safety objectives, the court rejected claims that it renders the statute content- or viewpoint-based or raises any Equal Protection concern. App. 14a.

The court found that the Act is narrowly tailored and leaves open ample alternative channels of communication. App. 15a-20a. The court dismissed as "jejune" petitioners' claims that the expanded reach of the statute outlaws peaceful leafletting on public sidewalks and restricts petitioners from speaking to listeners from the "conversational distance" discussed in *Hill*. App. 18a. It held that "the Constitution neither recognizes nor gives special protection to any particular conversational distance," and that even "handbilling is not specially protected." *Id.* It relied on *Hill* for the proposition that time, place, and manner restrictions "rou-

tinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels of communication, the court 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." App. 19a. Observing that petitioners retain their rights outside the zone to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and that "[a]ny willing listener is at liberty to leave the zone [and] approach those outside it," the court found ample alternative channels. *Id.*

As to overbreadth, the court found the legislature's change from a ban on close physical approaches toward unwilling listeners to a total ban on all First Amendment activity to be "not a matter of constitutional significance." App. 21a. The court found the case "readily distinguishable" from the exclusion of First Amendment activity on airport premises struck down in *Board of Airport Commissioners* v. *Jews for Jesus*, 482 U.S. 569 (1987), because "this case involves a time, place, and manner restriction" and the Supreme Court in *Hill* "left no doubt but that time-place-manner restrictions should not be analyzed in the same way as direct bans on speech." App. 21a.

REASONS FOR GRANTING THE PETITION

First, review is appropriate to correct the First Circuit's misapplication of *Hill*, which raises important questions requiring resolution by this Court. The First Circuit mistakenly read *Hill* to permit abortion-

specific, speaker-specific restrictions on peaceful speech that does not involve physical approaches to unwilling listeners. Massachusetts has simply abandoned all of the safeguards on which *Hill* critically relied—applicability at all medical facilities, applicability to all speakers, and preservation of the right to engage in all speech while avoiding close physical approaches to unwilling listeners. Nothing in *Hill* permits the government to create this type of permanent no-speech zone on public streets and sidewalks, nor to do so only when and where abortions are performed.

Hill is frequently cited and has been used by courts to analyze speech restrictions at a wide range of locations. The First Circuit's misreading of *Hill*—beginning with the *McGuire* cases and continuing with the decision below—has led other courts to permit much more targeted and restrictive laws than *Hill* actually allows. The Court should grant the petition to make clear that *Hill* was a narrow decision pronouncing an outer boundary of permissible regulation, not a license to ban peaceful speech to willing listeners on public sidewalks. Alternatively, if it permits such restrictions, *Hill* should be overturned.

Second, the decision below directly conflicts with decisions of other circuit courts on at least two First Amendment issues. The First Circuit's decision below (together with a decision from the Third Circuit) conflicts with decisions from the Eighth and Ninth Circuits that have rejected speech-restriction zones that go beyond merely protecting listeners from unwanted, harassing speech. The First Circuit's decision (again, together with a decision from the Third Circuit) also conflicts with decisions from the Second, Sixth, Ninth, and Tenth Circuits, which have held that this Court's decision in *Jews for Jesus*, 482 U.S. 569, applies to complete

bans on speech in public forums, even after this Court's decision in *Hill*. The Court should grant the petition to resolve these conflicts widened by the decision below.

I. THE DECISION UPHOLDING A NO-SPEECH ZONE ON PUBLIC STREETS AND SIDEWALKS NEAR ABORTION CLINICS CONFLICTS WITH *HILL*

A. The First Circuit's Approval Of A Law That Bans All First Amendment Activity In A Public Forum Conflicts With *Hill*

The decision below purported to rely on *Hill* to authorize a complete prohibition on public forum speech within 35 feet of each door and driveway of an abortion clinic.

