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Friends Indeed for Pro-Lifers at the Supreme Court

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Call me a First Amendment junkie, but I actually enjoyed reading the fifteen amicus briefs filed in support of the pro-life sidewalk counselors in *McCullen v. Coakley*.

McCullen concerns the constitutionality of a Massachusetts statute creating 35-foot buffer zones around abortion clinics. The law prohibits "entering or remaining" in these zones, with certain limited exceptions, including an exemption for abortion clinic "employees or agents . . . acting within the scope of their employment."

Three broad themes recurred in the amicus briefs urging the Court to find the Massachusetts law unconstitutional. The first theme was that the 35-foot buffer zone in many cases completely precludes two irreplaceable forms of First Amendment expression: leafleting and one-on-one conversation. Briefs by Bioethics Defense Fund and the Center for Constitutional Jurisprudence reviewed the importance of public forum speech and pamphleteering in our country's history, in particular at its founding. It is indeed ironic that the state that was the scene of so many of this nation's first steps toward liberty is now leading the way to crush dissenting viewpoints on abortion. Several other briefs emphasized the unique importance of personal communication between sidewalk counselors and abortion-minded women, communication rendered impossible by the 35-foot zone. The brief of Democrats for Life and Clergy for Better Choices cited social science research showing that women are receptive to hearing about alternatives, while the brief from "Twelve Women" explained, in the women's own words, why merely hearing something shouted at them from 35 feet away would not have changed their minds.

The second theme was that the Massachusetts law is impermissibly viewpoint-based, because of its imposition of speech restrictions only around abortion clinics and its exemption for clinic personnel. A brief filed on behalf of Michigan and 11 other states distinguished the buffer zone law from laws that exist in all 50 states prohibiting electioneering within 100 feet of polling places. While these electioneering laws do indeed restrict speech in traditional public fora, they do so in an entirely viewpoint-neutral fashion, making no exemptions or distinctions for any speakers. The National Hispanic Christian Leadership Conference and several other religious groups filed a brief that provided much needed scholarly underpinning for the intuitive argument that the imposition of the buffer zone solely around abortion clinics is in and of itself a form of viewpoint-discrimination, no matter how neutral such

a law appears on its face because it "applies to everyone."

The third major theme was actually a plea: overturn *Hill v. Colorado*. Decided by the Supreme Court in 2000, the *Hill* decision upheld a Colorado statute that prohibits approaching without consent within 8 feet of another person for the purpose of leafleting or oral protest, education, or counseling, when the approach takes place within 100 feet of the entrance to a medical facility. Although the statute was not nearly as draconian as the 35-foot buffer zone at issue in *McCullen*, several briefs argued that the *Hill* decision severely damaged the Court's First Amendment jurisprudence in many respects, paving the way for *McCullen*. In *Hill*, the Court for the first time approved a law imposing prophylactic restrictions on free speech in a public forum, restrictions premised on a newly-found governmental interest in assisting people to avoid unwanted communication in public places. Going even further, the Court allowed a presumption that speech outside medical facilities is unwanted, requiring the speaker to overcome that presumption by gaining prior consent to approach in order to leaflet or counsel. The Court also ignored the fact that the statute penalized the supposedly offensive conduct (i.e., an unwanted approach) only when it was accompanied by constitutionally protected speech activity, completely inverting First Amendment values.

Briefs from the American Center for Law and Justice, Eagle Forum, Eugene Volokh and other law professors, the Center for Constitutional Jurisprudence, and the Justice and Freedom Foundation took direct aim at *Hill*, pointing out its many flaws and urging the Court to repudiate the decision as the first step toward restoring fairness and intellectual integrity to the Court's treatment of First Amendment issues.1 Many briefs quoted liberally from the scathing dissents of Justices Scalia and Kennedy in *Hill*, in which, *inter alia*, these justices themselves pointed out the Court's unfavorable treatment of pro-life speech compared to speech on other topics. (Justice Scalia: "Does the deck seemed stacked? You bet.") Liberty Counsel's entire brief was an exposition of Justice Scalia's riff on the "ad hoc nullification machine" that drives Supreme Court decisions whenever the underlying topic is abortion. As even former Justice O'Connor noted, "No legal doctrine or rule of law is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." While all of these briefs will greatly assist the Court's deliberations on the First Amendment issues it faces in *McCullen*, some groups also deserve honorable mention for the originality of their arguments.

