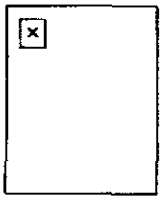
Preparer's Note:

The following documents pertain primarily to the original bill, Senate Bill No. 148, and the certified legal question to the Supreme Judicial Court of Massachusetts and the subsequent appeal.

UNCORRECTED PROOF OF THE JOURNAL OF THE SENATE.



Wednesday, July 29, 1998.

Met at twenty-three minutes past one o'clock P.M.

Petitions.

Petitions were presented and referred, as follows:

By Mr. Nuciforo, a petition (subject to Joint Rule 12) of Andrea F. Nuciforo, Jr., and Shaun P. Kelly (by vote of the town of Cummington) for legislation relative to the transfer of a certain parcel of land by the Hampshire County Housing Authority [Local approval received];

By Mr. Pacheco, a petition (subject to Joint Rule 12) of Marc R. Pacheco and William M. Straus (by vote of the town) for legislation to ratify certain actions of the annual town meeting in the town of Rochester in 1964 [Local approval received]; and

By Mr. Rauschenbach, a petition (subject to Joint Rule 12) of Henri S. Rauschenbach for legislation relative to the Wampanoag Tribe of Gay Head;

Severally, under Senate Rule 20, to the committees on Rules of the two branches, acting concurrently.

Reports of Committees.

By Mr. Nuciforo, for the committee on Election Laws, on petition, a Bill relative to the election of the city clerk in the city of Springfield (Senate, No. 2140) [Local approval received];

Read and, under Senate Rule 26, placed in the Orders of the Day for the next session.

Mr. Berry, for the committee on Steering and Policy, reported that the following matters be placed in the Orders of the Day for the next session:

The House bills

Designating an overpass in the town of Somerset as the John Marshall overpass (House, No. 5430); and

Relative to cost of living adjustments (House, No. 5683).

Papers from the House

Bills

Authorizing the town of Clinton to reimburse certain real property taxes (House, No. 5099,— on petition) [Local approval received];

Authorizing certain by-laws relative to the town of Wellesley (House, No. 5398,— on petition) [Local approval received]; and

Authorizing the town of Natick to lease a certain building (House, No. 5624,— on petition) [Local approval received];

Were severally read and, under Senate Rule 26, placed in the Orders of the Day for the next session.

YEAS.

Amorello, Matthew J.
Bernstein, Robert A.
Brewer, Stephen M.
Durand, Robert A.
Fargo, Susan C.
Havern, Robert A.
Hedlund, Robert L.
Jacques, Cheryl A.
Jajuga, James P.
Joyce, Brian A.
Keating, William R.
Knapik, Michael R.
Lees, Brian P.
Lynch, Stephen F.
Magnani, David P.
Melconian, Linda J.
Montigny, Mark C.
Morrissey, Michael W.
Murray, Therese
Norton, Thomas C.
Nuciforo, Andrea F., Jr.
O'Brien, John D.
Pacheco, Marc R.
Panagiotakos, Steven C.
Pines, Lois G.
Rauschenbach, Henri S.
Rosenberg, Stanley C.
Shannon, Charles E.
Tarr, Bruce E.
Tisei, Richard R.
Tolman, Warren E.
Walsh, Marian
Wilkerson, Dianne

—33.

NAYS.

Antonioni, Robert A.
Berry, Frederick E.
Clancy, Edward J., Jr.
Creedon, Robert S., Jr.
Moore, Richard T.

—5.

ANSWERED "PRESENT".

Travaglini, Robert E.

—1.

The yeas and nays having been completed at eight o'clock P.M., the bill was passed to be engrossed.
Sent to the House for concurrence.

The Senate Bill relative to health care facilities (Senate, No. 2252),— was considered, the main question being on passing the bill to be engrossed.

The amendment, previously moved by Mr. Lynch, that the bill be amended in section 2, by striking out, in line 11, the words "exit from, or driveway of" and inserting in place thereof the following words:— "or exit from"; and by striking out, in line 14, the words "exit from, or driveway of," and inserting in place thereof the following words:— "or exit from",— was considered.

During debate on the adoption of the amendment, Mr. Joyce delivered his maiden speech as Senator for the Suffolk and Norfolk District.

Mr. Joyce addressed the Senate as follows:

Mr. President:

Whether we are Pro-Life, as I am, or Pro-Choice, we all abhor violence. Violence, the threat of violence, intimidation or interference, or obstructing the entry to clinics for women exercising their constitutionally protected right to terminate their pregnancies must not be tolerated in this democracy.

And it is not. Federal law imposes a fine and/or jail sentence on individuals who use force, threat of force, or physical obstruction to intentionally injure, intimidate or interfere with persons using or working at reproductive health services clinics.

State law also imposes a fine and/or jail sentence on individuals who obstruct entry to or departure from any medical facility or attempt to impede the provision of medical services.

There is also a statewide injunction with criminal penalties, cumulative to the state law penalties, for blocking access to clinics.

While we must protect the public's safety, we must also zealously protect perhaps the most precious gift of democracy, the right to free speech. Moreover, we must apply our laws uniformly. Thomas Jefferson said, "The most sacred of the duties of a government is to do equal and impartial justice to all its citizens."

With this bill we are neither protecting free speech nor applying the law uniformly.

In addition to prohibiting clearly unacceptable behavior within

a 25-foot buffer zone, this bill prohibits prayer, peaceful protesting, quiet assembly or the offer of counseling. Clearly this bill is not drafted, as is constitutionally required, so as to" . . . burden no more free speech than necessary to accomplish a significant government interest." *Madsen* v. *Women's Health Center Inc.,* 512 U.S. 753, 767 (1994). Several weeks ago the Texas Supreme Court invalidated a complete buffer zone because, like this bill, it " ...burdened more speech than necessary by proscribing peaceful conduct" *Operation Rescue — National et al* v. *Planned Parenthood of Houston,* 1998 WL 352942 (Tex.). One of the great ironies of this bill, which prohibits peaceful protest, prayer and quiet assembly on public property, is that is specifically exempts "persons entering or leaving such facility." A literal interpretation of that provision would exempt a deranged killer such as John Salvi. Finally, in addition to my belief that this bill is simply unconstitutional, I am convinced that the deafening silence that we have heard from those who would normally be vehemently opposed to any infringement on free speech is due in large measure to the beliefs of the proponents, and those of the opponents, of this bill.

With this legislation we are stepping down that slippery slope toward unevenly applying our force of law, toward allowing speech with which the majority agrees, and stifling the free expression of the minority.

I hope that this bill is defeated.

Mr. Norton in the Chair,— On motion of Mr. Moore, the above statement was ordered printed in the Journal of the Senate.

After further debate, the amendment was *rejected.*

The President in the Chair,— Mr. Lynch moved that the bill be amended, in section 2, by adding the following subsection:—

"(f) Nothing herein shall be construed to interfere with any rights provided by chapter 150A or by the federal Labor—Management Act of 1947 or other rights to engage peaceful picketing which does not obstruct entry or departure.".

After debate, the question on adoption of the amendment was determined by a call of the yeas and nays, at twenty-eight minutes past ten o'clock P.M., on motion of Mr. Antonioni, as follow, to wit (yeas 13 — nays 26):

YEAS.

Antonioni, Robert A.	Lynch, Stephen F.
Brewer, Stephen M.	Moore, Richard T.
Clancy, Edward J., Jr.	Morrissey, Michael W.
Creedon, Robert S., Jr.	Norton, Thomas C.
Jajuga, James P.	Pacheco, Marc R.
Joyce, Brian A.	Walsh, Marian
Knapik, Michael R.	

— 13.

NAYS.

Amorello, Matthew J.	Murray, Therese
Bernstein, Robert A.	Nuciforo, Andrea F., Jr.
Berry, Frederick E.	O'Brien, John D.
Durand, Robert A.	Panagiotakos, Steven C.
Fargo, Susan C.	Pines, Lois G.
Havern, Robert A.	Rauschenbach, Henri S.
Hedlund, Robert L.	Rosenberg, Stanley C.
Jacques, Cheryl A.	Shannon, Charles E.
Keating, William R.	Tarr, Bruce E.
Lees, Brian P.	Tisei, Richard R.
Magnani, David P.	Tolman, Warren E.
Melconian, Linda J.	Travaglini, Robert E.
Montigny, Mark C.	Wilkerson, Dianne

— 26.

The yeas and nays having been completed at twenty-seven minutes before ten o'clock P.M., the amendment was *rejected.*

Mr Lynch moved that the bill be amended, in section 2, by inserting after the word "right-of-way", in line 9, the following words:— "; provided, however, that the police commissioner or other head of a police public safety department of a municipality where the reproductive health care facility is located determines that significant danger to public safety exists at such reproductive health care facility; provided, however, that said determination shall be in

effect for not more than 21 consecutive days"; in said section 2, by striking out, in line 11, the words "exit from, or driveway of" and inserting in place thereof the following words:— "or exit from"; in said section 2, by striking out, in line 14, the words "exit from, or driveway of," and inserting in place thereof the following words:— "or exit from"; and, in said section 2, by striking out, in line 17, the words "or driveway".

After debate, the amendment was *rejected.*

Ms. Walsh and Mr. Joyce moved that the bill be amended by striking out all after the enacting clause and inserting in place thereof the following text:—

"SECTION 1. Chapter 266 of the General Laws, is hereby amended by inserting after section 120E, as appearing in the 1996 Official Edition, the following section:—

Section 120F. (a) As used in this section. the following words shall have the following meanings:—

'Medical facility', any medical office, medical clinic, medical laboratory, or hospital.

'Notice', (1) receipt of or awareness of the contents of a court order prohibiting interference or attempted interference with the entry to or departure from any medical facility; (ii) oral request by an authorized representative of a medical facility, or law enforcement official to refrain from interference or attempted interference with the entry to or departure from any medical facility; or (iii) written posted notice outside the entrance to a medical facility to refrain from interference or attempted interference with the entry to or departure from any medical facility.

(b) Whoever, with the intent to obstruct entry to or departure from any medical facility, interferes by threats, intimidation, coercion, harassment or physically abusive or assaultive conduct, or attempts to interfere by threats, intimidation, coercion, harassment or physically abusive or assaultive conduct, with the entry to or departure from any medical facility, after notice to refrain from such interference or attempted interference, shall be punished for the first offense by a fine of not more than $1,000 or not more than 6 months in a jail or house of correction, or both such fine and imprisonment, and for each subsequent offense by a fine of not less than $500 and not more than $5,000 or not more than 2½ years in a jail or house of correction, or both such fine and imprisonment.

(c) Any person who continues to interfere or attempt to interfere with the entry to or departure from any medical facility by the conduct proscribed under the provisions of subsection (b) after notice to refrain from such interference or attempt to interfere shall be subject to arrest by a sheriff, deputy sheriff, constable, or police officer.

(d) Any medical facility or any person whose rights to provide or obtain services have been interfered with by a violation of this section or which has reason to believe that any person or entity is about to engage in conduct proscribed herein may commence a civil action for injunctive and other equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business. An aggrieved medical facility which prevails in an action authorized by this paragraph, in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

(e) Nothing herein shall be construed to interfere with any rights provided by chapter 150A or by the federal Labor-Management Act of 1947 or other rights to engage in peaceful picketing which does not obstruct entry or departure."

Mr. Clancy moved that the pending amendment be amended, in section 1, in the definition of "Notice" by inserting after the word "facility", each time it appears, the following words:— "church, synagogue, temple, mosque or other house of religious worship,";

in said section 1, in subsection (b) by inserting after the word "facility" each time it appears, the following words:— "church, synagogue, temple, mosque or other house of religious worship,"; in said section 1, in subsection (c) by inserting after the word "facility" the following words:— "church, synagogue, temple, mosque or other house of religious worship"; and, in said section 1, in subsection (d) by inserting after the word "facility" each time it appears, the following words:— "church, synagogue, temple, mosque or other house of religious worship,".

After debate, the question on adoption of the further (Clancy) amendment was determined by a call of the yeas and nays, at four minutes before eleven o'clock P.M., on motion of Mr. Clancy, as follow, to wit (yeas 19 — nays 20):

YEAS.

Antonioni, Robert A.	Morrissey, Michael W.
Brewer, Stephen M.	Murray, Therese
Clancy, Edward J., Jr.	Norton, Thomas C.
Creedon, Robert S., Jr.	Pacheco, Marc R.
Jajuga, James P.	Panagiotakos, Steven C.
Joyce, Brian A.	Tarr, Bruce E.
Knapik, Michael R.	Tisei, Richard R.
Lynch, Stephen F.	Travaglini, Robert E.

Magnani, David P.
Moore, Richard T.
Walsh, Marian

— 19.

NAYS.

Amorello, Matthew J.
Bernstein, Robert A.
Berry, Frederick E.
Durand, Robert A.
Fargo, Susan C.
Havern, Robert A.
Hedlund, Robert L.
Jacques, Cheryl A.
Keating, William R.
Lees, Brian P.
Melconian, Linda J.
Montigny, Mark C.
Nuciforo, Andrea F., Jr.
O'Brien, John D.
Pines, Lois G.
Rauschenbach, Henri S.
Rosenberg, Stanley C.
Shannon, Charles E.
Tolman, Warren E.
Wilkerson, Dianne

— 20.

The yeas and nays having been completed at two minutes past eleven o'clock P.M., the further (Clancy) amendment was *rejected.*

Mr. Clancy moved that this vote be reconsidered; and, after debate, the motion to reconsider was *negatived.*

The pending (Walsh-Joyce) amendment was further considered; and, after debate, the question on adoption of the amendment was determined by a call of the yeas and nays, at half past eleven o'clock P.M., on motion of Ms. Walsh, as follows, to wit (yeas 14 —nays 25):

YEAS.

Antonioni, Robert A.
Brewer, Stephen M.
Clancy, Edward J., Jr.
Creedon, Robert S., Jr.
Hedlund, Robert L.
Jajuga, James P.
Joyce, Brian A.
Knapik, Michael R.
Lynch, Stephen F.
Moore, Richard T.
Morrissey, Michael W.
Norton, Thomas C.
Tisei, Richard R.
Walsh, Marian

— 14.

NAYS.

Amorello, Matthew J.
Bernstein, Robert A.
Berry, Frederick E.
Durand, Robert A.
Fargo, Susan C.
Havern, Robert A.
Jacques, Cheryl A.
Keating, William R.
Lees, Brian P.
Magnani, David P.
Melconian, Linda J.
Montigny, Mark C.
Murray, Therese
Nuciforo, Andrea F., Jr.
O'Brien, John D.
Pacheco, Marc R.
Panagiotakos, Steven C.
Pines, Lois G.
Rauschenbach, Henri S.
Rosenberg, Stanley C.
Shannon, Charles E.
Tarr, Bruce E.
Tolman, Warren E.
Travaglini, Robert E.
Wilkerson, Dianne

— 25.

The yeas and nays having been completed at twenty-six minutes before twelve o'clock midnight, the pending amendment was *rejected.*

Messrs. Antonioni and Joyce moved that the bill be amended by striking out all after the enacting clause and inserting in place thereof the following text:—

"SECTION 1. Chapter 266 of the General Laws is hereby amended by inserting after section 120E the following section:—

Section 120E. (a) For the purposes of this section, 'reproductive health care facility' shall mean a place, other than within a hospital, where abortions are offered or performed.

