United States Court of Appeals
For the First Circuit

No. 00-2492

MARY ANNE McGUIRE, RUTH SCHIAVONE
and JEAN B. ZARRELLA,

Plaintiffs-Appellees,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; PHILIP A ROLLINS, DISTRICT ATTORNEY OF BARNSTABLE COUNTY, DUKES COUNTY, AND NANTUCKET COUNTY; GERARD D. DOWNING, DISTRICT ATTORNEY OF BERKSHIRE COUNTY; KEVIN M. BURKE, DISTRICT ATTORNEY OF ESSEX COUNTY; ELIZABETH D. SCHEIBEL, DISTRICT ATTORNEY OF FRANKLIN COUNTY AND HAMPSHIRE COUNTY; WILLIAM M. BENNETT, DISTRICT ATTORNEY OF HAMPDEN COUNTY; MARTHA COAKLEY, DISTRICT ATTORNEY OF MIDDLESEX COUNTY; WILLIAM R. KEATING, DISTRICT ATTORNEY OF NORFOLD COUNTY; MICHAEL J. SULLIVAN, DISTRICT ATTORNEY OF PLYMOUTH COUNTY; RALPH C. MARTIN II, DISTRICT ATTORENY OF SUFFOLK COUNTY; AND JOHN J. CONTE, DISTRICT ATTORNEY OF WORCESTER COUNTY,

Defendants-Appellants.

ON APPEAL FROM A PRELIMINARY INJUNCTION ENTERED BY THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF AMICI CURIAE OF CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, THE NATIONAL ABORTION FEDERATION, NOW LEGAL DEFENSE AND EDUCATION FUND, FEMINIST MAJORITY FOUNDATION, VOTERS FOR CHOICE, ET AL. IN SUPPORT OF APPELLANTS

(Additional Amici listed inside)

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American Jewish Congress

Connecticut NARAL

Connecticut Chapter of NOW

National Center for the Pro-Choice Majority

The Women's Law Project

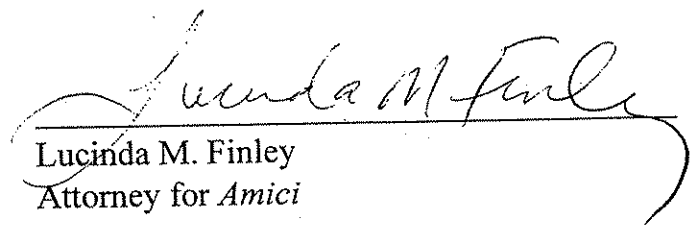
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that this brief *amici curiae* on behalf of Connecticut Women's Education and Legal Fund, et al. contains 6947 words, inclusive of headings, citations, and footnotes. The brief was prepared in Word Perfect 8.0, and is in Times Roman 13 point type. I used the word count function of Word Perfect.

Lucinda M. Finley
Attorney for *Amici Curiae*

RULE 26 DISCLOSURE STATEMENT

Amici are all not-for-profit organizations. While some are organized in a corporate form, none of them have any subsidiaries or parent corporations, and none have issued any stock.



Lucinda M. Finley
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INTEREST OF AMICI

Amici are organizations dedicated to ensuring safe access to reproductive health care, including ensuring that patients and providers are not subjected to unwelcome, intimidating close physical approaches while seeking access. Many of the *amici* have appeared in previous cases involving the constitutionality of statutes and injunctions designed to protect access to reproductive health care. *Amici* seek to advance their common mission through various means, including public education, representation of providers and patients in litigation, and advocacy. Some *amici,* such as the National Abortion Federation (NAF), are organizations whose members are providers of reproductive health care, including in Massachusetts. Thus, these members are directly protected by the Massachusetts law at issue here. Other amici are advocacy and membership organizations, whose members include Massachusetts citizens or women from neighboring states who may need safe access to Massachusetts reproductive health care facilities. The individual interests of *amici* are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

Amici adopt the statement of the case in Appellants' Brief.

SUMMARY OF THE ARGUMENT

The Massachusetts Reproductive Health Care Facilities' Buffer Zone Act ("the Act"), Massachusetts General Law chapter 266, § 120E1/2, is the Massachusetts legislature's chosen means of addressing threatening, intimidating, obstructive protest activity, which

sometimes erupted into violence, that plagues reproductive health care facilities in Massachusetts. To ensure safe and unfettered access to these facilities, the legislature required protestors who are congregating within eighteen feet of entrances to reproductive health facilities not to knowingly approach people closer than six feet without their consent. By thus requiring protestors to avoid forced physical proximity with unwilling listeners, the Massachusetts legislature intentionally tracked a virtually identical Colorado law which was upheld as consistent with the First Amendment by the U.S. Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 (2000).

