No. 23-1189

IN THE

# Supreme Court of the United States

JERYL TURCO,

*Petitioner*,

—v.—

CITY OF ENGLEWOOD, NEW JERSEY,

*Respondent.*

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

This case involves an eight-foot buffer zone that is qualitatively different than the 35-foot buffer zone involved in *McCullen v. Coakley*, 573 U.S. 454 (2014) and is similar to the eight-foot bubble zone involved in *Hill v. Colorado*, 530 U.S. 703 (2000). Affirmed by the Third Circuit, the District Court applied both *McCullen* and *Hill* to the disputed, and unique, facts of this case – in the process judging the credibility of Petitioner and of defendant's witnesses during a two-day trial.

The Sixth Circuit decision which Petitioner argues is in conflict with the Third Circuit decision in this case, *Sisters for Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400 (6th Cir. 2022), is neither a final judgment nor based on a developed record, and is distinguishable on other grounds as well.

Petitioner's reliance on *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) is misplaced, as *Dobbs* involved the right to abortion, not First Amendment rights as in this case. Also, contrary to Petitioner's argument, a majority of this Court did not describe *Hill* as a distortion of First Amendment doctrines.

Petitioner seeks certiorari on questions that misconstrue this Court's precedent and the record below. A more accurate statement of the questions presented is:

(1) Whether, based on the documentary evidence and witness testimony at trial, the City of Englewood's Buffer Zone Ordinance is constitutional; and

(2) Whether *Hill* should be overruled in any respect in this case.

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## INTRODUCTION

This Petition fails to meet the standard criteria for certiorari. Petitioner seeks review of a non-precedential Third Circuit decision which applied this Court's precedent and which does not conflict with holdings of other Circuit Courts or of this Court. The fact-specific legal analysis of the complex record in this case has no bearing beyond the context of this case. The District Court resolved key disputed facts particular to Petitioner, based in large part on key admissions made by Petitioner and on the credibility of defendant's witnesses at trial. This case is idiosyncratic as well since Petitioner has a distinct and unique method of sidewalk counseling not shared by others – that significantly impacts the analysis in this case.

The Third Circuit's Final Judgment, affirming the District Court, is not in conflict with a Final Judgment of any Circuit. The Sixth Circuit interlocutory Order relied on by Petitioner for this proposition – *Sisters for Life* – is distinguishable in material respects.

Nor is this case in conflict with this Court's Decision in *McCullen*. *McCullen* involved a demonstrably unconstitutional law because of the extraordinary size and effect of the 35-foot buffer zone it created. The alternative determination of constitutionality by the Courts below under a narrow tailoring analysis is predicated on an application of *McCullen*. Petitioner argues that the Third Circuit held that First Amendment scrutiny is triggered not by whether a restriction places a burden on speech but rather whether it places a substantial burden on speech. However, the Third Circuit did not invent the substantial burden test. That derives from *McCullen,*

which held that to be narrowly tailored, an ordinance must not burden substantially more speech than is necessary to further the government's legitimate interests. What Petitioner claims is a legal error by the Third Circuit is nothing more than her disagreement with how the Third Circuit applied precedent to the record in this case. The different outcome in this case as opposed to the outcome in *McCullen* is because of the material differences between the factual records in the two cases.

At the outset of this case and throughout the proceedings in this matter, the Parties stipulated that content neutrality was not an issue in this case, and the Courts below agreed.

Certiorari should be denied.

## STATEMENT OF THE CASE

Turco's Petition for Writ of Certiorari presents a very selective and incomplete account of the record in this case. Pursuant to Supreme Court Rule 15, the following Statement of the Case identifies and addresses misstatements of fact by providing context and addressing key omitted facts.

### The City of Englewood's Buffer Zone Ordinance

**Adoption of the Ordinance.** The District Court found that the Buffer Zone Ordinance was adopted "in order to deescalate the situation at Metropolitan Medical Associates ("MMA") by creating a degree of separation between the Bread of Life protestors and MMA patients, doctors, staff, companions, and escorts". Pet. App. 27a. As then Council President Algrant testified at trial, the City of Englewood chose

to adopt an eight-foot buffer zone (as in *Hill*) as opposed to a 35-foot buffer zone (as in *McCullen*):

> My understanding was that the 8-foot buffer zone had been tested through the courts and it had been allowed to stand. *** [W]e felt that an 8-foot buffer zone would be enough . . . to stop these close encounters.

3d Cir. Rec., Doc. 13-1, Appx 198, Trial Transcript.

The Ordinance, adopted in March 2014, provides in relevant part that:

> Within the City of Englewood, no person shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following
>
> 1. persons entering or leaving such facility;
> 2. employees or agents of such facility acting within the scope of their employment;
> 3. law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
> 4. persons using the public sidewalk or street right of way adjacent to such

> facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 107a-108a (Section B).

**The Ordinance's Effect.** The Ordinance had its desired effect. The District Court found that: "After the Ordinance was enacted, the situation at MMA generally became calmer. Sidewalk counselors and protestors could still talk to patients, but anyone needing to enter or exit the clinic had eight feet of space to do so without physical harassment." Pet. App. 31a. *See also Id.*:

> The clinic door could open out without obstruction because the buffer zone cleared out the overcrowded space in front of the entrance. *** [Volunteer escort Ashley] Gray testified that the buffer zone created space that prevented confrontations that could easily escalate, and stopped people from positioning themselves so close to the front door that they intimidated patients. *** Sidewalk counselors and protestors no longer followed patients all the way up to the front door, blocking other people behind them who were trying to enter the building. Witnesses, including Plaintiff, agreed that the Bread of Life protestors generally respected the buffer zone, perhaps going through it but rarely remaining in it.

In contrast, the District Court found that when it invalidated the Ordinance in 2017: "[I]t was absolute chaos." Pet. App. 32a (quoting the testimony of volunteer escort Christine Taylor). Protestors on microphones and loudspeakers or with huge signs would stand right next to the door or even chase patients right up to the door. Taylor testified to the

impact on patients, stating: "I don't know how many patients I have had hold my hand, grab me, cry on my shoulder, tuck their head into my neck so that they don't have to look at it." One protestor would walk up to the front door and just scream. "Even Plaintiff [Turco] would follow patients up to the front door. Sometimes a patient's companion who was behind Plaintiff would not be able to get around her to reach the entrance." Pet. App. 32a-33a.

Petitioner poses the question that "if Englewood cannot be expected to enforce existing laws protecting patient safety outside abortion clinics, or if clinic escorts are unwilling to file complaints against lawbreakers, the court below does not explain how the buffer zones themselves are to be enforced." Pet. at 30-31. Petitioner answered this question at trial, when she testified that the Bread of Life protestors generally respected the buffer zone. Pet. App. 31a.

## **Petitioner Jeryl Turco**

Petitioner does not address in her Petition her unique method of sidewalk counseling. Nor does she address how it affects analysis of the facts and the legal issues in this case. However, it is clearly relevant.

As the District Court found: Unlike other sidewalk counselors, Petitioner does not remain stationary. She runs in all different directions to meet patients as they approach the clinic. The clinic escorts call her "the Runner" because she runs up to patients as they are arriving and runs after and follows patients as they are leaving, for a block or more, even as they are going to their cars, and even as they are crossing Engle Street. She generally meets patients at some distance from the buffer zone and walks with them to

the perimeter of the buffer zone because she requires about 30 to 45 seconds to convey her message and hand them literature. She has used this approach whether or not there is a buffer zone. Pet. App. 33a (emphasis added). Indeed, Petitioner admitted at trial that: "I will approach a girl from anywhere that she is coming. And the sooner I get to her, the more time I have to be able to share literature, share a message." Pet. App. 32a-33a. Petitioner's method of sidewalk counseling is not representative of any other sidewalk counselor or protestor at the site.

The District Court found that Petitioner was not substantially burdened by the buffer zone and that any burden was minimal: "Overall, Plaintiff has talked to patients on some kind of regular basis both before and after Englewood's adoption of the Ordinance." Pet. App. 36a (citing Petitioner's trial testimony and Stipulation of Fact). Further, Petitioner admitted at trial that she that has convinced patients to listen to her and to take literature from her when walking with them and that she has been successful in referring patients to organizations that will help them get jobs. 3d Cir. Rec., Doc. 13-1, Appx 120, 125-26, Trial Transcript.

Petitioner's conclusory trial testimony that the buffer zones have resulted in "some obstruction" and "some difficulty" "at least 50 percent of the time" (Pet. 36a) is at variance with her testimony and stipulation that she has been able to talk to patients on some kind of regular basis both before and after adoption of the Buffer Zone Ordinance. It also ignores the fact that the Buffer Zone Ordinance only impacted her sidewalk counseling when she reached the eight-foot buffer zone after walking with a patient for 30 to 45 seconds. The District Court found that it would take

only a few extra seconds to traverse the buffer zone. Pet. App. 39a.

The District Court also found that "[o]ther sidewalk counselors have been able to talk to patients on a regular basis both before and after the Ordinance went into effect." Pet. 36a. For example, Rosemary Garrett, a long-time sidewalk counselor at the site, who "remains stationary" when she sidewalk counsels, testified at her deposition (read at trial) that "she was not bothered by the new buffer zone and was able to counsel patients even when the buffer zone was there." *Id.*

In an attempt to analogize the consequences of the buffer zone in this case to that of the 35-foot buffer zone in *McCullen*, Petitioner argues that McCullen was still able to persuade about 80 women not to terminate their pregnancies. Pet. at 22. However, Petitioner fails to note what the Court in *McCullen* said immediately thereafter:

> but . . . this figure was "far fewer people" than she [McCullen] previously reached. Jean Zarella, another petition [sic] in *McCullen*, described a far more dramatic effect of the Massachusetts Act. Before its passing, she stated that she had an estimated one-hundred "successful interactions." After its enactment, the buffer zones prevented her from persuading a single patient.

573 U.S. at 487-88 (emphasis added).

Petitioner argues that once the buffer zones were painted on the sidewalk, she had to move around the zones in an attempt to engage in close conversation and hand out materials. Pet. at 8. However,

Petitioner only describes how she would approach the MMA Clinic from the north if she was on the south side of the Clinic. Pet. at 8. Even in such case, however, as the District Court found, based on the testimony at trial of Petitioner and of the volunteer escorts:

> [I]n practice, Plaintiff can easily walk in the street gutter to traverse the rectangular buffer zones, which she does. Plaintiff can also get into the area between the two rectangular buffer zones by crossing Engle Street. In fact, if a patient is approaching from the north, Plaintiff sometimes just runs up Engle Street to meet the patient, avoiding the sidewalk entirely.

Pet. App. 35a.