(b) Any person who has been convicted of
(1) an offense under chapter 265, punishable by a term in the state prison, within 100 feet of a reproductive health care facility;
(2) an offense under said chapter 265, punishable by a term in the state prison, against any employee, agent, or patient of a reproductive health care facility;
(3) a violation of said chapter 266:120E of the General Laws or any similar law of another jurisdiction or the federal government shall be prohibited from knowingly entering or remaining in the following area of private property of a reproductive health care facility or public right of way:
(A) the area within 25 feet of any portion of an entrance to, exit from, or driveway of a reproductive health care facility; and
(B) the area within the rectangle created by extending the outside boundaries of any entrance to, exit from, or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.
(c) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $1,000 or not more than six months in a jail or house of correction or both, and for each subsequent offense by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both.
(d) A criminal conviction pursuant to the provision of this section shall not be a condition precedent to maintaining a civil action pursuant to the provision of this section.
SECTION 2. The provisions of this act shall be deemed severable, and if any provision of this act is adjudged unconstitutional or invalid, such judgement shall not affect other valid provisions hereof".
After debate, Mr. Norton in the Chair, the question on adoption of the amendment was determined by a call of the yeas and nays, at twenty-three minutes before twelve o'clock midnight, on motion of Mr. Antonioni, as follows, to wit (yeas 13 — nays 26):

YEAS.

Antonioni, Robert A.	Knapik, Michael R.
Brewer, Stephen M.	Lynch, Stephen F.
Clancy, Edward J., Jr.	Moore, Richard T.
Creedon, Robert S., Jr.	Morrissey, Michael W.
Hedlund, Robert L.	Norton, Thomas C.
Jajuga, James P.	Walsh, Marian
Joyce, Brian A.	

— 13.

NAYS.

Amorello, Matthew J.	Nuciforo, Andrea F., Jr.
Bernstein, Robert A.	O'Brien, John D.
Berry, Frederick E.	Pacheco, Marc R.
Durand, Robert A.	Panagiotakos, Steven C.
Fargo, Susan C.	Pines, Lois G.
Havern, Robert A.	Rauschenbach, Henri S.
Jacques, Cheryl A.	Rosenberg, Stanley C.
Keating, William R.	Shannon, Charles E.
Lees, Brian P.	Tarr, Bruce E.
Magnani, David P.	Tisei, Richard R.
Melconian, Linda J.	Tolman, Warren E.
Montigny, Mark C.	Travaglini, Robert E.
Murray, Therese	Wilkerson, Dianne

— 26.

The yeas and nays having been completed at nineteen minutes before twelve o'clock midnight, the amendment was *rejected.*
After debate, the President in the Chair, the question on passing the bill to be engrossed was determined by a call of the yeas and nays, at thirteen minutes before twelve o'clock midnight, on motion of Ms. Jacques, as follows, to wit (yeas 26 — nays 13):

YEAS.

Amorello, Matthew J.	Nuciforo, Andrea F., Jr.
Bernstein, Robert A.	O'Brien, John D.
Berry, Frederick E.	Pacheco, Marc R.
Durand, Robert A.	Panagiotakos, Steven C.
Fargo, Susan C.	Pines, Lois G.
Havern, Robert A.	Rauschenbach, Henri S.
Jacques, Cheryl A.	Rosenberg, Stanley C.
Keating, William R.	Shannon, Charles E.
Lees, Brian P.	Tarr, Bruce E.
Magnani, David P.	Tisei, Richard R.
Melconian, Linda J.	Tolman, Warren E.
Montigny, Mark C.	Travaglini, Robert E.
Murray, Therese	Wilkerson, Dianne

— 26.

NAYS.

Antonioni, Robert A.	Knapik, Michael R.
Brewer, Stephen M.	Lynch, Stephen F.
Clancy, Edward J., Jr.	Moore, Richard T.
Creedon, Robert S., Jr.	Morrissey, Michael W.
Hedlund, Robert L.	Norton, Thomas C.
Jajuga, James P.	Walsh, Marian
Joyce, Brian A.	

— 13.

The yeas and nays having been completed at nine minutes before twelve o'clock midnight, the bill was passed to be engrossed.
Sent to the House for concurrence.

Papers from the House.

Engrossed Bills — Land Taking for Conservation, Etc.

There being no objection, during the Orders of the Day, an engrossed Bill authorizing the transfer of certain state owned land in the town of Canton (see House, No. 5722) (which originated in the House), having been certified by the Senate Clerk to be rightly and truly prepared for final passage,— was put upon its final passage; and, this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution, the question on passing it to be enacted was determined by a call of the yeas and nays, at eight minutes before twelve o'clock midnight, as follows, to wit (yeas 39 — nays 0):

YEAS.

Amorello, Matthew J.	Berry, Frederick E.
Antonioni, Robert A.	Brewer, Stephen M.
Bernstein, Robert A.	Clancy, Edward J., Jr.
Creedon, Robert S., Jr.	Murray, Therese
Durand, Robert A.	Norton, Thomas C.
Fargo, Susan C.	Nuciforo, Andrea F., Jr.
Havern, Robert A.	O'Brien, John D.
Hedlund, Robert L.	Pacheco, Marc R.
Jacques, Cheryl A.	Panagiotakos, Steven C.
Jajuga, James P.	Pines, Lois G.
Joyce, Brian A.	Rauschenbach, Henri S.
Keating, William R.	Rosenberg, Stanley C.
Knapik, Michael R.	Shannon, Charles E.
Lees, Brian P.	Tarr, Bruce E.
Lynch, Stephen F.	Tisei, Richard R.
Magnani, David P.	Tolman, Warren E.

As of 5/12/2008

Organizations Which Have Endorsed the Buffer Zone Bill
Massachusetts Senate Bill 148

Abortion Access Project of Massachusetts
AIDS Project Worcester
Alliance for Young Families
American Association of University Women
American Baptists Concerned; Old Cambridge Baptist Church
Big Brother Association of Greater Boston
Big Sister Association of Greater Boston
Boston Area Rape Crisis Center
Boston Living Center
Boston Women's Health Book Collective
Crittenton Hastings House
Four Women Inc. Ob-Gyn Offices
Gray Panthers of Greater Boston
Health Care of Southeastern Massachusetts
League of Women Voters
Lesbian and Gay Political Alliance of Massachusetts
Massachusetts Asian AIDS Prevention Project
Massachusetts Business and Professional Women
Massachusetts Coalition of Nurse Practitioners
Massachusetts Medical Society
Massachusetts NARAL
Massachusetts Nurses' Association
Massachusetts Prevention Center, Cambridge
Massachusetts Public Health Association

-over-

As of 5/12/2008

Massachusetts Women's Political Caucus
Multicultural AIDS Coalition, Inc.
National Council of Jewish Women
Planned Parenthood League of Massachusetts
Religious Coalition for Reproductive Choice
Repro Associates/WomenCare of Boston
Reproductive Rights Network
The Republican Pro-Choice Coalition
Roxbury Multi-Service Center
Union of American Hebrew Congregations
WEATOC, Inc.
Women of Color AIDS Council
Women's Bar Association of Massachusetts
Women's Resource Center at UMass Dartmouth

-over-

Profile of Free Standing Health Clinics in Massachusetts

Alternative Medical Care of MA ~ 9 Boston Street Suite 9, Lynn

private OB-GYN doctors office simulation. No problems
Of harassment, violence on or near premises. BZ would
Would not effect this clinic.

Alternatives/Womancare ~ 12 Brigham Street, New Bedford

Darnell, Office Manager/Director
Has had substantial harassment problems on staff and clients. Used to employ detail officers (approx. $25/hr) but found enforcement lacking. Speculating that personal views kept them from doing their job properly. Currently employs full time security guard that checks clients for weapons among other precautions. Provides "well woman care" services (breast cancer screening, birth control, STD treatment) in addition to abortion (approx. 2 days per week devoted to this procedure) to low income women. (This area of New Bedford has one of the lowest income levels in the state.) Have approx. 20 protesters every day abortions are scheduled. Experiences various levels of harassment each time plus the token prayer group.

Location: Situated on narrow sidewalk. BZ would extend into street. Protesters would be pushed 25 ft. down each end of sidewalk and across the street. Parking not an issue here.

BZ would allow clients to be dropped off from cars unencumbered.

Cambridge Women's Health ~ 278 Elm Street, Somerville

No problems with violence or harassment. No protesters.
BZ would not effect them.
Police Chief Don Caligui was not aware that there was this type of clinic in Somerville until I informed him of it's location.

Four Women ~ 152 Emory Street, Attleboro

This is the place with the people hanging over the fence that abuts the parking lot. BZ would not effect this area. Enterance of the multi business building is on narrow sidewalk and often cars park in front of the doorway on the street. Protesters walk in between the cars and the enterance to the building. BZ would help eliminate this activity. Peaceful, no harassment or violence reported. Just annoying. Local law enforcement sympathetic and helpful.

Planned Parenthood (Preterm) ~ 1055 Commonwealth Ave. Boston

Planned Parenthood of Central Mass. ~ 631 Lincoln Street, Worcester

Repro ~ 1297 Beacon Street, Brookline

Geoffrey Bazel, Director

Situated directly on Beacon street. Narrow sidewalk and right on busy street. Has 3-4 regular daily protesters who pass out pamphlets. 10 – 15 on Saturdays. Peaceful but naturally blocks entrance because of building situation. Has full time security personnel, similar to Alternatives/Womancare. Escorts have never been invited or encouraged by the clinic, but they show up as an independent group occasionally. Clinic tries to dissuade them because confrontations usually occur when they are present. BZ will push protestors across street and down sidewalk.

Women's Health Services ~ 822 Boylston Street, Brookline

Glenda Parker, Director

Surrounded by large parking lot. Protesters not a problem. No harassment, no violence. Average 3 pickters every Saturday. Same people, peaceful. BZ will not really effect this clinic.

April 7, 1999

Martha Coakley, District Attorney
Middlesex District Attorney's Office
40 Thorndike Street
Cambridge, MA 02141

Dear Ms. Coakley:

I am writing to you to ask for your support for **S. 148 – The Buffer Zone Bill**. This legislation seeks to protect the public safety of those accessing medical care or working at reproductive health care facilities, by creating a 25-foot zone of protection around entrances, exits, and driveways to reproductive health care facilities in the Commonwealth. At the same time, S. 148 will also ensure the First Amendment rights of those who wish to protest in front of these facilities.

This bill is about law, order, public safety, individual liberties, and civil behavior. It has the backing of Republican and Democratic legislators on both sides of the choice issue. In fact, more than 80 legislators co-sponsored this legislation this session.

Senate Bill 148 has been referred to the Joint Committee on Criminal Justice and will be heard on **Thursday, April 15 at 10 am in Room 222.** Your testimony at this hearing would be extremely helpful. As such, I am contacting you to request that you attend the hearing or send written support to the committee members.

At your earliest convenience, could you please contact me to let me know of your position with regard to this proposed legislation. I have enclosed fact sheets and answers to some frequently asked questions for your information. If you have any additional questions, please feel free to call my Legislative Director, Julia Venema, at 722-1572.

Very truly yours,

Senator Susan C. Fargo

Whereas, There is pending before the general court a bill, printed as Senate No. 148, entitled "An Act relative to health care facilities", copies of which are submitted herewith; and

Whereas, Senate No. 148 establishes a buffer zone outside facilities where abortions are offered or performed; and

Whereas, Senate No. 148, with certain exceptions, prohibits persons from entering the buffer zone; and

Whereas, Senate No. 148 specifically enumerates its purposes, among which is "to enact reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm"; and

Whereas, grave doubt exists about whether Senate No. 148 would be constitutional if enacted; therefore be it

Ordered, That the opinion of the Honorable Justices of the Supreme Judicial Court be required on the following important question of law:

Does Senate No. 148, by restricting access to buffer zones outside reproductive health care facilities, violate the right of freedom of speech or the right of the people peaceably

to assemble as provided by the First Amendment to the Constitution of the United States (which the Fourteenth Amendment applies to the Commonwealth) or as provided in Articles XVI and XIX of the Declaration of Rights of the Commonwealth?

[For final: fix margins; add interest of signers; etc.]

COMMONWEALTH OF MASSACHUSETTSSUPREME JUDICIAL COURT

.....

Draft 12/3/99

REQUEST FOR ADVISORY OPINION
NO. A-103

No. SJC-08145

IN RE SENATE ORDER No. 2034

.....

BRIEF OF PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.,, ...

John H. Henn, BBO No. 230520
John Nilsson, BBO No. Pending
Foley, Hoag & Eliot LLP
One Post Office Square
Boston, Massachusetts 02109
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Planned Parenthood League of Massachusetts and the [NUMBER] other organizations listed above respectfully submit this brief in response to the Question posed to the Honorable Justices of the Supreme Judicial Court by the Senate of the Commonwealth of Massachusetts.

Question Presented

The Senate of the Commonwealth of Massachusetts has requested an Advisory Opinion of the following Question:

> Does Senate No. 148, by restricting access to buffer zones outside reproductive health care facilities, violate the right of freedom of speech or the right of the people peaceably to assemble as provided by the First Amendment of the Constitution of the United States (which the Fourteenth Amendment applies to the Commonwealth) or as provided in Articles XVI and XIX of the Declaration of Rights of the Commonwealth?

As discussed below, we believe the Question should be answered in the negative.

The Buffer Zones

Senate Bill No. 148 ("S.148" or "the Bill") creates two separate fixed "buffer zones" (though they will overlap in part), each of which is the subject of the question presented. Both consist of the kind of buffer zone known as a "fixed" buffer zone, as opposed to a "floating" buffer zone.[1]

The first zone — "the 25 foot buffer zone" — consists of a fixed buffer zone extending within "the area twenty five (25)feet from any portion of the entrance, exit or drive-way of a reproductive health facility" in the Commonwealth. S.148, §2(b)(1)(A).

The second zone — "the corridor zone" — consists of a fixed rectangle created by extending the outside boundaries of any entrance, exit or driveway in straight lines to the point where the lines intersect the street. The corridor zone by definition does not specify distances measured in feet, but it in effect creates a zone that in the usual case may be expected to extend

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[1] A "floating" or "bubble" zone creates constitutional issues not present here, and the constitutionality of one such zone is currently before the United States Supreme Court for review. Hill v. Colorado, 68 U.S.L.W. 3177 (Sept. 38, 1999), *granting certiorari* from Hill v. Thomas, 973 P.2d 1246 (Col. 1999). See also Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 375-85 (1997)(upholding a fixed zone and striking down a floating zone); id. at 395-401 (Breyer, J., dissenting as to striking down the "floating bubble").

three to four (3-4) feet on each side of a person walking down the middle of the corridor.[2] Id. § 2(b)(1)(B).

The Bill prohibits a person during a reproductive health care facility's business hours from knowingly "enter[ing] and remain[ing]" within either of the zones, with certain exceptions. The exceptions are: persons entering or leaving such facility; employees or agents of such facility acting within the scope of their employment; law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such a facility. S.148 § 2(b)(2).

The Legislative Findings

The Senate passed this bill after making the following four findings.

