



## City Attorney Dennis Herrera's Office Statement

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For Immediate Release:  
June 26, 2014  
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### **S.F. City Attorney's response to U.S. high court ruling on abortion clinic protest 'buffer zones'**

*'Disappointing' unanimous decision invalidated a balanced Massachusetts law 'that helped protect public safety and ensure women's access to reproductive health care'*

SAN FRANCISCO (June 26, 2014)—The U.S. Supreme Court today struck down a Commonwealth of Massachusetts law barring protests within a 35-foot buffer zone around entrances to abortion clinics. While the San Francisco City Attorney's Office is still evaluating whether or to what extent San Francisco's own local buffer zone ordinance may be impacted by today's unanimous high court decision, Deputy City Attorney Erin Bernstein (who co-authored the San Francisco's *amicus* brief in the case along with 17 other local governments) offered the following statement:

"At first glance, today's U.S. Supreme Court ruling in *McCullen v. Coakley* is disappointing," Deputy San Francisco City Attorney Erin Bernstein said. "The Court appears to have taken away from Massachusetts a balanced and effective law that helped protect public safety and ensure women's access to reproductive health care. The City Attorney's Office is closely examining the ruling and evaluating its effect, if any, on San Francisco's local buffer zone ordinance. For more than a decade, City Attorney Dennis Herrera has worked to make sure that San Franciscans can access constitutionally protected reproductive health care. Our office has worked to overturn federal laws that put barriers between women and the safest medical options available, and we are currently defending the Pregnancy Information Disclosure and Protection Ordinance, which prohibits centers from deceptively advertising to vulnerable women seeking abortion care. Regardless of today's ruling, City Attorney Herrera will continue protecting women's safe and timely access to care."

The case is: *McCullen v. Coakley*, Supreme Court of the United States Case No. 12-1168, decided June 26, 2014. Additional information is available on the San Francisco City Attorney's website at: <http://www.sfcityattorney.org/>.

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No. 12-1168

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

v.

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

*Respondents.*

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

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**BRIEF FOR THE CITY AND COUNTY OF SAN  
FRANCISCO, CALIFORNIA, AND SEVENTEEN  
OTHER MUNICIPALITIES AS *AMICI CURIAE* IN  
SUPPORT OF RESPONDENTS**

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## INTEREST OF THE *AMICI CURIAE*

The *amici* are cities located across the United States that recognize the paramount importance not only of the constitutional right to speak freely, but also of the constitutional right to privacy, including the right to unfettered access to reproductive health care, free from harassment and intimidation. The *amici* have a shared interest in maintaining the authority and flexibility inherent in their police powers to balance each of these rights—and to protect the health and safety of their residents—in the manner best-suited to each of their unique circumstances, including through the enactment of “fixed buffer zone” laws similar to the Massachusetts statute at issue in this case (the “Act”).

Some, but not all, of the *amici* have, in fact, promulgated laws creating fixed buffer zones outside of reproductive health care centers (the “Ordinances”) (collectively with the Act, the “Fixed Buffer Zone Laws”). For example, San Francisco, California, has enacted an ordinance that makes it “unlawful for any person to enter or remain” within a 25-foot buffer zone around an entrance, exit, or driveway of a reproductive health care facility. S.F., CAL., POLICE CODE art. 43, § 4303(a). The ordinance expressly exempts individuals entering or exiting the facility; employees, agents, or volunteers of the facility; law enforcement, emergency medical, firefighting, construction, and utilities personnel; and individuals passing temporarily through the buffer zone; provided that these individuals do not engage in “demonstration activity” while in the zone. *Id.* § 4303(b).

Burlington, Vermont, has enacted an ordinance that creates a 35-foot buffer zone around the premises of a reproductive health care facility in which “[n]o person or persons shall knowingly congregate, patrol, picket or demonstrate[.]” BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-113(2). Like the Act and the San Francisco ordinance, the Burlington ordinance carves out certain necessary exceptions, including exceptions for persons entering or leaving the facility; employees or agents of the facility acting within the scope of their employment; law enforcement, ambulance, firefighting, construction, utilities, public works, and other municipal agents acting within the scope of their employment; persons using the public sidewalk or right-of-way solely for the purpose of reaching a destination other than the facility; and any person or persons on private property with the consent of the property owner. *Id.* § 21-113(2)(a).

West Palm Beach, Florida, enacted two laws in 2005 to address public health and safety concerns in the vicinity of health care facilities: a “public safety buffer zone” that made it unlawful to “engage in protesting, picketing, distributing leaflets or handbills, attempting to impede access, or engage in oral advocacy, education or counseling activities” within 20 feet of a health care facility’s driveways and entrances, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425; and a “quiet zone” that made it unlawful to “shout” or produce “any amplified sound” within 100 feet of any portion of a health care facility, WEST PALM BEACH, FLA., CODE OF ORDINANCES art. II, § 34-38. In 2006, a federal district court enjoined the city from enforcing the buffer zone ordi-

nance, leaving only the quiet zone ordinance in place. See *Halfpap v. City of West Palm Beach*, No. 05-80900, 2006 WL 5700261 (S.D. Fla. Apr. 12, 2006).

Harrisburg, Pennsylvania, has enacted an ordinance that creates a 20-foot buffer zone surrounding health care facilities in which persons may not “knowingly congregate, patrol, picket or demonstrate.” HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A). Similar to the San Francisco and Burlington ordinances, Harrisburg’s ordinance includes exceptions for “police and public safety officers, fire and rescue personnel,” “emergency workers in the course of their official business,” “authorized security personnel,” and “employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic.” *Id.*

Los Angeles, California, has enacted an ordinance that prohibits intentional interference with the normal operations of a medical facility and authorizes police to create a 50-foot buffer zone when such interference occurs. L.A., CAL., MUN. CODE ch. 5, art. 6.1, § 56.45(b). Specifically, the police are authorized to order “the immediate dispersal of any congregation that . . . threatens or violates the peace or security of, a medical facility.” *Id.* § 56.45(c). Once properly ordered to disperse by the police, protestors must retreat at least 50 feet from the medical facility, the facility’s parking facilities, and any connecting pedestrian access, and they may not return for at least four hours, or until the police otherwise instruct. *Id.* § 56.45(d).

Although the cities of New York, Chicago, Baltimore, Boston, Minneapolis, Saint Paul, Columbus, Springfield, Austin, Denver, Boulder, Houston, and Ann Arbor have not needed to enact Fixed Buffer Zone Laws, they wish to ensure that any decision of this Court does not impede the flexibility that they historically have been afforded—in the context of anti-abortion protests and otherwise—to determine how best to respond to local conditions and concerns as they develop, including through the imposition of appropriately-tailored buffer zones. As a result, all of the *amici* have an interest in seeing the Massachusetts Act upheld.

## SUMMARY OF ARGUMENT

The Fixed Buffer Zone Laws are neither novel nor unique. In exercising their police powers, state and local governments have regularly made use of fixed buffer zones at protest and demonstration sites because, in their judgment, such safety zones were the most efficient and reliable way to protect the public—not from words, but from violence, harassment, or obstruction. Massachusetts and several of the *amici* have made precisely such a judgment here. Because this Court traditionally has granted deference to the judgment of state and local governments concerning regulation of the time, place, or manner of speech—and because those same entities require the flexibility to make such judgments if they are to govern effectively and protect their residents—the Act should be upheld.

Like safety zones imposed in other contexts, the Fixed Buffer Zone Laws are content neutral. Neither the Act nor the Ordinances discriminate on their face against anti-abortion speech, or any other message. And each of these laws was promulgated for the same content-neutral reasons that state and local governments have imposed fixed buffer zones in other contexts: “to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, [and] reduce disputes and confrontations requiring law enforcement services.” BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings). Of course, in this case, Massachusetts and the *amici* have an additional interest at stake—the interest in protecting the constitutional “right to seek reproductive health care services.” *Id.* But that additional

interest only strengthens the justification for regulation here.

Petitioners attempt to flip this constitutional interest on its head, arguing that, because the Fixed Buffer Zone Laws are tailored to protect access to reproductive health care, they have a disparate impact on anti-abortion speech; and, because of this disparate impact, they must be subject to strict scrutiny. But not only is petitioners' proposed "disparate impact" test unprecedented in this Court's First Amendment jurisprudence, it is also inconsistent with the deference historically granted to states and localities in the exercise of their police powers. Indeed, because there is a risk of "disparate impact" whenever local governments impose a time, place, or manner restriction on a protest or demonstration—and not just in this particular context—petitioners' proposed test could significantly undermine the ability of local governments to ensure public safety in a whole host of different circumstances. Because that cannot be the law, the Fixed Buffer Zone Laws are content neutral and subject only to intermediate scrutiny.

The Fixed Buffer Zone Laws also are narrowly tailored to serve significant governmental interests. Before enacting the Fixed Buffer Zone Laws, both Massachusetts and the *amici* had attempted to protect access to, and to ensure safety at, clinic sites through narrower provisions, like those endorsed by petitioners, that prohibited violence, obstruction, or harassment. But, in many locations, these laws proved both ineffective and difficult to enforce. Infractions could not be established without constant police monitoring, and even with such monitoring, it

was often difficult for police to determine whether a protestor's conduct had, in fact, violated the law. As a result of these difficulties, Massachusetts and several of the *amici* elected to implement Fixed Buffer Zone Laws, creating a bright-line rule whereby protestors can engage in any form of expression they wish well within earshot and eyeshot of reproductive health care facilities, but they cannot cross a clearly-marked, fixed line that is 35 feet or less from the clinics. Because these Fixed Buffer Zone Laws are easy to understand and enforce, they are a more efficient and reliable way to protect clinic-goers and the public from violence, obstruction, and harassment. They are also far narrower than the safety zones utilized by state and local governments—and upheld by the courts—in other contexts.

Finally, the Fixed Buffer Zone Laws leave open adequate alternative channels for petitioners and other anti-abortion protestors to make their views known. Petitioners remain free to approach and communicate face-to-face with individuals heading into or out of clinics, so long as they stay a short distance away from the clinic doors. And they remain free to share their anti-abortion message with the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora. Because the Act and the other Fixed Buffer Zone Laws advance important state and local interests and do not meaningfully impede petitioners' ability to speak freely, they are consistent with the First Amendment and should be upheld.

## ARGUMENT

### **I. State and Local Governments May Protect Public Safety and Privacy Rights by Regulating the Time, Place, and Manner of Speech.**

The use of “police powers to protect the health and safety of [ ] citizens” is “primarily, and historically, . . . [a] matter[ ] of local concern.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (first alteration in original) (internal quotation omitted). State and local governments “traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation omitted); see also *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (recognizing that the powers reserved in the Constitution for the states include “health laws of every description”). Indeed, localities have not only “[t]he power” but also “the duty . . . to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of [their] residents.” *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

To achieve these ends, state and local governments unquestionably may regulate where, when, and by what means speech may occur on their streets and sidewalks, so long as that regulation is not unreasonably restrictive. As this Court has explained, “[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the gen-

eral comfort and convenience, and in consonance with peace and good order.” *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 152 (1969).

