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LifeLine

A Legal Network in Support of Life

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SUPREME COURT

Katie Short

Friends Indeed for Pro-Lifers at the Supreme Court

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



foundings. 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

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The Power of Strategic Partnership

Marin Pregnancy Clinic is a nonprofit community clinic in Novato, Calif., with the mission of providing medical care, counseling, and practical solutions to women facing unexpected pregnancies. It is dedicated to reaching women, men, and families in the community through education and support, while providing care for their unborn children. From a modest start in 1987, the clinic now provides pregnancy options counseling, pregnancy tests, sonograms, lab work, and prenatal care up until seven months of gestation. In 2008, it obtained status as a presumptive Medi-Cal provider making them eligible for reimbursement of costs for qualified patients. This year, Marin Pregnancy Clinic faced two major conflicts with other community organizations. The following is the story of how they overcame defeat and discrimination.

“You don’t qualify...”

Within the last few years, changes in the structure of Medi-Cal at the State and County levels have impacted Marin Pregnancy Clinic’s ability to reach women in need. The County of Marin hired a new company to provide managed care, Partnership Health Plan (PHP). Under the program, new enrollees in Medi-Cal usually have their care managed through PHP, which provides a directory of “approved” providers for their members to choose from in obtaining care. Participation in this directory is an essential aspect of reaching new clients as it is the main way for patients to find out about their care options.

When the approved provider directory was first published, Marin Pregnancy Clinic was not included. Planned Parenthood was listed, but not the clinic that would

Mrs. Oblites was stunned by the position MCC was espousing, as well as by the unprofessional, vehement tone of the confrontation.

provide alternatives to abortion. Marin Pregnancy Clinic’s Director, Robin Strom, realized that not being on the list would mean new clients would generally not even know the clinic existed. She started making calls to ask about the process of

becoming an approved provider through PHP. She was told that Marin Pregnancy Clinic would not qualify because it does not provide prenatal care through all nine months of pregnancy and does not provide birth and delivery care. Mrs. Strom explained that Marin Pregnancy Clinic has a very effective referral system in place for patients past seven months. Explanations notwithstanding, staff at PHP refused to consider Marin Pregnancy Clinic as a potential PHP provider.

Ms. Strom realized that PHP’s explanation for excluding Marin Pregnancy Clinic based on a lack of “full-term care” failed to ring true since Planned Parenthood (which does not generally provide these services) was an approved provider.

Faced with this unequal treatment, and stonewalled for answers, Mrs. Strom refused to give up. For approximately a year she explored ways to join the PHP network—always receiving the same unsatisfactory answers. “I knew I couldn’t give up,” Mrs. Strom explains. “We had come so far to achieve presumptive status with Medi-Cal, we couldn’t back away when we were right.”

Unsure what her next step should be, Mrs. Strom shared her concerns with Anne O’Connor, General Counsel of the National Institute of Family and Life Advocates (NIFLA). As a former LLDF board member, who has worked with Life Legal Defense Foundation on California matters in the past, Anne referred the question to LLDF. Working together, Mrs. Strom and LLDF



lawyers drafted a letter to PHP setting out the problem, and asking for clarification of PHP policies.

The week after sending the letter, Mrs. Strom received a call from Mary Kerlin, the Director of Provider Relations at PHP expressing a complete change of tune. Ms. Kerlin assured Mrs. Strom that there would be no problem with contracting with Marin Pregnancy Clinic, and that once the contract was finalized, they would have full participation in PHP directories and programs.

After submitting all the required paperwork, Marin Pregnancy Clinic received its approved provider agreement on July 18, 2013, and is now a fully contracted PHP provider. Ecstatic with these results, Mrs. Strom gives the glory to God: “It is great having God on our side. Our ‘mantra’ has been—we wait and we wait and we wait on Him. Now what He will do remains to be shown.”

But that was not the only challenge Marin Pregnancy Clinic was to face this year.

“Don’t ‘dump’ patients...”



In Marin County, the largest health care provider for Medi-Cal patients is Marin Community Clinic (MCC). As in most managed health care systems, a patient has a primary care provider and then receives specialty care as approved by the primary care physician. MCC provides primary care as well as prenatal care.

Staff at MCC have complained from time to time about patients who receive their primary care from MCC going to Marin Pregnancy Clinic for prenatal care. (As a limited services pregnancy center, Marin Pregnancy Clinic does not provide primary health care. However, it is a presumptive Medi-Cal provider, and provides specialty care related to pregnancy.) Patients faced with pressure from MCC sometimes stopped coming to Marin Pregnancy Clinic for prenatal care. But the hostility from MCC reached a new height this spring and ultimately landed a patient in the emergency room.

On May 17, 2013, an expectant mother and patient at Marin Pregnancy Clinic called for advice because she was suffering from flu-like symptoms. Her symptoms were such that the staff encouraged her to get an appointment with her primary care provider. Since MCC was listed on the patient's Medi-Cal card as her primary care provider, she contacted MCC to set up an appointment. Staff at MCC responded that if she were not coming to MCC for her prenatal care, she would not receive an appointment for any other type of care. MCC's nurse stated that it was unfair for Marin Pregnancy Clinic to "dump" patients on MCC, and utterly refused to listen to the patient's perspective.

Unable to see her primary care physician, the patient ended up in the emergency room. She describes her experience: "I had to go to Novato Community Hospital Emergency Room ... where I was diagnosed with bronchitis, a bladder infection, and severe dehydration.... I was very frustrated that I couldn't be seen at MCC and I felt too sick and too weak to defend myself...."

Subsequently, a nurse in MCC's maternity

department called Marin Pregnancy Clinic on a diatribe about "dumping patients" on MCC. She spoke with Marin Pregnancy Clinic's Director of Operations, Alison Oblites, and angrily expressed that she felt it was inappropriate for one of Marin Pregnancy Clinic's patients to call MCC regarding anything. She refused to consider

Less than a week later, Mrs. Strom received a call from MCC's CEO, Dr. Tavaszi, with her apologies and assurance that the incident would not be repeated.

MCC's duty to treat patients for whom it is the contracted primary care provider. As Mrs. Oblites explains, "She made it clear to me that Marin Pregnancy Clinic's patients would be turned away every time, unless they transferred their care to Marin Community Clinic." Mrs. Oblites was stunned by the position MCC was espousing, as well as by the unprofessional, vehement tone of the confrontation.

As if that were not enough, landing a patient in the emergency room for basic care is exactly what managed health care is intended to avoid.

Following this experience, Mrs. Strom felt that enough was enough. It was time to hold MCC accountable for its duty to its patients and its position as the largest primary care provider in the County. She asked Life Legal Defense Foundation to work with her in drafting an appropriate letter that would both complain about the offending conduct and demand that MCC accept and abide by its duty.

In researching the rules and policies that apply to a primary care provider in Marin County, LLDF attorneys found that—not surprisingly—MCC's actions were exactly opposite of what they should have been. LLDF Staff Counsel comments, "Not only was MCC's conduct unbecoming to a clinic providing care to low-income patients, it was also a failure to follow the policies applicable to a primary care provider." Under the applicable policies, pregnancy testing, counseling and prenatal care is entirely within the control of the patient, and a primary care provider cannot insist that a patient go through their organization for such care. As if that were not enough, landing a patient in the emergency room for basic care is exactly what managed health care is intended to avoid. The letter asked that MCC take steps to properly train staff regarding patient choice so that such an incident would not occur again. "Our goal was to facilitate communication between Marin Pregnancy Clinic and MCC, so that the appropriate policies would be followed going forward," says Ms. Millard.

Less than a week later, Mrs. Strom received a call from MCC's CEO, Dr. Tavaszi, with her apologies and assurance that the incident would not be repeated. She expressed her desire that the two clinics work together in serving the community, and asked that Mrs. Strom speak with the MCC clinic manager to find common ground going forward. Of course, Mrs. Strom was glad to agree—she had been trying for years to open a dialog with clinic management.

"The recent experiences of Marin Pregnancy Clinic go to show what can be accomplished by working together," comments Dana Cody, President of LLDF. "We commend Marin Pregnancy Clinic, and especially their director, Robin Strom, for being willing to fight for what is right in both of these situations. LLDF is proud to be able to fulfill our mission by assisting Marin Pregnancy Clinic to more effectively defend life every day!"



