No. 19-1184

In the
Supreme Court of the United States

NIKKI BRUNI, *et al.*,
Petitioners,
v.
CITY OF PITTSBURGH, PA., *et al.*,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL FOUNDATION, THE PACIFIC JUSTICE INSTITUTE, AND CONCERNED WOMEN FOR AMERICA

in Support of Petitioners

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INTERESTS OF THE *AMICI CURIAE*[1]

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Pennsylvania, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and individuals, especially with respect to contentious issues like abortion.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of the First Amendment. Such includes civil litigation and criminal defense to vindicate the rights of free speech in public fora. As such, PJI has a strong interest in the development of the law in this area.

Concerned Women for America (CWA) is the largest public policy organization for women in

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[1] The parties received timely notice of Amici Curiae's intent to file this Brief and consented to its filing. No Party of Party's Counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than *Amici*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked-everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellants peaceably engage in one-on-one conversations with, and pass literature to, women about one of the most important decisions they will ever make—whether to kill their unborn baby. They also conduct prayer vigils. The challenged Pittsburgh ordinance bars them from doing so within 15 feet of entries to abortion clinics. The target of that ordinance is pro-life speech and assembly, and the city has enforced it—not at all healthcare clinics in the city as the ordinance on its face suggests—but only at the city's two abortion clinics, where it has painted an arc with a 15-foot radius on the sidewalk and even the road. This targeted, content-based restriction is unconstitutional both on its face and as applied, and both in its conception and in its enforcement.

Free speech still qualifies as speech when it involves abortion. The same holds true for the freedoms of assembly and the exercise of religion. All these fundamental freedoms are being practiced by the Petitioners. The fact that what motivates them to exercise these "First Freedoms" happens to be one of the most controversial issues of our day does not give Petitioners any less constitutional protection. It calls, instead, for punctilious preservation of their freedoms.

The "interpretation" finesse attempted by the Third Circuit provides no real protection, because it is inconsistent with how the challenged ordinance has been enforced by the city itself. That enforcement is targeted to restrain pro-life speech, as the legislators expressly admitted. The ordinance is also facially overbroad and adds restrictions on speech, religion, and assembly at abortion clinics when there is no demonstrated need to restrict them there any more than at any other location.

ARGUMENT

1. a. This case is not a pre-enforcement challenge to Pittsburgh's ordinance brought before it had been interpreted by local officials. The city has enforced the challenged ordinance, consistently with prior court decisions, by painting an arc with a 15-foot radius around the front doors of the two abortion clinics in the city, and only there. The city has consistently said the Petitioners violate the ordinance if they communicate their pro-life message within the arc by one-on-one conversations, by praying in groups, and by leafletting. Pittsburgh's actions are not "saved" by the Third Circuit deciding the city was misreading its own ordinance. What this Court observed in *Wood v. Strickland*, 420 U.S.

308 (1975), is just as apt here: "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement." *Id.* at 325.

b. The "saving" interpretations of the Third Circuit are strained, at best. No dictionary supports that "congregating" does not occur if only two persons are involved. *See Boos v. Barry*, 485 U.S. 312, 315 (1988) (recognizing that congregrating can involve two or more unless authoritatively construed otherwise). None says that leafletting and openly trying to dissuade a woman who plans to take her child's life cannot be classified as "protesting." None observes that holding a sign or wearing a T-shirt with a message cannot be considered "picketing." None reads that holding a prayer vigil cannot be categorized as "demonstrating." Pittsburgh certainly is not being unreasonable in disagreeing with the "limiting" interpretations of the Third Circuit, nor is it bound by them, as "it is not within [federal courts'] power to construe and narrow state laws." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) (finding that, when the challenged state law lacked a narrowing state court interpretation, the Court was "without authority to cure that defect"). The Third Circuit's gloss on the ordinance gives Petitioners no firm protection. *See City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 770 (1988) ("This Court will not write nonbinding limits into a silent state statute.").

c. To *Amici*'s knowledge, this Court has never adopted a limiting construction of a state or local law

when the state or locality itself has not offered it. Much less has this Court done so when the state or locality has actively adopted a different interpretation on the street, as Pittsburgh has done literally here. The Third Circuit stepped well outside precedent. It cannot erase the arcs the city has painted. *See Cantwell v. Conn.*, 310 U.S. 296, 302 (1940) (reviewing convictions under state law as interpreted and enforced by the state).