The flexibility afforded to state and local governments in regulating the time, place, and manner of speech is even more critical where, as here, that regulation serves to protect other constitutional rights: “[T]he First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right.” *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (upholding ordinance prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance of a polling place, where purpose of ordinance was to prevent voter intimidation); see also *Frisby v. Schultz*, 487 U.S. 474, 484–88 (1988) (upholding ordinance restricting picketing on streets or sidewalks outside of a residence where the ordinance was intended to protect the right to privacy). As a result, this Court has given state and local governments substantial latitude in balancing the right of their residents to speak freely against the right to safely and confidentially access health care, including reproductive health care. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) (allowing restrictions on speech outside of health care facilities because of the “recognizable privacy interest” in patients seeking medical care); cf. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994) (affording deference to court enjoining expressive activity outside of reproductive health center).

## II. The Fixed Buffer Zone Laws Are a Valid Exercise of State and Local Police Powers.

“[T]his Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Burson*, 504 U.S. at 197 (plurality). Because the Act—and the other Fixed Buffer Zone Laws—comply with all three of these requirements, the First Circuit’s decision should be upheld.

### A. The Fixed Buffer Zone Laws Are Not Content-Based.

The Fixed Buffer Zone Laws are content-neutral time, place, and manner restrictions. This Court has explained that a statute violates the principle of content neutrality if, “[o]n its face, [it] accords preferential treatment to the expression of views on one particular subject.” *Carey v. Brown*, 447 U.S. 455, 460–61 (1980). But the Fixed Buffer Zone Laws do no such thing. They preclude *all* persons from entering or exiting a small area of land unless they are doing so for a few, exempt purposes unrelated to expression.<sup>1</sup> Of course, where “the government has adopted

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<sup>1</sup> Unlike the other Fixed Buffer Zone Laws, the Harrisburg ordinance does preclude a particular type of speech—that involving “picket[ing] or demonstrat[ing].” HARRISBURG, PA., PUBLIC SAFETY CODE § 3-371.4(A); see also WEST PALM BEACH, FLA., CODE OF ORDINANCES art. XIII, § 78-425(a) (2005) (enjoined version of ordinance prohibiting “oral advocacy, education or counseling” within fixed buffer zone). But this is precisely the type

a regulation of speech *because of* disagreement with the message it conveys,” that regulation may be subject to strict scrutiny even if it does not discriminate on its face. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added). But the express purposes—and the actual purposes—of both the Act and the Ordinances are content neutral. These laws were not enacted in order to preclude abortion-related speech; they were enacted in order to ensure safety and order on public streets and sidewalks outside of reproductive health care clinics, and to protect the rights of individuals to access those facilities.<sup>2</sup>

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of language that this Court deemed content neutral in *Hill*. See 530 U.S. at 720–25.

<sup>2</sup> See, e.g., 2007 MASS. ACTS ch. 155 (stating that the purpose of the Massachusetts Act is, among other things, “to increase forthwith public safety at reproductive health care facilities”); S.F., CAL., POLICE CODE art. 43, §4301 (providing that ordinance was enacted for purpose of preventing “obstruction, delay, and deterrence of patients, and diversion of reproductive health care facilities’ staff and resources” and promoting “the City’s interest in maintaining the public health, safety, and welfare, and in preserving its residents’ constitutional right to privacy”); BURLINGTON, VT., CODE OF ORDINANCES art. IX, § 21-111 (Findings) (providing that ordinance was enacted “to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, reduce disputes and confrontations requiring law enforcement services, protect property rights, protect First Amendment freedoms of speech and expression and secure a person’s right to seek reproductive health care services”); West Palm Beach, Fla., Ordinance No. 3875-05 (Sept. 26, 2005) (providing that ordinance was intended to promote, among other things, “the right of its citizens to privacy and the right to have safe access to and from all health care facilities,” as well as “the City’s interests in promoting public safety and order, the free flow of

Petitioners nonetheless argue that the Act should be deemed content-based because, “as a practical matter [it] affects speech on only one issue—and, indeed, on only one side of that issue.” Pet. Br. 23. In essence, petitioners suggest that the Act has a disparate impact on anti-abortion speech,<sup>3</sup> and that, as a result of this disparate impact, it must be subject to strict scrutiny. But there is no disparate impact test in this Court’s First Amendment jurisprudence. To the contrary, this Court has made clear time and again that “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791; accord *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (holding that ordinance restricting location of adult film theaters was content neutral).<sup>4</sup>

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traffic on public streets and sidewalks, and protecting the property rights of its citizens”).

<sup>3</sup> It is also not clear from the record that the Act does, in fact, disproportionately impact anti-abortion speech. To the contrary, the record confirms that pro-choice groups also congregate outside of clinics to express their views, and the Act has the same impact on speech by these pro-choice demonstrators as it does on speech by anti-abortion groups. See JA at 26–28 (noting that pro-choice demonstrators congregate outside clinic on the second Saturday of each month); *id.* at 123 (discussing pro-choice group causing disturbance outside clinic).

<sup>4</sup> Petitioners also suggest, at least implicitly, that the Act must be content-based because it was motivated by the conduct of one particular group—anti-abortion protestors. Pet. Br. 25 (criticizing the act for its “targeted burdening of speech outside abortion clinics”); *id.* at 26 (arguing that the Act is not content neutral because its “focused effect on speech about abortion is de-

This rule, announced in *Ward*, is indispensable to local governance. Localities are routinely required to address public safety concerns surrounding speech—not just in the abortion context, but in the context of all different types of protests, marches, and demonstrations. They must be able to respond quickly and appropriately to safety risks posed not only by anti-abortion protestors at clinics, but also by political activists at conferences or conventions, animal rights activists at race tracks, union employees at workplaces, and military protestors at parades and funerals. If petitioners were correct—and decisions made by local governments were subject to strict scrutiny whenever they had a disparate impact on the speech of one particular group or one particular message—it would be virtually impossible for the *amici* and other cities to ensure the safety of their inhabitants during such public gatherings.

Take the example of a city hosting the Republican National Convention. As a practical matter, any safety barriers or “no protest” zones that a city might choose to implement at the convention site would disproportionately impact speech by protestors seeking to convey an anti-Republican message. Under

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liberate”). But that argument is inconsistent with this Court’s decision in *Frisby*, in which the Court held that an ordinance prohibiting picketing in front of a residence was content neutral, despite the fact that it was unequivocally prompted by the conduct of anti-abortion protestors picketing the home of a physician who performed pregnancy terminations. *Frisby*, 487 U.S. at 481–82; see also *Hill*, 530 U.S. at 724 (citing *Frisby* for the notion that a law is not content or “‘viewpoint based’ simply because its enactment was motivated by the conduct of the partisans on one side of a debate”).

the test proposed by petitioners, that fact alone would subject the city’s decision to strict scrutiny—“the most demanding test known to constitutional law,” Pet. Br. 52 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997))—and the safety barriers would only be permissible if the city could establish that they were, in fact, the least restrictive means of protecting convention attendees. This would leave municipal administrators and police in a conundrum: How are they to know in advance exactly how large of a barrier is big enough—but absolutely no larger than necessary—to ensure the safety of those attending the convention (and of protestors and other passersby)? If they err on the side of creating too small a safety zone, then there is a significant risk that people will get hurt. But if they err on the side of creating a zone that a court might find to be even slightly larger than necessary, then implementation of the safety zone could be enjoined, and the risks could be even greater. This dilemma would paralyze local governments, making it all but impossible for them to effectively exercise their police powers.

With good reason, this is not the law. Numerous courts have considered the constitutionality of precisely this type of “no protest” zone outside of political convention sites and, uniformly, have examined the propriety of such measures under intermediate scrutiny. See, e.g., *Marcavage v. City of New York*, 689 F.3d 98, 106 (2d Cir. 2012) (upholding a “no-demonstration zone” spanning two full New York City blocks surrounding a political convention); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004) (affirming denial of injunction against designated protest zones during political convention);

*Am. Civil Liberties Union of Colo. v. City & Cnty. of Denver*, 569 F. Supp. 2d 1142, 1184 (D. Colo. 2008) (upholding “Public/Demonstration Zone” outside political convention).

Political conventions are not the only context in which petitioners’ proposed disparate impact test would wreak havoc on municipal governance. By definition, *every* protest, march, or demonstration concerns speech on a particular topic and from a particular viewpoint. So, under petitioners’ proposed test, virtually *every* municipal act limiting the time, place, or manner of such gatherings would be subject to strict scrutiny.<sup>5</sup> This would hold true even if the

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<sup>5</sup> To borrow an example from the *amici* states supporting petitioners, 43 states and the federal government have enacted laws that create buffer zones around funeral sites in order to ensure the privacy and tranquility of such proceedings. See Br. of *Amici* State of Michigan and 11 Other States, at 7 n.2 (listing statutes). Many of these laws were enacted to cabin protests at military funerals by one particular group—the Westboro Baptist Church—seeking to convey one particular message—that God hates the United States for its tolerance of homosexuality. Without a doubt, then, these laws disproportionately impact this particular group and this particular message. Nonetheless, several Circuit Courts have held (and this Court has at least suggested) that these statutes are content-neutral time, place, and manner restrictions subject only to intermediate scrutiny. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (suggesting in dicta that laws imposing restrictions on funeral picketing are content neutral and may be considered “reasonable time, place, or manner restrictions”); *Phelps-Roper v. Koster*, 713 F.3d 942, 951, 954 (8th Cir. 2013); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 683, 695 (8th Cir. 2012) (upholding city ordinance limiting funeral protests as a reasonable time, place, and manner restriction); *Phelps-Roper v. Strickland*, 539 F.3d 356, 358, 373 (6th Cir. 2008) (upholding state statute prohibit-

decision were made for reasons entirely independent of the protests: Each temporary closure of the sidewalks in front of a reproductive health center for street or utility repairs would be subject to strict scrutiny. The test would also extend to ordinances having nothing to do with protests or demonstrations. For example, several cities have laws prohibiting pedestrians from loitering on medians or other select areas of the streets or sidewalks.<sup>6</sup> Such laws are intended to promote public safety, but because they disproportionately impact panhandling, they would be subject to strict scrutiny under petitioners' proposed test. In short, were this Court to adopt a disparate impact standard for time, place, and manner regulations, it would effectively tie the hands of local governments, making it impossible for them to carry out their "duty . . . to take adequate steps to preserve the peace and to protect . . . [their] residents." *Thornhill*, 310 U.S. at 105.

Petitioners and their *amici* attempt to distinguish the Act from other protest safety zones, arguing that

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ing picketing or protesting within 300 feet of a funeral or burial service).

