SUPREME COURT OF THE UNITED STATES

No. 12–1168

ELEANOR McCULLEN, ET AL., PETITIONERS *v.* MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 26, 2014]

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, *e.g.*, *Hill* v. *Colorado*, 530 U. S. 703 (2000); *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994).

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily—or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court's dicta (Part III) and hence see no reason to opine on its holding (Part IV).

I. The Court's Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes—in seven pages of the purest dicta—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations.[1] Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.

Just a few months past, the Court found it unnecessary to "parse the differences between . . . two [available] standards" where a statute challenged on First Amendment grounds "fail[s] even under the [less demanding] test." *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. ___, ___ (2014) (plurality opinion) (slip op., at 10). What has changed since then? Quite simple: This is an abortion case, and *McCutcheon* was not.[2] By engaging in constitutional dictum here (and reaching the wrong result), the

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[1] To reiterate, the challenged provision states that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" of such a facility or within an alternative rectangular area. Mass. Gen. Laws, ch. 266, §120E½(b) (West 2012). And the statute defines a "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." §120E½(a).

[2] The Court claims that *McCutcheon* declined to consider the more rigorous standard of review because applying it "would have required overruling a precedent." *Ante*, at 11. That hardly distinguishes the present case, since, as discussed later in text, the conclusion that this legislation escapes strict scrutiny does violence to a great swath of our First Amendment jurisprudence.

majority can preserve the ability of jurisdictions across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring standards applied in Part IV of the majority's opinion.

The Court cites two cases for the proposition that "[i]t is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive." *Ante*, at 10–11 (citing *Bartnicki* v. *Vopper*, 532 U. S. 514, 526–527 (2001); *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 25–28 (2010)). Those cases provide little cover. In both, there was no disagreement among the Members of the Court about whether the statutes in question discriminated on the basis of content.[3] There was thus little harm in answering the constitutional question that was "logically antecedent." *Ante*, at 10. In the present case, however, content neutrality is far from clear (the Court is divided 5-to-4), and the parties vigorously dispute the point, see *ibid.* One would have thought that the Court would avoid the issue by simply assuming without deciding the logically antecedent point. We have done that often before. See, *e.g.*, *Herrera* v. *Collins*, 506 U. S. 390, 417 (1993); *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 222–223 (1985); *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 91–92 (1978).

The Court points out that its opinion goes on to suggest

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[3] See *Bartnicki*, 532 U. S., at 526 ("We agree with petitioners that §2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability"); *id.*, at 544 (Rehnquist, C. J., dissenting) ("The Court correctly observes that these are 'content-neutral law[s] of general applicability'" (brackets in original)); *Humanitarian Law Project*, 561 U. S., at 27 ("[Section] 2339B regulates speech on the basis of its content"); *id.*, at 45 (BREYER, J., dissenting) ("[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly'").

(in Part IV) possible alternatives that apply only at abortion clinics, which therefore "raises the question whether those provisions are content neutral." *Ante*, at 11. Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to "consider an ordinance such as the one adopted in New York City that . . . makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Ante*, at 24 (quoting N. Y. C. Admin. Code §8–803(a)(3) (2014)). Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time (only at "reproductive health care facilit[ies]," of course) for so vague an offense as "follow[ing] and harass[ing]." It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction—and that we must therefore evaluate it through the lens of strict scrutiny.

A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech

because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a "'special position in terms of First Amendment protection.'" *Ante,* at 8 (quoting *United States* v. *Grace*, 461 U. S. 171, 180 (1983)). Moreover, "the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion." *Hill*, 530 U. S., at 763 (SCALIA, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it "may disproportionately affect speech on certain topics," so long as it is "justified without reference to the content of the regulated speech." *Ante*, at 12 (internal quotation marks omitted). But the cases in which the Court has previously found that standard satisfied—in particular, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), both of which the majority cites—are a far cry from what confronts us here.

