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LEGISLATIVE TESTIMONY

To: Members of the Joint Committee on Judiciary
From: James F. Driscoll, Esq., Executive Director
Re: House 2239, An Act Restoring Free Speech and Public Access
Date: June 8, 2011

The Massachusetts Catholic Conference ("Conference") respectfully submits this testimony in support of House 2239, "An Act Restoring Free Speech and Public Access." The legislation would repeal M.G.L. Chapter 266, § 120E½. This statute forbids all individuals except abortion clinic personnel and their clients from entering for any purpose all designated areas located immediately in front of the entrances to any abortion facility in Massachusetts. These areas, thirty-five feet wide and extending to the street, are colloquially referred to as "buffer zones." The statute imposes criminal penalties for any violations.

The statute should be repealed because it creates no-speech zones in areas traditionally regarded as open to the public precisely for the purposes of free expression and assembly. The statute prohibits speakers from engaging in all forms of peaceful speech, including the distribution of leaflets, display of signs, consensual conversation and communication with others from a normal conversational distance. The statute therefore goes far beyond the more limited time, place, and manner regulations found constitutional in *Hill v. Colorado*, 530 U.S. 703 (2000).[1] The statute is currently the subject of a First Amendment challenge in the federal courts.[2]

In the *Hill* case, the Supreme Court recognized that states could protect unwilling listeners from close and unwanted approaches,[3] but many women entering abortion clinics appreciate and take advantage of offers of help and information at a difficult time. Besides penalizing speakers, the Massachusetts buffer zone statute interferes with the ability of willing listeners to receive helpful information in the public forum. The current statute thus violates the First Amendment's free speech guarantee.[4]

There is already a statute on the books in Massachusetts that prohibits individuals from obstructing any entrances to medical facilities.[5] Aside from the important First Amendment concerns, criminalizing the peaceful and non-obstructive use of the sidewalks is unnecessary, punitive and unfairly excessive. For these reasons, the Conference supports the repeal of the buffer zone law and urges the Committee to give House 2239 a favorable report recommending that the bill ought to pass.

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.

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[1] The *Hill* decision upheld a statute that required individuals entering a designated zone outside the entrances of health facilities to gain the consent of other individuals before approaching closer than eight feet to counsel against abortion, but did not prevent speakers from approaching if consent is given or from standing in one spot within the zone to offer leaflets or to hold signs.

[2] After the U.S. Supreme Court declined in 2010 to hear a preliminary appeal from lower court decisions rejecting a facial challenge, plaintiffs in McCullen v. Coakley returned to trial court to continue the case with regard to their "as applied" claims. The case is presently before Judge Joseph Tauro of the Massachusetts Federal District Court in Boston. Many speculate that the Supreme Court may have determined initially that it would be better to hear both the facial and as-applied issues together upon a subsequent appeal.

[3] *Hill*, 530 U.S. at 729.

[4] The plaintiffs challenging the statute argue, and the Conference agrees, that the lower court decisions rejecting a facial challenge erred by ignoring the balance struck in the *Hill* case between the state's interest in safety and the constitutionally protected right to communicate to willing listeners. The current statute is far more restrictive of public forum speech than what the Court permitted in *Hill*.

[5] M.G.L. chapter 266, § 120E.