

No. 12-1168

IN THE
Supreme Court of the United States

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

v.

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

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

**BRIEF OF CIVIL RIGHTS ORGANIZATIONS
AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS AND AFFIRMANCE**

STEPHANIE TOTI
Counsel of Record
CENTER FOR
REPRODUCTIVE RIGHTS
120 Wall Street
14th Floor
New York, NY 10005
(917) 637-3684
stoti@reprorights.org

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. LAWS SECURING WOMEN'S SAFE PASSAGE INTO REPRODUCTIVE HEALTHCARE FACILITIES ARE PART OF A LONG TRADITION OF GOVERNMENT ACTION AIMED AT SAFEGUARDING THE EXERCISE OF FUNDAMENTAL RIGHTS FROM INTERFERENCE BY THIRD-PARTIES 4

II. MEASURES TAKEN BY THE GOVERNMENT TO PROTECT THE EXERCISE OF FUNDAMENTAL RIGHTS DO NOT CONSTITUTE CONTENT OR VIEWPOINT DISCRIMINATION MERELY BECAUSE THEIR IMPACT FALLS PRIMARILY ON INDIVIDUALS WITH A SPECIFIC SET OF BELIEFS 11

A. A Measure is Content and Viewpoint Neutral if it Regulates Non-Expressive Elements of Speech or Conduct 11

B. This Court Has Consistently Rejected Claims of Viewpoint Discrimination Based on the Disparate Impact of a Facially-Neutral Law That is Justified

Without Reference to the Expressive Content of Speech	17
III. THE MASSACHUSETTS BUFFER ZONE LAW IS A CONTENT- AND VIEWPOINT-NEUTRAL MEANS OF PROTECTING WOMEN SEEKING TO EXERCISE THEIR FUNDAMENTAL RIGHT TO ABORTION CARE FROM INTERFERENCE BY ABORTION-RIGHTS OPPONENTS.	20
A. The Massachusetts Buffer Zone Law is Facially Neutral and Distinguishable From the Colorado Buffer Zone Law at Issue in Hill	22
B. The Act Has a Neutral Justification . . .	25
C. The Commonwealth Does Not Seek to Suppress the Message of Abortion-Rights Opponents	28
CONCLUSION	30
Appendix A: Individual Statements of Interest of <i>Amici Curiae</i>	1a

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Am. Life League, Inc. v. Reno</i> , 47 F.3d 642 (4th Cir. 1995)	19
<i>Bd. of Dirs. of Rotary Int'l v. Duarte</i> , 481 U.S. 537 (1987)	14
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000)	15
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	11
<i>Bray v. Alexandria Women's Health Clinic</i> , 506 U.S. 263 (1993)	26-27
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)	6
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	4, 8, 12, 16
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	13
<i>Cheffer v. Reno</i> , 55 F.3d 1517 (11th Cir. 1995)	19
<i>Christian Legal Soc'y v. Martinez</i> , 130 S. Ct. 2971 (2010)	17, 18, 29
<i>Cox v. Louisiana</i> , 379 U.S. 536 (1965)	21
<i>Frisby v. Schultz</i> , 487 U.S. 474 (1988)	13
<i>Griffin v. Breckenridge</i> , 403 U.S. 88 (1971)	5

<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	10, 20, 22, 23, 26
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	15
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gr. of Bos.</i> , 515 U.S. 557 (1995)	15
<i>Kasper v. Brittain</i> , 245 F.2d 92 (6th Cir. 1957)	6, 15
<i>Madsen v. Women's Health Center, Inc.</i> , 512 U.S. 753 (1994)	10, 18, 25, 26-27, 28
<i>McCullen v. Coakley</i> , 708 F.3d 1 (1st Cir. 2013)	24
<i>McGuire v. Reilly</i> , 260 F.3d 36 (1st Cir. 2001)	26-27
<i>N.Y. State Club Ass'n v. City of N.Y.</i> , 487 U.S. 1 (1988)	14
<i>Norton v. Ashcroft</i> , 298 F.3d 547 (6th Cir. 2002)	18
<i>Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists</i> , 290 F.3d 1058 (9th Cir. 2002)	19
<i>Planned Parenthood of Se. Pa. v. Casey</i> , 505 U.S. 833 (1992)	9
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	11, 13, 27
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984)	14

<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	9
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995)	12
<i>Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.</i> , 547 U.S. 47 (2006)	24-25
<i>Runyan v. McCrary</i> , 427 U.S. 160 (1976)	15
<i>Schenck v. Pro-Choice Network</i> , 519 U.S. 357 (1997)	10, 26-27
<i>Terry v. Reno</i> , 101 F.3d 1412 (D.C. Cir. 1996)	19
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	13
<i>Turner Broadcasting Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994)	12, 19, 22, 29
<i>United States v. Albertini</i> , 472 U.S. 675 (1985)	24-25
<i>United States v. Dinwiddie</i> , 76 F.3d 913 (8th Cir. 1996)	19
<i>United States v. Eichman</i> , 496 U.S. 310 (1990)	13
<i>United States v. Gregg</i> , 226 F.3d 253 (3d Cir. 2000)	19
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	<i>passim</i>
<i>United States v. Soderna</i> , 82 F.3d 1370 (7th Cir. 1996)	19

<i>United States v. Weslin</i> , 156 F.3d 292 (2d Cir. 1998)	19
<i>Virginia v. Black</i> , 538 U.S. 343 (2003)	6, 13
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	18, 22
<i>Wisconsin v. Mitchell</i> , 508 U.S. 476 (1993)	14

STATUTES & LEGISLATIVE MATERIALS

18 U.S.C. § 241	5, 6
18 U.S.C. § 245	5-6
18 U.S.C. § 247	5-6
18 U.S.C. § 248	9
29 U.S.C. § 2615	7
42 U.S.C. § 1971	8
42 U.S.C. § 1973i	8
42 U.S.C. § 3617	7
California Freedom of Access to Clinic and Church Entrances Act, Cal. Penal Code §§ 423-423.6	9
Civil Rights Act of 1871, 17 Stat. 13 (now codified at 42 U.S.C. §§ 1983, 1985, and 1986)	5
Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.)	6, 7
Colo. Rev. Stat. § 18-9-122	20, 21, 22, 24
Mass. Gen. Laws ch. 12, §§ 11H-11I	5

