No. 12-1168

In The Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA, GREGORY A. SMITH, ERIC CADIN, CYRIL SHEA, MARK BASHOUR, AND NANCY CLARK,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MOLLY WHITE, ESTHER RIPPLINGER, MARLYNDA AUGELLI, AND DR. ALVEDA KING AS *AMICAE CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICAE CURIAE*[1]

Amicae are women who attest to the importance of free speech in their abortion decisions.

Ms. Molly White had two abortions. Before her first abortion, she "asked the clinic staff about . . . the risks of abortion," but was told there was no "risk of physical complications." She said that the clinic staff, whose objective was to convince her that abortion was her best choice, "deceived" her with false information. She explains that her abortion caused continual bleeding, a damaged cervix, and uterine scarring, which led to two stillborn children and a miscarriage. She believes that "[i]f someone had been outside the clinic offering help and information, [talking face-to-face with her, she] would have decided against abortion . . . the most regrettable decision of [her] life."

Ms. Esther Ripplinger had an abortion. She asked the clinic staff about the baby's stage of development, and was told "It's only a blob of tissue." She later learned her baby actually had "hands, feet, and a beating heart." She was also told the procedure was "quick and painless" and would only cause "minor discomfort," but she later felt "shocking" and

[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents accompany this brief. No counsel for a party authored this brief in whole or in part. The Judicial Education Project contributed the costs associated with the preparation and submission of this brief. Unless otherwise noted, all statements made by *amicae* are on file with counsel for *amicae curiae*.

"excruciating pain." She suffered from depression and anxiety from the "worst decision she ever made" and her "pain and incredible loss" from her abortion will "last[ ] a lifetime." She believes that "[i]f someone had given [her] information and alternatives as [she] walked into the clinic, [she] would not have made this choice." Unfortunately, her memory is only of "people with pictures of dead babies shouting," which she "perceived as not loving and caring for [her] needs."

Ms. Marlynda Augelli had an abortion. She was not given any "information on the development of the child," nor about the potential psychological side effects. She explains that her children after the abortion have "riddled [her] with guilt and remorse," since they are constant reminders that she "[threw] away" the life of her aborted child. She also cites the abortion and resulting "tremendous psychological trauma" as a factor in her divorce from her first husband. She "wish[es] that [she] could have heard a counselor on the sidewalk before [she] walked into [her] doctor's office," because "[i]f [she] had heard of the risks beforehand, [she] could have made an educated decision" and would have "never" aborted her first child.

Dr. Alveda King, niece of Dr. Martin Luther King, Jr. and a civil rights activist herself, had two abortions. She explains that her abortions led to "eating disorders, depression, nightmares, and sexual dysfunctions." Additionally, she struggles with guilt and anger, as well as an inability to bond with her other six children, who ask her why she "killed our baby."

She "wish[es] that she had received more information about abortion prior to [her] decision," because if she had seen a sonogram and known the increased risk of depression and cervical and breast cancer, "[she] never would have had an abortion."

SUMMARY OF ARGUMENT

Amicae can testify to the difficulties of being in a crisis pregnancy, including the appearance of limited options and consequent feelings of hopelessness. However, they also believe that these difficulties are exacerbated by incomplete and misleading information about the abortion procedure, fetal development, and abortion alternatives, and the *amicae* greatly regret their decisions to have an abortion. The law upheld by the Court of Appeals, MASS. GEN. LAWS ch. 266, § 120E 1/2 (2007) ("the Act"), effectively prevents other women in a similar situation from receiving this information by dramatically limiting the speech of individuals offering abortion alternatives, while leaving ample communication channels for abortion proponents. This discrimination undermines the very essence of the First Amendment by effectively silencing one side of what may be the most profound and most deeply emotional political and moral debate of our day.

