

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ELEANOR MCCULLEN, ET AL., :

4 Petitioners : No. 12-1168

5 v. :

6 MARTHA COAKLEY, ATTORNEY GENERAL :

7 OF MASSACHUSETTS, ET AL. :

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9 Washington, D.C.

10 Wednesday, January 15, 2014

11

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

15 APPEARANCES:

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17 Petitioners.

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19 Boston, Massachusetts; on behalf of Respondents.

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23 Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

6 Mr. Rienzi.

7 ORAL ARGUMENT OF MARK L. RIENZI

8 ON BEHALF OF THE PETITIONERS

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

11 This Court has held that the public
12 sidewalks are a natural and proper place for free
13 citizens to exchange information and ideas, and for that
14 reason the Court has held that public sidewalks occupy a
15 special position in First Amendment analysis.

16 If the Massachusetts law at issue here makes
17 it a crime to enter onto certain public sidewalks, even
18 for the purpose of peaceful conversation, or
19 leafletting, the law applies at abortion clinics
20 throughout the State on every hour of every day that
21 they are open, regardless of the circumstances.

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

25 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.

8 For example, Mrs. McCullen generally does
9 her counseling early in the morning on Tuesdays and
10 Wednesdays beginning at 7:00 in the morning. She
11 testified that she is sometimes alone when she does this
12 counseling. Nancy Clark testified that 90 percent of
13 the time that she is at the clinic in Worcester, she is
14 all alone.

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

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

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

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

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

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

24 For example, Section E of this statute makes
25 it illegal to impede, block, obstruct or even hinder

1 somebody's access to the clinics. And that section of
2 the statute is not challenged here and never has been.

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

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

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

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

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

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

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

1 JUSTICE SOTOMAYOR: You are not taking the
2 position that 1997 was the last time an entrance was
3 obstructed or that the police were called to open access
4 to a clinic? Are you taking that position that the last
5 time it happened was 1997?

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

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

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

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

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

1 scene, and if the police say, Get out of the doorway,
2 either the person moves in which case there is not a
3 problem anymore, or they don't, in which case, intent is
4 pretty clear.

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

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

14 MR. RIENZI: And so I agree that's the
15 second part of the State's argument. I don't think this
16 law is narrowly tailored to that concern, in two
17 respects.

18 One, the law applies -- you know, the
19 evidence in the case is that the crowds that the State
20 is concerned about happened essentially at one clinic,
21 one day, one time -- Saturday mornings in Boston -- and
22 when they happen, there are video cameras rolling and
23 police officers present.

24 And there is no reason to believe the police
25 can't simply say, Move out of the doorway. And if

1 someone is in front of the doorway, they certainly
2 should do that.

3 JUSTICE ALITO: Does the record show how
4 many clinics in the State are covered by the law?

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

8 JUSTICE BREYER: How far do you want to go
9 in your concession? Would you want to concede this
10 point that imagine the State has two groups of people
11 and one group feels what the other is doing is terribly
12 wrong. And the second group feels, We absolutely want
13 to do it.

14 And everyone is in a fragile state of mind,
15 and they want to, if possible, at least one group wants
16 to sort of shout as loud as you could at the other,
17 Please don't do this. And the other says, Please leave
18 me alone. And we are not saying which group is which;
19 the analogy is obvious, but I keep all the titles out.

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

1 that, too?

2 MR. RIENZI: So, no, I do not mean to
3 concede that. I don't think -- I think a solution that
4 is done with painted lines on the sidewalk that says at a point --

5 JUSTICE BREYER: But now you are into the
6 details. I want to know about the principle. I mean, I
7 can imagine the principle applying special care and need
8 must be taken outside of hospitals for veterans, even
9 though there are some who are very much opposed to the
10 war, because these people are gonna be coming out, they'll be
11 in wheelchairs, it will be terrible.

12 And others thinking -- you know, we can
13 think of many, many situations, irrespective subject
14 matter, where there is a need for such refereeing. And
15 I just want to know if the -- if the concept is okay
16 with you or if not.

17 MR. RIENZI: Generally --

18 JUSTICE BREYER: With the details.

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

21 JUSTICE SOTOMAYOR: So protestors like the
22 one we had in the Schneider case at a funeral of a
23 veteran can go right up to the public sidewalk outside
24 the church and put up the signs that they did and give
25 out the leaflets that they did, talking about that

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1 veteran in the ways that they did? That's okay by you.

2 MR. RIENZI: So -- so, a couple points about
3 that. One I think --

4 JUSTICE SOTOMAYOR: There was no evidence
5 there that they were -- that they were disruptive. They
6 were just expressing their First Amendment rights.

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

8 JUSTICE SOTOMAYOR: But there was the
9 potential for disruption because of the strong
10 sentiments around that.

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

17 JUSTICE SCALIA: In Schneider, they were
18 held not so far back that their shouts and protests
19 couldn't be heard. Isn't that the case? They could
20 still be heard --

21 MR. RIENZI: I think it made --

22 JUSTICE SCALIA: -- they were not out of earsight --

23 MR. RIENZI: -- perhaps were part of the
24 funeral procession that passed by. I don't think
25 they --

1 JUSTICE BREYER: Do you see now why I am
2 trying to narrow it? Because in my case, in Schneider,
3 I thought it was pretty important that the demonstrators
4 were behind a hill somewhere and the police restricted
5 where they can go. Many States have enacted similar
6 laws, and I thought that's important, because maybe it
7 would have come out differently. I mean, you could
8 argue that, I could.

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

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

21 If you compare it to, for example, the
22 Federal military funeral protest law, that law is
23 specifically drawn to acts that disrupt the peace and
24 good order of the funeral, and I think that is
25 different.

1 JUSTICE KAGAN: But are you saying that you
2 could not do an act that instead just says, look, it's a
3 little bit too hard to figure out what and what does not
4 disrupt peace and order, so we're just going to say
5 25 feet around a funeral, or 25 feet around any
6 facility, that that's never permissible?