[1] [E]xisting law does not adequately protect the public safety in the areas in and around reproductive health care facilities. Indeed, such facilities in the Commonwealth of Massachusetts have been the focal point of many blockades, disturbances and even violence, particularly the shootings at two reproductive health service facilities on December 30, 1994, which left two persons dead and many injured.

[2] It is further found that persons attempting to enter or depart from reproductive health care facilities have been subject to harassing and intimidating activity by persons approaching within extremely close proximity and shouting or waving objects at them, which has tended to hamper access to or departures from those facilities. It is further found that such activity near reproductive health care facilities creates a "captive audience" situation because persons seeking health care services cannot avoid the area outside of reproductive health care facilities if they are to receive the services provided therein, and their physical and emotional ailments or conditions can make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity.

[3] It is further found that violence and disturbances described above have required the deployment of police officers at significant cost to the cities and towns of the Commonwealth, and continue to occur despite civil injunctions that prohibit certain person from engaging in such conduct.

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2 Doorway entrances can obviously vary in width, but assuming a typical entrance width (door plus side panels) of eight feet, and a person walking down the middle of the corridor zone occupying the center one to two feet of that corridor, the buffer zone extending on each side of that person would be three to three and one-half feet.

[4] And it is further found that studies have shown that clinics with buffer zones experience far larger decreases in every type of violence that clinics without buffer zones. S.148 § 1 (numbering added).

The Massachusetts Caselaw Background to the Legislative Findings

The legislative findings were made against a background of previous judicial findings noted by this Court and lower courts. Those judicial findings reflect the history of harassment of patients and staff at reproductive health care facilities at the time the Senate considered S. 148.

The first legislative finding states the inadequacy of existing law in protecting public safety in the vicinity of such facilities (hereafter sometimes "clinics"), and notes the occurrence of blockades, disturbances and even murders at such facilities. This legislative finding reflects judicial findings previously made and noted by this Court. Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701 (1990)("PPLM I") and Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467 (1994)("PPLM II") upheld preliminary injunction and permanent injunctions, respectively, against blockading clinic entrances. After entry of those injunctions, two murders and several assaults with intent to murder occurred at two clinics on December 30, 1994. Commonwealth v. Salvi, Crim. Action Nos. 99518 to 99524,1996 WL 350842 (Mass. Super. Ct. Jan. 25,1996)(noting indictments for murder and intent to murder, for which it is a judicially noticeable fact that the defendant was convicted). Further, Planned Parenthood League of Mass., Inc. v. Bell, 424 Mass. 573 (1996)("PPLM III") upheld a 50 foot buffer zone injunction against a person whose activities included "shouting loudly into [patient's] faces." Id. at 582 n.10. A buffer zone will not, of course, stop a premeditated bullet. But it could easily deter unpremeditated violence resulting from clashes between protestors and their opponents or patient defenders. It would make a blockade harder to form. And a buffer zone would certainly stop someone from shouting loudly into patients' faces.

The second legislative finding focuses on the patients and clinic staff and is of particular importance because it directly concerns the constitutional right of a woman to chose abortion. The key features of that finding are that (i) persons attempting to enter or depart from clinics

have been subjected to "harassing and intimidating activity by persons approaching within extremely close proximity and shouting or waving objects at them." (emphasis added), (ii) this conduct tends "to hamper access to or departures from" clinics, (iii) such patients and staff are a "captive audience" of the activity, and (iv) the patients' physical and emotional condition can make them especially vulnerable to "adverse physiological effects" from such activity "directed at them from extremely close proximity." (Emphasis added.)

These legislative findings mirror judicial findings about the impact on patients of close proximity shouting and bellowing. In PPLM III, shouting carried out at a distance of *10* feet:

> distressed clinic patients and staff, created anxiety, and impeded the effective provision of medical services. Patients who were the targets ... often entered crying, trembling, and exhibiting other symptoms of fear and apprehension. As a result, clinic staff had to take time away from providing medical services in order to calm patients instead. The judge also found that those patients who reacted ... by turning away from the clinic were subject to increased health risks due to the delay in services." PPLM III, at 573.

As this passage indicated, the "adverse physiological effects" referred to by the legislature have previously been noted by this Court. Shouting loudly into the face of any patient about to incur a surgical procedure predictably produces emotional stress which can continue through the time of the procedure, with the equally predictable potential for adverse physiological effects. Although the legislature did at not spell out the "physiological effects," it is generally accepted in the medical community (see notes 9-10 infra) that patients in stress at the time of surgery suffer increased pain.

The third finding contains two components: first, that problems described in the prior findings have required significant police expenditures, and second, that the problems continue despite existing civil injunctions against certain persons.[3]

The fourth finding is also of considerable importance because it expressly states the benefit of a buffer zone: clinics with buffer zones experience far larger decreases in every type

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[3] Although the legislative finding refers to injunctions against "certain persons", the injunctions considered by this Court included any member of the public "acting in concert" with those persons. PPLM I, at 705 n.5; PPLM II, at 480 and n.16.

of violence than those without buffer zones. By definition, such zones certainly must decrease shouting into patients' faces, and decrease the attendant emotional stress and adverse physiological consequences (pain, in particular).

The Purposes of the Legislation

In keeping with these findings, Senate Bill Number 148 has four purposes:

(1) to increase the public safety in and around reproductive health care facilities;

(2) to maintain the flow of traffic and prevent congestion around reproductive health care facilities;

(3) to enact reasonable time, place and manner restriction to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm; and

(4) to create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services, including surgical procedures, to its patients.

SUMMARY OF ARGUMENT

The proper answer to the Senate's question is "no". The legal parameters for considering the question are not in doubt: speech and assembly in a public forum are constitutionally protected, but the state may nonetheless impose reasonable time, place and manner restrictions on those activities.

The subject of the speech and assembly is obviously abortion, and the communications at issue concern the twin questions of whether a particular patient should choose abortion, and more broadly, whether anyone should be allowed to choose abortion. Each message can be communicated by voice and by sign without it being shouted into a patients's face, and without it causing some patients to turn away in fear and others to suffer emotional distress and consequent physiological pain.

Each of the buffer zones is a reasonable time, place and manner restriction that does not impermissibly infringe upon the right of freedom of speech or the right peaceably to assemble. Each zone is content-neutral because it applies to everyone (protester and anti-protester alike), and makes no reference to the content of anyone's speech. It is narrowly tailored to serve significant government interests because it leaves open ample alternative channels of communication. Cases decided under the stricter standard of scrutiny implicated by an injunction as opposed to a statute or ordinance have repeatedly upheld the constitutionality of fixed buffer zones like the one at issue here. This is sufficient to confirm that the fixed buffer zones created by Bill No. 148 are facially constitutional, which resolves the question before the Justices. The Justices need not speculate as to possible challenges under hypothetical circumstances where the restrictions are claimed to be unconstitutional as applied.

ARGUMENT

1. The Twenty-five Foot Fixed Buffer Zone Created by Senate Bill 148 Is a Reasonable Restriction on the Time, Place, and Manner of Protected Speech, Justified Without Reference to the Content of the Regulated Speech, and Narrowly Tailored to Serve a Significant Governmental Interest.

We fully recognize that public sidewalks and rights-of-way are public fora in the most traditional sense,[4] and that speech and assembly in those fora are constitutionally protected speech.[5] However, "[e]ven protected speech is not equally permissible in all

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4 The buffer zone applies not only to "private property of a reproductive health care facility", but also to a "public right-of-way." S.148, §2(b)(1).

5 In interpreting the free speech provisions of the Massachusetts Constitution, this Court has looked to Supreme Court cases and other federal case law interpreting the First Amendment. See Hosford v. School Committee of Sandwich, 421 Mass. 708, 712 n.5 (1996)("Our freedom of speech analysis is guided by the Federal analysis."); Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 1202 (1982); Colo v. Treasurer & Receiver General, 378 Mass. 550, 557 (1979) (looking to "the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment, which criteria we believe are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution.").

places and at all times." Frisby v. Schultz, 487 U.S. 474, 479 (1988) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund. Inc., 474 U.S. 788, 799 (1985) while upholding a prohibition on picketing at the residence of an abortion clinic). Id. at 487. See Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct 855, 863 (1997)(upholding a fixed 15 foot buffer zone at abortion clinic); Madsen v. Woman's Health Ctr., Inc. 512 U.S. 753, 767-768 (1994)(upholding a fixed 36 foot buffer zone)

As the United States Supreme Court has made clear in a series of cases, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 778, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); accord Frisby, 487 U.S. at 481 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)); Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 647 (1981). In the Supreme Court's most recent (1997) buffer zone case, the Court referred to "our standard 'time, place and manner analysis,'" Schenck, 117 S.Ct 855 at 863, as it upheld a "fixed buffer zone", and struck down a "floating buffer zone", in the face of a First Amendment challenge. Id. at 859.[6] Schenck built upon the Supreme Court's seminal buffer zone case of three years before, Madsen, 512 U.S. at 767-768, which had upheld a fixed 36 foot buffer zone.

Thus, the Supreme Court has gone so far as to uphold a state statute prohibiting all political speech within 100 feet of a polling place, despite the fact that the statute was not

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6 The ACLU (national office) and others submitted an *amicus* brief in Schenck urging the Court to affirm the fifteen foot fixed zone based on the record therein. Brief of the American Civil Liberties Union, *et al*, in Schenck v. Pro-Choice Network, No. 95-1065. The "record" here consists of the legislative findings, of course, but also of the several decisions and findings of courts of the Commonwealth that provide identifiable bases for the legislative findings.

content neutral. See Burson v. Freeman, 504 U.S. 191, 210-11 (1992). This Court has similarly allowed reasonable restrictions to be placed upon otherwise protected speech in cases specifically involving reproductive health facilities that provide abortion services. PPLM I, PPLM II, and PPLM III.

Each of the buffer zones is a constitutional time, place and manner restriction. Each applies only at a specific time (when the facility is open), in a specific place (the facility), and as to a specific manner of conduct (entering or remaining within the twenty-five foot buffer zone). The proposed legislation says nothing about the content of the speech, the Senate's findings express no concern about the content of the speech, and the legislative prohibition applies to everyone, regardless of their views on abortion (or anything else), with exceptions that are not content based. Finally, both case law and an examination of the restrictions themselves reveal that they are narrowly tailored to the ills contemplated by the Senate, leaving ample alternative channels for protest and debate on the subject of reproductive rights.

2. Senate Bill No. 148 Is Content-Neutral.

Perhaps the single most important factor in determining whether a restriction on speech is valid is whether the restriction is based upon either the content or subject matter of speech. See, e.g., Heffron, 452 U.S. at 648. This is a subjective analysis; that is, it looks to the government's purpose in regulating the speech at issue, not the effect of the regulation. See Ward, 491 U.S. at 791 ("The government's purpose is the controlling consideration."). Thus, it simply is not relevant that a statute disproportionately constrains speech of one particular viewpoint. See id. ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). Or, as the United States Court of Appeals for the Eighth Circuit has expressed it, "'there is no disparate-impact theory in

First Amendment law." United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir. 1996) (citing Madsen, 512 U.S. at 763-64).

The Senate passed S.148 because of multiple concerns: concern for public safety in the wake of recent violence directed at reproductive health facilities; concern for the timely availability of reproductive services to patients in need; concern for the adverse effect on the physical and psychological health of patients when they are forced to become "captive audiences" to harassment and intimidation accomplished by "extremely close" shouting and waving of objects; and concern for the toll of these sorts of protests on the policing resources of cities and towns despite existing civil injunctions. None of these concerns is at all related to the actual message of those protesting, or "counseling," at reproductive health facilities. Compare Boos v. Barry, 485 U.S. 312, 318-19 (1988) (holding that restriction upon protesting outside embassies was content-based where it was limited to displays critical of the government in question). Any impact on that message is incidental to the statute's purposes. Cf. R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992) ("[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech"); Ward, 491 U.S. at 791 ("'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

Another way of stating the issue is that the Senate was concerned with the conduct that attends protest at reproductive facilities, not with the subject of that protest. The Supreme Court has long recognized that conduct, even when freighted with symbolic expression, can be regulated so long as the target of the regulation is the conduct, not the expression. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (holding that statute prohibiting burning of draft cards was constitutional insofar as the governmental interest motivating the statute was focused on the non-communicative ramifications of the conduct). The Senate findings make plain that S.148 seeks to regulate the sort of conduct

that has come to accompany protest at reproductive health facilities, not the message of that protest.

The fact that the legislation applies without discrimination confirms its content neutrality. In contrast to S.148, the injunction in Schenck only applied to that portion of the public consisting of "all other persons whomsoever, known or unknown" who acted in concert with the defendants in demonstrating within the fifteen foot buffer. Id. at 861 n.3 (emphasis added. That group of persons is necessarily limited to those who on one particular side abortion-related disputes: those protesting the patients' choice of abortion, the legal availability of that choice, and/or the existence of the abortion clinic. The buffer zone in S. 148 is not so limited in its application.

Similarly, the injunction approved by the Colorado court in Hill could arguably be seen as containing a content component, since it was directed at those passing leaflets, displaying signs, or engaged in "oral protest, education, or counseling". Hill v. Thomas, 973 p.2d 1246, 1249 (Colo.) (en banc), cert. granted, 120 S.Ct. 10 (1999). The Supreme Court appellants in Hill will certainly assert that this last category turns in some measure on content.[7]

Indeed, unlike the injunction against abortion clinic protesters that was upheld in Madsen, 512 U.S. at 769-71, the S. 148 buffer zone is not limited in its application to persons who "all share the same viewpoint regarding abortion". Id. at 563. Rather, this proposed statutory buffer zone applies without regard to "viewpoint" about anything.

The buffer zone does not prevent patients from hearing the content of protester's messages, nor the public from learning about them. Protesters interested in persuasion of the patient can shout as loudly as they like, and carry signs or objects of whatever size,

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[7] Speculating on the reasons why the Supreme Court agrees to hear a case is a popular but probably futile activity. However, there is at least a "content" argument to be made in Hill which, as noted in the text above, is not available as to S.148.

from the edge of the buffer zone.[8] If patients have an adverse reaction to that content, that is something the First Amendment requires them to endure. But it is not a matter of content for the state to prevent protestors from shouting the same message equally loudly, or thrusting signs or objects, right into the face of a patient. S.148, like a prior Massachusetts preliminary injunction against clinic blockading, "is content-neutral, and makes no reference to the specific viewpoints espoused by the defendants or the plaintiffs." PPLM I, 406 Mass. at 716.

3. Senate Bill No. 148 Is Prompted by a Significant Governmental Interest and Narrowly Tailored.

Because Bill 148 is content-neutral, its constitutionality is properly assessed under the standards set forth in Ward v. Rock Against Racism. See Lucero v. Trosch, 121 F.3d 591, 602 (11th Cir. 1997). That is, it must be deemed constitutional if the Court determines that the Bill's regulation of speech is "narrowly tailored to serve a significant governmental interest." Madsen, at 764 (quoting Ward. 491 U.S. at 791).

