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IN THE SUPREME COURT OF THE UNITED STATES

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ELEANOR MCCULLEN, ET AL., :

Petitioners : No. 12-1168

v. :

MARTHA COAKLEY, ATTORNEY GENERAL :

OF MASSACHUSETTS, ET AL. :

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Washington, D.C.

Wednesday, January 15, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MARK L. RIENZI, ESQ., Washington, D.C.; on behalf of
Petitioners.

JENNIFER GRACE MILLER, ESQ., Assistant Attorney General,
Boston, Massachusetts; on behalf of Respondents.

IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for
United States, as amicus curiae, supporting
Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-1168, McCullen v. Coakley.

Mr. Rienzi.

ORAL ARGUMENT OF MARK L. RIENZI
ON BEHALF OF THE PETITIONERS

MR. RIENZI: Mr. Chief Justice, and may it please the Court:

This Court has held that the public sidewalks are a natural and proper place for free citizens to exchange information and ideas, and for that reason the Court has held that public sidewalks occupy a special position in First Amendment analysis. If the Massachusetts law at issue here makes it a crime to enter onto certain public sidewalks, even for the purpose of peaceful conversation, or leafletting, the law applies at abortion clinics throughout the State on every hour of every day that they are open, regardless of the circumstances.

Massachusetts asked this Court to uphold that statute under the time, place, and manner test, but the law fails each aspect of that test.

I would like to begin with narrow tailoring.

1 The State says the law is necessary to protect its
2 interests in preventing obstruction and congestion. But
3 the law is not narrowly tailored to those interests for
4 three reasons: First, the law applies regardless of
5 whether there's any threat of obstruction or congestion
6 at all, even when the sidewalks are entirely open and
7 empty. For example, Mrs. McCullen generally does her
8 counseling early in the morning on Tuesdays and
9 Wednesdays beginning at 7:00 o'clock in the morning.
10 She testified that she is sometimes alone when she does
11 this counseling. Nancy Clark testified that 90 percent
12 of the time that she is at the clinic in Worcester, she
13 is all alone.

14 A statute that makes it illegal for
15 Mrs. McCullen or Mrs. Clark to engage in peaceful,
16 consensual conversation on a public sidewalk for fear of
17 obstruction and congestion is not narrowly tailored.

18 JUSTICE GINSBURG: Mr. Rienzi, the problem
19 that the State faced is it doesn't know -- and it has a
20 history, there was a considerable history of
21 disturbances and blocking the entrance, and it doesn't
22 know in advance who are the well-behaved people and who
23 are the people who won't behave well. So -- and after
24 the disturbance occurs, it's too late. So the State is
25 trying to say, We want to make sure that the entrance is

1 not blocked, and the only way we can do that is to have
2 a rule that applies to everyone. We can't -- we can't
3 screen people to know who will be well behaved and who
4 will be disruptive.

5 MR. RIENZI: So I think the State is simply
6 wrong about that fact for several reasons. There are
7 many tools that the State either has in its current
8 toolbox or could enact that would deal with that
9 concern.

10 And if I may back up for a second, I think
11 there are really two different interests that the State
12 asserts when it makes that argument, Justice Ginsburg.
13 First, they say that there are actual deliberate bad
14 actors. All right. There are some people whom the
15 State claims have deliberately violated the law and
16 blocked the door and interfered with access.

17 And then secondly, the State says there is
18 also some circumstances where there are enough people on
19 the sidewalk that even lawful, consensual conversation
20 might accidentally block the door. I think those are
21 actually two quite different interests, but there are
22 tools in the toolbox to deal with both of them.

23 For example, Section E of this statute makes
24 it illegal to impede, block, obstruct or even hinder
25 somebody's access to the clinics. And that section of

1 the statute is not challenged here and never has been.

2 JUSTICE SCALIA: You know, I should probably
3 ask this of the other side, and I will, but do you
4 happen to know when was the last time that Massachusetts
5 prosecuted somebody for obstructing entrance to an
6 abortion clinic?

7 MR. RIENZI: So I believe the last cite in
8 the record that I'm aware of is, as of 1997, there was a
9 decision in a previous injunction case against people
10 who had been adjudicated to have broken rules. There is
11 a 1997 case on that.

12 To my knowledge, they've never brought a
13 case, for example, under the Federal FACE law, which has
14 been in existence for 20 years.

15 JUSTICE SCALIA: So there have been laws
16 against obstruction during this entire period, right?

17 MR. RIENZI: There have been laws against
18 obstruction the entire time.

19 JUSTICE SCALIA: And you say that only once,
20 in 1997, that was the last time a prosecution was
21 brought.

22 MR. RIENZI: And that was an injunction
23 against prior bad actors. That was not a FACE
24 prosecution or a Section E prosecution.

25 JUSTICE SOTOMAYOR: You are not taking the

1 position that 1997 was the last time an entrance was
2 obstructed or that the police were called to open access
3 to a clinic? Are you taking that position that the last
4 time it happened was 1997?

5 MR. RIENZI: I frankly don't -- I couldn't
6 say that I know the last time it happened.

7 JUSTICE SOTOMAYOR: But you do know that in
8 the record there were more examples?

9 MR. RIENZI: I know that in the record there
10 was testimony claiming that that happened. My argument
11 is simply that the State has tools that are deliberately
12 designed to deal with that. And so the United States --

13 JUSTICE KAGAN: Mr. Rienzi, the State says,
14 of that particular tool, that it's a hard thing to
15 prosecute because you have to show intent, and there is
16 a lot of obstruction and interference that goes on
17 naturally just because there are a lot of people around.
18 So that is an insufficient tool is what the State
19 argues.

20 MR. RIENZI: Yes. And so to the extent,
21 what the State is saying -- to the extent the State is
22 claiming that there are deliberate bad actors
23 deliberately blocking the door, I don't think that's a
24 very persuasive argument. There are police on the
25 scene, and if the police say, Get out of the doorway,

1 either the person moves in which case there is not a
2 problem anymore, or they don't, in which case, intent is
3 pretty clear.

4 Amicus United States has prosecuted, I think
5 more than 45 cases and gotten more than 70 convictions
6 under that statute.

7 JUSTICE KAGAN: And sometimes there are
8 those bad actors, but probably more often it's just a
9 function of there are just lots of people, and they,
10 your clients and all of -- all of them want to be as
11 close as possible to the site, and that that naturally
12 leads to an interference with normal access.

13 MR. RIENZI: And so I agree that's the
14 second part of the State's argument. I don't think this
15 law is narrowly tailored to that concern, in two
16 respects. One, the law applies -- you know, the
17 evidence in the case is that the crowds that the State
18 is concerned about happened essentially at one clinic,
19 one day, one time -- Saturday mornings in Boston -- and
20 when they happen, there are video cameras rolling and
21 police officers present. And there is no reason to
22 believe the police can't simply say, Move out of the
23 doorway. And if someone is in front of the doorway,
24 they certainly should do that.

25 JUSTICE ALITO: Does the record show how

1 many clinics in the State are covered by the law?

2 MR. RIENZI: I believe there are 11 or 12
3 clinics in the State. So long as they are freestanding
4 abortion clinics they fall within statutory definitions.

5 JUSTICE BREYER: How far do you want to go
6 in your concession? Would you want to concede this
7 point that imagine the State has two groups of people
8 and one group feels what the other is doing is terribly
9 wrong. And the second group feels, We absolutely want
10 to do it. And everyone is in a fragile state of mind,
11 and they want to, if possible, at least one group wants
12 to sort of shout as loud as you could at the other,
13 Please don't do this. And the other says, Please leave
14 me alone. And we are not saying which group is which;
15 the analogy is obvious, but I keep all the titles out.

16 Does the State have the right, in your
17 opinion, to say, It's tough to referee this, we see the
18 potential for real harm on one side or the other, so
19 we're going to have this kind of 35-foot boundary? You
20 want to concede that and say, okay, but the evidence
21 here didn't doesn't justify it, or do you want to fight
22 that, too?