There can be no question that the Massachusetts legislature had reason for concern; the shootings at the clinics in Brookline, Massachusetts are still fresh in the memory of the citizens not only of Massachusetts, but of the country. As Dr. Maureen Paul, the current Board president of *amici* NAF, testified to the legislature, no reproductive health care provider or clinic staff member, and no patient seeking reproductive health care, approaches a clinic without remembering the carnage wrought by John Salvi when he murdered Lee Ann Nichols and Shannon Lowney just because they worked at the Brookline clinic. (A. 34)

The district court cited three aspects of the Act that, in its view, rendered it unconstitutional. The lower court erred on all three counts. First, the court below concluded that because the Act applied only outside reproductive health facilities, it was not content neutral. However, the lower court failed to grasp that addressing a problem that is actually occurring in a particular place is not the same thing as discriminating between the messages that may get expressed at that place. *Hill*, 120 S.Ct. at 2491, 2493-94. That the legislature chose to focus on reproductive health care facilities reflects both the precise recent history of

where medically dangerous unwanted approaches were occurring, and the legislature's prerogative to choose to address problems in stages, correcting the most serious first. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Indeed, the federal Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994), has been challenged repeatedly as content-based because it applies only to those targeting reproductive health care providers and patients, but has been upheld on every occasion.

Similarly, the fact that the legislature permitted clinic employees and agents to approach patients when acting within the scope of their employment while others must first get the patients' consent reflects nothing more than the reality that, even with statutory buffer zones, patients regularly need and even request assistance from clinic employees to venture through the wall of obstruction, intimidation and fear that anti-abortion demonstrators deliberately construct.

Finally, that the legislature ensured that potential violators would have notice by requiring a demarcation of the protected zone as a prerequisite for a finding of violation reflects the legislature's careful weighing of the rights of demonstrators and the rights of those seeking access to reproductive health care.

None of these legislative judgments carries with it legal significance sufficient to distinguish the Massachusetts law from the virtually identical Colorado statute upheld by the Supreme Court in *Hill*. The Massachusetts statute is content-neutral for the same reasons relied upon by the Court in *Hill* and the precedents upon which it was based. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

What is regulated by the Massachusetts statute is physical proximity, not speech. Nothing in the law requires anyone to stop speaking, to refrain from displaying visible images, or to in any way curtail his or her First Amendment rights. It simply regulates the place – the proximity between the speaker and the intended audience – in which that speech may occur. Because of the incompatibility of noisy, disruptive, threatening activity with the provision of health care services, the courts have long recognized the need to regulate certain types of protest activities around hospitals and other health care facilities. *See Hill,* 120 S. Ct. at 2496; *Madsen*, 512 U.S. at 769-71. Unwanted face-to-face confrontations exacerbate the medical risks of any procedure, so their regulation is particularly warranted in the immediate vicinity of health care facilities.

Hill put to rest the arguments made by Appellees, that laws like this one should be adjudged under some test more stringent than the time, place and manner test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under the *Ward* test, the Massachusetts law is constitutional.

ARGUMENT

I. THE MASSACHUSETTS STATUTE IS A CONTENT AND VIEWPOINT NEUTRAL REGULATION OF FORCED PHYSICAL PROXIMITY

On three recent occasions, the Supreme Court has found that government appropriately may regulate abusive "in-your-face" actions by protestors targeted at people, who may be medically vulnerable, who are seeking access to reproductive health care facilities. *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480 (2000); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S.

753 (1994). This case reiterates this principle so essential to the safe provision of health care.

A. Because the Statute Regulates only Forced Physical Proximity, It Does not Prohibit Any Speech

The first criterion for whether a statute that affects expressive activity may be upheld as a reasonable time, place, and manner regulation is the requirement that it be content-neutral, or justified without reference to the content of the regulated expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Massachusetts statute satisfies this test, for the same reasons the Supreme Court found the similar Colorado zone of separation statute was a content neutral reasonable time, place, and manner regulation.

The method chosen by the Commonwealth of Massachusetts to control the harms of coerced face-to-face confrontations with health care providers and patients regulates only the action of forcing physical proximity on an unwilling person specifically targeted by a demonstrator. It does not restrict or limit any speech or message; it simply prescribes the amount of space a demonstrator must maintain between himself and his mark when the person preyed upon does not wish to permit a closer physical encounter.[1] As was established in *Hill* less than a year ago, such a restriction on spatial proximity simply is not a restriction of speech and, thus, is constitutional. 120 S.Ct. at 2493 (the Colorado statute "places no

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[1] The Massachusetts statute is not a so-called "floating bubble zone" like the provision struck down in *Schenck*. As the Court explained in *Hill*, the *Schenck* bubble moved, or floated with a person, so it prohibited protestors from stationing themselves anywhere on the sidewalk where they might unwittingly wind up within fifteen feet of anyone coming to a clinic, and enabled such a person to force protestors to move away from them, even into the street. 120 U.S. at 2495. The Massachusetts law allows stationary protestors, and prohibits only "knowingly approaching," and thus is more properly called a zone of separation statute.

restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.").