This "narrowly-tailored" test is somewhat less stringent than the test established for content-neutral injunctions in Madsen, 512 U.S. 753. In Madsen, the Supreme Court reasoned that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances, which "represent a legislative choice regarding the promotion of particular societal interests." As a result, the Supreme Court in Madsen held that a content-neutral injunctions that restricts protected speech is constitutional so long as "the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Id. at 765 (emphasis added). Statutes on the other hand can be upheld provided they are "narrowly tailored to serve a significant government

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8 Specific individuals with abnormally powerful voices can, of course, be subject to more restrictive orders, as in the case of the 50 foot buffer zone order against Barbara Bell upheld in PPLM III.

interest." Id. at 764.[9] This Court need not pursue the question of whether this distinction between injunctions and statutes should apply under the Massachusetts Constitution because, as the cases cited infra Part A.2.b illustrate, S148 would withstand even the more rigorous standard of scrutiny applied to injunctions.[10]

4. The Fixed Buffer Zone Serves Several Significant Governmental Interests.

As stated previously, S. 148 reflects multiple public concerns relating to public safety at reproductive health facilities, to the timely availability of reproductive services, to the physical and psychological health of patients who must become "captive audiences" to aggressive "counseling" or focused picketing, and to the toll on the policing resources of cities and towns. Each of these is a significant governmental interest.

The state certainly has a significant interest in protecting the general health and safety of its citizens. See Madsen, 512 U.S. at 767-69; Heffron, 452 U.S. at 650; see also Concerned Jewish Youth v. MacGuire, 621 F.2d 471, 474 (2d Cir. 1980) ("The government interest in providing security, safety and silence may, at times, be superior to asserted First Amendment rights."). It is equally certain that this state interest extends to protecting the physical and emotional well-being of patients who are seeking medical care. See Planned Parenthood Shasta-Diablo v. Williams, 898 P.2d 402, 411 (Cal. 1995) (holding that state's interest in protecting health and safety of medical patients about to

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9 Concurring in part, Justice Stevens took the opposite view, arguing that "injunctive relief should be judged by a more lenient standard than legislation," because injunctions are imposed to address past illegal activity. Madsen, 512 U.S. at 778 (Stevens, J., concurring in part). While paying lip service to the majority's distinction, the ACLU, in its Amicus Curiae Brief in Hill v. Colorado, seemingly elevated Justice Stevens' opinion (in which no other Justice joined) to the status of majority opinion, repeating Justice Stevens' argument that a statutory buffer zone, unlike one created by an injunction, is less likely to be constitutional insofar as "[it] is generally applicable to everyone . . . regardless of whether they have previously engaged in misconduct." This argument was considered and expressly rejected by the majority in Madsen. 512 U.S. at 766.

10 The legislative findings made for S.148 mirror findings of fact previously made in the courts of this Commonwealth that justified injunctions notwithstanding First Amendment attacks. See PPLM I, at 716-717; PPLM II, at 480-481.

undergo surgery justifies imposing buffer zone); Horizon Health Ctr. v. Felissimo, 638 A.2d 1260, 1269-70 (N.J. 1994) (holding that because of its interest in preserving health, state has "significant interest in insuring [sic] unrestricted access to [the clinic's] medical services, including family planning, prenatal care . . . [and] first-trimester abortions"). Indeed, given the particular vulnerability of patients seeking abortion, the state interest in public safety has a special force. Reproductive health care clinics providing day surgery are like hospitals in the sense that:

"'Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients is the order of the day's activity...'"

Madsen, 114 S.Ct at 2528 (quoting NLRB v. Baptist Hosp., 442 U.S. 773, 783-784 (1979). Accord Sabelko, 120 F.3d at 164 (holding that state's interest in preserving sanctuary for patients was significant interest); cf. Heffron, 452 U.S. at 650-51 ("consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in the light of the characteristic nature and function of the particular forum involved.").

As this Court recently noted, "any person bellowing into the entrance of a medical facility creates a noxious and unwelcome condition inside, regardless of what he or she is shouting", and the "volume of [defendant's] shouting is objectionable activity unsheltered by the First Amendment". PPLM III, 424 Mass. at 581-82 & n.10.

The state has an equally compelling interest in protecting patients from adverse impacts on their emotional and physical health as they are about to undergo a surgical procedure, particularly a procedure protected by the constitution as a privacy right. The grounding of the constitutional right in "privacy" is important. There is still, as this Court noted in a related context, a "perceived stigma associated with the activity of seeking abortion services". PPLM II, 417 Mass. at 479 n.13. Patients seeking abortion are very differently situated from people walking into a lecture, or government or corporate

officials going to work. They are differently situated from the Holocaust survivors living in Skokie faced with a neo-Nazi parade (which, though unspeakably insensitive, was at least something the survivors did not have to observe). Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir.), cert. denied, 439 U.S. 916 (1978). These patients are even differently situated from those survivors were they, hypothetically, being shouted at while going into a synagogue by the same group at close distances (though we believe that conduct could be prohibited), because the abortion patient deterred by face-to-face shouting is exercising a time sensitive right which can expire entirely. See PPLM III, 424 Mass. at 581- 583.

Courts elsewhere have pointed out that shouting in the faces of abortion patients and thrusting things at them can drive them from exercising their constitutional right to choose that procedure, either causing potentially harmful delay in medical care (where the risks increase as time passes), or denial of medical care entirely (where the pregnancy has lasted until it is into the third trimester). See Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 620 (N.D. Cal. 1991)(explaining that some patients are so upset by protestors' conduct that they reschedule their appointments and later require more advanced, and therefore more dangerous, medical procedures); Right to Live Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564, 569 (Tex. Ct. App. 1987)(describing how one couple, intimidated by protesters, arrived and left three times before they could enter clinic); Bering v. Share, 721 P.2d 918, 928 (Wash. 1986)("the very presence of antiabortion picketers directly in front of [a] clinic could have such a coercive impact upon a woman that she forgoes the exercise of [her right to have an abortion] or seeks to exercise it [with] a licensed or unlicensed physician not of her first choosing."). This delay threatens serious medical consequences for the patient.[11] Thus,

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11 See Surgeon General's Report: The Public Health Risks of Abortion, 101st Cong., 1st Sess. (1989) (Surgeon General Koop) (explaining that early abortions are medically safer because later complications "may be serious, particularly in the second and third trimesters when a hemorrhage, bowel injury, or a perforated uterus may occur"); see also N.J. Binkin, Trends in

ensuring the availability of reproductive health services, and preventing their delay or denial, is a well established significant government interest. See Madsen, 512 U.S. at 767-69 (so holding); Sabelko, 120 F.3d at 64 (same); Dinwiddie, 76 F.3d at 923 (same). Admittedly, the Supreme Court has cautioned that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Madsen, 512 U.S. at 774 (quoting Boos, 485 U.S. at 322). Nonetheless, both the Supreme Court and this Court have made plain that citizens need not be victimized by the near-physical assaults characteristic of targeted, or focused, picketing. In PPLM III, this Court described the sort of harassing conduct that focused picketing entails. 424 Mass. at 575 (noting that protester "regularly rushed up to patients and the persons accompanying them, making uninvited contact and following them as they crossed the trolley tracks and Beacon Street to reach the clinic"). Other courts have described similarly egregious conduct. See Frisby, 487 U.S. at 477 (describing harassing nature of targeted residential picketing); Libertad v. Welch, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (describing protestor harassment of clinic personnel and patients); New York State NOW v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989) (describing the manner in which protesters harassed women entering clinic); Portland Feminist, 859 F.2d at 683 (noting that demonstrators screamed at, grabbed, pushed, and intimidated clinic patients).

Induced Legal Abortion Morbidity and Mortality, 13 Clin. Obstet. Gynec. 83, 83 (1986) (asserting that delay in abortion "is associated with an increased risk of abortion mortality"); James W. Buehler et al., The Risk of Serious Complications from Induced Abortion, 153 Am. J. Obstet. Gynec. 14, 14 (1985) (stating that "advanced gestational age is recognized as a major risk factor for serious complications following abortion"); Willard Cates et al., The Effect of Delay and Method of Choice on the Risk of Abortion Morbidity, 9 Family Planning Perspectives 266, 267 (1977) ("[T]he main risk to a woman who wants an abortion results from delay"); Richard Selik et al., Behavioral Factors Contributing to Abortion Deaths: A New Approach to Mortality Studies, 58 Obstet. Gynec. 631, 635 (1981) (noting that delay was significant factor in contributing to death due to abortion and that risk of death increases as period of gestation increases).

This sort of conduct poses serious medical consequences for the patient separate and apart from the risks associated with delay. A patient who is emotionally (though not physically) assaulted and stressed immediately before surgery is exposed to significantly increased risk of physical pain or other complications.[12] As the trial court in Schenck noted, women "who have been the target of 'sidewalk counseling'" enter a clinic "severely distressed", and increased stress can cause numerous medical complications, pain, need for additional sedation, or even harmful delay in surgery. Pro-choice Network of Western N.Y. v. Project Rescue Western N.Y., 799 F.Supp. 1417, 1427 (W.D.N.Y. 1992), aff'd 67 F.3d 359 (2d Cir. 1994), aff'd in part and rev'd in part, Schenck, *supra*, *519* U.S. 357 (1997). A woman's constitutional right to chose abortion should not be made contingent upon suffering increased physical pain during an invasive surgical procedure in order to accommodate a hypothesized free speech right to scream in her face.

"Speech" which causes the kinds of risks described above merits less protection than other forms of speech. See Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994) (noting distinction between "focused picketing" directed at clinic patients and staff and more "generally disseminated communication" such as hand-billing and solicitation).

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12 See Warren M. Hern, Abortion Practice 35-37 (1991) (noting that patients subject to protest "exhibited evidence of adrenergic 'fight-or-flight' reaction, such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention" and further noting that such agitation may cause patient "[to] experience serious complications of the abortion that would be extremely unlikely under other circumstances"); G.C. Polk-Walker, Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion, 28 Nursing Forum 22, 23 (1993) (reporting that women who are anxious or fearful are more likely to choose general anesthesia, despite its higher risks); cf. Fritz-Ulrich Meyer, Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anesthesia, 16 Int'l J. Oral Maxillofac. Surg. 688, 688 (1987) (explaining that in cases of "unexplained cardiovascular reactions and fatalities" associated with local anesthesia "important factors are fear, anxiety and stress."); Barnard S. Linn, M.D. et al., Effects of Psychophysical Stree on Surgical Outcome, 50 Psychomatic Medicine 23o, 241 (1988)(patients suffering greater stress before inguinal hernia repair experienced poorer surgicaloutcomes, used three or more times the amount of narcotics, and may be more susceptible to infectious diseases with longer recovery periods).

That is particularly so for patients "held 'captive' by medical circumstances," Madsen, 114 S.Ct at 2526, who are not free to retreat without sacrificing their own medical well being.

The Senate also recognized that focused picketing threatens another significant interest -- the right not to listen, which is a necessary correlative of the right to speak freely. Generally, we avail ourselves of this right by walking away from a speaker, or turning off the television or radio when the speaker is being broadcast. In certain circumstances, however, we simply cannot get away, either literally or figuratively. Cf. Franklyn S. Haiman, Speech v. Privacy: Is There a Right Not to Be Spoken to?, 67 N.W. U. L. Rev. 153, 183 (1972)("There is a significant difference between communication which pursues its audience and that which, figuratively speaking, stands still, allowing its audience to exercise the right not to be spoken to by getting away from the source.").[13] In such circumstances, where the listener is in effect a "captive audience," "[t]he First Amendment permits the government to prohibit offensive speech as intrusive." Frisby, 487 U.S. at 487.

The communicative aspects of speech are slight when the listener is an unwilling subject. See id. at 488; see generally Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment § 1.02(f) (1984) (explaining that speech on matters of public concern may become low value speech when persistently directed at an unwilling listener). As the Supreme Court has noted, "no one has a right to press even 'good' ideas on an unwilling recipient." Rowan v. United States Post Office, 397 U.S. 728, 738 (1970). Rather than being an exchange of ideas, such "speech" is actually little more than a harangue. See PPLM III, 424 Mass. at 575 (describing statements that defendant was "steadily shouting" at patients).

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13 See Kunz v. New York, 340 U.S. 290 (1951) ("The street preacher takes advantage of people's presence on the streets to impose his message upon what, in a sense, is a captive audience.").

Finally, there is a significant governmental interest in reducing the risk of confrontational violence. The findings in S.148 commence with a statement of inadequate public safety protection, the fact the reproductive health care facilities have been the "focal point" of "disturbances and even violence". Patients are usually accompanied by some sort of escort, and it is obvious that physically creating a buffer zone between them and those would would scream in the patient's face will reduce the danger of violent confrontations.

b. The Buffer Zone is Narrowly Tailored to Protect these Significant Interests.

The respective buffer zones -- the 25 foot buffer zone and the corridor zone -- constitute a narrowly tailored solution to the significant governmental concerns just outlined. They are "narrowly tailored" because they "promote[] a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799. The zones generally allow anyone to communicate as loudly as he or she likes, and display signs or objects without limitation as to size.[14] As a result, those who are trying to communicate to patients can certainly do so from the edge of the twenty-five foot zone. To be sure, they cannot place a leaflet directly in the hand of a patient within the zone, but they can certainly wave it and show that they have one to offer, and an interested patient can easily walk over to take it. Indeed, the leaflet case is a red herring in the real world context of abortion clinic protests. The notion that patients want these leaflets, and should therefore be subjected to being yelled at face to face, is a notion that, as this Court said in another but related context, "lacks practical plausibility". PPLM II, at 477 (denying discovery of patient identities to blockaders seeking to show that patients did not feel intimidated or coerced by the blockades). Beyond the 25 foot zone, moreover, the corridor zone is so narrow that someone trying to communicate to a patient can certainly reach out with a leaflet.

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[14] A particular individual may be subjected to more strict rules as a result of his or her specific behavior (including vocal power). PPLM III.

Others may be seeking not to communicate to a patient so much as to communicate, by the very fact of their protest, to the public at large. That message — designed for the passerby or for any media coverage that might exist — is not even affected by the buffer zones, unless one supposes that being seen on television screaming in someone's face would move public opinion in your favor more than being seen on television screaming from a modest distance away.

The fixed buffer zone has, moreover, the virtue of clarity. Unlike so-called "floating" buffer zones (or "bubble zones"), S. 148 does not leave a protester in a state of uncertainty as to whether, at any given moment and with respect to any given patient, he or she is violating the law. Compare Schenck, 117 S. Ct. at 867-68 (1997) (striking down "bubble zone" in part because of its "lack of certainty" in this regard); Sabelko, 120 F.3d at 165 (concluding that floating buffer zone "contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance."). The S.148 buffer zones cannot be said to be lacking in guidelines as to enforcement so as to risk impermissible vagueness. Cf. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

For reasons such as these, numerous fixed buffer zones similar to this one have been upheld, even when examined with the stricter scrutiny implicated by an injunctive (as opposed to statutory) buffer zone. See Schenck v. Pro-Choice Network, 519 U.S. 357, 380 (1997) (15 foot fixed buffer zone); Madsen, 512 U.S. at 767-68 (36 foot "speech-free zone"); Lucero v. Trosch, 121 F.3d 591, 605-06 (11th Cir. 1997) (25 foot fixed buffer zone); Portland Feminist Women's Health Ctr. v. Advocates for Life. Inc., 859 F.2d 681, 686 (9th Cir. 1988) (affirming injunction designating 12 and 1/2 foot protest free zone around front door of health center); Fischer v. City of St. Paul, 894 F. Supp. 1318 (D. Minn. 1995) (enjoining protest on sidewalk in front of clinic); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 626 (N.D. Cal. 1991) (enjoining demonstrating, picketing, distributing literature, and "counseling"" within 25 feet of entrance to clinic); Bering v. Share, 721 P.2d 918, 928 (Wash. 1986) (affirming

injunction prohibiting protests on sidewalk in front of clinic); Wisconsin v. Baumann, 532 N.W.2d 144 (Wis. Ct. App. 1995) (25-foot buffer zone). The range in these cases (where it is stated) is from 12 ½ feet to 36 feet, including two at 25 feet.[15]

Statutory fixed buffer zones (subject to less rigorous scrutiny, supra Part A.1 & n.7) have been upheld even when a floating zone in the same legislation has been struck down. Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998). In that case, the City of Santa Barbara passed an ordinance prohibiting demonstrations within a fixed eight feet zone from of entrances to reproductive health facilities or places of worship, and also creating eight foot floating bubble zones around individuals within a hundred-foot distance from such facilities. Within that one hundred foot area, patients or worshipers might require demonstrators or "sidewalk counselors" to keep at least eight feet away. Following the Supreme Court's decision in Schenck and the Ninth Circuit's own decision in Sabelko, the Edwards court struck down the floating buffer zone. The court let the fixed buffer zone stand, however, finding it narrowly tailored to protect the significant governmental interests of ensuring traffic flow and access and protecting public safety. Id. at 1216-17.

