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Women's Bar Association of Massachusetts is a statewide professional organization committed to the protection of the rights of women in the judicial system and society, which has filed numerous amicus briefs in matters involving reproductive health, reproductive rights, and equitable treatment of women, and has participated as an amicus and worked on legislation concerning access to reproductive health clinics.

League of Women Voters of Massachusetts of Massachusetts is a multi-issue, nonpartisan grassroots organization active in shaping public policy, that frequently participates as an amicus curiae for the rights of its members and pregnant women generally to privacy, bodily autonomy and reproductive freedom, including access to reproductive health care facilities in Massachusetts.

Four Women, Inc. is a medical management company running a women's reproductive health clinic located in Attleboro, Massachusetts.

Alternative Medical Care of Massachusetts is a women's health center.

Everywoman's Center is a multi-service women's center serving Hampshire County.

Tapestry Health Systems is a multi-service health agency focused on providing family planning and related services to low-income youth and adults throughout the four counties of Western Massachusetts.

Repro Associates is a women's reproductive health care facility specializing in pregnancy termination. Repro Associates is located in Brookline, Massachusetts. WomanCare facilities are located in New Bedford, Hyannis and Shrewsbury, Massachusetts and also specializes in pregnancy termination.

Abortion Access Project of Massachusetts is a group of activists and health care providers that seeks to increase awareness of abortion as a critical part of comprehensive reproductive health services, address the shortage of abortion providers, and ensure access to abortion for all women.

The Massachusetts Public Health Association is a statewide membership organization that seeks to improve health status through education, advocacy, and coalition building. MPHA educates its members, the public health community, and the general public on health-related issues and promotes action to address public health concerns.

Mass. NARAL is a statewide organization that works to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices.

Massachusetts National Organization for Women is an organization dedicated to making legal, political, social and economic change in society in order to eliminate sexism and oppression.

Religious Coalition for Reproductive Choice is an organization that promotes advocacy for women's choice by religious organizations and clergy.

Boston Women's Health Book Collective is an organization committed to women's health education, advocacy, and consulting.

National Council of Jewish Women - Massachusetts is a Jewish women's volunteer organization which promotes advocacy on women's health issues and the protection of reproductive rights.

American Association of University Women - Massachusetts Chapter is an educational and professional organization working for the education and advancement of women, including the protection of their reproductive rights.

AIDS Project Worcester is an HIV/AIDS organization working with and advocating for those infected and those affected with HIV or AIDS.

YWCA of Cambridge is an organization that works to empower women and their families.

Big Sister Association of Greater Boston provides positive mentoring relationships to girls.

Union of American Hebrew Congregation - Northeast Council is the congregation arm of the reform movement of Judaism.

None of the amici curiae have a parent corporation or any corporate stock.

INTRODUCTION

In *Hill v. Colorado*, 120 S. Ct. 2480 (2000), the Court upheld a Colorado statute that regulates certain conduct within 100 feet of a health care facility. Here, the district court struck down a Massachusetts statute that was modeled after the Colorado statute but was even less restrictive. For all the reasons set forth in *Hill*, the Massachusetts statute should be upheld.

The Colorado statute construed in *Hill* makes it unlawful inside a set zone to "knowingly approach" within eight 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...." Colo. Rev. Stat. § 18-9-122(3). The Court ruled that this statute is content-neutral, is narrowly tailored to serve significant governmental interests, and leaves open ample alternative channels for communication. *Hill*, 120 S. Ct. at 2494.

Effective November 10, 2000, the Massachusetts Legislature enacted G.L. c. 266, § 120E½ , "An Act relative to reproductive health facilities," ("the Act"), a statute modeled closely on the Colorado statute upheld in *Hill*. The Massachusetts Act, however, regulates conduct only within eighteen feet of a "reproductive health care facility."[1] Within that narrow zone, the Act makes it unlawful to

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[1] Section (a) of the Act defines "reproductive health care facility" as "a place, other than within a hospital, where abortions are offered or performed."

"knowingly approach" within six 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...." G.L. c. 266, § 120E½(b).

Although the Massachusetts Act is materially indistinguishable from the Colorado statute -- except that the Massachusetts Act is even less restrictive of speech -- the district court ruled that the Act violated the First Amendment because of two differences between the Massachusetts and Colorado statutory provisions. The Massachusetts Act applies only to "reproductive health care facilities," not to all health care facilities; and the Massachusetts Act exempts "employees or agents of such facility acting within the scope of their employment." According to the court below, the first difference destroyed the Act's content-neutrality and the second difference constituted viewpoint discrimination in the abortion debate.

