No. 23-389

IN THE

Supreme Court of the United States

COLLEEN REILLY, *et al.*,

Petitioners,

v.

CITY OF HARRISBURG, PENNSYLVANIA, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

Under *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691-92 (1978), a municipality may not be held liable under the doctrine of *respondeat superior* for a constitutional violation committed by one of its employees. Rather, *Monell* permits a suit against a municipality for a federal constitutional deprivation only when the municipality itself undertook the allegedly unconstitutional action pursuant to an "official policy" or "custom" made by lawmakers or by those "whose edicts and acts may fairly aid to represent official policy . . . ." 436 U.S. at 694. The question presented therefore is:

> Whether the Court of Appeals acted in accordance with settled law in affirming the dismissal of Petitioners' section 1983 constitutional claims predicated on a municipal "buffer zone" Ordinance where the Ordinance does not prohibit Petitioners' desired "leaftletting" or "sidewalk counseling," and Petitioners failed to establish, through evidence, the existence of an unwritten municipal policy or custom of enforcing the Ordinance in a manner that prohibits such conduct?

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INTRODUCTION

This is Petitioners' second Petition for Certiorari in this case. The first Petition was denied by this Court in July 2020. After remand to the District Court and an appeal to the Third Circuit Court of Appeals, Petitioners now seek this Court's intervention on three grounds. None of the three warrants this Court's review.

Petitioners first request this Court to accept this appeal to overrule *Hill v. Colorado*, 530 U.S. 703 (2000). However, Petitioners neither raised this issue nor mentioned *Hill* in their briefs to the Court of Appeals. Instead, the Court of Appeals affirmed the District Court's summary judgment decisions because Petitioners failed to prove a basis for municipal liability under *Monell v. Dep't of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 691-92 (1978). Because the Court of Appeals did not address, let alone analyze, *Hill*, this is not the proper vehicle for the Court to take the extraordinary step of overruling that precedent.

Further, the ordinance in *Hill* is materially different from the ordinance at issue here. The Harrisburg ordinance *does not prohibit peaceful one-on-one conversations or leafletting*—the focal point of the dissenters in *Hill*. Rather, the Harrisburg ordinance concerns certain behaviors and manners of expression—"congregate," "patrol," "picket," and "demonstrate"—but not content of speech. As such, there is "no need for law enforcement to examine the content of the message . . . to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (*quoting FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

Petitioners' second issue asks this Court to consider whether the Court of Appeals erred by "disregard[ing]" certain testimony in reviewing the factual record before affirming that there was no basis upon which to hold the municipality liable under *Monell*. This is nothing more than a request for error correction for which this Court's review also is not warranted. Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); *see also Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is 'outside the mainstream of the Court's functions'") (*quoting* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)).

Petitioners' third question—whether a federal court may disregard the unrebutted testimony of a government's Rule 30(b)(6) witnesses and/or provide a "limiting construction that the ordinance does not restrict speech based on content or viewpoint"—is equally unsubstantial and unworthy of certiorari. The first part of this question improperly would require this Court to wade into complicated questions of fact to address "erroneous factual findings" or "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The second part of the question has already been raised in a previous Petition for a Writ of Certiorari that this Court denied. No. 19-983, 141 S. Ct. 185 (2020).

For all these reasons, this case presents a poor vehicle to consider any of the three Questions Presented. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

The City of Harrisburg disputes Petitioners' recitation of the facts.

The City of Harrisburg passed Ordinance No. 12-2012, entitled "Interference with Access to Health Care Facilities" ("the Ordinance"), which makes it illegal to "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., Code §3-371.4A. *Reilly v. City of Harrisburg*, 205 F. Supp.3d 620, 625 (M.D. Pa. 2016) (hereinafter "*Reilly I*").

Petitioners are two individuals who seek to engage in individual conversations with women who are attempting to enter the health care facilities. Petitioners contend that they wish to engage within the zone as sidewalk counselors "to dissuade patients from termination their pregnancies." Pet. 3a.