Like the ordinance in Edwards, S.148 is narrowly tailored to serve a series of significant governmental interests. Indeed, the fixed buffer zone created by the bill is more modest

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15 In United States v. Grace, 461 U.S. 171 (1983), the Court struck down a statute prohibiting pamphleting and picketing throughout the block on which the Supreme Court itself is located as well as the public sidewalks surrounding that block. Besides the broad geographic scope of the prohibition, a number of other factors distinguish it. The Court emphasized that its ruling stemmed in large part from the absence of "[any] suggestion ... that appellee's activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." Id. at 182. Here, on the other hand, such conduct was the precise object of S. 148, which, moreover, reacts with a much more modest constraint that the substantial, block-wide ban in Grace. Finally, it is worth noting that Grace involved, an "as- applied" challenge, which allowed the Court to salvage an important part of the statutory prohibition (prohibiting pamphleting and picketing on the grounds within the side-walks). Such an "as applied" challenge is by its nature less ambitious (and more likely to succeed on the right facts) than a challenge claiming a statute is unconstitutional on its face. See supra Part B.

than many of the speech free zones approved under the more rigorous standard applicable to injunctions. The legislature's selection of twenty five feet is well within the range of buffer zones upheld in prior cases. The legislature did not attempt to create the sort of 300 foot zone struck down in Madsen. 512 U.S. 773- 74. As Schenck stated: "Although one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access, we defer to the District Court." 117 S. Ct. at 869. Here, against the backdrop of the Senate's extensive findings, made demonstrably reasonable by prior judicial findings in this Commonwealth, there is no reason to quibble over 25 feet, and this Court should properly defer to the legislature.

Nor does the possibility of a less restrictive statute render this one unconstitutional. As the Supreme Court has explained: "[A] regulation of the time, pace or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interest but . . . it need not be the least restrictive or least intrusive means of doing so." Ward, 491 U.S. at 798.[16] It is sufficient for constitutional purposes that the statute leaves open alternative channels through which restricted speech may be communicated. Senate Bill 148 does this. Indeed, Bill 148 leaves open myriad other channels through which individuals may voice their opposition to (or support for) what goes on inside reproductive health facilities. See, e.g., Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1352 (3d Cir. 1989) (suggesting that anti-abortion activists have "numerous

16 Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) upheld an ordinance prohibiting the posting of signs on public property after concluding that the ordinance "responds precisely" to the problem of visual blight that motivated its passage. Id. at 808. This holding does not mean, however, that a statute regulating speech is not narrowly tailored unless it constrains only those "evils" that it sought to remedy. Such a requirement would, of course, mean strict scrutiny, and the Supreme Court has made clear that time, place and manner restrictions on speech (especially restrictions imposed by statute) are subject to a less exacting standard.

legal alternatives" other than protesting directly in front of clinics), cert. denied, 493 U.S. 901 (1989).[17]

Finally, there is no merit to the position that the First Amendment requires buffer zones to be created only by injunction. No case has so held, and such a rule makes no sense, certainly not in the face of legislative findings that "violence and disturbances ... continue to occur despite civil injunctions that prohibit certain persons from engaging in such conduct." S.148, §1 (emphasis added). A statute, to be sure, could presumably not be directed at a specific group with a specific point of view, as the injunction was directed in Schenck, at 861 n. 3 (all persons "whomsoever" acting in concert with specific protestors). But S. 148 is not so directed, as it applies to everyone. [18]

B. The Justices Need Not Search for the Test Case

Having concluded that Bill 148 is in theory constitutional, the Justices need not search out hypothetical fact scenarios in which the Bill might arguably be unconstitutional as applied. As this Court explained in Opinion of the Justices to the Senate, 423 Mass. 1201, 1217 (1996), "[u]nlike an opinion on the merits of a litigated case, the questions the Justices answer in responding to a request for an advisory opinion are almost invariably abstract...." As a result, the Justices must resist the impulse "to hypothesize the fanciful," confining their inquiry to the question of whether the Bill "may reasonably be applied in ways that do not violated constitutional safeguards." Id. at 1218. If so, then "[the Justices] must indulge the presumption and find that the [the Bill] escape[s] a facial constitutional challenge." Id.; cf. Frisby, 487 U.S. at 488 ("Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the

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17 It is for this reason that the statute cannot be said to be any sort of prior restraint. "A prior restraint is generally any governmental action that would prevent a communication from reaching the public." Fischer v. City of St. Paul, 894 F. Supp. 1318, 1325 (D. Minn. 1995) (citing Madsen, 512 U.S. at 765 n.2).

18 Someone accused of violating an injunction is subject only to contempt processes rather, and is not afforded the additional due process safeguards of a criminal trial available to someone accused of violating a statute with criminal penalties, such as S.148 proposes.

ordinance . . . may present somewhat difference questions."); Lucero, 121 F.3d at 599 n.11.[19]

CONCLUSION

For the foregoing reasons, the Question posed in the Senate's request for an Advisory Opinion should be answered in the negative.

Respectfully submitted,
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19 One might construct wildly improbable, hypothetical, clinic locations -- renting space in the State House, for example -- but their consideration has no place in this Court's task of rendering an opinion on the facial constitutionality of S. 148.

430 Mass. 1205

1205 OPINION OF THE JUSTICES TO THE SENATE.

Supreme Judicial Court of Massachusetts.

Jan. 24, 2000.

Senate propounded question to the Supreme Judicial Court concerning validity of bill creating fixed buffer zones around entrances, exits, and driveways of a reproductive health care facilities and fixed corridor zones from clinic entrances to the street. The Supreme Judicial Court held that proposed bill would not violate the right to assemble peaceably under the First Amendment.

Question answered.

1. Courts ⇐208

Supreme Judicial Court was authorized to render an opinion in response to question propounded by the Senate regarding constitutionality of bill that would created buffer zones around reproductive health care facilities; solemn occasion existed due to bill's carryover into next legislative session. M.G.L.A. Const. Pt. 2, C. 3, Art. 2.

2. Courts ⇐208

Justices' constitutional duty is to render opinions on questions propounded by the Governor or the legislature only when they are properly required, and to abstain from answering questions of law not required under the applicable provision of state constitution. M.G.L.A. Const. Pt. 2, C. 3, Art. 2.

3. Courts ⇐208

"Solemn occasion," for purposes of provision of state constitution requiring Supreme Judicial Court to render opinions to questions propounded by the Governor or legislature upon important questions of law and upon solemn occasions, exists when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes. M.G.L.A. Const. Pt. 2, C. 3, Art. 2.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐208

When an opinion of the Justices of the Supreme Judicial Court, responding to a question propounded by the Governor or legislature, would not assist the requesting body in carrying out a present duty no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular questions. M.G.L.A. Const. Pt. 2, C. 3, Art. 2.

5. Constitutional Law ⇐91

Disorderly Conduct ⇐1

Bill creating fixed buffer zones around entrances, exits, and driveways of a reproductive health care facilities and fixed corridor zones from clinic entrances to the street would not violate the right to assemble peaceably under the First Amendment; bill was content-neutral, was designed to address substantial governmental interests and was narrowly tailored to serve those interests, leaving open ample alternative means of communication. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐90(3)

Statute or ordinance is content-neutral if it is justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐90(3)

Content-neutral statute which restricts speech is constitutional under the First Amendment if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. U.S.C.A. Const. Amend. 1.

8. Constitutional Law ⇐90(3)

In addition to serving a substantial governmental interest, a content-neutral bill must also be narrowly tailored to serve its legitimate interests, although it need not be the least restrictive or the least intrusive means of doing so.

On January 24, 2000, the Justices submitted the following answer to a question propounded to them by the Senate.

To the Honorable the Senate of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit their answer to the question set forth in an order adopted by the Senate on October 28, 1999, and transmitted to the Justices on November 3, 1999.[1] The order indicates that there is pending before the General Court a bill, Senate No. 148, entitled [1206] "An Act relative to health care facilities." A copy of the bill was transmitted with the order. The bill adds five new paragraphs to G.L. c. 266, § 120E, creating fixed buffer zones of twenty-five feet from any portion of an entrance, exit, or driveway of a reproductive health care facility, as well as a fixed corridor zone from a clinic entrance to the street. With limited exceptions, the bill prohibits anyone from knowingly entering into or remaining within the buffer zones.[2]

1. We invited interested parties to submit briefs which were due on December 8, 1999. Briefs were received from State Senator Cynthia Stone Creem; the Attorney General of the Commonwealth and the District Attorneys for Middlesex, Norfolk, and Suffolk Counties; Planned Parenthood League of Massachusetts, Inc., Women's Bar Association of Massachusetts, League of Women Voters of Massachusetts, Massachusetts Religious Coalition for Reproductive Choice—Massachusetts Chapter, National Council of Jewish Women, American Association of University Women—Massachusetts Chapter, National Abortion Federation, Physicians for Reproductive Choice and Health, NOW Legal Defense and Education Fund, Alternative Medical Care of Massachusetts, Womancare/REPRO Associates, Four Women, Inc., Mass. NARAL, Massachusetts Women's Political Caucus, Republican Pro-Choice Coalition, Feminist Majority Foundation, State Senator Susan C. Fargo, State Representative Ellen Story, and State Representative Paul M. Demakis; Robert A. Huff, Executive Director, Christian Counseling Services of Cape Cod, Inc.; Operation Rescue Boston; American Civil Liberties Union of Massachusetts; State Senator Marian Walsh; and Catholic Action League.

2. In pertinent part, Senate No. 148 reads as follows:

"SECTION 2. Chapter 266 of the General Laws is hereby amended by inserting after section 120E the following section:

"(*a*) For the purposes of this section, "reproductive health care facility" shall mean a place, other than within a hospital, where abortions are offered or performed.

"(*b*)(1) Except for those listed in subsection (2) below, no person shall, during business hours of a reproductive health care facility, knowingly enter or remain in the following area of private property of a reproductive health care facility or public right-of-way:

"(A) the area within twenty-five (25) feet of any portion of an entrance to, exit from, or driveway of a reproductive health care facility; and

"(B) the area within the rectangle created by extending the outside boundaries of any entrance to, exit from, or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

"(2) The provision of subsection (1) of this paragraph shall not apply to the following:

"(A) persons entering or leaving such facility;

"(B) employees or agents of such facility acting within the scope of their employment;

"(C) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

"(D) persons using the public sidewalk or street' right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

"(*c*) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than one thousand dollars or not more than six months in a jail or house of correction or both, and for each subsequent offense by a fine of not less than five hundred dollars and not more than five thousand dollars or not more than two and one-half years in a jail or house of correction or both.

"A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff, or police officer.

"(*d*) Any reproductive health care facility or any person whose rights to provide or

1207The order indicates that grave doubt exists as to the constitutionality of the bill, if enacted into law, and requests our opinion on this question:

"Does Senate No. 148, by restricting access to buffer zones outside reproductive health care facilities, violate the right of freedom of speech or the right of the people peaceably to assemble as provided by the First Amendment to the Constitution of the United States (which the Fourteenth Amendment applies to the Commonwealth) or as provided in Articles XVI and XIX of the Declaration of Rights of the Commonwealth?"

[1–4] As a threshold matter, we are authorized to render an opinion on this question. Part II, c. 3, art. 2, of the Constitution of the Commonwealth, as amended by art. 85 of the Amendments, provides that "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." The Justices' constitutional duty is to render opinions only when they are properly required, and to abstain from answering questions of law not required under this provision. *Answer of the Justices*, 319 Mass. 731, 733–734, 66 N.E.2d 358 (1946). A solemn occasion exists "when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes." *Answer of the Justices*, 364 Mass. 838, 1208844, 302 N.E.2d 565 (1973), quoting *Answer of the Justices*, 148 Mass. 623, 626, 21 N.E. 439 (1889). When an opinion of the Justices "would not assist the requesting body in carrying out a present duty . . . no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular questions." *Answer of the Justices*, 426 Mass. 1201, 1203–1204, 686 N.E.2d 444 (1997), citing *Answer of the Justices*, 406 Mass. 1220, 1224, 547 N.E.2d 17 (1989) (declining to answer questions propounded by Acting Governor where no question raised concerning Acting Governor's power or authority).

The Legislature ended its first annual formal session on November 17, 1999 (third Wednesday), and the second annual session commenced on January 5, 2000 (first Wednesday). See Joint Rule 12A, Manual for the General Courts, 1997–1998, at 698; art. 64, § 2, as amended by art. 82, of the Amendments to the Massachusetts Constitution. Until 1995, all proposed legislation pending before the Legislature expired at the end of each annual session if not enacted by both branches. In the past, if the question was propounded to us at the end of the first annual session, the expiration of the bill in the second annual session made it impossible for us to render an opinion. See *Answer of the Justices*, 401 Mass. 1234, 1235, 519 N.E.2d 244 (1988). However, in June, 1995, the Senate and the House of Representatives adopted substantial changes in their Joint Rules changing this internal procedure, pursuant to their rule making authority under Part II, c. 1, § 2, art. 7, § 3, art. 10,

obtain reproductive health care services have been interfered with by a violation of this section may commence a civil action for damages or injunctive and other equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business. An aggrieved person or entity which prevails in an action authorized by this paragraph, in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

"(e) A criminal conviction pursuant to the provision of this section shall not be a condition precedent to maintaining a civil action pursuant to the provision of this section.

"SECTION 3. The provisions of this act shall be deemed severable, and if any provision of this act is adjudged unconstitutional or invalid, such judgment shall not affect other valid provisions hereof."

of the Massachusetts Constitution. Under Joint Rule 12B, "[a]ny matter pending before the General Court at the end of the first annual session ... shall carry over into the second annual session of the same General Court in the same legislative status as it was at the conclusion of the first annual session...." Manual for the General Court, 1997–1998, at 699. When these legislative rules, as consistently interpreted by the Legislature itself, are applied to the present bill, it is clear that the bill will carry over into the second annual session of the 1999–2000 General Court and will remain pending. Therefore, a solemn occasion exists and it is proper to answer the question.