The district court erred. In fact, limiting the Act to "reproductive health care facilities" does nothing to destroy content-neutrality; exactly like Colorado's regulation of health care facilities, Massachusetts' regulation of reproductive health care facilities is "justified without reference to the content of regulated speech." *Hill*, 120 S. Ct. at 2491. Furthermore, as in Colorado, the Act arises

against a background of incidents in which protests became occasions for physical intimidation of clinic patients. Analyzing the Act's exemption for employees and agents, the district court assumed without any record support that such agents "counsel and exhort [clinic clients] to undergo an abortion within the restricted area." *McGuire v. Reilly*, 122 F. Supp. 2d 97, 103 n.9 (D. Mass. 2000). The court concluded that the exemption thus discriminated in favor of the pro-choice position. *See id.* at 103. In fact, the court misstated the role of clinic escorts and ignored that anyone within the zone can "counsel" or "exhort" clinic patients about abortion or any other topic. The exemption simply allows clinic employees -- for whom there is no basis for concern about physical intimidation or infliction of emotional distress -- to approach within six feet of clinic patients without fear of violating the law.

Contrary to the district court's implication, the Act grew out of a sustained legislative effort to balance the free speech rights of abortion protesters against patients' and providers' right of access. The Legislature's solution, developed by a working committee comprised of legislators with differing views on the issue, was a compromise: a statute that permits speakers on all sides of the abortion debate to voice their views about reproductive health services openly and vigorously, so long as, within an eighteen-foot radius of clinic entrances and

driveways, such speakers do not approach within six feet of unconsenting individuals. This "floating bubble" legislation has the advantage of protecting the interests of everyone involved in the abortion debate: it allows free and open communication while at the same time enabling patients and staff members to proceed into the clinic unhindered.

G.L. c. 266, § 120E½ is a constitutional regulation with neither the intent nor the effect of suppressing free speech. The district court's opinion to the contrary should be reversed.

FACTUAL STATEMENT

Few American citizens who seek to exercise constitutionally protected rights must run a gauntlet through a hostile, noisy crowd of "in-your-face" protesters. Still fewer citizens, when seeking medical or surgical care -- particularly care involving deeply private matters -- must confront a crowd swarming around them, shouting in their faces, blocking their way, and thrusting disturbing photographs and objects at them. Yet on any given day, patients of reproductive health clinics may face all of these.[2] A woman may be on her way to take an HIV test, to undergo day surgery, to receive a mammogram, or to receive counseling about an intimate physical matter. But regardless of her condition or

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[2] *See* Appendix submitted by Defendants-Appellants ("A.G. App.") at 48-49.

her needs, when a woman's intention to enter one of these clinics becomes manifest, she becomes an occasion for protest. Demonstrators may swarm around her or her vehicle. (A.G. App. 42-43, 45-46). Simply to get in the door, she may have to endure physical and emotional intimidation, heightened stress resulting in increased physical pain for surgery patients, unwanted exposure, and violations of personal space. Both patients and reproductive health care workers have been waylaid by screams shouted inches from their ears and gruesome placards shoved under their noses. The chaotic scenes, in which protest may go far beyond mere "speech," are well-documented.

They also are extremely frightening. Women who have sought services at reproductive health care facilities that are the target of vigorous public protests have reported feeling nervous, intimidated, afraid of "get[ting] shot" (A.G. App. 48-49), and a range of other emotions -- psychological stress that is indisputably harmful to a medical patient's physical well-being. The medical literature, for example, expressly recognizes that a patient who is emotionally assaulted and stressed immediately before surgery is at risk for significantly increased physical pain or other complications.[3]

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[3] *See* literature cited at pp. 28-29, notes 7-8 of the Brief of Defendants-Appellants; *see also* Aleksandr Perski et al., *Emotional Distress before Coronary Bypass Limits the Benefits of Surgery*, 136 Am. Heart J. 510 (1998) (attached in

(continued...)

In some areas of Massachusetts, the potential for harassment has become so great that people volunteer to escort patients into reproductive health clinics. Some clinics actually have marshaled a group of volunteer escorts. As one job description for the position of escort indicates, the role of these agents is to help patients walk by any demonstrators and enter the building.[4] The agents wear vests identifying them as clinic workers and are trained to greet the patient, offer assistance, and then physically assist in entry if necessary. Escorts neither counsel clinic patients nor try to persuade them to have abortions nor engage in verbal exchanges or physical confrontation with demonstrators. At most, if necessary, escorts physically place themselves between the demonstrators and the patient. In an age of protest by obstruction, escorts have become a necessary concomitant to ensuring access to reproductive health services.[5]

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[3](...continued)
Appendix of Amicus Curiae ("App.") at 37-46); Paula M. Trief, *A Prospective Study of Psychological Predictors of Lumbar Surgery Outcome*, 25 Spine 2616 (2000) (App. 47-55) .

