No. 23-389

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

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR 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). The City of Harrisburg enacted an ordinance "directed against the opponents of abortion," *Hill* v. *Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting), actually enforced that ordinance against Petitioner Reilly, and affirmed throughout this litigation—whether through Rule 30(b)(6) admissions, at oral argument, or in briefing—that the ordinance applied to Petitioners' sidewalk counseling. Yet the Third Circuit has allowed Harrisburg to escape Section 1983 liability by relying on this Court's decision in *Hill*; providing a limiting construction of the Ordinance; discounting Harrisburg's own binding admissions about the Ordinance's scope; and ignoring Petitioners' as-applied challenge.

Respondents do not meaningfully contest this case's importance. Nor do Respondents dispute that Harrisburg officials repeatedly confirmed that the Ordinance operates as a content-based regulation of prolife sidewalk counseling. And they do not dispute that 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. Instead, Respondents spend the bulk of their submission arguing that this Court need not revisit its much-maligned decision in *Hill*. But Respondents identify no reason why the Third Circuit should have the final say 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). In any event, as argued below, Respondents' arguments fail on their own terms. At bottom, the Third Circuit committed a series of legal errors and exacerbated a circuit split, both of which warrant this Court's correction.

I. Petitioners Adequately Addressed *Hill* Below, and Only this Court May Overrule its Precedents.

In their effort to insulate the Third Circuit decision from scrutiny, Respondents contend (Br. in Opp. 10) that Petitioners never asked the appellate panel or *en banc* court to address *Hill* v. *Colorado*. That is incorrect.

First, lower courts have no authority to overrule decisions of this Court: "[O]nly this Court may overrule one of its precedents." *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). Thus, it would have been futile for Petitioners to seek what Respondents claim they must have sought below, for "[o]nly the Supreme Court has the power to overrule one of its precedents, even where the viability of that precedent has been called into question by subsequent Supreme Court decisions." *United States* v. *Henderson*, 841 F.3d 623, 626 n.3 (3d Cir. 2016).

Second, "[a]n argument is not waived if it 'is inherent in the parties' positions throughout [the] case.'" *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund* v. *WithumSmith Brown, P.C.*, 692 F.3d 283, 301 (3d Cir. 2012). Petitioners' arguments against *Hill* are inherent in their positions, and as this Court's rules require, "fairly included" in the

Petition. Sup. Ct. R. 14.1(a) (providing "any question presented is deemed to comprise every subsidiary question fairly included therein").

Indeed, *Hill* is at the heart of this case. See, *e.g.*, *Reilly* v. *City of Harrisburg*, 205 F. Supp. 3d 620, 627 n.4 (M.D. Pa. 2016) (*Reilly I*) (relying on *Hill* in denying Plaintiffs' first motion for preliminary injunction, observing that *Reed* "did not overturn" *Hill* and thus *Hill* "remain[s] good law"); *Reilly* v. *City of Harrisburg*, 336 F. Supp. 3d 451, 464 (M.D. Pa. 2018) (*Reilly III*) (relying on *Hill* to deny Plaintiffs' motion for preliminary injunction); *Reilly* v. *City of Harrisburg*, 790 F. App'x 468, 474 (3d Cir. 2019) (relying on *Hill* to affirm denial of motion for preliminary injunction); *Reilly* v. *City of Harrisburg*, 2023 WL 4418231, at *3 (3d Cir. July 10, 2023) (noting that the Ordinance "is constitutional on its face under *Bruni*," which relied on *Hill* to uphold a buffer-zone law); see also *Bruni* v. *City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019) (continuing the Third Circuit's practice of relying on *Hill* to categorize buffer-zone laws as content-neutral speech restrictions requiring only intermediate scrutiny).

Third, even if Petitioners did not explicitly argue that *Hill* was wrongly decided under *Reed* and *McCullen* in the court of appeals, the Court may overrule *Hill* on its own right. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (citing *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990)). Moreover, "[a] court may consider an issue

'antecedent to *** and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat. Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia*, 498 U.S. at 77). This Court "has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Fed. Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (cleaned up)). And no doubt *Hill* is offensive to the First Amendment. See 530 U.S. at 741 (Scalia, J., dissenting) (calling it "a speech regulation directed against the opponents of abortion"); *id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based."); *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022) (observing that *Hill* was a "distort[ion]" of "First Amendment doctrines"); *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 104 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting) (noting that this Court's intervening decisions have "all but interred" *Hill*, rendering it "an aberration in [the Court's] case law"); *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)).