First honorable mention goes to the Cato Institute. While the other briefs discussed the Massachusetts law solely as a restriction on speech, the Cato brief pointed out that the law actually is broader even than that: it is a restriction on people simply being present in certain indisputably public areas. This brief argued that the Massachusetts statute unjustifiably infringes on the right of "peaceful public presence," a right that should be recognized as fundamental under this Court's doctrines.

Our friends at Bioethics Defense Fund also deserve special recognition for putting a new spin on *Planned Parenthood v. Casey*, the 1992 Supreme Court decision that re-affirmed *Roe v. Wade*. BDF quoted the *Casey* standard that states may not make laws "that have the effect of placing a substantial obstacle in the path of a woman's *choice*" about abortion. A woman's choice about abortion includes making an informed choice not to have an abortion, BDF argued. The Massachusetts buffer zone law places an substantial obstacle in the way of her making that choice, by precluding her receiving information that would more fully inform her decision, as well as information about alternatives. And in the strange bedfellows department, honorable mention to the American Federation of Labor and Congress of Industrial Organizations (AFLCIO) for its brief tackling the state of Massachusetts' argument that the buffer zone law was narrowly tailored to address unlawful conduct allegedly occurring outside abortion clinics. Quoting the testimony of a Boston police captain that having a fixed buffer zone

"will make our job so much easier," the brief counters that "the convenience of authorities is not a substantial governmental interest that justifies forbidding free speech on public sidewalks." The response to unlawful conduct is to enforce existing laws against individuals engaging in such conduct, not to punish the law-abiding by enacting new laws depriving them of their right to free speech on public sidewalks. Certainly, labor unions have grounds to fear a new jurisprudence that would impose a standard of "best party manners" on those seeking to utilize the public streets and sidewalks to educate the public about their grievances.

So what is there left to say? What could LLDF's amicus brief possibly have added to this all-star line-up?

First, ours was the only brief filed on behalf of a person actually punished under one of these abortion-specific speech restrictions. Rev. Walter Hoye was threatened with a two-year jail sentence for allegedly violating Oakland's 8-foot bubble zone law. His conviction was overturned on procedural grounds, but not before he had served a 30-day jail sentence. We wanted to drive home the point to the Court that under these laws, law-abiding citizens not just might but have and will go to jail for exercising their right to peaceful leafleting and speaking on public sidewalks. We also took the opportunity to include in our briefs the Internet links to videos of Rev. Hoye's activity and that of the pro-abortion escorts who harassed and blocked him, so the justices and their clerks could see what really goes on outside abortion clinics.

Second, our brief argued that the warping of the Court's First Amendment jurisprudence began well before *Hill*; it began with *Madsen v. Women's Health Center*, a 1994 case that upheld an *injunction* imposing a 36-foot buffer zone around an abortion clinic in Florida. The First Circuit decision upholding the Massachusetts law cited this Supreme Court opinion in support of its holding. Only LLDF's amicus brief and the amicus brief filed by the attorneys who litigated the *Madsen* case (Liberty Counsel) pointed to *Madsen* as part of the problem with the state of Supreme Court precedent in this area.

Finally, although many briefs argued persuasively that the 35-foot buffer zone made efforts at rational communication with abortion-bound women almost impossible, LLDF's brief made the point that, even with no restrictions in place, sidewalk counselors frequently face challenges that are not present in other settings. For example, angry parents or anxious boyfriends will do their best to prevent the young women they are accompanying from hearing or responding to the sidewalk counselors. Clinic escorts may purposely drown out the sidewalk counselors' voices or block their movements. Our point was that even an "exceedingly modest restriction" (which is how the *Hill* majority described the 8-foot bubble zone) can have an outsize effect when applied under the already difficult circumstances sidewalk counselors face. For that reason, rather than allowing special restrictions on speech around abortion clinics to stand, courts should, on the contrary, be mindful of the extra burdens any restriction on speech in this setting imposes.

As I noted at the outset, maybe one has to be a First Amendment junkie to enjoy spending hours reading briefs like these. But if you can't quite understand my enthusiasm, at least appreciate this: I read them so you don't have to.

Hill was decided by a vote of 6 to 3. Of the six in the majority, four have now been replaced by new justices: Roberts, Alito, Sotomayor, and Kagan. The three *Hill* dissenters are still on the Court. Thus, overturning *Hill* would require the votes of two of the four new justices, in addition to the three dissenters.