No. 12-1168

In the Supreme Court of the United States

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

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, *ET AL.,*

Respondents.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

Massachusetts has made it a crime for speakers to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The law applies only at abortion clinics. The law also exempts, among others, clinic "employees or agents ... acting within the scope of their employment." In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill v. Colorado,* 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended First Amendment freedoms against local, state, and federal encroachment. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adhering to the Constitution as

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; *amicus* has lodged the parties' written consents with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The Petitioners are peaceful "sidewalk counselors" who seek to counsel or pass leaflets to women who approach abortion facilities in Massachusetts. The challenged law – chapter 266, Section 120E½ of the Massachusetts General Laws (the "Act") – criminalizes the Petitioners' conduct.

Constitutional Background

The First Amendment protects freedom of speech from content- and subject-matter based restrictions imposed by government. *Carey v. Brown,* 447 U.S. 455, 489 n.6 (1980). In addition, public streets and parks are "held in trust for the use of the public" for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (citations and interior quotations omitted). In these "traditional public fora," the government may impose "[r]easonable time, place, and manner restrictions …, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest and restrictions based on viewpoint are prohibited." *Id.* (citations and interior quotations omitted).

Statutory Background

Subsection (b) of the Act makes it criminal to "knowingly enter or remain on a public way or sidewalk adjacent to" a non-hospital abortion facility "within a radius of 35 feet of any portion of an entrance, exit or driveway … or within the area

within a rectangle created by extending the outside boundaries of any entrance, exit or driveway … to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway." The Act exempts "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment."

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts as stated by the Petitioners' brief. *See* Opening Br. at 3-19.

SUMMARY OF ARGUMENT

As the Petitioners argue, Massachusetts drafted a content-based restriction on speech in public fora and did not narrowly tailor the Act to the ills that the Commonwealth sought to address. For those reasons, the Act is unconstitutional. *See* Section I, *infra.* In deciding this case, the Court also should revisit *Hill v. Colorado,* 530 U.S. 703 (2000), which upheld a similar type of law from Colorado, based on a perceived "right to be left alone" even in a public forum, as well as various abortion-specific departures from otherwise-controlling constitutional doctrines. *Amicus* Eagle Forum respectfully submits that the Court should revisit and reverse *Hill* for two primary reasons.

First, factual and legal developments since 2000 compel this Court to revisit *Hill.* Factually, it has become clear that the abortion industry opposes the disclosure of various negative effects correlated with abortion that have come into focus since 2000. For liberal states like Massachusetts that are politically unlikely to regulate the abortion industry as allowed

under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), private-sector action by the Petitioners in the public square may be the only chance that some women have to hear the other side of the abortion issue. *See* Section II.A.1, *infra.* Legally, this Court's decision in *Gonzales v. Carhart,* 550 U.S. 124, 163-64 (2007), marks an important departure from what Justice Scalia's *Hill* dissent called the Court's "ad hoc nullification machine" and its "whatever-it-takes proabortion jurisprudence," *Hill,* 530 U.S. at 741, 762 (Scalia, J., dissenting), under which the Court adopts abortion-specific exceptions for otherwise-applicable doctrines and then renders a pro-abortion ruling. *See* Section II.A.2, *infra.*

Second, if *Gonzales v. Carhart* indeed marks an end to the Court's treating abortion issues as exceptional, then decisions like *Hill* cannot stand. When it reviews *Hill,* the Court will find that abortion protections imposed on the entire field of medicine are overbroad, and abortion protections imposed only on the abortion context are not content-neutral. Either effort would violate the First Amendment. The Court also should confirm that there is no "right to be left alone" in public under the First Amendment. *See* Sections II.B.1-II.B.3, *infra.*

ARGUMENT

I. THE ACT IS UNCONSTITUTIONAL AS NEITHER NARROWLY TAILORED NOR CONTENT NEUTRAL

The Act singles out all abortion facilities, throughout the Commonwealth, regardless of whether a facility had experienced problems. For the

reasons argued by the Petitioners (Opening Br. at 22-45), the Act violates the First Amendment, both because Massachusetts did not tailor the Act narrowly and because the Act is not content-neutral. *Amicus* Eagle Forum supports the Petitioners' cogent arguments on the Act's unconstitutionality. The Act implicitly relies on the *Hill* finding of a "right to be left alone" even in a public forum, which requires this Court's revisiting *Hill* in this case.