In *Hill*, however, the Court relied heavily on the fact that the Colorado law barred only physical *approaches* and left open other means of communication. For example, the Court noted that the law "does not affect demonstrators with signs who remain in place." 530 U.S. at 726. The Court also stressed that Colorado's ban on close physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 727. In short, the Court recognized that 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.' " *Id.* at 728 (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)). The Court held that the Colorado statute "adequately protected those rights because, even though the law's 8-foot distance "certainly can make it more difficult for a speaker to be heard," the law still allowed a speaker to communicate with an unwilling listener from a "normal conversational distance." *Id.* at

726-727 (contrasting the 8-foot zone with the 15-foot zone rejected in *Schenck* v. *Pro-Choice Network*, 519 U.S. 357, 377 (1997); "Once again it is worth reiterating that only attempts to address unwilling listeners are affected."). The Court found Colorado's no-approach law narrowly tailored to the State's interest in protecting incoming patients "from unwanted encounters." *Id.* at 729. The court below ignored this aspect of *Hill* and upheld a statute that effectively criminalizes all speech on a public sidewalk—regardless of whether the speech involves any physical approach or unwilling listeners. Indeed, the First Circuit was able to reach this conclusion only by ignoring multiple precedents of this Court.

The First Circuit, for example, did not even attempt to explain how peaceful conversations with willing listeners on a public sidewalk could ever be an "appropriately targeted evil," *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988), nor how consensual conversations could plausibly implicate the public safety concerns asserted by the State. Nor did the court discuss how the Act's prohibition on stationary sign-holding, silent prayer, or peaceful offers of assistance and information could ever be "appropriately targeted evils" that raise the state's legitimate concerns under *Hill*. Nor did it explain how *Hill* could govern speech restrictions when no listeners are in the zone.

To the contrary, the First Circuit dismissed concerns that the Act outlaws peaceful handbilling and speech with willing listeners from a conversational distance on public sidewalks as "jejune."[4] App. 18a. In-

[4] According to *Webster's Third New International Dictionary* 1213 (2002), "jejune" means: "devoid of interest or significance ... giving evidence of lack of experience or information ... immature, juvenile, puerile."

stead of considering this Court's express holdings in *Hill*, the court treated *Hill* as holding broadly that time-place-manner regulations "routinely make particular forms of expression impracticable without raising constitutional concerns." App. 18a. Based upon this misreading of *Hill*, the court found that Massachusetts' significant expansion of the Act—from a no-approach zone to a no-entry-to-speak zone—was simply "not a matter of constitutional significance." App. 21a.

The First Circuit also inexplicably found that "handbilling is not specially protected."[5] App. 18a. This is simply wrong. Handbilling in the public forum is a core First Amendment activity protected by the First Amendment's speech and press provisions. *See, e.g., Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). Indeed, this Court's opinion in *Hill* provided detailed analysis of the "more serious" burden on handbilling imposed by Colorado, and upheld the law only because even unwilling recipients could be offered and easily accept handbills by a stationary leafletter. 530 U.S. at 727; *see also United States* v. *Grace*, 461 U.S. 171, 180 (1983) ("The inclusion of the public sidewalks within the scope of [the] prohibition [on signs and leafleting] results in the destruction of public forum status that is at

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[5] The court's only citation for this pronouncement was *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). But *Heffron* is not a traditional public forum case, *see id.* at 655, and therefore does nothing to reduce the protections afforded by the Constitution and this Court's cases to peaceful handbilling in the public forum. *See Good News Club* v. *Milford Central School*, 533 U.S. 98, 106 (2001) ("If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.").

least presumptively impermissible."). In fact, this Court explained in *Ward* v. *Rock Against Racism*, why a ban on leafleting would *not* be permissible: "A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it." 491 U.S. 781, 799 n.7 (1989).

Likewise, the First Circuit dismissed petitioners' charge that the Act prohibited them from addressing their intended audience from a "normal conversational distance," declaring that "the Constitution neither recognizes nor gives special protection to any particular conversational distance." App. 18a. This Court held to the contrary in *Hill*: "More significantly, this statute does not suffer from the failings that compelled us to reject the 'floating buffer zone' in *Schenck*. Unlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a 'normal conversational distance.' " 530 U.S. at 726-727; *see also New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 204 (2d Cir. 2001) ("The zone imposes a severe burden on First Amendment rights by effectively preventing protestors from picketing and communicating from a normal conversational distance").[6] In contrast, the Massachusetts Act precludes much normal conversa-

[6] *See also Halfpap* v. *City of West Palm Beach*, 2006 WL 5700261, at *21, 24 (S.D. Fla. Apr. 12, 2006) (unpublished) (striking down 20-foot fixed buffer zone at medical facilities because this Court "found in *Schenk* [sic] and reaffirmed in *Hill* that a fifteen foot zone did not allow the speaker to communicate at a 'normal conversational distance.' ").

tion by forcing speakers to remain beyond a 35-foot radius from clinic entrances, exits, and driveways.