The Ordinance does not prohibit peaceful one-on-one conversations or leafletting, the specific conduct in which Petitioners wish to engage. Rather, and to the contrary, the Ordinance prohibits only congregating, patrolling, picketing, and demonstrating. Additionally, the Ordinance expressly bars *content-based discrimination,* stating, in plain and unequivocal terms, that "[t]he provisions of this section shall apply to all persons equally regardless of the intent of their conduct or the content of their speech." Harrisburg, Pa., Code §3-371.4(B); *Reilly v. City of Harrisburg,* 858 F.3d 173, 175 (3d Cir. 2017).

Harrisburg adopted the Ordinance after members of the public presented testimony during a city council committee hearing attesting to problems occurring outside the city's two reproductive health facilities. In passing the Ordinance, the city council ratified a preamble that set forth "[f]indings" and the "purpose" of the Ordinance, which it articulated as "ensur[ing] that patients have unimpeded access to medical services while protecting the First Amendment rights of demonstrators to communicate their message." Harrisburg, Pa., Code § 3-371.2.

Petitioners sought to enjoin the City and various City officials from enforcing the Ordinance, which they claimed prohibited these activities. Petitioner Reilly based her claim on a July 2, 2014 encounter that occurred while she was "handing out literature and talking to clients coming into the office," after which she claims Harrisburg police "enforced the Ordinance and ordered [her] to move her sidewalk counseling beyond the buffer zone." Pet. at 2. Petitioner Reilly claims that the police 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." Pet. at 3 (citing C.A. App. 995).

Petitioner Biter admitted before the District Court that the Ordinance was not directly enforced against her, but nonetheless alleged that she has "voluntarily curbed her protected counseling to avoid citation" based on Reilly's encounter with the Harrisburg police. Pet. 17a, n.6.

Petitioners asserted that the Ordinance both on its face and as applied violates their First Amendment rights.

The District Court's Decision

In March 2016, Petitioners moved for a preliminary injunction to enjoin enforcement of the Ordinance on First Amendment grounds. The District Court denied Petitioners' motion. *Reilly v. City of Harrisburg*, 205 F. Supp. 3d 620 (M.D. Pa. 2016).

The Court of Appeals' Decision

On appeal, the Court of Appeals found that the District Court improperly applied the preliminary injunction standard by shifting the burden of demonstrating narrow tailoring to Plaintiffs, vacated the order denying the preliminary injunction, and remanded the matter to the District Court. *See Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017), as amended (June 26, 2017).

The Remand to the District Court

On remand, the District Court convened an evidentiary hearing, *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 456 (M.D. Pa. 2018), during which Respondents presented substantial evidence about the harm the Ordinance was intended to redress. This evidence included: an audio recording of the city council committee hearing which included testimony from a clinic employee and a neighborhood resident describing the harm caused in the neighborhood surrounding the clinic, testimony describing how anti-abortion protesters would brandish pepper spray at the counter-protesters and scream into the counter-protesters' faces, statement by a clinic representative describing how protestors would follow patients, take pictures of employees, "trespass, … bang on windows"

or "take photos inside the clinic; impede and deter cars from entering the clinic parking lot."

Respondents also presented substantial evidence about the alternatives considered by Harrisburg city council prior to the passage of the ordinance and how existing laws were insufficient to address the problems at these facilities.

The District Court considered this evidence in light of the Court of Appeals' standard, and denied Plaintiffs' motion for preliminary injunctive relief. *Reilly v. City of Harrisburg*, 336 F.Supp.3d 451, 474 (M.D. Pa. 2018).

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Third Circuit.

The Court of Appeals' Decision

The Court of Appeals unanimously affirmed the District Court's denial of Petitioners' preliminary injunction request. *Reilly v. City of Harrisburg*, 790 F. App'x 468, 478 (3d Cir. 2019). Applying the rationale from its recently-decided decision in *Bruni v. City of Pittsburgh*, No. 18-1084, 2019 WL 5281050 (3d Cir. Oct. 18, 2019) ("*Bruni II*"), the Court of Appeals agreed that Harrisburg's Ordinance was content neutral and narrowly tailored to meet Harrisburg's legitimate interests. As a result, the Court found that the Ordinance passed muster under an intermediate scrutiny test. Importantly, the Court also clarified that the Ordinance does not prohibit sidewalk counseling as its plain terms prohibit only congregating, patrolling, picketing, and demonstrating, none of which covers peaceful one-on-one conversations or leafletting. *Id.* at 474 (*citing Bruni,* 941 F.3d at 86-88).