Mass. Gen. Laws ch. 151B, §§ 1-10	7
Mass. Gen. Laws ch. 265, § 37	5-6
Mass. Gen. Laws ch. 266, § 120E1/2	<i>passim</i>
Mass. Gen. Laws ch. 272, § 98	7
N.Y. Penal Law §§ 240.70-240.73	9
S. Rep. No. 103-117 (1993)	26

OTHER AUTHORITIES

John Kifner, <i>Anti-Abortion Killings: The Overview; Gunman Kills 2 at Abortion Clinics in Boston Suburb</i> , N.Y. Times, Dec. 31, 1994	26-27
Anthony Lewis, <i>President Sends Troops to Little Rock, Federalizes Arkansas National Guard, Tells Nation He Acted to Avoid an Anarchy</i> , N.Y. Times, Sept. 24, 1957	6
Jon O. Shimabukuro <i>et al.</i> , Congressional Research Service, <i>Survey of Federal Whistleblower and Anti-Retaliation Laws</i> (2013), available at http://www.fas.org/sgp/crs/misc/R43045.pdf	8
Special Rapporteur on the Situation of Human Rights Defenders, <i>Third Rep. on the Situation of Human Rights Defenders</i> , 45, Human Rights Council, U.N. Doc. A/HRC/16/44 (Dec. 20, 2010) available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-44.pdf	8-9

INTEREST OF *AMICI*

*Amici Curiae*¹ are a coalition of organizations that have worked to advance a broad range of civil rights in the United States: Advocates for Youth, Black Women's Health Imperative, California Latinas for Reproductive Justice, Center for Reproductive Rights, Feminist Majority Foundation, Gay & Lesbian Advocates & Defenders, Legal Momentum, Mexican American Legal Defense and Educational Fund, National Advocates for Pregnant Women, National Center for Lesbian Rights, National Coalition on Black Civic Participation's Black Women's Roundtable, National Gay and Lesbian Task Force, National Latina Institute for Reproductive Health, National Organization for Women Foundation, People for the American Way Foundation, and Southern Poverty Law Center. *Amici* have a vital interest in ensuring that the government is able to protect individuals seeking to exercise their fundamental rights from interference by third-parties.

Individual statements of interest of the *Amici* are contained in Appendix A to this brief.

¹ Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person, other than *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The statute at issue in this case, Mass. Gen. Laws ch. 266, § 120E½ (the “Massachusetts Buffer Zone Law” or “Act”), seeks to secure the safe passage of women and healthcare providers into reproductive healthcare facilities. It is part of a long tradition of government action aimed at safeguarding the exercise of fundamental rights from interference by third-parties. From the Civil Rights Act of 1871 (and its state counterparts), enacted in response to a private campaign of violence and intimidation designed to prevent African-Americans from exercising the rights granted to them by the Reconstruction Amendments, to the Freedom of Access to Clinic Entrances Act of 1994 (and its state counterparts), enacted in response to a private campaign of violence and intimidation designed to prevent women from exercising the right to terminate a pregnancy, all levels of government have long recognized the importance of ensuring that all individuals are able to exercise their fundamental rights without intimidation, obstruction, or injury.

Measures taken by the government to safeguard the exercise of fundamental rights are presumptively valid under the First Amendment as long as they target the conduct of rights-opponents and not their message. Notably, a law does not constitute viewpoint discrimination merely because it has a disparate impact on individuals with a specific set of beliefs. Nor does an individual’s viewpoint-based objections to a law render it a form of viewpoint

discrimination. This Court, and the circuit courts, have consistently rejected arguments to the contrary. Were such arguments to prevail, the government would be stymied in its ability to safeguard the exercise of fundamental rights because those seeking to interfere with that exercise are usually motivated by ideology or deeply-held convictions.

The Massachusetts Buffer Zone Law is a presumptively valid means of securing safe passage for women and healthcare providers into reproductive healthcare facilities. The Act is facially neutral because it does not impose burdens or confer benefits on individuals based on the ideas expressed in their speech. To the contrary, the Act, by its terms, regulates non-expressive conduct; it prevents individuals from approaching within 35 feet of a reproductive healthcare facility entrance or driveway. Likewise, the Act has a neutral justification. It is aimed at ensuring the safe passage of women and healthcare providers into reproductive healthcare facilities by preventing people from occupying the space immediately surrounding their entrances and driveways. It does not seek to remedy harms that may arise from the *speech* of abortion-rights opponents, nor does it seek to render such speech less effective.

Given the Court's holding that a content-based, 100-foot buffer zone is a constitutionally permissible means of protecting individuals seeking to exercise a fundamental right from interference by third-

parties, see *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding the imposition of buffer zones around polling places), it follows that a content-neutral, 35-foot buffer zone is constitutionally permissible, as well.

ARGUMENT

I. LAWS SECURING WOMEN'S SAFE PASSAGE INTO REPRODUCTIVE HEALTHCARE FACILITIES ARE PART OF A LONG TRADITION OF GOVERNMENT ACTION AIMED AT SAFEGUARDING THE EXERCISE OF FUNDAMENTAL RIGHTS FROM INTERFERENCE BY THIRD-PARTIES.

The history of our Nation has entailed the progressive realization of civil rights. At the time of the Founding, many rights that we now take for granted were not recognized, and many groups within our society were denied equal protection of the laws. Over time, the struggle for civil rights has given rise to social movements seeking equal rights for people of color; women; lesbian, gay, bisexual, and transgender (LGBT) people; immigrants; religious minorities; and other communities that have historically been targets of oppression. Although they have achieved many successes, civil rights advocates have also provoked fierce opposition. From school desegregation to women in the military to marriage equality for same-sex

couples, civil rights issues have proven to be intensely controversial. In addition to sparking spirited public debate and legal advocacy, they have also sparked the use of violence, intimidation, and obstruction by those zealously committed to preventing the recognition and exercise of certain rights.