This Court has held repeatedly that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will

ultimately prevail, rather than to countenance monopolization of that market. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted). Without a vibrant and functioning marketplace, society loses "the best test of truth," which is the "the power of [a] thought to get itself accepted in the competition of the market." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). By misapplying this Court's precedents, the decision below undermines the marketplace of ideas by failing to adequately scrutinize a content-based regulation of speech. It also restricts both the ability of speakers to communicate their message, and of willing listeners like *amicae* to access critical information. The decision below is the most extreme decision in a line of lower court cases that have misinterpreted this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), and is in conflict with the Ninth Circuit's decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011).

This curtailment of the First Amendment has very destructive consequences. Forced further away from their intended audience by ever-expanding buffer zones, pro-life educators and counselors, however peaceful, civil and compassionate, are becoming increasingly precluded from delivering their message: a message that would have been welcomed by audience members such as *amicae*. These buffer zone laws make off-limits to these speakers the only plot of land on earth where their message has any plausible likelihood of achieving its desired effect.

Because the reasoning of the Court of Appeals poses a grave threat to the First Amendment, this Court should intervene and set clear limits on *Hill*'s reach.

REASONS FOR GRANTING CERTIORARI

I. The Act, As-Applied, Is Viewpoint-Based Because It Exempts Clinic Agents And Employees From The Buffer Zone

In analyzing a government restriction on speech, the first question is whether that restriction is content- or viewpoint-based, subjecting the restriction to strict scrutiny, or content-neutral, triggering less exacting scrutiny. *Compare United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (applying strict scrutiny), *with Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) ("the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))). *Hill v. Colorado* does not relieve the Court of performing this analysis by presuming that all buffer-zone laws are content- and viewpoint-neutral. On the contrary, *Hill*'s holding of content neutrality was conceded by the parties, and its

commentary on viewpoint discrimination was highly fact-based. The Court of Appeals improperly applied the holding to the Act as the facts of the Colorado law at issue in *Hill* are in stark contrast with those in the instant case.

In discussing the content-neutrality of the statute in *Hill* this Court was careful to limit its commentary to the specific facts of that case. The Court found significant the fact that the statute only minimally burdened the delivery of the pro-life counselors' message. The statute in *Hill* allowed for a "normal conversational distance," while allowing individuals to either remain in place and pass out literature, or come within 8 feet of clinic patients. *Hill*, 530 U.S. at 726-27 (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997)). Had the statute either imposed a significantly larger bubble, or exempted a particular viewpoint from the bubble's jurisdiction, this Court would have likely reached a different conclusion.[2]

The Court of Appeals' finding of facial neutrality can only be credited at the most superficial level.

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[2] This supposition is especially probable given the reasoning of the four-Justice concurrence: "[T]he reason for [the statute's] restriction on approaches goes to the approaches, not to the content of the speech . . . . [T]he content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence, the implausibility of any claim that an anti-abortion message, not the behavior of the protestors, is what is being singled out." *Hill,* 530 U.S. at 738 (Souter, J., concurring).

While in theory an exemption for clinic agents and employees could be neutral, in reality those exempted parties consistently favor abortion ideologically and have strong pecuniary incentives for doing so. Indeed, as the law is written, the exemption for clinic employees and agents is for speech *in the scope of their employment or agency*, which necessarily presents only a favorable perspective toward abortion. This is in stark contrast to the law upheld in *Hill*, which blocked pro-choice and pro-life speech equally. *See Hill*, 530 U.S. at 725 ("The statute is not limited to those who oppose abortion. It applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands").

Clinic representatives need not stand in front of clinics to inform pregnant women of the precise scope of their abortion rights or answer questions about the procedure itself, the safety precautions taken, or their view of its potential after-effects. Such information is readily available on the other side of the clinic's doors. But pro-life advocates know that if they are unable to deliver their message outside the clinic, prospective clients, like many of the *amicae*, will be unlikely to receive detailed information about the stage of development of their unborn babies, the details of the abortion procedure, or the risks of long-lasting emotional, psychological and even physical

harm.[3] The consequences of being prevented from communicating this type of information are immediate and irreversible; there is no second-best result and there are no second chances. *See Hill,* 530 U.S. at 792 (Kennedy, J., dissenting) ("Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur").