23 MR. RIENZI: So, no, I do not mean to
24 concede that. I don't think -- I think a solution that
25 is done with painted lines on the sidewalk that says --

1 JUSTICE BREYER: But now you are into the
2 details. I want to know about the principle. I mean, I
3 can imagine the principle applying special care and need
4 must be taken outside of hospitals for veterans, even
5 though there are some who are very much opposed to the
6 war, because these people will be coming out, they'll be
7 in wheelchairs, it will be terrible. And others
8 thinking -- you know, we can think of many, many
9 situations, irrespective subject matter, where there is
10 a need for such refereeing. And I just want to know if
11 the -- if the concept is okay with you or if not.

12 MR. RIENZI: Generally --

13 JUSTICE BREYER: With the details.

14 MR. RIENZI: Generally speaking, no. I
15 don't think the concept that --

16 JUSTICE SOTOMAYOR: So protestors like the
17 one we had in the Schneider case at a funeral of a
18 veteran can go right up to the public sidewalk outside
19 the church and put up the signs that they did and give
20 out the leaflets that they did, talking about that
21 veteran in the ways that they did? That's okay by you.

22 MR. RIENZI: So -- so, a couple points about
23 that. One --

24 JUSTICE SOTOMAYOR: There was no evidence
25 there that they were -- that they were disruptive. They

1 were just expressing their First Amendment rights.

2 MR. RIENZI: So I think that that --

3 JUSTICE SOTOMAYOR: But there is the
4 potential for disruption because of the strong
5 sentiments around that.

6 MR. RIENZI: Agreed. I think a statute that
7 worked the way the one -- this one does here, that would
8 make it illegal to even engage in peaceful conversation
9 on sidewalks near a church or near a funeral or near
10 just about anything else, I think clearly is not
11 permitted by the First Amendment.

12 JUSTICE SCALIA: In *Schneider*, they were
13 held not so far back that their shouts and protests
14 couldn't be heard. Isn't that the case? They could
15 still be heard --

16 MR. RIENZI: I think it made --

17 JUSTICE SCALIA: -- out of --

18 MR. RIENZI: -- perhaps were part of the
19 funeral procession that passed by. I don't think
20 they --

21 JUSTICE BREYER: Do you see now why I am
22 trying to narrow it? Because in my case, in *Schneider*,
23 I thought it was pretty important that the demonstrators
24 were behind a hill somewhere and the police restricted
25 where they could go. Many states have enacted similar

1 laws, and I thought that's important, because maybe it
2 would have come out differently. I mean, you could
3 argue about it, and I could.

4 So I'm trying to narrow it. I'm trying to
5 see to what extent do I have to look at this particular
6 set of facts, in which case we are into the hearings,
7 et cetera; and to what extent is there a matter of very
8 broad principle here, and any help you can give me on
9 that would be appreciated.

10 MR. RIENZI: So the matter of very broad
11 principle is that a law that makes it illegal to even
12 engage in consensual conversation, quiet conversation,
13 on a public sidewalk, an act that makes that a criminal
14 act for which Mrs. McCullen can go to prison, I think,
15 is not permissible under the First Amendment.

16 If you compare it to, for example, the
17 Federal military funeral protest law, that law is
18 specifically drawn to acts that disrupt the peace and
19 good order of the funeral, and I think that is
20 different.

21 JUSTICE KAGAN: But are you saying that you
22 could not do an act that instead just says, look, it's a
23 little bit too hard to figure out what and what does not
24 disrupt peace and order, so we're just going to say
25 25 feet around a funeral, or 25 feet around any

1 facility, that that's never permissible?

2 MR. RIENZI: So, generally speaking, I think
3 any law like that runs into a big First Amendment
4 problem of even eliminating peaceful, consensual
5 conversation that doesn't disrupt anything. And this
6 Court's past First Amendment decisions have said that
7 precision of regulation is required.

8 One difference, if it's a rule around any
9 facility or a rule around all funerals, for example, is
10 that -- that there isn't nearly as much distortion of
11 the marketplace of ideas as happens when you do what
12 Massachusetts did here, which is pick --

13 JUSTICE KAGAN: Well, for example, I was
14 intrigued by one of the examples that you gave in your
15 own brief, which you said slaughterhouses. So, let's
16 say, that there are animal rights activists, and this is
17 easy to imagine, who try to interfere with access in and
18 out of slaughterhouses. And a State passes a regulation
19 that says there's a ton of interference, it's preventing
20 the operation of these facilities, employees can't get
21 in, suppliers can't get in, slaughterhouses are leaving
22 the State because of this problem, and so we're just
23 going to set up a zone and let's call it 30 feet,
24 because it's very hard to enforce anything else.

25 I guess my reaction to that hypothetical --

1 you -- you must have used it for me to say, oh, that's
2 terrible. But my reaction, my intuition was kind of
3 what's wrong with that? Just have everybody take a step
4 back.

5 So what is wrong with that?

6 MR. RIENZI: So what's wrong with that is a
7 couple of things. One, again, this Court's decisions
8 require precision of regulation. So an injunction, for
9 example, against groups and individuals like Madsen and
10 Schenck, for example, an injunction against groups and
11 individuals who have interfered with access, keeping
12 them back, I think that's perfectly permissible. We
13 take no issue with that type of solution.

14 It's the generally applicable statute,
15 right, that's tied to just one particular
16 often-protested event that gives the State enormous
17 power to interfere with the marketplace of ideas.

18 JUSTICE ALITO: In one of the examples that
19 is given in one of the amicus briefs in this case, and
20 they -- they provide a lot of background, is a State law
21 that creates a buffer zone around every fraternal lodge.
22 What would you say about that?

23 MR. RIENZI: I think it is difficult to
24 imagine the government interest to -- well, first, I
25 guess, I don't know the particulars of that law and what

1 it -- what it restricts. If it restricts peaceful
2 conversation on public sidewalks anyplace there's a
3 fraternal lodge, I would say that -- that should not be
4 permissible under the First Amendment. I think,
5 generally speaking, the idea of the government picking
6 one particular item and saying, well, around this,
7 suddenly the character of the public forum changes from
8 a place where people can have peaceful, consensual
9 conversations to a place where we will imprison them for
10 doing that, I think that's a dramatic restriction of
11 First Amendment rights.

12 I think if there is a particular group or
13 individual who keeps interfering with the fraternal
14 order, of course, you can get an injunction against that
15 type of behavior, but I don't think the State can say
16 even peaceful discussion and leafletting --

17 JUSTICE KAGAN: But let's go back to the
18 slaughterhouse case. I mean, there might be people who
19 say it's really important to us to actually be able to
20 face-to-face talk with the employees and tell them why
21 they should get different jobs or why they should change
22 their practices in various kinds of ways. And, you
23 know, there are some people who think signs and chants
24 are great, but there are people who really want to make
25 one-to-one contact with the truck drivers, with the

1 employees, whoever.

2 But -- but you say, you know, we have to let
3 whatever interference goes on, even if there's a record
4 of -- of real obstruction, of real interference with the
5 operation of the facility, in order to allow that to
6 happen. And I guess I think that that's -- that's
7 pretty hard.

8 MR. RIENZI: To be clear, Your Honor, I'm
9 not saying the government has to let it go on. I'm
10 saying the government has tools that are better drawn to
11 it than eliminating even the peaceful, consensual
12 conversation.

13 JUSTICE KENNEDY: But suppose -- and this is
14 still Justice Kagan's question -- suppose it were a
15 given, assume that those laws just did not work. Could
16 there then be consideration of a buffer zone?

17 Now, this is a hypothetical that I'm sure
18 that you wouldn't accept in the context of your case,
19 but suppose.

20 MR. RIENZI: Suppose it were a given that
21 there is no way to keep the abortion clinic open --

22 JUSTICE KENNEDY: The laws simply do not --
23 reference to obstruction and blocking entrance, simply
24 do not work.

25 MR. RIENZI: If the laws simply do not work,

1 I think perhaps the government could come in and make a
2 case that it has a compelling interest and that this is
3 the least restrictive means of doing it.

4 JUSTICE BREYER: Okay. So that -- now, at
5 this point -- that was a better way of getting what I
6 was trying to get at. Just assume that there is --
7 let's look at the narrow part of the case, and let's
8 assume that the Colorado case is right. And this
9 particular restriction is more a restrictive than
10 Colorado in two important respects, which you've gone
11 into.

