**No. 19-1184**

**In the**
**Supreme Court of the United States**

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NIKKI BRUNI; JULIE COSENTINO; CYNTHIA RINALDI; KATHLEEN LASLOW; and PATRICK MALLEY,
*Petitioners,*

v.

CITY OF PITTSBURGH; PITTSBURGH CITY COUNCIL; MAYOR OF PITTSBURGH,
*Respondents.*

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

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# BRIEF OF *AMICUS CURIAE* LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS[1]

Life Legal Defense Foundation is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Many of Life Legal Defense Foundation's clients are individuals who, like the Plaintiffs here, seek to communicate a life-affirming message of hope to women considering abortion.

Life Legal Defense Foundation was founded in 1989, when arrests of large numbers of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and obstruction; sentences consisting of fines, jail time, or community service; and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990's, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response of many legislatures, local officials, and judges was not to applaud this conversion to lawful means of advocacy, but instead, like the City of Pittsburgh, to look for ways to criminalize peaceful

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing.

expressive activity. This history informs Life Legal Defense Foundation's vigilance to protect the First Amendment rights of ordinary citizens who peacefully and lawfully express a politically unpopular message.

Life Legal Defense Foundation is particularly concerned that the decision of the Third Circuit will undermine the hard-fought, though limited, victory for free speech embodied in this Court's unanimous decision in *McCullen v. Coakley*, 573 U.S. 464 (2014). and result in further distortion of the First Amendment in the service of special interests.

## SUMMARY OF THE ARGUMENT

Sidewalk counseling in front of abortion clinics is a form of free speech that is almost as old as this Court's abortion jurisprudence. It provides not just the last, but often the only chance for reaching women considering abortion and their companions with the message that they have other options. The leaflet showing fetal development, the business card with the number of a pregnancy resource center, and the verbal offer of free help reach the woman passing on the sidewalk either then and there, or not at all. As this Court itself has recognized, sidewalk counselors depend on a gentle, conversational approach in disseminating their message. This quiet-style delivery is an essential part of the message they seek to communicate, and the communication of this message is seriously hampered if not entirely destroyed by the City of Pittsburgh's ordinance.

Undoubtedly, fixed buffer zones on public sidewalks, particularly those created only for certain locations, make it easier for governments to prevent unpleasant encounters between citizens, but that is not enough to satisfy the First Amendment. "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). To justify its impingement on core First Amendment freedoms, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.*

In the instant case, the Third Circuit evaded this clear requirement by minimizing the impact on Petitioners' and others' speech and then holding that, in light of the minimal impact, Petitioners could not possibly show the existence of alternatives that would burden substantially less speech.

The Third Circuit erred twice: first, in downplaying the actual burden on speech, but second. and more importantly, in making it *Petitioners'* job to prove the existence of untried, less burdensome alternatives. The second error creates a conflict with several other circuits and guts this Court's unanimous decision in *McCullen*.

Finally, this case shows the problems inherent in what amicus Life Legal Defense Foundation seven years ago dubbed the "injordinance." See Brief of Amici Curiae Life Legal Defense Foundation and Walter Hoye in Support of Petitioners, filed in *McCullen v. Coakley*, No. 12-1168. This Court should grant the petition here and

take the opportunity to unwind over two decades of flawed abortion-specific First Amendment jurisprudence.

## ARGUMENT

### I. THE MOTIVATION, MESSAGE, AND METHODS OF PRO-LIFE SIDEWALK COUNSELORS NECESSITATE PROXIMITY.

What motivates ordinary citizens to voluntarily set out, day after day, week after week, rain or shine, to quietly talk with passers-by entering a clinic?

They receive no pay for this work. They act out of an earnest desire to do good, a desire deeply rooted in moral conviction and sometimes personal experience. As the late Justice Scalia put it:

> "For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur, is outside the entrances to abortion facilities."

*Hill v. Colorado*, 530 U.S. 703, 763 (2000) (Scalia J., dissenting). Whatever the motivation, Petitioners share the same underlying goal with thousands of

their fellow citizens across the nation: to save women from the pain, regret, and remorse that come with abortion, and to save nascent, innocent human life from destruction.

The methods used by pro-life sidewalk counselors such as Petitioners here are identical to those used by the sidewalk counselors in *McCullen*: they "approach and talk to women outside facilities, attempting to dissuade them from having abortions." 573 U.S. at 469. Contrary to the stereotyped portrayal of pro-life advocates as hurling epithets and blocking passage, Petitioners "attempt to engage women approaching the clinics in what they call 'sidewalk counseling,' which involves offering information about alternatives to abortion and help pursuing those options." *Id.* at 464. They initiate conversations through such phrases as "Good morning, may I give you this leaflet? Is there anything I can do for you? I'm available if you have any questions." Justice Scalia understood the methodology:

> "The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: 'My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?'"

*Hill*, *supra*, 530 U.S. at 757 (Scalia J. dissenting). They "consider it essential to maintain a caring

demeanor, a calm tone of voice, and direct eye contact during these exchanges." *McCullen*, 573 U.S. at 473.

