No. 19-1184

In the

Supreme Court of the United States

NIKKI BRUNI, ET AL.,
Petitioners,

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

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

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for
Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the doctrine of Separation of Powers, both vertical and horizontal. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Bond (2) v. United States*, 572 U.S. 844 (2014), *Arizona v. United States*, 567 U.S. 387 (2012), and *Bond (1) v. United States*, 564 U.S. 211 (2011).

SUMMARY OF ARGUMENT

The claim of power by the lower court here to impose a limiting construction on a municipal ordinance is at best ironic. The Third Circuit Court of Appeals has recognized that its authority to interpret federal law is limited by the rule of deference announced in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Helen Mining Co. v. Elliott*, 859 F.3d 226, 238 (3rd Cir. 2017). However, that court claims authority to impose a limiting construction on a city ordinance – exceeding the constitutional authority of a federal court under our system of dual sovereignty. Indeed, the court rejected the interpretation of the city that enacted the ordinance. Review should be granted in this case to preserve our system of dual sovereignty from erosion.

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

The local ordinance at issue creates a "buffer zone" in front of abortion clinics and it was intended to prohibit the petitioners from engaging in "sidewalk counseling." The city's arguments regarding the interpretation of the law reveal it to be content discriminatory. Yet the city relies on this Court's ruling in *Hill v. Colorado*, 530 U.S. 703 (2000), to uphold such content discrimination. The First Amendment was intended to protect speech that challenged the listener – speech intended to change the listener's mind. The Pittsburgh ordinance and the law upheld in *Hill* are instead intended to ensure that those visiting an abortion clinic will not be approached by someone seeking to engage in a calm and quiet conversation. The First Amendment does not allow such a purpose and this Court should grant review to overrule its prior decision in *Hill*.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Protect the Vertical Separation of Powers between State and Federal Governments.

It remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the entire residuum of power to be exercised by the state governments or by the people themselves. *See*, *e.g.*, Federalist No. 39, at 256 (Madison); Federalist No. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the

powers of the government are limited and that its limits are not to be transcended").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. Const. Art. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); U.S. Const. Art. I, Sec. 8 (enumerating powers so granted); *Bond (2) v. United States*, 572 U.S. at 854; *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405; *United States v. Lopez*, 514 U.S. 549, 552 (1995).

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, Rather it "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Bond (1)*, 564 U.S. at 221 (2011). *see also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

This vertical separation of power applies not only to the President and Congress. It also limits the power of the federal judiciary. *See Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 176 (1959). "[T]he States entered the federal system with their sovereignty intact; [and] the judicial authority in Article III is limited by this sovereignty."

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). This Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) noted:

> [T]he Constitution of the United States, . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Thus, this Court has held that interpretation of state or local law is the exclusive province of the state courts. *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470-71 (1945) ("the state alone can make" an authoritative construction of a state statute); *see Albertson v. Millard*, 345 U.S. 242, 244 (1953); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Only the state courts have the power to impose a limiting construction of a local law to avoid a constitutional question. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 n.15 (1975); *cf. Stenberg v. Carhart*, 530 U.S. 914, 945 (2000) (reference to state court for construction of a local law is only appropriate where the statute is fairly subject to a limiting interpretation that will avoid the constitutional question); *Baggett v. Bullitt*, 377 U.S. 360, 378 n.11 (1964).

The court below failed to heed these principles. While it disclaimed any intent to "rewrite" the ordinance at issue, it did impose a "limiting" construction on that ordinance in an attempt to avoid the constitutional question. Indeed, the court ruled that the ordinance did not mean what the city argued that the ordinance meant and that the ordinance did not reach the conduct that the city intended to prohibit when it enacted the ordinance.

A federal court cannot avoid a constitutional question by imposing its own limiting interpretation on a local law. The state courts are not bound by the federal judiciary's interpretation of local law. *Alabama State Fed'n of Labor*, 450 U.S. at 471; *see Leffingwell v. Warren*, 67 U.S. 599, 603 (1862); *Supervisors v. United States*, 85 U.S. 71, 81-82 (1873). Any such ruling is nothing more than an advisory opinion, providing the petitioners with no effective relief, since the state courts are free to ignore the limiting interpretation imposed by the federal court. This Court should grant review to enforce these rules of vertical separation of powers that are meant to protect the dignity and sovereignty of states in our federalist system of government.