[5, 6] We analyze the question under the First Amendment framework articulated by the United States Supreme Court and other Federal courts.[3] Because the buffer zone applies regardless of political viewpoint, Senate No. 148 is a content-neutral statute. A statute or ordinance is content-neutral if "it is 'justified without reference to the content of the regulated speech' " (emphasis in original). *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). See *Boston v. Back Bay Cultural Ass'n*, 418 Mass. 175, 179, 635 N.E.2d 1175 (1994). Under this analysis, "[t]he principal inquiry ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, *supra* at 791, 109 S.Ct. 2746, citing *Clark v. Community for Creative Non–Violence*, *supra* at 295, 104 S.Ct. 3065; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (regulations enacted "for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment"). "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*, citing *Renton v. Playtime Theatres, Inc.*, *supra* at 47–48, 106 S.Ct. 925. See *Boston v. Back Bay Cultural Ass'n*, *supra* at 179, 635 N.E.2d 1175 (applying *Ward* analysis). The bill's content neutrality is confirmed by the fact that the buffer zone applies regardless of the viewpoint being expressed. Cf. *Benefit v. Cambridge*, 424 Mass. 918, 923–924, 679 N.E.2d 184 (1997) (statute criminalizing requests for charity from beggars is content-based regulation).

[7] A content-neutral statute which restricts speech is constitutional under the First Amendment if it is "narrowly tailored to serve a significant government interest and ... leave[s] open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). See *Ward v. Rock Against Racism*, *supra* at 798–799, 109 S.Ct. 2746; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (*Ward* test applicable to content-neutral statutes, but heightened standard applies to content-neutral injunctions).

3. Although the question addressed to us also inquires about arts. 16 and 19 of the Massachusetts Declaration of Rights, in regard to issues of free speech and buffer zones surrounding reproductive health care facilities, the rights of the citizens of the Commonwealth are adequately protected by the Federal decisions in this area concerning fixed buffer zones. Thus, the analysis under arts. 16 and 19 is the same as that under the First Amendment to the Federal Constitution. See, e.g., *Walker v. Georgetown Hous. Auth.*, 424 Mass. 671, 674, 677 N.E.2d 1125 (1997) (interpreting Massachusetts Constitution as coextensive with First Amendment); *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 558, 392 N.E.2d 1195 (1979) (same). But see *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 88–90, 445 N.E.2d 590 (undertaking independent analysis under art. 16, as amended by art. 77 of the Amendments to the Massachusetts Constitution).

The bill recites the following four interests: (1) to increase the public safety in and around reproductive healthcare facilities; (2) to maintain the flow of traffic and prevent congestion around reproductive health care facilities; (3) to enact reasonable time, place, and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation, and harm; and (4) to create an environment in and around reproductive health care facilities which is conducive toward providing safe and effective medical services, including surgical procedures, to its patients. The bill's preamble points to the "many blockades, disturbances and even violence" surrounding reproductive health care facilities, including the December 30, 1994, shootings at two reproductive health services facilities that killed two people.[4] Testimony offered at the hearings on Senate No. 148 described how advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger.[5]

We conclude that the interests stated in the bill are substantial governmental interests. See *Planned Parenthood League of Mass. v. Bell*, 424 Mass. 573, 584, 677 N.E.2d 204, quoting *Schenck v. Pro–Choice Network of W.N.Y.*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

[8] [11] In addition to serving a substantial governmental interest, the bill must also be "narrowly tailored" to serve these legitimate interests, although "it need not be the least restrictive or the least intrusive means of doing so." *Ward v. Rock Against Racism*, *supra* at 799, 109 S.Ct. 2746. The Supreme Court and other Federal courts have unanimously struck down "floating" buffer zones and upheld "fixed" ones as being "narrowly tailored" under the First Amendment.[6] See, e.g., *Schenck v. Pro–Choice Network of W.N.Y.*, *supra* at 379–380, 117 S.Ct. 855; *Madsen v. Women's Health Ctr., Inc.*, *supra*; *Edwards v. Santa Barbara*, 150 F.3d 1213 (9th Cir.1998) (portion of statute creating fixed buffer zone of eight feet upheld, while portion of statute creating floating buffer zone of eight feet vacated). As the Supreme Court stated in *Schenck v. Pro–Choice Network of W.N.Y.*, *supra* at 378, 117 S.Ct. 855, floating buffer zones are problematic because, by their nature, they are difficult for a protester to comply with, and "[t]his lack of certainty leads to a substantial risk that much more speech will be burdened." There is no such risk inherent in the fixed buffer zone that would be established by Senate No. 148.[7]

4. See Abortion Violence Hits Home: Gunman Opens Fire in Brookline Clinics, Kills 2 and Wounds 5, Boston Globe, December 31, 1994, at 1.

5. We also note that clinics or "[h]ospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity...." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), *quoting NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783–784 n. 12, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979). Further, "any person bellowing into the entrance of a medical facility creates a noxious and unwelcome condition inside, regardless of what he or she is shouting." *Planned Parenthood League of Mass. v. Bell*, 424 Mass. 573, 581, 677 N.E.2d 204 (1997).

6. A "floating" or "bubble" buffer zone does not have a fixed point of reference, but rather follows a moving object or person.

7. We recognize that the United States Supreme Court has granted certiorari to review a decision of the Supreme Court of Colorado upholding Colorado's clinic buffer zone statute. See *Hill v. Thomas*, 973 P.2d 1246 (Colo.), cert. granted sub nom. *Hill v. Colo-*

The "fixed" clinic buffer zone at issue in Senate No. 148 is substantially comparable to other "fixed" clinic buffer zones that either we or the Federal courts have previously upheld under either the *Ward* standard or the heightened standard applicable to injunctions. See *Schenck v. Pro-Choice Network of W.N.Y.*, *supra* at 380, 117 S.Ct. 855 (injunction establishing fixed buffer zone of fifteen feet upheld); *Madsen v. Women's Health Ctr., Inc.*, *supra* at 768–771, 114 S.Ct. 2516 (upholding injunction establishing buffer zone of thirty-six feet); *Planned Parenthood of Mass. v. Bell*, *supra* at 583–584, 677 N.E.2d 204 (upholding injunction establishing fixed buffer zone of fifty feet around clinic); *Edwards v. Santa Barbara*, *supra* (statute creating fixed buffer zone of eight feet upheld); *Lucero v. Trosch*, 121 F.3d 591, 605–606 (11th Cir.1997) (injunction establishing fixed buffer zone of twenty-five feet upheld).

Further, Senate No. 148 leaves open ample alternative means [12] of communication. Demonstrators may still engage in all forms of protest as they previously have done, but are simply constrained to do so outside the buffer zone. See *Burson v. Freeman*, 504 U.S. 191, 210, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (upholding buffer zone of one hundred feet around polling places). The statute allows protesters to display signs or objects without limitation as to size or content. As a result, those who are trying to communicate to persons entering or leaving health care facilities can certainly do so from the edge of a zone of twenty-five feet. To be sure, they cannot place a leaflet directly in the hand of a patient within the zone, but they can certainly show that they have one to offer, and an interested patient can walk over easily to take it. See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654–655, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (rejecting challenge to prohibition on leafletting and solicitation on State fair grounds except at designated booths, given ability by religious group to express views orally throughout fair grounds, and to leaflet and solicit at booth or outside fair grounds).

Finally, we address whether Senate No. 148 impermissibly infringes on the right to freedom of association. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363–364, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), quoting *Norman v. Reed*, 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), the Supreme Court held that so long as the burdens imposed on one's associational rights are not "severe," the State's asserted interests need only be "sufficiently weighty to justify the limitation" imposed on the speaker. Senate No. 148 does not impose a "severe" burden on a protestor's right to assemble. Those who wish to gather to demonstrate would remain free to do so outside a buffer zone of twenty-five feet. The governmental interests underlying Senate No. 148 are sufficiently weighty to justify a buffer zone of twenty-five feet, and thus the bill would not violate the right to assemble peaceably under the First Amendment.

The answer to the question is, "No."

The foregoing answer and opinion are submitted by the Chief Justice and the Associate Justices subscribing hereto on the 24th day of January, 2000.

MARGARET H. MARSHALL
RUTH I. ABRAMS
NEIL L. LYNCH
[13] JOHN M. GREANEY
RODERICK L. IRELAND
FRANCIS X. SPINA
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rado, — U.S. —, 120 S.Ct. 10, 144 L.Ed.2d 841 (1999). The statute at issue in Colorado establishes a "floating" buffer zone whereas Senate No. 148 creates a "fixed" buffer zone.

Venema, Julia

From: Sullivan, David
Sent: Wednesday, January 26, 2000 11:34 AM
To: "Abalos, Alona; Abrams, Joshua; Badway, Eva; Brophy, Thomas; Brown, Doug; Calabrese, Christopher; Cecil, Catherine; Comlabor; Dehner, Thomas; DeLoach, Charlene; Ganguly, Nomita; Goldman, Sara; Hazen, Allison; Johnson, Lois; Kabrhel, Rosalind; Kealy, Sean; Martin, David; McMullin, Patricia; Neary, Mary Ann; Odonnell, David; Padien, Mary; Powell, Richard; Prebensen, Eileen; Ringel, Carolyn; Shannon, Melissa; Stephan, Gina; Turco, Jeffrey; Venema, Julia; Welch, William; Bowes, Robert; Burke, Gerard; Comeau, Irene; Dunn, Martin; Fitzgerald, Eileen; Fitzgerald, Eileen (home); Herndon, Matthew
Subject: SJC opinion about abortion clinic buffer zones

In a unanimous opinion opened at today's Senate informal session, the Justices of the Supreme Judicial Court advised the Senate that S. 148, which establishes 25-foot buffer zones around reproductive health care facilities, is constitutional. The Justices advised that, under the federal and state constitutions, the bill is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.

Copies of the opinion are available in the Counsel's and Clerk's offices.

United States Court of Appeals

For the First Circuit

No. 00-2492

MARY ANNE MCGUIRE ET AL.,

Plaintiffs, Appellees,

v.

THOMAS F. REILLY, ETC., ET AL.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, U.S. District Judge]

Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Lynch, Circuit Judge.

Patricia Correa, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General of Massachusetts, Adam Simms and Elizabeth Frumkin, Assistant Attorneys General, were on brief, for appellants.

Jennifer C. Jaff, Killian, Donohue & Shipman, LLC, and Lucinda M. Finley on consolidated brief for Conn. Women's Education and Legal Fund, National Abortion Federation, NOW Legal Defense and Education Fund, Feminist Majority Foundation, Voters for Choice, American Jewish Congress, Conn. NARAL, Conn. Chapter of NOW, National Center for the Pro-Choice Majority, and Women's Law Project, amici curiae.

Carter G. Phillips, Paul E. Kalb, Jennifer M. Rubin, and Sidley & Austin on brief for American College of Obstetricians and Gynecologists, Mass. Medical Society, and American Medical Ass'n, amici curiae.

Cynthia Stone Creem and Sean J. Kealy on brief for Senator Cynthia Stone Creem, Co-Chair, Joint Comm. on Criminal Justice (Mass. Senate), amicus curiae.

Richard Blumenthal, Attorney General of Connecticut, Eliot D. Prescott and Jane R. Rosenberg, Assistant Attorneys General, on brief for States of Connecticut, Colorado, Maryland, Nevada, and New York, amici curiae.

Paul E. Nemser, U. Gwyn Williams, Ketanji Brown Jackson, and Goodwin Procter LLP on brief for Women's Bar Ass'n of Mass., Abortion Access Project of Mass., AIDS Project of Worcester, Alternative Medical Care of Mass., American Ass'n of Univ. Women-Mass., Big Sister Ass'n of Greater Boston, Boston Women's Health Book Collective, Everywoman's Center, Four Women, Inc., League of Women Voters of Mass., Mass. NARAL, Mass. Chapter of NOW, Mass. Public Health Ass'n, National Council of Jewish Women-Mass., Religious Coalition for Reproductive Choice, Tapestry Health Systems, Union of

American Hebrew Congregations-Northeast Council, Womancare/Repro Associates, and YWCA of Cambridge, amici curiae.

Mark L. Rienzi, with whom Thomas M. Harvey and Dwight G. Duncan were on brief, for appellees.

Maryclare Flynn on brief for Mass. Citizens for Life, Inc., amicus curiae.

Vincent P. McCarthy, American Center for Law and Justice Northeast, Inc., on brief for Family Research Council and Focus on the Family, amici curiae.

August 13, 2001

SELYA, Circuit Judge. This appeal -- in which we have the benefit of exemplary briefing by the parties and the various amici -- requires us to reconcile a triad of state interests (protecting public health, maintaining public safety, and preserving access to medical facilities) with the First Amendment interests of those who challenge restrictions on how they may debate issues of public concern. We act in the context of a Massachusetts statute, Mass. Gen. Laws ch. 266, § 120E½ (the Act), which creates a floating six-foot buffer zone around pedestrians and motor vehicles as they approach reproductive health care facilities (RHCFs). We view that statute through the prism of Hill v. Colorado, 530 U.S. 703 (2000), in which the United States Supreme Court upheld an analogous statute despite the fact that it incidentally restricted some speech.

The district court found meaningful distinctions between the Act and the Colorado statute at issue in Hill, determined that these distinctions undermined the constitutionality of

the Act, and preliminarily enjoined the Act's enforcement. See McGuire v. Reilly, 122 F. Supp. 2d 97, 101-03 (D. Mass. 2000). But the distinctions noted by the district court do not make a dispositive difference. Hill controls, and the Act, on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint. Accordingly, we reverse the district court's ukase.

I. BACKGROUND

In order to frame the issues on appeal, we think it is useful to trace the developments leading to the Act's passage, survey its text, and place it in the context suggested by the Hill Court's decision. With that foundation in place, we then recount the proceedings below.

A. The Act's History.

By the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside RHCFs. Concerned legislators responded to these disturbances by introducing Senate Bill No. 148, see S.B. 148, 181st Gen. Ct., Reg. Sess. (Mass. Jan. 6, 1999), reprinted in Appendix B hereto. The bill purposed to create a fixed twenty-five foot buffer zone from RHCFs' entrances, exits, and driveways, and with limited exceptions, to prohibit all persons from entering, or remaining within, that buffer zone regardless of the person's intent or the willingness of others to listen. The state senate held a hearing in April of 1999. The received testimony chronicled the harassment and intimidation that typically occurred outside RHCFs. In addition, numerous witnesses addressed the emotional and physical vulnerability of women seeking to avail themselves of abortion services, and gave accounts of the deleterious effects of overly aggressive demonstrations on patients and providers alike. Based in part on this testimony, the senate concluded that existing laws did not adequately protect public safety in areas surrounding RHCFs. To remedy this situation, the senate favored the creation of fixed buffer zones. The sponsors of the bill left no doubt that they intended the proposed law to "increase public safety in and around [RHCFs]" while "maintain[ing] the flow of traffic and prevent[ing] congestion" there. S.B. 148, supra, § 1. In the bargain,

the sponsors expected the law to provide "reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." It thereby would "create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services . . . to its patients." Id.

