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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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For nearly a decade, Massachusetts defended its abortion-clinic buffer zones as just like the one held facially constitutional in *Hill* v. *Colorado*, 530 U.S. 703 (2000). The result has been three First Circuit decisions upholding unconstitutional speech restrictions on the basis of expansive interpretations of *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36 (1st Cir. 2001) (*McGuire I*); *McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*), and *McCullen* v. *Coakley*, 571 F.3d 167 (1st Cir. 2009). Other courts have reached various conclusions about *Hill*'s impact on First Amendment prin-

ciples, with some following the First Circuit's erroneous interpretation. *See* Pet. 15, 26 n.11, 28-32.

Respondent now (i) concedes that the Act is quite different and more restrictive than the statute in *Hill* and therefore requires the application of injunction cases like *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357, (1997), *see* Respondent's Brief in Opposition ("BIO") 8-11, 25-28, and (ii) argues that the "varying results" in other courts stem not from confusion about the reach of *Hill*, but rather from application of "well-settled" law that "lower courts have not had great difficulty in applying." BIO 28, 32.

These arguments fail. The Act's differences from *Hill*—its focus on abortion, its speaker exemptions, and its criminalization of even peaceful, welcomed speech on the public sidewalk—eviscerate the fundamental protections upon which *Hill* relied. And injunction cases like *Madsen* and *Schenk*—which involved restrictions tailored to specific individuals who had violated the law—are not blueprints for broadly applicable speech restrictions. Whether *Hill* allows government to selectively criminalize even welcome speech on the public sidewalk is an issue of paramount First Amendment importance. The Court should not wait until Petitioners are arrested to address that issue. Nor should it permit their rights to continue to be irreparably harmed while they are forced to pursue unnecessary as-applied litigation. Petitioners' facial challenge was litigated to its conclusion and comes to this Court with a 300-page trial record. Certiorari is appropriate now.

I. RESPONDENT'S ABOUT-FACE ON *HILL* DEMONSTRATES WHY CERTIORARI IS WARRANTED

A. Conflict With *Hill*

Petitioners agree with Respondent's new position that the Act is very different from the statute upheld in *Hill*. BIO 25-28. As set forth in detail in the Petition at 12-25, the Act lacks *Hill*'s critical safeguards of application at a broad range of health care facilities, application to all speakers, and limitation to *unwanted approaches* so as to permit, for example, effective leafleting and conversation with willing listeners.

These distinctions are of great importance. They provided the very basis for the decision in *Hill*. *See, e.g.*, 530 U.S. at 707-709, 727-728 (emphasizing distinction between willing and unwilling listeners); *id.* at 708, 723-724 (equal application to all speakers); *id.* at 715, 728-729 (application at all medical facilities rather than a subset); *id.* at 726-727 (preservation of normal conversational distance); *id.* (ability to stand still and leaflet, talk, or display signs).

Certiorari is appropriate because both lower courts—and other courts that have relied on them—ignored these crucial differences and relied on *Hill* to uphold the Act. And until last week Respondent eagerly urged them to do so. For example, Respondent originally argued that the Act modified "only the size and nature of the buffer zone ... [but in] all other respects ... remained identical" to the no-approach laws. Dist. Ct. Opp. to Prelim. Inj. 1-2. In fact, that first brief refers to the *Hill* and *McGuire* cases more than 90 times. Both lower courts ruled for Respondent by relying heavily on *Hill*. *See, e.g.*, Pet. App. 10a, 18a.

Now that Respondent concedes the Act is *not* "modeled on the *Hill* statute" (BIO 26), certiorari is

warranted to make clear that *Hill* does not support severe restrictions on speech.

B. Speaker Discrimination

Respondent acknowledges *Hill*'s statement that the Constitution "demands" that public forum speech restrictions apply to all speakers "whether they oppose or support" abortion. BIO 21. Yet Respondent defends the Act's facial exemption for abortion clinic speakers by promising to prosecute exempted speakers if they discuss "abortion" or "partisan" issues. Pet. App. 14a, 27a, 64a-67a. This attempt fails.