2. a. This Court should also accept this petition to clarify its content-neutrality precedent. It is obvious that this Court has significantly retrenched on *Hill v. Colorado*, 530 U.S. 703 (2000), both in *McCullen v. Coakley,* 573 U.S. 464 (2014), and, most recently, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (citing as authority dissenting opinions in *Hill*). This case provides a good opportunity to formalize that distancing.

b. The Third Circuit, while acknowledging that *Hill* has been restricted, proceeded to misapply *Reed*. *Reed* did, indeed, clarify that a statute that is content-discriminatory on its face cannot be saved because the legislature did not have an animus directed at the particular speech being discriminated against. *See* 135 S. Ct. at 2227-28. The Third Circuit used that to ignore evidence in this record that the legislature *intended* to restrict pro-life speech at abortion clinics. 941 F.3d at 88. That was error. This Court in *Reed* observed that, if the legislature acted with intent to shut down or hinder certain speech due to its content, that, too, was unconstitutional. 135 S. Ct. at 2228-30 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781,

791 (1989)). As Petitioners have amply shown, it was Pittsburgh's intent here to hinder pro-life speech, as proven in both its recorded legislative deliberations and in its enforcement of the ordinance only at abortion clinics.

c. The Petitioners are motivated in part by their religious beliefs, and Religion Clause jurisprudence provides helpful analogies. While in *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that a facially neutral law that affects a religious exercise cannot be challenged under the Free Exercise Clause, it has also repeatedly emphasized that a facially neutral law cannot be upheld when its *purpose* is to inhibit religious exercise. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Fowler v. R.I.*, 345 U.S. 67 (1953). Similarly, this Court has reversed enforcement of a local ordinance when the decision makers exhibited an open hositility to the violator's religious motivations. *See Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018). These protections apply to safeguard against content-based discrimination against free speech and assembly just as they do to safeguard religious exercise from deliberate government interference.

3. a. In rejecting the facial challenge of the ordinance, the Third Circuit contradicted itself and precedent. In finding no violation as applied, the Third Circuit simply rejected the city's reading and application of its own ordinance, giving it zero deference. 941 F.3d at 88. But when it came to the facial challenge, the Third Circuit then repeatedly professed "deference" to the city and its stated goals,

despite the obvious, expressed purpose of the legislation to "protect" women going into abortion clinics from well-meaning individuals like Petitioners who seek to discuss with them the advisability of abortion. *Id.* at 88, 91, 92. This inverts how the law works. As this Court ruled in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), "In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, *including its own implementation and interpretation of it*." *Id.* at 131 (emphasis added).

b. In any event, irrespective of the city's demonstrated purpose to hinder pro-life speech and its selective enforcement, the ordinance is overbroad. It obviously restricts speech in a tradtional public forum. The city has put forward no reason why its other ordinances that cover obstruction, breach of the peace, harrassment, and the like are not fully sufficient to handle any improper speech and assembly without imposing the additional restrictions of the challenged ordinance only around "health care facilities." *See Cantwell*, 310 U.S. at 306-07 (striking down anti-solicitation statute religious adherents violated when other state laws adequately protected against statute's goal of preventing fraud).

CONCLUSION

Speech about abortion is just that—speech. Assembly to discuss abortion is just that—assembly. The exercise of religion when involving abortion is just that—the exercise of religion. Restrictions on these fundamental rights cannot be justified by the content of the speech or the purpose of assembly or

the free exercise of religion. Nor can a buffer zone be justified by concern about the reaction of those who hear the speech. *See McCullen*, 134 S. Ct. at 2531-32; *Hill*, 530 U.S. at 716; *see also Cantwell*, 310 U.S. at 310-11.

This case is a good vehicle for the Court to reestablish these principles. The petition should be granted.

Respectfully submitted
this 29th day of April 2020,

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