No. 12-1168

In the
Supreme Court of the United States

ELEANOR MCCULLIN, et al.

Petitioners,

v.

MARTHA COAKLEY, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the First Amendment permits states to make it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility;"

(2) Whether this Court should overrule *Hill v. Colorado*, 530 U.S. 703 (2000).

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

The Center is vitally interested in preserving the freedom of speech from government censorship as one of the central liberties protected by the Constitution. The First Amendment prohibits laws "abridging the freedom of speech." This includes speech on controversial subjects – indeed; the exchange of views on matters of controversy was the purpose of the free speech guaranty. In our system of government, the people are sovereign and the legislature may not interfere with citizens wishing to speak with other citizens on matters of public importance.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The First Amendment protects a preexisting natural right to hold and share opinions with fellow citizens. The speech guaranty prohibits government from attempting, like Massachusetts seeks to do in this case, to silence citizens *especially* on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" first in their new state constitutions and ultimately in their new federal Constitution.

In this case, Massachusetts not only seeks to silence speech on a matter of controversy, it also seeks to withdraw a portion of the public sidewalks from the public forum. The state relies on this Court's decision in *Hill v. Colorado* for this action. *Hill*, however, stands as an outlier on the issue of speech in a traditional public forum. This Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. Further, this Court has consistently rejected attempts to ban speech in "special areas" of an otherwise open public sidewalk. Sidewalks in residential areas, near schools, in front of this Court, and even near private funerals are among the areas this Court has held to be open for free speech activity. Indeed, this Court has noted that attempts to withdraw the public sidewalks from the public forum as presumptively invalid. In light of *Hill*'s inconsistency with these cases and its inconsistency with the purpose of the free speech guaranty, this Court should overrule *Hill*.

ARGUMENT

I. The First Amendment Was Intended To Protect Citizens' Rights To Share Ideas, Even on Controversial Topics

The State of Massachusetts does not want pro-life advocates speaking to women going to and from abortion clinics.[2] The state did not seek to prevent intimidation, harassment, or even physical interference with access to the clinic. Instead the state bars communication. To accomplish this goal, the state has outlawed all speech activity on a portion of the public side – an area that the Court has found to be a traditional public forum. There is one exception to the state's ban. The law permits employees of the abortion clinic to speak to women on the way to the clinic, presumably because they will communicate the state-preferred message on the subject of abortion. The law prohibits other speech, whether it is labor picketers, political campaigners, or even advocates who wish to inform women of alternatives to abortion.

The state, however, cannot forbid discussion of alternatives to abortion simply because it wishes to promote abortion. Even if the state's purpose is to avoid conversations on uncomfortable or controversial topics, there is no such exception to the free speech guaranty. The First Amendment preserves the natural right to liberty of conscience. That right to one's own opinions, and to share those opinions

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[2] The law euphemistically refers to "reproductive health" facilities, but makes clear that its focus is clinics whose purpose is to ensure that reproduction does not happen and that pregnancies are terminated.

with others, in an attempt to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them.") Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431.

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Understandably, Paine chose to publish *Common Sense* anonymously in its first printing. *See id.* Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both adopted Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S. Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of lib-

erty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. The Pennsylvania Abolition Society was formed in 1775. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. Abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id.* at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery – a position that was highly controversial in many parts of the colonies.

The arguments offered by the abolitionist were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator", "I do not wish to think, or speak, or write, with moderation … I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

This example of the abolitionist speech activities is one that the current administration highlights as an example of the type of free speech guaranteed by the First Amendment. Adapting a speech by then Assistant Attorney General Thomas Perez given to the Conference on the Transformation of Security and Fundamental Rights Legislation in Kuala Lumpur, Malaysia, the State Department published a pamphlet of its own to tell citizens in other countries about the importance of freedom of speech.[3] *Americans Speak Freely*, United States Department of State, Bureau of International Information Programs, March 2013. Secretary Perez's speech and the State Department pamphlet specifically identify the "writings of abolition pamphleteers" as the type of activity protected by the First Amendment Freedom of Speech. *Id*. at 2-3

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[3] Oddly, however, the State Department's pamphlet asserts that "citizens right to think, believe, pray, write or speak as their conscience dictates" is something that is granted by the government. *Americans Speak Freely*, *supra*, at 2. Such rights are not gifts of government officials, but are instead inalienable and bestowed by our Creator. Declaration of Independence, ¶ 2 (U.S. 1776).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 722 (John P. Kaminski, et al. eds. 2009).