First, Respondent effectively concedes facial unconstitutionality by nowhere defending the statute as written. The legislature provided, without qualification, that clinic speakers were fully exempt if "acting within the scope of their employment." Pet. App. 125a. Granting clinic speakers public forum speech rights denied to others is unconstitutional (*see* Pet. 20-21), and Respondent presents no argument otherwise.[1]

Moreover, Respondent offers no authority for the proposition that she may constitutionally *broaden* a statute and hold exempted speakers criminally liable. Any clinic speakers actually prosecuted for violating Respondent's interpretation have been provided an absolute defense by the Act itself. In any case, this sleight of hand is expressly content-based—only speech

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[1] Respondent incorrectly suggests that Petitioners conceded the asserted legislative interests. BIO 7. Petitioners actually said the exact opposite: that they "assume[] but do[] not concede" validity of the asserted rationale and did so "[b]ased on the holding of *McGuire I*." Appellants' C.A. Br. 37; Dist. Ct. Mem. in Supp. of Prelim. Inj. 34; *see also* Pet. App. 10a.

on specified topics (abortion and "partisan issues") is criminal—and discriminatory. *See* Pet. 22-23 n.8 (noting clinic speakers would still be permitted to say to women "Follow me, I can help you" while Petitioners could be imprisoned for saying same).

Finally, the Court's recent decision in *Citizens United* v. *Federal Elections Commission*, No. 08-250, 2010 WL 183856 (U.S. Jan. 21, 2010), confirms that such speaker distinctions are prohibited. *Id.* at *19 (government may not "tak[e] the right to speak from some and giv[e] it to others," or "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

That the lower courts here permitted speaker distinctions—and did so using an essentially rational basis standard (*see* Pet. 22-25 & n.10)—warrants review by this Court.

C. *Madsen*, *Schenck*, And *Burson* Are Inapposite

Realizing that *Hill* cannot support the Act, Respondent seeks refuge in *Madsen*, *Schenck*, and *Burson* v. *Freeman*, 504 U.S. 191 (1992). However, *Madsen* and *Schenck* are largely inapposite because they concern targeted equitable relief on "extraordinary" records to prevent specific prior lawbreakers from future violations. *See Schenck*, 519 U.S. at 380-383; *Madsen*, 512 U.S. at 766 n.3.

Respondent seizes on language in *Madsen* suggesting that injunctions, because of their targeted nature, require greater scrutiny than statutes to guard against impermissible discrimination. BIO 10. Respondent (along with the First and Third Circuits) suggests that this means that any speech restriction is necessarily permissible if it is less onerous than one approved for

injunction against specific past violators. *Id.*; *see also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (fifteen foot zone "a fortiori" permissible as a statute because of *Madsen* and *Schenck* ... "This conclusion is bolstered by the First Circuit's recent decision in *McCullen*[.]").

Respondent significantly over-reads *Madsen* and *Schenck*. Simply because courts are particularly cautious about speech-restrictive injunctions does not mean that any restriction a court could constitutionally tailor to an individual is, *ipso facto*, a permissible statutory restriction against all citizens. Indeed, if Respondent's analysis were correct, statutes requiring all speakers to remain at least 100 feet away from actress Halle Berry, and at least ten feet from all Church of Scientology buildings, would also be *a fortiori* constitutional because injunctions against particular individuals have issued with those terms. *See* AP, *Celebrity Obsession*, Chicago Trib., Mar. 8, 2005, *available at* 2005 WLNR 23471400; Sommer, *Scientology Opponent Faces Battery Charge*, Tampa Trib., Jan. 15, 2000, *available at* 2000 WLNR 67940. Similarly, *Hill* would have been an open-and-shut case unworthy of certiorari review because its 8-foot separation zone is far less than the 36 feet approved in *Madsen*. *Madsen* requires no such result. *Cf. Madsen*, 512 U.S. at 778 (Stevens, J., concurring and dissenting in part) (noting, presumably under standard undisputed time-place-manner analysis for statutes, that "a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment.")

Burson, on the other hand, concerned a restriction at polling places that advanced "compelling interests in preventing voter intimidation and election fraud." 504 U.S. at 210-211. No one has suggested the Act serves

any compelling interest. Moreover, the law in *Burson* was even-handed and not viewpoint-based like the Act: it did not focus on ballot questions only about particular issues, and applied equally to anyone campaigning or soliciting votes, *id.* at 193-194, without exceptions for preferred speakers.