The Act's complete ban on all First Amendment activity within the zone also does not leave open ample alternative avenues of communication. As set forth above, all of the avenues preserved in *Hill* are illegal here. Gone is the right to address willing listeners. Gone is the right to stand still on the sidewalk holding a sign. Gone is the right to distribute leaflets. Gone is the right to offer help at a normal conversational distance. Instead, the court below simply suggested that petitioners may go elsewhere if they wish to "speak, ... wear screen-printed T-shirts, display signs, ... [or] engage in ... lawful expressive activities." App. 19a. But petitioners have the right to engage in such "lawful expressive activities" on public sidewalks; offering them the privilege to speak elsewhere is insufficient. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Hill*, 530 U.S. at 781-82 (Kennedy, J., dissenting) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)).

Indeed, the scope of criminal liability under the Massachusetts statute extends even beyond activists working against abortion. Both the lower courts and the Attorney General have been quite candid in acknowledging that the Act makes it illegal for passersby to discuss abortion, talk about "partisan" issues, wear political t-shirts or buttons, or even wear clothing with a Cleveland Indians logo. *See, e.g.*, App. 116a (interpreting the Act to prohibit even passersby from wearing shirts "with abortion-related or partisan messages" in the zone); *see* Oral Arg. Tr., May 5, 2009, *available at* 2009 WL 1346643, at *9 (State concession that a person wearing a Cleveland Indians shirt while passing

through the zone could be in violation of the Act); *id.* at *10 (State concession that passersby singing "We Shall Overcome" would "have to suspend" their singing as they passed through the zone). The statute likewise prohibits a wide range of speech having nothing to do with the State's asserted interests including: newspaper sales, charitable solicitations, labor organizing, petition circulation, or even just speaking on a cell phone. This chill on speech of third parties not before the Court is unacceptable. Neither *Hill* nor any other decision of this Court countenances these broad restrictions on peaceful expressive activity on public streets and sidewalks. Thus, the illegitimate sweep of the statute renders it unconstitutionally overbroad. *See, e.g., City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' " (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973))).

B. By Focusing Solely On Abortion Clinics, The Massachusetts Act Conflicts With *Hill*'s Content-Neutrality Analysis

Even if such a complete ban on peaceful speech in the public forum were constitutionally permissible, the Act is not neutral because its speech restrictions are solely dependent on the presence or absence of a single, often-protested activity—abortion. Unlike the statute at issue in *Hill*—which applied broadly at all health care facilities—the Massachusetts speech restrictions apply *only* to locations "where abortions are offered or performed." Act § 120E1/2(a)-(b) (App. 125a).

This singling-out of abortion is hardly accidental: the legislature was deliberately targeting abortion protesters. *See* App. 76a (noting legislature's desire to address "deleterious" effects "of anti-abortion protests" while *otherwise* "restrict[ing] as little speech as possible"). Indeed, when considering how the statute applied to speech on issues *other than* abortion, the First Circuit found that "anti-abortion protest[] ... falls squarely within the hard core of the proscriptions." App. 26a.

The courts below excused this targeting by relying on *Hill*—" 'Just as targeting medical centers did not render Colorado's counterpart statute content based, so too the Act's targeting of [only abortion clinics] fails to undermine its status as a content neutral regulation.' " App. 76a (quoting *McGuire I*, 260 F.3d at 44). In so holding, the lower courts disregarded this Court's reasoning that all patients at all health care facilities share interests in avoiding confrontational speech. *Hill* further explained that a speech-restrictive statute "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." 530 U.S. at 723. Colorado's no-approach statute, the Court stressed, did not "distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds." *Id.* at 724. To the contrary, the "constitutional[ly] significan[t]" point was that "all persons entering or leaving [all] health care facilities share[d] the interests served by the statute." *Id.* at 731. In assessing content-neutrality, "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." *Id.* Indeed, the Court explained that it

was "*precisely because* the Colorado Legislature made a *general policy choice* that the statute [was properly] assessed under the constitutional standard" for time, place and manner restrictions, rather than a stricter standard. *Id.* (emphasis added).