II. This Court Should Grant Review to Overrule *Hill v. Colorado*.

This Court's decision in *Hill v. Colorado* invited Pittsburgh and other state and local entities to enact laws similar to the one under review in this case. In *Hill*, this Court ruled that a law prohibiting approaching a person near an abortion clinic "'for the purpose of ... engaging in oral protest, education, or counseling'" was a content neutral regulation. *Hill*, 530 U.S. at 720-21. The Court stated that the Colorado law did

not prohibit a "particular viewpoint." *Id*. at 723. But the Court ignored the clear intent of the law to prohibit anti-abortion messages – an intent made clear by the use of language like "education" and "counseling" that plainly aimed at one, and only one, point of view. Indeed, later in the opinion the Court explicitly recognized that the State had targeted particular messages. The Court noted the State's concession that the law was designed to ensure that women entering an abortion clinic would be free from "unwanted encounters" with people opposed to abortion. *Id*. at 729.

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

Prior to *Hill*, this Court had long recognized that the public sidewalks were held open for speech activity subject only to regulation to ensure that traffic was not impeded. *Schneider v. State of New Jersey*, 308 U.S. 147, 160 (1939). Prior to *Schneider*, the Court ruled that cities could not require a permit to distribute literature on the city streets. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). These rulings were joined by the decision in *Hague v. CIO*, 307 U.S. 496 (1939), where a fractured Court held that the Free Speech guaranty protected speech activities in public parks and city streets. In his lead plurality opinion

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

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

Sidewalks in front of foreign embassies are not off limits to free speech activity. *Boos v. Berry*, 485 U.S. 312, 329 (1988). Even the sidewalk in front of this Court is open to picketers and speakers. *United States v. Grace*, 461 U.S. at 176-80. As this Court noted in *Grace*, public sidewalks are part of the public

forum and attempts to withdraw them from that forum are "presumptively impermissible." *Id*. at 180.

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

Hill simply does not fit in, neatly or otherwise, with this Court's prior decisions rejecting speech restrictions on public sidewalks. As Justice Scalia noted in his dissenting opinion in *Hill*, the only possible way to explain the decision is to say it is about abortion, and the Court's decisions on that sensitive subject stand "in stark contradiction of the constitutional principles [the Court applies] in other contexts." *Hill*, 530 U.S. at 742 (Scalia, J. dissenting).

Nor does *Hill* fit in with recent developments in this Court's First Amendment jurisprudence. In *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), this Court noted "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech." *Reed*, 135 S.Ct. at 2227; *see NIFLA v. Becerra*, 138 S.Ct. 2361, 2371 (2018). The Pittsburgh ordinance at issue in this case is just such a law – it can only be justified by the speech it seeks to prohibit. Yet under *Hill*, such a law would be characterized as content neutral. Similarly, *Hill*'s approach to narrow tailoring is inconsistent with this Court's more recent decision in *McCullen v. Coakley*, 573 U.S. 464 (2014). This Court noted that the ordinance at issue

in that case swept far too broadly, especially considering that it prohibited speech in a traditional public forum. *Id.* at 476-77. That analysis is missing from the decision in *Hill*.

There is no basis in the original understanding of the free speech guaranty, however, for an "abortion" exception, or indeed any similar subject matter exception. This Court should grant the petition and overrule *Hill*.

CONCLUSION

Federal courts have no role in pronouncing a limiting interpretation of a state law or municipal ordinance. The interpretation of state law is the domain of state courts. This Court should grant review to protect the system of dual sovereignty enshrined in the structure of the Constitution.

The limiting construction was adopted to avoid ruling on Petitioners' constitutional claims. The ordinance is a regulation of speech based on content. The city's attempt to justify this violation of speech rights shows why the Court's decision in *Hill* should be overruled.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
The Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae