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 to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent Englewood's buffer ordinance creates zones on public sidewalks in which Petitioner Turco can neither speak nor distribute literature to her intended audience, no matter how peacefully. Outside of the context of injunctions targeting particular alleged malefactors, this Court has *never* sustained such a flagrant denial of the right to free speech on a public sidewalk. Quite the contrary:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. . . . Here, the ordinance as construed and applied prohibits [such communication]. As such, *it cannot be sustained*.

Jamison v. Texas, 318 U.S. 413, 416 (1943) (citations omitted; emphasis added).

The decision below conflicts both with this Court's precedent and with the decisions of other circuits. Furthermore, both the decision below and Respondent's arguments rely heavily on the discredited—but not yet overruled—decision of *Hill v. Colorado*, 530 U.S. 703 (2000). This case further illustrates why the time has come for this Court formally to overrule *Hill*. This Court should grant the petition and reverse the Third Circuit.

ARGUMENT

I. The City Must Justify the Burden that the Ordinance Places on Speech.

The City embraces the view that one has the right to *no more* ***speech*** than necessary, which is the reverse of the governing First Amendment rule that the government may impose *no more* ***restrictions on speech*** than necessary. Respondent thus spends considerable effort arguing that the burden on Turco's speech isn't all that much. This topsy-turvy approach reflects the Third Circuit's mistaken holding that restrictions on peaceful speech in public places are permitted unless they impose "substantial" burdens. Pet.App.8a, 9a, 11a. But the buffer zones inherently make it "more difficult" for Turco to engage in core protected speech, i.e., one-on-one communication and leafletting, and that difficulty "imposes an especially significant First Amendment burden" as a matter of law. *McCullen v. Coakley*, 573 U.S. 464, 489 (2014). That Turco can still reach some women some of the time despite the buffer zones does not change that. "Narrow tailoring turns on whether a law sweeps more broadly than necessary, not on whether its yoke is heavy or light." *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400, 407 (6th Cir. 2022).[1]

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[1] Respondent points out that another sidewalk counselor, Rosemary Garrett (a non-party), "was able to counsel patients even when the buffer zone was there." BIO 7 (quoting district court). But as Respondent acknowledges, Garrett "remains stationary," *id.*, so she has no occasion to encounter the buffer zones.

The district court observed that the buffer zones have resulted in "some obstruction" and "some difficulty" to Turco's ability to reach patients "at least 50 percent of the time." Pet.App.36a. That suffices to demonstrate that the Ordinance burdens Turco's speech. And that burden requires the City to prove that the Ordinance is narrowly tailored. *See McCullen*, 573 U.S. at 476 (because the challenged law "restricts access to traditional public fora" it "is therefore subject to First Amendment scrutiny"); *Sisters For Life*, 56 F.4th at 407 (observing that under *McCullen*, 573 U.S. at 489, the "narrow tailoring [requirement] takes effect '[w]hen the government makes it more difficult to engage in' speech"). Under the Third Circuit's erroneous understanding of this Court's speech jurisprudence, burdening speech "at least 50 percent of the time" is not enough to require the City to show its legislation is narrowly tailored.

The City argues that the Third Circuit's threshold "substantial burden" inquiry comes directly from *McCullen*. BIO 21–22. But, neither *McCullen* nor any other decision of this Court holds that narrow tailoring is only triggered when a plaintiff demonstrates a *substantial* burden on her speech. As the Sixth Circuit held, "[o]nce a buffer zone burdens speech, *McCullen* demands narrow tailoring." *Sisters For Life*, 56 F.4th at 407. The City confuses what *triggers* narrow tailoring with what narrow tailoring *requires*. To be narrowly tailored, a content-neutral regulation of speech "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen*, 573 U.S. at 486. The government must satisfy that standard when it restricts speech in a content-neutral fashion. *See*

United States v. Playboy Entm't Grp., 529 U.S. 803, 816 (2000) ("[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). In other words, "substantial" in *McCullen* and this Court's other speech cases refers to the *scope* of the restriction (more is bad), not the *weight* of the restriction. Here, because the City forbids all speech by non-exempt speakers within the buffer zones, it must prove that the restriction is narrowly tailored. In fact, the Ordinance does more than restrict speech, it *criminalizes* it. *See* Englewood City Code § 307-4, *available at* https://perma.cc/AC9B-8NS3 (fine of up to $1,000, up to 90 days in jail, or both).

II. The Ordinance Fails Narrow Tailoring.

The City quotes the district court as saying that the Ordinance was adopted 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." BIO 2 (quoting Pet.App.27a). But Turco undisputedly is *not* a protestor, *see McCullen*, 573 U.S. at 466 ("petitioners are not protestors"); and yet her peaceful, quiet speech has now been criminalized within the buffer zones, even though the City has never contended her activities (or that of other sidewalk counselors) created any of the problems the Ordinance was adopted to address. Whether a buffer zone remedies a problem of allegedly unruly protestors is no more relevant than whether a leafletting ban remedies the problem of litterers. *See Schneider v. State*, 308 U.S. 147, 162 (1939). Narrow tailoring requires narrow

tailoring, not sacrificing unproblematic speech for the sake of getting at problematic speakers. Turco's quiet, intimate speech cannot, at least without difficulty, take place while navigating speech-free zones on the public sidewalk. Turco's desire to speak closely with a patient (*see* Pet.App.109a) is integral to the quiet manner in which she wishes to address her audience. *See Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 790–91 (1988) ("speakers, not the government, know best both what they want to say and how to say it"). Yet, to address the conduct of an identifiable group of protestors, the City has declared *verboten* not just Turco's speech, but the speech of *all non-exempt persons* who wish to enter or remain in a speech-free zone anywhere within the City.

Of a piece with this baby-and-bathwater approach is the City's defense of the breadth of the Ordinance (covering all health care and transitional facilities) by relying on the testimony of the former city council president who testified about the *potential* for protests outside transitional housing. BIO 12–13. That is just as speculative as the city manager who testified that "protests can pop up any day for any reason anywhere." Pet.App.46a. Because the City has never come forward with evidence of protests outside any facility other than MMA, such speculation can hardly support a regulation of speech as narrowly tailored. *See United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it . . . must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact

alleviate these harms in a direct and material way.") (citation omitted).

The City points out that *McCullen* did not address an overbreadth challenge. BIO 24–15. Turco also emphasized that point, Pet.25, but the City fails to grasp the significance. *McCullen* held that "[f]or 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 narrowly tailored solution*." 573 U.S. at 493. Here, the City authorized buffer zones outside every health care and transitional facility in the City (and began creating those zones after the Ordinance was adopted) even though the City only faced actual problems outside one facility for a few hours once a week. The City cannot explain how the Massachusetts law was not narrowly tailored in *McCullen* but that the Ordinance here is.

III. The Decision Below Conflicts with the Sixth Circuit's Decision in *Sisters For Life*.

The City does not dispute that the Sixth Circuit's narrow tailoring analysis in *Sisters For Life* conflicts with that of the court below; in fact, the City disparages its reasoning. BIO 16. The City emphasizes instead that *Sisters For Life* involved a preliminary injunction, not a final judgment. But the Sixth Circuit articulated a narrow tailoring framework, based squarely on *McCullen*, that will not (and cannot) change on remand. In other words, further litigation will not alter what the Sixth Circuit held—in square conflict with the Third Circuit here—on how narrow

tailoring is to be understood and applied in the context of speech-suppressing buffer zones.

As for the unpublished nature of the most recent appellate decision in this case, Pet.App.A (*Turco II*), that too is irrelevant for two reasons. First, this Court has reviewed unpublished decisions in the past. *See, e.g.*, *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."). Second, *Turco II* involves a direct application of past decisions of the Third Circuit, including the *published* opinion in *Turco v. City of Englewood*, 935 F.3d 155 (3rd Cir. 2019) (*Turco I*). Pet.App.E. *Turco I* conflicts with *McCullen* and *Sisters For Life* as much as *Turco II*.

IV. The Decision Below Conflicts with *McCullen*'s Less Restrictive Means Analysis.

The City argues there is no conflict between *McCullen* and the decision below. Incorrect.

The City does not dispute that before the Ordinance was adopted, it did not prosecute any wrongdoers outside MMA, seek injunctive relief against any bad actors (despite documentation of who they were and what they did), or consider the legislation of any jurisdiction facing similar issues—other than Massachusetts and its law subsequently declared unconstitutional by this Court in *McCullen*.

The City, like the courts below, responds that none of this matters because the City was "short on cash" and facing crime issues, so the City therefore supposedly couldn't pursue less restrictive

alternatives to suppressing speech. BIO 24. That sounds like a free pass for many urban areas. The City says that because "victims" of the protestors were unwilling to file complaints, the police could not enforce the laws against bad actors. BIO 12. But instead of *attempting* to allocate funds for police presence at MMA on one morning of the week or finding a way for victims to file complaints without using their home address, the City adopted *an additional law* that, like other laws, requires police enforcement. Respondent's argument is self-contradictory: if it (allegedly) cannot enforce laws against obstruction, harassment, disorderly conduct, etc., how can it enforce the buffer zones? Even assuming the Ordinance "had its desired effect" of addressing congestion and patient safety outside MMA, BIO 4, it has done so at the expense of the speech rights of Turco and others. The government may not suppress speech "for mere convenience." *McCullen*, 573 U.S. at 486.

