No. 19-1184

In the Supreme Court of the United States

NIKKI BRUNI; JULIE COSENTINO; CYNTHIA RINALDI; KATHLEEN LASLOW; AND PATRICK MALLEY,
Petitioners,

v.

CITY OF PITTSBURGH, PITTSBURGH CITY COUNCIL; MAYOR OF PITTSBURGH,
Respondents.

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

BRIEF OF *AMICI CURIAE* CONSITUTIONAL LAW PROFESSORS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Pittsburgh's buffer-zone ordinance violates the Free Speech Clause.

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INTEREST OF *AMICI CURIAE*[1]

Amici are the following constitutional law professors who often teach and write in the area of First Amendment law. Although *Amici* have divergent perspectives on the Court's abortion jurisprudence, *Amici* agree on the importance of the First Amendment principles at stake in this case. As scholars of the constitution and its amendments they have knowledge that may assist the Court.

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[1] Pursuant to Rule 37.6, *Amici Curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of *Amici's* intent to file this brief and have provided their consent.

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SUMMARY OF ARGUMENT

Our Constitution's First Amendment represents our society's decision to shelter speech, association, and matters of conscience from unnecessary governmental intrusion and censure. "[S]peech concerning public affairs is more than self-expression; it is the essence of self government[,]" *Garrison v. La.*, 379 U.S. 64, 74-75 (1964), and heightened protections apply to such expressions regardless of whether the speaker is an individual or a group, *e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010). Such protections apply with special force here because the speech at issue takes place on public ways and sidewalks that occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States v. Grace*, 461 U.S. 171, 180 (1983).

This case considers a regulation that, while appearing facially neutral, in practice targets the speech of persons who engage in sidewalk counseling near abortion clinics. The Third Circuit erred in finding that this seemingly neutral provision was content neutral when it is in fact content based. The Third Circuit did so because it was following the same form of judicial review that this Court applied in *Hill v. Colorado*, 530 U.S. 703 (2000). As commentators have shown, *Hill*'s content neutrality analysis is hopelessly flawed and should be corrected to find that, in instances such as the present case, seemingly facially neutral regulations may actually be content based.

ARGUMENT

I. The Third Circuit's Decision is at Odds with this Court's First Amendment Precedent and Should be Reversed.

Petitioners correctly point out that Pittsburgh's Ordinance, Pitts. Code § 623.04 ("Ordinance"), is designed to prohibit speech based on content. Pet. 25-27. The Ordinance is not necessary to facilitate entrance to health care facilities, as Pittsburgh prior to the Ordinance had provisions on its books which barred obstructing traffic, passageways, and entrances to facilities such as the two abortion clinics expressly covered by the Ordinance. App.48a. Indeed, while the language of the Ordinance appears to extend neutrally to all actors in front of all facilities, Pittsburgh's buffer zones are on public sidewalks and streets located only in front of the City's two abortion clinics. App.72a, 81a, 142a, 165a–66a. Pittsburgh implemented the Ordinance's speech restrictions nowhere else in the city. App.72a–73a.

Consequently, by implementation and design the Ordinance's prohibitions only affect Petitioners' sidewalk counseling. Pet. 25 (citing record sources). This content-based targeting is similarly evidenced in City Council hearing testimony that chiefly cited a need for police to mediate purported disputes between pro-life speakers and clinic visitors or abortion escorts. App.8a, 48a. And the content of Petitioners' speech was clearly and intentionally targeted by Pittsburgh's City Council and Mayor, who noted the Ordinance's "intent" was to avoid "disputes between those seeking [abortions] and those who would counsel against their actions." App.44a.

This context is important to grasp properly the issue before the Court. Like the many chamberlains who, praising the emperor's new clothes, "walked along behind carrying high the train that wasn't there," so the series of recent cases finding content neutral the restrictions aimed at the content of sidewalk abortion counselors' speech would turn blind to the obvious, and carry-on evermore chanting: "The emperor's procession must go on!" Hans Christian Andersen, "The Emperor's New Clothes" (1837) in The Annotated Hans Christian Andersen 3–16 (Maria Tatar, ed., trans., & contributor, Julie Allen, trans. & contributor, 1st ed. 2008); *see also* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 979-985 (2016) ("Calvert & Bunker") (surveying problems of identifying content-based regulation and collecting scholars' responses to *Colorado v. Hill*, 530 U.S. 703 (2000) and *McCullen v. Coakley*, 473 U.S. 464 (2014)).