How Many Experts Does It Take to Advise a Dying Patient?



Back when the mess that is Obamacare was working its way through the legislative sausage factory, warnings about “death panels” almost derailed the entire enterprise. There were two, somewhat related, areas of concern: (1) that Obamacare’s many cost/benefit bureaucratic boards would lead to explicit health care rationing; and (2) that doctors paid to “counsel” elderly and dying patients about end-of-life treatment would actually pressure them to refuse expensive treatments. Owing to the lack of popular trust, the end-of-life counseling provision was dropped to grease the way for Obamacare’s final passage.

Now [8/2013], the proposal is back in both the House and Senate, with bipartisan support. The Care Planning Act of 2013 is the most far-reaching of the bills. Supported by the AARP and sponsored by Senators Mark Warner (D-Va.) and Johnny Isakson (R-Ga.), the bill ostensibly aims to compensate medical providers who accept Medicare and Medicaid for participating in end-of-life treatment discussions with patients. But that’s just the tip of the proverbial iceberg.

No one is against doctors discussing end-of-life treatment options with patients. That’s part of good medical practice. But once the federal government sets the pay, it will make the rules. It won’t be enough for doctors to talk to their patients about tube feeding, cardiopulmonary resuscitation, and the like. If they want to be reimbursed, doctors will have to structure the conversations in the way the government instructs.

Ever wonder why the health care bureaucracy is becoming so byzantine and sclerotic? This bill—meant to encourage conversations—is 46 pages long. It would create a Care Planning Advisory Board, an “expert” panel of 15 members, three appointed by the president and the remainder by the four partisan leaders of the House and Senate (three apiece). Imagine the patronage opportunities!

Typical of how such boards are composed, the experts are to be selected from among every conceivable constituency:

Patient advocacy groups? Check.

Older patients? Check.

Individuals with cognitive or functional impairments? Check.

Family caregivers? Check.

Hospice providers? Check.

Researchers, ethicists, faith communities, and health care facilities? Check, check, check, and check.

Among its other duties, the care planning board will advise the Health and Human Services secretary about how to “assure



that individuals with advanced illness receive person- and family-centered care.” The board will also investigate and recommend ways the government can ensure that qualified patients “develop a treatment plan that is formed around their goals, values, and preferences, that is informed by research on disease trajectory.” Not only that, but the board’s proposal is expected to ensure that care plans are “realistic, actionable, and concrete.”

And what expert government advisory board has ever been created that wasn’t required to “develop quality measures” to enable providers to send data back to the bureaucrats for the requisite bean counting. Also, the board will help the government “develop and promote best

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But what if the culturally appropriate, multidisciplinary care-giving team disagrees with the patient? Who prevails?

practices in communications about advanced illness between providers, individuals, and family caregivers in different settings, including acute care hospitals.” Good grief.

Since patients can only receive paid counseling—“once in each 12-month period”—the bill establishes bureaucratic hoops through which providers must jump. First, the patient must be “eligible.” That would mean, for example, having advanced cancer or late-stage diabetes, or needing “assistance with two or more activities of daily living”—or meeting “other criteria determined appropriate by the Secretary.” Translation: Still more regulations will be needed. Patients are to receive the services of a multidisciplinary “core team,” made up of a “physician or an advanced practice registered nurse, a social worker, a nurse, and a minister or the individual’s personal religious or spiritual adviser.” The core team can be expanded “when necessary” to include “a pharmacist, a licensed clinical social worker, and a psychologist,” along with anyone else who meets the “requirements that may be established by the Secretary.”

One wonders: Isn’t helping patients decide on appropriate treatment already part of a doctor’s job? Moreover,

hospices—covered by Medicare and Medicaid—now use the multidisciplinary approach without having been told to by Washington.

The bill also requires that the government provide “culturally and educationally appropriate training for individual and family caregivers to support their ability to carry out the plan.” Again, imagine the rule-making possibilities!

The bill purports to facilitate the creation of advance directives and care-planning consistent with patient values. Great. But what if the culturally appropriate, multidisciplinary care-giving team disagrees with the patient? Who prevails?

