No. 19-1184

In the Supreme Court of the United States

NIKKI BRUNI, ET AL.,

*Petitioner*s

v.

CITY OF PITTSBURGH, PENNSYLVANIA, ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has advanced First Amendment free speech arguments before this Court as counsel for a party, *e.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003), or as *amicus curiae*, *e.g.*, *McCullen v. Coakley*, 573 U.S. 464 (2014); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This case has vital importance for the jurisprudence governing free speech activities and is therefore of special interest to the ACLJ.[2]

SUMMARY OF THE ARGUMENT

The court below strayed from recent decisions of this Court regarding regulations of free speech activity in public forums—most notably *McCullen v. Coakley* and *Reed v. Town of Gilbert*—and incorrectly upheld the City of Pittsburgh's buffer zone Ordinance that bans demonstrations and picketing within fifteen feet of two abortion clinic entrances.

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[1] Counsel of record for all parties received timely notice of the intent to file this brief and have consented to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity, aside from *Amicus*, their members, or their respective counsel, made a monetary contribution to the preparation or submission of this brief.

[2] This brief is also submitted on behalf of more than 108,000 ACLJ supporters as an expression of their support for the free speech principles at stake in this case.

Pittsburgh's Ordinance is an impermissible content-based regulation of speech, and the Third Circuit's contrary decision, which was based in part on this Court's decision in *Hill v. Colorado*, is incorrect. The aim of the Ordinance is to protect listeners from unwanted speech and its enforcement requires officials to examine the content of the speech to determine whether it violates the law.

As this Court has recognized, the government can further the interests of protecting patient safety outside abortion clinics by regulating *conduct* without having to restrict First Amendment-protected *advocacy*. That is precisely what narrow tailoring requires in this case. A content-based and prophylactic restriction on speech in a traditional public forum concerning moral, social and religious issues of high public interest, upheld by the court below, is a prime example of what the First Amendment prohibits.

This Court should grant review and, in addition to reversing the lower court's judgment, overturn this Court's erroneous decision in *Hill*.

ARGUMENT

The Third Circuit's Decision, Upholding a Content-Based and Prophylactic Restriction of Speech in a Public Forum, Warrants Review by this Court.

A. The clear aim of the challenged ordinance is to protect listeners from the viewpoint and content of unwanted messages.

In *McCullen v. Coakley*, this Court unanimously struck down a Massachusetts law imposing a 35-foot buffer zone outside abortion clinics. 573 U.S. at 471. With the exception of four classes of persons, individuals were categorically excluded from entering or remaining within the zone. Under the law, it didn't matter whether a speaker wanted to talk about the weather, counsel a patient about her choice to have an abortion, or demonstrate against abortion more generally. All speakers, no matter what their intended speech activity was, were banned from speaking within the buffer zone.

The Court held that Massachusetts was unable to demonstrate that the law was narrowly tailored to further a substantial governmental interest. The state unconstitutionally pursued its legitimate interests "by the extreme step of closing a substantial portion of a traditional public forum to all speakers," and did so "without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes." *Id*. at 497.

Though *McCullen* held that the Massachusetts law was content-neutral, the Court emphasized that "the

Act would *not* be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *Id*. at 481 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)) (emphasis added).

Regulating speech because of its impact on listeners is precisely what happened in this case. Pittsburgh did not adopt a law banning *all* speech activity within buffer zones outside hospitals and health care facilities. Instead, the City adopted an Ordinance that specifically targets and bans (in addition to patrolling and congregating) speech that consists of *advocacy*, *i.e.*, *demonstrating* and *picketing*, within its 15-foot buffer zones. App. 9a. In addition, the City did not impose buffer zones outside all health care facilities and hospitals, but instead chose to demarcate buffer zones only "at two locations, both of which provide reproductive health services including abortions." App. 10a.

If Pittsburgh were concerned about congestion, noise, or other conduct interfering with a person's ability to enter or leave a health care facility in the city, it could have adopted and/or applied *conduct*-based regulations incidental to speech, such as laws regulating noise amplification or the free flow of pedestrian traffic on sidewalks, or laws criminalizing harassment or impeding ingress and egress at building entrances.