A viewpoint-based exemption to a neutrally-phrased law, like the exemption from the Act for clinic representatives, is equivalent to a viewpoint-based limit on speech. *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (holding a general prohibition on picketing except by those involved in a labor dispute to be viewpoint-discriminatory on its face); *see also Hoye*, 653 F.3d at 854 (rejecting facial challenge to abortion clinic buffer zone statute, while upholding

[3] For example, according to the Planned Parenthood website, "Most women ultimately feel relief after an abortion . . . Serious, long-term emotional problems after abortion are about as uncommon as they are after giving birth." Planned Parenthood, In-Clinic Abortion Procedures, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm. Empirical research, however, raises serious doubts about the factual accuracy of such a statement. *See, e.g.*, David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health,* 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006) (finding a direct correlation between a woman's history of abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health). The testimony of the *amicae* also tends to illustrate that Planned Parenthood's position is not representative of all women.

challenge as-applied, due to an unconstitutional "content-discriminatory enforcement policy" that effectively exempted clinic representatives from the law). Furthermore, the analysis for whether a speech limitation is neutral, even facially, must go deeper than the Court of Appeals' cursory analysis to address the logical effects of the law. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (The "inevitable effect of a statute on its face may render it unconstitutional" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))).

But, even if the Court of Appeals is correct that the Act is neutral on its face, it is clearly viewpoint-based as-applied, and thus should be subject to strict scrutiny. As Petitioners allege in their complaint, clinic representatives "surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." *McCullen v. Coakley*, 708 F.3d 1, 19-20 (1st Cir. 2013). Petitioners' complaint also alleges that "clinic 'employees and/or agents stand idly on the public sidewalks and streets inside the [buffer] zone' – sometimes smoking, speaking with each other or on mobile phones, or drinking coffee – 'even when clinic clients are not present.'" *Id.* at 20. Petitioners explain that the law precludes "up-close, gentle conversations, accompanied by smiles and eye contact" requiring "shorter, louder, and less personal exchanges" that are ineffective and render Petitioners "untrustworthy." *Id.* at 30. The decision below even admits

that the law "curtails the plaintiffs' ability to carry on gentle discussions with prospective patients at a conversational distance, embellished with eye contact and smiles," *id.* at 31, and that "patients are not readily accessible to the plaintiffs [in Worcester and Springfield]," *id.* at 33. Petitioners' testimony comports with *amica* Esther Ripplinger's statement, which recounts how such restrained attempts at communication while she was contemplating an abortion would have been off-putting, whereas a normal conversation could have made a difference in her ultimate choice.

In this sense, the decision below conflicts squarely with that of the Ninth Circuit in *Hoye*, which held a buffer zone to be content-based as-applied because the City of Oakland selectively enforced its statute against pro-life counselors but not clinic representatives. *See* 653 F.3d at 851-52 ("The City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction. . . . [To do so is] necessarily to distinguish on the basis of substantive content").

The Court should grant certiorari to resolve this conflict and clarify that the Colorado statute at issue in *Hill* was treated as viewpoint- and content-neutral only because its restrictions did not significantly burden speech of any viewpoint or subject matter in front of abortion clinics.

As *Hill* explained, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 731. The Massachusetts statute upheld by the court below, by contrast, should be declared viewpoint-discriminatory both on its face and as-applied. Unlike in *Hill*, this statute does not apply to all health facilities such as hospitals. *See Hill*, 530 U.S. at 715. Moreover, the Massachusetts legislature specifically targeted only the public property surrounding abortion clinics – where sidewalk counselors have long offered information and support to pregnant women considering abortions – and created such vast no-speech zones that pro-life counselors are for all practical purposes entirely precluded from delivering their message to their intended audience.