Massachusetts' decision to create speech restrictions that apply only when and where abortions are performed is the exact opposite of the "general policy choice" that the Court found justified intermediate scrutiny in *Hill*. *See* 530 U.S. at 731. As the lower courts candidly acknowledged, the Act was *designed* to target anti-abortion protests while regulating as little other speech as possible. App. 21a, 76a. At all other medical facilities, the State has expressly preserved the activities criminalized here, namely peaceful non-obstructive speech. *See* G.L. c. 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"). Thus, at general service facilities where speakers might be expected to speak about any number of issues (labor disputes, animal testing, etc.), the State has focused solely on obstruction and has preserved peaceful speech; where speakers are only likely to be protesting abortion, the State has criminalized even peaceful, consensual speech, even if no incoming patients are in the zone.

Massachusetts is not free to create special criminal speech restrictions surrounding abortion. Under *Hill*, a regulation tied so narrowly and directly to a single controversial issue, while failing to protect the same asserted state interests at thousands of other locations where those interests are implicated separately from abortion, cannot fairly be called content-neutral.

C. The Statutory Preference For Clinic Speakers Conflicts With *Hill*'s Requirement Of Viewpoint Neutrality

The First Circuit also failed to follow *Hill* by permitting the State to grant special speech rights to speakers from abortion clinics, even while denying those same rights to speakers opposed to abortion. The First Circuit expressly held that it was "legitimate" for the state to privilege these speakers over others in the public forum. App. 13a-14a.

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).[7]

The *Hill* Court emphasized that Colorado's no-approach law passed this threshold test:

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion.... It applies to all "protest," to all "counseling," and to all demonstrators [,] ... whether they oppose or support ... [the] abortion decision. *That is*

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[7] Creating different classifications that discriminate on the basis of viewpoint, as the State has done here, violates the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. *See Mosley*, 408 U.S. at 96.

> *the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added); *see also, id.* at 731 ("As Justice Jackson observed, 'there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'" (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (concurring opinion)).

In stark contrast, the decision below upheld as neutral an Act that clearly does not apply equally to both sides of the abortion debate. On its face, the Act specifically exempts all "employees or agents of [the clinic] acting within the scope of their employment." Act § 120E1/2(b)(2) (App. 125a). This Court has recognized that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). Here, the exemption for clinic speakers, with its "scope of their employment" limitation, is viewpoint-based *on its face*: Any privileged speech will *necessarily* express the clinic's view. *See McGuire II*, 386 F.3d 45, 51-52 (citing evidence that clinic speakers engage in pro-choice speech); *see also Hoye* v. *City of Oakland*, 2009 WL 2392133, at *8 (N.D. Cal. 2009) (relying on the First Circuit's decisions in this case, *McGuire I*, and *McGuire II* in upholding a similar ordinance, despite "view[ing]

with great displeasure video clips ... in which escorts can be seen intermittently walking alongside Plaintiff and blocking Plaintiff's sign with their own, all-white signs").[8]

The lower courts were convinced that all of this is permissible under *Hill* and this Court's other cases. First, they concluded that the Act was facially valid because they could "envision" one potential legitimate reason for including the "employees or agents" exemption: "to make crystal clear ... that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." App. 82a (quoting *McGuire I*, 260 F.3d at 47 and *McGuire II*, 386 F.3d at 58); App. 13a-14a.[9] Sec-

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[8] The Attorney General's attempt to "interpret" away this facial discrimination in favor of clinic speakers cannot save the statute. First, the interpretation itself is *expressly* content-based—it would criminalize public forum speech by clinic speakers if it concerns abortion or "partisan" issues but not other issues—and is therefore presumptively unconstitutional. *See, e.g., Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533 (1980). In this regard, the interpretation itself is a clear admission that the statute is content-based—otherwise, why would the Attorney General attempt to "interpret" the Act to create special rules for clinic speech about abortion? Also, if prosecuted, such employees have been provided with an absolute defense on the face of the statute itself. Respondent cannot *broaden* the reach of a criminal statute to criminalize exempted speech in an effort to preserve its constitutionality. In any case, even as interpreted, clinic speakers can still say "Follow me, I can help you" while petitioners and others could go to jail for saying identical words on the same sidewalk.