[4] *See* App. 21 (sample escort protocol); App. 22-23 (testimony of volunteer escort to the Criminal Justice Committee).

[5]See *Hill*, 120 S. Ct. at 2486 (noting that "it [is] a common practice to provide escorts for persons entering and leaving the clinics both to ensure their access and to provide protection from aggressive counselors who sometimes used strong and abusive language in face-to-face encounters").

Against this backdrop, in early 1999, the Massachusetts Legislature considered Senate Bill No. 148 (hereinafter "S. 148"). In the bill, the drafters described the social problems that precipitated a buffer zone law and articulated the reasons for proposing it:

> It is hereby found and declared that existing law does not adequately protect the public safety in the areas in and around reproductive health care facilities....
>
> It is further found that persons attempting to enter or depart from reproductive health care facilities have been subject to harassing or intimidating activity by persons approaching within extremely close proximity and shouting or waving objects at them, which has tended to hamper or impede access to or departure from those facilities.
>
> It is further found that such activity near reproductive health care facilities creates a "captive audience" situation because persons seeking health care services cannot avoid the area outside of reproductive health care facilities if they are to receive the services provided therein, and their physical and emotional ailments or conditions can make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity.
>
> . . . .
>
> And it is further found that studies have shown that clinics with buffer zones experience far larger decreases in every type of violence than clinics without buffer zones.

S. 148, attached to Brief of Defendants-Appellants at Addendum ("A.G. Add.") 20-21. The initial bill provided for a 25-foot, fixed, 'no enter' buffer zone around places, other than hospitals, where abortions are performed. The Joint Committee on Criminal Justice considered testimony about the bill (A.G. App. 21), and the

state Senate requested and received a favorable advisory opinion from the Supreme Judicial Court on the constitutionality of the bill, *see Opinion of the Justices to the Senate*, 430 Mass. 1205, 1208-1212, 723 N.E.2d 1, 3-6 (2000). While the buffer zone issue was under consideration in the Massachusetts Legislature, the U.S. Supreme Court decided *Hill*. The Massachusetts House of Representatives then amended S. 148's substantive provisions to create a small floating zone of protection substantially identical to the one approved in *Hill*. The Massachusetts version, however, gave even greater freedom to those who sought to approach individuals outside of the state's health care facilities. The new bill (House No. 5401) extended "floating bubble" protection only to those individuals who are within eighteen feet of a clinic entrance or driveway -- rather than the hundred-foot zone adopted in Colorado -- and prevented an approach within six feet of an unconsenting person, rather than the eight feet in the Colorado statute. Moreover, the Massachusetts statute applies only to a "reproductive health care facility," whereas the Colorado statute applies to all health care facilities.

The Massachusetts House bill, which became G.L. c. 266, § 120E½, contains an articulation of purposes consistent with the findings in the original S. 148:[6]

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[6] Although the bill as passed did not retain the explicit legislative findings
(continued...)

(1) to increase the public safety in and around reproductive healthcare facilities;

. . . .

(3) to enact reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views ... near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm; and

(4) to create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services, including surgical procedures, to its patients.

The legislators' subsequent debate on the House bill reveals two other uncontroverted facts about legislative intent. (A videotape of the House debate on the amended bill is submitted herewith and an unofficial transcript of that videotape is attached for the Court's convenience at App. 1-17). First, the bill was intentionally modeled in all substantial respects after the statute approved in *Hill* and was intended to achieve the same constitutional purposes for the protection of Massachusetts citizens. (App. 5). Second, the bill reflected a hardwon legislative reconciliation, attained after a series of working group meetings involving representatives from both sides of the debate. Time and again,

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[6](...continued)
which were part of S. 148, those findings nonetheless remain applicable to Section 120E½. *See Franklin Foundation v. Attorney General*, 416 Mass. 483, 492, 623 N.E.2d 1109, 1114 (1993) (rejecting an argument that the deletion of a legislative preamble indicated a change in the Legislature's intent).

in speeches delivered from the House floor, legislators not only referred to the *Hill* opinion upholding a similar bill, but also called the House bill a "compromise" (App. 5), an "accommodation" (App. 2), and the result of a "truly extraordinary process" (App. 10). Both supporters and opponents of the legislation repeatedly thanked the Speaker of the House (who organized the working group committee) for "leading all of us to coming to a very balanced approach." (App. 10, 12). As one opponent put it, "I think this truly is the best we can do to on the one hand address the legitimate concerns of people on one side and the legitimate concerns of people on the other." (App. 2). Legislators recognized the Supreme Court precedent for the constitutionality of the statute, even if "in the conscience of everyone of us [that] does not make it right." (App. 11). The record reveals no evidence of bias against a particular speaker or viewpoint, nor bad faith by bill supporters; indeed, even strenuous opponents of the measure acknowledged that people from both sides had "worked in good faith" (App. 11) to "craft a compromise that they feel [we] can both live with" (App. 7).