Such an expansive speech restriction, applied only to individuals on one side of the abortion debate, is far outside the bounds of *Hill*'s viewpoint-neutrality test and should be invalidated. If, however, such a restriction is truly consistent with *Hill*, the Court should overturn that case.

II. The Decision Below Ignores The Well-Established First Amendment Right Of Women, Such As *Amicae Curiae*, To Receive Information About Abortion

In affirming the constitutionality of the Act, the Court of Appeals undermined the ability of Massachusetts women to make fully informed choices about

abortion. The decision below, unprecedented in its breadth and scope, ignores important First Amendment principles laid down by this Court concerning the right to receive information. Because the rights at stake here are crucial to the purpose of the First Amendment, and because – as the stories of the *amicae* aptly demonstrate – the consequences of their abridgement can be severe, this Court should grant certiorari and clarify this right's boundaries.

"It is now well-established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). The purpose of the First Amendment is to ensure that civil society develops a marketplace of ideas so that the truth may be found. *See Sorrell*, 131 S. Ct. at 2674 (recognizing the constitutional "importance of maintaining a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas and experiences'" in order to allow the public to "freely choose a government pledged to implement policies that reflect the people's informed will" (quoting *Red Lion,* 395 U.S. at 390)). Creating a true marketplace of ideas requires protecting the rights of both speakers and listeners.

Just as a speaker's First Amendment right entails a certain level of access to an audience, *see Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) ("[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there

must be opportunity to win their attention"), so does a listener's right include the right to receive information, *see Martin v. Struthers*, 319 U.S. 141, 143 (1943) (The First Amendment "embraces the right to distribute literature and necessarily *protects the right to receive it*") (emphasis added) (citations omitted). A law that removes a listener's reasonably unfettered ability to know what information is available renders this right practically meaningless, impermissibly burdening the listener's First Amendment rights. *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer") (citations omitted).

Nowhere is a robust supply of information more important than in difficult and crucial decisions about abortion, and *amicae* provide clear examples of the profound effects that receipt of information can have on individual choices. This Court has long recognized the importance of women making educated decisions about abortion. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences"). Women have the right to receive information about abortion from counselors with multiple perspectives on the issue, and in particular from those who have no economic interest in abortion, without interference from the state.

The strikingly broad decision of the Court of Appeals ignores the burden the Act places on the rights of women entering reproductive health centers. The Act prohibits a woman from having a conversation, receiving a leaflet, or engaging in any type of communication except with clinic employees and agents within a 35-foot fixed buffer zone in all directions. Unlike the previous version of the statute, which contained an exception for consensual communication, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2000), the current version of the statute prohibits all communication within the buffer zone, *see* MASS. GEN. LAWS ch. 266, § 120E 1/2(B) (2007). The Act applies to invited and uninvited approaches alike, regardless of how peaceful and welcomed the speech is. Even if a woman entering a clinic affirmatively chooses to communicate with one of the Petitioners, Petitioner could not enter the buffer zone to communicate with her.

By restricting consensual speech, the Massachusetts law violates the right of women to receive information about abortion. In *Hill v. Colorado,* this Court upheld a buffer zone law that contained an exception for consensual speech, and indicated that a law without such an exception would raise independent constitutional issues. In upholding that eight-foot floating buffer zone law, this Court was careful to limit its reasoning only to cases where the statute at issue strikes "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of *unwilling* listeners. . . ."

530 U.S. at 714 (emphasis added). This Court repeatedly emphasized the significance of the Colorado law's exception for consensual speech: "it is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a *willing* audience and those that protect listeners from unwanted communication." *Id.* at 715-16 (emphasis added). Despite *Hill*'s repeated admonitions, the Court of Appeals failed to consider the burden the Massachusetts statute placed on the First Amendment right of willing listeners to receive information about abortion procedures. But Massachusetts has no legitimate interest in prohibiting willing listeners from communicating with speakers inside the buffer zone.