Renton upheld a zoning ordinance prohibiting adult motion-picture theaters within 1,000 feet of residential neighborhoods, churches, parks, and schools. The ordi-

nance was content neutral, the Court held, because its purpose was not to suppress pornographic speech *qua* speech but, rather, to mitigate the "secondary effects" of adult theaters—including by "prevent[ing] crime, protect[ing] the city's retail trade, [and] maintain[ing] property values." 475 U. S., at 47, 48. The Court reasoned that if the city "'had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'" *Id.*, at 48 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 82, n. 4 (1976) (Powell, J., concurring in part)). *Ward*, in turn, involved a New York City regulation requiring the use of the city's own sound equipment and technician for events at a bandshell in Central Park. The Court held the regulation content neutral because its "principal justification [was] the city's desire to control noise levels," a justification that "'ha[d] nothing to do with [the] content'" of respondent's rock concerts or of music more generally. 491 U. S., at 792. The regulation "ha[d] no material impact on any performer's ability to exercise complete artistic control over sound quality." *Id.*, at 802; see also *id.*, at 792–793.

Compare these cases' reasons for concluding that the regulations in question were "justified without reference to the content of the regulated speech" with the feeble reasons for the majority's adoption of that conclusion in the present case. The majority points only to the statute's stated purpose of increasing "'public safety'" at abortion clinics, *ante*, at 12–13 (quoting 2007 Mass. Acts p. 660), and to the additional aims articulated by respondents before this Court—namely, protecting "'patient access to healthcare . . . and the unobstructed use of public sidewalks and roadways,'" *ante,* at 13 (quoting Brief for Respondents 27). Really? Does a statute become "justified without reference to the content of the regulated speech" simply because the statute itself and those defending it in

court *say* that it is? Every objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute's peculiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. See *ante*, at 26, 28. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently "tailored" to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute "restrict[s] more speech than necessary" in light of the problems that it allegedly addresses, *ante*, at 14–15, is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority

distorts not only the First Amendment but also the ordinary logic of probative inferences.

The structure of the Act also indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," Brief for Respondents 27, are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." §120E½(e). As the majority recognizes, that provision is easy to enforce. See *ante*, at 28–29. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court's fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person's consent* "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." §120E½(b) (West 2000). As the majority acknowledges, that provision was "modeled on a . . . Colorado law that this Court had upheld in *Hill*." *Ante*, at 2. And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called "[t]he unwilling listener's interest in avoiding unwanted communication." 530 U. S., at 716. The Court held that interest to be content neutral. *Id.*, at 719–725.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens' supposed

right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. See Pet. for Cert. i. (stating second question presented as "If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled"); 570 U. S. ___ (2013) (granting certiorari without reservation). The majority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, see 530 U. S., at 741–765 (SCALIA, J.); *id.*, at 765–790 (KENNEDY, J.), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence.[4] Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill*: It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from . . . '[l]isteners' reactions to speech,'" *ante*, at 13 (quoting *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) (brackets in original)), and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has

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[4] "*Hill* . . . is inexplicable on standard free-speech grounds[,] and . . . it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave." Constitutional Law Symposium, Professor Michael W. McConnell's Response, 28 Pepperdine L. Rev. 747 (2001). "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id.*, at 750 (remarks of Laurence Tribe). The list could go on.

sub silentio (and perhaps inadvertently) overruled *Hill.* The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment," §120E½(b)(2).

It goes without saying that "[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional." *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316, 325 (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision "draw[s] . . . distinctions on its face," *ante*, at 12, and instead proceeds directly to the purpose-related prong, see *ibid.,* asking whether the exemption "represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people," *ante*, at 15 (internal quotation marks omitted). I disagree with the majority's negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—"license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 392 (1992).