Skeptics worried that the proposed law might offend the Constitution. To stave off these gloom-and-doom predictions, the senate, on November 3, 1999, asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the bill's constitutionality. On January 24, 2000, the SJC concluded that the Constitution presented no obstacle to enactment. Opinion of the Justices to the Senate, 430 Mass. 1205, 1211-12 (2000). The SJC advised that the bill, as framed, was unrelated to the content of protected expression. Id. at 1209. Moreover, the restrictions imposed had a rational basis in view of the heightened governmental interest that arises when "advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." Id. at 1210.

After receiving this favorable review, the senate engrossed Senate Bill No. 148 on February 29, 2000. That version of the law never came to a vote in the house of representatives, mainly because the United States Supreme Court decided Hill on June 28, 2000. In that opinion, the Court upheld, as a content-neutral time, place, and manner restriction, a Colorado statute designed to ameliorate the same evils. 530 U.S. at 719-21. The Court's conclusion rested on three pillars:

> First, [the statute] is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted because of disagreement with the message it conveys. . . . Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.

Id. at 719-20 (internal quotation marks omitted).

Massachusetts decided to follow the trail that Colorado had blazed. Consequently, the house of representatives struck the text of Senate Bill No. 148 and reformulated its language. The amended version -- ultimately enacted and codified as section 120E½ -- recast the proposed statute and, most notably, replaced the fixed buffer zones originally envisioned by the state senate with floating buffer zones of the type upheld in Hill. The house engrossed the bill on July 28, 2000, and the senate concurred the next day. On August 10, 2000, Governor Cellucci signed the Act into law.

B. The Act's Text.

The Act, formally known as the Massachusetts Reproductive Health Care Facilities Act, is reprinted in Appendix A hereto. The Act makes it unlawful, absent consent, "knowingly to approach [within six feet of a person or occupied motor vehicle] for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility." Mass. Gen. Laws ch. 266, § 120E½(b).

The statutory prohibition is not absolute. In the first place, the architecture of this floating buffer zone precludes speakers from approaching unconsenting listeners, but it neither prevents speakers from holding their ground nor requires them to retreat from passersby. In the second place, the Act's prophylaxis does not attach unless and until an RHCF opens for business and clearly demarcates the protected eighteen-foot zone. Id. § 120E½(c). Finally, the Act exempts persons entering or leaving an RHCF; persons using the streets to reach a destination other than the RHCF; and, while acting within the scope of their employment, (i) the RHCF's employees and agents, and (ii) certain government officials (e.g., police officers). Id. § 120E½(b).

C. The Influence of Hill.

In rejecting a challenge to a similar Colorado statute, the Hill Court made a number of pronouncements that inform our resolution of this appeal. Perhaps most important, the Court held that the Colorado law was content-neutral even though it singled out "oral protest, education, [and] counseling," because this denoted a broad category of speech rather than specifying a particular subject matter or viewpoint. 530 U.S. at 720. In reaching this conclusion, the Court gave

short shrift to the argument that, by targeting health care facilities, the Colorado statute impermissibly discriminated against abortion protesters. Id. at 724.

Three other points deserve mention. First, the Court emphasized the significance of the state's interest in preserving access to health care facilities. Id. at 715. Second, the Court noted that the Colorado legislature had tailored the law narrowly to serve this end. Id. at 728-29. Third, the Court determined that a floating buffer zone of modest proportions left ample alternative channels for communication. Id. at 723.

Hill bears on this case in another way as well. Although the Act was conceived in the albedo of Hill, it is not a carbon copy of the statute at issue there. There are five key differences:

- The protections of the Colorado law apply to all health care facilities, Colo. Rev. Stat. § 18-9-122, whereas the Act applies only to free-standing clinics that provide abortions, Mass. Gen. Laws ch. 266, § 120E½.

- The Colorado statute specifies an 100-foot radius around all covered facilities, Colo. Rev. Stat. § 18-9-122(3), whereas the Act specifies an eighteen-foot radius, Mass. Gen. Laws ch. 266, § 120E½(b).

- The Colorado statute pretermits unwanted approaches within eight feet of anyone inside the specified area, Colo. Rev. Stat. § 18-9-122(3), while the Act constructs only a six-foot buffer zone, Mass. Gen. Laws ch. 266, § 120E½(b).

- The directive that the Act apply only when an RHCF is open for business and has clearly demarcated the protected area, Mass. Gen. Laws ch. 266, § 120E½(c), is not part of the Colorado scheme.

- The Act, unlike the Colorado law, exempts various groups of persons from its reach. Id. § 120E½(b).

In most of these respects, the Act arguably restricts less speech than its Colorado counterpart.

D. Proceedings Below.

The plaintiffs -- Mary Anne McGuire, Ruth Schiavone, and Jean B. Zarrella -- are Massachusetts residents who regularly protest, demonstrate, and provide sidewalk counseling outside RHCFs. Shortly after the passage of the Act, they sued a number of state hierarchs in the United States District Court for the District of Massachusetts. They argued that the Act violated their rights to freedom of speech, freedom of association, equal protection, and due process of law. To remedy these deprivations, they sought both a declaration of the Act's unconstitutionality and an injunction against its enforcement.

The district court determined that the Act offended the First Amendment in two ways. First, the court regarded the Act as an impermissible content-based restriction because it "pertain[s] exclusively to speech that communicates a message of protest, education, or counseling spoken at the entrances of abortion clinics." McGuire, 122 F. Supp. 2d at 102. Second, the court determined that the Act discriminated on the basis of viewpoint. Id. at 103. The court reasoned that the Act's exemption of agents and employees of RHCFs gives rise to this infirmity because, by virtue of their "personal relationship with the abortion clinic, [employees] have a strong financial interest or philosophic incentive to counsel the listener to undergo an abortion and they constitute very zealous advocates for this controversial procedure." Id. For these reasons, the court concluded that the plaintiffs had shown a substantial likelihood of success on the merits and enjoined the defendants from enforcing the Act pending a trial. Id. at 104.

This interlocutory appeal ensued. On motion duly filed, see Fed. R. App. P. 8(a), we stayed the injunction pending appeal. We now reverse.

II. THE PRELIMINARY INJUNCTION STANDARD

A party who seeks a preliminary injunction must show: (1) that she has a substantial likelihood of success on the merits; (2) that she faces a significant potential for irreparable harm in the absence of immediate relief; (3) that the ebb and flow of possible hardships are in favorable juxtaposition (i.e., that the issuance of an injunction will not impose more of a burden on the nonmovant than its absence will impose on the movant); and (4) that the granting of prompt injunctive relief will promote (or, at least, not denigrate) the public interest. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996); Narragansett Ind. Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991). Appellate review of rulings granting or

denying preliminary injunctions is quite deferential. The court of appeals will set aside such a ruling only if it is persuaded that the lower court mistook the law, clearly erred in its factual assessments, or otherwise abused its discretion in granting the interim relief. Ross-Simons, 102 F.3d at 15; Narragansett Ind. Tribe, 934 F.2d at 5.

III. THE FIRST AMENDMENT CHALLENGE

To place the appellants' First Amendment challenge into workable perspective, we begin with an overview of the constitutional doctrine governing restrictions on speech. We then consider whether the Act qualifies as content-neutral legislation for First Amendment purposes. After answering this question, we then subject the Act to the appropriate level of judicial scrutiny. Throughout, we bear in mind that the plaintiffs have mounted a facial challenge to the Act as a whole, not an as-applied challenge to some particular application of it.

A. The Doctrinal Underpinnings.

Freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.). Notwithstanding its exalted position in the pantheon of fundamental freedoms, free speech always must be balanced against the state's responsibility to preserve and protect other important rights. This balance may be weighted differently, however, depending upon the nature of the restriction that the government seeks to foster. We elaborate below.

Governmental restrictions on the content of particular speech pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994). As a general rule, therefore, the government cannot inhibit, suppress, or impose differential content-based burdens on speech. Id. at 641-42. To provide maximum assurance that the government will not throw its weight on the scales of free expression, thereby "manipulat[ing] . . . public debate through coercion rather than persuasion," id. at 641, courts presume content-based regulations to be unconstitutional. R. A. V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 736 (1st Cir. 1995). While courts theoretically will uphold such a regulation if

it is absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end, see, e.g., Boos v. Barry, 485 U.S. 312, 321-29 (1988); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231-32 (1987), such regulations rarely survive constitutional scrutiny.

Courts grow even more chary when the government attempts to differentiate between disparate views espoused by those speaking on a singular subject. That chariness -- some might say hostility -- is not surprising, for viewpoint-based discrimination is a particularly offensive type of content-based discrimination. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

Judicial review takes on a different cast when a statute does not regulate speech per se, but, rather, restricts the time, place, and manner in which expression may occur. Such laws are less threatening to freedom of speech because they tend to burden speech only incidentally, that is, for reasons unrelated to the speech's content or the speaker's viewpoint. Where that description applies, courts employ a less exacting level of scrutiny, upholding limitations on the time, place, and manner of protected expression as long as "they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). This less taxing level of analysis -- commonly called "intermediate scrutiny" -- makes sense because the very fact of content neutrality offers a meaningful assurance that the government is not striving in a clandestine manner to steer public discourse or brainwash its citizens. Turner Broad. Sys., 512 U.S. at 642. We start, then, by analyzing whether the Act is content-neutral.

B. Classifying the Act.

The Supreme Court has explained that "the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Thus, a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched. See Hill, 530 U.S. at 736; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986).

By addressing political speech on public streets and sidewalks, the Act plainly operates at the core of the First Amendment. See Hague v. CIO, 307 U.S. 496, 515 (1939) (noting that public streets and sidewalks are traditional public fora which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). First Amendment interests nonetheless must be harmonized with the state's need to exercise its traditional police powers. Hill, 530 U.S. at 714-15. The district court resolved this balance against the appellants. It opined that the state legislature enacted section 120E½ because it disagreed with both the content of, and the viewpoint inherent in, anti-abortion protests. See McGuire, 122 F. Supp. 2d at 102-03. The court thus concluded that the Act, on its face, discriminates against abortion-related speech, id. at 102, and that the employee exemption compounds this evil by facilitating the airing of pro-choice sentiments while simultaneously restricting the expressive activities of pro-life partisans, id. at 103. We do not agree.

In holding that the Act constitutes invidious content-based discrimination against abortion-related speech, the lower court emphasized that "the Massachusetts statute applies exclusively to speech communicated at abortion clinics and not . . . to all health care facilities." Id. at 102. We believe that the court, in reaching this conclusion, misconstrued applicable First Amendment doctrine by focusing exclusively on the effects of the Act rather than on its underlying purpose.

The critical question in determining content neutrality is not whether certain speakers are disproportionately burdened, but, rather, whether the reason for the differential treatment is -- or is not -- content-based. See Hill, 530 U.S. at 719 (positing that a statute is content-neutral when it does not directly regulate speech, has its origins in a legislative purpose unrelated to disagreement with the underlying message of particular speech, and advances interests unconnected to expressive content). As long as a regulation serves a legitimate purpose unrelated to expressive content, it is deemed content-neutral even if it has an incidental effect on some speakers and not others. Ward, 491 U.S. at 791; Nat'l Amusements, 43 F.3d at 740. In that event, all that remains is for the government to show that accomplishment of the legitimate purpose that prompted the law also rationally explains its differential impact. See City of Renton, 475 U.S. at 47-48; Nat'l Amusements, 43 F.3d at 738.

We conclude, without much question, that the Act's stated goals justify its specific application to RHCFs. The Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly. That investigation yielded solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs. Thus, targeting these sites furthers conventional objectives of the state's police power -- promoting public health, preserving personal security, and affording safe access to medical services. Although the Act clearly affects anti-abortion protesters more than other groups, there is no principled basis for assuming that this differential treatment results from a fundamental disagreement with the content of their expression. Rather, the finding required on these facts is that the legislature was making every effort to restrict as little speech as possible while combating the deleterious secondary effects of anti-abortion protests. Just as targeting medical centers did not render Colorado's counterpart statute content-based, Hill, 530 U.S. at 722-23, so too the Act's targeting of RHCFs fails to undermine its status as a content-neutral regulation.[1]

To be sure, the plaintiffs insist that the state's professed concerns about public safety, personal security, and access to medical facilities are mere pretexts for its desire to censor anti-abortion speech. This insistence gets them nowhere. For one thing, their insinuations are unsupported by any record evidence. For another thing, where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech. See Hill, 530 U.S. at 723; Madsen v. Women's Health Ctr., 512 U.S. 753, 762-64 (1994); see also Nat'l Amusements, 43 F.3d at 740 ("Secondary effects can comprise a special characteristic of a particular speaker or group of speakers."). This is such a case: considered as a whole, the Act provides a neutral justification -- unrelated to the content of speech -- for differential treatment.

In an effort to parry this thrust, the plaintiffs point conspicuously to the district court's holding that the statutory exemption for clinic agents and employees constitutes impermissible viewpoint-based discrimination (and, therefore, taints the entire Act). The court premised

this holding on its determination that, by allowing clinic employees to enter the floating buffer zone without constraint, the Act permits free-ranging expression of pro-choice views while suppressing pro-life messages. McGuire, 122 F. Supp. 2d at 103-04. Because this determination rests on an unsubstantiated factual foundation, we reject it. A court's findings of fact must be anchored in probative evidence. See United States v. Frankhauser, 80 F.3d 641, 654-55 (1st Cir. 1996); Blohm v. Commissioner, 994 F.2d 1542, 1548 (11th Cir. 1993); United States v. Williams, 891 F.2d 962, 964-67 (1st Cir. 1989). This bedrock principle applies to findings made on a motion for a preliminary injunction. See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 906 (1st Cir. 1993). Here, however, the district court lumped together all agents and employees of RHCFs and characterized them, without a shred of record support, as "very zealous advocates for this controversial procedure [abortion]." McGuire, 122 F. Supp. 2d at 103. The court then stated, again without any evidentiary predicate, that these "[e]mployees and agents of abortion clinics escort potential abortion clinic clients and counsel and exhort them to undergo an abortion within the restricted areas." Id. at 103 n.9. These findings are wholly unsupported and, hence, clearly erroneous. A judge's intuition cannot take the place of proof. See United States v. Ortiz, 966 F.2d 707, 717 (1st Cir. 1992) (holding that decisions must be based on more than the judge's hunch, unsupported by facts); cf. Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp., 223 F.3d 585, 590 (7th Cir. 2000) (noting that judges must reason from facts rather than settling for guesswork).

There is, moreover, another defect in the district court's treatment of the employee exemption. The court ignored the matter of secondary effects as they bear on that exemption. This was an unfortunate oversight: the secondary effects that the Act was designed to ameliorate include securing public safety in and around RHCFs, preventing traffic congestion, and balancing free speech with the need to maintain a salutary atmosphere for those seeking access to medical services. See S.B. 148, supra, § 1. There is no evidence that agents and employees of RHCFs cause these problems.[2] Thus, excluding those individuals does not undermine the legitimacy of the Act as a vehicle to curb the secondary effects of particular conduct and thereby achieve the legislature's announced purposes.

The legislative history bears witness to this conclusion. Testimony taken before the state senate indicates beyond cavil that the employee exemption will promote the Act's

goals because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs. Indeed, the record contains numerous accounts of incidents in which clinic personnel had to approach patients to protect them from protesters and, sometimes, to prevent physical altercations. Since it is within the scope of their employment for clinic personnel to escort patients in this fashion, and since a primary purpose of the law is to facilitate safe access, the employee exemption serves the basic objectives of the Act. To cinch matters, the legislature rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners -- a datum that the Hill Court recognized as justifying the statute there. See Hill, 530 U.S. at 715-17.