The result of the legislators' conciliatory efforts, signed by the Governor on August 10, 2000, was a statute that effectively balances the right of free speech and the right of reasonable access. That balance was achieved after the Legislature heard "[t]estimony offered at the hearings on Senate No. 148 [which]

described how advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." *Opinion of the Justices*, 430 Mass. at 1210, 723 N.E.2d at 5. As the photographs attached at App. 18-20 show, protesters on both sides of the issue -- not just those espousing the anti-abortion viewpoint -- continue to this day to demonstrate at clinics. The Commonwealth's statute, like the Colorado statute at issue in *Hill*, applies to both sides of the abortion controversy.

Moreover, by its terms, the Act is not directed specifically at abortion or at any other particular topic of discussion. The Act applies to "reproductive health care facilities" other than hospitals, but in Massachusetts abortions also are performed in great numbers at hospitals which do not fit that statutory definition. *See* Affidavit of Deborah Klein Walker, Assistant Commissioner for the Massachusetts Department of Public Health, App. 35-36.[7] Furthermore, reproductive health care facilities are not merely "abortion clinics." The Legislature heard testimony that the clinics provide a wide range of women's health services, including family planning, mammography, treatments for

[7] Indeed, in 1998, over 4000 abortions were performed in hospitals, including large facilities such as Beth Israel Deaconess, Boston Medical Center, and Brigham & Women's. *Id.* Under state law, late term abortions must be done in hospitals. G.L. c. 112 §§ 12M, 12P.

infertility and sexually-transmitted diseases, and HIV testing. *See* A.G. App. 39, 45.

Finally, rather than stifling speech, the law by its terms serves only to prevent speakers from engaging in a specific, narrow range of conduct: approaching within six feet of an unconsenting patient to deliver a message of protest, education, or counseling. This narrow conduct-based restriction still enables a speaker to plant himself in the public spaces that abut reproductive health care facilities and to promote his message vigorously to all who would listen, regardless what that message is.

ARGUMENT

Although free speech is a constitutionally protected right, "[e]ven protected speech is not equally permissible in all places at all times." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)). The Supreme Court has consistently held that

> even in a public forum 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."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Courts have often applied this intermediate level of scrutiny to uphold buffer zones around abortion clinics. *See, e.g.*, *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 380 (1997); *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215 (9th Cir. 1998); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 686 (9th Cir. 1988); *see also Madsen v. Woman's Health Ctr., Inc.*, 512 U.S. 753, 767-68 (1994) (upholding a clinic buffer zone even under the stricter level of scrutiny applicable to injunctions).[8] Most recently, in upholding a buffer zone virtually identical to the one at issue here, the Court recognized that a state's interest in protecting its citizens can "justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Hill*, 120 S. Ct. at 2489.[9]

The many cases upholding buffer zones around reproductive health care facilities reflect the "significant difference between state restrictions on a

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[8] Even the strictest level of scrutiny, applicable only to content-based regulations, does not necessarily sound the death knell for buffer zones. In *Burson v. Freeman*, the Supreme Court upheld a 100 foot buffer zone around polling places, even though the statute prohibited only speech related to political campaigns. 504 U.S. 191, 197, 211 (1992).

[9] The government has a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973).

speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id.* The right of listeners to avoid unwelcome speech is most often recognized in protecting the privacy of the home, but applies equally where an unwilling listener is "held 'captive' by medical circumstances." *See Madsen*, 512 U.S. at 768; *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) (states are not "powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people ... for public and other buildings that require peace and quiet to carry out their functions, such as ... hospitals"); *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 581, 677 N.E. 2d 204, 210 (1997) ("[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.") (quoting *Madsen*, 512 U.S. at 772-73); *see also Frisby*, 487 U.S. at 487 (offensive speech may be prohibited "when the 'captive' audience cannot avoid the objectionable speech").[10]

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[10] In its consideration of the buffer zone bill, the Massachusetts Legislature specifically found that the protest activity near reproductive health care facilities "creates a 'captive audience' situation" because the clinic patients cannot avoid the situation and because their "physical and emotional ailments or conditions can make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity." A.G. Add. 20.

Indeed, the protests at issue are not pure speech, but rather are

> a form of expression analogous to labor picketing. It is a mixture of conduct and communication.... Just as it protects picketing, the First Amendment protects the speaker's right to offer "sidewalk counseling" to all passers-by. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case....[The speaker] does not ... [have] an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services.