Notably, Petitioner does not describe how she would approach the Clinic from the south. The District Court found that in such situation: Petitioner is "minimally affected." Pet. App. 35a. She will run down Engle Street, as she did before the Ordinance, and meet the patient as far as the next intersection so that she will have the time she needs to talk to the patient. She "is able to get to the buffer zone on the south side of the clinic without obstruction and be no more than eight feet from the MMA doorway." *Id.*

Petitioner argues that "given the close, private, and intimate conversations [she] wishes to engage in, there can . . . be no doubt that such conversations are unduly burdened by the presence of the zones." Pet. at 22. However, Petitioner needs 30 to 45 seconds to convey her message to a patient before reaching the buffer zone, which at most would take two to three seconds to traverse. As the District Court found: "If anything, the Ordinance may have given Plaintiff

more opportunities to engage patients by decreasing the size and aggressiveness of the Bread of Life group, which cause patients to run into the clinic as quickly as possible." Pet. App. 40a.

In its Decision below, the Third Circuit appropriately affirmed the District Court's findings of fact on these issues:

> The record demonstrates that, despite Turco's suggestion that the Ordinance makes it "more difficult for her to engage in speech activities," the burden is small as she can still engage in several forms of communication. Both before and after the adoption of the Ordinance, Turco concedes that she could talk "to patients on some kind of regular basis". The District Court points to several alternative routes Turco can take to communicate with patients, and the record demonstrates that despite the buffer zone, Turco still follows and speaks with patients up to 100 feet from the clinic, far beyond the buffer zone. *** [L]ike in *Hill*, by "encourag[ing] the most aggressive and vociferous protestors to moderate their confrontational and harassing conduct," the Ordinance may "make it easier for thoughtful and law-abiding sidewalk counselors like [Turco] to make [herself] heard."

Pet. App. 8a, 11a.

**<u>The Volunteer Escorts</u>**

Three volunteer escorts testified at trial: Ashley Gray (who co-founded a volunteer escort program in

2013 to escort patients to the MMA Clinic when they arrived at the area); Christine Taylor (a head escort who has been volunteering with the program since 2016); and Andrea Long (a former head and longtime volunteer escort at MMA). Pet. App. 24a, 26a.

Contrary to Petitioner's gross mischaracterization of the record, the risk of reprisal that volunteer escorts faced if they filed complaints against protestors was very real. As the District Court found: "The volunteers risked their own safety because the Bread of Life protestors took pictures of them, their cars, and their license plates. To reduce the risk, the escorts were required to avoid using their real names and avoid engaging with the protestors." Pet. App. 24a. Then Englewood City Council President Algrant talked to the escorts about filing complaints against problematic protestors, "but the escorts felt unsafe doing so, as did patients, their companions, and MMA staff." Pet. App. 25a (emphasis added). "New Jersey does not permit filing anonymous complaints, and the City concluded that any individual who filed a complaint would be in danger of reprisal from the Bread of Life protestors." *Id.* (emphasis added). Even with the benefit of using the MMA address, there was still risk to individuals who filed complaints, and only a "handful" of "[m]ore than 100 escorts have filed complaints." Pet. App. 26a (emphasis added). Petitioner does not refute these figures. The Third Circuit noted, additionally, that volunteer escorts "feared retribution from protestors, particularly after one found a picture posted online of herself inside a bullseye." Pet. App. 14a.

The District Court found that when the Bread of Life protestors learned Ashley Gray's name, "they targeted her personally, showing her pictures and a video of her that they had found on the internet",

which she found "[v]ery intimidating." Pet. App. 26a (emphasis added). As Ashley Gray testified at trial, one of the reasons why she stopped escorting was because she "lost a parent to COVID" in May of 2020 and she "was really concerned that the protestors would find out and they would taunt [her], say unkind things, and harass [her] about the grief [she] was experiencing." 3d Cir. Rec., Doc. 13-1, Appx 298, Trial Transcript.

Petitioner's feeble response to the risk of reprisal feared by volunteer escorts was that "clinic escorts have filed complaints against the protestors for violating the buffer zone" (Pet. at 15) and that after enactment of the Buffer Zone Ordinance, two clinic escorts associated with MMA "filed a total of eight complaints" (Pet. at 9). There have been *over 100* escorts at the MMA site in the years following adoption of the Ordinance!

## **Alternatives to an Eight-Foot Buffer Zone**

The reasons why the City did not pursue alternative measures identified in *McCullen* were not "excuses" (Pet. at 28), and the record refutes Petitioner's efforts to trivialize them. Following a two-day trial, the District Court concluded that: "The testimony from City officials *credibly* showed that they considered some of the[] alternatives [referenced in *McCullen*] but ran into the same problems that would render all of the *McCullen* alternatives less effective. Pet. App. 45a (emphasis added). As specifically detailed in her Findings of Fact on this issue (Pet. App. 22a-24a), the District Court found that: The City was struggling financially and had multiple vacancies in its already-strained police department; off-duty police officers were not

volunteering to monitor MMA; Bread of Life protestors were generally peaceful when they saw police officers arriving; and patients, companions, volunteer escorts, and MMA physicians and staff were all generally afraid of filing complaints against Bread of Life protestors because of the risk of reprisal. Pet. App. 45a. The Third Circuit affirmed on this point. Pet. App. 12a.

In contrast to the prior appeal in this case, where the Third Circuit vacated the District Court's grant of summary judgment in favor of Petitioner (Pet. App. 88a), the District Court had the opportunity to observe at trial the credibility of all of the testifying witnesses on this and other issues: Petitioner Turco, Englewood City Council President Lynne Algrant, Englewood Business Manager Timothy Dacey, and volunteer escorts Ashley Gray, Christine Taylor, and Andrea Long.