At pivotal moments in our Nation's history, the government has taken action to protect individuals seeking to exercise their rights from interference by third-parties. For example, during Reconstruction, the Civil Rights Act of 1871, 17 Stat. 13 (now codified at 42 U.S.C. §§ 1983, 1985, and 1986), was enacted in response to a private campaign of violence and intimidation designed to prevent African-Americans from exercising the rights granted to them by the Thirteenth, Fourteenth, and Fifteenth Amendments. *See Virginia v. Black*, 538 U.S. 343, 353 (2003). Among other things, the statute creates a civil remedy for private conspiracies to interfere with the exercise of constitutionally-protected rights or liberties. *See* 42 U.S.C. § 1985(3); *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971). Subsequently, Congress enacted criminal penalties for such conspiracies, *see* 18 U.S.C. § 241, and states also outlawed this conduct, *see, e.g.*, Mass. Gen. Laws ch. 12, §§ 11H-11I.²

² In addition, Congress has made it a crime to injure, intimidate, or interfere with a person seeking to exercise

In the wake of this Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the government took various steps to secure safe passage for African-American children into newly integrated schools. See, e.g., Anthony Lewis, *President Sends Troops to Little Rock, Federalizes Arkansas National Guard, Tells Nation He Acted to Avoid an Anarchy*, N.Y. Times, Sept. 24, 1957, at A1 (reporting that President Eisenhower sent federal troops to Little Rock to protect nine African-American students from “[m]obs of pro-segregationists” seeking to obstruct their access to Central High School). These steps included federal court injunctions barring opponents of integration from interfering with access to public school facilities. See, e.g., *Kasper v. Brittain*, 245 F.2d 92, 94 (6th Cir. 1957).

At the height of the Civil Rights Movement, Congress enacted the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). It contains several provisions aimed at ensuring that minorities and women are not denied equal protection of the laws by the actions of private parties. Title II, for example, outlaws discrimination in public accommodations on the basis of race, color, religion, or national origin.

certain civil rights, 18 U.S.C. § 245, as well as to obstruct someone by force or threat of force from practicing his or her religion, 18 U.S.C. § 247. Several states have followed suit. See, e.g., Mass. Gen. Laws ch. 265, § 37.

See 42 U.S.C. §§ 2000a—2000a-6. Title VII outlaws discrimination in employment and union membership on those bases as well as on the basis of sex. *See* 42 U.S.C. §§ 2000e—2000e-17. Numerous states and localities have adopted similar measures prohibiting discrimination in public accommodations and employment. *See, e.g.*, Mass. Gen. Laws ch. 272, § 98 (public accommodations); Mass. Gen. Laws ch. 151B, §§ 1-10 (employment). Some of these provide greater protections than their federal counterparts, including by expressly identifying sexual orientation as a prohibited basis for discrimination. *See, e.g.*, Mass. Gen. Laws ch. 272, § 98; Mass. Gen. Laws ch. 151B, § 4(1).

Title VII and other civil rights statutes also ban private parties from retaliating against individuals for exercising their civil rights or seeking redress for rights violations. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an individual for opposing a practice made unlawful by Title VII or participating in a proceeding under that statute); 42 U.S.C. § 3617 (prohibiting retaliation against an individual for exercising or encouraging others to exercise rights granted by the Fair Housing Act); 29 U.S.C. § 2615 (prohibiting retaliation against an individual for exercising rights granted by the Family and Medical Leave Act, opposing a practice made unlawful by that statute, or participating in a proceeding under that statute); Mass. Gen. Laws ch. 151B, §§ 4(4)-4(4A) (prohibiting retaliation against an individual for opposing practices made unlawful by Massachusetts' employment discrimination

statute, participating in a proceeding under that statute, exercising rights granted by that statute, or encouraging others to exercise rights granted by that statute); *see generally* Jon O. Shimabukuro *et al.*, Congressional Research Service, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (2013), available at <http://www.fas.org/sgp/crs/misc/R43045.pdf>.

Government has also taken measures to protect individuals seeking to exercise their right to vote from interference by third-parties. The Civil Rights Act of 1957, for example, prohibits voter intimidation. *See* 42 U.S.C. § 1971. The Voting Rights Act of 1965 strengthens that prohibition and provides protection against other polling place abuses. *See* 42 U.S.C. §§ 1973i(a)-(b). In addition, many states have enacted laws that create buffer zones around polling locations to protect voters from intimidation, confusion, and undue influence by political workers. *See Burson*, 504 U.S. at 199-205.

Laws protecting women seeking to enter reproductive healthcare facilities from interference by third-parties are a part of this tradition.³ Their

³ Such laws also serve to ensure that healthcare providers are able to enter reproductive healthcare facilities safely. Of course, without these providers, women would not be able to exercise their rights. *See* Special Rapporteur on the Situation of Human Rights Defenders, *Third Rep. on the Situation of Human Rights Defenders*, ¶ 45, Human Rights Council, U.N. Doc. A/HRC/16/44 (Dec. 20, 2010) (by Margaret Sekaggya)

goal is to ensure that women are not prevented from obtaining constitutionally-protected healthcare services by violence, obstruction, intimidation, harassment, or similar conduct.⁴ In 1994, Congress enacted the Freedom of Access to Clinic Entrances (“FACE”) Act, 18 U.S.C. § 248, in response to a campaign of violence and obstruction by abortion-rights opponents aimed at abortion providers and women seeking abortion services. The statute prohibits the use or threat of force to injure, intimidate, or interfere with a person seeking to obtain or provide reproductive healthcare services, including abortion services. *Id.*; *see also* California Freedom of Access to Clinic and Church Entrances Act, Cal. Penal Code §§ 423-423.6; N.Y. Penal Law §§ 240.70-240.73.