The Supreme Court consistently has emphasized that there is no right to force speech on unwilling listeners. "Nothing in the Constitution compels us to listen to or view any unwanted communication," and there is no "right to press even a 'good' idea on an unwilling recipient." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970). The right to distribute literature extends only to those "willing to receive it." *Schneider v. State*, 308 U.S. 147, 162 (1939). If there is no right to force one's message or literature on an unwilling recipient, then surely there is no right to force one's close physical presence on a person who wishes to preserve a couple of arms' length of personal space, as the Supreme Court held in *Hill*, 120 S. Ct. at 2489-90. This principle is of crucial import in the medical context, because face-to-face protest activity focused on vulnerable individuals who cannot easily avoid the close physical contact threatens patients' psychological and physical well-being and, thus, it appropriately may be regulated. *Madsen*, 512 U.S. at 768.

Indeed, the language of the Massachusetts statute is identical to that of the Colorado statute in this regard. A person who is "passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling" within the protected zone of 18 feet from the entrance to a reproductive health care facility may not knowingly approach within six feet of a person in that zone unless the targeted person consents. Mass. Gen. L. ch. 266, § 120E1/2(2)(b); Colo. Rev. Stat. § 18-9-122(3). There is no reference in either Act to the content of any handbill, sign, or oral protest, education or counseling. The spatial restriction

applies regardless of the content of the speech or the viewpoint of the speaker.

As was the case in *Hill*, the Massachusetts statute does not curtail speech; it merely directs its location. The Act does not prohibit leafletting; in fact, it permits someone to stand still, within inches or feet of people or cars inside the 18 foot zone, and offer everyone who passes or drives by a leaflet. What a leafletter may not do is knowingly approach -- charge up to or go after -- someone who refuses the proffer. Thus, like the Colorado statute, the Massachusetts law prohibits "persistent 'importunity, following and dogging' after an offer to communicate has been declined." *Hill*, 120 S. Ct. at 2490. While remaining stationary, an anti-abortion demonstrator can say anything, hold any sign, and offer any written material. A demonstrator can move towards people, so long as they stop within six feet, which is two arm's lengths, and a normal conversational distance. 120 S.Ct. at 2495. Demonstrators even can scream at that person, or continue to insist verbally that the targeted person allow a closer approach or take a leaflet or look at a sign. The demonstrator does not have to cease or desist from saying a word, or from doing anything except knowingly approaching someone at a distance of less than six feet when the target objects to such proximity. *Cf. Schenck*, 519 U.S. at 384-85 (rejecting First Amendment challenge to injunctive provision that required demonstrators to cease and desist from all communication with an unwilling target and back away to a distance of fifteen feet). Under the Massachusetts statute, patients seeking access to health care are not shielded from any messages or any messengers; they are protected solely from demonstrators knowingly approaching them at a distance of less than six feet.

The *Hill* Court firmly established that legislatures constitutionally may craft statutes "[t]he purpose of [which] is not to protect a potential listener from hearing a particular

message. . . . [but instead] is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual within a close range . . . ." 120 S.Ct. at 2491. Indeed, even before *Hill*, numerous courts had held that the conduct regulated by the Colorado statute -- approaching physically close to someone who does not want such a confined encounter -- is independently proscribable as harassment and invasion of another's personal space, disorderly conduct, or stalking. *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) (no First Amendment right to demonstrate in close proximity to particular people; doing so is tortious harassment and invasion of personal space); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (shadowing, coming too close to, and photographing Jackie Onassis and her children without their consent, even for newsgathering purposes, constitutes tortious harassment and is unprotected by First Amendment); *Petersen v. State*, 930 P.2d 414 (Alaska Ct. App. 1996) (repeatedly closely approaching targeted person against that person's wishes can constitute stalking, and is not constitutionally protected); *City of Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996) (protestor prosecuted for disorderly conduct for invading personal space and waving arms close to unwilling targeted victim; court holds that this is physically intimidating, threatening conduct not protected by First Amendment); *People v. Blackwood*, 476 N.E.2d 742 (Ill. App. 1985) (man subject to prosecution for coming physically close to ex-wife and screaming at her; court finds this conduct "not subject to constitutional protection under any circumstances"); *People v. Calvert*, 629 N.E.2d 1154 (Ill. App. 1994) (criminal harassment and assault charges for coming physically close to individual who did not want the contact,

and screaming and gesticulating in her face); *Welsh v. Johnson*, 508 N.W.2d 212 (Minn. 1993) (protestor may be prosecuted under harassment statute for invading clinic employee's personal space); *Flamm v. Van Nierop*, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (conduct of walking or driving physically close to plaintiff constitutes torts of assault and intentional infliction of emotional distress).