Madsen, 512 U.S. at 781 (Stevens, J., concurring in part and dissenting in part). The Supreme Court has long recognized that expressive conduct is not as protected as "pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Gregory*, 394 U.S. at 124 (Black, J., concurring). This is particularly true where the conduct being regulated is designed not just to communicate ideas but also to exert influence and induce fear. *See, e.g., Gregory*, 394 U.S. at 125-26 (Black, J., concurring); *Hughes v. Superior Court of California*, 339 U.S. 460, 464-65, 468 (1950).

The purpose of the statute at issue here is to regulate conduct, not pure speech. Demonstrators who wish to express their support for or opposition to abortion may still do so in almost any manner they choose, including by yelling or displaying disturbing visual images. What is regulated, however, is a form of conduct that has proven over time to be threatening and dangerous to women attempting to enter a clinic: "in-your-face" confrontations. There is simply no

good reason to allow protestors to intimidate clinic clients in this fashion; there is no constitutionally-protected right to harass a woman entering a clinic or to invade her "personal space." *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989). Almost any speech -- including one in a normal conversational tone -- can be heard from a distance of six feet, signs can easily be seen, and leaflets and handbills can be passed from that distance.[11]

This kind of conduct regulation was modeled after the Colorado buffer zone upheld by the Supreme Court in *Hill*. *See* App. 5, 11; *McGuire*, 122 F. Supp. 2d at 101, n.4 (acknowledging that Section 120E½ was consciously modeled after the Colorado statute). For all the reasons set forth in the *Hill* decision, then, the Massachusetts statute is constitutional.

I. SECTION 120E½ IS A CONTENT-NEUTRAL RESTRICTION.

On its face, Section 120E½ is entirely content-neutral: its prohibitions apply no matter what the content of the speech, so as to ensure safe passage for

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[11] Indeed, researchers in "proxemics" (the study of interpersonal distances) have concluded that normal social distance ranges from four to twelve feet. Edward T. Hall, *The Hidden Dimension* 114-15 (1966) (four to seven feet is typically used for casual social gatherings while seven to twelve feet is typical of more formal discourse such as the seating of a visitor in a businessperson's office), App. 30-31. The use of "intimate distance" (zero to one and a half feet) in public is considered inappropriate by most Americans and even "personal distance" (one and a half feet to four feet) is "thought of as a small protective sphere or bubble that an organism maintains between itself and others." *Id.* at 112, App. 29.

patients wishing to enter a reproductive health care facility. The statute is content-neutral for all the reasons that the *Hill* Court found the Colorado statute to be content-neutral, and the few differences between the two statutes do not alter that conclusion.

A. Under The Three Tests Applied In *Hill*, The Massachusetts Buffer Zone Statute Is Content-Neutral.

In determining content neutrality, the principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791 (emphasis added), *quoted in Hill*, 120 S. Ct. at 2491. Applying this test, the *Hill* Court held that the Colorado statute was content-neutral for three reasons. *Hill*, 120 S. Ct. at 2491. First, Colorado's statute does not regulate speech, but simply regulates places where speech may occur. *Id.* Section 120E½ is the same; it does not prevent people from speaking on whatever subject they choose; it simply provides some very limited restrictions on the places where someone may speak.

Second, after reviewing the Colorado legislative history, the *Hill* Court concluded that the buffer zone bill was not adopted because of disagreement with the message conveyed by the speech. *Id.* The legislative history of Section 120E½ similarly demonstrates that the Massachusetts Legislature did not enact a buffer zone because it disagreed with any message conveyed. The Legislature heard

testimony that advocates on both sides of the abortion debate were protesting outside of reproductive health care facilities, creating "congested areas charged with anger." *Opinion of the Justices*, 430 Mass. at 1210, 723 N.E.2d at 5. During the legislative debates on the proposed bill, there was no hint of any intent to prefer one side of the debate to another and no accusations by either side of such intent. Instead, even legislators who opposed the bill because of their own moral objections to abortion praised the bill as an even-handed compromise. App. 2, 9-10, 13.[12]

Third, the *Hill* Court held that, because the state interests furthered by the statute were unrelated to the content of the speech, the regulation was "justified without reference to the content of regulated speech." *Id.* at 2491. Like the Colorado statute, Section 120E½ was enacted to further Massachusetts' interest in providing access to reproductive health care facilities and to ensure public safety around them. *See* S. 148, § 1 (A.G. Add. 18). Those purposes have nothing to do with a desire to restrict speech; rather any restriction on speech is merely an incidental by-product of a measure found by the Legislature to be necessary for

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[12] The Massachusetts Supreme Judicial Court, in construing the predecessor bill, held that "[t]he bill's content neutrality is confirmed by the fact that the buffer zone applies regardless of the viewpoint being expressed." *Id.* at 1209. The *Hill* Court found a similar holding by the Colorado Supreme Court to be persuasive evidence that the statute was not adopted because of disagreement with the message. 120 S. Ct. at 2491.

public safety. Accordingly, under any of these three tests, the Massachusetts buffer zone statute, like the Colorado statute, is content-neutral.

