No. _____

In the

Supreme Court of the United States

COLLEEN REILLY AND BECKY BITER,
PETITIONERS,
v.
CITY OF HARRISBURG, ET AL.,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioners

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

1. Whether the test for content neutrality set forth in *Hill* v. *Colorado*, 530 U.S. 703 (2000), should be overruled in light of this Court's holding in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), and *McCullen* v. *Coakley,* 573 U.S. 464 (2014), that laws restricting speech on the basis of its function or purpose are facially content-based.

2. Whether a local government can escape First Amendment liability under *Monell* even though its single enforcement of a speech-restrictive ordinance chills the petitioner from further speaking, and the government's designated Rule 30(b)(6) witnesses and its counsel repeatedly confirm through binding admissions that the ordinance operates as a content and viewpoint-based restriction.

3. Whether a federal court may disregard the unrebutted testimony of a government's Rule 30(b)(6) witnesses, corroborated by written and oral admissions of counsel, that its ordinance restricts speech based on content and viewpoint, and notwithstanding this evidence provide a limiting construction that the ordinance does not restrict speech based on content or viewpoint.

PARTIES TO THE PROCEEDINGS

Petitioners Colleen Reilly and Becky Biter were the appellants in the court of appeals.

Respondents were appellees in the court below. They are the City of Harrisburg; the Harrisburg City Council; and Eric Papenfuse, in his official capacity as Mayor of Harrisburg.

RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

Reilly v. *City of Harrisburg*, No. 1:16-cv-0510 (Aug. 23, 2018) (denying motion for preliminary injunction)

Reilly v. *City of Harrisburg*, No. 1:16-cv-0510 (Aug. 31, 2016) (denying motion for preliminary injunction)

United States Court of Appeals (3d Cir.):

Reilly v. *City of Harrisburg*, No. 18-2884 (Oct. 23, 2019) (affirming denial of renewed motion for preliminary injunction)

Reilly v. *City of Harrisburg*, No. 16-3722 (May 25, 2017) (vacating denial of initial motion for preliminary injunction and remanding)

United States Supreme Court:

Reilly v. *City of Harrisburg*, No. 19-983 (Jul 2, 2020) (denying petition for writ of certiorari)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Colleen Reilly and Becky Biter petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's memorandum disposition (App. 1a) is available at 2023 WL 4418231. The district court's memorandum opinion (App. 8a) is available at 2022 WL 906205.

JURISDICTION

The court of appeals issued its decision on July 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I.

Ordinance No. 12-2012 (the "Ordinance") provides: "No person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." Harrisburg, Pa. Mun. Code § 3-371 (2015).

STATEMENT

A. Harrisburg's Buffer Zone Ordinance

In 2012, Planned Parenthood began offering abortions at a clinic in Harrisburg, Pennsylvania. C.A. App. 98. To deal with a handful of "protestors," Planned Parenthood crafted a buffer-zone ordinance and presented it to Harrisburg City Councilman Brad Koplinski, a former abortion-rights activist. C.A. App. 152, 299–301, 309. Koplinski introduced the ordinance to the City Council, which enacted it in November 2012. C.A. App. 310–11.

The Ordinance established a 20-foot buffer zone around a "health care facility." Harrisburg, Pa. Mun. Code § 3-371 (2015). It does not define "congregate," "patrol," "picket" or "demonstrate," all of which are prohibited in the buffer zone. C.A. App. 163–64. Pursuant to the Ordinance, Harrisburg's policy vested police officers with discretion to enforce the buffer zone broadly against pro-life sidewalk counselors. C.A. App. 130–131.

B. Petitioners' Pro-Life Counseling

Colleen Reilly and Becky Biter are sidewalk counselors in Harrisburg, Pennsylvania. Petitioners offer advice and resources to women who are willing to consider alternatives to abortion. C.A. App. 985–989.

In 2014, Harrisburg police enforced the Ordinance and ordered Colleen Reilly to move her sidewalk counseling beyond the buffer zone. While Reilly was "handing out literature and talking to clients coming into the office," the police "advised [her] of * * * the

buffer zone related to the ordinance," told her that her counseling was violating the Ordinance, and "gave [her] a warning that she would be cited if she violates the ordinance in the future." C.A. App. 995. Deric Moody, the City's Police Bureau Captain and Rule 30(b)(6) witness on the "interpretation, application, and enforcement of the Ordinance," confirmed enforcement of the buffer zone by his police officer against Reilly was "the proper course" by "a very sound-minded officer." C.A. App. 132, 133–136. Since Reilly's encounter with the police, Petitioners have refrained from sidewalk counseling for fear of criminal prosecution under the Ordinance. C.A. App. 939–940, 944, 969–970, 972.

Harrisburg's statements and admissions during this litigation confirm that the Ordinance's purpose and effect is to deter pro-life speech and expression outside abortion clinics. For example, Neil Grover, Harrisburg's Solicitor, and a Rule 30(b)(6) designee on the City's interpretation, application, and enforcement of the Ordinance, testified that he was "sure" the Ordinance "prevents [Petitioners] from being in the buffer zone and doing what they want." C.A. App. 753. Grover noted that "[i]f two people were walking in the same direction and * * * they're talking * * * good morning, good afternoon, whatever, I don't know if those people would be considered congregating by any definition." App. 28a. But, "[i]f two people were talking about anything of substance," then "they're congregating" and violating the Ordinance. App. 28a. Harrisburg's 30(b)(6) witness insisted "if two persons are having a conversation walking side-by-side, moving in the same direction" within the buffer zone "*they're congregating*" if they "[are] talking about

anything of substance." App. 28a (emphasis added). Grover unequivocally stated that the Ordinance does not permit one-on-one sidewalk counseling regarding abortion inside the buffer zone. App. 39a.

Harrisburg's statements during the litigation also confirm its application of the Ordinance against sidewalk counseling. Beginning with its Brief in Opposition to Preliminary Injunction, the City confirmed that it interprets and applies the Ordinance to prohibit counseling within the buffer zone: "As in *Bruni*,[1] Plaintiffs can still engage in counseling, *just not within the small buffer zone*." D. Ct. Doc. 13-2, at 12 (emphasis added). The City argued that "Plaintiffs are adequately able to communicate their message *from outside the small buffer zone*." (D. Ct. Doc. 13-2, at 28 (emphasis added). In the Brief of Appellees, Harrisburg stated, "Plaintiffs can still engage in counseling, *just not within the small buffer zone*." C.A. App. 1043 (emphasis added). At oral argument before the Third Circuit, Harrisburg's counsel admitted that a person wishing to "hand out a leaflet that said don't go in there because this is an abortion clinic" "*would be covered*" by the Ordinance, but the same person could hand out literature about a law firm. C.A. App. 287.