## **Overbreadth**

The Buffer Zone Ordinance applies to health care facilities and transitional facilities in the City of Englewood. Pet. App. 107a-108a (Section B). Council President Lynne Algrant explained at trial why other health care facilities and transitional facilities were also included in the Ordinance:

> [W]e did not want to be – to appear to be singling out an abortion clinic and the protestors that it would attract. [T]o walk into a medical facility and somebody splashes your face on the internet just didn't seem – it didn't seem right. So we talked about other medical facilities of which Englewood has a lot. And transitional housing. *** And so transitional housing and

> supportive housing is a huge need in our community particularly in Bergen County. And I would not want anybody to feel like I didn't want this in my neighborhood and I am going to protest around this place and make it difficult for people to get in . . . and out of the place that would be their home.

3d Cir. Rec., Doc. 13-1, Appx 196-97, Trial Transcript.

## **REASONS FOR DENYING THE PETITION**

Turco's Petition for Writ of Certiorari should be denied for the following reasons. This case is extremely fact-sensitive and involves material credibility issues that the District Court has resolved. Also, the facts of this case are unique because of Petitioner's method of sidewalk counseling. The Third Circuit's judgment in this case is not in conflict with a final judgment of any other Circuit. Nor is the Third Circuit's decision in conflict with *McCullen*. The District Court's decision in this case was not erroneous but rather is consistent with Supreme Court precedents and common sense. Contrary to Petitioner's argument, the *Dobbs* decision is readily distinguishable and is not controlling. Finally, certiorari was recently denied in a buffer zone case such as this.

### **This Is A Highly Fact-Sensitive Case.**

In initially reversing a grant of summary judgment in favor of Petitioner and remanding to the District Court, the Third Circuit in its August 19, 2019 Opinion observed that:

> This record contains a multitude of contradicting factual assertions. Some facts

> suggest that the buffer zones impose a significant restraint on the plaintiff's ability to engage in constitutionally-protected communication. Others support Englewood's position that the buffer zones hardly affected plaintiff's ability to reach her intended audience. Some facts support plaintiff's argument that the City had foregone less-restrictive options to address the chaotic environment outside the clinic. Others show that Englewood considered these options and reasonably rejected them or found them to be ineffective.

Pet. App. 80a-81a. On remand, the District Court addressed a myriad of facts relating to these issues – as detailed in her Opinion. *See* Pet. App. 21a to 36a.

**<u>This Case Involves Material Credibility Issues That The District Court Has Reasonably Resolved.</u>**

In the absence of a jury, the District Court had to weigh credibility in addressing these fact issues and in presenting meticulously an exhaustive set of Findings of Facts in her August 12, 2022 Opinion. Pet. App. 21a to 36a. Such findings should be given due consideration by this Court. Even under this Court's heightened review in First Amendment cases, "some deference must be given to the [District Court's] familiarity with the facts and the background of the dispute between the parties." *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 381 (1997) (quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 769-770 (1994)).

## **The Facts Of This Case Are Unique Because Of Petitioner's Method Of Sidewalk Counseling.**

This case does not have broad application in a narrow tailoring analysis because Petitioner sidewalk counsels in a way that no other sidewalk counselor does at the MMA site, that no sidewalk counselor in *McCullen* did, and that no sidewalk counselor in *Sisters for Life* does. The buffer zone in this case is largely irrelevant to Petitioner's method of sidewalk counseling since she needs 30 to 45 seconds to convey her message to a patient before she even reaches the buffer zone. Indeed, when the buffer zone was invalidated for a period of time, she faced chaos at the site.

## **The Third Circuit's Judgment Is Not In Conflict With A Judgment Of Any Other Circuit.**

Petitioner argues that the Third Circuit's decision in this case is in conflict with the Sixth Circuit's decision in *Sisters for Life*. Pet. at i, 1, 17, 20. However, the decision in *Turco* is a final judgment; the decision in *Sisters for Life* is neither a final judgment nor a definitive ruling on the merits. The decision in *Sisters for Life* did not hold that the Ordinance in question was unconstitutional; rather, it was an interlocutory order reversing the denial of plaintiffs' application for a preliminary injunction and remanding the matter to the District Court. 56 F.4th at 408-09.

*Sisters for Life* is distinguishable on a number of other grounds as well. "Notably, neither set of parties sought an evidentiary hearing and neither claim[ed] that any material disputes of fact underlie the case." 56

F.4th at 403. Consequently, none of the factual conclusions made by the Sixth Circuit were supported by live testimony. Also, plaintiffs were not permitted to rely on the conclusions in *Hill* because, unlike the defendant in this case, they did not rely on the reasoning in *Hill*. *Id.* at 408. Moreover, unlike this case (where the Parties stipulated, and the Courts below ruled, that the City of Englewood's Buffer Zone Ordinance is content neutral), content neutrality appears to remain an issue in *Sisters for Life*. *Id.* at 404.

The Sixth Circuit's decision in *Sisters for Life* illustrates the folly of Petitioner's argument that the size of a buffer zone is immaterial. *See Sisters for Life*, 573 U.S. at 407:

> That the buffer zone in *McCullen* was larger does not change things. That decision does not create distinct sets of rules for a 35-foot buffer zone near an entrance, a 10-foot buffer zone near an entrance, and all manner of buffer zones in between.

That cannot possibly be. Of course, the distance at which a sidewalk counselor can talk to a patient in a conversational tone depends on the size of a buffer zone. If it is 8 feet, it can generally be done. In contrast, if the distance is 35 feet, it is by no stretch of the imagination possible.