[9] The First Circuit's approach to facial challenges in this regard—and, indeed, throughout the decision—is wholly inappropriate for the First Amendment context. As this Court's decision with respect to the facial challenge at issue in *Hill* demonstrates, there is nothing about the content-neutrality inquiry that changes at the facial challenge stage. Nor does the facial context somehow

ond, the lower courts relied on *McGuire I*, where the court of appeals speculated that the legislature "could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." *See McGuire I*, 260 F.3d at 46; App. 13a (relying on its *McGuire I* analysis); App. 81a-82a (quoting *McGuire I*, 260 F.3d at 46); *see also* App. 80a ("The employee exemption ... is neutral on its face") (quoting *McGuire I*, 260 F.3d at 48).

None of this is remotely satisfactory. First, when a statute impinges on First Amendment rights, a court

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raise the bar for showing that a statute is or is not content-based or overbroad. "After all, whether a statute is content neutral or content based is something that can be determined on the face of it[.]" *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). Indeed, overbreadth challenges are almost always facial challenges. *See, e.g., Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965) ("By permitting determination of the invalidity of [overbroad] statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation."). The First Circuit's approach would permit the government to chill speech with broad laws and then avoid review unless and until the government chooses to apply them, forcing speakers to risk criminal sanctions in order to test the legitimacy of the restrictions. This the Constitution forbids. *See Dombrowski*, 380 U.S.at 486-487. In any event, this case proceeded with a bench trial on a stipulated trial record (not the mere summary judgment record upon which the Court decided *Hill*), and the Attorney General has already expressly announced how the State will enforce the law. Therefore, the two principal reasons courts sometimes wait for as-applied challenges—to have a factual record and to see how the law will be enforced—simply are not implicated here. *Cf. Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007) (contrasting the circumstances at issue in that case with the "latitude given facial challenges in the First Amendment context").

may not simply postulate legislative aims that might support it and require the challenger to show that a facially biased provision "admits of no constitutionally permissible application," as the court opined in *McGuire I.* 260 F.3d at 47. To the contrary, in the First Amendment context it is the *State's* burden to establish the necessity for and propriety of regulation. *See, e.g., Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 661 (2004); *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). Here, the First Circuit applied what amounts to a *rational basis* test. That approach has no place in First Amendment cases.[10]

Second, the alleged "legitimate" reasons the courts below suggested for the facially discriminatory employee exemption are themselves viewpoint-based and thus not legitimate. A State may not include a special statutory exemption to make "crystal clear" that those

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[10] The court of appeals apparently believed that one conceivable legitimate purpose for a facially discriminatory exemption insulates it from facial attack. App. 12a (citing *McGuire I*, 260 F.3d at 44). That is incorrect. Where a law discriminates on its face on the basis of content or viewpoint, it is subject to strict scrutiny and presumptively invalid. *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 817; *R.A.V.*, 505 U.S. at 382. Such a law has *no* permissible applications unless its terms are narrowly tailored to serve compelling governmental interests. *See Playboy Entm't Group, Inc.*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642-643 (1994) ("But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.... *Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.*" (emphasis added)).

who "work to secure peaceful access" to abortion clinics "need not fear prosecution" for their speech while denying the same clear protection to those who work to offer the same listener peaceful access to abortion alternatives, such as adoption. *See* App. 80a. The First Circuit's approval of this course as neutral violates the constitutional "demand" that such speech restrictions apply equally to all speakers "whether they oppose or support" the abortion decision. *Hill*, 530 U.S. at 725; *see also Mosley*, 408 U.S. at 96; *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"). Nor may the government regulate public forum speech based on predictions like the one the lower court made here in reliance on the *McGuire* cases—that speakers of a particular viewpoint (those from the clinic) are less likely to engage in "unwanted" speech than those with a different view. *See Mosley*, 408 U.S. at 100-101.