The Massachusetts Act does no more and no less than control the spatial relation between speaker and listener. It does not curtail any message whatsoever. As such, it is constitutional.

B. The Statute is Content-Neutral Because it Regulates Physical Proximity Regardless of Content or Viewpoint, and Neither its Application Only to Reproductive Health Facilities Nor its Exception for Clinic Staff and Agents Alter this Conclusion

In an effort to distinguish the Massachusetts statute from its Colorado twin upheld as content-neutral in *Hill*, the district court concluded that because the zone of separation applied only at reproductive health facilities that perform abortions, the statute was not sufficiently comprehensive to pass constitutional muster. The lower court erroneously assumed that because the statute was limited to abortion clinics, it must pertain only to speech directed at the topic of abortion. (A. 60) There are two fundamental flaws with the reasoning. First, the court ignored the long-established principle that a legislature is entitled to address a problem in a step-by-step fashion, and to address the most acute harms first. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Second, as the Court explained in *Hill*, the fact that the legislature addressed the problem at the places where the problematic

discourse is actually occurring does not render a statute topic or viewpoint specific. 120 S. Ct. at 2493-94.

A statute aimed at regulating a known harm is not unconstitutional simply because it does not aim, as well, at additional harms. Thus, although the Colorado statute in *Hill* differs from the Massachusetts Act in that it applies to all medical facilities, and not just reproductive health care facilities, this difference is not sufficiently significant to distinguish this case from *Hill*.[2] Even if the Massachusetts legislature had any evidence that there was a problem at general health facilities that did not perform abortions, it still would have been entitled to start attacking the problem only at reproductive health care facilities, whether they were the worst trouble spots or only one of many. *Williamson*, *supra*; *see also Mathews v. deCastro*, 429 U.S. 181, 189 (1976) (legislation not constitutionally required to strike at worst evil, or even to filter out all possible sources of evil); *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) (legislatures entitled to address only part of a problem).

Although the Colorado statute was broader in application than the Massachusetts Act, in *Hill* the Court expressly rejected the position that a statute might be content-based simply because of its application to a particular location, reasoning that the content, and not the location, of speech is the proper focus of a First Amendment analysis. 120 S.Ct. at 2493-4.

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[2] It is ironic that the Appellees argue that the narrower scope of the Massachusetts statute renders it *more* problematic than the Colorado statute in *Hill*. In fact, in *Hill*, the petitioners argued that *because* it applied more broadly to all health care facilities, and not just to reproductive health care facilities, the Colorado statute was unconstitutionally overbroad. 120 S.Ct. at 2497.

As the Court explained, a statute's content-neutrality is determined not by where the statute applies, but by whether the statute prohibits equally, for example, both praise for and opposition to the Supreme Court's abortion jurisprudence. "[The statute] 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." *Id.* at 2494.

The Massachusetts Act is entirely compliant with this test of neutrality. The district court had no support in the record for its assumption that the only protest that might ever occur at abortion clinics is protest on the topic of abortion, and protest only on one side of the issue. Indeed, such an assumption is insupportable; abortion clinics could be the location for protests about their labor polices or workplace safety records; they could be the chosen location for people protesting contraceptive issues; they may well be the location for people protesting the policies of various religious groups. Pro-choice demonstrators are as affected by the Massachusetts law as are anti-abortion activists. The mere fact that the people who most frequently protest at abortion clinics are those who wish to express objection to abortion, and that the statute may most often apply to anti-abortion demonstrators, does not render it content specific. This argument was specifically rejected by the Supreme Court in *Madsen*, in response to anti-abortion protestors' complaint that only they, and thus their anti-abortion viewpoint, would in fact be restrained by an injunction establishing a protest-free buffer zone around an abortion clinic. 512 U.S. at 762-64. *See also Frisby v. Schultz*, 487 U.S. 474 (1988) (residential picketing ordinance enacted in response to activities of anti-abortion protestors content-neutral); *International Society for Krishna Consciousness, Inc. v.*

Lee, 505 U.S. 672 (1992) (ban on face-to-face solicitation in airports enacted in response to aggressive approaches of Hari Krishna group content-neutral even though confined to airports and impacting primarily the Hari Krishna).