In the end, Respondent remains unable to cite a single case from this Court approving a statute remotely like the one it now defends.

II. CERTIORARI IS APPROPRIATE NOW TO RULE ON THE ACT'S FACIAL UNCONSTITUTIONALITY UNDER THE FIRST AMENDMENT

Citing only a single 90-year-old non-constitutional trademark case, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916), Respondent contends that the stay of plaintiffs' as-applied challenge is sufficient reason to deny this petition. BIO 35. This is not the rule in the First Amendment context. *See, e.g., Schenck*, 519 U.S. at 370-371; *McCreary County* v. *ACLU*, 545 U.S. 844 (2005); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004).[2] This Court has repeatedly held—in authority that Respondent fails to address—that the "loss of First Amendment freedoms even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373-374 (1976). Accordingly, the Court has permitted "determination of the invalidity of ... statutes without regard to the permis-

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[2] *See also* Gressman, et al., *Supreme Court Practice* 282 (9th ed. 2007) ("[T]he interlocutory status of the case may be of no impediment to certiorari where the opinion of the Court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation.").

sibility of some regulation on the facts of particular cases" in order to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487 (1965).

Despite Respondent's repeated invocation of the term "interlocutory," Petitioners' case is interlocutory only in the sense that Petitioners included an as-applied challenge in the same complaint as their facial challenge. The mere fact that Petitioners combined these two challenges in one action—instead of filing an as-applied claim separately if necessary after the facial challenge—does not change the substance of the claim before this Court. Petitioners' facial challenge was the subject of a complete bench trial with a 300-page trial record, resulting in detailed findings of fact (*see, e.g.*, Pet. App. 43a-67a) and final decisions by the courts below.

The validity of this Act turns on questions that are properly addressed as part of a facial challenge. Whether a speech restriction is content-based, narrowly tailored to a sufficiently important governmental interest, leaves open ample alternatives, or is overbroad are all questions that courts address as part of a facial challenge. *See, e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).[3] This Court has repeatedly

[3] Respondent asserts that Petitioners waived certain arguments within an overbreadth claim that was otherwise presented. BIO 24 n.4. No waiver occurred. *Compare, e.g.*, Appellants' C.A. Br. 34-38 (arguing that the law is overbroad because it outlaws even t-shirts and buttons with abortion or partisan messages) with Pet. App. 116a (Act prohibits even passersby from wearing shirts "with abortion-related or partisan messages").

addressed facial First Amendment challenges with less than the complete trial record here provided. *See, e.g.*, *Hill*, 530 U.S at 709-710 (deciding facial validity based on summary judgment record); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (deciding facial validity based on stipulated record small enough to be produced entirely as an eight-page appendix to the district court opinion at 661 F. Supp. 1223, 1226-1234).

Here, granting certiorari at this time would protect core First Amendment freedoms and serve judicial economy by avoiding an entirely unnecessary as-applied challenge.

III. The Circuit Conflicts Present Important Federal Questions Needing Resolution

While acknowledging that courts "have reached varying results" on key First Amendment issues, Respondent focuses almost exclusively on alleged factual differences and ignores the different legal analyses performed by different circuits. *See, e.g.*, BIO 32. For example, Respondent argues that the Ninth Circuit's decision in *Berger* v. *Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), has no relevance here because the case did not involve "substantial privacy interests" associated with medical procedures. BIO 30. But the Ninth Circuit's legal analysis was not so limited: the Ninth Circuit held that even if the City's interest in a 30-foot buffer zone had been substantial, the law was still not

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In any case, Respondent concedes that Petitioners presented an overbreadth claim. *See, e.g.*, BIO 24 n.4. Under *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992), Petitioners are free to present any argument in support of that claim. *Id.*

sufficiently tailored because it was biased in favor of certain speakers, *id.* at 1055, and impermissibly overbroad by "prohibit[ing] both welcome and unwelcome communications, both verbal tirades and silent protests, both offensive language and the mildest remark," *id.* at 1056; *see also id.* ("No governmental interest ... could justify such a sweeping ban."). The First Circuit's analysis here could not be more different, breezily rejecting Petitioners' challenge even though the Act is similarly biased in favor of certain speakers and broadly prohibits *all* speech no matter how welcome or inoffensive.