<sup>6</sup> See, e.g., PORTLAND, ME., CITY CODE ch. 25, art. II, § 25-17(b) (prohibiting standing, sitting, staying, driving, and parking in medians, with an exception for pedestrians who are using the median as they cross from one side of the street to the other); WORCESTER, MASS., REV. ORDINANCES OF 2008, as amended through Oct. 22, 2013 ch. 13, § 77(a) (prohibiting standing or walking on a traffic island or roadway except for limited purposes, including crossing at an intersection or crosswalk); S.F., CAL., POLICE CODE art. 2, § 168 (prohibiting sitting or lying on sidewalks between 7 a.m. and 11 p.m.); LAGUNA HILLS, CAL., MUN. CODE ch. 12, § 42.030 (prohibiting pedestrians from "stepping, standing, sitting, or lying upon any median island").

the Act is not even-handed because it allows clinic employees, acting within the scope of their employment, to enter the buffer zone.<sup>7</sup> They suggest that, even if the Act were not otherwise content-based, this exception necessarily makes it so. Pet. Br. 28. But this same argument could be made whenever states or localities create safety zones. Returning to the Republican National Convention example, Republican delegates and other party members attending or working at a convention naturally are permitted within the safety zone so that they can access the event site. And, once within the safety zone, they are free to express themselves in any manner they choose. That disparity is a necessary consequence of using safety barriers to protect the public. It is not a basis for subjecting all such barriers to strict scrutiny.

Petitioners' proposed disparate impact test not only would undermine the ability of states and localities to exercise their police powers, it would also undermine the very First Amendment principles that petitioners purport to defend. To avoid strict scrutiny, state and local governments would have no choice but to enact broader, prophylactic regulations that limit the time, place, or manner of speech at all protests, marches, or demonstrations—irrespective of the historical behavior of the group protesting or otherwise speaking, and irrespective of the size, location, timing, duration, and expected noise level of the

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<sup>7</sup> See, e.g., Pet. Br. 27–28; Br. of *Amicus* 40 Days for Life, at 10–12; Br. of *Amici* 12 Women Who Attest to the Importance of Free Speech in their Abortion Decisions, at 11; Br. of *Amici* Legal Life Defense Foundation & Walter B. Hoye II, at 16–18.

gathering. Because of the broad applicability of such an ordinance, it would not have a disparate impact on any particular group or message, and so would not be subject to strict scrutiny. But it would impose a greater burden on an even wider range of expression, and it would be completely out of line with how local governments have been exercising their police powers for hundreds of years.

In short, states and localities must have substantial flexibility to respond to unique local circumstances in real time. The disparate impact test endorsed by petitioners would make this impossible by prohibiting localities from enacting reasonable time, place, or manner restrictions in response to legitimate concerns about the conduct of protestors—in the abortion context or any other. That cannot be the law.

### **B. The Fixed Buffer Zone Laws Are Narrowly Tailored.**

Not only are the Fixed Buffer Zone Laws content neutral, they also are narrowly tailored to serve the significant government interests of ensuring public safety and protecting access to reproductive health care.

Where a law regulating speech is content neutral, it “need not be the least restrictive or least intrusive means” of protecting the legitimate interests at stake. *Ward*, 491 U.S. at 798. To the contrary, courts must “defer to the [state’s or] city’s reasonable determination” concerning the precise nature, scope, and extent of restriction required. *Id.* at 800. Thus, in *Ward*, “[t]he Court of Appeals erred in failing to

defer to the city’s reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city’s sound technician.” *Id.* And in *Hill*, this Court granted “deference to the judgment of the Colorado Legislature” in determining “whether or not the 8-foot [floating buffer zone] [wa]s the best possible accommodation of the competing interests at stake.” 530 U.S. at 727; cf. *Madsen*, 512 U.S. at 769–70 (“The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to [the regulating entity’s] familiarity with the facts and [relevant] background[.]”); *Burson*, 504 U.S. at 210 (“We simply do not view the question whether the 100-foot boundary line [around polling places] could be somewhat tighter as a question of ‘constitutional dimension.’”).

Applying this precedent, courts around the country have granted deference to local governments concerning the need for—and the nature, size, and scope of—fixed buffer zones. And, in so doing, they have upheld buffer zones that were far more restrictive than the Act and the Ordinances. For example, in *Marcavage v. City of New York*, the Second Circuit upheld a “no-demonstration zone” surrounding a political convention that spanned two full New York City blocks. 689 F.3d at 106. The court observed that “[i]t may be . . . that a no-standing zone or no-large-sign zone would have been a less restrictive alternative, but ‘narrowly tailored’ does not mean the ‘least restrictive or least intrusive means.’” *Id.* (quoting *Ward*, 491 U.S. at 798). Similarly, in examining the security protocol for a North Atlantic Treaty Organization conference, the Tenth Circuit upheld

the creation of a “security zone” that closed off to protesters “several blocks in all directions” from the conference. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1217–18 (10th Cir. 2007). The court rejected appellant’s contention that it was unnecessary to completely exclude protesters from the security zone because, among other things, the complete exclusion promoted the city’s legitimate interest in decreasing the burden on its police force. *Id.* at 1223. And in *Menotti v. City of Seattle*, the Ninth Circuit upheld an order prohibiting all persons, with limited exceptions, from entering a portion of downtown Seattle during a World Trade Organization conference. 409 F.3d 1113, 1118, 1125 (9th Cir. 2005). The court concluded that the order was narrowly tailored, despite observing that only a small number of “violent protesters were breaking the law amidst throngs of lawful protesters.” *Id.* at 1132, 1137.

The *amici* supporting petitioners have argued that cases such as these are distinguishable because they concerned restrictions that were more limited in time than the Fixed Buffer Zone Laws.<sup>8</sup> But in those cases, as here, the timeframe of the restriction corresponded to the expected timeframe of the protests. If anything, the fact that anti-abortion protests are often perpetual makes the use of narrowly tailored, prophylactic regulation all the more appropriate. As acknowledged by this Court in *Schenck v. Pro-Choice Network of Western New York*, because anti-abortion “protests [a]re constant,” they are also more likely to

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<sup>8</sup> See, e.g., Br. of *Amici* State of Michigan and 11 Other States, at 4, 7–9.

“overwhelm[] police resources”—creating an even greater need for preventative measures. 519 U.S. 357, 363–64 (1997).

This Court also has repeatedly recognized—in other contexts and in this one—that general laws prohibiting violence and obstruction are not always adequate to protect the public’s safety or the ability of individuals to exercise their constitutional rights. For example, in *Burson*, this Court rejected the argument that “restricted zones [outside polling places] are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor . . . to use violence or intimidation to prevent voting.” 504 U.S. at 206. The Court explained that such a statute would ban only the most “blatant and specific attempts” to interfere with an individual’s ability to exercise his or her constitutional right to vote, while “undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.”<sup>9</sup> *Id.* at 207. Similarly, this Court acknowledged in *Hill* “the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior.” 530 U.S. at 729.

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<sup>9</sup> Notably, because the statute at issue in *Burson* was content-based, this Court examined it under strict scrutiny and nonetheless held that the 100-foot buffer zone was the “least restrictive means to serve the State’s interests.” 504 U.S. at 195, 211 (plurality). In other words, the Court concluded that a statute restricting “violence or intimidation” necessarily would be insufficient to protect the constitutional right to vote.

Both the record in this case and the legislative records supporting the Ordinances confirm that the government interests at stake here could not be sufficiently protected through laws prohibiting violence and obstruction. Before enacting the Fixed Buffer Zone Laws, Massachusetts and several of the *amici* had laws in effect that prohibited violent, abusive, or obstructionist conduct outside of reproductive health centers.<sup>10</sup> But those laws proved inadequate to ensure public safety at clinic sites and to protect access to reproductive health care.<sup>11</sup>

For example, before the passage of the Act, Massachusetts had laws in effect that precluded violence and obstruction at reproductive health care facilities. See MASS. GEN. LAWS ch. 266, § 120E½(e). It also had a “floating buffer zone” law similar to that addressed by this Court in *Hill*. See *McGuire v. Reilly*, 260 F.3d 36, 40–41 (1st Cir. 2001). But in spite of

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<sup>10</sup> See, e.g., MASS. GEN. LAWS ch. 266, § 120E½(e) (making it unlawful to obstruct entry to a reproductive health care facility); CAL. PENAL CODE § 423.2(c) (making it unlawful to interfere with reproductive health services client, provider, or assistant); VT. STAT. ANN. tit. 13, § 1026 (making it unlawful to obstruct vehicular or pedestrian traffic); PA. CONS. STAT. tit. 18, § 5507(a) (making it unlawful to intentionally obstruct any sidewalk or other public passage).

<sup>11</sup> As described in more detail by other *amici* supporting the respondents, there is a long history in this country of violence, obstruction, and intimidation at reproductive health care facilities. See, e.g., NATIONAL ABORTION FEDERATION, NATIONAL ABORTION FEDERATION VIOLENCE AND DISRUPTION STATISTICS, *available at* [http://www.prochoice.org/pubs\\_research/publications/downloads/about\\_abortion/stats\\_table2011.pdf](http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2011.pdf) (showing incidents of violence and disruption against abortion providers from 1977 through 2010).

these laws, women and men seeking to enter reproductive health centers still could not gain access without enduring verbal harassment, having literature and leaflets thrown at them, and being videotaped and photographed against their will. JA at 44–45, 49–51, 60–63. This situation created public safety hazards, as described in detail by the clinic security officers and Boston Police. *Id.* at 95–103, 122–28. Police and other law enforcement officials also had difficulty enforcing these prior laws, and, even when arrests were made, it was difficult to obtain convictions. *Id.* at 31, 33, 67–71, 126.

Several of the *amici* faced similar obstacles prior to enacting Fixed Buffer Zone Laws. For instance, San Francisco’s prior ordinance—like the prior Massachusetts statute—included a “floating buffer zone” similar to that upheld by this Court in *Hill*.<sup>12</sup> But,

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<sup>12</sup> Several cities, including Denver and Boulder, currently have “floating buffer zone” ordinances similar to the statute upheld in *Hill*. See, e.g., DENVER, COLO., CODE OF ORDINANCES ch. 38, art. IV, § 38-114; BOULDER, COLO., REV. CODE tit. 5, § 5-3-10; PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. 1, § 623.01. Accordingly, petitioners’ request that this Court reconsider its decision in *Hill* is inappropriate not only for the reasons set forth in respondents’ brief, but also because the doctrine of *stare decisis* is intended to protect such state and local regulation, enacted in reliance on the precedent of this Court. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 366–67 (1993) (explaining that “[t]he interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command”); *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (observing that this Court must consider “the cost of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application”).

notwithstanding that the ordinance prohibited “harassment, within 100 feet of an exterior wall of a health care facility,” protestors still were able to successfully block the sidewalks adjacent to the clinic and the clinic entrances and exits.<sup>13</sup> Moreover, San Francisco encountered difficulty enforcing its prior ordinance because each violation was short-lived and, thus, difficult to establish absent direct police observation. And even when police were on the scene and could observe the protestors’ conduct, it was often too difficult to measure whether, in fact, a protestor had entered the floating buffer zone.<sup>14</sup>

Similarly, in Burlington, prior to the enactment of the Fixed Buffer Zone Law the police department found it difficult to prevent harassment and obstruction in the areas surrounding reproductive health centers. Although obstruction of pedestrian traffic was prohibited by state law, that statute was difficult to enforce, and it did not prohibit other forms of harassment.<sup>15</sup> As explained by a member of the Bur-

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<sup>13</sup> See S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), *available at* [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=164&clip\\_id=17316](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=164&clip_id=17316), at 23:40; see also S.F., CAL., POLICE CODE art. 43, § 4301 (2013) (“Due to the density and space constraints of the City’s urban landscape, [the previous ordinance in San Francisco] has not adequately prevented harassment, delay, and deterrence of patients seeking vital health care services.”).