Indeed, the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994), prohibits certain modes of anti-abortion activity *only* when that activity occurs at reproductive health facilities, *see* 18 U.S.C. § 248(e)(4) (physical obstruction of reproductive health facilities). FACE prohibits other activity only if it is aimed at people who provide or obtain reproductive health services, and then only if conducted "because [the target] is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . ." 18 U.S.C. § 248(a)(1). Yet, in each instance in which FACE has been challenged as a violation of the First Amendment, the law has been upheld. *See, e.g., United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *Cheffer v. Reno*, 55 F.2d 1517 (11th Cir. 1995); *American Life League v. Reno*, 47 F.2d 642 (4th Cir. 1995); *Woodall v. Reno*, 47 F.3d 646 (4th Cir. 1995); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D.Cal. 1994). The fact that it applies in a particular type of location, or even that it affects people with a particular viewpoint, does not render a statute content-based and, thus, unconstitutional. *See Dinwiddie*, 76 F.3d at 922; *Soderna*, 82 F.3d at 1376.

This conclusion is not affected by the exception in the Massachusetts law for clinic employees and agents. The trial court assumed, without any evidence, that employees and agents of reproductive health care facilities have a financial and philosophic incentive to use

the exemption to persuade potential patients to undergo an abortion, and that they would use the Act's exception for the purpose of advancing their views.[3] First, it is clear from the Act's legislative history that the exception was not intended to permit anyone to force themselves on unwilling listeners. The four exceptions were part of a previous version of the Act that contained only a stationary buffer zone; in that context, the exceptions for clinic staff and people entering or leaving was necessary to allow them to get in and out of the facility. *See* Senate Bill No. 148 (1999).[4] There is nothing in the record to suggest that the Commonwealth of Massachusetts or any of its subdivisions intends to apply the Act in a way that is contrary to the legislature's intent.

More importantly, though, here, because only forced physical proximity is regulated, the employee exception does not favor the message or viewpoint of one group over that of another. Thus, in *Hill*, the Court found that the statute was not content-based simply because it applied only to persons who exercise their speech right "for the purpose of . . . engaging in oral protest, education, or counseling," and not to persons who approach to say "good morning" or engage in other speech that does not constitute protest, education, or counseling. 120 S.Ct. at 2491. The *Hill* Court distinguished the Colorado statute from the prohibition at issue in *Carey v. Brown*, 447 U.S. 455, 462 (1980), which exempted labor picketing, thereby "discriminat[ing] between lawful and unlawful conduct based on the content of the picketers'

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[3] It is impossible to avoid taking note of the trial court's obvious bias against abortion. Indeed, the trial court, in footnote 10 of its opinion, equated the "unborn child" to "Blacks in the ante-bellum south" and "Jews in Hitler's Nazi Germany . . . ." (A. 64).

[4] Because the exemptions appear to be unintended carry-overs from the earlier version of the bill with the fixed buffer zone, *amici* agree with the Commonwealth that if the Court thinks there may be viewpoint problems with the exemption for clinic employees, it properly can be severed.

messages." *Hill*, 120 S.Ct. at 2493. Here, the exemption for employees does not distinguish based on the message, topic, or viewpoint expressed by employees. The only distinction in the statute relating to the purpose of the approach is based on whether someone is acting within the scope of their employment.[5] This is an entirely rational, viewpoint neutral distinction for the legislature to draw.

Moreover, it is a necessary distinction in order to further the statutory purpose of protecting public and medical safety and securing safe access to clinics. As the record before the legislature demonstrated, clinic employees such as security guards or patient escorts, as part of their jobs, may have to closely approach patients or cars in order to physically assist patients into the building through a throng of angry, noisy anti-abortion demonstrators. (A. 39, 42). In the course of approaching for this reason, a clinic employee may have to give a patient information, such as "I am the clinic guard; I am here to help you into the building," that could potentially be construed as "education." When a patient or car is surrounded by screaming, grabbing, disorienting protestors, as the legislative record indicates happens too often, the clinic employee may not practically be able to get permission to approach before coming to the aid of the physically besieged patient. Similarly, law enforcement officers

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[5] It is not within the scope of a clinic employee's employment to engage in counter-protest with anti-abortion demonstrators. Indeed, abortion clinics take great care to ensure that the atmosphere outside is not one of political cacophony, but rather is one conducive to the stress-free calm environment necessary for health care. *See, e.g., Madsen*, 512 U.S. at 772-73 (clinic sought injunction clearing entrances in order to protect patients from cacophony of political protests); *People of the State of New York, et al. v. Operation Rescue National et al.* CV-99-209A (W.D.N.Y. July 26, 2000) (clinics obtained injunction because any sort of loud, obstructive protest activity, regardless of message, undermined medical safety). Thus, if a Massachusetts clinic employee ever did get in the face of an anti-abortion demonstrator in order to protest what they were doing or saying, that person would be acting beyond the scope of their employment and not protected by the exception.

often have to closely approach people without first being able to get permission in order to assist them, or to give them instructions or information. In this regard, the statutory exception for clinic employees and law enforcement personnel acting within the scope of their employment or official duties serve the same viewpoint neutral legislative purpose. The legislature maintained these exceptions in order to enable clinic employees and law enforcement to perform their essential patient-assistance and public safety functions. There is no evidence that the exemptions were adopted because of either disapproval or approval of anyone's likely message. *See, e.g., Hill*, 120 S.Ct. at 2500 (Souter, J., concurring). Neither exception makes any distinction based on viewpoint or content of any message that might have to be conveyed in the course of performing job duties.