Notably, Petitioner makes no reference to the history of the *Sisters for Life* case on remand. Applying the Sixth Circuit's law of the case doctrine, the District Court concluded that the Sixth Circuit's decision in *Sisters for Life* was not law of the case because the decision was not ruling on an issue of law "with the benefit of a fully developed record" and was issued under time pressures related to the circumstances of the preliminary injunction. *Sisters for Life, Inc. v.*

*Louisville-Jefferson Cty. Metro Gov't*, 2024 WL 1361924 (W.D. Ky. Mar. 30 2024). Therefore, the District Court said it was "not bound by the Sixth Circuit's free speech merits analysis". *Id.* at 20. The District Court conducted an evidentiary hearing on May 30, 2024 and has requested additional briefing. *Sisters for Life, Inc. v. Louisville-Jefferson Cty. Metro Gov't*, No. 3:21-CV-367-RGJ, ECF No. 144.

## The Third Circuit's Decision Is Not In Conflict With *McCullen.*

Petitioner argues that the Third Circuit's decision in this case is in conflict with this Court's decision in *McCullen*. Pet. at i, 16-32, 34. What is in conflict with *McCullen* is Petitioner's strained interpretation, and misapplication, of that case to the very different situation presented in this case.

**Buffer Zones.** Petitioner's argument would essentially outlaw buffer zones. *See, e.g.,* Pet. at 2 (the Third Circuit held that the City of Englewood's buffer zone was constitutional because it "took a smaller bite out of the First Amendment" than the buffer zone involved in *McCullen*); *Id.* at 19 ("*McCullen* stands for the proposition that where there are alternative ways of dealing with purported problems that would not entail the use of *any* buffer zone, even a relatively small buffer zone is impermissible.") (emphasis in the original). In her testimony at trial, Petitioner made her absolutist position about buffer zones clear:

> Q. Do you think it's good to be within 3 feet of a patient going into a clinic?
>
> A. It's okay to be 3 feet within – of a patient going in a clinic?

Q. 1 foot?

A. It's okay to be 1 foot.

Q. And most of the patients going to the clinic are young women?

A. Most.

Q. So vulnerable?

A. Yes.

3d Cir. Rec., Doc. 13-1, Appx 122-23, Trial Transcript.

This position is contrary to *McCullen,* where this Court clearly recognized the value of buffer zones: "This Court has previously recognized the legitimacy of the government's interests in 'ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.'" 573 U.S. at 486 (emphasis added) (citing *Schenck*, 519 U.S. at 376 and *Madsen*, 512 U.S. at 767-68). "The buffer zones clearly serve these interests." *McCullen*, 573 U.S. at 486-487 (emphasis added). The Court in *McCullen* then distinguished the facts in that case because "the [35-foot] buffer zones impose serious burdens on petitioners' speech" since they "carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways" and "thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling." *Id.* at 487.

In *Hill*, this Court addressed particularly the value of buffer zones in the context of a smaller (eight-foot) buffer zone, as exists in this case: The state's interest in protecting the health and safety of its citizens "may justify a special focus on unimpeded access to

health care facilities associated with confrontation protests. *** [A]s with every exercise of a State's police powers, rules that provide specific guidance to enforcement authorities serve the interest in evenhanded application of the law." 530 U.S. at 715. *See also Id.* at 729:

> [T]he statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8–foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself. *** The 8–foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8–foot gap with ease.

The District Court in *Turco* correctly determined that the buffer zones serve the foregoing interests by creating an unobstructed pathway for patients to enter the MMA clinic without confrontation. Pet. App. 38a. *See also* the Third's Circuit's affirming Decision. Pet. App. 7a.

Consistent with bedrock principles of federalism, governmental entities have "great latitude under

their police powers to legislate as to the protection of the lives and health of all persons", *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985), as the City of Englewood did in this case. *See also United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330-342-43 (2007) (States have a significant interest in protecting the health, safety, and welfare of their residents).

**Time, Place, and Manner Restrictions.** Even in a public forum, States can protect the public's safety by imposing reasonable restrictions on the time, place, or manner of protected speech as long as the restrictions are both content neutral and narrowly tailored to serve a significant governmental interest. *McCullen*, 573 U.S. at 486. The City of Englewood's Buffer Zone Ordinance is both content neutral and narrowly tailored.

In this case, the Parties have stipulated that the Buffer Zone Ordinance is content neutral. *See* November 14, 2014 District Court Opinion (Pet. App. 97a) ("Importantly, the parties agree that the Ordinance is content-neutral."); August 19, 2019 Third Circuit Opinion (Pet. App. 61a) ("The parties also agree – as do we – that the restrictions imposed are content-neutral . . ."); August 12, 2022 District Court Opinion (Pet. App. 37a) ("The parties also agree that the restrictions imposed are content-neutral – the Ordinance impacts the speech of those who support abortion as well as those who oppose it."); January 31, 2024 Third Circuit Opinion (Pet. 6a) ("We have already held – and the parties agree – that the restrictions imposed are content-neutral."). *See also 303 Creative LLC v. Elenis*, 600 U.S. 570, 587-88 (2023) (relying on the parties' stipulations as to free speech issues). Moreover, *McCullen*'s conclusion that the statute involved in that case was content neutral

(573 U.S. at 479-85) reinforces the fact, stipulated by the Parties, that the Ordinance in this case is content neutral. Content neutrality is not an issue before the Court in this case.

Petitioner argues that the Third Circuit's approach in this case flies in the face of *McCullen* because "*McCullen* states that when a speech restriction makes it 'more difficult' (not *substantially* burdensome) to engage in one-on-one communication and leafletting, narrow tailoring applies, and the government must prove both narrow tailoring and that measures less restrictive than regulating speech would not have adequately furthered the government's interests." Pet. at 18. Quite to the contrary, this Court said the following in *McCullen*:

> For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden <u>substantially</u> more speech than is necessary to further the government's legitimate interests." <u>Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests.</u> But the government still "may not regulate expression in such a manner that a <u>substantial</u> portion of the burden on speech does not serve to advance its goals."