D. This Court Should Grant The Petition To Articulate Clear Limits On *Hill*, Or, Alternatively, To Overrule *Hill*

This Court granted review in *Hill* "[b]ecause of the importance of the case." 530 U.S. at 714. In resolving the sensitive question that case presented, the Court noted the "legitimate and important concerns" on each side, including the "clear and undisputed" First Amendment interests weighing against a law that "unquestionably lessened" the ability of pro-life speakers "to communicate [their message] effectively" in " 'quintessential' public forums." *Id.* at 714-715.

Review here is important because, as explained further below in Section II, courts around the nation

have relied on the First Circuit's misreading of *Hill* to reach a variety of conclusions about important First Amendment issues.[11] Indeed, these issues are important far beyond the context of abortion clinics, and *Hill* has been used to uphold speech restrictions in a wide variety of locations. For example, the Ninth Circuit applied *Hill* to approve speech restrictions at a trade organization meeting. *See Menotti* v. *City of Seattle*, 409 F.3d 1113, 1124-1125, 1141 n.52 (9th Cir. 2005) (deeming neutral restrictions designed to cover the exact time and exact perimeter of meeting). And other courts have applied *Hill* to uphold speech restrictions specially protecting hunters and funerals. *See Shuger* v. *State*, 859 N.E.2d 1226, 1232-1233 (Ind. App. 2007), *transfer denied*, 869 N.E.2d 454 (Ind. 2007) (Indiana Hunter Harassment Act); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (funerals). This broad use of the *Hill* precedent was feared at the time of *Hill*, and prompted a wide variety of groups from across the political spectrum—including the AFL-CIO, PETA, and the ACLU—to file amicus briefs asking the Court to strike down Colorado's law. PETA Amicus Br., 1999

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[11] *See, e.g.*, *Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I*, *McGuire II*, and this case to uphold no-approach buffer zone that applies only at abortion clinics and exempts clinic speakers); *Brown* v. *City of Pittsburgh*, 2009 WL 3489838, at *5, 8, 13 n.22 (3d Cir. Oct. 30, 2009) (relying on *McGuire I*, *McGuire II*, and this case to deem facially valid a 15 foot no-entry zone on public streets and sidewalks near Pittsburgh medical facilities with exceptions for clinic employees); *Spingola* v. *Village of Granville*, 39 Fed. Appx. 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to uphold ordinance outlawing public speaking at permitted events unless speech occurs in "designated speaking areas," deeming law facially constitutional because "there is at least one legitimate reason for the Ordinance, crowd control").

WL 1032802; AFL-CIO Amicus Br., 1999 WL 1034471; ACLU Amicus Br., 1999 WL 1045141.

The Court should grant review at least to reaffirm that *Hill* approves only a narrowly tailored accommodation of interests at the outer edge of what the First Amendment allows. *Hill* cannot be a license for legislatures to enact targeted, speaker-specific, total bans on speech in large parts of the public forum.

The First Circuit's wrenching of *Hill* to criminalize public-forum speech to willing listeners also strongly implicates the constitutional rights of women to hear and receive information and offers of alternative assistance. Although *Hill* emphasized protecting *unwilling* listeners from close approaches, many women entering clinics appreciate and take advantage of offers of help and information at a difficult time. They have a constitutional right to listen to these speakers. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 866-867 (1982) ("[T]he Constitution protects the right to receive information and ideas."). The government has no power to make decisions about which peaceful public forum speech it does or does not wish women to hear. *See, e.g., Mosley*, 408 U.S. at 96 (government "may not select which issues are worth discussing or debating in public facilities.")