*These encounters are very brief*. A few seconds is all the time sidewalk counselors or picketers have in which to communicate, over the ambient noise of the city streets, their message and their invitation for further conversation.

In order for these methods of communication to be successful, pro-life counselors and advocates must meet their audience where it is—on the public sidewalks at the entrance to abortion clinics, in close enough proximity to be able to be heard over traffic without shouting and to place a leaflet into an outstretched hand. "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners, and to do so, there must be opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). That opportunity is exactly what the ordinance forestalls.

## II. THE THIRD CIRCUIT FAILED TO APPLY *MCCULLEN* CORRECTLY.

In affirming the district's grant of summary judgment against the sidewalk counselors, the Third Circuit acknowledged that *McCullen* controls. The parallels between the Massachusetts law at issue in *McCullen* and the ordinance here are numerous. Undeniably, Pittsburgh's zone is smaller than the 35-foot buffer zone at issue in *McCullen*, but the principles that determine its constitutionality are the same. However, while purporting to follow the

principles laid out in *McCullen*, the Third Circuit's application of those principles was off the mark.

### A. The Pittsburgh Ordinance Alters the Nature of the Sidewalk and Burdens Speech.

Streets and sidewalks are not just for transportation. They have historically been one of the most important venues for the dissemination and exchange of ideas. They are "traditional public fora… immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (internal citations omitted). "Even today, [sidewalks] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *McCullen*, 573 U.S. at 476. This is precisely why the sidewalk counselors have to speak on the portions of the sidewalk now closed off to them: to reach an audience they would not otherwise be able to reach. As Justice Kennedy stated regarding the no-approach zone at issue in *Hill*, "For these protesters the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." 530 U.S. at 791 (2000) (Kennedy, J., dissenting).

For Petitioners and others in Pittsburgh, a significant section of public forum is no longer a

forum; the fact that the speaker can walk through the zone does not change the fact that the fundamental nature of the sidewalk has been altered. At the same time, clinic workers or volunteer "escorts" have full use of the zone. They can surround an incoming pedestrian and effectively block and dissuade her from hearing, seeing, or accepting literature from Petitioners and others. Thus, the ordinance converts a "quintessential public forum" into an enclave where pro-abortion speech is privileged.

The painted lines on the street at the Planned Parenthood clinic on Liberty Street show that its speech-free zone has a particularly crippling effect on speech activities because of the layout of the clinic entrance with respect to the sidewalk and street. The clinic entrance, which is six feet wide, opens directly onto the public sidewalk, which is somewhat less than fifteen feet wide. Standing outside the zone on either side of the entrance, in order to intercept pedestrians approaching from the other direction, a sidewalk advocate must choose between walking through the zone tight-lipped and with leaflets and/or sign stowed away, or stepping into the street and racing around the zone, in both cases trying to reach the woman or couple sufficiently ahead of their reaching the zone to be able to explain her purpose and offer them information and assistance.

Moreover, at exactly the same site as the clinic entrance, a public crosswalk provides pedestrian access across the vehicle thoroughfare. A pro-life speaker cannot stand on the sidewalk close enough to reach pedestrians in the crosswalk without infringing on the zone. To reach pedestrians

coming to the clinic via the crosswalk, he or she would have to stand on the opposite side of the street from the clinic. Positioned there, however, the counselor cannot reach pedestrians walking up to the clinic on the clinic side of the street since an entire thoroughfare separates her from them. Assuming a relatively equal flow of traffic from all approaches, a sidewalk counselor, rather than being deprived of one-third of his or her potential audience, is essentially deprived of two thirds of the audience.[2] Just as in *McCullen*,

> "the buffer zones impose serious burdens on petitioners' speech. At each of the … clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances... The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'"

573 U.S. at 487.

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[2] The estimates of potential audience are for illustration only, and Amicus does not suggest that a deprivation of one-third of one's potential audience would be a "minimal" or constitutionally acceptable burden.

### B. The Third Circuit Erroneously Excused the City's Failure to Establish a Lack of More Narrowly Tailored Means of Serving its Interests.

Despite the unmistakable similarities between Pittsburgh's buffer zone and the zone at issue in *McCullen*, the Third Circuit quantified the burden on Petitioners' speech as "de minimis." App. 29a. This downgrading of the burden on Petitioners rests largely on the Third Circuit's decision to put a narrowing construction on the ordinance that conflicts with Pittsburgh's own binding interpretation, an interpretation the city insisted on throughout briefing and defended at oral argument in the face of opposition from the panel.

Whether the Third Circuit is allowed to rewrite the ordinance is the subject of the first question presented by the Petitioners. However that question is decided, the Third Circuit undoubtedly erred in its next step of putting the onus on Petitioners to establish the existence of less burdensome alternatives. This it did by rewriting a sentence from *McCullen*.