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). North Carolina pro-

posed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION at 18 (Philip B. Kurland & Ralph Lerner eds., 1987). New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania (John P. Kaminski, *et al*. eds. 2009).

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, *et al*. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

Congress quickly tested this limit on their power with the enactment of the Sedition Act. The question for the new country was whether the free speech and press guarantees only protected against prior restraint, as was the case in England, or whether they

guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February, 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 ANNALS OF CONGRESS, p. 934 (1794)." *New York Times Co.*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by

an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have that the people intended the First Amendment's speech and press clauses to protect the natural right to share opinions on controversial topics. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

In this case, Massachusetts has rejected liberties the founders included in the Constitution. The state prohibits almost all speech in an area tradi-

tionally open to free speech in order to censor those who wish to discuss alternatives to abortion with women visiting the abortion clinic. As noted, the law does not suppress *all* speech. The statute makes an exception for employees of the abortion clinic. The law permits them and them alone to engage in speech activities outside the abortion clinic. These employees have exclusive access to a particular audience – presumably because the state wishes to support the viewpoint of their message. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Massachusetts has no power, under the Constitution, to silence all that oppose the state's view on abortion. Like the City of Chicago in *Mosley*, the state seeks to discriminate between speakers and messages in area traditionally held open to free speech activities. Here, Massachusetts seeks to overturn *Mosley* or at least limit it to its facts and allow states to discriminate between speakers on the subject of abortion but not on other subjects. As this Court noted in *Mosley*, however, government may not "select which issues are worth discussing or debating" and may not censor speech based on its content. *Id.* at 96.

II. This Court Should Overrule *Hill v. Colorado*.

This Court's decision in *Hill v. Colorado* invited Massachusetts and other states to enact laws similar to the one under review in this case. In *Hill*, this Court ruled that a law prohibiting approaching a

person near an abortion clinic "'for the purpose of ... engaging in oral protest, education, or counseling'" was a content neutral regulation. *Hill*, 530 U.S. at 720-21. The Court stated that the Colorado law did not prohibit a "particular viewpoint." *Id*. at 723. But the Court ignored the clear intent of the law to prohibit anti-abortion messages – an intent made clear by the use of language like "education" and "counseling" that plainly aimed at one, and only one, point of view. Indeed, later in the opinion the Court explicitly recognized that the state has targeted particular messages. The Court noted the state's concession that the law was designed to ensure that women entering an abortion clinic would be free from "unwanted encounters" with people opposed to abortion. *Id*. at 729.

Hill stands as an outlier on the issue of speech in a traditional public forum. As noted below, this Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. Further, this Court has consistently rejected attempts to ban speech in "special areas" of an otherwise open public sidewalk. In light of *Hill*'s inconsistency with these cases and its inconsistency with the purpose of the free speech guaranty, this Court should overrule *Hill*.

Prior to *Hill*, this Court had long recognized that the public sidewalks were held open for speech activity subject only to regulation to ensure that traffic was not impeded. *Schneider v. State of New Jersey*, 308 U.S. 147, 160 (1939). Prior to *Schneider*, the Court ruled that cities could not require a permit to distribute literature on the city streets. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). These

rulings were joined by the decision in *Hague v. CIO*, 307 U.S. 496 (1939), where a fractured Court held that the Free Speech guaranty protected speech activities in public parks and city streets. In his lead plurality opinion Justice Roberts noted: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515 (opinion of Roberts, J.). This Court has repeatedly cited this observation of Justice Roberts as a truism of American constitution law. *See*, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985); *Frisby v. Schultz*, 487 U.S. 474, 481 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Even when the sidewalk or street fronted a "sensitive area," this Court has upheld speech activities on the public areas traditionally open to speech. Thus, while excessive noise in front of schools could be prohibited, peaceful picketing could not. *Compare Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) *with Mosley*, 408 U.S. at 100. Similarly, a city might prohibit picketing on the sidewalk in front of a single house but, as a general matter, the sidewalks of even residential neighborhoods are part of the traditional public forum open to free speech activities. *Frisby v. Schultz*, 487 U.S. at 482-84.