Even after the district court found that "the Ordinance does not bar a single individual from walking into the buffer zone and calmly handing a pamphlet

---

[1] The prohibitions in Pittsburgh's buffer-zone ordinance at issue in *Bruni* are identical to Harrisburg's: "'No person or persons shall knowingly congregate, patrol, picket or demonstrate in [the buffer] zone…." *Bruni* v. *City of Pittsburgh*, 941 F.3d 73, 77 (3d Cir. 2019) (quoting Pitts. Code § 623.04).

to an individual," *Reilly* v. *City of Harrisburg*, 336 F. Supp. 3d 451, 463 (M.D. Pa. 2018) (*Reilly III*), the City maintained in its brief in the second appeal that Petitioners would be guilty of "congregating" if they offered a leaflet to a passerby who stopped to converse with the counselor, or if the counselor walked with the passerby in the zone (C.A. App. 1045)—both of which are essential to Petitioners' sidewalk counseling (Reilly C.A. Br. 30).

At the preliminary-injunction hearing, Harrisburg repeatedly pressed that Becky Biter "violated the buffer zone" in September 2017, when she briefly entered the zone to console a crying woman. C.A. App. 911–913, 914–917, 1026–27. Moreover, Harrisburg has never rescinded its threat to cite Petitioners for counseling within the buffer zone. Nor has the City clarified, amended or modified the Ordinance; nor has it disavowed its interpretation, application, or enforcement of the Ordinance. Reilly C.A. Br. 7.

C. Proceedings Below

Petitioners brought this action in 2016, asserting that the Ordinance facially and as applied violates the First Amendment's Free Speech clause. Petitioners moved for a preliminary injunction.

The district court denied injunctive relief. See *Reilly* v. *City of Harrisburg*, 205 F. Supp. 3d 620 (M.D. Pa. 2016) (*Reilly I*). Petitioners appealed. The Third Circuit vacated the *Reilly I* order because the district court improperly shifted to Petitioners Harrisburg's burden of proving the constitutionality of the buffer zone, and remanded to give the City "the opportunity to meet their burden of showing that the ordinance is

narrowly tailored appropriate to the government interest involved." *Reilly* v. *City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017) (*Reilly II*).

On remand, the district court held an evidentiary hearing, and denied injunctive relief. See *Reilly III*, 336 F. Supp. 3d at 451. The court employed a narrowing construction of the Ordinance and concluded that the undefined terms "congregate, patrol, picket or demonstrate" do not include sidewalk counseling. *Id.* at 459–460. The court nevertheless found that Petitioners "demonstrated that the Ordinance substantially burdens their First Amendment rights," *id.* at 471, but concluded that Harrisburg met its burden of showing the Ordinance was narrowly tailored to achieve its asserted governmental interests in preventing noise, obstruction of public sidewalks, and impeding access to clinics, see *id.* The court determined that Petitioners were unlikely to succeed on the merits of their free speech challenge. *Id.* at 471.

The district court did not address Petitioners' as-applied challenge, which was based on the City's interpretation and enforcement of the Ordinance to prohibit pro-life expression, including leafleting within the buffer zone. The district court relied on *Hill* to suggest that Petitioners' fear of prosecution for engaging in pro-life speech inside the buffer zone was "misplaced." *Id.* at 464.

Petitioners appealed the second denial of injunctive relief. The Third Circuit affirmed the district court's conclusion "that the Ordinance permitted sidewalk counseling." *Reilly* v. *City of Harrisburg*, 790 F. App'x

468, 471, 474 (3d Cir. 2019) (*Reilly IV*). The Third Circuit relied on its own recent opinion in a Pittsburgh buffer-zone case involving a substantially similar ordinance, *Bruni* v. *City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019) (*Bruni II*). *Bruni II* in turn continued the Third Circuit's practice of relying on *Hill* v. *Colorado*, 530 U.S. 703 (2000), to categorize buffer-zone laws as content-neutral speech restrictions requiring only intermediate scrutiny, despite this Court's intervening decisions in *McCullen* v. *Coakley*, 573 U.S. 464 (2014), and *Reed* v. *Town of Gilbert*, 576 U.S. 155, 169 (2015).

Finding the Ordinance "'readily susceptible' to a narrowing construction under the doctrine of constitutional avoidance," the Third Circuit concluded that "the proscribed activities—congregating, patrolling, picketing, and demonstrating—did not encompass the sidewalk counseling in which the plaintiffs engaged." *Reilly IV*, 790 F. App'x at 473. The Third Circuit also did not address Petitioners' as-applied challenge. The court brushed aside the undisputed evidence from the City's two Rule 30(b)(6) witnesses, and the multiple oral and written admissions confirming that the Ordinance is a content-based restriction on pro-life verbal or written expression. The Third Circuit disregarded Harrisburg's fatal admission during oral argument that a lawyer soliciting business with leaflets would not be covered under the Ordinance, but if the same person handed out a pro-life leaflet, then that speech "would be covered." App. 36a. Rehearing was denied, and this Court denied the petition for a writ of certiorari. See *Reilly* v. *City of Harrisburg*, 141 S. Ct. 185 (2020).

Returning to the district court, the parties filed cross-motions for summary judgment. The district court denied summary judgment for Petitioners and granted summary judgment for Harrisburg. App. 8a. The district court recognized that "Plaintiffs' sidewalk counseling, to the extent it consists of peaceful one-on-one conversations and leafletting, is core political speech that merits the apex of constitutional protection" (App. 16a), and that "[t]he City does not argue any justification for restricting peaceful one-on-one conversations and leafletting" (App. 16a). The district court also acknowledged that Harrisburg's City Solicitor "testified that the Ordinance would prohibit a person from engaging clinic clients in quiet conversation within the buffer zone and that the prohibition on congregating would proscribe two people from conversing while walking side-by-side in the buffer zone" (App. 20a n.8); that the City's counsel argued that the City prohibits pro-life sidewalk counseling (including verbal speech and pamphleteering) within the buffer zone (App. 20a n.8); and that Harrisburg police enforced the Ordinance against Plaintiff Reilly for sidewalk counseling (App. 21a). Nevertheless, the court concluded that Petitioners did not show that the police officers acted according to a municipal policy prohibiting sidewalk counseling. App. 21a. The court applied no level of constitutional scrutiny to the City's actual enforcement of the Ordinance against Reilly's sidewalk counseling and the resultant chilling of Petitioners' speech within the buffer zone.