The Court also rejected Petitioners' claim that the Ordinance was unconstitutionally vague or overbroad, relying upon previous opinions that interpreted the term "demonstrate" in a way that prohibits a form or manner of speaking, and not one that turns on the substance of speech. *Id.* (citing *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 367 (1997) (excepting "sidewalk counseling" from a broader prohibition on "demonstrating within fifteen feet" from a clinic entrance)). Moreover, because the Court held that "demonstrating" and "picketing" go to "the manner in which expressive activity occurs, not its content," it held that "there is no need for law enforcement to examine the content of the message . . . to determine whether a violation has occurred,'" such that the ordinance was not content based and not subject to strict scrutiny. *Id.* at 475-76 (quotations omitted).

The Court concluded there was no evidence that the City adopted the Ordinance for an impermissibly content-based reason, and that the Ordinance was narrowly tailored to the government's legitimate interests. *Id.* at 476-77.

Petitioners sought rehearing *en banc* but the Court of Appeals denied Petitioners' request. *See* Petitioners' Feb. 3, 2020 Petition for Writ of Certiorari, 19-983, at 115a.

Petitioners' First Petition for a Writ of Certiorari.

Petitioners then filed a Petition for a Writ of Certiorari. This Court denied Petitioners' Petition. *Reilly v. City of Harrisburg*, 141 S. Ct. 185 (2020) (mem.).

The Remand to the District Court

On remand to the District Court, the parties moved for summary judgment. The District Court granted Harrisburg's motion for summary judgment and denied Petitioners' cross-motion. The District Court dismissed Petitioners' facial challenge after acknowledging that the City had previously "met its burden to show that the Ordinance is content-neutral and narrowly tailored to achieve a legitimate government interest." Pet. 14a. It held as a matter of law that the Ordinance is constitutional on its face and that the ordinance does not facially violate Plaintiffs' constitutional right to free speech or free assembly. *Id.*

The District Court likewise held that the City was entitled to summary judgment on Petitioners' challenge that the Ordinance, as applied, violated Petitioners' first amendment rights because, among other things, Plaintiffs failed to demonstrate that the City was the "moving force of the constitutional violation" through a custom, practice, or policy. *Monell, supra*, at 694.

Specifically, the District Court held that there was no evidence of any relevant written or unwritten policy, other than the Ordinance itself, which the Court had already held was facially constitutional; further, the Court held that there was no evidence that the City had a custom of enforcing the ordinance in a manner that prohibited sidewalk counseling. Pet. 18a. Rather, the District Court concluded, the evidence revealed "nothing more than a single ad-hoc enforcement action undertaken by an individual municipal employee who lacked policymaking authority," without any direction or encouragement by

policymakers to enforce the Ordinance in a manner that prohibited sidewalk counseling. *Id.* (citations omitted). Additionally, the District Court held, "any misapplication of the statute was therefore the product of discrete enforcement decisions by individual municipal employees rather than a "fixed plan[] of action" or a customary practice for which the City can be held liable." Pet. 19a (citing *Pembaur* v. *Cincinnati*, 475 U.S. 469, 480-481 (1986)).

The District Court also rejected Petitioners' "after-the-fact interpretations of the Ordinance," which the District Court recognized "were formulated in response to hypothetical enforcement scenarios and pursuant to the City's litigation strategy of defending the Ordinance's constitutionality." Pet. 20a. Ultimately, the District Court held that Petitioners failed to produce evidence sufficient to support a finding that the City is liable under *Monell* for their free speech and free assembly claims. Pet. 21a.

Petitioners' Appeal to the Third Circuit.