12 Now, the reason that they did that is they
13 had hearings in Massachusetts, and they discovered that
14 the Colorado law didn't really work very well. And so,
15 what are we supposed to do? Are we supposed to now go
16 look at -- as long as those hearings are -- are
17 legitimate hearings and they have good explanation on
18 something like whether the zone is 8 feet and consensual
19 or whether it's 35 feet and different amounts of
20 sidewalk, depending on the nearness of the facility,
21 when doesn't it become just up to them?

22 We can't -- we're not legislators. We don't
23 know the situation in Massachusetts. We can insist upon
24 a reasonable record. But how can we do more than that
25 on this detail?

1 MR. RIENZI: So -- so, on this detail,
2 what -- what I think the Court should look for is, for
3 example, had they had a -- the State said they did not
4 even convict a single person of one unconsensual --

5 JUSTICE BREYER: But you understand that.
6 We all understand that. It's one thing to try to prove
7 an intent on such matters, particularly when people are,
8 in good faith, they're trying to explain it, and it's
9 another thing to actually stop the congestion and to
10 protect the interests of the woman who wants to have the
11 abortion, may be in a fragile state of mind, and this
12 kind of thing could interfere with her health, et
13 cetera.

14 So there are two interests, one on each
15 side. We know 8 feet with the bubble is okay. We're
16 not sure about 35 feet, and they have an evidentiary
17 record.

18 MR. RIENZI: So, a few things. One, the
19 reasons this Court gave in Hill for allowing the 8-foot
20 no-approach zone was precisely that it only was about
21 protecting unwilling listeners and it did not stop
22 discussions with willing listeners. There are real
23 people --

24 JUSTICE SCALIA: Counsel, do you accept that
25 the record here shows that it did not work well in the

1 sense that Justice Breyer --

2 MR. RIENZI: No, not at all.

3 JUSTICE SCALIA: -- seems to use it?

4 MR. RIENZI: I understood I was being asked
5 to assume that.

6 JUSTICE SCALIA: As I recall the record,
7 all -- all it says is that the police found it difficult
8 to apply a bubble; that, you know, they have to measure
9 8 feet or whatever it is. They didn't say that massive
10 obstruction and protests are occurring, preventing
11 people from -- that wasn't the finding, was it?

12 MR. RIENZI: No. I -- I agree, it was not.
13 The claim was --

14 JUSTICE BREYER: That's why I just asked you
15 that question. It just happens that the police testify
16 with some evidence and examples that the 8-foot bubble
17 doesn't work. And it also -- they have some evidence
18 and reasons for thinking that if you want to have a
19 conversation, you have to convince the woman to walk 10
20 feet.

21 I mean, the difference is about half -- you
22 know, if you were near me, Price is near Colorado. If
23 we're over to where the first row is, we'd have
24 Massachusetts, and -- and they have some evidence that
25 we can't enforce this Colorado thing very well; it

1 doesn't help.

2 Now, go ahead. I want your answer.

3 MR. RIENZI: I -- I agree, but if --

4 JUSTICE BREYER: I'm not trying to put
5 words --

6 MR. RIENZI: -- if you sent me 35 feet
7 further back and asked me to make my argument from
8 there --

9 JUSTICE BREYER: I'd hear you.

10 MR. RIENZI: You might hear me, but I would
11 suggest you'd -- you'd receive it quite differently. If
12 I were sent back there, but the clinic -- or the State
13 were permitted to stand in front of you like a normal
14 lawyer and make their argument in the normal way, I
15 would suggest that would be a significant difference.
16 And what we have here is --

17 JUSTICE BREYER: I'm not denying the
18 difference.

19 MR. RIENZI: Yeah.

20 JUSTICE BREYER: I am asking you, we've now
21 heard different characterizations of the record. I
22 didn't mean to characterize it. I want you to explain
23 what it is in the record, from your point of view or
24 lack thereof, that means that the Constitution
25 intervenes to prevent Massachusetts from doing it.

1 MR. RIENZI: So the constitutional narrow
2 tailoring test under the time, place, and manner test
3 requires that the law not restrict substantially more
4 speech than necessary to serve the government's
5 interest. Here --

6 JUSTICE GINSBURG: How much is -- how much
7 is restricted? How -- how long does it take from when
8 you enter the buffer zone until you reach the clinic
9 entrance?

10 MR. RIENZI: If -- if you're walking
11 nonstop, I assume 7 to 10 seconds or something like
12 that.

13 JUSTICE GINSBURG: So the conversation can
14 go on before those 7 to 10 seconds.

15 MR. RIENZI: Yeah.

16 JUSTICE GINSBURG: There's not much you're
17 going to be able to do to have a conversation that will
18 persuade people in 7 to 10 seconds.

19 MR. RIENZI: I respectfully disagree on that
20 last point, Your Honor. The evidence in this record is
21 that the -- the inability to speak with people close to
22 the clinic has a dramatic effect on the Petitioners'
23 ability to reach their audience. So if someone happens
24 to be walking from the same side of the zone that you're
25 standing on, you may have a shot.

1 Now, the clinic still has the space in front
2 of the clinic to talk to people, which you don't, but
3 you may have a shot if you're on the right spot.

4 JUSTICE SCALIA: And if you know they're
5 going to the clinic.

6 MR. RIENZI: And if you can identify the
7 audience early enough. But, for example, places like
8 Worcester and Springfield, where essentially the only
9 chance to reach the audience is by standing on the
10 public sidewalk and waving a leaflet as they drive
11 through the driveway entrance. If you have to stand
12 35 feet back and do that, the evidence here shows
13 there's essentially zero chance to reach that audience.
14 So it is --

15 JUSTICE KAGAN: But isn't that more a
16 function that they just have a private parking lot? So
17 even if this law didn't exist, you actually couldn't
18 reach most of these people because they drive into the
19 private parking lot and you can't talk to them anyway.

20 MR. RIENZI: No, Your Honor. I don't think
21 that's a fair characterization of it. So yes, there's a
22 private parking lot, but there's a public sidewalk on
23 which, before this law, you had the right to engage in
24 speech. The fact that this law pushes you 35 feet back
25 is what makes it impossible to make the offer.

1 Many people would just drive on by, they
2 don't want the information, and that's fine. That's
3 their right. But many people do want the information
4 and have acted on the information. And this law makes
5 it much harder, almost impossible in places like
6 Worcester and Springfield, to offer it.

7 JUSTICE KAGAN: Is there a buffer zone that
8 you would concede is permissible? In other words, if it
9 were 12 feet, would that be all right?

10 MR. RIENZI: So, as the size of the zone
11 decreases, I think the -- the imposition on the speech
12 rights is -- you know, gets less and less and better and
13 better. And so the adequacy of the alternatives, for
14 example, that may improve as you go.

15 It would still be a problem, I think, to
16 have zones on the sidewalk where, even when no one's
17 there, it's a criminal act to have a conversation.

18 JUSTICE KAGAN: Well, but that goes back to
19 Justice Ginsburg's question. I mean, how is a law
20 supposed to deal with -- with that, sort of the
21 fluctuating conditions that may be at a particular
22 clinic site?

23 MR. RIENZI: That's -- that's precisely the
24 point. That's why this is not something that should be
25 addressed with a statute like this. This is something

1 that should be addressed with either a statute drawn to
2 something like large crowds or a dispersal statute. The
3 brief -- amicus brief for New York State in support of
4 Massachusetts here talks about how Concord, New
5 Hampshire and Los Angeles deal with this problem. They
6 give the police the power to disperse crowds when they
7 become obstructive or violent, the same way this Court
8 approved in *Boos v. Barry*.

9 JUSTICE SCALIA: It is the case, isn't it,
10 that not only abortion counselors are -- are excluded
11 from this area, everybody is, right? Anybody who wants
12 to talk to anybody or who just wants to be there --

13 MR. RIENZI: So --

14 JUSTICE SCALIA: -- can't -- I mean, this is
15 a -- a dead speech zone, right?

16 MR. RIENZI: In many respects it is. In
17 many respects it is no different than the speech-free
18 zone in the *Jews for Jesus* case. It's a place where the
19 government claims it can essentially turn off the First
20 Amendment.

21 But the government says --

22 JUSTICE KAGAN: It's more than a speech-free
23 zone. It's also a conduct-free zone, right? You can't
24 sell hats there, you can't, you know, beg there. I
25 mean, you just can't go there.