The Third Circuit affirmed the district court's finding that Harrisburg "has no policy or custom of over-enforcing the Ordinance to prohibit peaceful sidewalk counseling." App. 6a. The Third Circuit again did not

address Petitioners' as-applied challenge, simply noting that the Ordinance "is constitutional" under its previous decision in *Bruni II*, 941 F.3d at 91. App. 6a.

The Third Circuit observed that "Harrisburg gives police officers discretion to investigate and determine whether a violation has occurred" (App. 6a–7a), yet it failed to analyze whether such discretion was the result of an existing policy to enforce the Ordinance against sidewalk counseling. The Third Circuit downplayed Harrisburg's actual enforcement of the Ordinance against Reilly, merely characterizing it as "a one-off improper warning." App. 7a. The court did not address Petitioners' argument that Harrisburg's "warning" chilled their free speech and was an actual enforcement of the Ordinance. Reilly C.A. Br. 22–26.

Finally, the Third Circuit ignored Harrisburg's sworn admissions that it enforced the Ordinance only against pro-life sidewalk counseling. In the court's view, the litigation statements "show[ed] only that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014." App. 7a. The court cited no testimony and no law for the proposition that a government's admissions during litigation confirming the existence of a municipal policy may be properly characterized as a mere misunderstanding of its own ordinance. Instead, the Third Circuit adopted Harrisburg's counsel's after-the-fact stumbling statement during the last argument that the Ordinance's proscriptions "do not include peaceful sidewalk counseling." App. 7a. The Third Circuit did not consider Harrisburg's counsel's numerous contradictory admissions, noted by the district court, that "[i]n

appellate briefing and at oral argument, the City's counsel argued that the Ordinance would prohibit Plaintiffs from engaging in sidewalk counseling within the buffer zone, handing out leaflets discouraging people from entering the clinic, and standing or walking with clinic clients while conversing within the zone." App. 20a n.8.

REASONS FOR GRANTING THE PETITION

As a result of this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), this case is yet another example of First Amendment distortion. See *McCullen* v. *Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in the judgment). Harrisburg enacted a content-based Ordinance specifically aimed at preventing pro-life expression. The City's two Rule 30(b)(6) witnesses on the "interpretation, application, and enforcement" of the Ordinance and numerous oral and written admissions by counsel for the City in the district court and before the Third Circuit confirm that the Ordinance is content-based and applies only to restrict pro-life speech about abortion. The buffer zone "impose[s] serious limits on free speech." *Bruni* v. *City of Pittsburgh*, 141 S. Ct. 578 (2021) (Thomas, J., respecting the denial of certiorari). While the ordinances in *Bruni* and Harrisburg share four operative words in common ("congregate, patrol, picket or demonstrate"), the undisputed evidence *sub judice* demonstrates that the Harrisburg Ordinance is a content and viewpoint restriction on pro-life speech. The City's two Rule 30(b)(6) witnesses and multiple oral and written admissions by Harrisburg's own counsel throughout this litigation demonstrate that the Ordinance was intended to restrict the content and

viewpoint of pro-life speech. Harrisburg police applied the Ordinance to Reilly and threatened her with arrest if she entered the zone ever again. Harrisburg knows this history and has never backed away from this enforcement and never sought to clarify or limit its application to Petitioners.

This Court has warned about "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies." *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988). Yet the Third Circuit allowed Harrisburg to escape Section 1983 liability by relying on this Court's decision in *Hill*, 530 U.S. at 703; providing a limiting construction of the Ordinance to exclude sidewalk counseling; discounting the City's own binding admissions about the Ordinance's scope; and ignoring the validity of Petitioners' as-applied challenge. The Third Circuit committed a series of legal errors that warrant this Court's correction.

This case is an ideal vehicle to confirm that strict scrutiny is the proper standard "when a law targets a 'specific subject matter * * * even if it does not discriminate among viewpoints within that subject matter.'" *Bruni*, 141 S. Ct. at 578 (Thomas, J., respecting the denial of certiorari) (quoting *Reed* v. *Town of Gilbert*, 576 U.S. 155, 169 (2015)). This Court denied certiorari in *Bruni* "because it involve[d] unclear, preliminary questions about the proper interpretation of state law." 141 S. Ct. at 578. Here, however, Harrisburg's interpretation of the Ordinance is clear. This case is a clean vehicle "to resolve the glaring tension in [this Court's] precedents," *id.*, because there are no disputed material facts.

I. THIS COURT SHOULD SETTLE THE CONFUSION IN THE LOWER COURTS REGARDING CONTENT RESTRICTIONS AND OVERRULE *HILL* BECAUSE IT CONFLICTS WITH *REED* AND *McCULLEN*.

The Third Circuit concluded that the Ordinance was "constitutional on its face" under its decision in *Bruni* v. *City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019) (*Bruni II*). App. 6a. *Bruni II* in turn relied on *Hill* v. *Colorado*, 530 U.S. 703, 724 (2000), to uphold Pittsburgh's buffer-zone ordinance. 941 F.3d at 87. Continued reliance on *Hill* in light of this Court's decisions in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), and *McCullen* v. *Coakley*, 573 U.S. 464 (2014), is erroneous and demonstrates the need for this Court's intervention.

A. *Hill* is an Outlier in This Court's First Amendment Content and Viewpoint Precedents, and Will Continue to Cause Confusion Until it is Overruled.

In *Hill*, this Court issued a decision that inverted ordinary free-speech principles and turned the concept of content neutrality on its head. *Hill* found that a statute prohibiting "oral protest, education, or counseling" with individuals attempting to enter a health care facility was content-neutral, despite not restricting casual speech such as saying "good morning" in the same area. 530 U.S. at 724. The Court determined the statute was content-neutral because its "restrictions appl[ied] equally to all demonstrators, regardless of viewpoint, and the statutory language ma[de] no reference to the content of the speech." *Id.* at 719–20. Even though "the content of the oral

statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute," *Hill* found "it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether sidewalk counselors are engaging in oral protest, education, or counseling rather than pure social or random conversation" and that a "cursory examination" did not render the statute facially content-based." *Id*. at 721–22.

Hill stood for the proposition that a facially content-neutral law does not become content-based simply because the government must review the content of the speech to determine whether a restriction applies. *Hill* recognized another reason for identifying a speech-restrictive law as content-neutral even though it requires examining the content of a message: where the government justifies the law because of "[t]he unwilling listener's interest in avoiding unwanted communication," not because of disagreement with the message conveyed. *Id.* at 716.

The content-neutrality analysis in *Hill* was twofold: (1) a speech-restrictive law is not content-based simply because the officials tasked with enforcing it must look at the content of the message to determine whether the restriction applies, and (2) a speech-restrictive law is not content-based when the government's purpose in adopting it was to protect unwilling listeners. *Id.* at 716, 722.

Hill was immediately pilloried by members of this Court. See 530 U.S. at 741 (Scalia, J., dissenting) (calling it "a speech regulation directed against the

opponents of abortion") (quoting *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting in part)); *id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based.").

Recently, the Court observed that *Hill* was a "distort[ion]" of "First Amendment doctrines." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022). Three Justices have noted that this Court's intervening decisions have "all but interred" *Hill*, rendering it "an aberration in [the Court's] case law." *City of Austin* v. *Reagan Nat'l Advert. Of Austin, LLC*, 142 S. Ct. 1464, 1484, 1491 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting); *Bruni* v. *City of Pittsburgh*, 141 S. Ct. 578 (2021) (Thomas, J., respecting denial of certiorari) (noting that the Court's use of intermediate scrutiny in *Hill* "is incompatible with current First Amendment doctrine" (quoting *Price* v. *City of Chicago*, 915 F.3d 1107, 1117 (7th Cir. 2019)).

Despite its pernicious effects on the First Amendment, this Court has not overruled *Hill*. Yet the Court's recent free-speech decisions have undermined its viability. Given that lower courts—including the Third Circuit—continue to rely on *Hill*, it should be overruled.

B. *Reed* Expanded the Category of Content-Based Laws and Replaced *Hill's* Analysis As to Whether a Law is Content-Neutral or Content-Based.

Since *Hill* was decided, this Court has never relied on it, arguably because of its "distort[ion of] First Amendment doctrines." *Dobbs*, 142 S. Ct. at 2276. The Court ignored *Hill* in *McCullen*, which invalidated a statute originally "modeled on" the *Hill* buffer-zone law. 573 U.S. at 470. In *Reed*, the Court pushed back against lower courts relying on *Hill* to "conclude[] that [a speech restriction was] content neutral." 576 U.S. at 162–63. And in *City of Austin*, the Court refused to reaffirm *Hill* when determining whether another speech classification was content-neutral. 142 S. Ct. at 1475. This Court's decisions in *McCullen* and *Reed* expanded the category of content-based laws and replaced *Hill*'s analysis as to whether a law is content-based or content-neutral.

1. This Court first cabined *Hill* in *McCullen*.

McCullen addressed a Massachusetts statute creating a "35-foot fixed buffer zone from which individuals are categorically excluded" near abortion clinic entrances. 573 U.S. at 471. Rejecting the first step of *Hill*'s content-neutrality analysis, the Court held that the statute was content-neutral precisely because the Massachusetts law did not rely on *Hill*'s rationale. The law was content-neutral because it was purportedly justified to remedy sidewalk congestion, not to suppress pro-life advocacy. See 573 U.S. at 480; see also *id*. at 479–80 ("Indeed, petitioners can violate the Act merely by standing in a buffer zone, without

displaying a sign or uttering a word."). The Court observed that a speech-restrictive law "would be content based if it required 'enforcement authorities' to 'examine the content of the message conveyed to determine whether' a violation has occurred." *Id*. at 479 (quoting *F.C.C.* v. *League of Women Voters of California*, 468 U.S. 364, 383 (1984)). The law also would be content-based "if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *Id*. at 481.

Under *McCullen*, the Colorado statute in *Hill*, as well as its Harrisburg counterpart, present a clear case for content discrimination: both lack a content-neutral justification, and both rely on what *McCullen* held to be content-based rationales. This Court should therefore clarify what is implicit in *McCullen*—that *Hill* was wrongly decided.

2. This Court in *Reed* rejected *Hill*'s content-neutrality analysis while expanding the category of speech-restrictive laws that qualify as content-based.

Reed rejected *Hill's* framework and articulated a new standard for defining content-based laws. 576 U.S. at 155. First, a law "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 163. "Some facial distinctions based on a message are obvious, defining regulated speech by a particular subject matter," but "*others are more subtle*, defining regulated speech by its function or purpose." *Id.* (emphasis added). "Both are distinctions drawn based on the message a speaker conveys…." *Id.* at 163–164. Laws

that define speech by its function or purpose are content-based, which is a clear rejection of *Hill*.

Second, *Reed* identified "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech." 576 U.S. at 164 (cleaned up). This, too, was a rejection of *Hill*, because it recognized that *Hill* was incorrect in holding that a law can be content-neutral even if enforcement authorities must review the content of the speech to determine the law's applicability.

3. *Hill* is an outlier in this Court's precedents, including *City of Austin*.

In *City of Austin*, the Court held a sign code that distinguished between on- and off-premises signs was not content-based. 142 S. Ct. at 1471. Even though the distinction required reading the sign to know whether it was permissible, that did not make it content-based. This review was "agnostic as to content," requiring "an examination of speech only in service of drawing neutral, location-based lines." *Id.* The substance of the message was irrelevant. *Id.* at 1472.

That is not true for the buffer zone law in *Hill*. To be sure, this Court held the law was not content-based even though it required hearing the oral communication to discern whether it was for counseling or education. See 530 U.S. at 716. But that is not like the "neutral, location-based lines" in *City of Austin*. See 142 S. Ct. at 1471. Whether a sign is located on or off premises is not about content. By contrast, counseling

or education is most certainly about content. In other words, the law in *Hill* can hardly be described as "agnostic as to content." *Id.* Even after *City of Austin*, *Hill* remains an outlier.

C. The Third Circuit's Continued Reliance on *Hill* Conflicts with the Content Analysis of *Reed* and *McCullen*.

The Third Circuit admittedly "ha[s] continued to rely on *Hill* since *McCullen* and *Reed* were handed down…." *Bruni II*, 941 F.3d at 87 n.16. The Third Circuit's failure to grasp that *McCullen* and *Reed* effectively nullified *Hill*'s content-neutrality analysis is wrong and should be corrected. Until this Court overrules *Hill*, lower courts will continue to erode the First Amendment.

By its terms, the Ordinance is content-based because it "regulates speech by its function or purpose." *Compare* Harrisburg, Pa. Mun. Code § 3-371 (2015) (prohibiting only speech involving "picket[ing]" or "[d]emonstrating]"), *with Reed*, 576 U.S. at 163 (holding that speech restrictions "defining speech by function or purpose" is a distinction "drawn based on the message the speech conveys"). Under the Ordinance's plain terms, speech whose function or purpose is to "demonstrate" is prohibited, while speech whose function or purpose is to communicate something else is not. As counsel for the City admitted during argument before the Third Circuit, leafletting in the buffer zone about a law firm is permitted, but leafletting about abortion is not. C.A. App. 1000–01.