It is no answer to say that the women approaching an abortion clinic could walk outside the 35-foot radius created by the ordinance to talk to pro-life counselors. Counselors attempting to communicate with women entering a reproductive health center are effectively prevented by this law from peacefully initiating communications in a conversational tone. From 35 feet away, a conversational voice will be wholly drowned out by the loud background noise of city streets, even without the intentional attempts by clinic employees and agents to interfere with speech of pro-life counselors attested to by Petitioners. *See McCullen*, 708 F.3d at 19-20 ("plaintiffs aver that 'pro-choice advocates . . . surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life

speech and thwart Plaintiffs' efforts to distribute literature'").

If individuals like Petitioners are prohibited from attempting to approach to initiate a conversation, women like *amicae* will likely never discover that there are people willing to have a calm and rational conservation with them about the consequences of abortion. *Amica* Esther Ripplinger, for example, recalls entering a clinic for her abortion and only being confronted with "people with pictures of dead babies shouting," which she "perceived as not loving and caring for [her] needs." She maintains that "[i]f someone had given [her] information and alternatives as [she] walked into the clinic, [she] would not have made this choice" to have an abortion. Her experience illustrates the inadequacy of the alternatives available to individuals like Petitioners under the Act.

Further, there is no other source of neutral information about abortion readily available to women who visit reproductive health facilities in Massachusetts. Unlike some other states, Massachusetts reproductive health centers are not required to provide information about the consequences of abortion. *See, e.g.,* OHIO REV. CODE ANN. § 2317.56(B)-(C); 18 PA. CONS. STAT. ANN. § 3208(a)(2); GA. CODE ANN. § 31-9A-4(a)(2). Moreover, given the pecuniary interest reproductive health-care clinics have in providing abortions, it is eminently sensible to maintain a healthy skepticism of the objectivity and forthrightness of clinic personnel in advising patients about the nature of the abortion procedure and its potential

risks. *Amicae,* like many women contemplating an abortion, insist that they needed information and either did not get it from clinic personnel, or were provided with misleading information.[4] While the First Amendment does not require that states provide information about abortion to women, it does prohibit a state from preventing third parties from circulating such information. Because Massachusetts does not require the dissemination of this information and because abortion clinics themselves are not neutral sources of information, it is especially crucial that the government not impede third parties, such as Petitioners, from making this information available to women considering an abortion.

The Court should address these issues because serious consequences result when women decide to terminate their pregnancies without full information. The right to receive information about abortion should receive special attention because of "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned*

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[4] *See, e.g.*, Statement of Molly White ("I specifically asked the abortion clinic staff about fetal development and the risks of abortion. . . . I later found out that these two answers were untrue. The abortion clinic workers withheld vital information when I asked for it. . . . I also needed information about abortion alternatives"); Statement of Esther Ripplinger ("I was not made aware of the many community services available for pregnant women. . . . I asked the [clinic employee] about the baby's stage of development [and was given false information]").

Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion). As Justice Kennedy observed in his dissent in *Hill,* there is "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time," 530 U.S. at 792, than the abortion protester seeking to inform a vulnerable and often distraught young woman of the true nature of, and alternatives to, the irrevocable decision she is about to make.

The stories of *amicae* demonstrate that some women experience deep regret when they choose to abort a child without knowing all the facts. Several *amicae* attest they have suffered psychologically and, in some cases, physically, as a result of abortion decisions made with incomplete, misleading, or false information.[5] The experiences of *amicae* are representative of the experiences of many women. Empirical research on the psychological effects of abortion suggests that a woman who has undergone an abortion may face a number of difficulties. There is a direct correlation between a woman's history of

[5] *See, e.g.*, Statement of Molly White ("I suffered from a damaged cervix and uterine scarring. . . . In addition to the physical pain, I had longer-lasting emotional pain. . . . This has taken a heavy psychological and emotional toll on my life and the life of my family"); Statement of Esther Ripplinger ("I realized that my annual increased depression was the anniversary of the abortion. . . . I also became overly protective of my young son and feared he might die"); Statement of Marlynda Augelli ("I began to grieve the death of my first little one. . . . I was riddled with guilt and remorse and there was nothing I could do to stop those feelings. . . .").