573 U.S. at 486 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 788-89 (1989)). Contrary to Petitioner's argument (Pet. at 12-13), it follows that, as the Third Circuit held in this case:

> Where "the burden on speech is de minimis, a regulation may be viewed as narrowly tailored" as "any challengers would struggle to show that 'alternative measures [would]

> burden substantially less speech.'" By contrast, where the burden is substantial, the City needs to show that it seriously considered substantially less restrictive alternatives.

Pet. App. 12a (emphasis in the original; citation omitted).

Petitioner cites *Frisby v. Schultz*, 487 U.S. 474 (1988) for the proposition that a statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy. Pet. at 11. Notably, *McCullen* does not cite *Frisby* – and for good reason. Not only is *Frisby* inconsistent with *McCullen*'s "substantiality" requirement but *Frisby* is a residential speech case involving a homeowner where the applicable standards are different.

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which Petitioner relies on for the proposition that there is no *de minimis* exception for a speech restriction which lacks sufficient tailoring or justification (Pet. at 13), is a commercial speech case. So too is *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002), which Petitioner relies on for the proposition that if the City could achieve its interests in a manner that does not restrict speech, or that restricts less speech, it must do so (Pet. at 31). *See also United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) (Pet. at 18). The *Turco* case is not a commercial speech case.

Petitioner also argues that the Third Circuit erred in comparing the size of the Ordinance's fixed buffer zones with "injunctive fixed buffer zones" that this Court approved in *Schenck* and *Madsen*. Pet. at 14-15. However, as the District Court correctly noted in this case:

> [T]he buffer zones in *Schenck* and *Madsen* were created under injunctions, rather than statutes, and thus are assessed under a different, albeit more stringent standard. *** Even so, under a stricter standard, the Supreme Court found that both zones pass muster under the First Amendment.

App. 10a n.38.

**Alternatives to a Buffer Zone.** The District Court held, in the alternative, in this case that: "Even assuming that the burden on Plaintiff's speech is substantial, this Court is satisfied that Englewood has "'show[n] that it tried or 'seriously considered[] substantially less restrictive alternatives.'" Pet. 44a (citations omitted). The City "did not avail itself of any of these less restrictive alternatives, but that alone is not dispositive. The testimony from City officials credibly showed that they considered some of these alternatives but ran into the same problems that would render all of the *McCullen* alternatives less effective . . . ."[1] Pet. 45a (citation omitted). "City officials were entitled to consider these obstacles while crafting a solution, and they were not required to 'meticulously vet every less burdensome alternative,' particularly where the situation at MMA required urgent action and the chosen solution created a much safer solution for all parties." Pet. App. 46a (citations omitted).

The Third Circuit affirmed on this point. "Because we agree with the District Court that the burden on Turco's speech is not substantial, our inquiry can end there. Even so, we agree with the District Court that

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[1] *See also* Statement of the Case, Alternatives to an Eight-Foot Buffer Zone.

the City properly tried and considered less restrictive alternatives." Pet. App. 12a-13a. Lynn Algrant, the President of Englewood City Council, and Timothy Dacey, the City Manager for Englewood, "testified extensively about alternatives considered by the City." Pet. App. 13a.

Rather than address the District Court's meticulous Findings of Fact, Petitioner relies on snippets of testimony taken out of context and disregards the gravamen of the District Court's findings. For example, Petitioner argues that the City allegedly could not afford $100 an hour to pay for a few hours of police presence on Saturday mornings. Pet. at 5. However, Petitioner fails to mention that the District Court found that having a regular police presence stationed at MMA on Saturday mornings would, among other things, negatively impact the City's ability to address crime and rebuild after Hurricane Sandy; that the City was "short on cash"; that "there were more vacancies [in the police department] than there should have been," and that the department was "too strained," as the City "had problems with shootings, drive-by shootings, drug issues, [and] gang issues," unlike most other towns in Bergen County. Pet. App. 23a-24a (emphasis added) (citing the trial testimony of then City Council President Algrant and then City Business Manager Dacey). *See also* Pet. 13a-14a (Third Circuit's comments regarding the District Court's Findings of Fact).

**Overbreadth.** Petitioner argues that the Third Circuit's Decision in this case conflicts with *McCullen* regarding overbreadth. Pet. at 23. However, this Court expressly said in *McCullen* that it was not addressing the issue of overbreadth. 573 U.S. at 496 n.9 ("Because we find that the Act is not

narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners' overbreadth challenge."). Rather, Petitioner relies on the *a priori* statement in *McCullen* (Pet. at 23) that: "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrow tailored solution." 573 U.S. at 493 (emphasis added).

In doing so, Petitioner ignores the well-established body of Supreme Court law addressing overbreadth in the context of First Amendment issues – both before and after *McCullen*. For example, Petitioner cites *United States v. Stevens*, 559 U.S. 460 (2010) (Pet. at 25), but fails to address what this Court had to say about overbreadth in that case: "In the First Amendment context, . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 473 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n. 6 (2008))." *See also Stevens*, 559 U.S. at 485 (J. Alito, dissenting):

> In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. *** Accordingly, we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists.

(emphasis added) (citing *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)). Further, this Court held in *United States v. Williams,* 553 U.S. 285, 293 (2008) that: "Invalidation for overbreadth is strong medicine that is not to be casually employed."