As with the district court, the Third Circuit failed to consider how police officers tasked with enforcing the Ordinance may know whether a speaker is intending to "demonstrate" without reviewing the content of the speech. The answer is obvious—they cannot. And as *Reed* made clear, a law is content-based if it "cannot be justified without reference to the content of the regulated speech." 576 U.S. at 164 (cleaned up).

Harrisburg candidly admitted that speakers violate the Ordinance if they are "talking about anything of substance." App. 28a. The City stated that "[i]f two people were walking in the same direction and * * * they're talking * * * good morning, good afternoon, whatever, I don't know if those people would be considered congregating by any definition." App. 28a. The Third Circuit concluded that such admissions did not render the Ordinance content-based. App. 7a. The court relied on *Hill*'s obsolete notion that requiring an examination of the content of speech is not enough to make an Ordinance content-based. See *Reilly IV*, 790 F. App'x at 473 (citing *Bruni II*, 941 F.3d at 88). Those conclusions run counter to *Reed*'s articulation of the content-neutrality standard. Police officers cannot tell whether a discussion is "of substance" (App. 28a) or whether a leaflet is about abortion without inspecting the content of the communication.

The Third Circuit's decision conflicts with *Reed* and *McCullen* and warrants this Court's review.[2]

---

[2] At least two courts of appeals have questioned *Hill*'s viability since this Court's decisions in *McCullen* and *Reed*. See, *e.g.*, *Price*

II. THE THIRD CIRCUIT'S REJECTION OF A POLICY UNDER MONELL IN LIGHT OF THE ENFORCEMENT, TESTIMONY AND NUMEROUS ADMISSIONS ABOUT THE INTERPRETATION AND APPLICATION OF THE ORDINANCE CONFLICTS WITH THIS COURT AND THE NINTH CIRCUIT.

Section 1983 imposes liability on a municipality that, under color of some official policy, "causes" an employee to violate another's constitutional rights. 42 U.S.C. § 1983. The Third Circuit agreed with the district court's conclusion that Harrisburg "ha[d] no policy or custom of over-enforcing the Ordinance to prohibit peaceful sidewalk counseling." App. 6a. The Third Circuit misinterpreted this Court's precedents, discounted Harrisburg's own binding admissions, and ignored the City's actual history of enforcement. This warrants this Court's reversal.

A. The Third Circuit's Holding That Multiple Admissions by Designated Municipal Officials Does Not Establish an Official Policy Under *Monell* Conflicts With this Court's Precedents.

Looking to this Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the Third Circuit concluded that Harrisburg lacked a policy or

---

v. *City of Chicago*, 915 F.3d 1107, 1109 (7th Cir. 2019) (noting that *Hill*'s content-neutrality holding "is hard to reconcile with" both *McCullen* and *Reed* and that *Hill*'s "narrow-tailoring holding is in tension with *McCullen*"); *Sisters for Life, Inc.* v. *Louisville-Jefferson Cnty.*, 56 F.4th 400, 408 (6th Cir. 2022) (recognizing the "tension" between *Hill* and *McCullen*)

custom to trigger municipal liability. App. 6a. That conclusion is legally and factually wrong.

1. This Court's precedents confirm that the one-time application of an ordinance by an officer vested with enforcement authority, coupled with a credible threat of future enforcement, is sufficient to establish *Monell* liability.

Under *Monell*, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* In a First Amendment challenge, courts must first identify the official policy or custom at issue and then apply the correct First Amendment principles to that policy based on the nature and use of the forum where the speech occurred. See *id.* at 690.

To prevent municipalities from being held liable for the random acts of their employees, proof of a single instance of unconstitutional activity is not enough to impose liability under *Monell unless* there is proof that the incident was caused by an existing, unconstitutional municipal policy that can be attributed to a policymaker. See *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823–24 (1985) (Opinion of J. Rehnquist). Thus, "once a municipal policy is established, it requires only *one* application to satisfy *fully Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the

municipality's official policy." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 478 (1986) (cleaned up) (emphasis added); *id*. at 481 ("[W]here action is directed by those who establish governmental policy, municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.").

And it makes no difference whether an officer has enforcement discretion. When a municipal official's discretionary action "is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988). A one-time application of an ordinance by an officer vested with enforcement authority, coupled with a credible threat of future enforcement, is sufficient to establish Section 1983 liability under *Monell*. See *id*. at 123 (collecting cases).

2. Harrisburg's binding litigation admissions established an official policy for purposes of *Monell* liability, and the enforcement of the Ordinance chilled Petitioners from further attempting to offer sidewalk counseling.

The Third Circuit's rejection of such clear-cut liability under *Monell* is wrong. At the outset, the court misconstrued Petitioners' challenge as being based only on one incident of alleged constitutional deprivation—when the police warned petitioner Reilly that she was violating the Ordinance. App. 6a–7a. The court then cut off Petitioners' as-applied challenge by declaring the Ordinance constitutional under *Bruni*,

which in turn relied on *Hill* v. *Colorado*. This cascade of errors warrants correction.

Citing *Tuttle*, the Third Circuit concluded that Petitioners only "ha[d] evidence of a one-off improper warning" that was insufficient to trigger *Monell* liability. App. 6a (citing 471 U.S. at 824). Although *Tuttle* sets forth the correct guiding principle, it is distinguishable and inapposite. *Tuttle* teaches that a plaintiff must adduce more than a single incident to *infer* the existence of an unconstitutional policy in the absence of direct evidence. See 471 U.S. at 823–24. But in cases such as here, where there is an *acknowledged* and *admitted* city policy of enforcing an ordinance to chill protected speech, *Tuttle* is inapposite.

Petitioners never asked the lower courts to infer the existence of a policy based on the isolated "one-off improper warning." App. 7a. Throughout this litigation, Harrisburg repeatedly acknowledged that it knowingly and intentionally interpreted, applied, and enforced the Ordinance to prohibit sidewalk counseling about abortion. C.A. App. 127, 130–131, 132, 133–136, 137, 158, 159, 750, 753, 981–983. Harrisburg defended its policy against Petitioners' sidewalk counseling within the buffer zone. C.A. App. 287, 981, 911–913, 914–917, 1043. Harrisburg explicitly ratified the Ordinance as-applied to pro-life sidewalk counseling in 2016 (C.A. App. 727–729, 810–814), and continues to maintain its policy against peaceful pro-life speech within the buffer zone, arguing in its summary judgment briefing that Petitioners would be guilty of "congregating" under the Ordinance "if they stood or walked with other individuals inside the zone" (C.A. App. 1175–76).