In short, even if Petitioners were precluded from briefing *Hill*'s validity in the direct appeal below, that does not bar this Court from resolving the ultimate legal issues at play here: the lower courts' reliance on *Hill* to uphold a content-based buffer-zone ordinance.

II. Respondents' Attempt to Differentiate Its Ordinance from *Hill* is Unavailing.

Respondents contend that the Ordinance is unlike the *Hill* statute because, on its face, it "does not prohibit peaceful one-on-one conversations of leafletting." (Br. in Opp. 12.) That argument falls short. To begin with, the district court found that the law in *Hill* was "a similar statute" to the Ordinance. See *Reilly I*, 205 F. Supp. 3d at 628. Beyond that, Harrisburg *applied* the Ordinance to prohibit peaceful sidewalk counseling, as shown by the police officer's enforcement of the Ordinance against Reilly and confirmed by the City's testimony and briefing. (See Pet.App. 28a. 34a–37a, 39a; C.A.App. 287, 753, 1043; D.Ct.Doc. 13-2, at 12.) After *Reed* and *McCullen*, the "principal inquiry in determining content neutrality" is not *Hill*'s test of "whether the government has adopted a regulation of speech because of disagreement with the message it conveys," 530 U.S. at 719 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989)), but whether a law "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin*, 596 U.S. at 69 (quoting *Reed*, 576 U.S. at 163)). Harrisburg applied the Ordinance to Petitioners, singling them out because of the pro-life viewpoint of their sidewalk counseling. Yet because this case is about abortion, *Hill* distorted the lower courts' analysis, just as *Hill* continues to "distort[] First Amendment doctrines." *Dobbs*, 597 U.S. at 287.

Respondents also contend that the Ordinance is unlike the *Hill* law because it "expressly states that it is

not content-based." (Br. in Opp. 12 (citing Harrisburg, Pa., Code § 3-371.4(B)). That is beside the point. This Court's cases "have also recognized 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,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys." *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791).

The Ordinance operated to restrict Petitioners' speech and has only been applied to restrict pro-life speech. Indisputable is that a police officer warned Reilly that she was violating the Ordinance. (Pet.App. 6a–7a.) In doing so, the police officer examined Reilly's speech activities to determine whether her expressive activity fell within the ambit of the Ordinance. Cf. *Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). In short, Harrisburg's enforcement policy—as confirmed by City officials throughout this litigation—was a content-based regulation of speech. Unfortunately, the Third Circuit cut off Petitioners' as-applied challenge by declaring the Ordinance constitutional under *Bruni*, which in turn relied on *Hill*.

At bottom, Harrisburg adopted the Ordinance to stifle pro-life activity at the local abortion clinics, and it actually *applied* the Ordinance to chill Petitioners' protected pro-life speech. Although the distinction between facial and as-applied challenges can sometimes be blurry, see *Citizens United* v. *Fed. Election*

Comm'n, 558 U.S. 310, 331 (2010), no such confusion exists here considering Harrisburg's actual enforcement of the Ordinance against Petitioner Reilly and its binding admissions during litigation. (Pet.App. 6a–7a.)

III. The Third Circuit's Disregard of Harrisburg's Rule 30(b)(6) Witnesses' Unrebutted Testimony, Along with Its Counsel's Admissions, Warrants this Court's Review

Respondents have no answer to this Court's precedents confirming that if a municipal policy is established, only one application of that policy is enough to trigger *Monell* liability. See *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823–24 (1985). Nor do Respondents meaningfully engage with Petitioners' argument that the Third Circuit misconstrued Petitioners' challenge as being based only on the police officer's enforcement of the Ordinance against Reilly. Instead, Respondents contend that the question presented as to whether a court may disregard government testimony and admissions during litigation raises "complicated questions of fact." (Br. in Opp. 18.) Respondents' evasion should be rejected.

As Petitioners pointed out (Pet. at 23–24), although the police officer's enforcement of the Ordinance was an example of Harrisburg applying the Ordinance against pro-life speech, the City's binding testimony and litigation admissions confirmed its official policy for purposes of *Monell* liability. In the same vein, Harrisburg's designated Rule 30(b)(6) witnesses, corroborated by admissions during litigation, confirmed that

the Ordinance operates as a content- and viewpoint-based speech restriction.

