No. 12-1168

IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a state government make standing on the street illegal?

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INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates everyone's fundamental right to be in a public place. One of America's iconic poets, Walt Whitman, once celebrated the egalitarian nature of America's public spaces with these words:

> You road I enter upon and look around, I believe you are not all that is here,
>
> I believe that much unseen is also here.
>
> Here the profound lesson of reception, nor preference nor denial,
>
> The black with his woolly head, the felon, the diseas'd, the illiterate person, are not denied;

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* made a monetary contribution its preparation or submission.

> The birth, the hasting after the physician, the beggar's tramp, the drunkard's stagger, the laughing party of mechanics,
>
> The escaped youth, the rich person's carriage, the fop, the eloping couple,
>
> The early market-man, the hearse, the moving of furniture into the town, the return back from the town,
>
> They pass, I also pass, any thing passes, none can be interdicted,
>
> None but are accepted, none but shall be dear to me.

Walt Whitman, "Song of the Open Road," in *Leaves of Grass* 121 (Signet Classics 2005) (1855).

SUMMARY OF ARGUMENT

Despite appearances, this case isn't about abortion. It's about free speech and an unprecedented attempt by the Commonwealth of Massachusetts to deprive the majority of its citizens of their right to public presence, undermining the equality Whitman praised. Indeed, without the veneer of that particular subject, this case would be easy. If Nazis protesting outside synagogues were the object of this unprecedented law, federal judges would quickly identify the statute as an unconstitutional content-based abridgement of First Amendment rights.

Yet this Court need not even reach the First Amendment issue to decide this case in accordance with the principles of liberty upon which our modern liberal society was founded. There is a philosophically prior fundamental principle upon

which this case can be decided: the right to peaceful presence in public places.

The right to public presence is integral to a free society. It is a right upon which other rights, such as assembly, depend. Although public places can have many rules that circumscribe permitted uses—from anti-loitering laws to park-closure times—these restrictions must be justified against the presumption of equal public access that is inherent in the very term "public property." Massachusetts's law is neither sufficiently justified nor sufficiently tailored to defeat that presumption.

The state recognizes that the effect and intent of its 35-foot "zone of exclusion" has been to restrict the speech and assembly rights of those who wish to picket outside of abortion clinics. The state's argument, accepted by the court of appeals below, is that, while the law *does* restrict free speech, it's a time-place-manner restriction that satisfies intermediate scrutiny under this Court's precedent in *Hill v. Colorado*, 530 U.S. 703 (2000). This logic is flawed, not only because of the petitioner's point that the law is *not* content-neutral, Pet. Br. at 19, but because the legislature made no attempt to restrict the scope of the law. *Hill* was a far narrower law that targeted a specifically problematic behavior pattern.

Yet even if the law passes scrutiny as a time-place-manner regulation, its breadth brings it into conflict with the right to peacefully enter, travel through, and occupy public places. Because the statute significantly infringes on that right—and it hasn't been narrowly tailored to serve a compelling state interest—the law violates the Fourteenth Amendment's protection of substantive due process.

ARGUMENT

I. THE RIGHT TO PUBLIC PRESENCE IS FUNDAMENTAL

The right of public presence can be defined as the freedom of individuals to enter and make use of public spaces and property so long as they do not harm others, or impair their equally peaceful use of the space. This is the right of a parent and child to play catch in a public park, and the right of a Supreme Court justice to stroll outside the court building with his or her clerks while discussing the docket. This is the right of someone to sit on a bench and read a paper, or to simply stand on the sidewalk and appreciate a city's skyline. Public presence protects not just the right of a speaker to stand on a street corner and preach, but of each member of the audience to stand there and listen.