abortion and her risk of anxiety, depression, suicide, drug dependence, and poor mental health. *See* David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health,* 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006). A number of other studies have also found similar correlations.[6]

The stories of the *amicae* demonstrate that these consequences can, in some cases, be prevented if the state merely steps out of the way and allows the kind of rational moral discussion protected by the First Amendment to occur. Several *amicae* assert that they would not have chosen to have an abortion had they received accurate information.[7] *Amicae*'s experience confirms Petitioners' statements. For example,

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[6] *See, e.g.*, M. Gissler et al., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, 15 EUROPEAN J. PUB. HEALTH 459 (2005) (suicide); P.K. Coleman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009*, 199 BRITISH J. PSYCHIATRY 180-86 (2011) (mental health); W. Pedersen, *Childbirth, abortion and subsequent substance use in young women: a population based longitudinal study*, 102 ADDICTION 1971-78 (2007) (drug use).

[7] *See, e.g.*, Statement of Molly White ("If sidewalk counselors had been there to give me an independent source of information, I would not have made the two most regrettable decisions of my life"); Statement of Marlynda Augelli ("I did not receive . . . any information . . . about the risk of physical and psychological side effects. . . . If I had heard the risks beforehand, I could have made an educated decision and I would not have aborted my child"); Statement of Esther Ripplinger ("If someone had given me information and alternatives as I walked into the clinic, I would not have made this choice and paid this price").

Petitioner McCullen attests to persuading around 80 women to choose to continue their pregnancies, while Petitioner Zarrella recounts the same for more than 100 women. Pet. 14-15. These stories illustrate the impact free speech can have on a woman's decision-making process. Information about abortion can have a life-altering effect, and the government should not deny a woman the opportunity to receive it.

III. The Act Violates The First Amendment By Leaving Sidewalk Counselors Without An Adequate Channel To Communicate Their Messages

The decision of the Court of Appeals also puts an impermissible burden on the First Amendment rights of would-be sidewalk counselors and all individuals, including *amicae curiae* and Petitioners, who wish to speak peacefully to women visiting reproductive health clinics. Even if the Court of Appeals is correct that the Act is a time-place-manner restriction, it is a restriction that clearly fails to leave open alternative channels of communication as required by *Ward v. Rock Against Racism,* 491 U.S. 781, 802 (1989). In upholding the Act, the Court of Appeals assures us that Petitioners' "voices are audible" and placards are visible from 35 feet away, while reminding us that Petitioners may still pray, use sound amplifiers, "congregate in groups outside a clinic" "employ symbols," "wear evocative garments," and "don costumes." *McCullen*, 708 F.3d at 31. This excises from the First

Amendment the right to engage in rational discourse, preserving only a vulgar right to shout at distant passers-by. The *Hill* Court, on the other hand, found significant that Colorado's 8-foot buffer zone still "allows the speaker to communicate at a 'normal conversational distance.'" *Hill*, 530 U.S. at 726-27 (quoting *Schenck*, 519 U.S. at 377). Most abortion counselors are understandably not interested in shouting slogans in the vicinity of an abortion clinic; they instead aim to discuss the dangers of abortion with those contemplating the decision to have one. Some ideas cannot be shared through simplistic T-shirt slogans or shouted over bullhorns.

Likewise, the Court of Appeals' insistence that "as long as a speaker . . . [may] reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication," is problematic on at least two levels. *McCullen*, 708 F.3d at 31. First, this Court's discussion of handbilling in both *Schenck* and *Hill* suggests that there is some limited right to engage in certain forms of communication that lie "at the heart of the First Amendment," and that merely offering alternate means of communication is therefore not necessarily an adequate alternative. *Schenck*, 519 U.S. at 377; *see also Hill*, 530 U.S. at 727 ("The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients," explaining that handbillers

may still "stand[ ] near the path of oncoming pedestrians" to hand out their material instead).