1 MR. RIENZI: I agree the government has
2 eliminated more than speech on that sidewalk, but
3 they've eliminated speech on that sidewalk as surely as
4 in the Jews for Jesus case.

5 JUSTICE KAGAN: It's still a thoroughfare --

6 JUSTICE ALITO: Well, they haven't entirely
7 eliminated speech because employees are permitted --

8 MR. RIENZI: Yes.

9 JUSTICE ALITO: -- to speak within the scope
10 of their employment; isn't that right?

11 MR. RIENZI: Thank you, Justice Alito. Yes.
12 So they haven't eliminated speech for all people. They
13 have --

14 JUSTICE GINSBURG: Well, that's a -- a
15 contested point because the Attorney General reads
16 "scope of employment" to mean getting to my job and
17 leaving my job, and does not include speech activity.

18 MR. RIENZI: So on the face of the statute,
19 I don't that -- that that interpretation doesn't do very
20 much. That statute --

21 JUSTICE GINSBURG: This is the -- the chief
22 legal officer of the State says this is a term that
23 needs to be interpreted. The term is "scope of
24 employment." Scope of employment within this statute
25 means getting to work and leaving work, and it doesn't

1 mean political speech.

2 MR. RIENZI: So the Attorney General says
3 it's more than just getting to work and leaving work.
4 It says it's just doing their jobs.

5 First, I don't believe -- I don't believe
6 that they have the authority to do that; in other words,
7 I don't think they could go arrest somebody who happened
8 to speak about abortion when they work for an abortion
9 clinic. They have an absolute statutory defense.

10 But even if they could limit it to just
11 doing their job, you end up with the problem that the
12 Ninth Circuit sought in the Hoyt case, which is if the
13 clinic is allowed to use that sidewalk, even just to
14 say, "good morning, may I help you into the clinic," and
15 the government says that's a valid use of our public
16 sidewalks, but the State says Mrs. McCullen will go to
17 prison if she goes on that sidewalk and says, "good
18 morning, may I offer you an alternative?" As the Ninth
19 Circuit panel said, that's indubitably content-based.

20 The government doesn't get to decide that
21 the public sidewalk -- which it leaves open for people
22 just walking by, right? If I'm going down that sidewalk
23 to get a cup of coffee, it's fine.

24 JUSTICE KENNEDY: Well, am I correct that
25 the Attorney General's regulation with respect to

1 employees of the clinic in a way made this even more
2 content-based because there was a prohibition on
3 discussing the -- the abortion procedure?

4 MR. RIENZI: I -- I agree. That's one of
5 the reasons that the interpretation is flagrantly
6 unconstitutional. The government can't simply say to
7 people who work for Planned Parenthood, we won't arrest
8 you when you talk on the sidewalk unless you talk about
9 abortion, right? If you talk about abortion, then we'll
10 arrest you. And that mirrors -- that mirrors the
11 State's interpretation of its -- of the exemption for
12 people walking through the zone, where it says you can
13 walk through, and this is J.A. 93-94, "provided that the
14 individual does not do anything else within the buffer
15 zone, such as expressing their views about abortion."
16 So the government's saying you can walk through, but you
17 can't talk about abortion.

18 JUSTICE GINSBURG: But it's "such as," it's
19 "such as." It says you can't talk about anything.

20 MR. RIENZI: Well, I -- I agree. I don't
21 think --

22 JUSTICE GINSBURG: Well, it's not content --
23 it's not based on speech about abortion. It's that you
24 can't speak about anything.

25 MR. RIENZI: Well, the -- the interpretation

1 as to the employees that the Attorney General has
2 proffered for 6 years is about speech about abortion.
3 So it's not they can't talk about abortion --

4 JUSTICE SCALIA: Excuse me. If -- if you're
5 going through the zone just to get somewhere, not to get
6 to the clinic, and you're walking with a companion,
7 can't you speak to your companion as you -- it doesn't
8 ban speech by everybody who's walking through.

9 MR. RIENZI: The Attorney General has taken
10 multiple positions on that. In the lower court, their
11 position was you can't talk about abortion or partisan
12 issues. They told the First Circuit that you can't even
13 wear -- that you can be arrested if you wore a Cleveland
14 Indians shirt while you were just passing through. At
15 this Court, they say that people passing through have
16 speech rights.

17 Either one is bad. Either way the
18 government doesn't have the ability to say who gets to
19 speak and who doesn't get to speak on an open public
20 sidewalk.

21 If I may reserve my time?

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Miller.

24 ORAL ARGUMENT OF JENNIFER GRACE MILLER
25 ON BEHALF OF THE RESPONDENTS

1 MS. MILLER: Mr. Chief Justice, and may it
2 please the Court:

3 Petitioners can and do protest abortion in
4 Massachusetts and they can do it in the public spaces
5 right outside abortion facilities.

6 JUSTICE SCALIA: This is not a protest case.
7 These people don't want to protest abortion. They want
8 to talk to the women who are about to get abortions and
9 try to talk them out of it. I -- I think it -- it
10 distorts it to say that what they want to do is protest
11 abortion.

12 If it was a protest, keeping them back
13 35 feet might not be so bad. They can scream and yell
14 and hold up signs from 35 feet. But what they can't do
15 is try to talk the woman out of the abortion. It's a
16 counseling case, not a -- not a protest case.

17 MS. MILLER: It -- Your Honor, I would say
18 it's a congestion case. Certainly, Ms. McCullen and
19 others can have those conversations right in front of
20 the abortion facility. It's just that those
21 conversations are moved back a few feet. And in point
22 of fact, Ms. McCullen --

23 JUSTICE KAGAN: Well, it's more than a few
24 feet. You know, 35 feet is a ways. It's from this
25 bench to the end of the court. And if you imagine the

1 Chief Justice as sort of where the door would be, it's
2 most of the width of this courtroom as well. It's --
3 it's pretty much this courtroom, kind of. That's a lot
4 of space.

5 MS. MILLER: Just as a factual matter, I did
6 want to point out that in Boston, for example, the door
7 is recessed. It's a private entrance with a recessed
8 door and the 35 feet is measured from the door. So it's
9 actually only about 23 feet.

10 JUSTICE SOTOMAYOR: I thought it was two car
11 lengths.

12 MS. MILLER: I'm sorry?

13 JUSTICE SOTOMAYOR: Two car lengths.

14 MS. MILLER: I'm sorry. I didn't hear you.

15 JUSTICE SOTOMAYOR: Two car lengths.

16 MS. MILLER: Two car lengths. Exactly
17 right, Your Honor.

18 JUSTICE SOTOMAYOR: That's, I think, a
19 little less than this courtroom.

20 MS. MILLER: We measured this courtroom.

21 JUSTICE BREYER: I'd just like you to go
22 back to Justice Scalia's question for one second. I
23 didn't hear the -- as he was saying that this case is
24 not a protest case, it's simply about calm
25 conversations. And that is what I want to know if the

1 evidence showed that.

2 MS. MILLER: Well, certainly, there's a
3 picture of a calm conversation --

4 JUSTICE BREYER: No, the evidence upon which
5 Massachusetts based its decision to go to 35 feet
6 instead of 8 feet. There were hearings. Did the
7 evidence show that what was involved was calm
8 conversations between one person trying to counsel
9 another or did the evidence show something else?

10 MS. MILLER: Certainly, the evidence showed
11 something else.

12 JUSTICE BREYER: What?

13 MS. MILLER: Experience showed that there
14 had to be a certain amount of space around the
15 facilities. What we had, for example, were pro choice
16 advocates swearing and screaming at pro life advocates
17 within the buffer zone. That's at Joint Appendix 26
18 through 28. You had the Pink Group, which is a pro
19 choice organization, pushing and shoving and jockeying
20 for position.

21 JUSTICE SCALIA: Well, surely you could have
22 a law against screaming and shouting within 35 feet or
23 protesting within 35 feet. Isn't that more narrowly
24 tailored? I mean, what this case involves, what these
25 people want to do is to speak quietly and in a friendly

1 manner, not in a hostile manner, because that would --
2 that would frustrate their purpose, with the people
3 going into the clinic.