<sup>14</sup> See, e.g., S.F., Cal., Bd. of Supervisors Mtg. (Apr. 18, 2013), at 22:25.

<sup>15</sup> See Burlington, Vt., City Council Mtg. (May 21, 2012), *available at* <http://www.cctv.org/watch-tv/programs/burlington-city-council-214>, at 32:04 (describing protestors “verbally assaulting and physically blocking” women from entering clinic).

lington Police Department, individuals who had to push through a wall of protestors in order to gain entry to the clinic often did not report that fact to the police. And when such conduct was reported, it was difficult to determine and prove whether, in fact, pedestrian traffic had been obstructed, and, if so, who was responsible.<sup>16</sup>

In West Palm Beach, just two months before the City enacted its fixed buffer zone ordinance, a reproductive health care center within city limits had been subjected to arson—the third such clinic fire in Florida in two years.<sup>17</sup> Even before the fire, however, the clinic’s director had been petitioning city officials to consider imposing a fixed buffer zone because of complaints that anti-abortion protesters were regularly intimidating, obstructing, and harassing patients.<sup>18</sup>

Despite this persistence of violence and obstruction, petitioners nonetheless suggest that the then-existing laws prohibiting such conduct in Massachusetts sufficed to protect public safety and access to reproductive health care because “government agen-

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<sup>16</sup> Burlington, Vt., City Council Ordinance Comm. Mtg. (June 27, 2012), *available at* <http://www.cctv.org/watch-tv/programs/ordinance-committee-part-1>, at 38:10 & 39:20.

<sup>17</sup> See NATIONAL ABORTION FEDERATION, HISTORY OF VIOLENCE/ARSONS AND BOMBINGS, *available at* [http://www.prochoice.org/about\\_abortion/violence/arsons.asp](http://www.prochoice.org/about_abortion/violence/arsons.asp); *New Limits Set For Abortion Protesters*, MIAMI HERALD, Sept. 28, 2005, at B11.

<sup>18</sup> See, e.g., Peter Franceschina, *Women’s Clinic Reopens Five Weeks After Holiday Fire*, SUN SENTINEL, Aug. 11, 2005, at B13, *available at* [http://articles.sun-sentinel.com/2005-08-11/news/0508101546\\_1\\_clinic-fire-abortion-clinic-womancare-center](http://articles.sun-sentinel.com/2005-08-11/news/0508101546_1_clinic-fire-abortion-clinic-womancare-center).

cies, medical facilities, and individuals [could] seek injunctive and other civil relief against persistent offenders.” Pet. Br. 36. This argument is specious: State and local “[l]egislatures [are] permitted to respond to potential [impairments of constitutional rights] with foresight rather than reactively.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); see also *Hill*, 530 U.S. at 729 (“[T]he statute’s prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior.”).

Moreover, the injunction is an inadequate tool to protect the significant rights and interests at stake: Injunctions bind particular individuals only; as a practical matter, they are available only after one or more violations *already* have occurred; they take significant time and resources to obtain; they are left to the discretion of the courts and, thus, cannot replace the authority of state and local legislatures to make law; and, as this Court has repeatedly recognized, they are available only upon a heightened showing, beyond that required to defend content-neutral time, place, and manner regulations. *Schenck*, 519 U.S. at 372 (holding that injunctions must “burden no more speech than necessary to serve a significant governmental interest”); accord *Madsen*, 512 U.S. at 765.

As evidenced by the facts and circumstances of the *Schenck* case, these differences between prophylactic lawmaking and retroactive injunctions are significant. In *Schenck*, doctors and health care clinics filed a private-party suit seeking an injunction against anti-abortion protestors who had repeatedly violated the existing laws prohibiting violence and

obstruction at clinic sites. Before seeking relief from the courts, “the clinics [had been] subjected to numerous large-scale blockades” and “consistent[] attempt[s] to stop or disrupt clinic operations.” 519 U.S. at 362. The initial attempts made by “sidewalk counselors” to “persuade [women] not to get an abortion,” if rebuffed, “often devolved into ‘in your face’ yelling, and sometimes into pushing, shoving, and grabbing,” and “the local police had been ‘unable to respond effectively’ to the protests, for a number of reasons,” including that “the protests were constant, overwhelming police resources; when the police arrived, the protesters simply dispersed and returned later; prosecution of arrested protesters was difficult because patients were often reluctant to cooperate for fear of making their identity public; and those who were convicted were not deterred from returning to engage in unlawful conduct.” *Id.* at 363–64. The clinics were left with no choice but to spend their own resources pursuing litigation. In the 17 months between the filing of the complaint and the issuance of the preliminary injunction in *Schenck*, the protesters continued to engage in “sidewalk counseling” and “constructive blockades [which] consisted of ‘demonstrating and picketing around the entrances of the clinics, and . . . harassing patients and staff entering and leaving the clinics.’” *Id.* at 365 (alteration in original). Although the district court ultimately issued the requested injunction, it held 39 days of hearings before doing so. *Id.* at 365–66. The case then continued for another five years before this Court struck down a portion of the injunction for failure to meet the heightened showing applicable only to injunctive relief. And, of course, the portion of the injunction that was left intact could be en-

forced only by the particular clinics that brought suit, and only against the particular individuals who had been named in the complaint six years earlier. Certainly, petitioners cannot be suggesting that such injunctive relief is sufficient to ensure the safety and wellbeing of clinic patients, staff, and the public—or that state and local governments are somehow precluded by the First Amendment from taking any additional steps to protect their residents.

Petitioners' argument also ignores the practical realities faced by local governments. Cities, towns, and counties often do not have sufficient resources to post police officers outside of reproductive health centers every day during business hours—let alone to pursue and enforce injunctions like that addressed by this Court in *Schenck*. Because Fixed Buffer Zone Laws provide clear, bright-line rules for *all* persons in the vicinity of a reproductive health care facility, such laws decrease the need for a police presence and judicial intervention. And because the preservation of such scarce municipal resources is itself a legitimate governmental interest, the Fixed Buffer Zone Laws are narrowly tailored. See, e.g., *Citizens for Peace in Space*, 477 F.3d at 1223 (upholding security zone, because, among other things, the complete exclusion promoted the city's legitimate interest in decreasing the burden on its police force).

### **C. The Fixed Buffer Zone Laws Leave Open Adequate Alternative Channels for Communication.**

Petitioners argue that the Act fails to leave open adequate alternative channels of communication because it impedes their ability to speak at a “conver-

sational distance” with a “unique audience”—women visiting a reproductive health care facility for the purpose of terminating a pregnancy—about perhaps the most fundamentally private decision a woman can make—whether to have an abortion. Pet. Br. 22, 43–44. But the First Amendment does not guarantee anyone the right to have a face-to-face conversation with a particular individual in all places at all times. Instead, it guarantees the right of all individuals to be able to share their message on matters of public concern. And because the Fixed Buffer Zone Laws permit delivery of petitioners’ anti-abortion message to the public—via leafleting, picketing, canvassing, and just about any other means imaginable—on all but the tiniest portion of the streets, sidewalks, and parks that have traditionally served as public fora, they unquestionably leave open adequate alternative channels of communication.

In conducting its “adequate alternative channel” analysis, this Court need look no further than its prior decision in *Frisby*. In *Frisby*, the Court upheld a municipal ordinance prohibiting the picketing of a particular residence or dwelling. The ordinance was precipitated by targeted picketing outside the home of a physician that was intended to “force [that] doctor to cease performing abortions.” 487 U.S. at 487. The Court held that, because the ordinance applied to “picketing [ ] narrowly directed at the household, not the public,” it was “virtually self-evident that ample alternatives remain[ed]” for public expression. *Id.* at 483, 486. Put differently, because the ordinance did not impede “the more general dissemination of [the petitioners’ anti-abortion] message,” *id.* at 483, it was of no moment that the ordinance

might, in fact, make it substantially more difficult for the picketers to reach their target audience.

So, too, here, petitioners assert the right to target a particular audience—women visiting reproductive health care centers for the purpose of terminating a pregnancy—at a location where the target audience necessarily *must* go to exercise a constitutionally-protected right, and where that audience has a strong expectation of privacy.<sup>19</sup> Petitioners contend that, because the Act does not leave open adequate alternative channels for them to speak directly—and up close—with this particular target audience at this particular location, it does not pass constitutional muster. But this argument misses the mark: The relevant question is not whether the regulation

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<sup>19</sup> As this Court suggested in *Madsen*, “the State’s strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, applie[s] by analogy to medical privacy[:] . . . while targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.” 512 U.S. at 768 (citations omitted). Of course, the Act and the other Fixed Buffer Zone Laws are not intended solely for the purpose of promoting “medical privacy”—they are also intended to protect the constitutional right of clinic-goers to access reproductive medical information and care, and to protect the safety of all individuals using the public streets and sidewalks. Thus, the question addressed at length by the dissenters in *Hill*—whether individuals have a “right to be left alone” that can ever justify restrictions on speech outside of the residential context, see 530 U.S. at 750–54 (Scalia, J., dissenting); *id.* at 771–72 (Kennedy, J., dissenting)—is not presented here. Moreover, resolution of that question is wholly unnecessary to address the entirely separate question of whether adequate alternative channels of communication exist.

leaves open adequate alternative channels for particular speakers to have one-on-one conversations with particular individuals whom they choose to target. It is whether that law impedes “the more general dissemination of a message.” *Frisby*, 487 U.S. at 483. Because petitioners—like all other speakers—are free to share their message through any means or method desired, so long as they are 35-feet from the entrances to a reproductive health care facility, the Act—and the other Fixed Buffer Zone Laws—unquestionably pass this test.

To be sure, proximity to a particular location may sometimes be significant to protesters seeking to convey a particular message. Those protesting a political convention or an international conference have an interest in securing a site for their protest that is reasonably proximate to that event. But reasonable proximity does not mean a conversational distance. See, e.g., *Marcavage v. City of Chicago*, 659 F.3d 626, 629, 631 (7th Cir. 2011) (rejecting argument that First Amendment required City of Chicago to allow plaintiffs to situate themselves on the main thoroughfare of the Gay Games in order to make “one-on-one presentation[s] of the Gospel of Jesus” to Games attendees, and holding instead that the alternate locations available to plaintiffs were more than adequate because they “were within view and earshot of those traveling to the Games”); see also *Marcavage v. City of New York*, 689 F.3d at 108 (rejecting convention protesters’ argument that an adequate alternative channel for communication must be within “sight and sound” of the convention and upholding restriction that required protestors to remain a block or more away from convention site); *Menotti*, 409

F.3d at 1138–39, 1141 (rejecting argument that the First Amendment required the City of Seattle to allow protestors to “communicat[e] with WTO delegates at close range,” and holding that protestors restricted from the portion of downtown Seattle where the WTO conference was being held nonetheless had adequate alternative channels available to them because they were permitted to demonstrate across the street from some of the conference locations); *Bl(a)ck Tea Soc’y*, 378 F.3d at 14 (rejecting convention protesters’ argument that an adequate alternative channel for communication must be within “sight and sound” of the convention, and observing that, “[a]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators’ ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access”).

