No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN ZARRELLA,
GREGORY A. SMITH, MARK BASHOUR, AND
NANCY CLARK,

Petitioners,

v.

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

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

BRIEF OF EUGENE VOLOKH, RICHARD W. GARNETT, MICHAEL STOKES PAULSEN, TIMOTHY ZICK, WILLIAM E. LEE, ALAN K. CHEN, & RONALD J. KROTOSZYNSKI, JR. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law. He is the author of over 30 law review articles on the First Amendment, including—most relevant to this case—*Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005), reprinted in FIRST AMENDMENT LAW HANDBOOK 314 (Rodney A. Smolla ed. 2005-06). He is also the author of THE FIRST AMENDMENT AND RELATED STATUTES: LAW, CASES, PROBLEMS, AND POLICY ARGUMENTS (Foundation Press, 4th ed. 2011).

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

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

(forthcoming 2014), and FIRST AMENDMENT STORIES (ed., with Andrew Koppelman) (Foundation Press 2011).

Michael Stokes Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas Law School. The courses he teaches include Constitutional Law. He has published widely on constitutional theory and interpretation, including several publications on First Amendment issues.

Timothy Zick is Robert & Elizabeth Scott Research Professor at William & Mary Law School. He teaches Constitutional Law and the First Amendment, and has written extensively about public speech rights. His publications include SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (Cambridge University Press, 2008), *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581 (2006), and *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439 (2006).

William E. Lee is a Professor in the Grady College of Journalism and Mass Communication at the University of Georgia. He is the author of 25 law review articles on freedom of expression, including—most relevant to this case—*The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. Davis L. Rev. 387 (2002). Professor Lee is also a co-author of THE LAW OF PUBLIC COMMUNICATION, a widely-used textbook now in its ninth edition.

Alan K. Chen is Associate Dean for Faculty Scholarship and Professor of Law at the University

of Denver Sturm College of Law, where he teaches both introductory and advanced constitutional law courses. He has published numerous articles on constitutional law and civil rights, including *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31 (2003). Prior to entering academia, he was a staff attorney with the Illinois affiliate of the American Civil Liberties Union, where he litigated cases concerning free speech. He continues to be active in pro bono First Amendment litigation.

Ronald J. Krotoszynski, Jr. is the John S. Stone Chair, Director of Faculty Research, & Professor of Law at University of Alabama School of Law. He is an expert on the First Amendment and the author of dozens of law review articles, including *The Return of Seditious Libel*, 55 UCLA L. Rev. 1239 (2008) (co-authored with Clint Carpenter). His books include RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (Yale University Press 2012); THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (NYU Press 2006 & 2009); and FIRST AMENDMENT CASES AND THEORY (Aspen 2d ed. 2013) (co-authored with Professors Steven Gey, Lyrissa Lidsky, and Christina Wells).

SUMMARY OF ARGUMENT

I. Even many steadfast supporters of abortion rights believed that the Court erroneously applied the First Amendment in *Hill v. Colorado*, 530 U.S. 703 (2000). As put bluntly by leading liberal scholar Professor Laurence Tribe, *Hill* was among the candidates for "most blatantly erroneous" decisions of the 1999 Term. Tribe added that the case was "slam-dunk simple" yet the Court got it "slam-dunk wrong."

Specifically, pro-choice and pro-life scholars alike agreed that the *Hill* majority wrongly deemed the Colorado statute "content-neutral." The ACLU, for instance, called the statute "fundamentally flawed," and urged the *Hill* Court to strike down the law because it "distinguishes among speakers based on what they are saying and not on what they are doing . . . [s]uch distinctions are plainly content-based and trigger strict scrutiny." Kathleen Sullivan and Erwin Chemerinsky also opposed the *Hill* majority's content-neutrality finding.

Further, pro-choice and pro-life scholars also disagreed with the *Hill* majority's willingness to protect a listeners' "interest" in being let alone above a speakers' freedom of speech on a public sidewalk. Dean Sullivan called this a "listener preclearance requirement." Scholars observed that the Court's treatment of privacy interests on a public sidewalk contradicted decades of First Amendment precedent. And they worried that the State's interest in protecting the unwilling listener could serve as a tool for government to infringe on the free speech of other disfavored groups.