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

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

18 JUSTICE KAGAN: Well, for example, I was
19 intrigued by one of the examples that you gave in your
20 own brief, which you said slaughterhouses. So, let's
21 say, that there are animal rights activists, and this is
22 easy to imagine, who try to interfere with access in and
23 out of slaughterhouses. And a State passes a regulation
24 that says there's a ton of interference, it's preventing
25 the operation of these facilities, employees can't get

1 in, suppliers can't get in, slaughterhouses are leaving
2 the State because of this problem, and so we're just
3 going to set up a zone and let's call it 30 feet,
4 because it's very hard to enforce anything else.

5 I guess my reaction to that hypothetical --
6 you -- you must have used it for me to say, oh, that's
7 terrible. But my reaction, my intuition was kind of
8 what's wrong with that? Just have everybody take a step
9 back.

10 So what is wrong with that?

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

19 It's the generally applicable statute,
20 right, that's tied to just one particular
21 often-protested event that gives the State enormous
22 power to interfere with the marketplace of ideas.

23 JUSTICE ALITO: one of the examples that
24 is given in one of the amicus briefs in this case, and
25 they -- they provide a lot of background, is a State law

1 that creates a buffer zone around every fraternal lodge.
2 What would you say about that?

3 MR. RIENZI: I think it is difficult to
4 imagine the government interest to -- well, first, I
5 guess, I don't know the particulars of that law and what
6 it -- what it restricts. If it restricts peaceful
7 conversation on public sidewalks anyplace there's a
8 fraternal lodge, I would say that -- that should not be
9 permissible under the First Amendment.

10 I think, generally speaking, the idea of the
11 government picking one particular item and saying, well,
12 around this, suddenly the character of the public forum
13 changes from a place where people can have peaceful,
14 consensual conversations to a place where we will
15 imprison them for doing that, I think that's a dramatic
16 restriction of First Amendment rights.

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

22 JUSTICE KAGAN: But let's go back to the
23 slaughterhouse case. I mean, there might be people who
24 say it's really important to us to actually be able to
25 face-to-face talk with the employees and tell them why

1 they should get different jobs or why they should change
2 their practices in various kinds of ways. And -- you
3 know, there are some people who think signs and chants
4 are great, but there are people who really want to make
5 one-to-one contact with the truck drivers, with the
6 employees, whoever.

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

13 MR. RIENZI: To be clear, Your Honor, I'm
14 not saying the government has to let it go on. I'm
15 saying the government has tools that are better drawn to
16 it than eliminating even the peaceful, consensual
17 conversation.

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

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

25 MR. RIENZI: Suppose it were a given that

1 there is no way to keep the abortion clinic open --

2 JUSTICE KENNEDY: The laws simply do not --
3 reference to obstruction and blocking entrance, simply
4 do not work.

5 MR. RIENZI: If the laws simply do not work,
6 I think perhaps the government could come in and make a
7 case that it has a compelling interest and that this is
8 the least restrictive means of doing it.

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

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

1 when doesn't it become just up to them?

2 We can't -- we're not legislators. We don't
3 know the situation in Massachusetts. We can insist upon
4 a reasonable record. But how can we do more than that
5 on this detail?

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

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

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

23 MR. RIENZI: So, a few things. One, the
24 reasons this Court gave in Hill for allowing the 8-foot
25 no-approach zone was precisely that it only was about

1 protecting unwilling listeners and it did not stop
2 discussions with willing listeners. There are real
3 people --

4 JUSTICE SCALIA: Counsel, do you accept that
5 the record here shows that it did not work well in the
6 sense that Justice Breyer --

7 MR. RIENZI: No, not at all.

8 JUSTICE SCALIA: -- seems to use it?

9 MR. RIENZI: I understood I was being asked
10 to assume that.

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

18 MR. RIENZI: No. I -- I agree, it was not.
19 The claim was --

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

1 feet.

2 I mean, the difference is about half -- you
3 know, if you were near me, Price is near we have Colorado. If
4 we're over to where the first row is, we'd have
5 Massachusetts, and -- and they have some evidence that
6 we can't enforce this Colorado thing very well; it
7 doesn't help.

8 Now, go ahead. I want your answer.

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

10 JUSTICE BREYER: I'm not trying to put
11 words --

12 MR. RIENZI: -- if you sent me 35 feet
13 further back and asked me to make my argument from
14 there --

15 JUSTICE BREYER: I'd hear you.

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

23 JUSTICE BREYER: I'm not denying the
24 difference.

25 MR. RIENZI: Yeah.

1 JUSTICE BREYER: I am asking you, we've now
2 heard different characterizations of the record. I
3 didn't mean to characterize it. I want you to explain
4 what it is in the record, from your point of view or
5 lack thereof, that means that the Constitution
6 intervenes to prevent Massachusetts from doing it.

7 MR. RIENZI: So the constitutional narrow
8 tailoring test under the time, place, and manner test
9 requires that the law not restrict substantially more
10 speech than necessary to serve the government's
11 interest. Here --

12 JUSTICE GINSBURG: How much is -- how much
13 is restricted? How -- how long does it take from when
14 you enter the buffer zone until you reach the clinic
15 entrance?

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

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

21 MR. RIENZI: Yeah.

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

25 MR. RIENZI: I respectfully disagree on that

1 last point, Your Honor. The evidence in this record is
2 that the -- the inability to speak with people close to
3 the clinic has a dramatic effect on the Petitioners'
4 ability to reach their audience. So if someone happens
5 to be walking from the same side of the zone that you're
6 standing on, you may have a shot.

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

10 JUSTICE SCALIA: And if you know they're
11 going to the clinic.

12 MR. RIENZI: And if you can identify the
13 audience early enough. But, for example, places like
14 Worcester and Springfield, where essentially the only
15 chance to reach the audience is by standing on the
16 public sidewalk and waving a leaflet as they drive
17 through the driveway entrance.

18 If you have to stand 35 feet back and do
19 that, the evidence here shows there's essentially zero
20 chance to reach that audience. So it is --

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

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

7 Many people would just drive on by, and they
8 don't want the information, and that's fine. That's
9 their right. But many people do want the information
10 and have acted on the information. And this law makes
11 it much harder, almost impossible in places like
12 Worcester and Springfield, to offer it.