Petitioners filed a third appeal to the Court of Appeals for the Third Circuit. After briefing and argument, the Court of Appeals affirmed the District Court's decision, agreeing with the District Court that Petitioners failed to prove the existence of a policy or custom of prohibiting sidewalk counseling. The Court of Appeals noted both that the "City issued no rules, proclamations, or edicts that could be considered a policy" of barring one-on-one counseling, and that the plain language of the Ordinance was constitutional on its face under *Bruni*. Pet. 6a. The Court of Appeals also held that the City had no custom of precluding such conduct. Pet. 7a. Because there was no

basis upon which to hold the City liable in a Section 1983 suit where there was no policy or custom, the Court of Appeals held that Petitioners' claims failed to establish municipal liability under *Monell*. *Id.* And, without a basis for municipal liability, the Court of Appeals held, there was no need to reach Petitioners' first amendment claims. Thus, the Court of Appeals affirmed the District Court's grant of summary judgment in the City's favor.

REASONS FOR DENYING THE PETITION

The Petition contains three issues, not one of which warrants this Court's review.

I. PETITIONERS DID NOT RAISE THE ISSUE BELOW.

The Petition first asks this Court to overrule *Hill v. Colorado*, notwithstanding that Petitioners never asked the appellate panel or the *en banc* court to address this precedent. Even if the argument is not waived because it is jurisdictional, review is not warranted here because "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citation omitted); *see also Adams v. Robertson*, 520 U.S. 83, 91 (1997) (where Petitioners failed to establish that they properly presented their due process issue to the Alabama Supreme Court, this Court refused to reach the question presented, and dismissed the writ as improvidently granted; as the Court noted, raising issues in the lower courts "assist[] us in our deliberations by promoting the creation of an adequate factual and legal record" and gives the parties the opportunity to "test

and refine their positions before reaching this Court."); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 9 (2015) (failure to raise and preserve argument below precludes consideration by this Court).

The Court of Appeals affirmed the District Court's grant of summary judgment primarily because Petitioners failed to establish that the conduct they wished to pursue (sidewalk counseling) was barred by municipal policy or custom. The Court of Appeals correctly noted that without proof of a policy or a custom prohibiting the described conduct, there is no basis for municipal liability under *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691-92 (1978), and, accordingly, there was no need for the Court to "apply the correct First Amendment principles" to the Ordinance. Pet. 5a. Because the Court of Appeals was not asked, and did not mention *Hill,* this is a poor vehicle upon which to determine *Hill*'s viability.

II. THE ORDINANCE HERE HAS NO SEMBLANCE TO THE ORDINANCE IN *HILL*.

Petitioners' invitation to revisit and overrule *Hill* should be rejected for another compelling reason—because the ordinance language in *Hill* is materially different from the ordinance language at issue in this case. The ordinance in *Hill* expressly precluded "passing leaflet[s] or handbill[s]" within a particular zone (unless the person consented) and expressly precluded "engaging in . . . education or counseling with such other person in the public way or sidewalk . . ." *See Hill*, 530 U.S. 703 at 707 n.1 ("(3) No person shall knowingly approach

another person within eight feet of such person, unless such other person consents, for the purpose of **passing a leaflet** or handbill to, displaying a sign to, or engaging in oral protest, education, or **counseling** with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor" (emphasis added).) The *Hill* dissenters considered the Colorado statute content-based because it only constrained messages of "protest, education, or counseling." *See Hill*, 530 U.S. at 742-749 (Scalia, J., dissenting, with Thomas, J.), and at 765-70 (Kennedy, J., dissenting).

By contrast, the Harrisburg Ordinance *does not prohibit peaceful one-on-one conversations or leafletting*—the focal point of the dissenters in *Hill*. Rather, as the Court of Appeals recognized, the terms "congregate," "patrol," "picket," and "demonstrate" as used in the Harrisburg Ordinance address only certain behavior or manners of expression—but not the content—of speech; in such circumstances, there is "no need for law enforcement 'to examine the content of the message . . . to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quotations omitted).