II. The majority's unsound analysis in *Hill* set the stage for the even more restrictive Massachusetts law here. As scholars predicted, *Hill* sent a clear message that laws obviously targeting abortion clinic protests should be considered content-neutral and receive only friendly intermediate scrutiny in the courts. *Hill* also set the alarming precedent that protecting an "unwilling listener" on a public sidewalk was a powerful State interest worthy of balancing against the First Amendment. Those themes of *Hill* are dramatically on display here, in *McCullen*.

Finally, attempting to limit its holding, the *Hill* majority placed significant weight on three aspects of the Colorado statute it upheld: (1) that willing listeners could still be approached; (2) that the 8-foot bubble was very small; and (3) that the law only banned "approaching," so that demonstrators could always stand in place and offer leaflets or hold signs as people walked around them. The *Hill* Court's emphasis on those limiting factors, however, utterly failed to cabin the *Hill* decision. Not one of them is true of the Massachusetts law here—but the First Circuit, applying *Hill*, readily upheld it anyway.

ARGUMENT

I. EVEN STRONG SUPPORTERS OF ABORTION RIGHTS FAVORED FREE SPEECH IN *HILL v. COLORADO*.

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court voted 6 to 3 to uphold a speech restriction around abortion clinics. The Colorado statute applied within 100 feet of health care facilities, and outlawed "'knowingly approach[ing]' within 8 feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.'" *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1993)). The law effectively banned unconsented, up-close protesting and "sidewalk counseling" around abortion clinics.

Pro-life sidewalk counselors challenged the law under the First Amendment. Upholding the statute for a six-justice majority, Justice Stevens first determined that the law qualified as "content neutral," then that it was "narrowly tailored" to significant government interests, and lastly that it left open "ample alternative channels for communication." *Hill*, 530 U.S. at 725-26. Justices Kennedy, Scalia, and Thomas dissented. They disputed every step of the majority's analysis, but in particular its "content-neutrality" finding. *E.g.*, *id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based."). The *Hill* dissenters believed that the Court had bent the First Amendment badly out of shape.

Leading liberal scholars agreed. Just months after *Hill*, Professor Laurence Tribe opined that it was "right up there" among the "candidates for most blatantly erroneous" cases of the 1999 Term. Laurence Tribe, *quoted in Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001). Tribe added that the case was "slam-dunk simple" and the Court got it "slam-dunk wrong." *Id.* The ACLU (which had asked the Court to strike down the Colorado law), as well as Kathleen Sullivan and Erwin Chemerinsky, all also disapproved of the *Hill* majority's analysis.

Indeed, both pro-choice and pro-life scholars raised concerns about the Court bending the First Amendment to accommodate abortion rights. Professor Michael McConnell worried that "we're in very serious trouble" when "the Court lines up on free-speech cases according to whether they agree with the speakers or not." *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747 (2001). Professor William E. Lee agreed that "[r]egardless of one's stance on reproductive autonomy as a constitutional right and the power of government to punish private action that interferes with the exercise of constitutional rights, the *Hill* decision is problematic." William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002). By 2003, *Hill* had been "condemned by progressive and conservative legal scholars alike." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).

Two aspects of *Hill* drew particularly fierce criticism from a broad spectrum of critics. First, hardly anyone seemed to agree with the *Hill* majority that the Colorado statute was "content-neutral." After all, on its face the law required examining the *content* of the speech to determine whether a crime had been committed; moreover, by addressing advocacy around health care facilities, the law clearly targeted anti-abortion speech. Second, many critics rebuked the Court for accepting a "listener preclearance requirement," thereby elevating amorphous interests in being let alone or avoiding offense in a public place to a level where they could balance out the First Amendment right to free speech.

A. *Hill*'s content-neutrality holding disagreed with the ACLU and drew immediate criticism from leading liberal scholars.