Not necessarily the patient. The bill specifically permits doctors to refuse to provide wanted end-of-life care based on their own “conscience,” if such refusals are allowed by state law.

End-of-life care is a crucial aspect of medical practice. And to be sure, problems exist in ensuring that all patients receive optimal care. But do we really want doctors marching to the drumbeat of memos from the secretary of Health and Human Services?

A far less centralized approach—such as encouraging continuing medical education programs and public awareness efforts by the nonprofit sector—would surely improve end-of-life care, and far less intrusively than allowing government to transform dying into a public-sector regulatory growth opportunity.

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ReCAP

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counselor arrested for purported harassment and accused of spraying holy water in the direction of two pro-abortion protesters. **Victory!:** Judge found Ms. Fecteau not guilty of harassment.

Kansas v. White (Wichita, Kan.)—Pro-life activist arrested for trespassing on a public college campus. Butler College administrators told the activists that their free speech activity was restricted to a small, remote area on the outskirts of campus. The campus life team went to the free speech area where they observed few to no passersby. Mr. White declined to stand in a place where his life saving message would not reach a single person. Butler College police arrested Mr. White for trespassing. **Victory!:** Charges dismissed.

People v. Foti and Hathaway (San Francisco)—Sidewalk counselors cited for multiple alleged violations of sign law and “Mother May I” no-approach law, as well as disturbing the peace. Citations dismissed. (One charge still pending on alleged violation of amplified sound ordinance for playing Christmas carols on portable CD player.)

CASES TO WATCH:

Alabama Board of Health v. All Women’s, et al. (Ala.)—As NAWAW violates *Alabama Dept. of Public Health Closure*, LLDF filed complaint against NAWAW for operating an unlicensed abortion center. LLDF filed amicus in support of ADPH. Court found that abortionist Bruce Norman was performing abortions unlawfully without a license and issued a permanent injunction. Abortionist Norman filed a motion for reconsideration. LLDF filed an amicus brief opposing Norman’s motion. Motion for Reconsideration denied October 3, 2012. Defendant has 42 days from that date to appeal.

McCullen v. Coakley (Mass.)—The case began in 2007, when Massachusetts passed a law prohibiting “entering or remaining” within 35 feet of abortion clinic

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IN MEMORIAM: William Patrick Clark (October 23, 1931–August 10, 2013)

Life Legal Defense Foundation and no doubt many of its supporters marked the passing of Justice William P. Clark (Calif. Supreme Court 1973–1981). Justice Clark was well-known for his relationship with U.S. President Ronald Reagan as well as his serving as Secretary of the Interior and later as National Security Advisor during Reagan’s terms in office.

Justice Clark served on the Life Legal Board of Advisors from nearly the beginning until shortly before his death in August of this year. Lifeline is pleased to honor the memory of Judge Clark by reprinting an article of his from 2004.

For Reagan, All Life Was Sacred

A New York Times op-ed

William P. Clark

Paso Robles, Calif., June 11, 2004

Ronald Reagan had not passed from this life for 48 hours before proponents of human embryonic stem-cell research began to suggest that such ethically questionable scientific work should be promoted under his name. But this cannot honestly be done without ignoring President Reagan’s own words and actions.

Ronald Reagan’s record reveals that no issue was of greater importance to him than the dignity and sanctity of all human life. “My administration is dedicated to the preservation of America as a free land,” he said in 1983. “And there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.” One of the things he regretted most at the completion of his presidency in 1989, he told me, was that politics and circumstances had prevented him from making more progress in restoring protection for unborn human life.

Still, he did what he could. To criticize the *Roe v. Wade* decision on its 10th anniversary in 1983, he published his famous essay “Abortion and the Conscience of the Nation” in *The Human*

Life Review. “We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life,” he wrote. He went on to emphasize “the truth of human dignity under God” and “respect for the sacred value of human life.” Because modern science has revealed the wonder of human development, and modern medicine treats “the developing human as a patient,” he declared, “the real question today is not when human life begins, but, What is the value of human life?”