Even after the Third Circuit's narrowing construction, Harrisburg never abandoned its official policy of enforcing the Ordinance to prohibit Petitioners' sidewalk counseling within the buffer zone. The issue here is not whether a policy existed—because it clearly did, as evidenced by Harrisburg's own admissions during litigation—but whether the Ordinance facially and as applied violates Petitioners' First Amendment rights. And it does, because at a minimum the Ordinance as-applied chilled Petitioners from continuing their sidewalk counseling.

The Third Circuit erred in concluding that Petitioners rely *solely* on the enforcement action against Reilly in 2014 to establish Harrisburg's policy, and in rejecting the as-applied claim because there were no further instances of enforcement. App. 7a. Indeed, the unrefuted record establishes that the 2014 enforcement against Reilly intimidated her into abandoning her sidewalk counseling—thus chilling her protected speech—out of fear of violating the Ordinance. C.A. App. 925–926, 964–967. The City's own litigation admissions confirm that it had a policy of prohibiting peaceful pro-life sidewalk counseling and leafleting within the buffer zone.

3. The City's designated Rule 30(b)(6) witnesses, corroborated by admissions during litigation, confirmed that the Ordinance operates as a content and viewpoint restriction on speech.

A government entity may officially speak through a designee who testifies on the municipality's behalf. Fed. R. Civ. P. 30(b)(6). "This procedure provides a ready venue for a plaintiff to garner testimony that it

can point to as representing the municipality," and "can be used to determine a municipality's *policies*, the identity of a final policymaker, or various facts related to training." Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 Denv. U. L. Rev. 583, 602 (2014) (emphasis added).

Petitioners conducted multiple depositions of Harrisburg officials under Fed. R. Civ. P. 30(b)(6), specifically to ascertain the City's interpretation, application, and enforcement of the Ordinance. Harrisburg's 30(b)(6) witnesses testified unequivocally that the Ordinance applies to sidewalk counseling. Neil Grover, Harrisburg's Solicitor and Rule 30(b)(6) designee on the City's interpretation, application, and enforcement of the Ordinance, testified that he was "sure" that the Ordinance "prevents [Plaintiffs] from being in the buffer zone and doing what they want." C.A. App. 753. Grover testified that "if two persons are having a conversation walking side-by-side, moving in the same direction" within the buffer zone "they're congregating" when they "[are] talking about anything of substance," and thus violating the Ordinance. App. 28a. According to Grover, the Ordinance does not permit sidewalk counseling inside the buffer zone.

> Q. So is it your testimony that a person may enter the buffer zone and engage in a quiet conversation with a woman approaching the entrance to the abortion clinic?
>
> A. *No*, but I do not believe that the fact that *they can't walk in that area*, just like they can't walk

> in a crosswalk to cross the street, curtails their activity.

App. 39a. (emphasis added).

Similarly, Deric Moody, the Police Bureau Captain and another Rule 30(b)(6) designee on Harrisburg's interpretation, application, and enforcement of the Ordinance, testified that "if an individual were within that 20-feet buffer zone * * * and was merely quietly engaging in conversation with a patient entering or leaving that clinic," "then yeah, that would be—*that could be considered a violation*," and, "if a person merely entered the 20-foot zone and initiated a *one-on-one conversation* with a person about abortion," "my answer would remain the same.... [T]echnically it would be—*it's a violation* again." App. 32a (emphasis added).

Joshua Autry, Defendants' counsel at oral argument before the Third Circuit in *Reilly II* corroborated these admissions that the Ordinance operates as content and viewpoint speech restriction:

> JUDGE JORDAN: Now, your whole argument depends on the assertion that this is a content-neutral ordinance, right?
>
> MR. AUTRY: Yes, Your Honor.
>
> …
>
> JUDGE JORDAN: Right. So, a person could panhandle, could ask for money. How about just a person soliciting business? Suppose that it were an accountant or heaven forbid a lawyer with

leaflets, saying come use my services, would that be covered by the ordinance within 15 feet?

MR. AUTRY: It could potentially be demonstrating, depending on how they're doing it.

JUDGE JORDAN: How could that possibly be demonstrating? Just handing somebody a leaflet that says I'd like you to consider my business. Under what possible definition is that demonstration?

MR. AUTRY: Under that scenario, that would not be demonstrating.

…

JUDGE JORDAN: But the same person couldn't … hand out a leaflet that said don't go in there *because this is an abortion clinic, that's covered*.

MR. AUTRY: *I believe that would be covered*, Your Honor.

JUDGE JORDAN: Okay.

…

JUDGE JORDAN: -- stick with me on *Reed*, here, for a minute. So, if I can hand out a leaflet that says, come use the services of Ambro, Roth, and Jordan -- of course they probably don't want to be in the same firm with me, but assume they did.

…

> JUDGE JORDAN: Yeah. So, I could hand out a leaflet, that says that and describe my services, but *I can't hand out a leaflet that says you shouldn't be getting an abortion. How is that not content-based?*

App. 34a–37a (emphasis added).

The Third Circuit discounted these admissions, remarking that they "show only that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014." App. 7a. The official statements made by Harrisburg's Rule 30(b)(6) designees are direct and unrebutted evidence of an explicit policy regarding the interpretation, application, and enforcement of the Ordinance based on content and viewpoint. Because Harrisburg's policy was established, the one application of that policy—the police's banishing Petitioner Reilly from the buffer zone on credible threat of punishment for future violations—triggered Harrisburg's *Monell* liability. See *Pembaur*, 475 U.S. at 478. The Third Circuit's error merits this Court's correction.

B. The Third Circuit's Disregard of the Unrebutted Testimony of the City's Rule 30(b)(6) Witnesses, Along With its Counsel's Written and Oral Admissions, Conflicts with the Ninth Circuit.

The Third Circuit's refusal to credit Harrisburg's admissions of a municipal policy during litigation creates a circuit split. In *Hoye* v. *City of Oakland*, 653 F.3d 835 (9th Cir. 2011), the government conceded, both at oral argument and through the Rule 30(b)(6)

deposition of its police captain, that its buffer-zone ordinance permitted speech on one side of a controversial public debate but not on the other. *Id.* at 849. Based on these admissions, the Ninth Circuit found "grave constitutional problems with the manner in which the City has understood and enforced its Ordinance," *id.*, such that the City's implementation and enforcement of the sidewalk ordinance was content-based, *id.* at 851. Indeed, the Ninth Circuit found "*dispositive* * * * Oakland's admissions throughout this litigation that it understands and enforces the Ordinance in a content-discriminatory manner." *Id.* at 850 (emphasis added).