The issue of content-neutrality loomed large in *Hill*. Finding the statute content-neutral led to weaker scrutiny and all but invited the Court to uphold the law. On the other hand, if the Court had found the statute *not* content-neutral, that would have led to frequently "fatal in fact" strict scrutiny. On *Hill*'s facts, scholars quickly recognized that finding the law content-neutral did not stand up to dispassionate analysis. Their criticisms took two main paths.

First, it was widely understood that the Colorado statute did in fact target anti-abortion speech. The ACLU, for one, had always recognized

this. Tellingly, although the ACLU staunchly favors abortion rights, it believed the Colorado statute was "fundamental[ly] flaw[ed]." Br. for ACLU as Amicus Curiae Supporting Petitioners, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1045141, at *1, *7. In particular, the ACLU repeatedly contended that the Colorado law was *not* content-neutral: "the floating buffer zone created by the new Colorado law cannot be described as content-neutral"; the statute "distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content-based and trigger strict scrutiny"; and it is "only by evaluating the content of the speech that a factfinder can determine [whether the law has been violated]." *Id.* at *7, *10. The ACLU's root position in *Hill* was that the Court should not "avoid the hard choices that the Constitution requires by mislabeling Colorado's statute as content-neutral." *Id.* at *13. Yet that is exactly what the *Hill* Court did.

Agreeing with the ACLU, Kathleen Sullivan, (at the time, the dean of Stanford Law School) described § 18-9-122(3) as "the Colorado legislature's effort to draw a facially neutral statute to achieve goals *clearly targeting particular content*." Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) (emphasis added). "After all," she added, "the motivation for this facially neutral law had to do with its effect in shielding patients (abortion patients) known to be the recipients of a particular kind of speech (anti-abortion speech)." *Id.* at 737-38 (parentheticals in original). Dean Sullivan also noted that the Court's "striking" acceptance of facial neutrality was

inconsistent with *Santa Fe Independent School District v. Doe*, where the Court—during the same 1999 Term—struck down a facially-neutral invitation to student speeches at football games under the Establishment Clause because "it was truly a thinly veiled effort to showcase student-led prayer." *Id.* at 737.

Other scholars offered more in-depth criticisms of the content-neutrality holding in *Hill*. One elaborated on Dean Sullivan's view, noting that "the legislature was indeed disfavoring a particular message." Timothy Zick, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 101 (University of Cambridge Press 2008). And others expanded on the inconsistency between abortion in *Hill* and the Court's approaches to other types of constitutional cases. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1262-63 (2008) (citing *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964)).

Still others examined in detail what had actually happened in the Colorado legislature when it passed the statute in 1993. They found "explicit evidence that many members of the legislature itself objected to the content of the protestors' speech. The legislature 'heard descriptions of demonstrations that were highly offensive in both their content and in their location . . . .' During debate, members of the legislature discussed the 'extremely offensive terms' used by anti-abortion demonstrators. Legislators listened to testimony about protestors 'flashing their bloody fetus signs,' and yelling 'you are killing your baby.'" 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, 215 (2001) (citations omitted). Indeed, "there is powerful evidence that the legislature's principal or only concern was anti-abortion protestors." Chen, 38 HARV. C.R.-C.L. L. REV. at 56; *id.* at 75 ("[A]lmost everyone in Colorado knew that the state adopted the bubble law solely to restrict anti-abortion protestors."). Even the majority opinion *itself* in *Hill* conceded that "the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics." 530 U.S. at 715. Dean Sullivan was right: the Colorado law "clearly target[ed] particular content." Sullivan, 28 PEPP. L. REV. at 737.

Finally, Professor Erwin Chemerinsky was "troubled by the rationale that was given" in *Hill*, particularly on the issue of content-neutrality.[2] Erwin Chemerinsky, *quoted in Colloquium*, 28 PEPP. L. REV. at 752. Chemerinsky observed that the Court had taken views of content-neutrality in *City of Renton v. Playtime Theatres* and *Erie v. Pap's A.M.* that were inconsistent with *Hill*, and he was "concerned" that "the Court tried to find a content-neutral regulation."[3] *Id.*

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[2] Chemerinsky did not, however, disagree with the ultimate outcome in *Hill*; he believed that the Court should have recognized that the law was not content-neutral, but upheld it under *strict* scrutiny.