II. THIS COURT SHOULD OVERTURN *HILL*

As Justice Scalia explained in his *Hill* dissent, the *Hill* decision relies on several instances of the majorities' simply declining to apply otherwise-applicable doctrines of constitutional law in the abortion context:

> None of these remarkable conclusions should come as a surprise. *What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.*
>
> …
>
> Does the deck seem stacked? You bet. As I have suggested throughout this opinion, *today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years.* Today's distortions, however, are particularly blatant.

Hill, 530 U.S. at 741, 764-65 (citations omitted, emphasis added) (Scalia, J., dissenting).[2] *Amicus* Eagle Forum respectfully submits that subsequent factual and legal developments preclude this Court's reflexively applying *Hill* to the Act here.

In any event, under the Due Process Clause, "[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. General Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998). Similarly, with respect to *stare decisis,* courts can apply their precedents so conclusively as to violate due process. *S. Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). Significantly, this Court has never relied on the First Amendment analysis in *Hill,*[3] which undercuts its precedential value. Under the circumstances, *amicus* Eagle Forum respectfully submits first that the Court must reconsider *Hill* before applying it to defend the Act here, and second that reconsidering *Hill* would require overturning it.

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[2] The doctrinal distortions to which Justice Scalia refers include selectively neutering the doctrines of narrow tailoring and overbreadth, *Hill,* 530 U.S. at 762, ignoring content-based regulation of speech, *id.* at 746-47, and inventing a "right to be left alone" in a public forum, *id.* at 754.

[3] Majorities cited *Hill* for non-controversial propositions on vagueness in *U.S. v. Williams,* 553 U.S. 285, 304 (2008), and *Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2720 (2010), but the other three instances of this Court's citing *Hill* were in dissent. *Stenberg v. Carhart,* 530 U.S. 914, 954 (2000) (Scalia, J., dissenting); *id.* at 978 (Kennedy, J., dissenting); *Virginia v. Black,* 538 U.S. 343, 399 (2003) (Thomas, J., dissenting); *Citizens United v. FEC,* 558 U.S. 310, 485 n.2 (2010) (Thomas, J., concurring in part and dissenting in part).

A. Factual and Legal Developments Have Undermine the Case for Exempting Abortion from Constitutional Norms

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). When justification is present, however, "we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem." *Swift & Co. v. Wickham,* 382 U.S. 111, 116 (1965). There are both factual and legal reasons for revisiting *Hill.*

1. The Abortion Industry Needs the Regulation that Petitioners Provide

One of the bases for this Court to reject *stare decisis* and revisit an issue is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. Several factual issues have come into focus in the intervening decade-plus that undermine *Hill.* Equally important, as Justice Kennedy explained in dissent, *Hill* undid the balance that this Court struck in *Casey* not only for the opponents of abortion whom *Hill* left without recourse, *Hill,* 530 U.S. at 791 (Kennedy, J., dissenting), but also for the women considering an abortion – whom the Court *allowed,* but did not *require,* states to protect from the abortion procedure itself. *Casey*, 505 U.S. at 878. In reliably liberal, reliably Democratic states like Massachusetts, where politicians would never challenge the abortion industry's orthodoxy, the Petitioners represent the

only real hope that some women contemplating an abortion will hear both sides of the issue. Since this Court has taken the mantle of the nation's legislator on issues having to do with abortion, it is up to this Court to ensure that women have at least a chance to get the full debate when their states decline to exercise the option to enter the fray.

As a factual matter, the problem with speech restrictions under *Hill* has gotten worse since 2000, based on accumulating known – but generally not disclosed – medical risks correlated with abortion:

- Abortion correlates with significant increases in suicide risk compared with both birth mothers and the general population. D. Reardon *et al., Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women,* 95:8 SO. MED. J. 834-41 (2002).
- Women who undergo elective abortions have higher incidence of mood and anxiety disorders than either the general population or women who deliver children. David M. Fergusson *et al., Abortion and mental health disorders: evidence from a 30-year longitudinal study,* 193 BRIT. J. PSYCHIATRY 444-51 (2008); Reardon *et al., Record Linkage Study,* 95:8 SO. MED. J. at 834-41.
- Women who undergo elective abortions have higher incidence of substance abuse than either the general population or women who deliver children. Priscilla K. Coleman *et al., Induced abortion and anxiety, mood, and substance abuse disorders: Isolating the effects of abortion in the national comorbidity survey,* 43 J. PSYCHIATRIC RES. 770-76 (2009).