Contrary to the Ninth Circuit, the Third Circuit discarded Harrisburg's multiple admissions as merely "that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014." App. 7a. It is not the province of a federal court to adjudge the subjective interpretations of a municipality, much less so when that municipality expressly conceded throughout litigation that "it understands and enforces the Ordinance in a content-discriminatory manner." *Hoye*, 653 F.3d at 850. If left uncorrected, the Third Circuit's handling of the City's binding admissions can be employed on an ad hoc basis by any subsequent court that wishes to give a municipality a pass on *Monell* liability, which will result in discordant, uneven, and unpredictable results. The litigation admissions of some municipalities will be dispositive, while those of other municipalities will be discarded, based on the preference of the reviewing courts.

Nor is the Ninth Circuit's reliance on litigation statements and deposition testimony an aberration. District courts routinely consider Rule 30(b)(6) deposition testimony as evidence of operative municipal practices, policies, and customs in a *Monell* claim. See generally *Davila* v. *N. Reg'l Joint Police Bd.*, 370 F. Supp. 3d 498, 537 n.15 (W.D. Pa. 2019) (collecting cases).

The Third Circuit's rejection of Harrisburg's binding admissions creates a conflict with the Ninth Circuit, thereby warranting this Court's resolution.

III. THE THIRD CIRCUIT EXACERBATED A CIRCUIT CONFLICT AND MISAPPLIED THIS COURT'S PRECEDENTS BY REWRITING AN ORDINANCE THAT IS NOT SUSCEPTIBLE TO A NARROWING CONSTRUCTION.

This Court recognized that federal courts have no power to rewrite a law to conform it to the First Amendment. The Fifth, Sixth, and Eighth Circuits have likewise recognized that federal courts may not impose a limiting construction on a state law or local ordinance in the absence of a narrowing state-court interpretation. The Third Circuit's decision conflicts with this Court's precedents and the precedents of at least three other circuits.

A. The Third Circuit's Decision Cannot be Reconciled with *Erznoznik*, *Hynes*, and Other Decisions of This Court.

"This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the

legitimate exercise of First Amendment rights." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). Recognizing the competing interests between respecting state sovereignty and safeguarding First Amendment protections, the general rule is that a federal court should not invalidate a state statute unless "it is not readily subject to a narrowing construction by the state courts" and "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik*, 422 U.S. at 216. Nor may federal courts "rewrite a state law to conform it to constitutional requirements." *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988).

In upholding the Ordinance under its prior decision in *Bruni II*, the Third Circuit concluded that the Ordinance does not cover pro-life sidewalk counseling. App. 6a. The court reached that conclusion despite no state-court clarification, and despite the Ordinance's real and substantial deterrent effect on Petitioners' expression. Most egregiously, the Third Circuit ignored Harrisburg's admissions that the Ordinance covered pro-life sidewalk counseling. The Third Circuit's conclusion conflicts with this Court's decisions.

In *Erznoznik*, this Court struck down a city ordinance that prohibited exhibition of films containing nudity by certain drive-in movie theaters. 422 U.S. at 205. The ordinance was not easily susceptible to a narrowing construction, and when the state courts were presented with an overbreadth challenge, they made no effort to restrict its application. *Id.* at 216. The effect of the ordinance was both "real and substantial." *Id*. The Court concluded: "Where First Amendment freedoms are at stake we have

repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here." *Id.* at 217–18.

In *Hynes* v. *Mayor & Council of Borough of Oradell*, 425 U.S. 610 (1976), this Court found that an ordinance requiring advance written notice by any person desiring to canvass, solicit or call from house to house for a "recognized charitable cause" was unconstitutionally vague. *Id.* at 620. The Court noted that the New Jersey Supreme Court considered a limiting construction but nevertheless concluded that "we are without power to remedy the defects by giving the ordinance constitutionally precise content." *Id.* at 622.

Erznoznik and *Hynes* instruct that a federal court faced with an overbreadth challenge to an ordinance may consider whether the enactment is readily subject to a narrowing construction by the state courts, but it may not *sua sponte* provide a limiting construction that is not readily susceptible by state courts. Nor may it rewrite or interpret an ordinance to rescue it from a First Amendment challenge. Cf. *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974) (declining to supply a limiting construction in the absence of a "narrowing state court interpretation," stating that "[w]e are without authority to cure that defect"). See also *Am. Booksellers*, 484 U.S. at 383; *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The Third Circuit failed to follow this Court's clear teachings.

B. The Third Circuit's Decision Exacerbates an Important Circuit Conflict.

The Third Circuit has acknowledged that "other Courts of Appeals take a contrary approach" under the constitutional avoidance doctrine when providing a narrowing construction of a state law. See *Bruni II*, 941 F.3d at 86 n.14 (citing cases). The Third Circuit exacerbated a circuit split on the power of federal courts to rewrite a state statute or local ordinance to save it from a constitutional challenge.

The Fifth, Sixth, and Eighth Circuits hold that federal courts lack authority to give a narrowing construction to a state statute in the absence of a narrowing state-court interpretation.

In *Hill* v. *City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986) *aff'd*, 482 U.S. 451 (1987), the Fifth Circuit concluded that a municipal ordinance which made it unlawful to oppose, molest, abuse, or interrupt any policeman in the execution of his duty could not be narrowly construed because it had not been limited by state courts and it was beyond the federal court's province to volunteer interpretations not urged by the city itself. See *id.* at 1165. "Federal courts * * * do not sit as a super state legislature, and may not impose their own narrowing construction onto the ordinance if the state courts have not already done so." *Id.* at 1164. The Fifth Circuit found that overbreadth could not be avoided by a narrowing construction. *Id.*

In *Eubanks* v. *Wilkinson*, 937 F.2d 1118 (6th Cir. 1991), the Sixth Circuit acknowledged that "the general federal rule is that courts do not rewrite statutes

to create constitutionality." *Id.* at 1122 (citing *Am. Booksellers*, 484 U.S. at 397). "[A] federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it rather than a state court." *Id.* at 1126 (quoting *Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F.2d 916, 926 (6th Cir.1980), *vacated on other grounds*, 456 U.S. 968 (1982), *on remand*, 709 F.2d 534 (6th Cir. 1983)). The Sixth Circuit concluded that the district court erred by supplying new limiting language modifying a Kentucky parental-consent abortion statute to avoid unconstitutionality. *Id.* at 1127.