[3] Shortly after *Hill*, Chemerinsky published an article titled *Content Neutrality as a Central Problem of Freedom of Speech:*

B. *Hill*'s focus on protecting the unwilling listener was also widely doubted and criticized.

A second focus of criticism was that the *Hill* majority had embraced "avoiding offense to listeners" as a reason to squelch speech in a traditional public forum. This subverted normal First Amendment principles by elevating unwilling listeners' presumed "interest" in being let alone on a public sidewalk above speakers' freedom of speech. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 & n.127 (2005) (explaining that, with narrow exceptions that do not apply to an entire category of speech in a traditional public forum, the right to free speech must "generally include . . . the right to offend people through that content, since much speech that persuades some people also offends others"). Dean Sullivan called this a "listener preclearance requirement." Sullivan, 28 PEPP. L. REV. at 737.

Scholars considered this new balancing between listeners and speakers in a traditional

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Problems in the Supreme Court's Application, 74 S. CAL. L. REV. 49 (2000). In the article, Chemerinsky noted that one "major problem with the Court's application of the principle of content-neutrality has been its willingness to find clearly content-based laws to be content-neutral because they are motivated by a permissible content-neutral purpose." *Id.* at 59. Cf. *Hill*, 530 U.S. at 719-20 ("The Colorado statute passes [the content-neutrality] test for three independent reasons. . . . Third, the State's interest in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.").

public forum both remarkable and unwelcome. Dean Sullivan, for instance, observed that *Hill* was "a holding inconsistent with the usual rule that, in the public forum . . . offended listeners must simply turn the other cheek." *Id.* Professor McConnell agreed: "*Hill v. Colorado* inverted ordinary free-speech principles" by restricting the speaker to protect unwilling listeners in a traditional public forum. McConnell, 28 PEPP. L. REV. at 748.

Others took an even stronger view. "[T]he Supreme Court's apparent recognition of a public 'right to be let alone' is in tension with literally decades of First Amendment jurisprudence. . . . [P]rior to *Hill* no such right or interest had ever been recognized." Zick, SPEECH OUT OF DOORS at 101; *see also* Lee, 35 U.C. DAVIS L. REV. at 426 ("In stark terms, the privacy interest in *Hill* contradicts more than half a century of First Amendment doctrine. Protection for the unwilling listener markedly alters the structure of dialogue on the public streets."). Looking to the future, scholars worried that "this novel 'interest'" in avoiding unwelcome speech had been accorded "sufficient weight to justify balancing it against the constitutional bedrock of free speech rights in the public forum." Raskin & LeBlanc, 51 AM. U. L. REV. at 199. "Consequently, the state's interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups." *Id.*

In sum, the *Hill* majority embraced at least two positions that were widely recognized as very strange—at best. First, it found that laws creating advocacy-free bubbles around health institutions were content-neutral, thus denying the obvious

targeting of pro-life speakers around abortion clinics. Second, it elevated the protection of unwilling listeners far beyond prior doctrine. Unfortunately, these ideas did not fade away after *Hill* or stay cabined in Colorado.

II. THE LOGIC OF *HILL* OPENED THE DOOR TO THE MORE RESTRICTIVE MASSACHUSETTS LAW HERE.

A. In the wake of *Hill*, scholars predicted trouble such as this ahead.

Even while *Hill* was pending at the Court, observers began to sense that it carried great risk to the First Amendment. In addition to the ACLU, the AFL-CIO filed a 21-page amicus brief defending the speech interest in *Hill*, to protect the speech rights of labor unions. Br. for AFL-CIO as Amici Curiae Supporting Petitioners, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1034471.

After *Hill*, predictions of trouble ahead intensified. One article opined that allowing speech restrictions to protect "unwilling listeners" could "be the basis for [future] laws restricting speech near other places, such as the sites of labor disputes." Lee, 35 U.C. DAVIS L. REV. at 390. Another article contended that *Hill* had created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places." Raskin & LeBlanc, 51 AM. U. L. REV. at 182.