In any event, even accepting that anti-abortion protestors have an interest in situating themselves within reasonable proximity to locations where abortions are performed, that interest is not impeded here. The Fixed Buffer Zone Laws unquestionably permit petitioners and other anti-abortion advocates to speak freely within sight and sound of reproductive health care centers. And they unquestionably permit petitioners and other anti-abortion advocates to engage in face-to-face conversations with clinic patients and staff, so long as those conversations take place before the clinic-goers enter the buffer zone or after they leave it. In Massachusetts, for example, petitioners can—and do—position themselves on

public sidewalks just 35 feet from clinic entrances—well within both earshot and eyeshot of the clinics. And from that position petitioners can—and do—engage in any form of expression they wish. They can approach passersby (including individuals heading to or from the facility), they can leaflet, they can call out to individuals entering and exiting the facility, they can picket, they can display signs, and they can pray.

In short, the Act and the other Fixed Buffer Zone Laws do not “limit the range of information and ideas to which the public is exposed,” as petitioners contend. Pet. Br. 32 (internal quotation marks and alteration omitted). Instead, they appropriately protect clinic patients, clinic employees, and passersby from the harassment, intimidation, and violence that historically have plagued such facilities, while still leaving open ample alternative channels for petitioners and other anti-abortion advocates to spread their message.

## CONCLUSION

Because the Act and the other Fixed Buffer Zone Laws epitomize precisely the type of content-neutral time, place, and manner restrictions that state and local governments must have at their disposal to deal with uniquely local concerns and to protect the significant rights and interests of their residents, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 22, 2013

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**MCCULLEN ET AL. v. COAKLEY, ATTORNEY GENERAL  
OF MASSACHUSETTS, ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

No. 12–1168. Argued January 15, 2014—Decided June 26, 2014

In 2007, Massachusetts amended its Reproductive Health Care Facilities Act, which had been enacted in 2000 to address clashes between abortion opponents and advocates of abortion rights outside clinics where abortions were performed. The amended version of the Act makes it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” Mass. Gen. Laws, ch. 266, §§120E½(a), (b). The Act exempts from this prohibition four classes of individuals, including “employees or agents of such facility acting within the scope of their employment.” §120E½(b)(2). Another provision of the Act proscribes the knowing obstruction of access to an abortion clinic. §120E½(e).

McCullen and the other petitioners are individuals who attempt to engage women approaching Massachusetts abortion clinics in “sidewalk counseling,” which involves offering information about alternatives to abortion and help pursuing those options. They claim that the 35-foot buffer zones have displaced them from their previous positions outside the clinics, considerably hampering their counseling efforts. Their attempts to communicate with patients are further thwarted, they claim, by clinic “escorts,” who accompany arriving patients through the buffer zones to the clinic entrances.

Petitioners sued Attorney General Coakley and other Commonwealth officials, seeking to enjoin the Act’s enforcement on the ground that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied both challenges, and the First Circuit affirmed. With regard to petition-

## Syllabus

ers’ facial challenge, the First Circuit held that the Act was a reasonable “time, place, and manner” regulation under the test set forth in *Ward v. Rock Against Racism*, 491 U. S. 781.

*Held:* The Massachusetts Act violates the First Amendment. Pp. 8–30.

(a) By its very terms, the Act restricts access to “public way[s]” and “sidewalk[s],” places that have traditionally been open for speech activities and that the Court has accordingly labeled “traditional public fora,” *Pleasant Grove City v. Summum*, 555 U. S. 460, 469. The government’s ability to regulate speech in such locations is “very limited.” *United States v. Grace*, 461 U. S. 171, 177. “[E]ven in a public forum,” however, “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, supra*, at 791. Pp. 8–10.

(b) Because the Act is neither content nor viewpoint based, it need not be analyzed under strict scrutiny. Pp. 10–18.

(1) The Act is not content based simply because it establishes buffer zones only at abortion clinics, as opposed to other kinds of facilities. First, the Act does not draw content-based distinctions on its face. Whether petitioners violate the Act “depends” not “on what they say,” *Holder v. Humanitarian Law Project*, 561 U. S. 1, 27, but on where they say it. Second, even if a facially neutral law disproportionately affects speech on certain topics, it remains content neutral so long as it is “justified without reference to the content of the regulated speech.” *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48. The Act’s purposes include protecting public safety, patient access to healthcare, and unobstructed use of public sidewalks and streets. The Court has previously deemed all these concerns to be content neutral. See *Boos v. Barry*, 485 U. S. 312, 321. An intent to single out for regulation speech about abortion cannot be inferred from the Act’s limited scope. “States adopt laws to address the problems that confront them.” *Burson v. Freeman*, 504 U. S. 191, 207. There was a record of crowding, obstruction, and even violence outside Massachusetts abortion clinics but not at other kinds of facilities in the Commonwealth. Pp. 11–15.

(2) The Act’s exemption for clinic employees and agents acting within the scope of their employment does not appear to be an attempt to favor one viewpoint about abortion over the other. *City of Ladue v. Gilleo*, 512 U. S. 43, 51, distinguished. Given that some kind of exemption was necessary to allow individuals who work at the clinics to enter or remain within the buffer zones, the “scope of

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employment” qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. Even assuming that some clinic escorts have expressed their views on abortion inside the zones, the record does not suggest that such speech was within the scope of the escorts’ employment. If it turned out that a particular clinic authorized its employees to speak about abortion in the buffer zones, that would support an as-applied challenge to the zones at that clinic. Pp. 15–18.

(c) Although the Act is content neutral, it is not “narrowly tailored” because it “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U. S., at 799. Pp. 18–29.

(1) The buffer zones serve the Commonwealth’s legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities. See *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 376. At the same time, however, they impose serious burdens on petitioners’ speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature. Those forms of expression have historically been closely associated with the transmission of ideas. While the Act may allow petitioners to “protest” outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message. Pp. 19–23.

(2) The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests. Subsection (e) of the Act already prohibits deliberate obstruction of clinic entrances. Massachusetts could also enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994, 18 U. S. C. §248(a)(1), which imposes criminal and civil sanctions for obstructing, intimidating, or interfering with persons obtaining or providing reproductive health services. Obstruction of clinic driveways can readily be addressed through existing local traffic ordinances. While the Commonwealth contends that individuals can inadvertently obstruct access to clinics simply by gathering in large numbers, that problem could be addressed through a law requiring crowds blocking a clinic entrance to disperse for a limited period when ordered to do so by the police. In any event, crowding appears to be a problem only at the Boston clinic, and even there, only on Saturday mornings.

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The Commonwealth has not shown that it seriously undertook to address these various problems with the less intrusive tools readily available to it. It identifies not a single prosecution or injunction against individuals outside abortion clinics since the 1990s. The Commonwealth responds that the problems are too widespread for individual prosecutions and injunctions to be effective. But again, the record indicates that the problems are limited principally to the Boston clinic on Saturday mornings, and the police there appear perfectly capable of singling out lawbreakers. The Commonwealth also claims that it would be difficult to prove intentional or deliberate obstruction or intimidation and that the buffer zones accordingly make the police's job easier. To meet the narrow tailoring requirement, however, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. In any event, to determine whether someone intends to block access to a clinic, a police officer need only order him to move; if he refuses, then there is no question that his continued conduct is knowing or intentional. For similar reasons, the Commonwealth's reliance on *Burson v. Freeman*, 504 U. S. 191, is misplaced. There, the Court upheld a law establishing buffer zones outside polling places on the ground that less restrictive measures were inadequate. But whereas "[v]oter intimidation and election fraud" are "difficult to detect," *id.*, at 208, obstruction and harassment at abortion clinics are anything but subtle. And while the police "generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," *id.*, at 207, they maintain a significant presence outside Massachusetts abortion clinics. In short, given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked. Pp. 23–29.

708 F. 3d 1, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. ALITO, J., filed an opinion concurring in the judgment.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 12–1168

ELEANOR McCULLEN, ET AL., PETITIONERS *v.*  
MARTHA COAKLEY, ATTORNEY GEN-  
ERAL OF MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[June 26, 2014]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Mass. Gen. Laws, ch. 266, §§120E½(a), (b) (West 2012). Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities’ entrances. The question presented is whether the statute violates the First Amendment.

I  
A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, §120E½ (West 2000). The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act

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established a defined area with an 18-foot radius around the entrances and driveways of such facilities. §120E½(b). Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—“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.” *Ibid.* A separate provision subjected to criminal punishment anyone who “knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” §120E½(e).

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*, 530 U. S. 703 (2000). Relying on *Hill*, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge. *McGuire v. Reilly*, 386 F. 3d 45 (2004) (*McGuire II*), cert. denied, 544 U. S. 974 (2005); *McGuire v. Reilly*, 260 F. 3d 36 (2001) (*McGuire I*).

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute “on a routine basis.” App. 78. To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals’ consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Depart-

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ment, however, testified that his officers had made “no more than five or so arrests” at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. *Id.*, at 68–69. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18-foot zones were so crowded with protestors that they resembled “a goalie’s crease,” making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. *Id.*, at 69–71. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were “unenforceable.” *Id.*, at 79. What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. *Id.*, at 74, 76. Captain Evans agreed, explaining that such a zone would “make our job so much easier.” *Id.*, at 68.

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

“No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.” Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012).

A “reproductive health care facility,” in turn, is defined as “a place, other than within or upon the grounds of a hospi-

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tal, where abortions are offered or performed.” §120E½(a).

The 35-foot buffer zone applies only “during a facility’s business hours,” and the area must be “clearly marked and posted.” §120E½(c). In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to \$500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between \$500 and \$5,000, up to two and a half years in prison, or both. §120E½(d).

The Act exempts four classes of individuals: (1) “persons entering or leaving such facility”; (2) “employees or agents of such facility acting within the scope of their employment”; (3) “law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment”; and (4) “persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.” §120E½(b)(1)–(4). The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility. §120E½(e).

## B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call “sidewalk counseling,” which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: “Good morning, may I give you my literature? Is there anything I can do for you?”

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I'm available if you have any questions." App. 138. If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone—marked by a painted arc and a sign—surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. *Id.*, at 293–295. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic.<sup>1</sup>

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. Unlike the Boston clinic, the Worces-

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<sup>1</sup>The zone could have extended an additional 21 feet in width under the Act. Only the smaller area was marked off, however, so only that area has legal effect. See Mass. Gen. Laws, ch. 266, §120E½(c).