This Court has established three independent but related tests to determine whether a right qualifies for protection under the doctrine of substantive due process. Under the majority's test in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the rights explicitly enshrined in the Constitution cast "penumbras" of protection over secondary rights, which, while not themselves named in the text, must be protected if citizens are to have full and effective enjoyment of those rights that are. A second test, articulated by Justice Harlan II in *Griswold*, holds that the Fourteenth Amendment protects those fundamental rights implicit in our understanding of "ordered liberty." *Id.* at 500 (Harlan, J., concurring). A third test, first articulated explicitly in *Moore v. East Cleveland*, 431 U.S. 494, 500-06 (1977) protects those rights that are "deeply rooted" in the nation's

history and traditions. While it has historically only been necessary for a putative fundamental right meet the standards set by any *one* of these three tests to merit strict scrutiny—and *amicus* takes no position, for purposes of this brief, on which test it believes to be most faithful to the Constitution—the right of public presence clearly satisfies all three.

A. THE RIGHT TO PUBLIC PRESENCE IS PROTECTED BY THE "PENUMBRAS" OF THE BILL OF RIGHTS

The *Griswold* majority, extrapolating from earlier cases where the Court protected rights not expressly mentioned in the Constitution—such as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) ("the right to educate one's children as one chooses") and *Martin v. Struthers*, 319 U.S. 141 (1943) (finding the freedoms of speech and of the press include the right to read, receive, and distribute written materials)—held "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The liberties or "peripheral" rights that fall within those penumbras are granted the same level of protection as the primary rights which they protect and enrich.

Examples given by the *Griswold* majority included the fact that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach—indeed, the freedom of the entire university community.

Without those peripheral rights, the specific rights would be less secure." *Id.* at 483.

But just as the freedoms of speech and of the press would be devalued if these peripheral rights were not protected, the right of an individual to physically *be* in public is a necessary part of the freedoms of speech, assembly, association, and interstate travel. Most obviously, the right of an individual to be in public is a necessary precursor to the right of a *group* of individuals to assemble in public *together*—otherwise, an oppressive state could arrest individuals on their way to a protest, *before* they are "assembled," without violating that constitutional right. *Cf. McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring and dissenting in part) ("To a government bent on suppressing speech, . . . Control any cog in the machine, and you can halt the whole apparatus. . . . Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.").

Similarly, if one doesn't have a right to access and use public places, the state could put conditions on admittance, such as how other "privileges" can be conditioned on acceptance of certain rules and restrictions, including restrictions on speech. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (holding that where the public has no right to enter publicly owned property, the government can condition admission and continued presence on an individual not exercising his First Amendment rights); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (holding that in non-public forums the government can legitimately exclude speakers based

on their political viewpoints); *cf. Rust v. Sullivan*, 500 U.S. 173 (1991) (holding generally that the government can require recipients of discretionary benefits and opportunities to abstain from certain types of First Amendment activity).

The right to speak freely is next to useless if its protected exercise is restricted to private property. In *Aptheker v. Secretary of State*, Justice William O. Douglas wrote that the freedom of movement "often makes all other rights meaningful. . . . Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person." 378 U.S. 500, 520 (1964) (Douglas, J., concurring). This argument applies with equal if not greater strength to freedom of physical presence, which is a *sine qua non* for free movement. And as Justice Douglas hinted, if governments had an unrestricted power to ban individuals, classes, or the entire population from being physically present on public property, they could effectively sentence anyone or everyone to permanent house arrest.

If this Court holds that there is no constitutionally protected right to peacefully be physically present on public property it could create a precedent establishing that those who cannot afford to either purchase or rent private property have no right to physically reside *anywhere*. Such a holding would tacitly endorse a nation-wide campaign by state and local government to effectively criminalize homelessness, a campaign which courts have held violates the constitutional rights of the homeless. In *Pottinger v. Miami*, 810 F. Supp. 1583 (S.D. Fla. 1992), the district court recognized that, because homeless people may have

no other choice but to sleep in public spaces, criminal prohibition severely impairs their ability to travel within cities, between cities, and between states, an argument similar to that which this Court endorsed in *Heart of Atlanta Motel v. United States*, when it recognized that a lack of overnight accommodation effectively restricted the ability of blacks to travel between states. 379 U.S. 241, 257 (1964).