Justice Scalia observed as much the last time this issue was before the Court: "It blinks reality to say . . . 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." *McCullen*, 473 U.S. at 476 (Scalia, J., concurring in judgment). Consequently, if the emperor has no clothes we should say so, and that is true of the content neutrality findings in cases such as *Hill*, its progeny including *McCullen*, and the present case. The Court should correct the blindness inherent

in continuing to treat such provisions as content neutral.

Amici agree with the First Amendment arguments advanced by Petitioners regarding the Third Circuit's misapplication of First Amendment precedent and the overbreadth doctrine. Petitioners' points warrant consideration and the Court should grant Petitioners a writ. *Amici* will not repeat Petitioners' well-founded arguments.

Instead, *Amici* here write to emphasize two points regarding Free Speech. First, as a matter of commonsense, *Amici* urge the Court to cease treating as content neutral government regulation that clearly targets the content of Petitioners' speech and those similarly situated. Second, the Court should find that *Hill*'s content neutrality analysis is untenable and clearly specify that a formally neutral regulation that targets specific speech is a content-based regulation subject to strict scrutiny. Each of these issues is treated in turn.

A. The Ordinance is a Content-Based Speech Regulation, as were the Provisions at Issue in *Hill* and *McCullen*, and it Violates the Speech Clause.

The First Amendment prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amend. 1. Under that Clause, our government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) *quoting Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based

on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227 (citing *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663–2664 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 95)). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell*, 131 S.Ct. at 2664). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by *its function or purpose*. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* (emphasis supplied). As was the case in *Hill* and *McCullen*, so Pittsburgh's Ordinance is a content-based restriction on Petitioners' speech due to its "function or purpose" and this Court should invalidate it because it does not pass the requisite strict scrutiny. *Id.*

1. Criticism of *Hill*'s Content Neutrality Holding.

The conclusion that speech restrictions around abortion clinics are content neutral has a troubled and controversial pedigree; it has been a source of contention since this Court's decision in *Hill*.

Undeniably, *Hill*'s content-neutrality conclusion was disparaged by constitutional scholars regardless of apparent political leanings, as pro-choice and pro-life scholars roundly criticized content neutral findings in this context. The incoherency in content neutrality analysis, as many scholars have noted, has been exacerbated by cases such as the present one before the Court attempting to apply *Hill* and *McCullen*. *E.g.*, Calvert & Bunker at 979-985 (collecting scholars' responses to *McCullen* in wake of *Hill*). A simple consideration of *Hill*'s reception is illustrative of this fact.

Indeed, both pro-choice and pro-life scholars raised concerns about the Court bending the First Amendment to accommodate abortion rights. Reflecting on *Hill*'s content-neutral conclusion, Professor Michael McConnell worried that "we're in very serious trouble" when "the Court lines up on free-speech cases according to whether they agree with the speakers or not." *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747 (2001). Professor William E. Lee agreed that "[r]egardless of one's stance on reproductive autonomy as a constitutional right and the power of government to punish private action that interferes with the exercise of constitutional rights, the *Hill* decision is problematic." William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002). Within three years, by 2003, *Hill* had been "condemned by progressive and conservative legal scholars alike." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. Rev. 31, 31 (2003).

The criticisms seem to transcend politics, as leading liberal scholars also agreed with the criticism. Just months after *Hill*, Professor Laurence Tribe opined that it was "right up there" among the "candidates for most blatantly erroneous" cases of the 1999 Term. Laurence Tribe, quoted in *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001). Tribe added that the case was "slam-dunk simple" and the Court got it "slam-dunk wrong." *Id.* The ACLU (which had asked the Court to strike down the Colorado law), as well as Kathleen Sullivan and Erwin Chemerinsky, all also disapproved of the *Hill* majority's content neutrality analysis.