B. That Section 120E½ Does Not Apply To All Speech Does Not Render It Content-Based.

The Massachusetts buffer zone statute is content-neutral even though it does not apply to all speech within the protected zone. The Act's application is limited to leafleting, displaying signs, and "engaging in oral protest, education or counseling," G.L. c. 266, § 120E½(b), words taken verbatim from the Colorado statute upheld in *Hill*. The court below believed that Section 120E½ was content based because, among other reasons, it would be necessary to examine a speaker's content to determine whether the speech was prohibited under the statute. *McGuire*, 122 F. Supp. 2d at 102 n.8. The *Hill* Court, however, specifically rejected this very notion, holding that a need to examine the type of speech to determine the statute's applicability does not render it content-based. *See Hill*, 120 S. Ct. at 2492 (construing identical language in the Colorado statute). As long as the statute places no restrictions on a particular viewpoint or subject matter, the failure to prohibit some types of speech (here, casual or social conversation) does not affect the statute's content-neutrality. *Id.*

By contrast, statutes found to be content-based typically reveal on their face a preference for some subject matter or viewpoint. For instance, the content-based

statute in *Burson* prohibited only speech that solicited votes for or against a person, party, or question. 504 U.S. at 193-94. Bans against picketing which contain an explicit exception for labor dispute picketing are similarly content-based. *See, e.g., Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94, 99 (1972). So too are prohibitions against displaying symbols such as a burning cross or Nazi swastika that insult on the basis of race or religion. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992).

Indeed, the Supreme Court held that the "oral protest, education or counseling" language of the Colorado statute was necessary to effectuate the goals of the buffer zone. Recognizing that the statute's purpose was to protect entering patients from harassment, "persistent importuning," and "the implied threat of physical touching that can accompany an unwelcome approach within eight feet," the Court noted that the statutory language served to "distinguish speech activities likely to have those consequences from speech activities ... that are most unlikely to have those consequences." *Hill*, 120 S. Ct. at 2493.

C. The Exception For Employees Or Agents Of The Clinics Does Not Affect Section 120E½'s Content Neutrality.

Focusing on the Massachusetts Act's exception for "employees or agents of such facility acting within the scope of their employment," the district court tried to distinguish the Act from the one in *Hill*, arguing that the exception renders the

statute content-based both in its effect and because it is evidence of the Legislature's intent to regulate anti-abortion speech only. *McGuire*, 122 F. Supp. 2d at 103. Neither theory is persuasive.

1. The employee exception does not accord preferential treatment for any viewpoint.

The court below concluded that the statute restricted anti-abortion speech while affording pro-choice clinic employees and agents an unmatched opportunity to counsel clinic clients within the buffer zone. *Id.* In reaching this conclusion, the court overlooked that the statute affords no special treatment to members of the general public who gather near clinic entrances to demonstrate for the pro-choice viewpoint; those demonstrators are equally subject to Section 120E½'s restrictions. Indeed, it is not at all unusual for both pro- and anti-abortion demonstrators to gather at reproductive health care facilities (App. 18-20), and the statute treats them all equally.

Even if the statute had the effect of regulating the speech of only anti-abortion protesters, which it does not, the Supreme Court has recognized that a regulation is not rendered content or viewpoint based simply because it covers only people with a particular viewpoint. *See Madsen*, 512 U.S. at 763. Rather, the relevant question is the government's purpose in enacting the regulation; where the regulation is justified without reference to the regulated speech's content, a

regulation is content-neutral even though its incidental effect is to regulate only one side of a debate. *Id.*; *see also Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 738 (1st Cir. 1995) (ordinance may differentiate between speakers if it is for a reason related to the legitimate governmental interests that prompted the regulation).

The court also erroneously and baselessly misdescribed the role of clinic escorts. With no support whatsoever in the factual record, the court supposed that clinic employees and agents "escort potential abortion clinic clients and counsel and exhort them to undergo an abortion," that they "have a strong financial interest or philosophic incentive to counsel the listener to undergo an abortion," and that they "constitute very zealous advocates for this controversial procedure." *See McGuire*, 122 F. Supp. 2d at 103. Nothing could be further from the truth.