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In that essay, [President Reagan] expressly encouraged continued support for the “sanctity of life ethic” and rejection of the “quality of life ethic.”

life ethic” and rejection of the “quality of life ethic.” Writing about the value of all

human life, he quoted the British writer Malcolm Muggeridge’s statement that “however low it flickers or fiercely burns, it is still a divine flame which no man dare presume to put out, be his motives ever so humane and enlightened.” And in the *Roe v. Wade* decision, he insisted, the Supreme Court “did not explicitly reject the traditional American idea of intrinsic worth and value in all human life; it simply dodged the issue.”

Likewise, in his famous “Evil Empire” speech of March 1983—which most recall as solely an indictment of the Soviet Union—Ronald Reagan spoke strongly against the denigration of innocent human life. “Abortion on demand now takes the lives of up to one and a half million unborn children a year,” he said. “Unless and until it can be proven that the unborn child is not a living entity, then its right to life, liberty, and the pursuit of happiness must be protected.”

His actions were as clear as his words. He supported the Human Life Amendment, which would have inscribed in the Constitution “the paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency.” And he favored bills in Congress that would have given every human being—at all stages of development—protection as a person under the 14th Amendment.

ReCAP

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entrances. The law contains exceptions for patients, clinic employees, and persons merely passing through the zone to get to another destination. The undisputed target of the bill was pro-life sidewalk counselors who attempt to bring their life-affirming message directly to women seeking abortions. The law was challenged in federal court, but both the District Court and the First Circuit ruled the law constitutional. When the plaintiffs appealed to the United States Supreme Court, LLDF filed an amicus brief on behalf of itself and Pastor Walter Hoyer urging the Court to review the case. In June, the Supreme Court announced that it will hear the case. Life Legal Defense Foundation then filed a second *amici curiae* (friends of the court) brief in the Supreme Court. The brief argues, *inter alia*, that speech restrictions targeted at abortion clinics are de facto content and viewpoint based laws and thus inconsistent with the First Amendment. [Read more starting on page 1 of this issue of *Lifeline*.]

In re Kline—Former Kansas Attorney General accused of violating state ethics rules while investigating abortion providers. While Kline served as district attorney in 2007, a district judge reviewed Kline's evidence and found probable cause to believe that Planned Parenthood committed 107 criminal acts including falsifying abortion records to cover up illegal late term abortions. Kline filed charges against Planned Parenthood the next day. Kline's dogged investigation

and prosecution of Planned Parenthood for these illegal acts and for its cover-up of statutory rape of young girls contributed to the abortion giant being defunded by some states and local governments, and even endangered its receipt of \$350 million in federal funding. Planned Parenthood and the Kansas Supreme Court, consisting largely of appointees of rabidly pro-abortion Kathleen Sebelius, filed ethics complaints against Kline in May 2012. Kline and his attorneys, supported by LLDF, stated the ethics complaint was politically motivated and Kline filed exceptions to the claims. Kline's filings forced five of the seven Supreme Court justices to recuse themselves from Kline's case, which was argued before a reconstituted court in November 2012. During the hearing held at the Supreme Court, a law clerk working with the Kansas Court of Appeals publicly tweeted derogatory comments about Kline and predicted that Kline would lose his law license. The attorney has since been fired and the Court announced that it would investigate its attorney staff for unprofessional conduct and bias. That investigation is still pending. The criminal charges against Planned Parenthood were dismissed after it was learned that the administration of then-Governor Kathleen Sebelius destroyed records under criminal subpoena implicating Planned Parenthood of criminal conduct. The Sebelius Administration was never investigated for its conduct. The case against Phill Kline is still awaiting decision from the court.

(RECAP CONT'D ON PAGE 9)

Aside from the moral principle, President Reagan would also have questioned picking the people's pocket to support commercial research. He understood the significance of putting the imprimatur of the nation, through public financing, behind questionable research.

He consistently opposed federal support for the destruction of innocent human life. After the charter expired for the Department of Health, Education and Welfare's ethical advisory board—which in the 1970s supported destructive research on human embryos—he began a de facto ban on federal financing of embryo research that he held to throughout his presidency.

As for today's debate, as a defender of free people and free markets, he would have asked the marketplace question: if human embryonic research is so clearly promising as

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[President Reagan] supported the Human Life Amendment, which would have inscribed in the Constitution "the paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency."

the researchers assert, why aren't private investors putting money into it, as they are in adult stem cell research?

Mr. Reagan's suffering under Alzheimer's disease was tragic, and we should do everything we can that is ethically proper to help others afflicted with it. But I have no doubt that he would have urged our nation to look to adult stem cell research—which has yielded many clinical successes—and away from the destruction of developing human lives, which has yielded none. Those who would trade on Ronald Reagan's legacy should first consider his own words.

William P. Clark was national security adviser and secretary of the interior under President Ronald Reagan.

[This op-ed article was originally published June 11, 2004 in the *New York Times* and was reprinted in *Lifeline* by kind permission of the author.]



WHY DO WOMEN GET LATE-TERM ABORTIONS?

Abortions after 20 weeks have been banned in Texas. We are now hearing the familiar argument that all late-term abortions are done because there is a serious health risk for the mother or a major disease or deformity of the baby.

Some time ago, Abby Johnson, former clinic director in the largest Planned Parenthood clinic in Texas, addressed this issue by saying:

... it is false to say the women who choose late-term abortion do so because of medical reasons. We referred hundreds of women to abort their babies after 24 weeks ... not *one* was for medical reasons. (<http://clinicquotes.com/abby-johnson-on-late-term-abortions/>)

This is first-hand testimony from a former abortion provider. Of course, some pro-choicers might be hesitant to accept what a pro-life figure has to say. So let's turn to some studies:

In 2003, Katha Pollitt, who is pro-choice, wrote an article for *The Nation* discussing late-term abortion. She gave the three most common reasons why women had these abortions¹:

- 71% didn't realize they were pregnant
- 48% had difficulty making arrangements
- 33% were afraid of telling parents or partner

The study she cites allowed for more than one answer, and these were the most common reasons given.

A study (<http://www.guttmacher.org/pubs/journals/3811806b.html>) in 2006 in *Perspectives of Sexual and Reproductive Health*, a publication of the Alan Guttmacher institute, which has been affiliated with Planned Parenthood

throughout its history, conducted a study of hundreds of women who had second-trimester abortions (the second trimester ends at 27 weeks [<http://www.parenting.com/article/when-does-second-trimester-pregnancy-end>]). It came up with the following results:

- 68% had no pregnancy symptoms
- 58% Didn't confirm the pregnancy until the second trimester
- 45% had trouble finding abortion provider
- 37% unsure of date of last menstrual period
- 30% had difficulty deciding on abortion

Believe it or not, the study sample did not contain a single case of abortion for health reasons.

This data indicates that late-term abortions are usually elective. Has it always been this way? In 1998, a survey was sent out to clinics that did late-term abortions. According to data from the 18 clinics that responded:

Only 9.4 percent of late abortions at clinics that responded to the U.S. News survey were done for medical reasons, either to protect the mother's health (a rare situation) or, more commonly, because of fetal defects such as spina bifida and Down's syndrome (box, Page 32) ... for post-20-week abortions generally, about 90 percent were classified by the clinics as "nonmedical."¹

It further quotes a clinic worker saying that most of these abortions are done on teenagers in "total denial" of their pregnancies.²

In a 1990 article in *The Los Angeles Times*, a worker at a late-term abortion clinic described the typical late-term abortion patient:

These women know they are pregnant, but not until the 16th or 17th week, when the fetus is kicking and bothering them, do they say, 'Oh, I have to deal with this.'³

She goes on to defend these patients and says:

They don't lead organized, routine lives.³

Sometimes abortionists and clinic workers who are still performing late-term abortions reveal the fact that most of them are elective. In his response to a 2012 article about a proposed national ban on abortions after 20 weeks, a law similar to the one that just passed in Texas, one practicing abortionist said (emphasis mine):

Thanks for this piece. It resonates with me deeply as a provider of abortion care and as an "out" advocate of reproductive justice, the framework most cogent with your remarks but least known by people moved by this issue. To your point, when advocates have sought stories from me to make the case for abortion, it has always been a request for tragic circumstances, the stories felt to be the most likely ones to move opinion. The reality is



that *that is not the typical patient I see, as most women having abortions are not raped or are not carrying a lethally flawed fetus,* and yet I have not identified a clear distinction between women I am willing to help and those I am not based on “acceptability” of circumstance.”⁴

Pro-choicers like to parade women with the most tragic circumstances before the camera and claim that they are typical of those having late-term abortions. In reality, that does not seem to be the case.

¹Katha Pollitt “In the Waiting Room” *The Nation* April 21, 2003.

²“When Abortions Come Late in Pregnancy” *U.S. News and World Report*. Jan 19, 1998 Vol 124 Issue 2.

³*Los Angeles Times*, The Abortions of Last Resort, 1-7-1990.

⁴Tracy Weitz “What do responses to the Washington D.C. 20-week abortion ban tell us about the habits of the prochoice movement?” (<http://blog.ansirh.org/2012/07/habits-of-the-prochoice-movement/>) ANSIRH blog, July 25, 2012.

⁵“Second Trimester Abortion: Logistics and Lack of Symptoms are Factors” *Perspectives of Sexual and Reproductive Health* Volume 38 No 2, June 2006.

[Sarah Terzo is a pro-life author and creator of the website clinicquotes.com. She is a member of Secular Pro-Life and Pro-Life Alliance of Gays and Lesbians. This article was published on LiveActionNews.org July 14, 2013. More articles by Ms. Terzo are available at her website and <http://liveactionnews.org/author/sarah-terzo/>

Lifeline Mission Statement:

The mission of Life Legal Defense Foundation is to give to innocent and helpless human beings of any age, and particularly to unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

Lifeline Editorial Policy:

The purpose of LLDF is set forth in our mission statement above. To that end Lifeline welcomes all ideas, opinions, research and comments, and all religious and political points of view, so long as not seen as clearly divisive, and so long as fundamentally based upon the twin pillars of truth and charity.

Legal Services: LLDF, on an ongoing basis, provides referrals to attorneys for assistance in ensuring care for medically dependent relatives and for adoption and guardianship matters; obtains legal assistance for women injured by abortion; advises employees in regard to free speech rights in the workplace; instructs pro-lifers in how to defend themselves in court; advises attorneys and citizens on working with legislative bodies re proposed legislation and zoning issues; advises and assists attorney representing pro-life advocates; communicates with employers, educational institutions, and governmental entities on behalf of individuals and entities whose rights are threatened and/or whose ability to advance the cause of life is hindered.

Education: advises sidewalk counselors, picketers, and prayer supporters of their free speech rights and rights to peaceful assembly when speaking out for the unborn in their communities; provides spokespersons for television, radio, and print media, and speakers for training workshops and debates.

Wanted: LLDF is receiving calls from people whose loved ones are being denied necessary medical treatment. We need local attorneys to assist us in these matters. LLDF is currently compiling model briefs, petitions and other forms for use in these cases.

Please consider making a tax-deductible contribution today. Your generosity allows LLDF to fulfill its mission to provide a trained and committed voice in the courtroom so that you and others can continue life-saving work.

ReCAP

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HHS Mandate litigation—LLDF, in conjunction with the Bioethics Defense Fund, is filing amicus briefs, both at the district and appellate court levels, in many of the cases challenging the HHS contraceptive abortifacient mandate. Our brief demonstrates that the Government’s argument that contraceptives promote women’s health is based on evidence that is inaccurate, incomplete, irrelevant, and/or biased. Moreover the government entirely failed to consider the harmful effects of hormonal contraceptives on women’s health before mandating no-cost coverage of these drugs in virtually every insurance plan. For these reasons, the Government cannot meet its burden under the Religious Freedom Restoration Act of showing that the Mandate furthers a compelling governmental interest.

Following conflicting rulings in the various circuit courts, both plaintiffs and the Government have filed petitions for certiorari in the United States Supreme Court. At the appropriate time, LLDF will file an amicus brief in whichever case or cases the Supreme Court takes.

*I am only one, but still
I am one. I cannot do
everything, but still I can
do something; and because
I cannot do everything,
I will not refuse to do
something that I can do.
—Helen Keller*



(FRIENDS INDEED CONT'D FROM PAGE 1)

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

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

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 a 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 (AFL-CIO) 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 leafletting 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.

¹*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.

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**— Justice William P. Clark, Retired California Supreme Court;
National Security Advisor for President Reagan**



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