Pittsburgh did not select any of these constitutionally permissible options. Instead, according to the Preamble of the Ordinance itself, the City sought to regulate "First Amendment activity," specifically, a

"person's right *to protest against* certain medical procedures." Ja78a (emphasis added). The Ordinance does not regulate that activity solely in terms of conduct, but also in terms of content by targeting *advocacy* (*i.e.*, picketing and demonstrating).

It's clear why a government would ban advocacy-based activities, as opposed to pure conduct or behavior, *at two locations of moral and political controversy*: a desire to curb the effect or communicative impact of the advocacy itself.[3] The Ordinance thus achieves what the City Council Chair and sponsor of the ordinance stated was its goal: "protecting the listen[er] from unwanted communication." Pet. at 6.

Under *Hill*, which was decided five years before Pittsburgh adopted its Ordinance, such a concern would have been appropriate. *See* 530 U.S. at 716 (describing "[t]he unwilling listener's interest in avoiding unwanted communication"). *Hill*'s creation of a "right" to silence speakers in a traditional public

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[3] In *Hill*, this Court noted that "the comprehensiveness of [Colorado's] statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 731. Pittsburgh's legislation is hardly as nondiscriminatory as Colorado's in its operation. While the Colorado law imposed its zones outside all hospitals and healthcare facilities, the City has used its discretion to demarcate zones only outside two abortion clinics. Coupled with the Preamble's focus on the right of a "person's right to protest against certain medical procedures," the City's choice to create zones *solely* at abortion facilities robs the Ordinance of the "comprehensiveness" *Hill* suggested was a "virtue," and reveals the true (and discriminatory motive) behind the Ordinance.

forum was anomalous when *Hill* was decided,[4] and has since been undermined by decisions that are much more in line with long-recognized First Amendment principles. For instance, prior to *Hill*, it was clear that listener reaction to speech is not a content-neutral basis for restricting speech, *see, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992), and, more recently, *McCullen* recognized that a desire to silence speakers reveals the content-based nature of a law. *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that burning the American flag is protected by the First Amendment despite the strong, emotional reaction that it often evokes). The Ordinance is inconsistent with these principles.

B. Application of the challenged ordinance reveals its content-based nature.

In *McCullen*, this Court indicated that a law would be content-based "if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." 573 U.S. at 479 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377, (1984)). In other words, the relevant inquiry is whether application of the law "depends . . . on what [speakers]

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[4] In the opinion of *Amicus*, *Hill* was wrong at the time it was decided. *See* ACLJ Amicus Brief, *Price v. Chicago*, No. 18-1516 (petition docketed June 6, 2019).

say." *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)).

Subsequently, in *Reed v. Town of Gilbert*, this Court noted that while some "facial distinctions based on a message are obvious," other distinctions are "more subtle," *i.e.*, those that regulate speech "by its function or purpose." 135 S. Ct. at 2227. Because both of these distinctions are "based on the message a speaker conveys," they are both "subject to strict scrutiny." *Id.*

Applying the free speech principles of *McCullen* and *Reed* to the challenged ordinance yields only one possible conclusion: it is content-based. The Ordinance does not ban all speech within the buffer zones, nor does it ban only congregating or patrolling. Instead, the Ordinance singles out and restricts messages with a "particular function or purpose," *i.e.*, speech advocating a position through picketing or demonstrating—thereby leaving unaffected all other *non-advocating* speech activities. Indeed, any prosecution under the Ordinance of a person picketing or demonstrating, *i.e.*, *advocating a position*, within a buffer zone could not succeed without evidence that the speech activity consisted of such advocacy. An examination of the content of the communication is thus inevitable; otherwise, deciding whether the speech activity had crossed the line would be impossible.[5]

Although this Court held in *Hill* that a ban on "protest, education, or counseling" was content-

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[5] It is readily apparent that all, or almost all, of the individuals who are going to "picket" outside an abortion clinic are those opposed to the activities taking place therein.

neutral, even though it would require officials "to review the content of the statements made," 530 U.S. at 720-21, this holding is no longer tenable in light of this Court's subsequent decisions in *McCullen* and *Reed*. Even though *McCullen* did not explicitly overturn *Hill*, it is telling that *McCullen*, which adjudicated free speech claims remarkably similar to those at issue in *Hill*, nowhere relied upon, explained, or applied that decision. In fact, except to note that Massachusetts previously had a law similar to the statute at issue in *Hill*, 573 U.S. at 470, *McCullen* does not even mention the decision. *Hill*, in sum, is no longer viable law and this Court should say so.[6]

C. The Ordinance is an impermissible prophylactic restriction of speech that lacks appropriate tailoring.

There is no doubt that Pittsburgh may "prevent people from blocking sidewalks, obstructing traffic . . . committing assaults, or engaging in countless other forms of antisocial conduct." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In furthering these goals, however, the City is required to do so "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Id*.