4 MS. MILLER: But, again, experience showed
5 that even individuals who wanted to engage in close,
6 quiet, peaceful conversation were creating congestion
7 around --

8 JUSTICE BREYER: Rather -- I note there's
9 some people who are peaceful, in which case I would
10 accept Justice Scalia's suggestion this is a counseling
11 case. But you've cited some other evidence that
12 suggests there were other people who were screaming,
13 pushing and shouting, which sounds like, in his
14 characterization, a protest case. And the reason that
15 Massachusetts found it difficult to write a statute that
16 distinguishes one from the other is?

17 Why do people write statutes that sometimes
18 do not make these fine distinctions? Why did they in
19 this instance?

20 MS. MILLER: They didn't make a fine
21 distinction, Your Honor, because it didn't matter
22 whether people were being peaceful or whether they
23 were --

24 JUSTICE BREYER: Could you have written such
25 a statute that would have worked?

1 MS. MILLER: It would have been very
2 difficult to write such a statute, Your Honor.

3 JUSTICE KAGAN: How did you pick 35 feet?
4 Why 35?

5 MS. MILLER: Well, again, experience showed
6 that some amount of space around the buffer zones --
7 around the facilities needed to be open. So then it was
8 simply a question of looking at past experience, at the
9 prior injunctions, for example, Your Honor.

10 For example, in Planned Parenthood v. Bell,
11 which is cited at page 2 of our brief, there was
12 actually a 50-foot buffer zone imposed by a district
13 court judge in Massachusetts. We knew from, of course,
14 Madsen and Schenk, that 36-foot buffer zones were
15 acceptable in -- when you were being responsive to that
16 kind of problem; and we knew that a 15-foot buffer zone
17 would be acceptable if responding to a similar kind of
18 problem.

19 So at some point or another, the -- the
20 legislature was aware that some amount of space needed
21 to be created, and it chose 35 feet as a reasonable
22 response, a reasonable amount of space around the
23 facility to allow --

24 JUSTICE BREYER: To go to -- go back for a
25 second. I see that. Is there anything in the record --

1 the obvious reason for a legislator, I think -- I did
2 work in the legislature for a while as a staff member --
3 that you don't write these fine statutes is they won't
4 work. They have too fine a distinction. The activity
5 is commingled. The activity -- all right. Now, I knew
6 you were just going to nod my -- your head as soon as I
7 said that. So I was trying to get you to say it in
8 spontaneously if it's true. Is there anything in this
9 record that suggests that this is one of those cases
10 where it's just too tough to say whether they're
11 counseling somebody or whether they're screaming at
12 somebody, whether they're pushing somebody or whether
13 they're standing near them peacefully? Is there any
14 evidence in the record I could turn to that would
15 suggest that?

16 JUSTICE SCALIA: You should say yes.

17 (Laughter.)

18 MS. MILLER: And I will.

19 (Laughter.)

20 JUSTICE BREYER: She can't say yes if it
21 isn't there, because I'm going to ask her where because
22 I want to read it.

23 MS. MILLER: I will of course, Your Honor.
24 The best description of that is, of course, Commissioner
25 Evans's description of the space functioning like a

1 goalie's crease.

2 JUSTICE KENNEDY: Well, let -- let me ask
3 this question: Assume it to be true that an elderly
4 lady who was quite successful and had meaningful
5 communication with over 100 women going into the clinic,
6 before this law, was unable to talk to even one after
7 this law. Assume that's true.

8 Does that have any bearing on our analysis?
9 And does that have any bearing on Justice Breyer's
10 question about whether or not a law can be written to
11 protect that kind of activity but still to prevent
12 obstruction and blocking?

13 MS. MILLER: I -- I think, Your Honor, that
14 no one is guaranteed any specific form of communication.
15 So, there is no guarantee, as a doctrinal matter, to
16 close, quiet conversations. The question is, are there
17 adequate alternatives? And in this particular instance
18 in this record, there are adequate alternatives. Take,
19 for example, the situation --

20 JUSTICE KENNEDY: You say there's no -- no
21 guarantee of talking quietly?

22 MS. MILLER: There is --

23 JUSTICE KENNEDY: Do you want me to write an
24 opinion and say there's no free speech right to quietly
25 converse on an issue of public importance?

1 MS. MILLER: Generally on the public
2 sidewalk. But, of course, that right is tempered by
3 the -- the State's interest in making sure that the
4 public sidewalks function as they should and that there
5 is peace and good order.

6 But I would give you an example, Your Honor.
7 I'd -- I'd point you --

8 JUSTICE KENNEDY: I still don't know where
9 you're going to -- this -- this goes to Justice Breyer's
10 question. You -- you cannot write an ordinance that
11 says obstruction, intimidation, blocking is prohibited,
12 and still allow the kind of conversation that I
13 described earlier and that I want you to assume to be
14 true for the -- for the purposes of this question.

15 MS. MILLER: Your Honor, we -- we couldn't
16 here, obviously, because that wasn't the problem. The
17 problem with making that kind of a fine distinction is
18 that it doesn't address what the State's --

19 JUSTICE KENNEDY: But in speech cases, when
20 you address one problem, you have a duty to protect
21 speech that's -- that's -- that's lawful.

22 MS. MILLER: You do. As long as your
23 protection is narrowly tailored to your interest, you --

24 JUSTICE KENNEDY: But I -- I think what you
25 have to say to this Court is that it's impossible to

1 write a statute of the kind that we are discussing now,
2 and this is Justice Breyer's question.

3 MS. MILLER: It would be enormously
4 difficult to write a statute that addressed the problem
5 and the significant interest here where you are making
6 that kind of a find --

7 JUSTICE ALITO: May I ask you a question
8 about a distinction that is in this statute? Now, let
9 me give you this -- this example. A woman is
10 approaching the door of a clinic, and she enters the
11 zone. Two other women approach her. One is an employee
12 of the facility, the other is not. The first who is an
13 employee of the facility says, good morning. This is a
14 safe facility. The other one who's not an employee
15 says, good morning, this is not a safe facility.

16 Now, under this statute, the first one has
17 not committed a crime; the second one has committed a
18 crime. And the only difference between the two is that
19 they've expressed a different viewpoint. One says it's
20 safe; one says it's not safe. Now, how can a statute
21 like that be considered viewpoint-neutral?

22 MS. MILLER: Your Honor, I think what the
23 statute distinguishes is based on what those two
24 different people are doing. The -- as you say, the
25 employee could say, if she was performing her job, which

1 would be escorting that individual into the facility,
2 and if she wasn't unnecessarily cluttering up the -- the
3 buffer zone, which was the reason that the statute
4 was -- was enacted in the first place, then that person
5 could say that. You judge it on what she's doing, not
6 what she's saying.

7 JUSTICE ALITO: Well, that's what she --
8 what she's doing is what she's saying. She approaches
9 and she says this is a safe facility. The other one
10 says it's not a safe facility. They have a bad safety
11 record. And they're -- they're the only people in the
12 zone.

13 MS. MILLER: Right.

14 JUSTICE ALITO: If it's as big as this
15 courtroom, they're the only three people in that zone.

16 MS. MILLER: Right.

17 JUSTICE ALITO: The difference is a
18 viewpoint difference.

19 MS. MILLER: The -- what the legislature has
20 done is that it has created a circle around these
21 entrances and has only permitted particular conduct
22 within that buffer zone to allow the traffic to keep
23 moving on the sidewalk and to allow people to get in and
24 out. So unless you have a permissible purpose for your
25 conduct to be in the buffer zone, then you cannot be in

1 the buffer zone and that is what the statute is
2 addressing. With respect --

3 JUSTICE SCALIA: I don't understand it.
4 It's a permissible purpose to say this is a safe
5 facility, but not a permissible purpose to say this is
6 an unsafe facility?

7 MS. MILLER: The --

8 JUSTICE SCALIA: Is that --

9 MS. MILLER: The statute is not focused on
10 that person's speech. The statute is focused on -- on
11 what they're doing in the buffer zone.

12 JUSTICE KENNEDY: But the consequence is
13 just what is described by Justice Scalia; that is, the
14 consequence of the statute. Are you saying that the
15 consequences of what you write are irrelevant to this
16 argument?

17 MS. MILLER: Certainly, I wouldn't say that,
18 Your Honor. However, with respect to --

19 JUSTICE KENNEDY: It seems to me that you
20 should answer Justice Scalia's question, then.

21 MS. MILLER: With respect to viewpoint
22 discrimination, Your Honors, the statute has a perfectly
23 legitimate sweep. It allows people to go in and out of
24 the building. It allows pedestrians to go -- move back
25 and forth across the sidewalk, and it allows for even

1 employees, the snow shovelers mentioned in the Walter
2 Dell brief.

3 JUSTICE ALITO: Well, you could have created
4 a completely silent zone. Now, I don't know whether
5 that would be permissible or not, but it would be a
6 different question. You could have -- you could say
7 nobody can speak here. People can shovel snow. If they
8 work for the -- for the clinic, they can sweep the
9 sidewalk, they can do maintenance, they can go in and
10 they -- and out, but they can't utter a word.

11 Well, that would be a different statute.
12 But that's not this statute. This statute says that
13 there is an exemption for employees of the facility if
14 they are operating within the scope of their employment.
15 And surely coming out and saying this is a safe facility
16 is within the scope of their employment.

17 MS. MILLER: Right.

18 JUSTICE ALITO: So how do you justify that?
19 Forget about the conduct now. The speech that's
20 allowed. One can speak and say it's safe. The other
21 cannot speak and say it is not safe.

22 MS. MILLER: What I would argue, Your Honor,
23 is that speech in that particular circumstance of the
24 employee actually doing her job and not unnecessarily
25 cluttering the buffer zone, what -- then that speech is

1 simply incidental to the permissible conduct. And it
2 doesn't make the statute on its face -- it doesn't make
3 it viewpoint-discriminatory. Because as I said --

4 JUSTICE ALITO: You think it's incidental?
5 What if there's a real question about whether this is a
6 safe facility? That's incidental speech?

7 MS. MILLER: It's incidental to her
8 performing her job. And, Your Honor, it -- if there
9 were a circumstance where that kind of speech were
10 habitual or widespread or touched on advocacy in any
11 way, shape or form, then obviously, Petitioners would
12 have an opportunity to challenge the statute as applied.
13 But, of course, they haven't even begun to make the case
14 that there's viewpoint discrimination actually happening
15 in the buffer zone.

16 JUSTICE KENNEDY: It's very hard for me to
17 credit the statement or the implication that for an
18 employee to say, "We're glad you're here. You're going
19 to be well taken care of. This is a safe facility.
20 It's important for you to be here," it's very hard for
21 me to credit your statement that that's incidental to
22 their function.

23 MS. MILLER: It's incidental to the
24 permissible purpose for which they are allowed in the
25 buffer zone. And I should point out, actually, that

1 PPLM -- and again, this is in the Walter Dillinger brief
2 at page 2A -- they actually train their escorts not to
3 engage in that kind of speech. So that's first of all.
4 And second of all, escorts really only exist and only
5 operate in Boston on Saturday mornings for a couple of
6 hours. They don't work at all in Worcester or
7 Springfield.

8 JUSTICE KAGAN: Well, that raises another
9 question, Ms. Miller, because I assume that that's true
10 because the crowds and the obstruction really are with
11 respect to one facility at certain periods of time. So
12 Mr. Rienzi says, look, if it's at one facility, not all
13 ten of them or whatever it is, and it's only for certain
14 periods of time, not all day every day, you know, why
15 not narrow it that way?

16 MS. MILLER: Right.

17 JUSTICE KAGAN: So why not?

18 MS. MILLER: Because the experience has
19 shown that you do have problems at Worcester and
20 Springfield, and those problems do center around the
21 driveways. 85 to 90 percent of patients who approach
22 those facilities do so by car. And the only public
23 sidewalk -- there's a small slice of public sidewalk
24 between the road and the private driveway, and that's
25 the only opportunity that you'd -- that individuals

1 would have in order to protest.

2 And what's happened in the past in Worcester
3 and Springfield is that you would have pacing across
4 these driveways. That's at Joint Appendix 41. You'd
5 have individuals stopping and standing and refusing to
6 move in Worcester. You'd have literature thrown into
7 cars. You'd have hands and heads thrust into open
8 windows. And there was at least one accident in
9 Worcester. That's at J.A. 19.

10 So there definitely was conduct that was a
11 problem, and it wasn't even that there are a couple of
12 lone protestors in Worcester or Springfield. There are
13 events in Worcester and Springfield. There are regular
14 protestors there every week, first of all. And second
15 of all, the crowds get much larger at the semi-annual --

16 JUSTICE SCALIA: I -- I object to you
17 calling these people protestors, which you've been doing
18 here during the whole presentation. That is not how
19 they present themselves. They do not say they want to
20 make protests. They say they want to talk quietly to
21 the women who are going into these facilities. Now how
22 does that make them protestors?

23 MS. MILLER: Your Honor, the problem, of
24 course, that the statute was looking to address was not
25 with protestors, per se. It was with people who had a

1 desire to be as close to the facility doors and
2 driveways as possible to communicate their message. But
3 the result of that was congestion around these doors and
4 driveways.

5 So it wasn't a concern about the protest; it
6 was a concern about people actually being able to use --

7 JUSTICE KAGAN: And I would think,
8 Ms. Miller, that if you tried to do a statute that
9 distinguished between protestors and counselors, that
10 would be content-based much more than this statute is.

11 MS. MILLER: I would agree.

12 JUSTICE KAGAN: I mean, but -- you know,
13 which is not to say that this statute doesn't have its
14 problems, in my view. I mean, so I guess I'm a little
15 bit hung up on why you need so much space.

16 MS. MILLER: Again, the experience. We've
17 had quite a long experience in Massachusetts, a long
18 history of crowds around these doors or of even violence
19 at the clinics. And we've had law enforcement and
20 others who have viewed that crowd on a regular basis and
21 have described it, the activity around the doors and
22 driveways, as being so frenetic. You have so many
23 people there, the bad actors and the good actors. You
24 have so many people congested in the same space from all
25 points of view that it effectively blocks the door.

1 JUSTICE ALITO: Well, before you sit down,
2 can I ask you this question that's suggested by the
3 AFL-CIO briefs. Suppose the State legislature has
4 hearings, and they say there's a long history of
5 violence and obstruction at sites where there is a
6 strike and replacement workers have been called in.

7 Could the -- could a State pass a statute
8 that says there is a 35-foot zone like this around every
9 location in the State whenever there is a strike and
10 there are replacement workers? Could they do that?

11 MS. MILLER: Right. Well, of course labor
12 actions are protected by Federal law, so any State law
13 couldn't directly conflict with the --

14 JUSTICE ALITO: All right. Could Federal
15 law do that?

16 MS. MILLER: Well, this Court has repeatedly
17 upheld restrictions on labor activity, if given the
18 right record. So there is -- so the answer is yes, the
19 First Amendment would permit regulation on the record --

20 JUSTICE ALITO: In every case, in every
21 case --

22 MS. MILLER: No, no, no.

23 JUSTICE ALITO: -- there could just be a
24 flat rule. Doesn't matter whether there is any history
25 at that place, any indication there's going to be

1 violence. Maybe there will, maybe there won't. Across
2 the board, a zone around every place where there's a
3 strike.

4 MS. MILLER: Right. Well, certainly it
5 would be an easier case to defend if there was a
6 history, as we have here. And you'd have to prove that
7 the solution --

8 JUSTICE ALITO: You don't think there's a
9 history -- you don't think there's a history of violence
10 at places where there are strikes and replacement
11 workers?

12 MS. MILLER: Well, I don't think there has
13 been the kind of history and sustained violence that
14 we've had -- this almost unique record in Massachusetts
15 with respect to facilities. But Your Honor, I would say
16 --

17 JUSTICE ALITO: That's not my understanding
18 of the labor history.

19 MS. MILLER: -- does not have is --

20 JUSTICE SOTOMAYOR: Is there any abortion
21 clinic that has not had -- is there any abortion clinic
22 that has not had a problem in Massachusetts?

23 MS. MILLER: In -- there was, when the
24 legislature was considering the statute, there was a
25 survey submitted by NARAL that reviewed the experience

1 of the ten facilities that were then in existence in
2 Massachusetts. And six of them said that they had
3 significant problems outside of their facilities. Eight
4 of them said, at the very least, they had regular
5 protestors. There were two who did not report that
6 there was a significant problem.