The ACLU had always recognized this. Although the ACLU staunchly favors abortion rights, it believed the Colorado statute was "fundamental[ly] flaw[ed]." Br. for ACLU as *Amicus Curiae* Supporting Petitioners, *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1045141, at *1, *7. Indeed, the ACLU repeatedly contended that the Colorado law was not content neutral: "the floating buffer zone created by the new Colorado law cannot be described as content neutral"; the statute "distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content based and trigger strict scrutiny"; and it is "only by evaluating the content of the speech that a factfinder can determine [whether the law has been violated]." *Id.* at *7, *10. The ACLU's root position in *Hill* was that the Court should not "avoid the hard choices that the Constitution requires by mislabeling Colorado's statute as content-neutral." *Id.* at *13. Yet that is exactly what the *Hill* Court did.

Then Stanford Law Dean Kathleen Sullivan described the provision at issue as "the Colorado legislature's effort *to draw a facially neutral statute* to achieve goals clearly *targeting particular content*." Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) (emphasis supplied) (hereinafter "Sullivan on Speech"). "After all," she added, "the motivation for this facially neutral law had to do with its effect in shielding patients (abortion patients) known to be the recipients of a particular kind of speech (antiabortion speech)." *Id*. at 737-38 (parentheticals in original). Dean Sullivan also noted that the Court's "striking" acceptance of facial neutrality was inconsistent with *Santa Fe Independent School District v. Doe*, where the Court—during the same 1999 Term—struck down a facially-neutral invitation to student speeches at football games under the Establishment Clause because "it was truly a thinly veiled effort to showcase student-led prayer." *Id*. at 737.

Other scholars offered more in-depth criticisms of the content-neutrality holding in *Hill*. One elaborated on Dean Sullivan's view, noting that "the legislature was indeed disfavoring a particular message." Timothy Zick, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 101 (University of Cambridge Press 2008). And others expanded on the inconsistency between abortion in *Hill* and the Court's approaches to other types of constitutional cases. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1262-63 (2008) (citing *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964)).

Still others examined in detail what had actually happened in the Colorado legislature when it passed the statute in 1993. They found "explicit evidence that many members of the legislature itself objected to the content of the protestors' speech. The legislature 'heard descriptions of demonstrations that were highly offensive in both their content and in their location . . . .' During debate, members of the legislature discussed the 'extremely offensive terms' used by anti-abortion demonstrators. Legislators listened to testimony about protestors 'flashing their bloody fetus signs,' and yelling 'you are killing your baby.'" Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado*, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 215 (2001) (citations omitted). Indeed, "there is powerful evidence that the legislature's principal or only concern was antiabortion protestors." Chen, 38 HARV. C.R.-C.L. L. REV. at 56; *id*. at 75 ("[A]lmost everyone in Colorado knew that the state adopted the bubble law solely to restrict anti-abortion protestors."). Even the majority opinion itself in *Hill* conceded that "the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics." 530 U.S. at 715. Dean Sullivan was right: the Colorado law "clearly target[ed] particular content." Sullivan on Speech at 737.

Finally, Professor Erwin Chemerinsky was "troubled by the rationale that was given" in *Hill*, particularly on the issue of content-neutrality. Erwin Chemerinsky, quoted in *Colloquium*, 28 PEPP. L. REV. at 752. Chemerinsky observed that the Court had

taken views of content-neutrality in *City of Renton v. Playtime Theatres and Erie v. Pap's A.M.* that were inconsistent with *Hill*, and he was "concerned" that "the Court tried to find a content neutral regulation." *Id.*; *see also* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59 (2000) (collecting critical reception of content neutrality analysis).

2. *Hill*'s Neutrality Analysis Has Devolved Into Repeated Error and Should Be Corrected.

McCullen and the present case essentially have the same content neutrality analysis infirmity as *Hill*. As noted, *McCullen* drew nearly identical criticism regarding its content neutrality holding. *See*, *e.g.*, Case Comment, *First Amendment—Freedom of Speech—Content Neutrality*—McCullen v. Coakley, 128 HARV. L. REV. 221, 227-28 (2014); Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 456-57 (2017). Indeed, Dean Sullivan's observation regarding the Colorado legislature in *Hill* is equally applicable to the actions of the Massachusetts General Court in *McCullen* and the Pittsburgh City Council in the present case, as each evidences an "effort to draw a facially neutral statute to achieve goals clearly targeting particular content." Sullivan on Speech at 737.