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

16 MR. RIENZI: So, as the size of the zone
17 decreases, I think the -- the imposition on the speech
18 rights is -- you know, gets less and less and better and
19 better. And so the adequacy of the alternatives, for
20 example, that may improve as you go.

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

24 JUSTICE KAGAN: Well, but that goes back to
25 Justice Ginsburg's question. I mean, how is a law

1 supposed to deal with -- with that, sort of the
2 fluctuating conditions that may be at a particular
3 clinic site?

4 MR. RIENZI: That's -- that's precisely the
5 point. That's why this is not something that should be
6 addressed with a statute like this. This is something
7 that should be addressed with either a statute drawn to
8 something like large crowds or a dispersal statute.

9 The brief -- amicus brief for New York State
10 in support of Massachusetts here talks about how
11 Concord, New Hampshire and Los Angeles deal with this
12 problem. They give the police the power to disperse
13 crowds when they become obstructive or violent, the same
14 way this Court approved in *Boos v. Barry*.

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

19 MR. RIENZI: So --

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

22 MR. RIENZI: In many respects it is. In
23 many respects it is no different than the speech-free
24 zone in the *Jews for Jesus* case. It's a place where the
25 government claims it can essentially turn off the First

1 Amendment.

2 But the government says --

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

7 MR. RIENZI: I agree the government has
8 eliminated more than speech on that sidewalk, but
9 they've eliminated speech on that sidewalk as surely as
10 in the Jews for Jesus case.

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

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

14 MR. RIENZI: Yes.

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

17 MR. RIENZI: Thank you, Justice Alito. Yes.
18 So they haven't eliminated speech for all people. They
19 have --

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

24 MR. RIENZI: So on the face of the statute,
25 I don't think that -- that that interpretation doesn't do very

1 much. That statute --

2 JUSTICE GINSBURG: This is the -- the chief
3 legal officer of the State says this is a term that
4 needs to be interpreted. The term is "scope of
5 employment." Scope of employment within this statute
6 means getting to work and leaving work, and it doesn't
7 mean political speech.

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

11 First, I don't believe -- I don't believe
12 that they have the authority to do that; in other words,
13 I don't think they could go arrest somebody who happened
14 to speak about abortion when they work for an abortion
15 clinic. They have an absolute statutory defense.

16 But even if they could limit it to just
17 doing their job, you end up with the problem that the
18 Ninth Circuit sought in the Hoyt case, which is if the
19 clinic is allowed to use that sidewalk, even just to
20 say, "good morning, may I help you into the clinic," and
21 the government says that's a valid use of our public
22 sidewalks, but the State says Mrs. McCullen will go to
23 prison if she goes on that sidewalk and says, "good
24 morning, may I offer you an alternative?"

25 As the Ninth Circuit panel said, that's

1 indubitably content-based.

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

6 JUSTICE KENNEDY: Well, am I correct that
7 the Attorney General's regulation with respect to
8 employees of the clinic in a way made this even more
9 content-based because there was a prohibition on
10 discussing the -- the abortion procedure?

11 MR. RIENZI: I -- I agree. That's one of
12 the reasons that the interpretation is flagrantly
13 unconstitutional. The government can't simply say to
14 people who work for Planned Parenthood, we won't arrest
15 you when you talk on the sidewalk unless you talk about
16 abortion, right? If you talk about abortion, then we'll
17 arrest you.

18 And that mirrors -- that mirrors the State's
19 interpretation of its -- of the exemption for people
20 walking through the zone, where it says you can walk
21 through, and this is JA-93-94, "provided that the
22 individual does not do anything else within the buffer
23 zone, such as expressing their views about abortion."
24 So the government's saying you can walk through, but you
25 can't talk about abortion.

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

3 MR. RIENZI: Well, I -- I agree. I don't
4 think --

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

8 MR. RIENZI: Well, the -- the interpretation
9 as to the employees that the Attorney General has
10 proffered for 6 years is about speech about abortion.
11 So it's not they can't talk about abortion --

12 JUSTICE SCALIA: Excuse me. If -- if you're
13 going through the zone just to get somewhere, not to get
14 to the clinic, and you're walking with a companion,
15 can't you speak to your companion as you walk -- it doesn't
16 ban speech by everybody who's walking through.

17 MR. RIENZI: The Attorney General has taken
18 multiple positions on that. In the lower court, their
19 position was you can't talk about abortion or partisan
20 issues. They told the First Circuit that you can't even
21 wear -- that you can be arrested if you wore a Cleveland
22 Indians shirt while you were just passing through. At
23 this Court, they say that people passing through have
24 speech rights.

25 Either one is bad. Either way the

1 government doesn't have the ability to say who gets to
2 speak and who doesn't get to speak on an open public
3 sidewalk.

4 If I may reserve my time?

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Ms. Miller.

7 ORAL ARGUMENT OF JENNIFER GRACE MILLER

8 ON BEHALF OF THE RESPONDENTS

9 MS. MILLER: Mr. Chief Justice, and may it
10 please the Court:

11 Petitioners can and do protest abortion in
12 Massachusetts and they can do it in the public spaces
13 right outside abortion facilities.

14 JUSTICE SCALIA: This is not a protest case.
15 These people don't want to protest abortion. They want
16 to talk to the women who are about to get abortions and
17 try to talk them out of it. I -- I think it -- it
18 distorts it to say that what they want to do is protest
19 abortion.

20 If it was a protest, keeping them back
21 35 feet might not be so bad. They can scream and yell
22 and hold up signs from 35 feet. But what they can't do
23 is try to talk the woman out of the abortion. It's a
24 counseling case, not a -- not a protest case.

25 MS. MILLER: It -- Your Honor, I would say

1 it's a congestion case. Certainly, Ms. McCullen and
2 others can have those conversations right in front of
3 the abortion facility. It's just that those
4 conversations are moved back a few feet. And in point
5 of fact, Ms. McCullen --

6 JUSTICE KAGAN: Well, it's more than a few
7 feet. You know, 35 feet is a ways. It's from this
8 bench to the end of the court. And if you imagine the
9 Chief Justice as sort of where the door would be, it's
10 most of the width of this courtroom as well. It's --
11 it's pretty much this courtroom, kind of. That's a lot
12 of space.