This Court also suggested in *Hill* that the availability not of alternate means of speaking altogether, but of handbilling in particular, even proffering handbills to unwilling recipients, was important. Thus it noted that a speaker offering handbills could still "stand[ ] near the path of oncoming pedestrians and proffer[ ] his or her material, which the pedestrians can easily accept." 530 U.S. at 727. Under the Act, handbilling would be rendered virtually impossible because of the distance counselors are required to stand from entrances, putting them well outside the "path of oncoming pedestrians." *Id.*

The Court of Appeals' hasty dismissal of a speaker's right to use her preferred method of communication further ignores the fact that some communication methods do carry unique features, as this Court taught in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Just as a lawn sign is a "venerable means of communication that is both unique and important," *City of Ladue*, 512 U.S. at 54, so normal conversation carries a particular message of caring and personal respect that shouting or distant picketing with signs or costumes could not convey.

While on its face the Act may appear to merely forbid certain *means* of communication by banning speech by non-clinic employees or agents within a 70-foot bubble, as applied it can prevent *all* communications about abortion alternatives. For example, the

Court of Appeals acknowledged that patients at both the Worcester and Springfield clinics were "not readily accessible to the plaintiffs" due to the location of clinic entrances in relation to the buffer zone. *McCullen*, 708 F.3d at 33. The practical difficulty – and at times impossibility – of initiating conversation with women squarely conflicts with *Hill*, which underscored 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.'" *Hill*, 530 U.S. at 728 (quoting *Kovacs,* 336 U.S. at 87) (emphasis added). The question, ultimately, is whether the First Amendment protects merely the right to cheer for one's own team or whether it protects the right to a fair opportunity for persuasion through the free exchange of ideas. We respectfully ask this Court to grant certiorari and reaffirm the latter protection.

Finally, by forbidding *all* non-clinic-based speech in a fixed area, the Act "burden[s] substantially more speech than is necessary to further the government's legitimate interes[t]" in promoting public health and safety. *Ward,* 491 U.S. at 799. This intrusion is not necessary to achieving their statutory goal of increasing "public safety at reproductive health care facilities." 2007 Mass. Adv. Legis. Serv. 155**.** In fact, by the time of the law's passage in 2007, there had been no adjudicated violation of Massachusetts' previous less restrictive buffer zone law, or even from 2000 to 2007, "prosecution during that period under any state, federal or local law directly targeting violence,

obstruction, intimidation, trespass, or harassment at abortion clinics in Massachusetts." Pet. 6.

While the *Hill* Court did state that a speech restriction "may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal," 530 U.S. at 726, it did not eliminate this tailoring requirement altogether. *Hill* explains that a time, place, or manner restriction must be "narrowly tailored to serve the government's legitimate, content-neutral interests." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798). It pointed specifically to the way that speech was still possible under the Colorado statute at issue:

> the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in *Schenck*, demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

530 U.S. at 729-30. The Court of Appeals, on the other hand, completely failed to address how a rule excluding those silently distributing leaflets, standing in place with signs, or engaging in consensual conversations, from a much larger fixed zone is remotely

related to – let alone tailored to – the asserted governmental interest in public safety.

The Court of Appeals also misread *Hill* by failing to take into consideration a crucial caveat to this Court's discussion of narrow tailoring: that the lower bar for narrow tailoring only applied to a "content-neutral regulation [that] does not entirely foreclose any means of communication." *Hill*, 530 U.S. at 726. Even if the Court of Appeals is correct that the Act is content-neutral, it clearly forecloses certain means of communication, including handbilling as discussed above, and thus is materially different from the type of regulation discussed in *Hill*.

CONCLUSION

For the foregoing reasons, *Amicae* request that this Court grant the writ of certiorari.

Respectfully submitted,

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