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[6] Similarly, in *Reed*, *Hill* is cited only three times. The first citation is simply to note that *Hill* was the principal case relied upon by the lower court that this Court reversed, 135 S. Ct. at 2226. The second and third citations are to the *dissents* of Justices Kennedy and Scalia, respectively. *Id*. at 2229. Indeed, in the twenty years since *Hill* was decided, this Court has never applied *Hill*'s reasoning in any meaningful way in any subsequent decision.

In *McCullen*, this Court described the plentiful ways in which Massachusetts could have furthered its interests in ensuring safety and access without having to ban speech in a traditional public forum: enforce laws already on the books, prosecute law-breakers, seek targeted injunctions against bad actors, adopt legislation focused on conduct as opposed to speech, etc. 573 U.S. at 491-93. As the Third Circuit acknowledged, however, the City did not try or seriously consider "arrests, prosecutions, or targeted injunctions," as a means of furthering its interests in ensuring patient access and safety. App. 32a.

Instead of truly demanding "a close fit between ends and means," *McCullen* 573 U.S. at 486, the court below upheld the prophylactic speech ban in this case based on (1) deference to the judgment of the city council, App. 28a, 32a, and 35a, and (2) the supposedly insignificant burden on speech created by the Ordinance. App. 32a. Neither of these rationales support upholding the Ordinance under this Court's current free speech jurisprudence.

1. Deference

Although *Hill* suggested "we must accord a measure of deference" to the government's judgment about how best to regulate speech activity, 530 U.S. at 727, *McCullen* made it clear that "it is not enough for [the City] simply to say that other approaches have not worked." 573 U.S. at 496. It is solely the burden of the government to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495. And while *Hill*

specifically approved the "bright-line prophylactic" nature of Colorado's regulation of speech because other less restrictive measures, such laws against harassment and breaching the peace, were harder to enforce, 530 U.S. at 729, *McCullen* reaffirmed that "the prime objective of the First Amendment is not efficiency. . . ." 573 U.S. at 495.

In light of *McCullen*'s observation that enforcing conduct-based laws is a more direct and constitutionally appropriate way to ensure patient safety than banning speech (*even if this approach is less "efficient"*), the Third Circuit's consideration of a police department's "finite resources" as a factor in determining narrow tailoring cannot stand. App. 31-32a n.21. No police department has *infinite* resources, and under the Third Circuit's rationale, the government could ban pamphleteering because of the increase in littering that it indirectly creates. *But see Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it."). In addition, if police cannot be expected to enforce existing laws protecting patient safety outside abortion clinics, thus allegedly creating the need to create speech-restricting buffer zones, then who will enforce the buffer zones? Buffer zones, like laws criminalizing obstruction and harassment, do not enforce themselves.

In sum, to suppress protected speech activity on a public sidewalk is to apply a sledgehammer to a problem where a scalpel is the more constitutionally appropriate tool. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *accord Riley*, 487 U.S. at 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same).

2. Burden

With respect to the burden on speech created by the Ordinance, *McCullen*'s statement that when the government makes it "more difficult" to engage in communication in a public forum, "it imposes an especially significant First Amendment burden," 573 U.S. at 489, is instructive. By blocking out portions of a traditional public forum to ban quintessential free speech activities (picketing and demonstrating), *at the only place where the message can be heard by the intended audience*,[7] the Ordinance does not just make these activities "more difficult," it outright bans them within the prohibited areas. Yes, protestors can stand outside the zones to try to communicate their

[7] The area immediately outside an abortion clinic "is not just the last place where the message can be communicated. It is likely the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." *Hill*, 530 U.S. at 789 (Kennedy, J., dissenting); *see also id.* at 763 (Scalia, J., dissenting) (noting that the public space around health care facilities has become "a forum of last resort for those who oppose abortion . . . the most effective place, if not the only place" where pro-life demonstrators can express their message.).