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

18 JUSTICE SOTOMAYOR: I thought it was two car
19 lengths.

20 MS. MILLER: I'm sorry?

21 JUSTICE SOTOMAYOR: Two car lengths.

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

23 JUSTICE SOTOMAYOR: Two car lengths.

24 MS. MILLER: Two car lengths. Exactly
25 right, Your Honor.

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

3 MS. MILLER: We measured this courtroom.

4 JUSTICE BREYER: I'd just like you to go
5 back to Justice Scalia's question for one second. I
6 didn't hear the -- as he was saying that this case is
7 not a protest case, it's simply about calm
8 conversations. And that is what I want to know if the
9 evidence showed that.

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

12 JUSTICE BREYER: No, the evidence upon which
13 Massachusetts based its decision to go to 35 feet
14 instead of 8 feet. There were hearings. Did the
15 evidence show that what was involved was calm
16 conversations between one person trying to counsel
17 another or did the evidence show something else?

18 MS. MILLER: Certainly, the evidence showed
19 something else.

20 JUSTICE BREYER: What?

21 MS. MILLER: Experience showed that there
22 had to be a certain amount of space around the
23 facilities. What we had, for example, were pro choice
24 advocates swearing and screaming at pro life advocates
25 within the buffer zone. That's at Joint Appendix 26

1 through 28. You had the Pink Group, which is a pro
2 choice organization, pushing and shoving and jockeying
3 for position.

4 JUSTICE SCALIA: Well, surely you could have
5 a law against screaming and shouting within 35 feet or
6 protesting within 35 feet. Isn't that more narrowly
7 tailored? I mean, what this case involves, what these
8 people want to do is to speak quietly and in a friendly
9 manner, not in a hostile manner, because that would --
10 that would frustrate their purpose, with the people
11 going into the clinic.

12 MS. MILLER: But, again, experience showed
13 that even individuals who wanted to engage in close,
14 quiet, peaceful conversation were creating congestion
15 around --

16 JUSTICE BREYER: Rather -- I note there's
17 some people who are peaceful, in which case I would
18 accept Justice Scalia's suggestion this is a counseling
19 case. But you've cited some other evidence that
20 suggests there were other people who were screaming,
21 pushing and shouting, which sounds like, in his
22 characterization, a protest case. And the reason that
23 Massachusetts found it difficult to write a statute that
24 distinguishes one from the other is?

25 Why do people write statutes that sometimes

1 do not make these fine distinctions? Why did they in
2 this instance?

3 MS. MILLER: They didn't make a fine
4 distinction, Your Honor, because it didn't matter
5 whether people were being peaceful or whether they
6 were --

7 JUSTICE BREYER: Could you have written such
8 a statute that would have worked?

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

11 JUSTICE KAGAN: How did you pick 35 feet?
12 Why 35?

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

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

1 problem.

2 So at some point or another, the -- the
3 legislature was aware that some amount of space needed
4 to be created, and it chose 35 feet as a reasonable
5 response, a reasonable amount of space around the
6 facility to allow --

7 JUSTICE BREYER: To go to -- go back for a
8 second. I see that. Is there anything in the record --
9 the obvious reason for a legislator, I think -- I did
10 work in the legislature for a while as a staff member --
11 that you don't write these fine statutes is they won't
12 work. They have too fine a distinction. The activity
13 is commingled. The activity -- all right. Now, I knew
14 you were just going to nod my -- your head as soon as I
15 said that.

16 So I was trying to get you to say it in
17 spontaneously if it's true. Is there anything in this
18 record that suggests that this is one of those cases
19 where it's just too tough to say whether they're
20 counseling somebody or whether they're screaming at
21 somebody, whether they're pushing somebody or whether
22 they're standing near them peacefully?

23 Is there any evidence in the record I could
24 turn to that would suggest that?

25 JUSTICE SCALIA: You should say yes.

1 (Laughter.)

2 MS. MILLER: And I will.

3 (Laughter.)

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

7 MS. MILLER: I will of course, Your Honor.
8 The best description of that is, of course, Commissioner
9 Evans's description of the space functioning like a
10 goalie's crease.

11 JUSTICE KENNEDY: Well, let -- let me ask
12 this question: Assume it to be true that an elderly
13 lady who was quite successful and had meaningful
14 communication with over 100 women going into the clinic,
15 before this law, was unable to talk to even one after
16 this law. Assume that's true.

17 Does that have any bearing on our analysis?
18 And does that have any bearing on Justice Breyer's
19 question about whether or not a law can be written to
20 protect that kind of activity but still to prevent
21 obstruction and blocking?

22 MS. MILLER: I -- I think, Your Honor, that
23 no one is guaranteed any specific form of communication.
24 So, there is no guarantee, as a doctrinal matter, to
25 close, quiet conversations. The question is, are there

1 adequate alternatives? And in this particular instance
2 in this record, there are adequate alternatives. Take,
3 for example, the situation --

4 JUSTICE KENNEDY: You say there's no -- no
5 guarantee of talking quietly?

6 MS. MILLER: There is --

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

10 MS. MILLER: Generally on the public
11 sidewalk. But, of course, that right is tempered by
12 the -- the State's interest in making sure that the
13 public sidewalks function as they should and that there
14 is peace and good order.

15 But I would give you an example, Your Honor.
16 I'd -- I'd point you --

17 JUSTICE KENNEDY: I still don't know where
18 you're going to -- this -- this goes to Justice Breyer's
19 question. You -- you cannot write an ordinance that
20 says obstruction, intimidation, blocking is prohibited,
21 and still allow the kind of conversation that I
22 described earlier and that I want you to assume to be
23 true for the -- for the purposes of this question.

24 MS. MILLER: Your Honor, we -- we couldn't
25 here, obviously, because that wasn't the problem. The

1 problem with making that kind of a fine distinction is
2 that it doesn't address what the State's --

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

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

8 JUSTICE KENNEDY: But I -- I think what you
9 have to say to this Court is that it's impossible to
10 write a statute of the kind that we are discussing now,
11 and this is Justice Breyer's question.

12 MS. MILLER: It would be enormously
13 difficult to write a statute that addressed the problem
14 and the significant interest here where you are making
15 that kind of a fine distinction --

16 JUSTICE ALITO: May I ask you a question
17 about a distinction that is in this statute? Now, let
18 me give you this -- this example. A woman is
19 approaching the door of a clinic, and she enters the
20 zone. Two other women approach her. One is an employee
21 of the facility, the other is not. The first who is an
22 employee of the facility says, good morning. This is a
23 safe facility. The other one who's not an employee
24 says, good morning, this is not a safe facility.

25 Now, under this statute, the first one has

1 not committed a crime; the second one has committed a
2 crime. And the only difference between the two is that
3 they've expressed a different viewpoint. One says it's
4 safe; one says it's not safe. Now, how can a statute
5 like that be considered viewpoint-neutral?

6 MS. MILLER: Your Honor, I think what the
7 statute distinguishes is based on what those two
8 different people are doing. The -- as you say, the
9 employee could say, if she was performing her job, which
10 would be escorting that individual into the facility,
11 and if she wasn't unnecessarily cluttering up the -- the
12 buffer zone, which was the reason that the statute
13 was -- was enacted in the first place, then that person
14 could say that. You judge it on what she's doing, not
15 what she's saying.

16 JUSTICE ALITO: Well, that's what she --
17 what she's doing is what she's saying. She approaches
18 and she says this is a safe facility. The other one
19 says it's not a safe facility. They have a bad safety
20 record. And they're -- they're the only people in the
21 zone.

22 MS. MILLER: Right.

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

25 MS. MILLER: Right.

1 JUSTICE ALITO: The difference is a
2 viewpoint difference.

3 MS. MILLER: The -- what the legislature has
4 done is that it has created a circle around these
5 entrances and has only permitted particular conduct
6 within that buffer zone to allow the traffic to keep
7 moving on the sidewalk and to allow people to get in and
8 out.

9 So unless you have a permissible purpose for
10 your conduct to be in the buffer zone, then you cannot
11 be in the buffer zone and that is what the statute is
12 addressing. With respect --

13 JUSTICE SCALIA: I don't understand it.
14 It's a permissible purpose to say this is a safe
15 facility, but not a permissible purpose to say this is
16 an unsafe facility?

17 MS. MILLER: The --

18 JUSTICE SCALIA: Is that --

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

22 JUSTICE KENNEDY: But the consequence is
23 just what is described by Justice Scalia; that is, the
24 consequence of the statute. Are you saying that the
25 consequences of what you write are irrelevant to this

1 argument?

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

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

6 MS. MILLER: With respect to viewpoint
7 discrimination, Your Honors, the statute has a perfectly
8 legitimate sweep. It allows people to go in and out of
9 the building. It allows pedestrians to go work -- back
10 and forth across the sidewalk, and it allows for even
11 employees, the snow shovelers mentioned in the Walter
12 Dellinger brief.

13 JUSTICE ALITO: Well, you could have created
14 a completely silent zone. Now, I don't know whether
15 that would be permissible or not, but it would be a
16 different question. You could have -- you could say
17 nobody can speak here. People can shovel snow. If they
18 work for the -- for the clinic, they can sweep the
19 sidewalk, they can do maintenance, they can go in and
20 they -- and out, but they can't utter a word.

21 Well, that would be a different statute.
22 But that's not this statute. This statute says that
23 there is an exemption for employees of the facility if
24 they are operating within the scope of their employment.
25 And surely coming out and saying this is a safe facility

1 is within the scope of their employment.

2 MS. MILLER: Right.

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

7 MS. MILLER: What I would argue, Your Honor,
8 is that speech in that particular circumstance of the
9 employee actually doing her job and not unnecessarily
10 cluttering the buffer zone, what -- then that speech is
11 simply incidental to the permissible conduct. And it
12 doesn't make the statute on its face -- it doesn't make
13 it viewpoint-discriminatory. Because as I said --

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

17 MS. MILLER: It's incidental to her
18 performing her job. And, Your Honor, it -- if there
19 were a circumstance where that kind of speech were
20 habitual or widespread or touched on advocacy in any
21 way, shape or form, then obviously, Petitioners would
22 have an opportunity to challenge the statute as applied.
23 But, of course, they haven't even begun to make the case
24 that there's viewpoint discrimination actually happening
25 in the buffer zone.

1 JUSTICE KENNEDY: It's very hard for me to
2 credit the statement or the implication that for an
3 employee to say, "We're glad you're here. You're going
4 to be well taken care of. This is a safe facility.
5 It's important for you to be here," it's very hard for
6 me to credit your statement that that's incidental to
7 their function.

8 MS. MILLER: It's incidental to the
9 permissible purpose for which they are allowed in the
10 buffer zone. And I should point out, actually, that
11 PPLM -- and again, this is in the Walter Dellinger brief
12 at page 2A -- they actually train their escorts not to
13 engage in that kind of speech. So that's first of all.

14 And second of all, escorts really only exist
15 and only operate in Boston on Saturday mornings for a
16 couple of hours. They don't work at all in Worcester or
17 Springfield.

18 JUSTICE KAGAN: Well, that raises another
19 question, Ms. Miller, because I assume that that's true
20 because the crowds and the obstruction really are with
21 respect to one facility at certain periods of time. So
22 Mr. Rienzi says, look, if it's at one facility, not all
23 ten of them or whatever it is, and it's only for certain
24 periods of time, not all day every day -- you know, why
25 not narrow it that way?

1 MS. MILLER: Right.

2 JUSTICE KAGAN: So why not?

3 MS. MILLER: Because the experience has
4 shown that you do have problems at Worcester and
5 Springfield, and those problems do center around the
6 driveways. 85 to 90 percent of patients who approach
7 those facilities do so by car.

8 And the only public sidewalk -- there's a
9 small slice of public sidewalk between the road and the
10 private driveway, and that's the only opportunity that
11 you'd -- that individuals would have in order to
12 protest.

13 And what's happened in the past in Worcester
14 and Springfield is that you would have pacing across
15 these driveways. That's at Joint Appendix 41. You'd
16 have individuals stopping and standing and refusing to
17 move in Worcester. You'd have literature thrown into
18 cars. You'd have hands and heads thrust into open
19 windows. And there was at least one accident in
20 Worcester. That's at JA-19.

21 So there definitely was conduct that was a
22 problem, and it wasn't even that there are a couple of
23 lone protestors in Worcester or Springfield. There are
24 events in Worcester and Springfield. There are regular
25 protestors there every week, first of all. And second

1 of all, the crowds get much larger at the semi-annual --

2 JUSTICE SCALIA: I -- I object to you
3 calling these people protestors, which you've been doing
4 here during the whole presentation. That is not how
5 they present themselves. They do not say they want to
6 make protests. They say they want to talk quietly to
7 the women who are going into these facilities. Now how
8 does that make them protestors?

9 MS. MILLER: Your Honor, the problem, of
10 course, that the statute was looking to address was not
11 with protestors, per se. It was with people who had a
12 desire to be as close to the facility doors and
13 driveways as possible to communicate their message. But
14 the result of that was congestion around these doors and
15 driveways.

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

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

22 MS. MILLER: I would agree.

23 JUSTICE KAGAN: I mean, but -- you know,
24 which is not to say that this statute doesn't have its
25 problems, in my view. I mean, so I guess I'm a little

1 bit hung up on why you need so much space.

2 MS. MILLER: Again, the experience. We've
3 had quite a long experience in Massachusetts, a long
4 history of crowds around these doors or of even violence
5 at the clinics. And we've had law enforcement and
6 others who have viewed that crowd on a regular basis and
7 have described it, the activity around the doors and
8 driveways, as being so frenetic.

9 You have so many people there, the bad
10 actors and the good actors. You have so many people
11 congested in the same space from all points of view that
12 it effectively blocks the door.

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

19 Could the -- could a State pass a statute
20 that says there is a 35-foot zone like this around every
21 location in the State whenever there is a strike and
22 there are replacement workers? Could they do that?

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

1 JUSTICE ALITO: All right. Could Federal
2 law do that?

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

7 JUSTICE ALITO: In every case, in every
8 case --

9 MS. MILLER: No, no, no.

10 JUSTICE ALITO: -- there could just be a
11 flat rule. Doesn't matter whether there is any history
12 at that place, any indication there's going to be
13 violence. Maybe there will, maybe there won't. Across
14 the board, a zone around every place where there's a
15 strike.

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

20 JUSTICE ALITO: You don't think there's a
21 history -- you don't think there's a history of violence
22 at places where there are strikes and replacement
23 workers?

24 MS. MILLER: Well, I don't think there has
25 been the kind of history and sustained violence that

1 we've had -- this almost unique record in Massachusetts
2 with respect to facilities. But Your Honor, I would
3 say --

4 JUSTICE ALITO: That's not my understanding
5 of the labor history.

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

7 JUSTICE SOTOMAYOR: Is there any abortion
8 clinic that has not had -- is there any abortion clinic
9 that has not had a problem in Massachusetts?

10 MS. MILLER: In -- there was, when the
11 legislature was considering the statute, there was a
12 survey submitted by NARAL that reviewed the experience
13 of the ten facilities that were then in existence in
14 Massachusetts.

15 And six of them said that they had
16 significant problems outside of their facilities. Eight
17 of them said, at the very least, they had regular
18 protestors. There were two who did not report that
19 there was a significant problem.

20 JUSTICE SCALIA: This is testimony by the --
21 by the clinics themselves, right?

22 MS. MILLER: Correct.

23 Thank you, Your Honors.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Gershengorn.

1 ORAL ARGUMENT OF IAN H. GERSHENGORN,
2 FOR UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENTS

4 MR. GERSHENGORN: Mr. Chief Justice, and may
5 it please the Court:

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

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

12 MR. GERSHENGORN: So, Your Honor, I think
13 that there are a number of precedents that are helpful.
14 Madsen, of course, upheld the 36-foot buffer zone that
15 had a no-speech zone very much like this.

16 JUSTICE GINSBURG: That was an injunction.

17 MR. GERSHENGORN: It was an injunction, Your
18 Honor, but it was upheld under an even stricter standard
19 that -- that is applies here. But even aside from that,
20 I think a number of the pillars of Petitioners'
21 arguments here are directly contradicted by this Court's
22 precedents. So, for example, the idea that -- that
23 unrestricted -- that you have the right to choose the
24 best mechanism of communication is contradicted by
25 Hefernon and by Frisby.

1 In Hefernon, there was -- the Petitioner
2 said, "I need to be able to talk quietly to people to
3 ask for money, and that's the only way I can get it."
4 And this Court said you have ample communication
5 channels -- alternative channels over in that booth.

6 In Frisby, what the protestor wanted to do
7 was target a house, and what this Court said in Frisby
8 was you have alternative channels of communication. You
9 can go door to door. You can mail things. You can make
10 calls. So I think that that pillar of the -- of the
11 argument --

12 JUSTICE SCALIA: What's the alternative
13 here?

14 MR. GERSHENGORN: The alternative --

15 JUSTICE SCALIA: Standing 35 feet away and
16 yelling?

17 MR. GERSHENGORN: No, Your Honor.

18 JUSTICE SCALIA: Is that the alternative?

19 MR. GERSHENGORN: No, Your Honor.

20 JUSTICE SCALIA: To comfort these women?

21 MR. GERSHENGORN: No, Your Honor. The
22 alternative in this case is the entire length of the
23 sidewalk, quiet counseling, leafletting, and
24 conversation is permitted. It is the last four to five
25 seconds before the petition -- before the counselors

1 enter the clinic that --

2 JUSTICE SCALIA: They don't know who's going
3 into the clinic.

4 MR. GERSHENGORN: Your Honor, the
5 testimony --

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

9 MR. GERSHENGORN: Your Honor, the testimony
10 is actually to the contrary, that they get -- that Ms.
11 McCullen and others get quite good at identifying who is
12 going and is not going into the clinic. And actually --
13 so what we're talking about is the last four to five
14 seconds before they go in. And Justice Kagan --

15 JUSTICE KENNEDY: Is your concern that,
16 absent this statute, there will be physical obstruction
17 to the entrance? Is that a major concern?

18 MR. GERSHENGORN: So, Your Honor, let me
19 address that. The answer is -- the answer is yes, but
20 that's not all. What the legislature had before it, and
21 Justice Breyer --

22 JUSTICE KENNEDY: Let me ask, if that's --
23 if that's your concern, how many Federal prosecutions
24 were brought in Massachusetts for physical obstruction
25 under the Federal statute?

1 MR. GERSHENGORN: Your Honor, I'm not aware
2 of the number. There are 45 FACE prosecutions
3 nationwide. But FACE is a very different statute. The
4 criminal prosecutions in FACE are for -- are for murder,
5 arson, and for chaining yourselves to doorways. They
6 are not for the kind of quiet counseling and -- and
7 picketing that's at issue here.

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

11 MR. GERSHENGORN: That's right.

12 JUSTICE KENNEDY: But what's wrong with the
13 physical obstruction statute as an answer to many of the
14 problems that Massachusetts is facing?

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

21 What this statute is getting at is something
22 quite different. It is congestion in front of doorways.
23 It is people -- individuals handing out --

24 JUSTICE KENNEDY: That's obstruction under
25 the Federal statute.

1 MR. GERSHENGORN: It is not, Your Honor,
2 because those are specific intent crimes in both
3 Massachusetts and in the Federal statute. The -- for
4 example --

5 JUSTICE KENNEDY: Justice Holmes said even a
6 dog knows the difference in being stumbled over and
7 being kicked.

8 MR. GERSHENGORN: So, Your Honor --

9 JUSTICE KENNEDY: Can't -- can't -- you're
10 saying Federal prosecutions can't tell when people are
11 deliberately obstructing --

12 MR. GERSHENGORN: I'm saying --

13 JUSTICE KENNEDY: -- this is beyond -- this
14 is beyond the realm of the law?

15 MR. GERSHENGORN: I'm saying what's at issue
16 here, Your Honor, is not that kind of -- of deliberative
17 obstruction. What the testimony before the legislature
18 was, was that there was a congregation of people and the
19 massing of people. That indeed, there were Pro Choice
20 protestors in the zone who have -- certainly are not
21 intending to obstruct.

22 And it was -- so what they were dealing with
23 was quiet counseling leading to -- counter-counseling
24 leading to congestion in front of the doorways.

25 They also was testimony that there were

1 people handing literature to moving cars, accidents and
2 near accidents, which are not intentional obstruction in
3 the least. The kinds of statutes that this Court --
4 that -- that are at issue in the specific intent crime
5 in Massachusetts and the FACE Act do not get at the kind
6 of peaceful, quiet, yet congesting and disrupting
7 conduct that is at issue here.

8 And, Justice Breyer, I would urge you to
9 look at the Evans testimony at Joint Appendix 67 to 71.
10 The Hefernon testimony at 79 to 80. The Coakley
11 testimony of JA-51, and the Capone testimony at JA-19.
12 There are specific arguments as to why these did not
13 work.

14 The argument Petitioners make here, Your
15 Honors, is very, very broad. The lower courts have
16 upheld buffer zones around political conventions, around
17 circuses, around funerals.

18 The idea that you could defeat those buffer
19 zones by simply saying, I would like to have a quiet
20 conversation with the delegates as they go into the
21 political convention, would wipe out a number of court
22 of appeals decisions and the kind of buffer zones that
23 this Court, I submit, and that the lower courts have
24 found are -- are needed.

25 Justice --

1 JUSTICE ALITO: Well, how far do you
2 think -- what do you think a State legislature or
3 Congress needs to find in order to establish a zone
4 around some category of facility at which there -- they
5 have some evidence that there have been some disruptions
6 and some obstruction?

7 MR. GERSHENGORN: So, Your Honor --

8 JUSTICE ALITO: Take the example of -- I
9 think it's -- it's a real -- real ordinance someplace
10 you can't have, there's a buffer zone around fraternal
11 lodges.

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

15 JUSTICE ALITO: What would they have to
16 find? Or slaughterhouses. Or labor -- or sites where
17 there are strikes.

18 MR. GERSHENGORN: So I think -- I think, for
19 example, in the slaughterhouse or what they found in --
20 around circuses and conventions is the idea that there
21 is massing of people that prevents the orderly ingress
22 and egress to and from the facilities.

23 What the State was dealing with here was not
24 an isolated incident, but the State had 14, 15 years of
25 history of the massing. They had tried other things.

1 They had tried the statutes that Justice Scalia
2 identified. They had tried a narrower buffer zone, and
3 the testimony was it wasn't working, and that the police
4 were coming in and said, we can't enforce it. Why is
5 that? Because they had a hard time measuring consent,
6 evaluating what does --

7 JUSTICE ALITO: What kind of a record do
8 they need? Could -- could there be a State law that
9 says no picketing around any -- you can never have a
10 picket around any store to try to prevent people -- to
11 tell people don't go -- don't patronize this store.
12 Could they do that? Isn't that Thornhill v. Alabama?

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

15 JUSTICE ALITO: Right.

16 MR. GERSHENGORN: But it was very different
17 from this statute. Thornhill's was you can't go
18 anywhere near the facility and it was -- it was only one
19 type of speech.

20 This is content neutral and it is -- it is a
21 narrow buffer zone.

22 Justice Kagan, I really urge you to --
23 because --

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

1 MR. GERSHENGORN: Yes.

2 JUSTICE ALITO: I think it's -- I understand
3 the -- the desire to create a buffer zone around certain
4 sensitive facilities. What I'm asking is: What
5 requirements, if any, does Congress or a State
6 legislature have to meet before they can do that? If it
7 is done, do we simply say they -- they have a rational
8 basis for it and that's it, so they can establish
9 basically a buffer zone around any kind of a facility
10 they want.