Since the zone of separation in the Massachusetts statute curtails no messages at all, but merely "establishes a minor place restriction on an extremely broad category of communications with unwilling listeners," the exception for clinic workers does not constitute favoritism of one speaker over another. *Hill*, 120 S.Ct. at 2493. "[T]he statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within [six] feet of a patient by a person wishing to argue vociferously face-to-face . . . ." *Id.* Because only proximity, and not speech, is restricted, the exception allowing clinic employees and agents to approach patients and providers does not favor one viewpoint over another. As such, it violates neither the First Amendment nor the Equal Protection Clause.

II. THE MASSACHUSETTS STATUTE IS NECESSARY TO PROTECT THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE, AND IS NARROWLY TAILORED TO SERVE THAT INTEREST

An important component of the "time, place, and manner" inquiry is assessing whether certain kinds of protest activities are or incompatible with the purposes and needs of the places at which the activities are targeted. *See Hill*, 120 S.Ct. at 2489; *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Because the "cacophony of political protest" is so fundamentally incompatible with the needs of health care facilities, staff, and patients, *Madsen*, 512 U.S. at 772-73, courts have upheld restrictions on protest or solicitation activity at health care facilities that might not be justifiable in non-health care settings. *See. e.g., NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (ban on union solicitation in areas frequented by patients and their families is permissible); *Madsen*, 512 U.S. at 769-71 (complete ban on all protest activity within 36 feet of entrance to health care facility is permissible). "Persons who are attempting to enter health care facilities – for any purpose – are often in particularly vulnerable physical and emotional conditions." *Hill*, 120 S.Ct. at 2495. Government has a "substantial and legitimate interest in protecting these persons from close physical approaches by demonstrators." *Id.*

The Massachusetts legislature has acted within its police powers by determining that the strong governmental interest in safe access to reproductive health care is not sufficiently protected by simply prohibiting assaults and blockades. Although physically preventing people from getting into or out of health care facilities undoubtedly is adverse to the

compelling governmental interest in public health, forcing people to run a gauntlet of highly intimidating and stressful protest activity also seriously undermines the governmental interest in medical safety. The Massachusetts statute seeks not only to curtail blockades, but also to reduce intimidation and physical and psychological stress and, therefore, protect and enhance the safety of both patients and providers of reproductive health care.

A. Unwanted Invasions of Personal Space When Seeking Medical Care Are Physically and Psychologically Dangerous

Research has established that, in the United States, the necessary amount of personal space to maintain a sense of security and safety when encountering strangers in public is eight to twelve feet. Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication*, in NONVERBAL COMMUNICATION IN HUMAN INTERACTION 114-31 (Mark L. Knapp ed., 1978). Unwanted knowing invasions of personal space by strangers are perceived as aggressive and intimidating, and may trigger distinct physiological reactions: arousal, a "fight or flight" reaction, elevated blood pressure, palpitations, hyperventilation, and urinary retention. *See* Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* 93 (1975); Marianne LaFrance et al., *Sex Differences in Reaction to Spatial Invasion*, 102 Social Psychology 59 (1977). *See also United States v. Scott*, 958 F.Supp. 761, 767 (D. Conn. 1997) (finding that demonstrators' activity outside health care facility increases medical risk of surgical procedure); *People of the State of New York, et al. v. Operation Rescue National et al.* CV-99-209A (W.D.N.Y. July 26, 2000, slip op. at 28-29 (finding that patients' unwanted close encounters with demonstrators not only emotionally upsetting, but also cause physical manifestations, such as elevated blood pressure and pulse

and need for additional sedation, that increase medical risk of the abortion procedure).

These physiologic stress reactions can be exacerbated in the medical care context, when someone already is anxious, upset, or stressed by their illness or impending surgery. For most patients, even a minor surgical procedure can present an important problem of emotional stress. Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofacial Surgery 688, 694 (1987). Patients subjected to exacerbated stress prior to surgical care have more complications, poorer surgical outcomes, experience greater pain and require greater use of painkillers or anaesthesia. *Id.*; Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 Psychomatic Medicine 230 (1988); Anne Mayande et al., *Anxiety and Endocrine Responses to Surgery*, 54 Psychomatic Medicine 275 (1992).