## Opinion of the Court

ter clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54-foot-long private walkway to the main entrance. More than 85% of patients, however, arrive by car, turning onto the clinic's driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway.

Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway's entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. *Id.*, at 295–297. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. *Id.*, at 297–299. Like petitioners at the Worcester clinic, Shea now stands far down the sidewalk from the driveway entrances.

Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling ef-

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forts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones—particularly at the Boston clinic—they say they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect. *Id.*, at 136–137, 180, 200.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to enter the buffer zones. Relying on this exemption, the Boston clinic uses “escorts” to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners’ attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to “pay any attention” or “listen to” petitioners, and disparaging petitioners as “crazy.” *Id.*, at 165, 178.

## C

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners’ facial challenge after a bench trial based on a stipulated record. 573 F. Supp. 2d 382 (Mass. 2008).

The Court of Appeals for the First Circuit affirmed. 571 F. 3d 167 (2009). Relying extensively on its previous decisions upholding the 2000 version of the Act, see *McGuire II*, 386 F. 3d 45; *McGuire I*, 260 F. 3d 36, the court upheld the 2007 version as a reasonable “time, place, and manner” regulation under the test set forth in *Ward v. Rock Against Racism*, 491 U. S. 781 (1989). 571 F. 3d, at 174–181. It also rejected petitioners’ arguments that the Act was substantially overbroad, void for vagueness, and an impermissible prior restraint. *Id.*, at 181–184.

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The case then returned to the District Court, which held that the First Circuit’s decision foreclosed all but one of petitioners’ as-applied challenges. 759 F. Supp. 2d 133 (2010). After another bench trial, it denied the remaining as-applied challenge, finding that the Act left petitioners ample alternative channels of communication. 844 F. Supp. 2d 206 (2012). The Court of Appeals once again affirmed. 708 F. 3d 1 (2013).

We granted certiorari. 570 U. S. \_\_\_ (2013).

## II

By its very terms, the Massachusetts Act regulates access to “public way[s]” and “sidewalk[s].” Mass. Gen. Laws, ch. 266, §120E½(b) (Supp. 2007). Such areas occupy a “special position in terms of First Amendment protection” because of their historic role as sites for discussion and debate. *United States v. Grace*, 461 U. S. 171, 180 (1983). These places—which we have labeled “traditional public fora”—“have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Pleasant Grove City v. Sumnum*, 555 U. S. 460, 469 (2009) (quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U. S. 37, 45 (1983)).

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth

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will ultimately prevail,” *FCC v. League of Women Voters of Cal.*, 468 U. S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny. See Brief for Respondents 26 (although “[b]y its terms, the Act regulates only conduct,” it “incidentally regulates the place and time of protected speech”).

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is “very limited.” *Grace, supra*, at 177. In particular, the guiding First Amendment principle that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” applies with full force in a traditional public forum. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). As a general rule, in such a forum the government may not “selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others.” *Erznoznik v. Jacksonville*, 422 U. S. 205, 209 (1975).

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. “[E]ven 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*, 491 U. S., at 791 (quoting *Clark v.*

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*Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)).<sup>2</sup>

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test's three requirements.

## III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. See *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000). Respondents do not argue that the Act can survive this exacting standard.

JUSTICE SCALIA objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny, given that we ultimately conclude that it is not narrowly tailored. *Post*, at 2 (opinion concurring in judgment). But we think it unexceptional to perform the first part of a multipart constitutional analysis first. The content-neutrality prong of the *Ward* test is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a

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<sup>2</sup>A different analysis would of course be required if the government property at issue were not a traditional public forum but instead “a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Pleasant Grove City v. Sumnum*, 555 U. S. 460, 470 (2009).

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constitutional test, even when the preliminary steps turn out not to be dispositive. See, e.g., *Bartnicki v. Vopper*, 532 U. S. 514, 526–527 (2001); *Holder v. Humanitarian Law Project*, 561 U. S. 1, 25–28 (2010) (concluding that a law was content based even though it ultimately survived strict scrutiny).

The Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny, as we did earlier this Term in *McCutcheon v. Federal Election Commission*, 572 U. S. \_\_\_\_, \_\_\_\_ (2014) (plurality opinion) (slip op., at 10). But the distinction between that case and this one seems clear: Applying any standard of review other than intermediate scrutiny in *McCutcheon*—the standard that was assumed to apply—would have required overruling a precedent. There is no similar reason to forgo the ordinary order of operations in this case.

At the same time, there is good reason to address content neutrality. In discussing whether the Act is narrowly tailored, see Part IV, *infra*, we identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted. Some apply only at abortion clinics, which raises the question whether those provisions are content neutral. See *infra*, at 12–15. While we need not (and do not) endorse any of those measures, it would be odd to consider them as possible alternatives if they were presumptively unconstitutional because they were content based and thus subject to strict scrutiny.

## A

The Act applies only at a “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” Mass. Gen. Laws, ch. 266, §120E½(a). Given this definition, petitioners argue, “virtually all speech affected by the Act is speech concerning abortion,” thus rendering the Act content based. Brief for Petitioners 23.

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We disagree. To begin, the Act does not draw content-based distinctions on its face. Contrast *Boos v. Barry*, 485 U. S. 312, 315 (1988) (ordinance prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into “public odium” or “public disrepute”); *Carey v. Brown*, 447 U. S. 455, 465 (1980) (statute prohibiting all residential picketing except “peaceful labor picketing”). The Act would be content based if it required “enforcement authorities” to “examine the content of the message that is conveyed to determine whether” a violation has occurred. *League of Women Voters of Cal.*, *supra*, at 383. But it does not. Whether petitioners violate the Act “depends” not “on what they say,” *Humanitarian Law Project*, *supra*, at 27, but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. Brief for Petitioners 24 (quoting *United States v. O’Brien*, 391 U. S. 367, 384 (1968)). But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, *supra*, at 791. The question in such a case is whether the law is “justified without reference to the content of the regulated speech.” *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976); *emphasis deleted*).

The Massachusetts Act is. Its stated purpose is to “increase forthwith public safety at reproductive health care

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facilities.” 2007 Mass. Acts p. 660. Respondents have articulated similar purposes before this Court—namely, “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” Brief for Respondents 27; see, e.g., App. 51 (testimony of Attorney General Coakley); *id.*, at 67–70 (testimony of Captain William B. Evans of the Boston Police); *id.*, at 79–80 (testimony of Mary Beth Heffernan, Undersecretary for Criminal Justice); *id.*, at 122–124 (affidavit of Captain Evans). It is not the case that “[e]very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion.” *Post*, at 7.

We have previously deemed the foregoing concerns to be content neutral. See *Boos*, 485 U. S., at 321 (identifying “congestion,” “interference with ingress or egress,” and “the need to protect . . . security” as content-neutral concerns). Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “[l]isteners’ reactions to speech.” *Ibid.* If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener’s reactions. Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Common-

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wealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. Brief for Petitioners 24. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion." Reply Brief 9.

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451–452 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U. S. 191, 207 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment." Brief for Petitioners 24. In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

JUSTICE SCALIA objects that the statute does restrict more speech than necessary, because "only one [Massa-

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chusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses.” *Post*, at 7. But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by JUSTICE SCALIA goes to the question of narrow tailoring, which we consider below. See *infra*, at 26–28.

## B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, Mass. Gen. Laws, ch. 266, §§120E½(b)(1)–(4), one of which comprises “employees or agents of [a reproductive healthcare] facility acting within the scope of their employment.” §120E½(b)(2). This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an “egregious form of content discrimination,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). In particular, petitioners argue that the exemption allows clinic employees and agents—including the volunteers who “escort” patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that “an exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.’” *City of Ladue v. Gilleo*, 512 U. S. 43, 51 (1994) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 785–786 (1978)). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at

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the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance, see App. 95 (affidavit of Michael T. Baniukiewicz).

Given the need for an exemption for clinic employees, the “scope of their employment” qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical “scope of their employment” restriction on the exemption for “law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents.” §120E½(b)(3). Contrary to the suggestion of JUSTICE SCALIA, *post*, at 11–12, there is little reason to suppose that the Massachusetts Legislature intended to incorporate a common law doctrine developed for determining vicarious liability in tort when it used the phrase “scope of their employment” for the wholly different purpose of defining the scope of an exemption to a criminal statute. The limitation instead makes clear—with respect to both clinic employees and municipal agents—that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The “scope of their employment” limitation thus seems designed to protect against exactly the sort of conduct that petitioners and JUSTICE SCALIA fear.

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways. See App. 165, 168–169, 177–178, 189–190. It is

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unclear from petitioners' testimony whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. Cf. *Hoye v. City of Oakland*, 653 F. 3d 835, 849–852 (CA9 2011) (finding selective enforcement of a similar ordinance in Oakland, California). While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. See *post*, at 1–2 (ALITO, J., concurring in judgment). In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment.<sup>3</sup> The Act's exemption for clinic

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<sup>3</sup>Less than two weeks after the instant litigation was initiated, the Massachusetts Attorney General's Office issued a guidance letter clarifying the application of the four exemptions. The letter interpreted the exemptions as not permitting clinic employees or agents, municipal employees or agents, or individuals passing by clinics "to express their views about abortion or to engage in any other partisan speech within the buffer zone." App. 93, 93–94. While this interpretation supports our conclusion that the employee exemption does not render the Act viewpoint based, we do not consider it in our analysis because it appears to *broaden* the scope of the Act—a criminal statute—rather than to adopt a "limiting construction." *Ward v. Rock Against Racism*, 491 U. S. 781, 796 (1989) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, n. 5 (1982)).

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employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.<sup>4</sup>

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

## IV

Even though the Act is content neutral, it still must be “narrowly tailored to serve a significant governmental interest.” *Ward*, 491 U. S., at 796 (internal quotation marks omitted). The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demand-

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<sup>4</sup>Of course we do not hold that “[s]peech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed.” *Post*, at 13. We instead apply an uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so. JUSTICE SCALIA can decry this analysis as “astonishing” only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges. *Ibid.*

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ing a close fit between ends and means, the tailoring requirement prevents the government from too readily “sacrific[ing] speech for efficiency.” *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U. S., at 799. Such a regulation, unlike a content-based restriction of speech, “need not be the least restrictive or least intrusive means of” serving the government’s interests. *Id.*, at 798. But the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.*, at 799.

## A

As noted, respondents claim that the Act promotes “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” Brief for Respondents 27. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government’s interests in “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services.” *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 376 (1997). See also *Madsen v. Women’s Health Center, Inc.*, 512 U. S. 753, 767–768 (1994). The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners’ speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics’ entrances and driveways. The zones

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thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. App. 135. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." *Id.*, at 135, 152. Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey. *Id.*, at 133, 152–153. Clark gave similar testimony about her experience at the Worcester clinic. *Id.*, at 243–244.