Subsequent to *McCullen*, this Court said the following about overbreadth in *United States v. Hansen*, 599 U.S. 762, 770 (2023), a First Amendment case: A challenger must demonstrate that the statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." (citing *Hicks*). Quoting *Williams*, this Court further noted that "[b]ecause it destroys some good along with the bad, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed'". *Id.* "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Id.* Petitioner does not cite *Hansen*.

The District Court and the Third Circuit in this case properly applied the foregoing overbreadth law, citing the testimony elicited at trial. *See* Pet. App. 46a-48a;[2] Pet. App. 14a-16a. What this Court said in *Hill* about overbreadth is consistent with these decisions:

> The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. *** Here, the comprehensiveness of

[2] *See also* Statement of the Case, Overbreadth.

> the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.

*Hill*, 530 U.S. at 730-31. The City of Englewood's Buffer Zone Ordinance's sweep is both modest and legitimate. It regulates the places in which interactions may occur in order to protect public safety and health care access at the covered health care facilities, without interfering with First Amendment activities. Petitioner has failed to sustain her heavy burden of showing that the Ordinance, when judged in relation to that legitimate sweep, is unconstitutional in a substantial number of its applications. Indeed, had the City of Englewood limited the scope of its Buffer Zone Ordinance to abortion clinics, it would no doubt be challenged as not being content neutral.

**The *Dobbs* Decision Is Readily Distinguishable And Is Not Controlling.**

Petitioner's reliance on the *Dobbs* decision, which is cited multiple times throughout her Petition, is misplaced. *Dobbs* is an abortion case, not a First Amendment case (like this case). In fact, the *Dobbs* majority Opinion explicitly "emphasize[d] that our decision concerns the constitutional right to abortion and no other right" and that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." 597 U.S. at 290 (emphasis added). Moreover, the language that "[t]he Court's abortion cases have . . . distorted First Amendment doctrines", quoted by Petitioner (Pet. at 32), cites only two dissenting opinions in *Hill*. *Id.* at 2275-76.

Similarly, Petitioner relies on dissents in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596

U.S. 61, 83-106 (2022). Pet. at 32-33. *City of Austin* is a case about signage that focused on the issue of content neutrality. This is not an issue that is raised by Turco in her Petition for Writ of Certiorari as the parties have stipulated that the City of Englewood's Buffer Zone Ordinance is content neutral. The fact that the majority in that case expressly declined to engage with the dissent's attack on *Hill* regarding content neutrality (Pet. at 33) is not significant to this case.

**The District Court's Decision In This Case Was Not Erroneous And Is Consistent With Supreme Court Precedents And Common Sense.**

The District Court did not error in its conclusions of law. First, the District Court correctly held that Petitioner was not substantially burdened by the buffer zones, which were, at best, tangential to her method of sidewalk counseling and from which she obtained favorable results. Secondly, assuming *arguendo* that the burden on Petitioner's speech was not minimal, the District Court correctly held, in the alternative, that the City seriously considered less restrictive alternatives.

**Certiorari Was Recently Denied In A Case Involving Similar Issues.**

*Price v. City of Chicago*, 915 F.3d 222 (4th Cir. 2015) involves issues similar to those involved in this case, including the validity of time, place, and manner restrictions in a similar context. *Price* also involved content neutrality issues that are not involved in this case. Petitioner cites *Price* (*see* Pet. at 12-13, 36), without, however, noting its subsequent

history – *i.e.*, that certiorari was denied by this Court just four years ago. 141 S. Ct. 185 (July 2, 2020).

## ***HILL v. COLORADO*** **SHOULD NOT BE OVERRULED.**

Certiorari should not be granted in this case. Even if it were to be granted, however, this case is not an appropriate vehicle to overturn *Hill*.

Petitioner argues that "*Hill* was all but abandoned the day after it was decided" and that "[i]n the 24 years since *Hill* was decided, this Court has never applied *Hill*'s reasoning in any meaningful way in any subsequent decision." (Pet. at 32). This is not so.

In *United States v. Williams*, 553 U.S. 285 (2008), one of the leading overbreadth cases recently decided by this Court (none of which Petitioner cites),[3] Justice Scalia cited *Hill*, eight years after it was decided, as setting the current standard for vagueness:

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado***,** 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) . . . .

553 U.S. at 304.

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[3] *See* Reasons for Denying the Petition, Overbreadth.

In a concurring opinion in *Johnson v. United States*, 576 U.S. 612 (2015) nine years ago, Justice Thomas described *Hill* as setting forth the vagueness "doctrine we have developed". *Id.* at 612. Although critical of the doctrine, Justice Thomas noted that it was embedded in the law. "Using this doctrine, we have nullified a wide range of enactments." *Id.* at 612-13. Overruling *Hill* would upset this established body of law.

More particularly, *Hill* has been cited by Circuit Courts to support statutory measures restricting the location of demonstrations near funerals. Both before and after *McCullen,* such courts have explicitly relied on *Hill* because of the similarity between individuals attending a funeral and patients attending a health facility. *See, e.g., Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017), *cert. denied,* 583 U.S. 997 (2017):

> We have "conclude[d] that mourners attending a funeral . . . share a privacy interest analogous to those which the Supreme Court has recognized for individuals in their homes . . . and for patients entering a medical facility."

*Id.* at 693 (citing *Hill*, 530 U.S. at 717). *See also Phelps-Roper v. Ricketts*, 539 F.3d 356, 364 (6th Cir. 2008) (citing *Hill*).