(noting that “medical and health professionals, by providing sexual and reproductive health services, ensure that women can exercise their reproductive rights”), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-44.pdf>.

⁴ Under the Due Process Clause of the Fourteenth Amendment, every woman has a fundamental right to terminate a pregnancy before viability. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973). In Massachusetts, as elsewhere, reproductive healthcare facilities provide a wide range of healthcare services to women, including family planning services, treatment of infertility, cancer screening, general gynecological care, and abortion services. *See* J.A. 18, 61, 77. Laws ensuring women’s safe passage into reproductive healthcare facilities safeguard not only a woman’s right to terminate a pregnancy, but also her ability to access this full spectrum of care.

Federal and state courts have also issued injunctions barring abortion-rights opponents from interfering with access to reproductive healthcare facilities, including through the imposition of buffer zone restrictions. *See, e.g., Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 770 (1994) (upholding a 36-foot buffer zone around clinic entrances and driveways ordered by a state court); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380 (1997) (upholding a 15-foot buffer zone around clinic entrances and driveways ordered by a federal district court). The purpose of buffer zone restrictions is to ensure the safe passage of women and healthcare providers into reproductive healthcare facilities by preventing members of the public from occupying the space immediately surrounding facility entrances. *See Madsen*, 512 U.S. at 769. In addition to buffer zones created by injunction, several states and localities have created buffer zones by statute, like the one at issue here. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a Colorado buffer zone statute).

II. MEASURES TAKEN BY THE GOVERNMENT TO PROTECT THE EXERCISE OF FUNDAMENTAL RIGHTS DO NOT CONSTITUTE CONTENT OR VIEWPOINT DISCRIMINATION MERELY BECAUSE THEIR IMPACT FALLS PRIMARILY ON INDIVIDUALS WITH A SPECIFIC SET OF BELIEFS.

A. A Measure is Content and Viewpoint Neutral if it Regulates Non-Expressive Elements of Speech or Conduct.

Although the speech of civil-rights opponents is entitled to robust protection under the First Amendment, *see, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (upholding Ku Klux Klan leader’s First Amendment right to advocate for violence as a means of social change), it does not follow that the government may not intervene to protect individuals seeking to exercise their fundamental rights from interference by third-parties. Such action is not presumptively invalid merely because rights-opponents are motivated by ideology or deeply-held convictions. Rather, laws designed to safeguard the exercise of rights are presumptively valid as long as they are content and viewpoint neutral. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from

regulation merely because they express a discriminatory idea or philosophy.”).

A law discriminates on the basis of content if it either (a) confers benefits or imposes burdens on individuals based on the ideas or views expressed in their speech, or (b) serves a governmental interest related to the expressive content of speech. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643-45 (1994). A law that does neither of these things is content neutral and, by extension, viewpoint neutral.⁵ As a result, restrictions on a particular instance of speech are likely permissible when based on the speech’s non-expressive elements or accompanying conduct, but not when based on its message.

Thus, the government may prohibit burning draft cards as a means of advancing the government’s interest in the effective administration of the Selective Service System because that interest is unrelated to any message that may be conveyed by

⁵ Viewpoint discrimination is a particularly egregious form of content discrimination that occurs when a law imposes burdens on speech based on “the specific motivating ideology or the opinion or perspective of the speaker.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Although all content-based laws are subject to strict scrutiny, laws that discriminate on the basis of viewpoint are less likely to survive such scrutiny than laws that discriminate on the basis of content alone. See *Burson*, 504 U.S. at 211 (upholding a ban on electioneering within 100 feet of a polling location on election day that was content-based but viewpoint-neutral).

the destruction of a draft card. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968). But the government may not prohibit burning the American flag as a means of preserving the flag's symbolic meaning because that interest depends on the suppression of messages that undermine the flag's symbolism. *See United States v. Eichman*, 496 U.S. 310, 315 (1990); *Texas v. Johnson*, 491 U.S. 397, 410 (1989). Likewise, the government may prohibit all instances of cross burning that constitute true threats because such threats are not protected by the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 362 (2003). But it may not prohibit only those instances of cross burning that are intended to express racial, religious, or gender-based animus because such a prohibition selectively burdens speech based on the message it expresses. *See R.A.V.*, 505 U.S. at 391-92. Similarly, the government may impose a blanket ban on residential picketing to preserve the sanctity of the home because such a ban does not burden or privilege any particular message. *See Frisby v. Schultz*, 487 U.S. 474, 488 (1988). But the government may not selectively ban residential picketing on certain topics. *See Carey v. Brown*, 447 U.S. 455, 462-63 (1980).

It follows, then, that the government may take protective measures to prevent interference with the exercise of fundamental rights provided that those measures are facially neutral and justified without reference to the message of rights-opponents. Indeed, the Court has upheld such protective

measures against First Amendment challenge in numerous cases. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (holding that a Wisconsin statute providing for enhanced penalties when the perpetrator of certain crimes selects the victim on the basis of that person's race, religion, color, disability, sexual orientation, national origin, or ancestry does not violate the First Amendment) ("The Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13-14 (1988) (holding that New York City's Human Rights Law does not, on its face, violate the First Amendment by prohibiting discrimination on the basis of race, creed, color, national origin, or sex by private clubs that provide opportunities for members to engage in professional networking activities with nonmembers); *Bd. of Dirs. of Rotary Int'l v. Duarte*, 481 U.S. 537, 549 (1987) (holding that California's Unruh Civil Rights Act does not violate the First Amendment by requiring California Rotary Clubs to admit women as members); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that Minnesota's Human Rights Act does not violate the First Amendment by requiring the United States Jaycees to admit women as members) ("On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and

permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.”); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII of the Civil Rights Act of 1964 does not violate the First Amendment by requiring a law firm to consider a female lawyer for partnership on her merits); *Runyan v. McCrary*, 427 U.S. 160, 176 (1976) (holding that § 1981 does not violate the First Amendment by requiring private schools to admit African-American students); *cf. Kasper*, 245 F.2d at 95 (holding that an injunction prohibiting individuals from interfering with the enforcement of a school desegregation order and picketing a certain high school did not violate the First Amendment).⁶

⁶ In cases where the application of a law would alter a speaker’s message, the outcome has been different. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that New Jersey’s public accommodations law was unconstitutional insofar as it required Boy Scouts of America to accept gay members because such requirement would “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gr. of Bos.*, 515 U.S. 557, 573 (1995) (holding that Massachusetts’ public accommodations law was unconstitutional insofar as it required parade organizers to permit a group to march in their parade as a means of expressing a message of gay pride because, in that instance, “the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.”).