B. THE RIGHT TO PUBLIC PRESENCE IS IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY

In *Palko v. Connecticut*, this Court held that the Due Process Clause protects those fundamental rights and freedoms which are "implicit in the concept of ordered liberty," or "of the very essence of a scheme of ordered liberty." 302 U.S. 319, 325 (1937). While the Court did not define the "concept of ordered liberty," it did say that its content "has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." *Id.* at 328. In *Loving v. Virginia*, "fundamental freedoms" and the "basic civil rights of man" were identified as those "vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. 1, 12 (1967). If these are the characteristics by which the Court defines ordered liberty, Justice Thurgood Marshall was correct when, dissenting from a denial of certiorari, he recognized, in the context of a curfew, that the "freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'" *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 964-65 (1976) (Marshall, J., dissenting from denial of cert.).

This Court in *Loving* called marriage a "vital personal right essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. This is true, but public presence is even more essential. While one can live a happy life without ever marrying—and many do—our everyday lives would completely collapse if we didn't have the right to make reasonable use of public property.

Deeply influenced by classical liberal philosophers, the Framers had a rich appreciation of "liberty" that went beyond freedom from incarceration and embraced a wider conception of free will and autonomy. After breaking away from an oppressive monarchy, they established the Republic as a social compact designed to guarantee its citizens the greatest possible mutually compatible liberty. The basic premise of that compact is that unless an individual's exercise of his natural freedom harms either his peers or the state itself, he is to be free of political and legal restraint. The right to use property owned by nobody, or by everyone in common, in a manner that doesn't deprive others of that same opportunity, is clearly an aspect of the liberty envisioned by the Framers and by Justice Cardozo in *Palko*.

C. THE RIGHT TO PUBLIC PRESENCE IS DEEPLY ROOTED IN THE NATION'S HISTORY AND TRADITIONS

This Court has consistently protected rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Several cases have highlighted the fact that various

aspects of the right to public presence are part of the liberty Americans have historically enjoyed.

In *Hague v. CIO*, the Court noted that the use of public places for the purposes of gatherings and communication "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." 307 U.S. 496, 515-16 (1939). In *United States v. Wheeler*, the Court highlighted the pre-Articles of Confederation roots of the right: "In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, [and] to move at will from place to place therein." 254 U.S. 281 (1920). The Court in *Kent v. Dulles* not only explicitly found the right to be a component of the liberty protected by the Fifth Amendment, it found that its pedigree extends back to Magna Carta and concluded that "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." 357 U.S. 116, 125-26 (1958).

The Court in *Papachristou v. City of Jacksonville* was especially concerned with the importance of the traditional rights to use public spaces:

> these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. *These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be*

> *nonconformists and the right to defy submissiveness.* They have encouraged lives of high spirits rather than hushed, suffocating silence. They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.

405 U.S. 156, 164 (1972) (emphasis added). Moreover, Massachusetts's own supreme court has recognized that the state's Declaration of Rights implicitly guarantees individuals "a fundamental right of free movement" in public. *Commonwealth v. Weston*, 455 Mass. 24, 26 (2009).

Arbitrary zones of exclusion, like the one here, go against the very core of the traditional distinction between public and private property. The right of abortion clinics (or any private-property owner) to bar protesters or any individual from their premises is not in question. But abortion clinics—and abortion clinics alone—cannot be allowed to extend a form of quasi-ownership over *public* property, especially property that constitutes a public forum and has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515. Such a selective extension of the private domain violates not just the trust the government owes to the public but the American tradition of equality before the law. Just as an abortion clinic's licensees (clients and staff) are protected against trespassing charges when they're on the clinic's private property, they are now also

given special rights in the zone of exclusion that aren't extended to any other member of the public.

In the same way that other essential public institutions—like courts and polling stations—must be open on an equal footing to all members of the public, so must public fora. Creating classes of favored or marginalized speakers, or favored or marginalized occupants, is incompatible with the Constitution's guarantee of equal protection.[2]

II. THE STATE'S ASSERTED INTERESTS ARE NOT COMPELLING

At the court below, and in its initial brief before this Court, Massachusetts claimed that the law was justified by the state's "significant" interests in protecting "public safety and patient access to medical care." Resp. Br. in Opp'n to Cert. at i.