These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, App. to Pet. for Cert. 42a, she also says that she reaches "far fewer people" than she did before the amendment, App. 137. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. *Id.*, at 180. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]." *Id.*, at 217.

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting

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the patients to accept it. *Id.*, at 179. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics’ driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. *Id.*, at 213, 218, 252–253. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners’ speech. As the Court of Appeals saw it, the Constitution does not accord “special protection” to close conversations or “handbilling.” 571 F. 3d, at 180. But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that “one-on-one communication” is “the most effective, fundamental, and perhaps economical avenue of political discourse.” *Meyer v. Grant*, 486 U. S. 414, 424 (1988). See also *Schenck, supra*, at 377 (invalidating a “floating” buffer zone around people entering an abortion clinic partly on the ground that it prevented protestors “from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks”). And “handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression”; “[n]o form of speech is entitled to greater constitutional protection.” *McIntyre v. Ohio Elections Comm’n*, 514 U. S. 334, 347 (1995). See also *Schenck, supra*, at 377 (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment”). When the government makes it more difficult to engage in these modes of com-

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munication, it imposes an especially significant First Amendment burden.<sup>5</sup>

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of “protest”—such as chanting slogans and displaying signs—outside the buffer zones. Brief for Respondents 50–54. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners’ testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be “seen and heard” by women within the buffer zones. *Id.*, at 51–53. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.

Finally, respondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the

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<sup>5</sup>As a leading historian has noted:

“It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form.” B. Bailyn, *The Ideological Origins of the American Revolution* 2 (1967).

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clinics' private lots. *Id.*, at 52. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' *doorways*, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

## B

## 1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics.<sup>6</sup> That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment “[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry

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<sup>6</sup>*Amici* do identify five localities with laws similar to the Act here. Brief for State of New York et al. as *Amici Curiae* 14, n. 7.

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to or exit from a reproductive health care facility.” Mass. Gen. Laws, ch. 266, §120E½(e).<sup>7</sup> If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. §248(a)(1), which subjects to both criminal and civil penalties anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person 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.” Some dozen other States have done so. See Brief for State of New York et al. as *Amici Curiae* 13, and n. 6. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.” N. Y. C. Admin. Code §8–803(a)(3) (2014).<sup>8</sup>

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. See App. 18, 41, 51, 88–89, 99, 118–119. That is, however, an example of its failure to look to less intru-

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<sup>7</sup>Massachusetts also has a separate law prohibiting similar kinds of conduct at any “medical facility,” though that law, unlike the Act, requires explicit notice before any penalty may be imposed. Mass. Gen. Laws, ch. 266, §120E.

<sup>8</sup>We do not “give [our] approval” to this or any of the other alternatives we discuss. *Post*, at 4. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term “harassment” had been authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by JUSTICE SCALIA.

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sive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, e.g., Worcester, Mass., Revised Ordinances of 2008, ch. 12, §25(b) (“No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon”); Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013) (“No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)”).

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. See Mass. Gen. Laws §120E½(f); 18 U. S. C. §248(c)(1); N. Y. C. Admin. Code §§8–804, 8–805. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction “regulates the activities, and perhaps the speech, of a group,” but only “because of the group’s past *actions* in the context of a specific dispute between real parties.” *Madsen*, 512 U. S., at 762 (emphasis added). Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. See, e.g., *id.*, at 770; *Schenck*, 519 U. S., at 380–381. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

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The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. See Brief for State of New York et al. as *Amici Curiae* 14–15, and n. 10. We upheld a similar law forbidding three or more people “to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police,” *Boos*, 485 U. S., at 316 (quoting D. C. Code §22–1115 (1938))—an order the police could give only when they “reasonably believe[d] that a threat to the security or peace of the embassy [was] present,” 485 U. S., at 330 (quoting *Finzer v. Barry*, 798 F. 2d 1450, 1471 (CADDC 1986)).

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. App. 69–71, 88–89, 96, 123. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its

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interests, without excluding individuals from areas historically open for speech and debate.

## 2

Respondents have but one reply: “We have tried other approaches, but they do not work.” Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth’s allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth’s experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the “frenetic” activity in front of clinic entrances. Brief for Respondents 43. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts “tried other laws already on the books,” *id.*, at 41, they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth “tried injunctions,” *ibid.*, the last injunctions they cite date to the 1990s, see *id.*, at 42 (citing *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 677 N. E. 2d 204 (1997); *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 550 N. E. 2d 1361 (1990)). In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives we have discussed suffer from two defects: First, given the “widespread” nature of the problem, it is simply not “practicable” to rely on individual prosecutions and injunctions.

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Brief for Respondents 45. But far from being “widespread,” the problem appears from the record to be limited principally to the Boston clinic on Saturday mornings. Moreover, by their own account, the police appear perfectly capable of singling out lawbreakers. The legislative testimony preceding the 2007 Act revealed substantial police and video monitoring at the clinics, especially when large gatherings were anticipated. Captain Evans testified that his officers are so familiar with the scene outside the Boston clinic that they “know all the players down there.” App. 69. And Attorney General Coakley relied on video surveillance to show legislators conduct she thought was “clearly against the law.” *Id.*, at 78. If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. Brief for Respondents 45–47. As Captain Evans predicted in his legislative testimony, fixed buffer zones would “make our job so much easier.” App. 68.

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine

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whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.

For similar reasons, respondents' reliance on our decision in *Burson v. Freeman* is misplaced. There, we upheld a state statute that established 100-foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. 504 U. S., at 193–194. We approved the buffer zones as a valid prophylactic measure, noting that existing “[i]ntimidation and interference laws fall short of serving a State’s compelling interests because they ‘deal with only the most blatant and specific attempts’ to impede elections.” *Id.*, at 206–207 (quoting *Buckley v. Valeo*, 424 U. S. 1, 28 (1976) (*per curiam*)). Such laws were insufficient because “[v]oter intimidation and election fraud are . . . difficult to detect.” *Burson*, 504 U. S., at 208. Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle.

We also noted in *Burson* that under state law, “law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process,” with the result that “many acts of interference would go undetected.” *Id.*, at 207. Not so here. Again, the police maintain a significant presence outside Massachusetts abortion clinics. The buffer zones in *Burson* were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here.

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.<sup>9</sup>

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<sup>9</sup>Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of

## Opinion of the Court

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Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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communication. Nor need we consider petitioners' overbreadth challenge.

SCALIA, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

No. 12–1168

ELEANOR McCULLEN, ET AL., PETITIONERS *v.*  
MARTHA COAKLEY, ATTORNEY GEN-  
ERAL OF MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[June 26, 2014]

JUSTICE SCALIA, with whom JUSTICE KENNEDY and  
JUSTICE THOMAS join, concurring in the judgment.

Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, *e.g.*, *Hill v. Colorado*, 530 U. S. 703 (2000); *Madsen v. Women’s Health Center, Inc.*, 512 U. S. 753 (1994).

The second half of the Court’s analysis today, invalidating the law at issue because of inadequate “tailoring,” is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court’s analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily—or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court’s dicta (Part III) and hence see no reason to opine on its holding (Part IV).

SCALIA, J., concurring in judgment

### I. The Court’s Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today’s opinion is Part III, which concludes—in seven pages of the purest dicta—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations.<sup>1</sup> Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral “time, place, and manner” regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.

Just a few months past, the Court found it unnecessary to “parse the differences between . . . two [available] standards” where a statute challenged on First Amendment grounds “fail[s] even under the [less demanding] test.” *McCutcheon v. Federal Election Comm’n*, 572 U. S. \_\_\_, \_\_\_ (2014) (plurality opinion) (slip op., at 10). What has changed since then? Quite simple: This is an abortion case, and *McCutcheon* was not.<sup>2</sup> By engaging in constitutional dictum here (and reaching the wrong result), the

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<sup>1</sup>To reiterate, the challenged provision states that “[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway” of such a facility or within an alternative rectangular area. Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012). And the statute defines a “reproductive health care facility” as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” §120E½(a).

<sup>2</sup>The Court claims that *McCutcheon* declined to consider the more rigorous standard of review because applying it “would have required overruling a precedent.” *Ante*, at 11. That hardly distinguishes the present case, since, as discussed later in text, the conclusion that this legislation escapes strict scrutiny does violence to a great swath of our First Amendment jurisprudence.

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majority can preserve the ability of jurisdictions across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring standards applied in Part IV of the majority’s opinion.

The Court cites two cases for the proposition that “[i]t is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive.” *Ante*, at 10–11 (citing *Bartnicki v. Vopper*, 532 U. S. 514, 526–527 (2001); *Holder v. Humanitarian Law Project*, 561 U. S. 1, 25–28 (2010)). Those cases provide little cover. In both, there was no disagreement among the Members of the Court about whether the statutes in question discriminated on the basis of content.<sup>3</sup> There was thus little harm in answering the constitutional question that was “logically antecedent.” *Ante*, at 10. In the present case, however, content neutrality is far from clear (the Court is divided 5-to-4), and the parties vigorously dispute the point, see *ibid.* One would have thought that the Court would avoid the issue by simply assuming without deciding the logically antecedent point. We have done that often before. See, e.g., *Herrera v. Collins*, 506 U. S. 390, 417 (1993); *Regents of Univ. of Mich. v. Ewing*, 474 U. S. 214, 222–223 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U. S. 78, 91–92 (1978).

The Court points out that its opinion goes on to suggest

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<sup>3</sup>See *Bartnicki*, 532 U. S., at 526 (“We agree with petitioners that §2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability”); *id.*, at 544 (Rehnquist, C. J., dissenting) (“The Court correctly observes that these are ‘content-neutral law[s] of general applicability’” (brackets in original)); *Humanitarian Law Project*, 561 U. S., at 27 (“[Section] 2339B regulates speech on the basis of its content”); *id.*, at 45 (BREYER, J., dissenting) (“[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications ‘strictly’”).

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(in Part IV) possible alternatives that apply only at abortion clinics, which therefore “raises the question whether those provisions are content neutral.” *Ante*, at 11. Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to “consider an ordinance such as the one adopted in New York City that . . . makes it a crime ‘to follow and harass another person within 15 feet of the premises of a reproductive health care facility.’” *Ante*, at 24 (quoting N. Y. C. Admin. Code §8–803(a)(3) (2014)). Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time (only at “reproductive health care facilit[ies],” of course) for so vague an offense as “follow[ing] and harass[ing].” It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

## II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction—and that we must therefore evaluate it through the lens of strict scrutiny.

### A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech

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because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a “special position in terms of First Amendment protection.” *Ante*, at 8 (quoting *United States v. Grace*, 461 U. S. 171, 180 (1983)). Moreover, “the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court’s decisions, a forum of last resort for those who oppose abortion.” *Hill*, 530 U. S., at 763 (SCALIA, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it “may disproportionately affect speech on certain topics,” so long as it is “justified without reference to the content of the regulated speech.” *Ante*, at 12 (internal quotation marks omitted). But the cases in which the Court has previously found that standard satisfied—in particular, *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and *Ward v. Rock Against Racism*, 491 U. S. 781 (1989), both of which the majority cites—are a far cry from what confronts us here.