In some instances, the Court has even upheld protective measures that embody content-based restrictions on speech. In *Burson*, the Court upheld a Tennessee statute that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. *See* 504 U.S. at 193. After finding that this statute was content based because “[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign,” *id.* at 197, the Court held that it nevertheless satisfied the First Amendment as the least restrictive means of serving a compelling state interest, *id.* at 211. Noting the documented history of voter intimidation outside of polling places, the Court concluded that “some restricted zone is necessary in order to serve the States’ compelling interest in preventing voter intimidation and election fraud.” *Id.* at 206. The Court explained that, when the State is acting to safeguard the exercise of fundamental rights, First Amendment freedoms must be balanced against the other rights at stake. *See id.* at 211; *see also id.* at 213 (Kennedy, J., concurring) (“[T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right.”). It ultimately concluded that, given the conflict between the right to free speech and the right to vote, “requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.” *Id.* at 211.

If a content-based, 100-foot buffer zone is a constitutionally-permissible means of protecting individuals seeking to exercise a fundamental right from interference by third-parties, then *a fortiori*, a content-neutral, 35-foot buffer zone is, as well.

B. This Court Has Consistently Rejected Claims of Viewpoint Discrimination Based on the Disparate Impact of a Facially-Neutral Law That is Justified Without Reference to the Expressive Content of Speech.

A law does not constitute viewpoint discrimination merely because its impact falls primarily on individuals with a specific set of beliefs. *See Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2994 (2010). If it did, the government would be stymied in its ability to safeguard the exercise of fundamental rights because those opposed to such exercise are generally motivated by ideology or deeply-held convictions.

In *Martinez*, the Court held that a public university’s policy of prohibiting student organizations that discriminate against prospective members on the basis of their status or beliefs from attaining “registered student organization” status was viewpoint neutral. *See id.* at 2993. The plaintiff organization, which sought to exclude students based on their religion and sexual orientation, had argued that the policy, although neutral on its face,

had a disparate impact on groups whose viewpoints embraced certain forms of discrimination. *Id.* at 2994. The Court decisively rejected this argument, explaining that, because the university’s policy was aimed at the harms that flow from the act of exclusion rather than from the expression of discriminatory ideas, it was viewpoint neutral notwithstanding that its impact was felt primarily by individuals with a particular set of beliefs. *Id.* It went on to say that the plaintiff was “simply confusing its *own* viewpoint-based objections to . . . nondiscrimination laws . . . with viewpoint *discrimination.*” *Id.* (emphasis in original).

The result in *Martinez* accords with earlier precedent from the Court rejecting claims of viewpoint discrimination based on the disparate impact of a facially-neutral law that is justified without reference to the expressive content of speech. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (“[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“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.”); *O’Brien*, 391 U.S. at 382 (upholding ban on destruction of draft cards despite disparate impact on those seeking to protest the Vietnam War); *accord Norton v. Ashcroft*, 298 F.3d 547, 553 (6th Cir. 2002) (holding that the FACE Act is

viewpoint neutral notwithstanding that most people whose conduct it proscribes are abortion-rights opponents) (“That most of the individuals who are prosecuted under the Act are abortion opponents is irrelevant because there is no disparate impact theory under the First Amendment.”); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002) (same); *United States v. Gregg*, 226 F.3d 253, 267 (3d Cir. 2000) (same); *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir. 1998) (same); *Terry v. Reno*, 101 F.3d 1412, 1419-20 (D.C. Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (same); *United States v. Soderna*, 82 F.3d 1370, 1376 (7th Cir. 1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1521-22 (11th Cir. 1995) (same); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 651 (4th Cir. 1995) (same).

Further, where a law is content neutral on its face and is justified without reference to the expressive content of speech, the Court has consistently declined to entertain speculative allegations that the government’s asserted interest in the law is a pretext for viewpoint discrimination. *See Turner Broadcasting Sys., Inc.*, 512 U.S. at 652; *O’Brien*, 391 U.S. at 382-84. Instead, it has repeated the “familiar principle of constitutional law that [the] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Turner Broadcasting Sys., Inc.*, 512 U.S. at 652 (quoting *O’Brien*, 391 U.S. at 383).

III. THE MASSACHUSETTS BUFFER ZONE LAW IS A CONTENT- AND VIEWPOINT-NEUTRAL MEANS OF PROTECTING WOMEN SEEKING TO EXERCISE THEIR FUNDAMENTAL RIGHT TO ABORTION CARE FROM INTERFERENCE BY ABORTION-RIGHTS OPPONENTS.

Based on the foregoing principles, the Massachusetts Buffer Zone Law is a presumptively valid means of securing the safe passage of women and healthcare providers into reproductive healthcare facilities. Notably, unlike the Colorado statute at issue in *Hill*, the Massachusetts statute at issue here does not ban speaking or leafleting within a buffer zone; it bans only physical presence.⁷

⁷ Moreover, unlike the Colorado statute, the Act does not prevent abortion-rights opponents from getting close enough to individuals approaching a reproductive healthcare facility to distribute literature or initiate quiet conversations. The Act has no floating buffer zone requirements, and the fixed buffer zones it requires have only a 35-foot radius. In contrast, the fixed buffer zones required by the Colorado statute have a 100-foot radius. *Compare* Colo. Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). Thus, only a small percentage of the area covered by a Colorado buffer zone is covered by a Massachusetts buffer zone. Beyond this area, abortion-rights opponents are free to approach women advancing toward reproductive healthcare facilities at whatever distance is otherwise lawful. Indeed, the record indicates that, notwithstanding the Act, Petitioners have consistently been able to distribute literature to and initiate quiet conversations with individuals approaching all three facilities at issue in this

Compare Colo. Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). Its purpose is to ensure safe passage into reproductive healthcare facilities by preventing members of the public from occupying the space immediately surrounding facility entrances. *Cf. Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (“A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.”)