Scholars recognized that several themes in *Hill* could cause future damage to the First Amendment. Most relevant to this case, the *Hill* majority's finding of content-neutrality instructed legislatures how to restrict speech, especially anti-abortion speakers around clinics. The message was that speech restrictions, at least if drawn to bar *all* speech and applied generally to medical facilities—would be considered content-neutral and receive only friendly intermediate scrutiny from the courts. *Hill* also essentially instructed that protecting people from hearing disagreeable words in a traditional public forum is a powerful State interest worthy of balancing against the freedom of speech. Given these instructions, outcomes like the one reached by the First Circuit in this case are no surprise.

B. The courts have slid directly down *Hill* to *McCullen.*

In upholding the Colorado statute, the *Hill* majority attempted to limit the scope of its holding by emphasizing certain unique aspects of the Colorado law. It failed. Thirteen years after *Hill*, and directly referring to it, the First Circuit has upheld here a Massachusetts law that even more clearly treads on the First Amendment.

The *Hill* majority pointed to several elements of the Colorado statute that it believed would limit its holding in that case. First, the *Hill* majority carefully and repeatedly stated that Colorado's statute "deal[t] only" with *unconsenting listeners*; that is, the statute and the question presented were about "protect[ing] listeners from unwanted

communication." 530 U.S. at 716. The majority urged that laws protecting unwilling listeners were "significant[ly] differen[t]" from those barring speech to a willing audience. *Id.* Indeed, Justice Stevens referred to "unwilling listeners" or "unwanted communication" at least 14 times in the majority opinion. *E.g.*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").[4]

Second, the *Hill* majority emphasized the small size of Colorado's 8-foot bubble zone. Beginning at the oral argument, the justices probed the 8-foot scope of the law.[5] The majority eventually concluded that the "8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators," *id.* at 726, and added that it still allowed communication "at a 'normal conversational distance.'" *Id.* at 726-27 (quoting *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S.

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[4] With respect to citizens' rights to "'reach the minds of willing listeners,'" the Court concluded that the "Colorado statute adequately protects those rights." 530 U.S. at 728.

[5] *See* Oral Arg., *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856), 2000 U.S. Trans. LEXIS 14, at *3 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *12 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully.").

357, 377 (1997)); *id.* at 729 ("Signs, pictures, and voice itself can cross an 8-foot gap with ease.").[6]

Third, the *Hill* majority relied on the fact that the Colorado law allowed demonstrators to stand in the path of oncoming pedestrians and offer their material, so long as they did not make additional physical "approaches" to people. "[T]he statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute." *Id.* at 727. The Court further observed that "[t]he statute does not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept." *Id.*

The *Hill* majority put significant weight on these three facts—that willing listeners could still be approached; that the 8-foot bubble was very small; and that the law only banned "approaching," so that demonstrators could always stand in place and offer leaflets or hold signs as people walked around them. *None of these things is true of the Massachusetts law here*. In fact, the Massachusetts law infringes on free speech substantially more than the Colorado law in *Hill*—but under *Hill*, it was upheld.

There is no question that this case is the progeny of *Hill*. The Massachusetts law here began as a no-approach statute modeled on Colorado's.

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[6] *See also Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*.") (emphasis added).

McCullen v. Coakley, 571 F.3d 167, 173 (1st Cir. 2009) (describing Massachusetts' bubble law passed in 2000 as "loosely patterned on the Colorado statute"). Concerns about "difficulties in enforcing the 2000 Act" and questions about its "efficacy" led to passage of the modern law in 2007. *Id.* The latest iteration of Massachusetts' bubble law establishes this rule: No one may enter or remain within 35 feet of a "reproductive health care facility" during business hours, with exceptions for people entering or leaving the facility, clinic employees acting in the scope of their employment, emergency or municipal workers, and people using the sidewalk "solely" to pass by on their way elsewhere. Mass. Gen. Laws ch. 266, § 120E 1/2(b) (2007) (described in 571 F.3d at 173-74). There are several obvious differences between this law and the Colorado law upheld in *Hill.*

First, the Massachusetts statute has no exception that would allow approaching a *willing* listener. The well-developed record in this case shows that before this law was enacted, many women accepted petitioners' conversational offers of help outside of abortion clinics. Yet the law here contains no consent provision that allows petitioners to enter or remain in an exclusion zone while communicating with a willing listener. Instead, petitioners must communicate from outside the painted boundary lines. That has had a profound effect on petitioners' speech. For example, "Plaintiff Zarrella—an 85-year-old grandmother who offers help on Saturdays and some Wednesdays—testified that the Act has so dramatically reduced her ability to effectively convey her message that she has not had a single successful interaction with an incoming

woman since the Act took effect—after more than 100 successful interactions before the Act." Pet. Cert. at 14-15.