The Court should grant review to make clear that *Hill* does not countenance the broad speech restrictions in public forums that the Massachusetts law establishes. Alternatively, if *Hill* does permit such restrictions, *Hill* itself is now demonstrably unsound and should be reconsidered as being in conflict with *United States* v. *Grace*, 461 U.S. 171 (1983), *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and countless other First Amendment decisions, as legal commenta-

tors from across the political spectrum have concluded.[12]

II. THE DECISION BELOW CONFLICTS WITH COURTS OF APPEALS DECISIONS CONCERNING PUBLIC FORUM SPEECH RESTRICTIONS

A. The Decision Below Conflicts With Other Circuits Concerning Whether And How Governments May Establish Speech-Free Buffer Zones

The First Circuit's decision conflicts directly with the en banc Ninth Circuit's application of the First Amendment in *Berger* v. *City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc). *Berger* invalidated as overbroad a rule that prohibited all visitors to the Seattle Center, "other than Center employees and licensed concessionaires, from engaging in 'speech activities' within thirty feet of a 'captive audience.' " *Id.* at 1035.

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[12] *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* has been "condemned by progressive and conservative legal scholars alike"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 734-738 (2001) (critiquing *Hill*'s First Amendment analysis); Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001) (quoting Laurence Tribe's description of *Hill* as "slam-dunk simple and slam-dunk wrong"); *id.* at 747-750 (quoting Prof. McConnell's critique of *Hill*); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill* v. *Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001) ("Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest facade of neutrality.").

Like the Massachusetts law upheld by the First Circuit, the Seattle rule prohibited "both welcome and unwelcome communications, both verbal tirades and silent protests;" forbade offering a handbill to consenting individuals "in an entirely benign—even silent—manner;" and prevented even the "passive and unthreatening" display of a sign. *Id.* The court reasoned that such flat prohibitions in a 30-foot zone were fatally overbroad because they regulated much more than the specific sorts of expressive activity that might create alleged problems. *Id.*

Here, in contrast, the First Circuit upheld Massachusetts' flat prohibition on speech outside abortion clinics on the ground that it "places no burden at all on the plaintiffs' activities *outside* the 35-foot buffer zone." App. 19a (emphasis added). Had the Ninth Circuit applied that understanding of the First Amendment, it could not have invalidated the speech-free zone at issue in *Berger*. It would have been a complete answer to "Magic Mike" Berger, the street performer who brought the challenge in that case, that he could work his magic outside the buffer zone.[13]

The Eighth Circuit reached a similar result in *Phelps-Roper* v. *Nixon*, 545 F.3d 685 (8th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2865 (2009). *Phelps-Roper* held that a plaintiff was likely to succeed on the merits of a First Amendment challenge against a

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[13] In fact, the First Circuit's "ample alternative avenues" analysis below resembles the Ninth Circuit panel decision, upholding the challenged restrictions, that was vacated by the grant of en banc review. *See Berger* v. *City of Seattle*, 512 F.3d 582, 597 n.24 (9th Cir. 2008), *vacated by grant of reh'g*, 533 F.3d 1030 (9th Cir. 2008).

speech-restrictive buffer zone near funerals. The Eighth Circuit reached that conclusion because the statute, like the Massachusetts law here, did "not limit itself to activity that targets, disrupts, or is otherwise related to the funeral, memorial service or procession." *Id.* at 693.

Even the Third Circuit's recent decision in *Brown* v. *City of Pittsburgh*—which upheld a 15-foot no-entry zone outside all health care facilities, 2009 WL 3489838, at *6-8 (3d Cir. Oct. 30, 2009)—is in tension with the First Circuit's unprecedented approach. The zone approved in *Brown* was both more neutral (applying at all health care facilities) and less restrictive (15 feet instead of 35) than the law at issue here. The Third Circuit concluded that additional speech restrictions beyond that 15-foot zone (namely, a no-approach zone) were impermissible. *Id.* at *10-11. The Third Circuit was focused particularly on protecting the right to leaflet, *id.* at *10, a right the First Circuit dismissed as not "specially protected." App. 18a.

The decision below likewise conflicts with the way federal district courts have evaluated buffer zones that impose broad speech bans. *See, e.g.*, *Halfpap* v. *City of West Palm Beach*, 2006 WL 5700261, at *24 (S.D. Fla. Apr. 12, 2006) (unpublished) (rejecting 20-foot buffer zone outside medical facilities because it was "not narrowly tailored to remedy the 'evil' of confrontational or 'in your face' protesting[] ... [and u]nlike the restriction approved in *Hill*, it fails to accommodate the 'willing listener' "); *McQueary* v. *Stumbo*, 453 F. Supp. 2d 975, 995-996 (E.D. Ky. 2006) (rejecting funeral speech restriction because it did not focus on unwanted speech, but instead "prohibits activity that would not interfere with a funeral and prohibits communications that are neither necessarily unwanted nor so obtrusive that

they cannot be avoided by the funeral attendees."). *But see Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I* and *II* and this case to uphold buffer zone targeting abortion clinics).