Contrary to Petitioners’ contentions, the Act does not seek to silence abortion-rights opponents or render their speech less effective. It merely seeks to ensure that women and healthcare providers can enter reproductive healthcare facilities safely, without being subject to intimidation, or worse. Of paramount importance, the harms that the Act seeks to prevent do not derive from the persuasive force (whatever it may be) of Petitioners’ speech. If a woman is persuaded (as opposed to intimidated) from having an abortion, no harm has occurred in the eyes of the Commonwealth. Rather, the harms that the Act seeks to prevent derive from the physical presence of Petitioners and others in the areas immediately surrounding clinic entrances. Given the overwhelming evidence in the historical record, as well as the specific legislative record in

case. *See* J.A. 114-15, 117-18, 126, 162-63, 206, 208, 255-56, 259-61, 269-71, 272-73, 306.

this case, that such physical presence has often led to violence, intimidation, and other forms of interference with clinic access, the Act is a constitutionally-permissible means of protecting women's ability to exercise a fundamental right.

A. The Massachusetts Buffer Zone Law is Facially Neutral and Distinguishable From the Colorado Buffer Zone Law at Issue in *Hill*.

The Court has recognized that “[d]eciding whether a particular regulation is content based or content neutral is not always a simple task.” *Turner Broadcasting Sys., Inc.*, 512 U.S. at 642. *Hill* was a difficult case in this regard. The Colorado statute at issue made it unlawful for anyone, within 100 feet of the entrance of any health care facility, to “knowingly approach” within eight feet of another person, without the person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3)).

On one hand, this statute was adopted for a neutral purpose and not “because of disagreement with the message it conveys.” *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791); *see also id.* at 735 (Souter, J., joined by O’Connor, Ginsburg, and Breyer, JJ., concurring) (“The key to determining whether [the statute] makes a content-based distinction between varieties of speech lies in

understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some message, whether or not with the effect of approving or promoting others.”). But, on the other hand, the statute’s restrictions are triggered by engaging in certain speech. *See id.* at 742 (Scalia, J., joined by Thomas, J., dissenting) (“Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content based. . . . Whether a speaker must obtain permission before approaching within eight feet . . . depends entirely on *what he intends to say* when he gets there.”) (emphasis in original); *id.* at 766 (Kennedy, J., dissenting) (“Under the Colorado enactment . . . the State must review content to determine whether a person has engaged in criminal ‘protest, education, or counseling.’”).

The Massachusetts Act at issue here is distinguishable from the Colorado statute at issue in *Hill* in ways that make the content-neutrality analysis far easier.⁸ Critically, the Act is neutral on its face; its requirements are not triggered based on the content of anyone’s speech, and government actors need not scrutinize any speaker’s message to determine if a violation has occurred. *Compare Colo.*

⁸ As a result, the Court need not consider the continuing validity of *Hill* to decide this case.

Rev. Stat. § 18-9-122(3) *with* Mass. Gen Laws ch. 266, § 120E½(b). The Act simply limits entry into designated buffer zones adjacent to the entrances and driveways of reproductive healthcare facilities, which is a form of non-expressive conduct. *Cf. O'Brien*, 391 U.S. at 375 (noting that there is nothing inherently expressive in the act of destroying a draft card). Those who are permitted to enter the zones are not distinguished from those who are excluded based on the content of their speech. Individuals on their way into or out of a reproductive healthcare facility are permitted to enter a buffer zone, as are facility employees, municipal agents, and tradespeople acting in the scope of their employment. In addition, pedestrians seeking to cross from one side of a buffer zone to another while *en route* somewhere else are permitted to enter. All other individuals—including anti-abortion demonstrators, abortion-rights demonstrators, vendors, solicitors, pickets, and loiterers—are excluded from the buffer zone. Thus, the Act is content and viewpoint neutral on its face.⁹

⁹ Although the First Circuit reviewed the Act under the standard for time, place, and manner regulations, which requires consideration of whether the Act leaves open ample alternative channels of communication, *McCullen v. Coakley*, 708 F.3d 1, 12-14 (1st Cir. 2013), the Act does not directly regulate when, where, or how speech may occur. Rather, it regulates only how near to the entrance of a reproductive healthcare facility a person may approach, “and there is nothing necessarily expressive about such conduct.” *O'Brien*, 391 U.S. at 375; *cf. Rumsfeld v. Forum for Academic & Inst'l*

B. The Act Has a Neutral Justification.

Further, the Act serves a governmental interest unrelated to the expressive content of speech. It serves to ensure that women can enter reproductive healthcare facilities safely for the purpose of exercising their rights.¹⁰ *Cf. Madsen*, 512 U.S. at

Rights, Inc., 547 U.S. 47, 60 (2006) (“As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”) (emphasis in original). Whatever limitations on speech may result from the Act’s regulation of physical proximity to facility entrances are merely incidental. As a result, the proper standard for evaluation of the Act’s constitutionality is the one set forth in *O’Brien*. See 391 U.S. at 376-77 (holding that a regulation of non-expressive conduct that imposes incidental burdens on speech satisfies the First Amendment “if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”). An “incidental burden on speech is no greater than is essential, and therefore is permissible under *O’Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Rumsfeld*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

¹⁰ It also serves to ensure that healthcare providers can enter reproductive healthcare facilities safely, for the purpose of facilitating women’s exercise of rights, and to maintain public safety generally by minimizing the risk of violent confrontations outside facilities.