Additionally, the Harrisburg Ordinance differs from the ordinance in *Hill* because, unlike the ordinance at issue in *Hill*, the Harrisburg Ordinance expressly states that it is not content-based. Harrisburg, Pa., Code § 3-371.4(B) ("The provisions of this section shall apply to all persons equally regardless of the intent of their conduct or the content of their speech.") Thus, the Ordinance prevents consideration of content even if content could in the

abstract factor into whether a person is "demonstrating" or "congregating."

Because the ordinance at issue is materially different from that at issue in *Hill*, this is not the proper vehicle to use to overrule this precedent.

III. THE THIRD CIRCUIT PROPERLY APPLIED *MONELL* TO THE FACTS OF THIS CASE.

Petitioners' second issue challenges the lower courts' application of *Monell* to the facts of this case. Specifically, Petitioners ask "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." Pet. at i.

Petitioners' dissatisfaction with the Court of Appeals' application of *Monell* simply is not a basis upon which to grant this Petition. This is particularly true where Petitioner's *Monell* analysis fails to specify caselaw purportedly overlooked by the Third Circuit.

Pursuant to *Monell* and its progeny, "a municipality cannot be held liable under §1983 on a respondeat superior theory." *Id.* at 691; *see also*, *e.g.*, *Connick v. Thompson*, 563 U.S. 51, 60-62 (2011). This Court previously held that when an employee's alleged unconstitutional act forms the basis of a plaintiff's claim against a municipality, the municipality's failure to prevent the harm must be

shown to be deliberate under "rigorous requirements of culpability and causation." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 415 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388. As this Court has explained:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. 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.
>
> Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Pembaur, supra, at 483-84. Thus, "under §1983, local governments are responsible only for 'their own illegal acts.'" *Connick v. Thompson*, 563 U.S. 51, 60. To succeed on a *Monell* claim, the plaintiff must demonstrate that the actions taken by the officials in inflicting the constitutional injury were done pursuant to "some official policy" established by the defendant government entity. *Monell,* 436 U.S. at 692. Typically, this showing requires a plaintiff to identify some official "decision[] of a government's lawmakers," "act[] of its policymaking officials," or "practice[] so persistent and widespread as to practically have the force of law." *Id.* at 61.

Also, Plaintiffs must show that the municipality acted with "deliberate indifference" in relation to its custom and/or policy. *Beck v. Pitt.*, 89 F.3d 966, 972 (3d Cir. 1996). This generally requires proof of repeated violations to establish the level of "deliberate indifference" necessary to trigger municipal liability. *Brown*, *supra*, at 407.

The Courts of Appeals' conclusion—that the City of Harrisburg had no "policy" of restricting sidewalk counseling—is eminently correct based on the evidence adduced. The District Court conducted a fact-specific legal analysis of a complex record before determining that the ordinance was not unconstitutional on its face and that the City of Harrisburg did not have an unwritten policy or custom of applying it beyond its plain meaning. The Court of Appeals' decision affirming the District Court's conclusion does not conflict with any decision of this Court or another court of appeals. Further review of the Court of Appeals' fact-bound decision is unwarranted.

While Petitioners continue to argue, incorrectly, that the ordinance on its face is unconstitutional because, according to Petitioners, it prohibits sidewalk counseling, the Court of Appeals earlier found the Ordinance "fairly susceptible" to a construction that excluded sidewalk counseling or other similar conduct from the Ordinance's prohibitions. Specifically, the Court concluded that the District Court properly construed the terms "congregate," "patrol," "picket," and "demonstrate" in accordance with their plain meanings to exclude peaceful one-on-one conversations or leafletting. Pet. 4a (*citing Bruni II*, slip. op. at 24–26). Because it found that the ordinance did not prohibit sidewalk counseling—or any other peaceful one-on-one conversations on any topic or for any purpose—and

the ordinance "did not regulate speech based on subject matter, function or purpose," *id.*, the Court also found that the plain language of the ordinance did not require law enforcement to examine the content of speech to determine if a violation occurred.