In fact, the job of clinic escorts is simply to provide physical assistance and assurance to clinic clients in entering the facility. App. 21. It is ludicrous to suppose that these clinic escorts stand outside on the sidewalk and -- in the face of loud and often confrontational protesting by both sides -- try to importune or exhort pregnant women walking by to come in and have an abortion. Instead, their mission is to help clients enter the facility as quickly and quietly as possible, so as to minimize the stress felt by clients coming to have a surgical procedure for

which stress is medically contraindicated. App. 21. Indeed, one court has specifically noted that clinic escorts' "sole purpose is to ensure safe access to and exit from" a clinic by its patients. *U.S. v. Scott*, 958 F. Supp. 761, 766 (D. Conn. 1997).[13]

In short, it is not part of a clinic employee or agent's job to engage in the types of expressive conduct and speech prohibited by the statute, and thus the exception does not provide some unequaled opportunity to the pro-choice position.[14] Furthermore, the Supreme Court has recognized the notion that there are audiences who are "presumptively unwilling to receive" speech directed at them. *Frisby*, 487 U.S. at 488. It is hard to imagine an audience more "presumptively unwilling" to hear protesting by anti-abortion protesters than

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[13] In addition to the clinic escorts' need to approach clients, the employee/agent exception is also justified for other employees. In passing Section 120E½, the Legislature had testimony before it that, for safety reasons, clinic security guards often need to approach protesters in order to ask them to stop blocking clinic entrances or approaching cars. A.G. App. 39.

[14] Given the true role of clinic escorts, one could think that they do not need this exception as the statute does not apply unless someone is leafleting, demonstrating, or engaging in oral protest, education or counseling. The Supreme Court, however, has construed those phrases to encompass all speech except social or random conversation. *Hill*, 120 S. Ct. at 2492. A clinic worker who merely approaches a client and asks if she would like assistance entering the clinic could be in danger of arrest, depending on a police officer's interpretation of education and counseling. The exception therefore serves the purpose of providing clear guidelines for law enforcement personnel and providing peace of mind for the clinic escorts who are merely doing their job.

women entering a clinic for the purpose of having an abortion. By contrast, however, those women can be presumed to be amenable to assistance by the clinic escorts, whose role is to help these women accomplish physical entry into the clinic facilities.

2. The clinic employee or agent exception is not evidence of any intent by the Legislature to favor the pro-choice viewpoint.

The court below also concluded that the employee/agent exemption made it "obvious that ... the government has adopted a regulation of speech because of disagreement with the message that speech conveys...." *McGuire*, 122 F. Supp. 2d at 103. To the contrary, the exception is additional evidence of the Legislature's intent to further its important governmental interest in ensuring safe access to medical facilities.

As described above, the role of the clinic escorts is to assist in physically providing safe access to the clinic. The Legislature received testimony about the stressful and confrontational atmosphere that often surrounds clinic entrances, App. 22-23, which threatens serious medical consequences for the patient. "Women who have been the target of 'sidewalk counseling'" enter a clinic "severely distressed," and increased stress can cause numerous medical complications, pain, need for additional sedation, or even harmful delay in

surgery. *Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y.*, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 359 (2d Cir. 1994), *aff'd in part and rev'd in part, Schenck*, 519 U.S. 357; *see also Madsen*, 512 U.S. at 758 (clinic doctor testified that patients who had to run a gauntlet of protestors to enter the clinic needed a higher level of sedation and therefore had greater medical risks); *Hill*, 120 S. Ct. at 2486 (noting that the Colorado legislature had evidence "that emotional confrontations may adversely affect a patient's medical care"); *Scott*, 958 F. Supp. at 767 (interfering with access to the clinic can increase a patient's stress level and make the abortion procedure riskier in several ways); *Planned Parenthood*, 424 Mass. at 576, 677 N.E.2d at 207 (some patients targeted with sidewalk counseling turned away from the clinic, thus increasing health risks by the delay in services).

The congressional hearings that led to the enactment of the Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248) included testimony by doctors and clinic directors that clinic escorts "are considered an integral part of the functioning of clinics." *U.S. v. Hill*, 893 F. Supp. 1034, 1039 (N.D. Fla. 1994). The fact that the Massachusetts Legislature included an exception in the buffer zone statute to ensure that clinic escorts would be able to continue their integral

role in physically ensuring safe access to clinics is hardly evidence of an intent to favor pro-choice speech.

D. The Statute's Application Only To Reproductive Health Care Facilities Does Not Make It A Content-Based Regulation.

The court below also attempted to distinguish *Hill* on the ground that Section 120E½ applies only to reproductive health care facilities where abortions are performed, rather than to all health care facilities as in the Colorado statute. *McGuire*, 122 F. Supp. 2d at 102. The court concluded, based on that distinction, that the only speech regulated by Section 120E½ is the subject of abortion. *Id.* That conclusion flies in the face of the *Hill* decision, the SJC's advisory opinion, and the plain language of the statute.