769 (“The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic.”). This interference, which historically has taken the form of violence, threats of violence, physical obstruction, intimidation, harassment, and similar scare tactics,¹¹ does not derive from

¹¹ See, e.g., S. Rep. No. 103-117, at 3 (1993) (noting, as part of the legislative history of the FACE Act, that from 1977 through April 1993, more than 1,000 acts of violence against abortion providers and 6,000 clinic blockades and other disruptions were reported in the United States); *Hill*, 530 U.S. at 709 (“[D]emonstrations in front of abortion clinics impeded access to those clinics and were often confrontational.”) (footnote omitted); *Schenck*, 519 U.S. at 362-63 (“[Reproductive healthcare facilities in Western New York] were subjected to numerous large-scale blockades in which protestors would march, stand, kneel, sit, lie in parking lot driveways and in doorways. This conduct blocked or hindered cars from entering clinic parking lots, and patients, doctors, nurses, and other clinic employees from entering the clinics. In addition to these large-scale blockades, smaller groups of protestors consistently attempted to stop or disrupt clinic operations. Protestors trespassed onto clinic parking lots and even entered the clinics themselves. . . . Sometimes protestors used more aggressive techniques, with varying levels of belligerence: getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics; or jostling, grabbing, pushing, and shoving women as they attempted to enter the clinics. Male and female clinic volunteers who attempted to escort patients past protestors into the clinics were sometimes elbowed, grabbed, or spit on. Sometimes the escorts pushed back. Some protestors remained in the doorways after the patients had entered the clinics,

expressive elements of speech, but rather from conduct and unprotected “modes” of expression. See *R.A.V.*, 505 U.S. at 386. Indeed, the Massachusetts legislature enacted the statute in response to a substantial factual record documenting threats to public safety in the areas adjacent to reproductive healthcare facilities as well as obstacles faced by women and healthcare providers attempting to enter such facilities. See, e.g., J.A. 26-27, 44, 67, 72-73, 95-96, 122-24 (access to reproductive healthcare facilities impeded by abortion-rights opponents and

blocking others from entering and exiting.”); *Madsen*, 512 U.S. at 758 (“[Abortion-rights opponents] impede[d] access to [a Florida reproductive healthcare facility] by congregating on the paved portion of the street . . . leading up to the clinic, and by marching in front of the clinic’s driveways. . . . [A]s vehicles heading toward the clinic slowed to allow the protestors to move out of the way, ‘sidewalk counselors’ would approach and attempt to give the vehicle’s occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.”); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 266 (1993) (“Among its activities, Operation Rescue organizes antiabortion demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics.”); *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) (“By the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside [reproductive healthcare facilities.]”); John Kifner, *Anti-Abortion Killings: The Overview; Gunman Kills 2 at Abortion Clinics in Boston Suburb*, N.Y. Times, Dec. 31, 1994, at A1 (reporting that a gunman opened fire at two abortion clinics in Brookline, Massachusetts, killing two clinic employees and wounding five other people).

pro-choice counter-protestors gathering in front of their entrances); J.A. 18-19, 21-22, 41, 51, 86 (cars surrounded or otherwise obstructed from accessing reproductive healthcare facility driveways and dropping off patients); J.A. 41, 88-89 (patients attempting to enter reproductive healthcare facilities regularly scared away by the intimidating behavior of individuals gathered in front of facility entrances and driveways); J.A. 12, 16-17, 20 (reproductive healthcare providers harassed and threatened by abortion-rights opponents). Thus, the Act is not only neutral on its face; it has a neutral justification.

C. The Commonwealth Does Not Seek to Suppress the Message of Abortion-Rights Opponents.

Notwithstanding this neutrality, Petitioners contend that the Act is viewpoint based because it has a disparate impact on individuals wishing to express an anti-abortion message. Assuming, *arguendo*, that Petitioners are correct about the disparate impact of the buffer zone restrictions, such impact would not render the otherwise neutral Act a form of viewpoint discrimination. *See supra* at 17-19; *cf. Madsen*, 512 U.S. at 763 (“That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court’s order happen to share the same opinion regarding abortions being performed at the clinic.”) (emphasis

in original). Like the plaintiffs in *Martinez*, Petitioners here simply confuse their own viewpoint-based objections to the buffer zone restrictions with viewpoint discrimination.

Finally, there is absolutely no support for the allegation that the Commonwealth's asserted interest in the law is a mere pretext for suppressing the message of abortion-rights opponents. *Cf. Turner Broadcasting Sys., Inc.*, 512 U.S. at 652 ("Appellants' ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon [their] content-neutral character"). It would be unprecedented for the Court to impute an illicit motive to the Commonwealth for enacting a facially neutral law that serves compelling governmental interests unrelated to the expressive content of speech, *see supra* at 19, especially given that the harms targeted by the Act are so well documented, *see supra* at 26-28 & n.11.

In sum, the Act is a presumptively valid means of safeguarding women's exercise of a fundamental right from interference by third-parties.¹²

¹² Although this brief does not address the issue of tailoring, *Amici* agree with Respondents that the Act is narrowly tailored to serve the Commonwealth's compelling interests. Further, should the Court conclude that the Act is a time, place, and manner regulation rather than a regulation of non-expressive conduct, *see supra* at 24-25 n.9, *Amici* agree with Respondents

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted.

Stephanie Toti
Counsel of Record
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3684
stoti@reprorights.org

Counsel for Amici Curiae

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that the Act, both on its face and as applied to Petitioners, leaves open ample alternative channels for communication.

Appendix A:
Individual Statements of Interest
of *Amici Curiae*

ADVOCATES FOR YOUTH is the only organization that works both in the United States and in developing countries with a sole focus on adolescent reproductive and sexual health. Advocates for Youth believes that all young people have the right to the reproductive and sexual health information, confidential, safe services, and a secure stake in the future. Advocates for Youth envisions a world in which societies view adolescent sexual development as normal and healthy, treat youth as partners in promoting sexual health, and value young people's relationships with each other and with adults.