The Court of Appeals previously recognized that where law enforcement is required to examine "decibel level, the distance between persons, the number of persons, the flow of traffic, and other things usually unrelated to the content or intent of speech," as opposed to the content of speech to determine whether a violation occurred, the ordinance is content neutral. As a result, the court agreed that the Ordinance "as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations," and, as such, is content neutral.

Petitioners' reliance on the fact that one of the two Petitioners received a warning from a police officer in 2014—more than nine years ago—as evidence of official policy or custom of precluding sidewalk counseling or leafletting fares no better. Simply stated, Petitioners failed to prove that the alleged misconduct was continuing, widespread or involved a series of decisions by the defendant government entity. *Monell,* 436 U.S. at 691. Thus, Petitioners failed to prove that this one-off situation established custom with the force of law such that the City of Harrisburg's alleged official policy was "the moving force behind the due process violation." *Id.* at 695.

Rather, as the Court of Appeals astutely noted, "[b]eyond the text of the Ordinance itself, Harrisburg

has not issued formal guidance on how it will enforce that measure. Instead, each individual police officer investigates and decides whether to issue a warning or citation, sometimes checking with a supervisor to receive guidance on how to respond." Pet. 2a. Thus, there is no evidence that the conduct was so widespread as to become the municipality's policy. And even if that policy were causally connected to a First Amendment violation, it is undisputed that Petitioner failed to even allege, much less prove at the summary judgment stage, the "pattern of injuries" necessary to establish deliberate indifference. *Brown, supra*, at 408.

In fact, when pressed, Petitioners were unable to point to any other instance in which any person was arrested or threatened with arrest for the same or similar conduct. This Court has previously made clear that these facts are insufficient to establish *Monell* liability. *See Brown*, *supra*, at 404 (an act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law).

In light of this factual record and Petitioners' abject failure to adduce evidence—such as statistics, records of complaints filed with the City, or any other facts—to prove that the warning Petitioner Reilly received in 2014 was anything more than an isolated incident, the Court of Appeals properly applied this Court's precedent. There is no need for this Court to address the Court of Appeals' application of *Monell* to the facts of this case.

IV. ISSUES REGARDING FACT-SPECIFIC TESTIMONY ARE UNWORTHY OF THIS COURT'S REVIEW.

Petitioners' third issue—which asks 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—is equally unsubstantial and unworthy of certiorari. Indeed, to decide this issue would require this Court to wade into complicated questions of fact.

Petitioners rely primarily on the deposition testimony from the City's solicitor regarding his view of what conduct or speech the Ordinance is intended to address, as well as Petitioners' reliance on comments from witnesses to suggest that the content-neutral Ordinance may be transformed into a content-based Ordinance. Petitioners' reliance on this testimony is misplaced. The testimony upon which Petitioners rely consists of answers to hypothetical questions bracketed by the phrase "I don't know." Pet. 28a (A: "If two people were …walking parallel to the building…, and they're talking about…—you know, "good morning," "good afternoon," whatever, I don't know if those people would be considered congregating by any definition. If two people were talking about anything of substance, I think the answer is, they're congregating.") Putting aside that the testimony referred to a hypothetical involving people passing through the zone, not persons going to or from the clinic, which Petitioners have never

claimed to be prohibited, the witness's testimony was equivocal at best.

Furthermore, hypotheticals also cannot substitute for evidence. This Court "must be careful not to . . . speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *McCullen*, 573 U.S. at 485 ("[T]he record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics…") Here, again, Petitioners presented no evidence to establish that persons passing through the zone have been cited or that police consider content when issuing citations. Petitioners certainly did not demonstrate that Harrisburg engaged in a pattern of doing so that is "so permanent and well settled as to constitute a custom or usage with the force of law." *Monell*, *supra*, at 691. Accordingly, there is no policy and/or custom of the City of Harrisburg that caused any violation of the First Amendment rights of individuals engaged in sidewalk counseling in relation to the buffer zone.

CONCLUSION

Not one of the three issues Petitioners present provides a "compelling reason" for this Court to exercise its discretion and accept this appeal.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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