7 JUSTICE SCALIA: This is testimony by the --
8 by the clinics themselves, right?

9 MS. MILLER: Correct.

10 Thank you, Your Honors.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Gershengorn.

13 ORAL ARGUMENT OF IAN H. GERSHENGORN
14 FOR UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENTS.

16 MR. GERSHENGORN: Mr. Chief Justice, and may
17 it please the Court:

18 The Massachusetts statute here is simply a
19 place regulation that does not ban speech, but instead
20 effectively moves it from one part of a public forum to
21 another, in this case away from the small areas --

22 JUSTICE SOTOMAYOR: Which of our -- which of
23 our precedents do you think governs this case?

24 MR. GERSHENGORN: So, Your Honor, I think
25 that there are a number of precedents that are helpful.

1 Madsen, of course, upheld the 36-foot buffer zone that
2 had a no-speech zone very much like this.

3 JUSTICE GINSBURG: That was an injunction.

4 MR. GERSHENGORN: It was an injunction, Your
5 Honor, but it was upheld under an even stricter standard
6 that -- that is applies here. But even aside from that,
7 I think a number of the pillars of Petitioners'
8 arguments here are directly contradicted by this Court's
9 precedents. So, for example, the idea that -- that
10 unrestricted -- that you have the right to choose the
11 best mechanism of communication is contradicted by
12 Hefernon and by Frisby. In Hefernon, there was -- the
13 Petitioner said, "I need to be able to talk quietly to
14 people to ask for money, and that's the only way I can
15 get it." And this Court said you have ample
16 communication channels -- alternative channels over in
17 that booth.

18 In Frisby, what the protestor wanted to do
19 was target a house, and what this Court said in Frisby
20 was you have alternative channels of communication. You
21 can go door to door. You can mail things. You can make
22 calls. So I think that that pillar of the -- of the
23 argument --

24 JUSTICE SCALIA: What's the alternative
25 here?

1 MR. GERSHENGORN: The alternative --

2 JUSTICE SCALIA: Standing 35 feet away and
3 yelling?

4 MR. GERSHENGORN: No, Your Honor.

5 JUSTICE SCALIA: Is that the alternative?

6 MR. GERSHENGORN: No, Your Honor.

7 JUSTICE SCALIA: To comfort these women?

8 MR. GERSHENGORN: No, Your Honor. The
9 alternative in this case is the entire length of the
10 sidewalk, quiet counseling, leafletting, and
11 conversation is permitted. It is the last four to five
12 seconds before the petition -- before the counselors
13 enter the clinic that --

14 JUSTICE SCALIA: They don't know who's going
15 into the clinic.

16 MR. GERSHENGORN: Your Honor, the
17 testimony --

18 JUSTICE SCALIA: Until you get to the area
19 close to the clinic, you don't know whether passersby
20 are going there or not.

21 MR. GERSHENGORN: Your Honor, the testimony
22 is actually to the contrary, that they get -- that Ms.
23 McCullen and others get quite good at identifying who is
24 going and is not going into the clinic. And actually --
25 so what we're talking about is the last four to five

1 seconds before they go in. And Justice Kagan --

2 JUSTICE KENNEDY: Is your concern that,
3 absent this statute, there will be physical obstruction
4 to the entrance? Is that a major concern?

5 MR. GERSHENGORN: So, Your Honor, let me
6 address that. The answer is -- the answer is yes, but
7 that's not all. What the legislature had before it, and
8 Justice Breyer --

9 JUSTICE KENNEDY: Let me ask, if that's --
10 if that's your concern, how many Federal prosecutions
11 were brought in Massachusetts for physical obstruction
12 under the Federal statute?

13 MR. GERSHENGORN: Your Honor, I'm not aware
14 of the number. There are 45 FACE prosecutions
15 nationwide. But FACE is a very different statute. The
16 criminal prosecutions in FACE are for -- are for murder,
17 arson, and for chaining yourselves to doorways. They
18 are not for the kind of quiet counseling and -- and
19 picketing that's at issue here.

20 JUSTICE KENNEDY: But the Federal interest
21 that you're the defending is you don't want this
22 physical obstruction statute to be misinterpreted.

23 MR. GERSHENGORN: That's right.

24 JUSTICE KENNEDY: But what's wrong with the
25 physical obstruction statute as an answer to many of the

1 problems that Massachusetts is facing?

2 MR. GERSHENGORN: Your Honor, I don't think
3 it's at all an answer to the problems Massachusetts is
4 facing because, as Justice Scalia has repeatedly pointed
5 out, these are not the type of defendants who are at
6 issue in the FACE Act. What FACE Act is talking about
7 is murder, arson, and chaining to doorways.

8 What this statute is getting at is something
9 quite different. It is congestion in front of doorways.
10 It is people -- individuals handing out --

11 JUSTICE KENNEDY: That's obstruction under
12 the Federal statute.

13 MR. GERSHENGORN: It is not, Your Honor,
14 because those are specific intent crimes in both
15 Massachusetts and in the Federal statute. The -- for
16 example --

17 JUSTICE KENNEDY: Justice Holmes said even a
18 dog knows the difference in being stumbled over and
19 being kicked.

20 MR. GERSHENGORN: So, Your Honor --

21 JUSTICE KENNEDY: Can't -- can't -- you're
22 saying Federal prosecutions can't tell when people are
23 deliberately obstructing --

24 MR. GERSHENGORN: I'm saying --

25 JUSTICE KENNEDY: -- this is beyond -- this

1 is beyond the realm of the law?

2 MR. GERSHENGORN: I'm saying what's at issue
3 here, Your Honor, is not that kind of -- of deliberative
4 obstruction. What the testimony before the legislature
5 was, was that there was a congregation of people and the
6 massing of people. That indeed, there were Pro Choice
7 protestors in the zone who have -- certainly are not
8 intending to obstruct. And it was -- so what they were
9 dealing with was quiet counseling leading to --
10 counter-counseling leading to congestion in front of the
11 doorways.

12 There also was testimony that there were
13 people handing literature to moving cars, accidents and
14 near accidents, which are not intentional obstruction in
15 the least. The kinds of statutes that this Court --
16 that -- that are at issue in the specific intent crime
17 in Massachusetts and the FACE Act do not get at the kind
18 of peaceful, quiet, yet congesting and disrupting
19 conduct that is at issue here.

20 And, Justice Breyer, I would urge you to
21 look at the Evans testimony at Joint Appendix 67 to 71.
22 The Hefernon testimony at 79 to 80. The Coakley
23 testimony of JA-51, and the Capone testimony at JA-19.
24 There are specific arguments as to why these did not
25 work.

1 The argument Petitioners make here, Your
2 Honors, is very, very broad. The lower courts have
3 upheld buffer zones around political conventions, around
4 circuses, around funerals. The idea that you could
5 defeat those buffer zones by simply saying, I would like
6 to have a quiet conversation with the delegates as they
7 go into the political convention, would wipe out a
8 number of court of appeals decisions and the kind of
9 buffer zones that this Court, I submit, and that the
10 lower courts have found are -- are needed. Justice --

11 JUSTICE ALITO: Well, how far do you
12 think -- what do you think a State legislature or
13 Congress needs to find in order to establish a zone
14 around some category of facility at which there -- they
15 have some evidence that there have been some disruptions
16 and some obstruction?

17 MR. GERSHENGORN: So, Your Honor --

18 JUSTICE ALITO: Take the example of -- I
19 think it's -- it's a real -- real ordinance someplace
20 you can't have, there's a buffer zone around fraternal
21 lodges.

22 MR. GERSHENGORN: So, Your Honor, I'm not
23 aware of the history of fraternal lodges, but what's at
24 issue here is really --

25 JUSTICE ALITO: What would they have to

1 find? Or slaughterhouses. Or labor -- or sites where
2 there are strikes.

3 MR. GERSHENGORN: So I think -- I think, for
4 example, in the slaughterhouse or what they found in --
5 around circuses and conventions is the idea that there
6 is massing of people that prevents the orderly ingress
7 and egress to and from the facilities.