Contrary to Petitioner's argument, it is not true that *McCullen* "ignored *Hill"*. Pet. at 33. The Court in *McCullen* cited *Hill* on the second page of its Opinion, and not unfavorably: the Massachusetts statute "was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)." *McCullen*, 573 U.S. at 470 (emphasis added). In fact, that Massachusetts statute created a six-foot no-approach

zone (within an 18-foot area) and was sustained by the First Circuit Court of Appeals, relying on *Hill*. *Id.* at 470-71. *See McGuire v. Reilly*, 386 F.3d 45 (2004) (*McGuire II*), *cert. denied,* 544 U.S. 974 (2005). Petitioner further argues that the City of Englewood's Buffer Zone Ordinance was modeled after the law in *McCullen,* but that ignores the uncontested trial testimony by then Council President Algrant that the Ordinance in *Turco* was modeled after *Hill* in terms of the size of the buffer zone. 3d Cir. Rec., Doc. 13-1, Appx 188, Trial Transcript. In contrast, after the Massachusetts statute was amended in 2007 to create "a 35-foot fixed buffer zone from which individuals are categorically excluded" (573 U.S. at 471), *McCullen* involved an extraordinarily large buffer zone where the principles enunciated in *Hill* in the context of an eight-foot bubble zone (like the eight-foot buffer zone here) had limited applicability.

Englewood's Ordinance is constitutional under well-established First Amendment principles. The Ordinance is a narrowly drawn regulation of the manner and place of speech – not of its content – that serves legitimate government interests and goes no further than necessary in restricting expression. Petitioner's citation to *Hill* suggesting that offensive speech may not be protected (Pet. at 33-34) is misplaced. The content of speech is not an issue in this case.

As the Parties have stipulated (and the Courts below have agreed), the City of Englewood's Buffer Zone Ordinance is content neutral. Content neutrality is not a Question Presented in Turco's Petition for Writ of Certiorari.

On the record developed at trial in this case, the City of Englewood's Buffer Zone Ordinance is narrowly tailored under *McCullen*. A fundamental difference between the facts in *McCullen* and the facts in this case is that in *McCullen* this Court found that Massachusetts "[ha[d] available to it a variety of approaches that appear capable of serving its interests", but that the State offered little evidence demonstrating that it considered such alternatives. 573 U.S. at 494-95. In contrast, the District Court in this case held, based on the witness testimony at trial, that "testimony from City officials *credibly* showed that the City had considered such options, but identified problems that would render all of the *McCullen* alternatives less effective." Pet. App. 45a (emphasis added).

It should also be noted that this case involves the application of established law to particular facts. *McCullen* and *Hill* both applied the intermediary scrutiny standard for content-neutral speech restrictions, but reached different results because of the markedly different facts of the two cases. As the Third Circuit correctly concluded, the Buffer Zone Ordinance in this case is plainly distinguishable from the 35-foot buffer zone Ordinance invalidated by this Court in *McCullen* – it is a "substantial distinction". Pet. App. 10a. The buffer zone in *McCullen* "carved out a significant portion of the adjacent sidewalks and required counselors to stand "well back" from the clinic, "prohibit[ing] McCullen and her colleagues from effectively engaging in sidewalk counseling either verbally or by handing literature to patients." 573 U.S. at 163-64. In contrast, Petitioner Turco is still able to meet patients anywhere outside the eight-foot buffer zone and there is no prohibition against her engaging in the one-on-one conversations

that are central to her sidewalk counseling. Pet. App. 41a.

*Hill* provides guidance that is helpful and instructive in a case such as this, where the buffer zone is only eight feet and not four and a half times larger as in *McCullen*. The observation in *Hill* that an eight-foot restriction leaves ample room to communicate a message through speech is not a legal conclusion, as Petitioner contends. Pet. at 34. It is a practical observation, based on common sense. Like the Ordinance in *Hill*, the Ordinance in this case imposed minimal burdens on protected speech and left open ample avenues for sidewalk counselors to convey their message.

Also, it is not necessary to address *Hill* to affirm the holdings of the Courts below that the City of Englewood's Buffer Zone Ordinance is not overbroad. These decisions, which are fact-based, are supported by a long line of Supreme Court decisions, both pre- and post-*McCullen*, which Petitioner does not address.

Petitioner argues that <u>this Court</u> has accurately described *Hill* as a distortion of First Amendment doctrines, has directly criticized *Hill*, and has placed *Hill* on its deathbed. Pet. at 32-33. However, this represents only the view of a <u>minority</u> of Justices.[4] Petitioner should heed the comments of *Agostini v. Felton*, 521 U.S. 203 (1997) (which Petitioner relies on as a basis for granting her Petition) (Pet. at 32). In that case, this Court held that the views of <u>five</u> Supreme Court Justices that *Aguilar v. Felton*, 473 U.S. 402 (1985) should be reconsidered or overruled

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[4] *See* Reasons for Denying the Petition, The *Dobbs* Decision Is Readily Distinguishable And Is Not Controlling.

could not be said to have effected a change in the law where the question of *Aguilar*'s propriety was not before the Supreme Court in the case in which the Justices expressed such views. 521 U.S. at 217. *A fortiorari*, that is the case here.

Finally, Petitioner's argument that lower courts are "forced" to apply *Hill* in cases before them (Pet. at 35-36) is overstated. First of all, *Hill* is the law and can be applied compatibly with *McCullen*. Secondly, the Second Circuit in *Vitagliano v. Cty. of Westchester*, 71 F.4th 130 (2d Cir. 2023) – one of the Courts cited by Petitioner (Pet. at 36) – was fine with applying *Hill*; it was plaintiff who objected. *Id.* at 136. This Court denied certiorari in *Vitagliano*. 144 S.Ct. 486 (2023).

*Hill* should not be overruled.

## **CONCLUSION**

Turco's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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