message—just as Cohen could have worn his "F— the Draft" jacket outside the courthouse, *Cohen v. California*, 403 U.S. 15, 16 (1971)—but "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939); *cf. U.S. Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) ("The government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . .").[8]

As Petitioners correctly point out, no other circuit employs a "significant-burden-on-speech analysis" in deciding whether a time, place, and manner restriction satisfies constitutional scrutiny. Pet. 29-30. Indeed, neither *McCullen* nor any other decision of this Court requires a free speech plaintiff to demonstrate a significant burden on their First Amendment activity before a court can adjudicate whether the challenged

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[8] For these reasons, it is little wonder that, among *McCullen*'s numerous suggestions as to how Massachusetts could have created a more narrowly tailored statute than its 35-feet buffer zone, two suggestions are notably *absent*: (1) create a smaller zone; (2) focus on banning the speech of protesters, while allowing sidewalk counselors to speak. 573 U.S. at 490-93. After *McCullen* was decided, Massachusetts did not adopt either of these measures. Instead, Massachusetts enacted a new law, modeled on the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, specifically targeting, *inter alia*, anyone "who, by force, physical act or threat of force, intentionally injures or intimidates or attempts to injure or intimidate a person who attempts to access or depart from a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½(d) ("Impeding Access to or Departure from Reproductive Health Care Facility").

law satisfies strict scrutiny (in the case of content- or viewpoint-based restrictions on speech) or intermediate scrutiny (in the case of content-neutral restrictions on speech).

A ban on speech in a traditional public forum (even if it allows one to speak elsewhere) imposes a burden on constitutionally protected activity by its very terms, and the government must carry the burden of justifying that restriction. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). The government's burden should be especially high where, as here, the government is intentionally targeting "undesirable" speech due to its viewpoint and communicative impact, as opposed to regulating conduct in a manner that has an incidental effect upon speech.

Finally, the Third Circuit's suggestion, based on language from *Hill*, that "[w]hen a buffer zone broadly applies to health care facilities to include buffer zones at non-abortion related locations, we may then conclude the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive," cannot be squared with *McCullen*. App. 34a (citations and internal marks omitted). While the *McCullen* Court did not need to address the overbreadth claim in that case, finding that the challenged law failed narrow tailoring, 573 U.S. at 496 n.9, the gravamen of *McCullen* is that regulating *more speech* as a part of a legislative scheme to deal with problems at *one* locale, is the very

antithesis of "a close fit between ends and means." Indeed, *McCullen* pointed out that because congestion issues only arose "once a week in one city at one clinic" in the state, creating "buffer zones at every clinic across the Commonwealth [was] hardly a narrowly tailored solution." *Id*. at 493.

Though the City has only marked out zones outside two abortion clinics, instead of outside all hospitals and health care facilities, nothing in the Ordinance would preclude the City from exercising its discretion to create such zones throughout the city tomorrow. In fact, the Ordinance specifically authorizes it. The First Amendment does not permit the government to give itself the license and discretion to restrict speech in this untailored, unbounded fashion. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").[9]

CONCLUSION

The decision of the court below is incorrect, warranting this Court's intervention and reversal, and the decision of this Court relied upon by the court

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[9] *Amicus* agrees with Petitioners that the Third Circuit's attempt to narrowly construe the meaning and scope of the ordinance was an impermissible exercise of its judicial function. Pet. at 15-24. It is also, as Petitioners correctly point out, nothing more than a non-binding, advisory opinion as far as Pennsylvania courts are concerned—the very tribunals that would adjudicate prosecutions under the ordinance. *See*, *e.g.*, *Commonwealth v. Bennett*, 618 Pa. 553, 583, 57 A.3d 1185, 1203 (2012) ("[W]e are not bound by the decisional law of the lower federal courts, construing Pennsylvania law.").

below, *Hill v. Colorado*, should be overturned. *Hill* was wrong when it was decided; it has had a profoundly negative impact on the right of persons to engage in free speech activity in places where that right has long been protected, and it would not unduly upset reliance interests, as governments are more than capable of prosecuting illegal *conduct*, without having to restrict *speech* in traditional public forums. *Cf. Ramos v. Louisiana*, slip op. at 8-9 (S. Ct. April 20, 2020) (Kavanaugh, J., concurring in part).

The petition should be granted.

Respectfully Submitted,

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