*Renton* upheld a zoning ordinance prohibiting adult motion-picture theaters within 1,000 feet of residential neighborhoods, churches, parks, and schools. The ordi-

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nance was content neutral, the Court held, because its purpose was not to suppress pornographic speech *qua* speech but, rather, to mitigate the “secondary effects” of adult theaters—including by “prevent[ing] crime, protect[ing] the city’s retail trade, [and] maintain[ing] property values.” 475 U. S., at 47, 48. The Court reasoned that if the city “had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.” *Id.*, at 48 (quoting *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 82, n. 4 (1976) (Powell, J., concurring in part)). *Ward*, in turn, involved a New York City regulation requiring the use of the city’s own sound equipment and technician for events at a bandshell in Central Park. The Court held the regulation content neutral because its “principal justification [was] the city’s desire to control noise levels,” a justification that “ha[d] nothing to do with [the] content” of respondent’s rock concerts or of music more generally. 491 U. S., at 792. The regulation “ha[d] no material impact on any performer’s ability to exercise complete artistic control over sound quality.” *Id.*, at 802; see also *id.*, at 792–793.

Compare these cases’ reasons for concluding that the regulations in question were “justified without reference to the content of the regulated speech” with the feeble reasons for the majority’s adoption of that conclusion in the present case. The majority points only to the statute’s stated purpose of increasing “public safety” at abortion clinics, *ante*, at 12–13 (quoting 2007 Mass. Acts p. 660), and to the additional aims articulated by respondents before this Court—namely, protecting “patient access to healthcare . . . and the unobstructed use of public sidewalks and roadways,” *ante*, at 13 (quoting Brief for Respondents 27). Really? Does a statute become “justified without reference to the content of the regulated speech” simply because the statute itself and those defending it in

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court *say* that it is? Every objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute’s peculiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. See *ante*, at 26, 28. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently “tailored” to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute “restrict[s] more speech than necessary” in light of the problems that it allegedly addresses, *ante*, at 14–15, is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority

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distorts not only the First Amendment but also the ordinary logic of probative inferences.

The structure of the Act also indicates that it rests on content-based concerns. The goals of “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways,” Brief for Respondents 27, are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for “[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” §120E½(e). As the majority recognizes, that provision is easy to enforce. See *ante*, at 28–29. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court’s fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to 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.” §120E½(b) (West 2000). As the majority acknowledges, that provision was “modeled on a . . . Colorado law that this Court had upheld in *Hill*.” *Ante*, at 2. And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called “[t]he unwilling listener’s interest in avoiding unwanted communication.” 530 U. S., at 716. The Court held that interest to be content neutral. *Id.*, at 719–725.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens’ supposed

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right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. See Pet. for Cert. i. (stating second question presented as "If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled"); 570 U. S. \_\_\_\_ (2013) (granting certiorari without reservation). The majority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, see 530 U. S., at 741–765 (SCALIA, J.); *id.*, at 765–790 (KENNEDY, J.), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence.<sup>4</sup> Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill*: It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from . . . '[l]isteners' reactions to speech," *ante*, at 13 (quoting *Boos v. Barry*, 485 U. S. 312, 321 (1988) (brackets in original)), and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has

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<sup>4</sup>"*Hill* . . . is inexplicable on standard free-speech grounds[,] and . . . it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave." Constitutional Law Symposium, Professor Michael W. McConnell's Response, 28 *Pepperdine L. Rev.* 747 (2001). "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id.*, at 750 (remarks of Laurence Tribe). The list could go on.

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*sub silentio* (and perhaps inadvertently) overruled *Hill*. The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

#### B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts “employees or agents” of an abortion clinic “acting within the scope of their employment,” §120E½(b)(2).

It goes without saying that “[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional.” *Thomas v. Chicago Park Dist.*, 534 U. S. 316, 325 (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision “draw[s] . . . distinctions on its face,” *ante*, at 12, and instead proceeds directly to the purpose-related prong, see *ibid.*, asking whether the exemption “represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people,” *ante*, at 15 (internal quotation marks omitted). I disagree with the majority’s negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—“license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R. A. V. v. St. Paul*, 505 U. S. 377, 392 (1992).

Is there any serious doubt that *abortion-clinic employees or agents* “acting within the scope of their employment” near clinic entrances may—indeed, often will—speak in

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favor of abortion (“You are doing the right thing”)? Or speak in opposition to the message of abortion opponents—saying, for example, that “this is a safe facility” to rebut the statement that it is not? See Tr. of Oral Arg. 37–38. The Court’s contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic employee sent out to “escort” prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor’s pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as “the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.” *Ante*, at 16. I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.

The Court takes the peculiar view that, so long as the clinics have not specifically authorized their employees to speak in favor of abortion (or, presumably, to impede antiabortion speech), there is no viewpoint discrimination. See *ibid.* But it is axiomatic that “where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[,] they are presumed to have been used in that sense unless the context compels to the contrary.” *Standard Oil Co. of N. J. v. United States*, 221 U. S. 1, 59 (1911). The phrase

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“scope of employment” is a well-known common-law concept that includes “[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer’s business.” Black’s Law Dictionary 1465 (9th ed. 2009). The employer need not specifically direct or sanction each aspect of an employee’s conduct for it to qualify. See Restatement (Second) of Agency §229 (1957); see also Restatement (Third) of Agency §7.07(2), and Comment *b* (2005). Indeed, employee conduct can qualify even if the employer specifically forbids it. See Restatement (Second) §230. In any case, it is implausible that clinics would bar escorts from engaging in the sort of activity mentioned above. Moreover, a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.

There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. See *post*, at 1–2 (ALITO, J., concurring in judgment). Indeed, as the majority acknowledges, the trial record includes testimony that escorts at the Boston clinic “expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways,” including by calling them “crazy.” *Ante*, at 7, 16 (citing App. 165, 168–169, 177–178, 189–190). What a surprise! The Web site for the Planned Parenthood League of Massachusetts (which operates the three abortion facilities where petitioners attempt to counsel women), urges readers to “Become a Clinic Escort Volunteer” in order to “provide a safe space for patients by escorting them through protestors to the health center.” Volunteer and Internship Opportunities, online at <https://>

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plannedparenthoodvolunteer.hire.com/viewjob.html?optlink-view=view-28592&ERFormID=newjoblist&ERFormCode=any (as visited June 24, 2014, and available in Clerk of Court’s case file). The dangers that the Web site attributes to “protestors” are related entirely to speech, not to safety or access. “Protestors,” it reports, “hold signs, try to speak to patients entering the building, and distribute literature that can be misleading.” *Ibid.* The “safe space” provided by escorts is protection from that speech.

Going from bad to worse, the majority’s opinion contends that “the record before us contains insufficient evidence to show” that abortion-facility escorts have actually spoken in favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. *Ante*, at 18. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing.<sup>5</sup>

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<sup>5</sup>The Court states that I can make this assertion “only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges.” *Ante*, at 18, n. 4. That is not so. The sentence in question appears in a paragraph immediately following rejection of the facial challenge, which begins: “It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones.” *Ante*, at 17. And the prior discussion regarding the facial challenge points to the fact that “[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones.” *Ante*, at 16. To be sure, the paragraph in question then goes on to concede only that the statute’s constitutionality *as applied* would depend upon

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## C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent “the least restrictive means” of furthering “a compelling Government interest.” *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) (internal quotation marks omitted). Respondents do not even attempt to argue that subsection (b) survives this test. See *ante*, at 10. “Suffice it to say that if protecting people from unwelcome communications”—the actual purpose of the provision—“is a compelling state interest, the First Amendment is a dead letter.” *Hill*, 530 U. S., at 748–749 (SCALIA, J., dissenting).

## III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court’s opinion—whether the statute is “‘narrowly tailored to serve a significant governmental interest,’” *ante*, at 18 (quoting *Ward*, 491 U. S., at 796 (internal quotation marks omitted)). I suppose I *could* do so, taking as a given the Court’s erroneous content-neutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half

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explicit clinic authorization. Even that seems to me wrong. Saying that voluntary action by a third party can cause an otherwise valid statute to violate the First Amendment as applied seems to me little better than saying it can cause such a statute to violate the First Amendment facially. A statute that punishes me for speaking unless *x* chooses to speak is unconstitutional facially and as applied, without reference to *x*’s action.

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and the arguably correct half of the Court’s analysis to the majority.

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The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to “protect” prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

ALITO, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

No. 12–1168

ELEANOR McCULLEN, ET AL., PETITIONERS *v.*  
MARTHA COAKLEY, ATTORNEY GEN-  
ERAL OF MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[June 26, 2014]

JUSTICE ALITO, concurring in the judgment.

I agree that the Massachusetts statute at issue in this case, Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012), violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, see *ante*, at 10, and I believe the law clearly discriminates on this ground.

The Massachusetts statute generally prohibits any person from entering a buffer zone around an abortion clinic during the clinic’s business hours, §120E½(c), but the law contains an exemption for “employees or agents of such facility acting within the scope of their employment.” §120E½(b)(2). Thus, during business hours, individuals who wish to counsel against abortion or to criticize the particular clinic may not do so within the buffer zone. If they engage in such conduct, they commit a crime. See §120E½(d). By contrast, employees and agents of the clinic may enter the zone and engage in any conduct that falls within the scope of their employment. A clinic may direct or authorize an employee or agent, while within the zone, to express favorable views about abortion or the clinic, and if the employee exercises that authority, the employee’s conduct is perfectly lawful. In short, petitioners and other critics of a clinic are silenced, while the

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clinic may authorize its employees to express speech in support of the clinic and its work.

Consider this entirely realistic situation. A woman enters a buffer zone and heads haltingly toward the entrance. A sidewalk counselor, such as petitioners, enters the buffer zone, approaches the woman and says, “If you have doubts about an abortion, let me try to answer any questions you may have. The clinic will not give you good information.” At the same time, a clinic employee, as instructed by the management, approaches the same woman and says, “Come inside and we will give you honest answers to all your questions.” The sidewalk counselor and the clinic employee expressed opposing viewpoints, but only the first violated the statute.

Or suppose that the issue is not abortion but the safety of a particular facility. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee may not enter the buffer zone to warn about the clinic’s health record, but an employee may enter and tell prospective clients that the clinic is safe.

It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.

The Court holds not only that the Massachusetts law is viewpoint neutral but also that it does not discriminate based on content. See *ante*, at 11–15. The Court treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral. See, *e.g.*, *Turner Broadcast-*

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*ing System, Inc. v. FCC*, 512 U. S. 622, 645–646 (1994).

In this case, I do not think that it is possible to reach a judgment about the intent of the Massachusetts Legislature without taking into account the fact that the law that the legislature enacted blatantly discriminates based on viewpoint. In light of this feature, as well as the overbreadth that the Court identifies, see *ante*, at 23–27, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth’s asserted interests.