And in *United Food and Commercial Workers International Union, AFL-CIO, CLC* v. *IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), the Eighth Circuit found it lacked power to rewrite a state's picketing statute in a facial challenge to avoid the statute's constitutional difficulties. *Id.* at 431. The court's "role in this case," given that the state court did not authoritatively construe the statute, was to determine whether the construction of the statute urged by defendants and amicus are "reasonable and readily apparent." *Id.* at 431 (quoting *Boos* v. *Barry*, 485 U.S. 312, 330 (1988)). The Eighth Circuit affirmed the invalidation of the picketing statute as facially overbroad. *Id.* at 432.

On the other hand, the Third and First Circuits hold that a federal court may rewrite an ordinance to save it from a constitutional challenge regardless of the government's interpretation of its own law and regardless of whether a state court has already provided a limiting construction. In *Bruni II*, the Third Circuit found Pittsburg's interpretation of its own sidewalk

ordinance "not dispositive" because "no state court has weighed in and the Ordinance is readily susceptible to a 'reinterpretation' consistent with the Ordinance's text." 941 F.3d at 86 n.14. Although it noted that a federal court may not "rewrite a * * * law to conform it to constitutional requirements," *id.* at 85 (quoting *United States* v. *Stevens*, 559 U.S. 460, 481 (2010)), the Third Circuit relied on its prior precedents to affirm that "[i]n the absence of a limiting construction from a state authority, we must presume any narrowing construction or practice to which the law is fairly susceptible," *ibid.* (quoting *Brown* v. *City of Pittsburgh*, 586 F.3d 263, 274 (3d Cir. 2009) (citation omitted)). The *Bruni II* court thus held that Pittsburgh's buffer-zone ordinance, which prohibited any person from knowingly congregating, patrolling, picketing, or demonstrating within 15 feet of health care facilities, was susceptible to a narrowing construction, under which it was content-neutral. *Id.* at 86.

And in *Cutting* v. *City of Portland*, 802 F.3d 79 (1st Cir. 2015), the First Circuit held that a court may read a law in light of a municipality's official interpretation if doing so would render the law constitutional, but, consistent with the principle of constitutional avoidance, a court may not do so to make that law more vulnerable to constitutional challenge. *Id.* at 84. The First Circuit thus found that a city ordinance that prohibited persons from standing, sitting, staying, driving, or parking on median traffic strips was a content-neutral law under the First Amendment, despite the city's adoption of an interpretation that exempted the posting of campaign signs from the ordinance's reach. *Id.* at 84–85.

The above circuit split, which centers on core protected speech and expression, must be resolved. A party's success in challenging an unconstitutionally overbroad ordinance should not hinge on whether they live in Harrisburg or Houston. To maintain uniformity of its First Amendment decisions, this Court should grant review to resolve the circuit split.

C. The Third Circuit's Rewriting of the Ordinance Contrary to the Legislative Body's Intent and Enforcement Warrants Review by this Court.

The Third Circuit's narrowing interpretation of the Ordinance to exclude sidewalk counseling conflicts with this Court's precedents and violates the doctrine of constitutional avoidance. Considering the Ordinance's plain language, along with Harrisburg's interpretation, application, enforcement, and defense of the Ordinance, the Ordinance is not readily susceptible to the Third Circuit's narrowing construction. Facially and as applied to Petitioners, the Ordinance's deterrent effect on protected speech is both real and substantial. *Erznoznik*, 422 U.S. at 216. The Third Circuit lacked authority, in the absence of state court guidance, to usurp Harrisburg's legislative function and rewrite the Ordinance to save it.

The plain text and Harrisburg's interpretation, application, enforcement, and defense of the Ordinance are directly contrary to the Third Circuit's narrowing construction. Harrisburg enforced the Ordinance against Reilly's peaceful sidewalk counseling and

leafletting in a traditional public forum.[3] And that was not a "one-off" incident: Harrisburg intended the Ordinance to prohibit pro-life sidewalk counseling in the buffer zone, admitted that it was intended to cover peaceful sidewalk counseling, and defended the Ordinance as a sidewalk counseling prohibition in the Third Circuit and the district court. See *supra* at II.A.2–3. *Harrisburg never argued that the Ordinance could be saved from unconstitutionality by construing it to allow one-on-one counseling*. Nor did Harrisburg ever argue that the enforcement of the Ordinance against Petitioner Reilly was wrong or that the police officer misunderstood the Ordinance.

The Third Circuit, however, found none of these considerations relevant when adopting the district court's conjuring of a new and legislatively unknown version of the Ordinance. Contravening its duty to not supersede Harrisburg's legislative body, the Third Circuit concluded that the terms "'congregate,' 'patrol,' 'picket,' and 'demonstrate' do not cover peaceful one-on-one conversations or leafletting." *Reilly IV*, 790 F. App'x at 474 (citing *Bruni II*, 941 F.3d at 86–88). But the Third Circuit offered no explanation as to why that conclusion was merited by the terms of the Ordinance or how it could be reconciled with Harrisburg's actual enforcement of it. In fact, the Third

[3] The Third Circuit's disregard of Harrisburg's actual enforcement is particularly significant because the court handcuffed its *Reilly IV* conclusion—that Harrisburg's own interpretation of its Ordinance is not dispositive—to its *Bruni II* analysis. See 790 F. App'x at 474 n.7 (citing *Bruni II*, 941 F.3d at 85–86). But in *Bruni II*, the court noted that Pittsburgh's interpretation of its ordinance was only an assumption because there had been no enforcement. See 941 F.3d at 85 n.12.

Circuit plainly recognized that "the City asserts that the Ordinance covers Plaintiffs' sidewalk counseling." *Id.* at 474 n.7. If the Ordinance's legislative drafters and the officials tasked with enforcing it readily admit that the Ordinance applies to the speech that the Third Circuit excluded from the Ordinance's reach, an improper judicial rewriting has occurred, and this Court's review is warranted.

Moreover, the Third Circuit's conclusion that the Ordinance's plain terms do not encompass peaceful sidewalk counseling is directly contrary to this Court's precedents construing the terms "picketing," "demonstrating," "congregating," and "patrolling" to include such peaceful speech. See, *e.g.*, *Madsen*, *supra*, 512 U.S. at 768, 775 (instructing that a ban on "congregating," "picketing," "patrolling," and "demonstrating" applies to the peaceful sidewalk counseling and speech in a traditional public forum); *Schenck* v. *Pro-Choice Network of W. New York*, 519 U.S. 357, 367 (1997) (same).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioners

OCTOBER 2023