The *Hill* majority opinion specifically rejected the argument that an otherwise content-neutral regulation becomes content-based because of its application "to the specific locations where that discourse occurs." 120 S. Ct. at 2493-94. Similarly, although S. 148 applied only to reproductive health care facilities, the SJC ruled that "[b]ecause the buffer zone applies regardless of political viewpoint, Senate No. 148 is a content-neutral statute." *Opinion of the Justices*, 430 Mass. at 1206 n.2, 1209, 723 N.E.2d at 2, 4. Moreover, a substantial percentage of abortions are performed at hospitals, which are specifically exempted from coverage under Section 120E½. App. 35-36. If the Legislature's

intent was to prohibit all speech concerning abortion, it would have included hospitals in the statute's coverage. The testimony before the Legislature, however, was that the access problems to be addressed occurred at clinics and other non-hospital facilities. A.G. App. 37-49. The statute's restricted coverage is therefore further evidence that the purpose of Section 120E½ is to ensure access and safety, and not to restrict speech.

Furthermore, Section 120E½ applies to any subject matter occurring within the protected zone, including speech by "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Compare McGuire*, 122 F. Supp. 2d at 102 (arguing that while the Colorado statute applied to these speakers listed in *Hill* (120 S. Ct. at 2493), the Massachusetts statute did not). For instance, an animal rights activist who approached a person entering a reproductive health care facility to protest the facility's use of drugs tested on animals would be in violation of Section 120E½.

Indeed, the court below mistakenly assumed that the only service provided by reproductive health care facilities is the performance of abortions. To the contrary, these facilities provide a wide range of women's health services, including gynecological care and birth control. A.G. App. 39, 45. There is no

reason to suppose that Section 120E½ would have an effect only on abortion-related speech. As the Supreme Court held in *Hill*, 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.

120 S. Ct. at 2494.

II. SECTION 120E½ IS NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

Because the Massachusetts statute is content-neutral, it must be deemed constitutional if its regulation of speech is narrowly tailored to serve a significant governmental interest and leaves open other channels of communication. *See Ward*, 491 U.S. at 791. The government has a substantial interest in controlling activity around medical facilities and in protecting patients entering those facilities from unwanted confrontations. *Hill*, 120 S. Ct. at 2496; *see also Madsen*, 512 U.S. at 772. The purposes detailed by the Massachusetts Legislature in the preamble to Section 120E½, therefore, manifestly represent significant governmental interest which the Legislature is entitled to protect.

The only remaining question, then, is whether Section 120E½'s restrictions are narrowly tailored. The regulation need not be the "least restrictive or least intrusive means of serving the statutory goal" as long as communication is not

totally foreclosed. *Hill*, 120 S. Ct. at 2494; *see also Ward*, 491 U.S. at 798. The *Hill* court held that even an eight-foot separation within a hundred-foot zone was reasonable and narrowly tailored. *See Hill*, 120 S. Ct. at 2495-96. *Hill* noted that the eight foot zone would still allow protestors to "communicate at a normal conversational distance," that a speaker is allowed to remain in one place and does not have to move as an individual passes near the speaker, and that signs and pictures could still easily be seen by anyone entering the clinic. *Id.* All of those facts are even more true for the narrower Massachusetts Act and the fact that the prohibitions apply only at a category of facilities where physical intimidation has proven to be a problem (rather than at all medical facilities) confirms that Section 120E½ is narrowly tailored.

"[T]he lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate." *Nat'l Amusements, Inc.*, 43 F.3d at 745 (recognizing that "some diminution in the overall quantity of speech will be tolerated"). In construing the prior version of S.148, the SJC concluded that even a twenty-five-foot buffer zone left open "ample alternative means of communication." *Opinion of the Justices*, 430 Mass. at 1204-05, 723 N.E.2d at 6. Here there remains ample opportunity for protestors outside of reproductive health care facilities to convey their message, both to

passers-by and to individuals entering the facility. The only "communicative avenue" curtailed is threat of physical intimidation which accompanies an approach to within six feet of an unwilling listener. To the extent that such conduct is a form of speech at all, it is one that this Court should have no hesitation in curtailing.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision and find M.G.L. c. 266, § 120E½ to be constitutional.

Respectfully submitted,

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United States Court of Appeals
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

No. 00-2492

Mary Anne McGuire, et al.,
Plaintiffs - Appellees,
V.
Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts, et al.,
Defendants - Appellants

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARY ANNE McGUIRE, RUTH SCHIAVONE, and JEAN B. ZARRELLA,	*	
Plaintiffs-Appellees,	*	
v.	*	
	*	NO. 00-2492
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Defendants-Appellants.	*	

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2001, I served upon all parties two copies of the Brief In Support of Defendants-Appellants By Amici Curiae Women's Bar Association, et al., and one copy of the accompanying Appendix and videotape by causing these copies to be mailed first-class, postage prepaid to:

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