- Prior abortions correlate with increased risk of premature births in later pregnancies, including a significantly elevated risk (64 percent) of "very preterm" births prior to 32 weeks gestation. Jay D. Iams *et al., Primary, secondary, and tertiary interventions to reduce the morbidity and mortality of preterm birth,* 371 THE LANCET 164-75 (Jan. 2008); Hanes M. Swingle *et al., Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses,* 54 J. REPRODUCTIVE MED. 95-108 (2009); Institute of Medicine, *Preterm Birth: Causes, Consequences, and Prevention,* 519 (National Academy of Science Press, July 2006) (listing abortion as an immutable risk factor for preterm birth).[4]
- Induced abortions correlate with significantly increased breast-cancer risk. Kim E. Innes, Tim E. Byers, *First Pregnancy Characteristics & Subsequent Breast Cancer Risk Among Young Women,* 112 INT. J. CANCER 306-11 (2004). Significantly, the physiology of why abortion increases the risk of breast cancer is well-understood, but nonetheless minimized or suppressed, apparently for political reasons. *See* Angela Lanfranchi, M.D., *The Federal Government and Academic Texts as Barriers to*

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[4] Significantly, among very preterm newborns, the risk of cerebral palsy increases fifty-five fold (5500 percent) vis-à-vis full-term newborns. E. Himpens *et al., Prevalence, type, and distribution and severity of cerebral palsy in relation to gestational age: a meta-analytic review,* 50 DEVELOPMENTAL MED. CHILD NEUROLOGY 334-40 (2008).

Informed Consent, 13:1 J. AM. PHYSICIANS & SURGEONS 12, 13-15 (Spring 2008).

Far from disclosing these risks, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health risks that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (opposition to South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. Leblanc,* __ F.3d __, 2013 U.S. App. LEXIS 18423 (5th Cir. Sept. 4, 2013) (No. 12-30456) (opposition to Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Although the abortion industry's lack of transparency calls out for heightened regulation, vis-à-vis other, less politicized medical practices, states with relatively liberal political establishments are unlikely to do so. Indeed, in the aftermath of the horrors revealed by the prosecution of abortionist Kermit Gosnell, Democrats lionized a Texas state senator for *opposing* legislation designed to prevent similar practices in Texas. Manny Fernandez, *"In Battle Over Texas Abortion Bill, Senator's Stand Catches the Limelight,"* N.Y. TIMES, at 18A (June 26, 2013); Ross Ramsey, *"Democrats Look To Wendy Davis As the Charm,"* N.Y. TIMES, at 25A (Aug. 10, 2013). Massachusetts is unlikely to impose new regulations on leading backers of its ruling party.

Perhaps due to the abortion issue's politicization in the United States – caused in great part by this Court's unprecedented *Roe* decision – the abortion

industry appears to regard itself more as civil-rights warriors than as medical providers. As such, many abortion providers apparently believe that they simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted). Against this backdrop of increasingly understood risks from abortion and no challenges to the abortion industry from states with liberal political establishments, the Petitioners represent one of the few chances for Massachusetts women who are contemplating abortion to experience the benefits of an open society.

2. ***Gonzales v. Carhart*** **Ended Abortion's Exemption from Constitutional Norms**

Another reason for the Court to revisit an issue, notwithstanding *stare decisis,* is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855. Although the many distortions of constitutional doctrines cited by Justice Scalia's *Hill* dissent have undoubtedly clouded this Court's abortion cases, *see Hill,* 530 U.S. at 741, 746-

47, 750, 754, 762, a subsequent abortion decision rejected treating abortion as exceptional:

> The law need not give abortion doctors unfettered choice in the course of their medical practice, *nor should it elevate their status above other physicians in the medical community.* … [¶] Medical uncertainty does not foreclose the exercise of legislative power in the abortion context *any more than it does in other contexts.*

Gonzales v. Carhart, 550 U.S. 124, 163-64 (2007) (emphasis added). That holding about "abortion doctors" and the "abortion context" applies equally to *abortion patients* (*i.e.,* the very women that the Act misguidedly attempts to protect from the Petitioners' attempts to communicate with those same women). If *Gonzales v. Carhart* signals the end of abortion's "ad hoc nullification machine" and the Court's "whatever-it-takes proabortion jurisprudence," *Hill,* 530 U.S. at 741, 762 (Scalia, J., dissenting), this Court should now apply standard constitutional doctrines in its abortion cases. *Hill* cannot survive that inquiry.