In prior cases concerning the limitation of free speech and association rights in proximity to abortion clinics, this Court has noted that states have significant interests "in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen v. Women's Health Ctr.*, 512 U.S.753, 767 (1994), and in

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[2] This point hardly needs support, but one particularly apt precedent come from the Fourth Circuit, which has noted that a law which unevenly restricts or permits access to a public forum based on the identity or affiliation of the speaker cannot rightly be considered a "reasonable time, place, or manner restriction." *Warren v. Fairfax County* 196 F.3d 186,198 (4th Cir. 1999). That court rejected a law which restricted access to a park to residents or employees of Fairfax County, holding that such arbitrary limitations "balkanize" civic dialogue. *Id.* at 199.

protecting patients from "potential trauma . . . associated with confrontational protest." *Hill v. Colorado* 530 U.S. 703, 715 (2000). In this context, not one of these interests provides a compelling reason to restrict the right of Massachusetts citizens to public presence. The passive presence of persons within 35 feet of an abortion clinic doesn't pose a risk to public safety or hinder patient access. Nor does the presence of peaceful protesters or sidewalk counselors—let alone uninterested third parties—unlawfully impair a woman's right to seek an abortion, or cause her trauma.

A. PEACEFUL PUBLIC PRESENCE DOES NOT THREATEN PUBLIC SAFETY OR IMPAIR PATIENTS' ACCESS TO CLINICS

The mere presence of individuals within 35 feet of a clinic doesn't create a threat to public safety. Any argument to the contrary is undermined by the law's exemptions for clinic visitors, staff, government agents, and members of the public using a sidewalk or road for the sole purpose of traveling past the clinic. If a series of pedestrians passing a clinic within the zone of exclusion doesn't pose a risk to public safety, then a single protester, walking back and forth on the same sidewalk while carrying a sign reading "I think abortion is wrong" doesn't either—certainly not to the point where the state can ban anyone who might want to, say, sit on the grass outside a clinic and have a picnic. There's nothing inherently dangerous about human bodies or abortion clinics, or their interaction, that necessitates keeping them at least 35 feet apart.

Massachusetts argues that the law was passed because "protesters regularly barred access to clinics by physically blocking doors and driveways." Resp. Br. in Opp'n to Cert. at 5. Maintaining access to medical facilities can be a compelling state interest, to be sure, but it would only justify a law against blockading clinic access points. The state has not shown—and, due to the fundamental nature of the right at issue, should not be taken at its word in asserting—that standing within 35 feet of a clinic limits physical access to it. *United States v. Carolene Products*, 304 U.S. 144, n.4 (1938) (explaining that there is a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face [to violate a fundamental right]").

While protecting public safety and ensuring access to medical facilities are both recognized as legitimate state interests, this Court has always required not just that the state assert a legitimate interest, but that the law has some rational connection the claimed interest. *Id.* at 153 (holding that legislators must have at least a rational basis for believing a law will further a legitimate end); *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (noting that one purpose of strict scrutiny "is to ensure that the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the [law's] motive was illegitimate"(internal citations omitted)); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding a law unconstitutional because "its sheer breadth [was] so discontinuous with the reasons offered for it"); *Cleburne v. Cleburne Living Center Inc.,* 473 U.S. 432, 441 ("[T]he Equal Protection Clause requires [that a law be] a rational means to serve a legitimate end."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)

(striking down a law because it "further[ed] no legitimate state interest").

There is no clear causal relationship between peaceful (and otherwise lawful) physical proximity to clinics and the circumstances that might pose a safety risk or limit access to them. The state's interest in preventing both those ills cannot justify a law that targets mere physical presence.

B. PEACEFUL PUBLIC PRESENCE DOES NOT UNLAWFULLY RESTRICT WOMEN'S RIGHT TO SEEK MEDICAL CARE AT ABORTION CLINICS OR TRAUMATIZE PATIENTS

Massachusetts claims that some percentage of clinic clients opted not to go through with an appointment and reported "feeling too intimidated by the pacing protesters to enter." Resp. Br. in Opp'n to Cert. at 6. But even assuming *arguendo* that the presence of protesters (or even disinterested third-party observers) did chill a significant percentage of women from seeking abortions (or abortions at a specific clinic), the state simply doesn't have a compelling interest in preventing people from using nonviolent means to discourage behavior they find immoral, or to persuade others to choose between two equally lawful courses of action. Picketing has historically been used as a means of shaming a targeted business, and discouraging potential clients. The fact that a business offers medical care doesn't sufficiently change the nature of the activity to justify the state's involvement. Moreover, *Bray v. Alexandria Women's Health Clinic* established that while a woman's right to choose is protected against

government interference, the Constitution doesn't protect it against *private* encroachment. 506 U.S. 263 (1993). By preventing patients from being exposed to messages that might dissuade them from patronizing abortion clinics, the state violates its obligation to respect the constitutionally protected freedoms of speech, assembly, and public presence

A related justification for the zone of exclusion is the fear that exposure to anti-abortion protesters would traumatize clinic patients. Massachusetts offered no empirical evidence to support this claim, but a study conducted by the University of California at San Francisco found that, of those patients who notice protesters (less than half), 25 percent thought the protesters "a little" upsetting and only 16 percent reported being "quite a lot" or "extremely" upset. The study also found that any distress lasted only a short time, dissipating within a week of the procedure. Diana Green Foster et al., *Effect of Abortion Protesters on Women's Emotional Response to Abortion*, 87 Contraception 81 (2013). The most that can be seriously alleged is that anti-abortion protests might cause patients emotional distress, and even this claim is dubious. The UCSF study showed that those patients who reported a negative response to protests were no more likely to experience "negative" emotions (anger, fear, sadness, regret, guilt, etc.) in connection to their abortion experiences than those who didn't notice the protesters or those who didn't find them emotionally distressing. *Id*. at 84.

Even if *every* clinic patient were emotionally distressed by protests, the state still wouldn't have a compelling reason to ban protesters. That some speech might distress, anger, or offend listeners

doesn't justify its suppression, save in very rare circumstances. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court said the government had a legitimate interest in protecting the targets of protests from intrusive and distressing speech *while they were in their homes*. This is due, the Court said, to the unique nature of the home, noting that "the home is different," and that, *in public*, the burden is on the affected individuals to ignore or avoid speech they find distressing and unpleasant. 487 U.S. 474, 484. Massachusetts's zone of exclusion flips this principle on its head, making it the state's responsibility to protect people in public spaces from possibly distressing speech. In so doing, it conflates public and private spaces, transgressing this Court's settled jurisprudence that draws a distinct line between the two. *See*, *e.g.*, *Stanley v. Georgia*, 394 U.S. 597 (1969) (First Amendment protects right to private possession of obscene material).

In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court reaffirmed that one doesn't have a right to be sheltered from even hurtful speech while in public places. If the families of dead soldiers must tolerate "outrageous" and hurtful slurs about the deceased *at their loved one's funeral* because the protesters were "on public land next to a public street," *id.* at 9, then the same can be requested of clients seeking treatment at an abortion clinic. As Chief Justice Roberts wrote in that case: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain . . . we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id.* at 15.

III. THE MASSACHUSETTS STATUTE IS NOT NARROWLY TAILORED

Even if any of Massachusetts's asserted interests could be considered compelling enough to justify restricting a fundamental right, the state's total failure to limit the collateral damage caused by the statute would still render the law unconstitutional. Specifically, by targeting *presence* as opposed to *activity* the state has criminalized a wide range of behaviors that don't threaten either public safety or the peace of mind of clinic patients and staff.

Massachusetts also maintains that the 35-foot exclusion zone was only adopted because it was easier to enforce than a prior less-restrictive law modeled after the behavior-restricting (but presence-permitting) statute upheld in *Hill*. Rather than strengthening the state's case, this admission undercuts any claim it can make to narrow-tailoring. This Court's precedents are clear: the fact that a less-restrictive law is more difficult to enforce isn't a defense to a charge of overbreadth under strict-scrutiny analysis. *See*, *e.g.*, *Sable Communications v. FCC,* 492 U.S. 115, 126 (1989).

In *Frisby,* Justice John Paul Stevens was concerned that a law prohibiting targeted picketing was overly broad because its wide definition of "picketing" covered a fifth-grader standing outside a sick classmate's house with a sign that read "GET WELL CHARLIE" 487 U.S. at 496 (Stevens, J., dissenting). Given that even prohibitions on specific behaviors can be overly broad if drafted imprecisely, a total ban on *all* behavior will clearly sweep in legitimate, constitutionally protected conduct that in no way imperil public safety or the physical well-

being of clinic patients. No reasonable person could believe that a Girl Scout selling cookies, a Salvation Army Santa fundraising, or a busker playing guitar 34 feet from an abortion clinic poses a risk to public safety, yet doesn't at 36 feet. On the other hand, no reasonable person could deny that a group of aggressive protesters mobbing patients, or rocking clinic staff's cars, pose a safety risk *no matter how far they are from the clinic*.

Many statutes specifically prohibit unruly and disruptive behavior outside the 35-foot zone, but Massachusetts has failed to show why such narrowly tailored statutes wouldn't be sufficiently effective within 35 feet. Targeting specifically problematic behaviors—rather than declaring an entire area "off limits" for every conceivable purpose—is not only less invasive and oppressive, but it's also a more effective way of serving the state's asserted interests.

A zone of exclusion will prevent an untold number of people from exercising their constitutionally protected right to peaceful public presence. Relatively few people will move from peaceful communication to illegitimate disruption and violence, yet the actions that do cross that line are already unlawful and subject to criminal or civil penalty, or both. The state draws attention to anecdotal accounts of patients feeling "terrified" or "intimidated" by protestors or, before passage of the new law, being physically prevented from entering clinics. These behaviors clearly threaten public safety, so the state properly recognized them as crimes long before the advent of the statute at issue.

In other words, when intimidation rises to the level of assault or harassment, it's a crime. Touching

another person without their consent is battery, even if it's just to get their attention or to block them from getting past you. And blocking access to medical facilities of any kind is prohibited by the section of Massachusetts's General Laws that directly precedes the law that creates the zone of exclusion. Mass. Gen. Laws ch. 266, § 120(e). The state has long proscribed the use or threatened use of force by private actors to deprive citizens of their protected rights, including the right to have an abortion. Mass. Gen. Laws ch. 265, § 37. Those laws properly target the behavior that the state has a legitimate interest in stopping.

In a democracy, individuals are free to try and persuade one another regarding lawful courses of action without the use of force. Since illegitimate coercion is *already* a crime in Massachusetts, the law creating the zone of exclusion serves only to criminalize legitimate, non-coercive behaviors that are rightly outside the scope of § 37 and § 120(e)—and to infringe upon the right to peaceful public presence. How can a law that only serves to criminalize behavior which is *not* aggressive or harmful—and would not be considered improper two feet farther away—be considered narrowly tailored?

Just as New York City, to deter littering, couldn't forbid anyone but staff and police from entering Central Park or using its serpentine rights of way, Massachusetts can't maintain zones of exclusion that implicate sidewalks and other public areas. These spaces exist to be used and enjoyed by everyone. If specific antisocial and disruptive behavior makes it impossible or dangerous for the general public to use such an area, the appropriate response is to regulate or punish that behavior. Banning the *public* from a

public space to protect them from undesirable or unsafe behavior in that space is like amputating an arm to stop a paper-cut from bleeding. The problem's been solved, but no one could accuse the physician of subtlety or restraint. The occasional problems created by unruly protesters—whether outside abortion clinics, government buildings, or nuclear power plants—call for a scalpel, not an axe.

CONCLUSION

For the reasons set forth above, this Court should reverse the court below and declare the state law unconstitutional.

Respectfully submitted,

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