Likewise, the Second, Sixth, Ninth and Tenth Circuits have analyzed complete speech bans at particular locations as impermissible under *Jews for Jesus*, while the First Circuit expressly rejected *Jews for Jesus* and followed *Hill* simply because the restriction was limited to a particular location. *See* Pet. 30-31.[4] Cataloguing alleged factual differences[5] does not dispel these conflicts.

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[4] The First Circuit's approach would mean that *Jews for Jesus* would not apply even to a complete ban on speech at the National Mall, so long as the complete speech ban was defined by location. *Jews for Jesus* itself disproves this assertion, as the restrictions there occurred only at a particular place—the airport terminal.

[5] Respondent says *Huminski* v. *Corsones*, 396 F.3d 53 (2d Cir. 2005), is different because it did not involve a "generally applicable" statute (BIO 33), but as explained above and in the Petition, the Act here can hardly be labeled "generally applicable" when it exempts abortion clinic employees. Similarly, Respondent says *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), is different because it prohibited all expressive activity on a pedestrian easement. BIO 34. Yet, the

Two cases concerning abortion-related speech merit particular discussion. Respondent asserts, without discussion, that there is no "true conflict" between the Third Circuit's decision in *Brown* and the decision below because the Third Circuit upheld a 15-foot buffer zone around hospitals and health-care facilities. BIO 29. But just as the supposed factual differences between this case and the cases above cannot make conflicts in *legal analysis* disappear, neither do any factual similarities between this case and *Brown* eliminate the fundamentally conflicting understanding of *Hill* embraced by the Third Circuit. First, although the Third Circuit held that a 15-foot buffer zone would, in isolation, be permissible, it held (and explained at great length) that *additional* speech restrictions beyond the 15-foot buffer zone were *not* permissible. *Brown*, 586 F.3d at 282 ("The fifteen-foot exclusion is a prophylaxis that effectively advances the City's interests. The additional burden of the bubble zone's restrictions would be, on this record, unduly—and unconstitutionally—onerous.").

Second, the Third Circuit's rejection of restrictions beyond the 15-foot buffer zone focused heavily on the burden on leafleting—a burden the Third Circuit treated entirely differently from the First Circuit. The Third Circuit explained that "leafleting is a classic form of speech that lies at the heart of the First Amendment" and that it is "especially hard hit" by the additional restrictions beyond the 15-foot zone. *Brown*, 586 F.3d at 281. Relying heavily on *Hill*, the court rejected even *Hill*-type no-approach restrictions beyond the 15-

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Act likewise prohibits *all* speech on public sidewalks. Worse, the restrictions here are triggered solely by the presence of one often-protested activity—abortion.

foot zone as either "effectively foreclos[ing]" or at least "severely curtail[ing]" leafleting. *Id.*; *see also* Dr. Alveda King *et al.* Amicus Br. 4-12.

In contrast, the First Circuit relied on *Hill* to reject virtually identical concerns about leafleting. Pet. App. 18a. Without even addressing this Court's careful discussion of leafleting in *Hill*, 530 U.S. at 727-730, the First Circuit instead cited *Hill* for the broad proposition that Massachusetts may make leafleting "impracticable without raising constitutional concerns." Pet. App. 18a.

Thus the First and Third Circuits reached inconsistent conclusions about the permissibility of speech restrictions beyond 15 feet, and did so with diametrically opposed analyses of this Court's opinion in *Hill* and its impact on the ability of government to restrict peaceful leafleting on public sidewalks.

Nor does Respondent satisfactorily address the issue of "normal conversational distance." *Hill* upheld Colorado's law in part because it allowed speech at a "normal conversational distance" of less than fifteen feet. 530 U.S. at 726-727. The Second Circuit has applied this principle straightforwardly. *See New York ex rel. Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 204 (2d Cir. 2001) (cutting back as not narrowly tailored a buffer zone that "imposes a severe burden on First Amendment rights by effectively preventing protesters from picketing and *communicating from a normal conversational distance* along the public sidewalk [near the clinic]." (emphasis added) (citing *Hill*)). The First Circuit cites *Hill* for the opposite proposition.

Respondent nowhere explains how the First Circuit's application of a fundamentally different under-

standing of *Hill* from other circuits does not create a conflict warranting resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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