Endeavoring to counter these points, the plaintiffs posit that the employee exemption could not possibly have been designed to combat those undesirable secondary effects because the Act, without the exemption, permits any person to approach a non-consenting patient for purposes other than education, protest, and counseling. See Mass. Gen. Laws ch. 266, § 120E½(b). The exemption only has meaning, therefore, insofar as it allows those who work for RHCFs to approach within six feet of non-consenting patients to engage in such activities (i.e, education, protest, and counseling). From this plateau, the plaintiffs suggest that if a clinic employee were to approach to educate or counsel a prospective patient, that education or counseling doubtless would manifest a pro-choice viewpoint. So viewed, the sole practical purpose of the employee exemption is to promote a particular side of the abortion debate -- a feature that renders the exemption discriminatory and ensures that any application would violate the First Amendment.

While this argument has a certain logic, it ultimately fails. After all, the plaintiffs have challenged the Act on its face. The nature of this challenge raises the bar for their success: a party who mounts a facial challenge to a statute must carry a significantly heavier burden than one who seeks merely to sidetrack a particular application of the law. See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998); Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 76 (1st Cir. 2001); Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton, 240 F.3d 553, 562 (6th Cir.), petition for cert. filed, 69 U.S.L.W. 3750 (U.S. May 18, 2001) (No. 00-1737).

In the First Amendment context, this means that a plaintiff who challenges a statute on its face ordinarily must show

either that the law admits of no valid application or that, even if one or more valid application exists, the law's reach nevertheless is so elongated that it threatens to inhibit constitutionally protected speech. Time Warner Entm't Co. v. FCC, 93 F.3d 957, 967 (D.C. Cir. 1996). The plaintiffs do not challenge the employee exemption on the ground that it sweeps too broadly. Thus, they must show that the exemption admits of no constitutionally permissible application. This is an uphill climb, requiring the legal equivalent of an alpenstock and carabiners -- and the plaintiffs are unable to scale the heights.

Courts owe legislative judgments substantial respect and, as a general matter, should be reluctant "to reduce statutory language to a merely illustrative function." Mass. Ass'n of HMOs v. Ruthardt, 194 F.3d 176, 181 (1st Cir. 1999). The Massachusetts legislature may or may not have intended the employee exemption to serve the purpose envisioned by the plaintiffs. There are other likely explanations. For example, the legislature may have exempted clinic workers -- just as it exempted police officers -- in order to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to RHCFs need not fear prosecution. See id. (explaining that a legislative body "may consider a specific point important or uncertain enough to justify a modicum of redundancy").

The ultimate difficulty, of course, is that the legislature's subjective intent is both unknown and unknowable. At this juncture, we can look only to the purposes that may rationally be said to be served by the provision in question (here, the employee exemption). That is a large part of the reason why one who challenges a statute on its face must carry an appreciably heavier burden: a facial challenge, unlike an as-applied challenge, does not allow a reviewing court to base its judgments on actual experience or provide the court any room to capture nuances in a statute's meaning. See United States v. Raines, 362 U.S. 17, 20-22 (1960); Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1330-35 (2000).

That ends this aspect of the argument. Because we can envision at least one legitimate reason for including the employee exemption in the Act, it would be premature to declare the Act unconstitutional for all purposes and in all applications. See United States v. Hilton, 167 F.3d 61, 71 (1st Cir.) (noting that "[i]t makes little sense to strike down an entire statute in response to a facial attack when potential difficulties can be remedied in future cases

through fact-specific as-applied challenges"), cert. denied, 528 U.S. 844 (1999). If, as the plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting. See Pharm. Research & Mfrs., 249 F.3d at 78 (rejecting facial challenge to state statute without prejudice to plaintiff's right to launch an as-applied challenge after implementation of the statute).

We recapitulate. The Act, on its face, is content-neutral. Futhermore, although courts correctly regard viewpoint discrimination as a particularly pernicious form of content discrimination, the Act does not discriminate against speakers based on their views. The employee exemption too is neutral on its face, drawing no distinction between different ideologies. And to the extent (if at all) that the exemption contributes to the Act's disproportionate impact on anti-abortion protesters, it can be justified by reference to the state's neutral legislative goals. We conclude, therefore, that since neither the Act as a whole nor the employee exemption reflects an impermissible bias against either the content of certain speech or the views of certain speakers, the Act's constitutionality must be determined by reference to the intermediate level of scrutiny that attaches to content-neutral time, place, and manner restrictions.

C. Intermediate Scrutiny.

Under the intermediate scrutiny standard, a law is deemed constitutional if it is narrowly tailored to serve significant state interests while leaving open ample alternative channels of communication. See Renton, 475 U.S. at 50; Clark, 468 U.S. at 293. The Act passes this test. The state legislature ascribed four purposes to the Act:[3] to increase public safety in and around RHCFs; to ensure smooth traffic flow; to balance free speech with the rights of persons seeking access to RHCFs to be free from hindrance; and to create an environment conducive to safe and effective medical services. S.B. 148, supra, § 1. The interests that underlie these purposes are firmly rooted in the state's traditional police powers, and these are precisely the sort of interests that justify some incidental burdening of First Amendment rights. See Hill 530 U.S. at 715 (noting the "enduring importance of the right to be free from persistent importunity, following and dogging after an offer to communicate has been declined") (citation and internal quotation marks omitted); Schenck v. Pro-Choice

Network, 519 U.S. 357, 376 (1997) (extolling the significance of "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); see also Madsen, 512 U.S. at 772-73 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

On the flip side of the coin, the Act is narrowly tailored and leaves open sufficient opportunity to communicate in other ways. A law is narrowly tailored if it promotes a substantial governmental interest that would be less effectively achieved without the law and does so without burdening substantially more speech than is necessary to further this goal. Ward, 491 U.S. at 799. The plaintiffs argue that Massachusetts previously had enacted a number of general protections designed to combat the same evils as the Act, e.g., Mass Gen. Laws ch. 266 § 120E (knowingly obstructing entry to health care facility); id. ch. 272 § 53 (disturbing the peace); id. ch. 12 § 11H (impairing civil rights); id. 265 § 13A (assault and battery), and that these non-speech-restricting protections have not been enforced in the context of abortion protests. They claim, moreover, that the only behavior targeted by the Act that is not already covered by other laws is non-threatening speech, and that the Commonwealth has offered no content-neutral justifications for limiting such peaceful discourse.

This argument is unconvincing. The Massachusetts legislature reasonably concluded that existing law inadequately addressed the public safety, personal security, traffic, and health care concerns created by persistent demonstrations outside RHCFs. Indeed, the state senate specifically found that existing statutory protections did not suffice -- and this finding is plausible given the general terms used by those statutes (e.g., "obstruction," "disturbing the peace"). While such wider nets might catch the big fish, there is every reason to believe that they would let the fingerlings through. We have said enough on this subject. The short of it is that the legislature weighed the Hill Court's conclusions and formulated a bill to suit. As a result of this careful craftsmanship, the Act, in its final form, affects only areas immediately adjacent to RHCFs; prohibits only nonconsensual approaches within six feet; and applies only within a clearly marked eighteen-foot radius from clinic entrances and exits. This framework is more precisely focused and gives abortion protesters more opportunity for advocacy than does the Colorado statute

upheld in Hill. Compare Mass. Gen. Laws ch. 266, § 120E½ with Colo. Rev. Stat. § 18-9-122.[4] Because the Supreme Court concluded that the Colorado statute was narrowly tailored, the Act too satisfies that requirement. If, as the Hill Court stated, visual and verbal images are able to cross an eight-foot floating buffer zone with sufficient ease that the "restriction on an unwanted physical approach leaves ample room to communicate a message through speech," 530 U.S. at 729, that same conclusion perforce must apply to the Act's less commodious six-foot floating buffer zone.

D. The Equal Protection Challenge.

Without developing the argument in detail, the plaintiffs, like the court below, conclusorily assert that the Act violates the Equal Protection Clause. Because the equal protection interests involved in the differential treatment of speech are inextricably intertwined with First Amendment concerns, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972), and the plaintiffs do not develop the point separately, we treat this assertion as part of the plaintiffs' First Amendment challenge. In all events, it need not occupy us for long.

From time to time, the Supreme Court has invoked equal protection rather than free speech, as the basis for invalidating a content-based speech restriction. E.g., Carey v. Brown, 447 U.S. 455, 459-63 (1980); Mosley, 408 U.S. at 94-95. But where the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily passes the rational basis test employed under the Equal Protection Clause. See Thorburn v. Austin, 231 F.3d 1114, 1122 (8th Cir. 2000); Hoover v. Morales, 164 F.3d 221, 227 n.3 (5th Cir. 1998); DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 411 n.7 (6th Cir. 1997). So it is here: the Act passes muster under the Equal Protection Clause for the same reasons that it passes muster under the First Amendment.

IV. THE DUE PROCESS CHALLENGE

The failure of the plaintiffs' First Amendment challenge does not end our journey. Even if the trial court's rationale collapses, an appellee is free to defend the judgment below on any other ground made manifest by the record. Mass. Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 481 (1976) (per curiam); United States v. Craven, 239 F.3d 91, 97 (1st Cir. 2001). Embracing that tenet, the plaintiffs urge us to affirm the issuance of the preliminary injunction on the ground that the Act vests unbridled discretion in RHCFs (and, thus, violates the plaintiffs' due process rights).

This exhortation hinges upon language in the Act which provides that the six-foot floating buffer zone "shall only take effect during a facility's business hours and if the area contained within the radius . . . is clearly marked." Mass. Gen. Laws ch. 266, § 120E½(c). The plaintiffs posit that this language vests private actors -- the RHCFs -- with unconstrained power to restrict speech, and they cite numerous cases for the black-letter proposition that the Due Process Clause forbids standardless delegations of governmental authority, especially to private parties. E.g., Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758-59 (1988); Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

The district court rejected this asseveration, concluding that the quoted portion of the Act "is more logically viewed as a notice requirement serving to protect the interests of speakers such as plaintiffs." McGuire, 122 F. Supp. 2d at 101 n.7. We agree with this assessment. While the plaintiffs cherry-pick statements from the case law in an effort to bolster their position, they have wrested these statements from their contextual moorings.

Without exception, the cases on which the plaintiffs rely involve licensing schemes that allowed public officials to make discriminatory, content-based decisions. E.g., City of Lakewood, 486 U.S. at 759; Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981). By their very nature, licensing schemes that embody grants of standardless discretion to public officials (or sometimes private individuals -- conceptually, it makes no difference) cannot constitute valid time, place, and manner restrictions because they "ha[ve] the potential for becoming a means of suppressing a particular point of view." Heffron, 452 U.S. at 649. Since the floating buffer zone contemplated by the Act is content-neutral, see supra Part III(B), the activation provision cannot raise this type of constitutional concern. And in all events, the activation provision, to the extent that it allows clinic employees to make decisions that have a disproportionate impact on anti-abortion speech, is easily justified as an incidental burden.[5] See Nat'l Amusements, 43 F.3d at 740.

V. CONCLUSION

The existence of a four-part framework for granting or denying preliminary injunctive relief does not mean that all four components are weighted equally. In the great majority of cases, likelihood of success constitutes the proper focal point of the inquiry. Ross-Simons, 102 F.3d at 16. This case

is no exception. The district court premised its issuance of a preliminary injunction on its mistaken view that the plaintiffs probably would succeed on their First Amendment challenge. But this conclusion is insupportable. See supra Part III(B-C). Moreover, the plaintiffs cannot establish a probability of merits success on any other theory encompassed within their facial challenge to the Act. See supra Parts III(D), IV. Since likelihood of success is the sine qua non of preliminary injunctive relief, Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993), we need go no further.

We reverse the order granting a preliminary injunction and remand for further proceedings consistent with this opinion. The stay previously issued is dissolved as moot.

Appendix A

Mass. Gen. Laws ch. 266, § 120E½

SECTION 120E½: Reproductive Health Care Facilities

(a) For the purposes of this section, "reproductive health care facility" means a place, other than within a hospital, where abortions are offered or performed.

(b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway. This subsection shall not apply to the following: --

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff, deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested

without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

Appendix B

S.B. 148, 181st Gen. Ct., Reg. Sess. (Mass. Jan. 6, 1999)

An Act relative to reproductive health care facilities

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. It is hereby found and declared that existing law does not adequately protect the public safety in the areas in and around reproductive health care facilities. Indeed, such facilities in the Commonwealth of Massachusetts have been the focal point of many blockades, disturbances and even violence, particularly the shootings at two reproductive health services facilities on December 30, 1994, which, left two persons dead and many injured.

It is further found that persons attempting to enter or depart from reproductive health care facilities have been subject to harassing or intimidating activity by persons approaching within extremely close proximity and shouting or

waving objects at them, which has tended to hamper or impede access to or departure from those facilities.
It is further found that such activity near reproductive health care facilities creates a "captive audience" situation because persons seeking health care services cannot avoid the area outside of reproductive health care facilities if they are to receive the services provided therein, and their physical and emotional ailments or conditions can make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity.

It is further found that the violence and disturbances described above have required the deployment of police officers at significant cost to the cities and towns of the Commonwealth, and continue to occur despite civil injunctions that prohibit certain persons from engaging in such conduct.

And it is further found that studies have shown that clinics with buffer zones experience far larger decreases in every type of violence than clinics without buffer zones.

Therefore, the purpose of this legislation is:

(1) to increase the public safety in and around reproductive health care facilities;

(2) to maintain the flow of traffic and prevent congestion around reproductive health care facilities;

(3) to enact reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm; and

(4) to create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services, including surgical procedures, to its patients.

SECTION 2. Chapter 266 of the General Laws is hereby amended by inserting after section 120E the following section: --

(a) For the purposes of this section, "reproductive health care facility" shall mean a place, other than within a hospital, where abortions are offered or performed.

(b)(1) Except for those listed in subsection (2) below, no person shall, during business hours of a reproductive health care facility, knowingly enter or remain in the following area of private property of a reproductive health care facility or public right-of-way:
(A) the area within twenty-five (25) feet of any portion of an entrance to, exit from, or driveway of a reproductive health care facility; and

(B) the area within the rectangle created by extending the outside boundaries of any entrance to, exit from, or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

(2) The provision of subsection (1) of this paragraph shall not apply to the following:

(A) persons entering or leaving such facility;

(B) employees or agents of such facility acting within the scope of their employment;

(C) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(D) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than one thousand dollars or not more than six months in a jail or house of correction or both, and for each subsequent offense by a fine of not less than five hundred dollars and not more than five thousand dollars or not more than two and one-half years in a jail or house of correction or both. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff, or police officer.

(d) Any reproductive health care facility or any person whose rights to provide or obtain reproductive health care services have been interfered with by a violation of this section may commence a civil action for damages or injunctive and other equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business. An aggrieved person or entity which prevails in an action authorized by this paragraph, in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

(e) A criminal conviction pursuant to the provision of this section shall not be a condition precedent to maintaining a civil action pursuant to the provision of this section.

SECTION 3. The provisions of this act shall be deemed severable, and if any provision of this act is adjudged unconstitutional or invalid, such judgment shall not affect other valid provisions hereof.