What's more, Pittsburgh itself took the position in litigation below "that [Petitioners'] sidewalk counseling falls within the prohibition on 'demonstrating'—if not 'congregating,' 'patrolling,' and 'picketing' too." *Bruni v. City of Pittsburgh*, 942

F.3d 73 (3d Cir. 2019). As such, it is a "subtle [facial distinction], defining regulated speech by *its function or purpose*[—demonstrating, picketing, etc.,] . . . and, therefore, . . . subject to strict scrutiny." *Reed*, 135 S.Ct. at 2227 (emphasis supplied). By the Ordinance's own terms, Petitioners' sidewalk counseling is defined by what Pittsburgh understands is Petitioners' function or purpose, *demonstrating*, and the Ordinance therefore regulates content and is subject to strict scrutiny. The Third Circuit ignored this fact, as it merely focused on the language of the Ordinance: "despite the assumptions of both parties, nothing in the plain language of the Ordinance supports a construction that prohibits peaceful one-on-one conversations on any topic or conducted for any purpose at a normal conversational volume or distance." *Bruni*, 941 F.3d at 84-85.

The Court should correct this error and clarify that even facially content neutral provisions, in the context of Speech Clause analysis, can be content based in fact. Even before *Reed*, this Court observed as much in passing: "That the . . . provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content based if its *manifest purpose* is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645-46 (1994) (emphasis supplied), *citing United States v. Eichman*, 496 U.S. 310, 315 (1990); *Ward v. Rock Against Racism*, 491 U.S. 781, 791–792 (1989); *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984). And while *Turner* did not hold that to be the rule of decision, it also referenced via *conferatur*

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534–535 (1993), as support for the proposition. *Turner*, 512 U.S. at 646 (*cf.* citing *Lukumi*).

Of course, neither *Turner*, *Ward* nor *Clark* actually found a facially neutral provision to be a content-based regulation at odds with the First Amendment's Speech Clause; each of those cases upheld the provision at issue in each case. *Turner*, 512 U.S. at 647, 652; *Ward*, 491 U.S. at 794-99; *Clark*, 468 U.S. at 298-99. This prompted Justice Marshall to dissent in *Clark*, as he reasoned: "By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity." 468 U.S. at (Marshall, J. dissenting). And *Eichman*, arguably, was not clearly facially neutral, as it distinguished between desecrators and preservers of our nation's flag. 496 U.S. at 315-16.

Presumably, that is why *Turner* cites *Lukumi*, as *Lukumi* in its Free Exercise analysis looked at the function and purpose of an otherwise facially neutral and generally applicable statute, under the teaching of *Emp't Div. v. Smith*, 494 U.S. 872 (1990), and found the seemingly neutral provision nevertheless content based because it in fact, practice and design targeted a specific religious practice. *Lukumi*, 508 U.S. at 537–38, 543–46. This is the course this Court should take in this case in its Speech Clause analysis as it rejects the Third Circuit's content neutrality conclusion.

As discussed in *Reed*, the analysis should turn on whether the regulation targets content via the expressive activity's "function or purpose[,]" 135 S.Ct. at 2227, and such targeting can be found, as here, in a provision's "manifest purpose." *Turner,* 512 U.S. at 646. As noted, the Pittsburgh Ordinance's stated goal and target of implementation is Petitioners' speech activities in sidewalk counseling. This is true even in the face of the formal neutrality the Third Circuit found. In *Reed*, the government contended that "regulation is content neutral—even if it expressly draws distinctions based on . . . communicative content—if those distinctions can be 'justified without reference to the content of regulated speech.'" *Reed*, 135 S.Ct. at 2228 (quoting Brief of United States as *Amicus Curiae*, which quoted *Ward*, 491 U.S. at 791). This Court rejected that argument. *Reed* insisted that "'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference'. . . . Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." *Id.* at 2223 (quoting *Turner*, 512 U.S. at 658). Such is the case here, and this Court should clarify, as it did for Free Exercise clause analysis in *Lukumi*, that even formally neutral provisions may be found to be content based if they target specific speech and expressive activity, as the Ordinance does here with respect to Petitioners.

CONCLUSION

This Court should provide Petitioner with a writ.

Respectfully submitted,

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