In the context of reproductive health care facilities, many of which are besieged battlegrounds, the governmental interest in protecting people from intimidating, targeted, unwanted close physical encounters is particularly compelling. When a patient is coming in for the results of a pap smear, pregnancy test, rape counseling, or an abortion, she already may be experiencing a great amount of stress, and the unwanted close physical encounters with aggressive demonstrators significantly exacerbates it in physically dangerous ways. *See, e.g.,* Nancy E. Adler, et al., *Psychological Factors in Abortion*, Am. Psychologist 1194 (Oct. 1992); Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. & Clinical Psychol. 404 (1994) (stress from unwanted encounters with protestors

leads to increased post-surgical depression). Moreover, abortion is a surgical procedure, and involves the use of anaesthetics or sedatives. When patients leave a clinic, they may still be a bit groggy from sedation, and they are especially medically vulnerable to the invasive in-your-face tactics of protestors at this time. *See, e.g., People of the State of New York v. Operation Rescue National, supra*, slip op. at 15, 26 (W.D.N.Y. July 26, 2000) (patients express realistic fear of being attacked or harassed when they leave clinics while still feeling effects of sedation).

Courts have found that similar adverse health effects result from unwelcome, "in-your-face" demonstrations outside of reproductive health care facilities. For example, in *United States v. Scott*, 958 F.Supp. at 767, the court found that:

> Shouting, pushing, blocking and otherwise interfering with a patient's access to [a health care facility] can increase the patient's stress level, and thereby increase the risks of a subsequent abortion procedure in the following ways. First, if the procedure is being done under local anesthesia, a stressed patient may experience significantly more pain than a patient who is not stressed. The stressed patient may also move around on the table during the procedure which creates a risk that the doctor could puncture the wall of the uterus. Second, if the procedure is being done under general anesthesia, a stressed patient requires significantly more anesthetic to keep her calm. This increases the risks of complications, such as aspiration of stomach contents. Finally, stressed patients may have increased post-operative risks. A stressed immune system has more difficulty fighting off infection.

(Internal citations omitted). These adverse medical effects resulted not from blockades, but from unwanted, aggressive "in-your-face" physical approaches to people on foot or in automobiles. *Id.* at 767-70. *See also Operation Rescue National v. Planned Parenthood of Houston & Southeast Texas,* 975 S.W.2d 546, 551 (Tex. 1998) ("patients would enter clinics visibly shaken, crying, and nervous. Physicians reported increased respiration, heart rate, and

blood pressure among such patients, which at times required sedatives to treat. These symptoms, some of which patients experienced even in the absence of protesters, became more acute when the demonstrations occurred."); *People of the State of New York, supra,* slip op. at 25-31 (court finds that close encounters with aggressive sidewalk counselors makes patients terrified, stressed, sobbing, and often too agitated safely to undergo medical care, because of elevated pulse and blood pressure, inability to lie still on operating table; stress and anxiety sometimes causes delays in medical care, which increases risks).

The Commonwealth of Massachusetts's effort to protect patients and providers from the increased health risks that accompany anti-abortion demonstrations is not just permissible; it is laudable. Indeed, in light of the health risks the Massachusetts statute is designed to prevent, the lower court's action to enjoin the enforcement of this law risks causing irreparable injury to women seeking reproductive health care in the Commonwealth. *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989), *cert. denied,* 495 U.S. 947 (1990); *Pro-Choice Network of Western New York v. Project Rescue*, 799 F. Supp. 1427, 1428 (W.D.N.Y. 1992), *aff'd in subst'l part sub nom Schenck v. Pro-Choice Network,* 67 F.3d 377 (2d Cir. 1995) (in banc), 519 U.S. 357 (1997) (finding irreparable harm warranting injunctive relief from actions of anti-abortion protestors similar to actions considered by Massachusetts legislature). Thus, the district court erred in concluding that the "balance of equities" favors the interests of plaintiffs-appellees. While they will suffer no incursion on any legitimate interest from by being prohibited only from forcing their physical proximity on an unwilling listener, the public and individual patients' interest in medical safety will be gravely threatened if the "no unwanted approach" statute is unenforceable.