Respondents attempt to downplay Harrisburg's admissions as merely "answers to hypothetical questions." (Br. in Opp. 18.) That is not the full story. Throughout this litigation, Harrisburg repeatedly affirmed that it knowingly and intentionally interpreted, applied, and enforced the Ordinance to prohibit pro-life sidewalk counseling. (C.A.App. 127, 130–131, 132, 133–136, 137, 158, 159, 750, 753, 981–983.) Harrisburg has repeatedly defended its policy against Petitioners' sidewalk counseling within the buffer zone. (C.A.App. 287, 981, 911–913, 914–917, 1043.) And the City explicitly ratified the Ordinance as applied to pro-life sidewalk counseling in 2016. (C.A.App. 727–729, 810–814.)

Indeed, Respondents have been overwhelmingly clear that Harrisburg applied and enforced the Ordinance to restrict pro-life sidewalk counseling:

- Neil Grover, Harrisburg's Solicitor and Rule 30(b)(6) designee on Harrisburg'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 testified 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." (Pet.App. 28a.) But, he added, "[i]f two people were *talking about*

anything *of substance*," then "they're congregating" and violating the Ordinance. (Pet.App. 28a (emphasis added).)

- Deric Moody, Harrisburg's Police Captain, 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." (Pet.App. 32a (emphasis added).)

- In its Brief in Opposition to Preliminary Injunction, Harrisburg confirmed that it interprets and applies the Ordinance to prohibit counseling within the buffer zone: "As in *Bruni*, Plaintiffs can still engage in counseling, *just not within the small buffer zone*." (D.Ct.Doc. 13-2, at 12 (emphasis added).) Harrisburg further 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 its 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 (emphasis added).)

- 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 to an individual," *Reilly III*, 336 F. Supp. 3d at 463 , Harrisburg maintained 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.)

- At the preliminary-injunction hearing, Harrisburg repeatedly pressed that Petitioner 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.)

- In its summary-judgment briefing, Harrisburg declared 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.)

Respondents have no meaningful response to Petitioners' argument that all these statements made by Harrisburg's Rule 30(b)(6) designees, along with the

City's litigation admissions, are direct and unrebutted evidence of an explicit policy under *Monell*. Respondents also fail to rebut Petitioners' argument (Pet. at 28–29) that the Third Circuit's discounting of Harrisburg's admissions of a municipal policy creates a circuit split with the Ninth Circuit. See *Hoye* v. *City of Oakland*, 653 F.3d 835, 850 (9th Cir. 2011) (finding "dispositive *** city's admissions throughout this litigation that it understands and enforces the Ordinance in a content-discriminatory manner"). Indeed, Harrisburg's dogged defense of the Ordinance as applied to pro-life sidewalk counseling stands in stark contrast to the Third Circuit's conclusion that such statements "show only that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014." (Pet.App. 7a.)

In short, because Harrisburg's enforcement of the Ordinance against pro-life sidewalk counseling was established as confirmed by its admissions and testimony, 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. Respondents and the court of appeals simply have no basis to ignore that factual reality.

IV. This Case Presents Exceptionally Important Questions that Warrant this Court's Review and is a Clean Vehicle to Overrule *Hill*.

Members of this Court have noted that buffer zones "impose[s] serious limits on free speech." *Bruni* v. *City of Pittsburgh*, 141 S. Ct. 578 (2021) (Thomas, J.,

respecting the denial of certiorari). This Court denied certiorari in *Bruni* "because it involve[d] unclear, preliminary questions about the proper interpretation of state law." *Id*. No such concern exists here given that this appeal followed summary judgment, and thus it is a clean vehicle "to resolve the glaring tension in [this Court's] precedents," *id*., because there are no disputed material facts. Moreover, the Third Circuit admittedly "ha[s] continued to rely on *Hill* since *McCullen* and *Reed* were handed down…." *Bruni*, 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.

Aside from addressing *Hill*'s ongoing "distort[ion]" of First Amendment doctrine, *Dobbs*, 597 U.S. at 287, this Court should grant certiorari to reject Harrisburg's capacious conception of its power to enforce a speech-restrictive law so long as it is not challenged in court. The Third Circuit's disregard for Harrisburg's binding admissions about the Ordinance's application against protected speech, along with its limiting construction of the Ordinance, has allowed Harrisburg to insulate itself from liability for its unconstitutional policy. See *City of St. Louis*, 485 U.S. at 127.

Respondents have no meaningful response to the exceptional questions raised in this petition. Respondents also fail to grapple with the unavoidable consequences of their position: that the government may hide behind a seemingly content neutral "buffer zone" law but wield it as necessary to chill the First Amendment speech of sidewalk counselors. But

Respondents—or any other municipality, for that matter—should no longer be able to rely on *Hill*. Nor should municipalities in the Third and First Circuits be able to rely on a federal court to 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.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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