Is there any serious doubt that *abortion-clinic employees or agents* "acting within the scope of their employment" near clinic entrances may—indeed, often will—speak in

favor of abortion ("You are doing the right thing")? Or speak in opposition to the message of abortion opponents—saying, for example, that "this is a safe facility" to rebut the statement that it is not? See Tr. of Oral Arg. 37–38. The Court's contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic employee sent out to "escort" prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor's pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as "the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance." *Ante*, at 16. I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.

The Court takes the peculiar view that, so long as the clinics have not specifically authorized their employees to speak in favor of abortion (or, presumably, to impede antiabortion speech), there is no viewpoint discrimination. See *ibid.* But it is axiomatic that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[,] they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59 (1911). The phrase

"scope of employment" is a well-known common-law concept that includes "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business." Black's Law Dictionary 1465 (9th ed. 2009). The employer need not specifically direct or sanction each aspect of an employee's conduct for it to qualify. See Restatement (Second) of Agency §229 (1957); see also Restatement (Third) of Agency §7.07(2), and Comment *b* (2005). Indeed, employee conduct can qualify even if the employer specifically forbids it. See Restatement (Second) §230. In any case, it is implausible that clinics would bar escorts from engaging in the sort of activity mentioned above. Moreover, a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.

There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. See *post*, at 1–2 (ALITO, J., concurring in judgment). Indeed, as the majority acknowledges, the trial record includes testimony that escorts at the Boston clinic "expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways," including by calling them "'crazy.'" *Ante*, at 7, 16 (citing App. 165, 168–169, 177–178, 189–190). What a surprise! The Web site for the Planned Parenthood League of Massachusetts (which operates the three abortion facilities where petitioners attempt to counsel women), urges readers to "Become a Clinic Escort Volunteer" in order to "provide a safe space for patients by escorting them through protestors to the health center." Volunteer and Internship Opportunities, online at https://

plannedparenthoodvolunteer.hire.com/viewjob.html?optlink-view=view-28592&ERFormID=newjoblist&ERFormCode=any (as visited June 24, 2014, and available in Clerk of Court's case file). The dangers that the Web site attributes to "protestors" are related entirely to speech, not to safety or access. "Protestors," it reports, "hold signs, try to speak to patients entering the building, and distribute literature that can be misleading." *Ibid.* The "safe space" provided by escorts is protection from that speech.

Going from bad to worse, the majority's opinion contends that "the record before us contains insufficient evidence to show" that abortion-facility escorts have actually spoken in favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. *Ante*, at 18. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing.[5]

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[5] The Court states that I can make this assertion "only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges." *Ante*, at 18, n. 4. That is not so. The sentence in question appears in a paragraph immediately following rejection of the facial challenge, which begins: "It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones." *Ante*, at 17. And the prior discussion regarding the facial challenge points to the fact that "[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones." *Ante*, at 16. To be sure, the paragraph in question then goes on to concede only that the statute's constitutionality *as applied* would depend upon

C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent "the least restrictive means" of furthering "a compelling Government interest." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) (internal quotation marks omitted). Respondents do not even attempt to argue that subsection (b) survives this test. See *ante*, at 10. "Suffice it to say that if protecting people from unwelcome communications"—the actual purpose of the provision—"is a compelling state interest, the First Amendment is a dead letter." *Hill*, 530 U. S., at 748–749 (SCALIA, J., dissenting).

III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court's opinion—whether the statute is "'narrowly tailored to serve a significant governmental interest,'" *ante*, at 18 (quoting *Ward*, 491 U. S., at 796 (internal quotation marks omitted)). I suppose I *could* do so, taking as a given the Court's erroneous content-neutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half

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explicit clinic authorization. Even that seems to me wrong. Saying that voluntary action by a third party can cause an otherwise valid statute to violate the First Amendment as applied seems to me little better than saying it can cause such a statute to violate the First Amendment facially. A statute that punishes me for speaking unless *x* chooses to speak is unconstitutional facially and as applied, without reference to *x*'s action.

and the arguably correct half of the Court's analysis to the majority.

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The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to "protect" prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.