Second, the 8-foot "bubble" in *Hill* has inflated into a 35-foot exclusion zone here. It goes without saying that 35 feet is not "a normal conversational distance." 530 U.S. at 726-27. In *Hill*, the ACLU did not even approve of 8 feet—as its brief pointed out, "it is impossible to hand a leaflet to someone who is standing eight feet away." Br. for ACLU as Amicus Curiae, *Hill*, 520 U.S. 703 (No. 98-1856), at *21. But 35 feet obviously is more than four times worse. That distance squelches any opportunity for normal conversation and leaves petitioners here in an ugly world of shouts, bullhorns, and poster-size pictures.

Third, the 35-foot bubble zone here categorically excludes speech. Unlike the Colorado law in *Hill*, the statute here leaves no way for a stationary speaker to converse or offer leaflets anyplace within arm's reach of patients entering the clinics. The Massachusetts law makes it a crime even to remain stationary and hold out literature or offer help in a normal conversational tone on public sidewalks. This goes well beyond any reasonable "prophylactic" approach for a speech restriction; indeed, any concern about intimidation or obstruction could be satisfied by requiring speakers to remain stationary while speaking or handbilling, and by having a separate rule prohibiting physical obstruction. Indeed, exactly such a statute existed in Massachusetts well before it enacted the law challenged here. *See* Mass. Gen. Laws, ch. 266, § 120E (2007) (prohibiting obstruction of "entry to or departure from any medical facility").

In sum, the *Hill* majority accepted an 8-foot no-approach bubble with exceptions for stationary speakers and consenting listeners. Relying on *Hill*, the First Circuit here accepted an absolute 35-foot speech-free zone. *McCullen v. Coakley*, 708 F.3d 1, 7 (1st Cir. 2013) (referring to the Supreme Court's "well-settled abortion clinic/buffer zone jurisprudence").

In fact, reliance on *Hill* in this case began in the District Court, which found content neutrality by "relying mainly on *Hill*." *McCullen*, 571 F.3d at 176. The First Circuit itself agreed that the Massachusetts law was content neutral mostly by relying on its own 2001 and 2004 decisions upholding earlier versions of the statute—both of which heavily relied on *Hill*. *E.g., id.* at 176-78; *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("We view [this] statute through the prism of *Hill* . . . . *Hill* controls."); *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004).

On the narrow-tailoring and overbreadth parts of its analysis, the First Circuit again followed *Hill*. *E.g.*, *McCullen*, 571 F.3d at 180 (citing *Hill* twice). Applying the same type of thinking as in *Hill*, the First Circuit observed that petitioners could stand and speak or offer leaflets outside the 35-foot zone, and from there they could still "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities." *Id.* Accordingly, the First Circuit "respected" the "legislature's judgment" and found the statute good enough to "surviv[e] intermediate scrutiny." *Id.* at 179, 181. On overbreadth, the First Circuit dismissed the

petitioners' argument as "eerily reminiscent of one considered and rejected in *Hill*." *Id.* at 181.

Hill is the seed from which this cursory analysis sprouted. The gist of *Hill*—that speech-restrictive bubbles around abortion clinics are content-neutral laws deserving only friendly intermediate scrutiny—is on full display in this case. Given that gist, it was only predictable that precise footage-calls, consenting-listener exceptions, and narrow approach-only limits that the Court discussed so much in *Hill* factored not at all in the First Circuit's decision in this case.

CONCLUSION

Amici respectfully request that this Court reverse the judgment of the First Circuit.

Respectfully submitted,

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