B. This Court Needs to Unwind the Pretzel Logic that Underlies *Hill*

As signaled by the *Hill* dissents and highlighted by the Petitioners' citation to Professor Tribe, this is not a difficult case:

> I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.

Opening Br. at 54 (*quoting Symposium,* 28 PEPP. L. REV. 747, 750 (2001) (Prof. Laurence H. Tribe)

(Petitioners' alteration). To the extent that there is difficulty, it lies in the *Hill* majority's bending First Amendment doctrines to fit the desired outcome. In a very real sense, *Hill* is too convoluted for this Court to narrow. It would be considerably easier to consider *Hill* as a misguided anomaly and overrule it – for the reasons stated in Section II.A, *supra* – than to attempt to reconcile it with the otherwise-prevailing norms of First Amendment jurisprudence.

1. *Hill* Is Inconsistent with *Casey*

As Justice Kennedy explained, *Hill* defeats the balance struck in *Casey* by denying abortion opponents access to the public square, given that *Casey* essentially precluded legislative redress for many aspects of the abortion debate. *Hill,* 530 U.S. at 791 (Kennedy, J., dissenting). *Hill* is even further out of balance with *Casey,* which held that states may insert themselves into a physician's office to require disclosures "to ensure that the woman's choice is informed," even if she does not want to see or hear the disclosure. *Casey,* 505 U.S. at 878. Against that backdrop of permissible intrusion into a private setting (namely, a physician's office), it is puzzling that the Court would see the need to invent – for the first and only time – a "right to be left alone" in a purely public forum.

2. Failing to Tailor Speech Restrictions Produces Measures that Are Unlawfully Overbroad

Although a narrowly tailored measure need not be the least-restrictive alternative, *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989), it must nonetheless "be specifically and narrowly framed to

accomplish [an appropriate governmental] purpose." *Shaw v. Hunt,* 517 U.S. 899, 908 (1996). In *Hill,* as chronicled in Justice Scalia's dissent, the majority's position evolved in response to Justice Kennedy's dissent to acknowledge taking a "bright-line prophylactic" approach to restricting speech, *Hill,* 530 U.S. at 761-62 (Scalia, J., dissenting), notwithstanding that "[b]road prophylactic rules in the area of free expression are suspect," and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (*quoting NAACP v. Button,* 371 U.S. 415, 438 (1963)). This Court should reject as hopelessly inconsistent any effort broadly to regulate speech as a means of bestowing perceived benefits on a favored industry.

3. Tailoring Speech Restrictions Produces Measures that Are Non-Neutral and Content-Specific

The problem facing abortion-friendly restrictions on speech is that once the legislature cures its over-breadth problem, it finds itself hopelessly ensnared in an even-worse content-specific problem:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

Carey, 447 U.S. at 489 n.6; *see also id.* at 461-62 (1980) ("Equal Protection Clause mandates that the [speech-discrimination] legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"). Thus, whether the

proposed restriction would allow the pro-abortion side a free pass or, instead, would quash the entire subject of abortion (*i.e.,* both sides of the debate), the result is essentially the same. This is because "restriction[s] on expressive activity because of its content … would completely undercut the profound national commitment to … uninhibited, robust, and wide-open" debate. *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). This Court should make clear to the abortion industry and its political allies that their cause provides no basis for abandoning the foundational freedoms enshrined in the First Amendment.

In summary, the First Amendment does not allow abortion-specific restrictions on speech, and it does not allow overbroad restrictions on speech. That the abortion industry and its political allies cannot restrict speech in the manners that they would like is not a bad thing. Debate is good, and they may learn something. Certainly, their patients will.

CONCLUSION

For the foregoing reasons and those argued by the Petitioners, this Court should reverse the lower courts and overturn *Hill.*

September 16, 2013

Respectfully submitted,

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