The City says that had the City "limited the scope of its Buffer Zone Ordinance to abortion clinics, it would no doubt be challenged as not being content neutral." BIO 27. This argument essentially concedes that the City was only interested in protecting a particular abortion facility (and swept in other locations purely for show). Moreover, the City's fear is unfounded: the law in *McCullen* did not apply to all health care facilities, only to "reproductive health care facilit[ies]," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." 573 U.S. at 471 (quoting statute). The Court nevertheless held that the law was content-neutral, though unconstitutional. *Id*. at 485.

The City says that Turco's citations to *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001), and *Thompson v. W. States Med. Cir.*, 535 U.S. 357, 371 (2002), are misplaced because those are commercial speech cases. BIO 22. But if the "Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993), then what this Court said in *Lorillard* ("[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification") and *Thompson* (if the government "could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so") must apply with greater force to Turco's noncommercial speech.

Finally, the buffer zones approved in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), do not help the City. BIO 22–23. Those were *injunctions*, which apply only to those persons bound by them and who were found to have breached some relevant legal duty. A buffer zone ordinance, by contrast, applies to *all* persons, no matter their conduct or intentions. "[I]njunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The [Ordinance], by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech." *McCullen*, 573 U.S. at 492–93. Comparing the size of a buffer zone created under an injunction to one enacted by the government, as did the Third Circuit, is an erroneous endeavor. Pet.App.10a.

V. This Court Should Overrule *Hill*.

The City offers paltry arguments why this Court should not overrule *Hill*. It does not offer any principled defense of *Hill*'s reasoning; nor does it respond to Petitioner's arguments about the irreconcilable conflict between *McCullen* and *Hill*. Pet.33–35. It states that only a "minority of Justices" have criticized *Hill*, BIO 33, but the *majority* opinion in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022), flatly contradicts that. The City says that *McCullen* didn't ignore *Hill*, but *McCullen* only noted that the challenged law "was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*." BIO 30 (quoting *McCullen*, 573 U.S. at 470). That is not an application of *Hill*'s reasoning. *McCullen* did not rely on *Hill* in addressing the merits of the case.

The Court's citation to *Hill* in *United States v. Williams*, 553 U.S. 285, 304 (2008), can hardly be described as a meaningful application of *Hill*. BIO 29. That statement is nothing more than a reiteration of black-letter law on vagueness doctrine that predates *Hill*. *Williams* not only cites *Hill* but also *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972), a decision that this Court has cited time and again—unlike *Hill*. Overruling *Hill* would therefore not upset this Court's vagueness doctrine, as the City suggests. BIO 30.

That this Court declined review in *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), and *Vitagliano v. Cty. of Westchester*, 71 F.4th 130 (2d Cir. 2023)—involving laws modeled on the law at issue in *Hill*—is irrelevant. BIO 28–29, 34. There could be any number

of reasons why the Court declined review, including that in *Vitagliano* the law was repealed after the petition was filed. Pet.36. The court in *Vitagliano* was not just "fine with applying *Hill*," as the City states, BIO 34, it had no choice: "the County's bubble zone law is materially identical to the Colorado law the Supreme Court previously upheld in *Hill*." 71 F.4th at 135. What is noteworthy is that these petitions keep on coming, and will keep on coming, until this Court officially inters *Hill*. Indeed, yet another petition raising the issue of overturning *Hill* has already appeared on this Court's docket. *See Coalition Life v. City of Carbondale*, No. 24-57 (U.S. July 16, 2024).

In addition, as explained by petitioner in *Coalition Life*, numerous states and localities have *Hill*-like laws on the books, including San Diego, California, which recently reenacted an 8-foot bubble zone ordinance. *Coalition Life,* Pet. at 30–31. Until this Court overturns *Hill*, a "distort[ion]" of "First Amendment doctrines," *Dobbs*, 597 U.S. at 287 & n.65, that is "patently incompatible with the guarantees of the First Amendment," *Hill*, 530 U.S. at 741 (Scalia, J., dissenting), these laws remain unassailable, at the cost of the speech they silence.

If the courts in this case were faithful in applying *McCullen* they would have used *Hill* in the same manner as *McCullen*: *not at all*. Instead, despite *McCullen*'s clear application to this case, the courts used *Hill* to undermine *McCullen*'s narrow tailoring analysis—an analysis that cannot be squared with the distorted one used in *Hill*. Pet.33–35. This Court should not allow the court below to sap the decision in *McCullen* of value, especially by invocation of a

decision this Court has itself criticized and *de facto* abandoned.

Hill was and is a distortion of First Amendment principles. So long as it remains precedent it will continue to undermine the free speech rights of persons like Jeryl Turco who wish to share a message of immediate and public concern. This Court should grant the petition and place "a tombstone" on *Hill* "that no one can miss." *Loper Bright Enters. v. Raimondo*, 219 L. Ed. 2d 832, 870 (2024) (Gorsuch, J., concurring).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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