B. The Decision Below Conflicts With Other Circuits Concerning Whether Complete Bans On Speech In A Particular Location Are Governed By *Hill* Or *Jews For Jesus*

The decision below also conflicts with other circuit court decisions that have addressed whether this Court's holding in *Jews for Jesus*, 482 U.S. 569, governs cases involving complete bans on speech in particular locations. Other circuits have held that the overbreadth analysis from *Jews for Jesus* does apply in such cases. The First Circuit held here that—at least after *Hill*—*Jews for Jesus* did not apply.

A law is unconstitutionally overbroad where "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.' " *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (quoting *New York* v. *Ferber*, 458 U.S. 747, 769-771 (1982)). In *Jews for Jesus*, for example, this Court rejected a "First Amendment Free Zone" in the Los Angeles International Airport because, even though the airport was not a traditional public forum, the challenged speech restriction did "not merely regulate expressive activity ... that might create problems" but also "prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing." 482 U.S. at 574-75. The Court rejected the ban because, even in a nonpublic forum, no "conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

Other circuits therefore have recognized, when confronted with speech regulations that eliminate all speech in a particular zone, that *Jews for Jesus* is the governing precedent for such time-place-manner restrictions. *See, e.g.*, *Berger*, 569 F.3d at 1056 (applying *Jews for Jesus* to 30-foot buffer zone); *Huminski* v. *Corsones*, 396 F.3d 53, 92-93 (2d Cir. 2004) (applying *Jews for Jesus* to trespass order prohibiting subject from speaking in and around courthouse); *Parks* v. *Finan*, 385 F.3d 694, 702-703 (6th Cir. 2004) (applying *Jews for Jesus* to permit requirement governing even casual conversation and debate on state capitol grounds); *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1131-1133 (10th Cir. 2002), *cert. denied sub nom.*, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *First Unitarian Church*, 539 U.S. 941 (2003) (applying *Jews for Jesus* to public easement retained after sale of portion of street to private entity). *But see Brown*, 2009 WL 3489838 (making no mention of *Jews for Jesus* and instead relying primarily on *Hill* in analyzing a no-entry zone at health care facilities).

Here, by contrast, the First Circuit declined to apply *Jews for Jesus* to a "First Amendment Free Zone," 482 U.S. at 574, on the streets and sidewalks around Massachusetts abortion clinics. The First Circuit held, in contrast to the other circuits cited above, that *Jews for Jesus* did not apply because, according to the First Circuit, this Court's decision in *Hill* "left no doubt" that time-place-manner restrictions should not be analyzed in the same way as bans on speech. App. 21a. The First Circuit's misreading of *Hill* in this regard is directly contrary to *Jews for Jesus* and the way most other circuit courts have applied that case, even after *Hill*.

CONCLUSION

Properly understood, *Hill* is a narrow decision reflecting a balance between the rights of speakers and unwilling listeners. Massachusetts has taken *Hill*, ignored all of its safeguards—applicability at a broad class of locations, equal applicability to all speakers, and applicability only to unwanted physical approaches—and used it to justify a law that is far more selective and far more restrictive of public forum speech than what the Court permitted in *Hill*. Not surprisingly, the decisions upholding Massachusetts' approach have brought the First Circuit into conflict with numerous decisions of this Court and other circuits, and have led other courts and jurisdictions to view *Hill* as similarly permissive.

The principles at stake are too important, and the ongoing chill on core protected speech too great, to leave that misreading of this Court's First Amendment precedent unreviewed and the conflicts unresolved. The Court should grant review to make clear that *Hill*, at most, marked an outer boundary, not an invitation to unequal government regulation of private speech with even consenting listeners in the public forum.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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