The **BLACK WOMEN'S HEALTH IMPERATIVE** (the "Imperative") is the only organization devoted solely to advancing the health and wellness of America's 19.5 million Black women and girls through advocacy, community health and wellness education, and leadership development. The Imperative seeks to improve the health and wellness of Black women by providing health resources and information, promoting advocacy and health policies, and interpreting and issuing reports on relevant research about the health status of America's Black women. We offer our members culturally appropriate tools and information to be an informed and empowered healthcare consumer.

CALIFORNIA LATINAS FOR REPRODUCTIVE JUSTICE (“CLRJ”) is a statewide organization committed to honoring the experiences and upholding the rights of Latinas. CLRJ builds Latinas’ power and cultivates leadership through community education, policy advocacy, and community-informed research designed to achieve reproductive justice.

The **CENTER FOR REPRODUCTIVE RIGHTS** (the “Center”) is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center’s work focuses on ensuring that all women have access to a full spectrum of high-quality reproductive healthcare services. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, and its attorneys have regularly appeared before this Court. As a rights-based organization, the Center has a vital interest in affirming the government’s ability to protect individuals endeavoring to exercise their fundamental rights from interference by third-parties. At the same time, the Center places a high value on First Amendment freedoms and has brought litigation in defense of those freedoms on numerous occasions. The law at issue in this case strikes an appropriate balance between respect for First Amendment freedoms and protection of women’s reproductive rights.

The **FEMINIST MAJORITY FOUNDATION** (“FMF”), founded in 1987, is the largest feminist research and action organization dedicated to women’s equality and reproductive health. FMF’s programs focus on advancing the legal, social and political equality of women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and development programs. FMF has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and the federal circuit courts to advance the opportunities for women and girls.

GAY & LESBIAN ADVOCATES & DEFENDERS (“GLAD”) is a public interest organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD appeared as counsel in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) and as *amicus* in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), both discussed in the briefing to this Court.

LEGAL MOMENTUM, founded in 1970 and the nation’s oldest legal advocacy organization for women, advances the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women’s equality.

To this end, Legal Momentum has litigated many cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

The **MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND** ("MALDEF") is the leading Latino legal organization in the U.S. focusing on litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 45 million Latinos living in the United States. Protecting the rights of Latina women is at the core of MALDEF's mission. MALDEF monitors federal and state proposed legislation, submits comments on matters that affect the fair and equitable treatment of Latinos, and participates in litigation to further its mission.

NATIONAL ADVOCATES FOR PREGNANT WOMEN is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women. National Advocates for Pregnant Women advocates for reproductive justice including the right to an abortion, the right to decide whether, when and how to carry a pregnancy to term, access to culturally appropriate and evidence-based medical care, and the right to parent the children one bears without inappropriate state intrusion and family disruption.

The **NATIONAL CENTER FOR LESBIAN RIGHTS** (“NCLR”) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that seek to preserve access to reproductive rights and health are upheld and strengthened.

The **NATIONAL COALITION ON BLACK CIVIC PARTICIPATION’S BLACK WOMEN’S ROUNDTABLE** is an intergenerational civic engagement network of the National Coalition championing just and equitable public policy on behalf of Black women. Founded in 1976, The National Coalition serves as an effective convener and facilitator at the local, state and national levels to address the disenfranchisement of marginalized communities through civic engagement, women and girls empowerment, youth civic leadership development and public policy.

The **NATIONAL GAY AND LESBIAN TASK FORCE** (the “Task Force”), founded in 1973, is the oldest national organization advocating for the rights of lesbian, gay, bisexual, and transgender (“LGBT”) people. As a longtime supporter of women’s health and reproductive freedom, the Task Force is concerned about the impact the Court’s decision may

have on women's access to constitutionally-protected reproductive health services.

NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH is the only national organization working on behalf of the reproductive health and justice of the 24 million Latinas, their families, and communities in the United States through public education, community mobilization, and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, geography, and discrimination based on gender, race/ethnicity, sexual orientation and gender identity, national origin and immigration status. These circumstances make it especially difficult for Latinas to realize their fundamental human and civil rights, including access to abortion services. Latinas are twice as likely to experience unintended pregnancies as their white peers, making access to abortion care without barriers a priority for Latina health. Therefore, the issues addressed in this case are central concerns to the organization.

The **NATIONAL ORGANIZATION FOR WOMEN FOUNDATION** ("NOW Foundation") is a nonprofit organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters with chapters in every state and the District of Columbia. The litigation efforts of the

Foundation seek to protect reproductive health options, as well as focus on other areas of concern to women, such as pregnancy discrimination, employment issues, discrimination against women in the military, sexual harassment and exploitation, lesbian and gay rights, civil rights, sex discrimination in insurance, and ending violence against women.

PEOPLE FOR THE AMERICAN WAY FOUNDATION (“PFAW Foundation”) is a nonpartisan, citizens’ organization established to promote and protect civil and constitutional rights, including the First Amendment right to free speech and the constitutional right to privacy. Founded in 1981 by a group of religious, civil and educational leaders, PFAW Foundation has over 41,103 members and supporters in the Commonwealth of Massachusetts who support a woman’s right to reproductive choice. We have frequently represented parties and filed *amicus curiae* briefs in similar cases and are vitally concerned with the threat to reproductive health services posed by this case.

The **SOUTHERN POVERTY LAW CENTER** (“SPLC”) is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Founded by civil rights lawyers Morris Dees and Joseph Levin Jr. in 1971, the SPLC is internationally known for tracking and exposing the activities of hate groups and works to ensure that the promises of the civil rights movement become a reality for all. SPLC has pursued litigation and won numerous landmark

legal victories on behalf of the exploited, the powerless and the forgotten. SPLC lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination, including gender discrimination.