8 What the State was dealing with here was not
9 an isolated incident, but the State had 14, 15 years of
10 history of the massing. They had tried other things.
11 They had tried the statutes that Justice Scalia
12 identified. They had tried a narrower buffer zone, and
13 the testimony was it wasn't working, and that the police
14 were coming in and said, we can't enforce it. Why is
15 that? Because they had a hard time measuring consent,
16 evaluating what does --

17 JUSTICE ALITO: What kind of a record do
18 they need? Could -- could there be a State law that
19 says no picketing around any -- you can never have a
20 picket around any store to try to prevent people -- to
21 tell people don't go -- don't patronize this store.
22 Could they do that? Isn't that Thornhill v. Alabama?

23 MR. GERSHENGORN: Right. And what --
24 actually, in Thornhill, they struck that down.

25 JUSTICE ALITO: Right.

1 MR. GERSHENGORN: But it was very different
2 from this statute. Thornhill's was you can't go
3 anywhere near the facility and it was -- it was only one
4 type of speech.

5 This is content neutral and it is -- it is a
6 narrow buffer zone.

7 Justice Kagan, I really urge you to --
8 because --

9 JUSTICE ALITO: Well, I mean, I understand.
10 Stop. I'll ask this one more time.

11 MR. GERSHENGORN: Yes.

12 JUSTICE ALITO: I think it's -- I understand
13 the -- the desire to create a buffer zone around certain
14 sensitive facilities. What I'm asking is: What
15 requirements, if any, does Congress or a State
16 legislature have to meet before they can do that? If it
17 is done, do we simply say they -- they have a rational
18 basis for it and that's it, so they can establish
19 basically a buffer zone around any kind of a facility
20 they want. If not, then what needs to be established?

21 MR. GERSHENGORN: So, Your Honor, I think in
22 the evidentiary realm, it's hard to have hard-and-fast
23 rules. I would say you would need a lengthy history of
24 serious congestion and other problems and -- and a --
25 some sort of showing that the alternatives weren't

1 working, but that's what's here. This problem has been
2 going on in Massachusetts since 1994. This is not
3 something the legislature woke up one day and said in
4 light of one incident, we're going to -- to deal with
5 this. They tried other things. They -- and the
6 evidence, therefore, supported this. What would it take
7 to support a broader statute? It's hard for me to say,
8 but I think this record shows.

9 Justice Kagan, can I --

10 JUSTICE ALITO: One more thing. What about
11 the example of a strike? There certainly is a long
12 history of labor violence in places where there are
13 replacement workers. Could that -- could it be done in
14 that situation across the board?

15 MR. GERSHENGORN: So I think that would be a
16 very broad statute and hard -- hard to defend. But if
17 there were before the legislature, as there is in this
18 case, the kind of congestion -- and the solution, I
19 submit, is much narrower than the Petitioners are
20 suggesting. It is to clear out an area around the
21 entrance.

22 JUSTICE BREYER: What kind of --

23 MR. GERSHENGORN: Justice Kagan, the
24 testimony is 22 feet from the entrance in Boston,
25 22 feet from the edge of the doorway to the edge of

1 the -- of the buffer zone. It is from me to the
2 marshal. It is not to the back of the courtroom. It
3 is -- it is an NBA 3-point zone. I don't -- it is not
4 the --

5 JUSTICE BREYER: But I understand you're
6 saying the reasonableness of it.

7 (Laughter.)

8 JUSTICE BREYER: But go back to
9 Justice Alito's first question. Maybe we can make some
10 progress here.

11 The regulation of labor is up to the NLRB.
12 All right. Now, the NLRB does regulate picketing. It
13 does say what you can do and can't do, and the courts
14 have reviewed that. And you -- what standard do courts
15 use when the NLRB decides, in its wisdom and expertise,
16 well, the pickets can go here, but they can't go there.
17 You can do this, but you can't do that. All of which
18 have speech implications. What standard of review do
19 the courts use?

20 MR. GERSHENGORN: Your Honor, I am not aware
21 of the standard they use, but it is a --

22 JUSTICE BREYER: Are you aware of any
23 case -- I'm putting it -- loading it because -- only
24 because to show my ignorance of it -- where the standard
25 has differed from the ordinary APA standard?

1 MR. GERSHENGORN: I'm not, Your Honor. I'm
2 not aware of cases one way or the other.

3 JUSTICE BREYER: Should we create a new
4 standard for reviewing this kind of regulation? I think
5 that's actually a serious question.

6 MR. GERSHENGORN: I don't think so, Your
7 Honor. Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Rienzi, you have three minutes
10 remaining.

11 REBUTTAL ARGUMENT OF MARK L. RIENZI
12 ON BEHALF OF THE PETITIONERS

13 MR. RIENZI: Thank you, Mr. Chief Justice.
14 Several points. First, it's not impossible
15 to draw a statute to deal with the problems. 49 other
16 states deal with the alleged problems. The next
17 prosecution Massachusetts institutes for blocking a door
18 will be its first in at least two decades.

19 JUSTICE KAGAN: Is that true, Mr. Rienzi?
20 Is Massachusetts' statute the only one of this kind?

21 MR. RIENZI: It is the only State statute of
22 its kind. There are a few municipal statutes of -- that
23 are similar that are, frankly, based on the First
24 Circuit decisions in this case.

25 Secondly, here, the police officers

1 testified that they know all the regular players at the
2 clinics. That's their testimony. They know them all.
3 Well, if you know them all and if they're congregating
4 in the doors and they need to get out of the doors, you
5 should go to court and get an injunction and say, stay
6 out of the doors. Until they do that, the claim that
7 they have to throw their hands up and put people in
8 prison for peaceful speech is not a very persuasive
9 claim.

10 Secondly, all of the evidence that the
11 United States cited -- cited you to from the record, all
12 of it, Boston, Saturday mornings. The claim that the
13 legislature can extrapolate from that to ban peaceful
14 speech in Boston at other times when the sidewalk is
15 empty, and at other clinics where the sidewalk is empty
16 and say, well, there's abortion there, and where there's
17 abortion, we expect certain speech problems, therefore,
18 we're going to make it illegal to speak there.

19 That's the State's claim here. The evidence
20 is Boston specific. The First Amendment requires
21 precision. They need to regulate the problem where it
22 happens and if that means police officers, if that means
23 dispersal laws, if that means actually bringing a FACE
24 prosecution, which the United States has never done,
25 they ought to do that. But they shouldn't imprison

1 Mrs. McCullen for her speech.

2 Third, the United States mentions --

3 JUSTICE SOTOMAYOR: Are you questioning the
4 government's representation? I haven't looked at FACE.

5 MR. RIENZI: I don't believe the
6 government --

7 JUSTICE SOTOMAYOR: Is it limited to the
8 three situations, to -- to murder, arson and chaining?

9 MR. RIENZI: Thank you, Your Honor.

10 No, it is not. The statute is not remotely
11 limited to that. I direct the Court to Section C -- I'm
12 sorry, Section -- it's the definitions section of the
13 statute. Definition 4, physical obstruction, includes
14 even making entry unreasonably difficult. It is not at
15 all solely for violence. It's for physical obstruction
16 even making it unreasonably difficult.

17 Counsel said that they brought 45 cases
18 across the country. That's true. Zero, zero in
19 Massachusetts. They shouldn't be able to restrict the
20 peaceful speech.

21 Lastly, to the extent the Court feels the
22 need to recognize that there are some situations that
23 are so extraordinary that we should put people in prison
24 for peaceful conversations on public streets, that ought
25 to be the exceptional case where the statute passes

1 strict scrutiny and the State actually has tried the
2 solutions that it claims don't work. That is not this
3 case. The government does not claim its restriction to
4 pass strict scrutiny. They didn't say it would be
5 impossible. They said it would be hard. 49 other
6 states do different things. The Federal government
7 protects peaceful speech in the FACE law. FACE is a
8 great example of something that deliberately gets at the
9 problem and if somebody's in the doorway and they need
10 to get out of the doorway, the answer is, sir, please
11 get out of the doorway. It is not dragging
12 Mrs. McCullen off to prison because she has a consensual
13 conversation 25 feet away from the doorway.

14 That's an extraordinary power for the
15 government to ask to selectively control speech among
16 willing participants on public sidewalks.

17 Thank you very much.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:04 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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