B. Zones of Separation Are an Essential Tool for Narrowly Tailoring a Statute Designed to Preserve Medical And Public Safety

Although the passage of FACE in 1994 has had a positive effect on reducing physical blockades of reproductive health care facilities, targeted harassment of staff and patients, and disruptive picketing continues unabated, against a backdrop of dramatic incidents of fatal violence. U.S. General Accounting Office (GAO), *Report to the Ranking Member, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, 2 (Nov. 1998). Disruptive picketing at reproductive health care facilities has escalated from a 1994 level of 1,407 instances, to a 1998 peak of 8,402 reports of picketing at clinics.[6] National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (last modified Nov. 1999) <http://www.prochoice.org/violence/ 99vd.htm> (hereinafter "NAF, Incidents of Violence"). An overwhelming majority -- 78%, of abortion providers in the U.S. -- experienced some form of disruptive picketing in 1997. Stanley Henshaw, et al., *Alan Guttmacher Institute Working Paper on Abortion Access* (1999). Enforced buffer zones have proven to be an effective tool in reducing clinic violence. *See* Feminist Majority Foundation, *1998 National Clinic Violence Survey Report*, <http://www.feminist.org/research/cvsurveys/ 1998/finaldraft.html> ("Better enforcement of buffer zones correlated with reduced violence" at reproductive health care facilities). *See also People of the State of New York, supra*, slip op. at 80 (finding that fixed buffer zone

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[6] "Disruptive picketing" generally is defined as protest activity that harasses, intimidates, and impedes staff or patients. *Id.*

established by a TRO "significantly reduced the negative impact on health care caused by [anti-abortion protestors'] conduct" while preserving effective avenues of communication.)

The psychological toll of protest activity on staff and patients is inalterably colored by the climate of increasing violence directed at reproductive health clinics. During the period from January 1, 1997 to November 16, 1999, there were 8 clinic bombings, 20 arsons, 8 attempted bombings or arsons, and 41 death threats directed at clinic staff or patients. In 1998, there were two murders of abortion providers, and one attempted murder that left its victim permanently maimed. NAF, *Incidents of Violence*. Testimony in the *People of the State of New York, supra,* injunction trial from employees of the Buffalo, New York clinic where one of the slain physicians had worked established that, after this murder, continued protest activity seemed intended to "up the ante of intimidation and fear" (Buckham testimony, Tr. 100-102, CV. 99-209A, W.D.N.Y.); patients would see protestors and express fear that "they're going to get me like they got your doctor." (Testimony of M. DuBois, CV 99-209A, W.D.N.Y.) One of the most infamous incidents of violence at reproductive health care clinics – the murder of two clinic employees -- occurred in Brookline, Massachusetts. This fact was of great significance to the Massachusetts legislature in passing the Act.

The 25 foot fixed buffer zone around clinic entrances in the initial Senate Bill No. 148 might have been even more effective and easier to enforce than the six foot no approach zone actually enacted – and would have easily passed constitutional muster, *see, e.g.*, *Opinion of the Justice to the Senate*, 430 Mass. 1205 (2000) (finding Senate Bill No. 148 constitutional); *Madsen*, 512 U.S. 753 (1994) (finding 36 foot buffer zone around clinic constitutional under even stricter standard of first amendment review for injunctions); *Burson*

v. Freeman, 540 U.S. 191 (1992) (upholding 100 foot buffer zone around polling places under strictest first amendment scrutiny for content-based speech regulations, because of importance of prophylactic measures against intimidation and interference with other protected rights).

Nonetheless, the legislature chose the much less restrictive six foot zone of separation provision in an effort to be responsive to the *Hill* decision and to "bend over backwards" to accommodate protestors' interests in addressing their targets at a normal conversational distance – something the complete buffer zones do not do. The legislature should be commended for this effort to be more protective of first amendment rights than its initial bill. *See, e.g., Schenck*, 519 U.S. at 381, and n. 11 (fact that district court "bent over backwards" to accommodate protestors' rights by allowing them in buffer zone until asked to stop significant factor in upholding injunction provision requiring protestors whose proximity and message were rejected to "cease and desist" and back away from targets). The Massachusetts "no forced approaches closer than six feet" statute is undoubtedly narrowly tailored to protect public safety and access to medical care in as least intrusive a way as possible.[7]

The Massachusetts legislature is entitled to fashion a remedy that makes sense based on its consideration of all of the facts, including the physical location and situation of clinics,

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[7] The Appellees argue that premising enforcement of the law on demarcation of the 18-foot stationary buffer zone amounts to a "heckler's veto," allowing clinic employees to decide when the law should be enforced. Instead, this provision should be viewed as a means of ensuring against the risk of inadvertent violations that troubled the Supreme Court in *Schenck*, 519 U.S. at 378-79, by providing clear, unambiguous notice of the existence and location of the zone.

the history of violence in and outside of the Commonwealth, and the needs of patients and providers. That legislative determination is entitled to deference, especially when it does not affect the right of anyone, regardless of viewpoint, to free speech. Here, because the statute does not limit speech at all, and addresses significant public interests in safety and access to reproductive health care in as least intrusive a way as possible, the Act should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of Massachusetts should be reversed.

Respectfully submitted,

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