Sidewalks in front of foreign embassies are not off limits to free speech activity. *Boos v. Berry*, 485

U.S. 312, 329 (1988). Even the sidewalk in front of this Court is open to picketers and speakers. *United States v. Grace*, 461 U.S. at 176-80. As this Court noted in *Grace*, public sidewalks are part of the public forum and attempts to withdraw them from that forum are "presumptively impermissible." *Id*. at 180.

Even the most sensitive areas do not qualify as No Free Speech Zones. In *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), this Court struck down a tort judgment against Westboro Baptist Church for its display of particularly offensive signs on a public street outside of a funeral for a fallen soldier. *Id*. at 1217.

The one exception to this line of authority, other than *Hill*, involved a prohibition of campaigning within 100 feet of a polling place on Election Day. *Burson v. Freeman*, 504 U.S. 191 (1992). The plurality opinion upholding the prohibition found the statute narrowly tailored and supported by the compelling state interest in preventing voter intimidation and election fraud. *Id*. at 198-202 (plurality opinion of Blackmun, J.) Justice Scalia concurred in the judgment but on the basis that he believed long-standing restrictions on campaigning near a polling place had withdrawn those areas from the public forum – at least for the brief period of time necessary of the actual conduct of the election. *Id*. at 215-16 (Scalia, J., concurring in the judgment).

The restrictions of the type approved in *Hill*, by contrast, are quite different than the polling place restrictions. The statute in *Burson* did not prohibit all speech, but only prohibited active campaigning. *Id*. at 193-94 (plurality opinion of Blackmun). Where the type of statute at issue in *Burson* had been in ef-

fect in a number of states for nearly a century (*id.* at 215-16 (Scalia, J., concurring in the judgment), the restrictions on speech near abortion clinics are a recent invention. In *Burson*, the restriction was only in place for Election Day. The statute at issue in this case restricts freedom of speech every day of every year.

Hill simply does not fit in, neatly or otherwise, with this Court's prior decisions rejecting speech restrictions on public sidewalks. As Justice Scalia noted in his dissenting opinion in *Hill*, the only possible way to explain the decision is to say it is about abortion, and the Court's decisions on that sensitive subject stand "in stark contradiction of the constitutional principles [the Court applies] in other contexts." *Hill*, 530 U.S. at 742 (Scalia, J. dissenting). There is no basis in the original understanding of the free speech guaranty, however, for an "abortion" exception, or indeed any similar subject matter exception. This Court should overrule *Hill*.

CONCLUSION

The history behind the free speech clause shows an intent to protect the citizen's right to share opinions with other citizens on controversial topics. This is Madison's theory that the people have "a property" in their opinions and their ability to share those opinions.

It does not matter if the opinions at issue are on a matter of controversy. As this Administration notes in explaining the Free Speech guaranty to citizens of other countries, the importance of the right rests in the ability of citizens to move public opinion on matters of intense controversy – like abolition.

Americans Speak Freely, *supra*, at 2-3. It would hardly advance these ideals to say that abolitionist speech is fine in general, but it should not happen anywhere close to an actual slave auction. The value of a free speech guaranty is that allow citizens to go directly to those whose opinion they need to change. States like Colorado (in the *Hill* case) and Massachusetts in this action seek to silence voices of protest in precisely the area where the protest can have an effect.

This is not to say that states cannot prohibit interference or harassment or similar conduct. States may not, however, ban speech on a particular topic.

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Respectfully submitted,

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