11 If not, then what needs to be established?

12 MR. GERSHENGORN: So, Your Honor, I think in
13 the evidentiary realm, it's hard to have hard-and-fast
14 rules. I would say you would need a lengthy history of
15 serious congestion and other problems and -- and a --
16 some sort of showing that the alternatives weren't
17 working, but that's what's here. This problem has been
18 going on in Massachusetts since 1994.

19 This is not something the legislature woke
20 up one day and said in light of one incident, we're
21 going to -- to deal with this. They tried other things.
22 They -- and the evidence, therefore, supported this.
23 What would it take to support a broader statute? It's
24 hard for me to say, but I think this record shows.

25 Justice Kagan, can I --

1 JUSTICE ALITO: One more thing. What about
2 the example of a strike? There certainly is a long
3 history of labor violence in places where there are
4 replacement workers. Could that -- could it be done in
5 that situation across the board?

6 MR. GERSHENGORN: So I think that would be a
7 very broad statute and hard -- hard to defend. But if
8 there were before the legislature, as there is in this
9 case, the kind of congestion -- and the solution, I
10 submit, is much narrower than the Petitioners are
11 suggesting. It is to clear out an area around the
12 entrance.

13 JUSTICE BREYER: What kind of --

14 MR. GERSHENGORN: Justice Kagan, the
15 testimony is 22 feet from the entrance in Boston,
16 22 feet from the edge of the doorway to the edge of
17 the -- of the buffer zone. It is from me to the
18 marshal. It is not to the back of the courtroom. It
19 is -- it is an NBA 3-point zone. I don't -- it is not
20 the --

21 JUSTICE BREYER: But I understand you're
22 saying the reasonableness of it.

23 (Laughter.)

24 JUSTICE BREYER: But go back to
25 Justice Alito's first question. Maybe we can make some

1 progress here.

2 The regulation of labor is up to the NLRB.

3 All right. Now, the NLRB does regulate picketing. It
4 does say what you can do and can't do, and the courts
5 have reviewed that. And you -- what standard do courts
6 use when the NLRB decides, in its wisdom and expertise,
7 well, the pickets can go here, but they can't go there.
8 You can do this, but you can't do that. All of which
9 have speech implications. What standard of review do
10 the courts use?

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

13 JUSTICE BREYER: Are you aware of any
14 case -- I'm putting it -- loading it because -- only
15 because to show my ignorance of it -- where the standard
16 has differed from the ordinary APA standard?

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

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

22 MR. GERSHENGORN: I don't think so, Your
23 Honor. Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Rienzi, you have three minutes

1 remaining.

2 REBUTTAL ARGUMENT OF MARK L. RIENZI

3 ON BEHALF OF THE PETITIONERS

4 MR. RIENZI: Thank you, Mr. Chief Justice.

5 Several points. First, it's not impossible
6 to draw a statute to deal with the problems. 49 other
7 States deal with the alleged problems. The next
8 prosecution Massachusetts institutes for blocking a door
9 will be its first in at least two decades.

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

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

16 Secondly, here, the police officers
17 testified that they know all the regular players at the
18 clinics. That's their testimony. They know them all.
19 Well, if you know them all and if they're congregating
20 in the doors and they need to get out of the doors, you
21 should go to court and get an injunction and say, stay
22 out of the doors.

23 Until they do that, the claim that they have
24 to throw their hands up and put people in prison for
25 peaceful speech is not a very persuasive claim.

1 Secondly, all of the evidence that the
2 United States cited -- cited you to from the record, all
3 of it, Boston, Saturday mornings. The claim that the
4 legislature can extrapolate from that to ban peaceful
5 speech in Boston at other times when the sidewalk is
6 empty, and at other clinics where the sidewalk is empty
7 and say, well, there's abortion there, and where there's
8 abortion, we expect certain speech problems, therefore,
9 we're going to make it illegal to speak there.

10 That's the State's claim here. The evidence
11 is Boston specific. The First Amendment requires
12 precision. They need to regulate the problem where it
13 happens and if that means police officers, if that means
14 dispersal laws, if that means actually bringing a FACE
15 prosecution, which the United States has never done,
16 they ought to do that. But they shouldn't imprison
17 Mrs. McCullen for her speech.

18 Third, the United States mentions --

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

21 MR. RIENZI: I don't believe the
22 government --

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

25 MR. RIENZI: Thank you, Your Honor.

1 No, it is not. The statute is not remotely
2 limited to that. I direct the Court to Section C -- I'm
3 sorry, Section -- it's the definitions section of the
4 statute. Definition 4, physical obstruction, includes
5 even making entry unreasonably difficult. It is not at
6 all solely for violence. It's for physical obstruction
7 even making it unreasonably difficult.

8 Counsel said that they brought 45 cases
9 across the country. That's true. Zero, zero in
10 Massachusetts. They shouldn't be able to restrict the
11 peaceful speech.

12 Lastly, to the extent the Court feels the
13 need to recognize that there are some situations that
14 are so extraordinary that we should put people in prison
15 for peaceful conversations on public streets, that ought
16 to be the exceptional case where the statute passes
17 strict scrutiny and the State actually has tried the
18 solutions that it claims don't work. That is not this
19 case.

20 The government does not claim its
21 restriction to pass strict scrutiny. They didn't say it
22 would be impossible. They said it would be hard. 49
23 other States do different things. The Federal
24 government protects peaceful speech in the FACE law.

25 FACE is a great example of something that

1 deliberately gets at the problem and if somebody's in
2 the doorway and they need to get out of the doorway, the
3 answer is, sir, please get out of the doorway. It is
4 not dragging Mrs. McCullen off to prison because she has
5 a consensual conversation 25 feet away from the doorway.

6 That's an extraordinary power for the
7 government to ask to selectively control speech among
8 willing participants on public sidewalks.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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