In *McCullen*, this Court squarely put the onus of this issue on the government, holding, "To meet the requirement of narrow tailoring, the *government must demonstrate* that alternative measures that burden substantially less speech would fail to achieve the government's interests . . ." 573 U.S. at 495 (emphasis added). However, citing *McCullen* as authority, the Third Circuit said, "*Any challengers would struggle to show* that alternative measures would burden substantially less speech." App. 29a

(emphasis added) (simplified). But evidence concerning what alternatives were tried or considered will be primarily, and often solely, in the hands of the government, not the challenger. Even assuming *arguendo* that "a less demanding inquiry is called for where the burden on speech is not significant" (*id.*), the inquiry should focus on the evidence adduced *by the City*, not the challengers, to show "either that substantially less restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016).[3]

No matter which party bore the burden, the Third Circuit's review of the alternative measures attempted or considered by Pittsburgh was so cursory as to be meaningless. The Third Circuit identified three measures: an overtime police detail in front of Planned Parenthood, discontinued because of budget constraints; incident-based police responses; and "consideration of criminal laws that the police were finding inadequate to address the problem of protesters following patients and obstructing their way to the clinic." App. at 32a.

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[3] Moreover, putting the burden on the plaintiffs to show the existence of less restrictive alternatives to achieve the government's interests puts them in the position of assuming the truth of a proposition they may dispute, namely, that there is a problem not adequately addressed by existing laws and that therefore that "measures" need to be taken. Many if not most pro-life plaintiffs would dispute the accusations brought by abortion advocates that undergird the decisions by city council or state legislatures to enact new legislation to deal with anti-abortion speech activity.

The Third Circuit's opinion is unclear about whether the overtime police detail was always an inadequate alternative to a speech restrictive zone, or it only became inadequate because the City could no longer afford it. Either way, however, the record is silent as to why the police could not deal with alleged pushing, shoving, and blocking through incident-based responses, using existing laws against battery and obstruction. Even if the police were not on scene when these alleged incidents occurred, why could the police not apprehend and the city not prosecute and punish the perpetrators of these criminal acts? Did the perpetrators run off before the police arrived, never to return to the clinic? If so, problem solved. Were the police foiled in their attempts to locate the perpetrators? Was no one at the scene able to identify them? Did juries inexplicably acquit the malefactors? If not criminal prosecution, did the city attempt to obtain injunctions against persons repeatedly engaging in these activities?

Moreover, why is there is no video or photographic evidence of the obstruction and "aggressive pushing and shoving" that allegedly was a weekly if not daily occurrence at this location?[4]

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[4] Video evidence of the stereotypical confrontational anti-abortion protest is strangely absent from court records, including this one. On the contrary, *see, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 642 (3rd Cir. 2009) (video evidence introduced by plaintiffs "paint[s] a picture . . . very different from most other abortion clinic protest cases. . . . The [city] defendants have admitted allegations in plaintiffs' complaint as to the absence of physical confrontations of the sort **that frequently accompany anti-abortion proselytizing**")

Well into the 21st century, why did both the police and the clinic rely solely on oral testimony to make their case, rather than setting up one or more cameras to document the perpetrators and their behavior that eluded detection and prosecution? Indeed, might video surveillance serve as a deterrent to bad behavior, and thus serve the City's interests without in any way infringing on free speech rights?[5]

The City's claim that criminal acts were regularly occurring on a public sidewalk with impunity cries out for an explanation, not for a restriction on the speech of Petitioners and other law-abiding speakers. Its enumeration of the ways it purportedly "seriously considered and reasonably rejected" the alternative of enforcing existing laws against obstruction and battery is, upon closer examination, essentially identical to that provided by Massachusetts in defending its statute in *McCullen*: a clearly-defined line works better. The

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(emphasis added); *Madsen v. Women's Health Center*, 512 U.S 753, 785-90 (1994) (Scalia, J., concurring and dissenting) (describing in detail contents of video depicting peaceful demonstration activity; "anyone seriously interested in what this case was about must view this tape. And anyone doing so who is familiar with run-of-the-mine labor picketing, not to mention some other social protests, will be aghast at what it shows we have today permitted an individual judge to do.")

[5] "If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law." *McCullen*, 573 U.S. at 495.

Supreme Court rejected this argument, holding, "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495. The Third Circuit erred in not doing the same.

## III. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RECONSIDER *HILL*, *MCCULLEN*, AND THE CONSTITUTIONALITY OF INJORDINANCES.

An injordinance is a law that, like an injunction, creates speech restrictive zones on public sidewalks at specific locations. Whether because of the provisions of the law itself or its enforcement, in practice an injordinance will usually create only one or two such zones in an entire city. Like injunctions, injordinances are legitimated by reference to an alleged history of unlawful conduct by unnamed persons, attested to by ideological opponents. As with injunctions, the elusiveness of this conduct purportedly necessitates the creation of tools beyond those found in the usual law enforcement toolbox. As with injunctions, employees and agents for the business in whose favor the zone is created are permitted to engage in speech activity prohibited to others. Not surprisingly for such a bizarre creature of First Amendment law, injordinances exist only to serve abortion providers.

Twenty years ago in *Hill*, this Court approved the first injordinance to come before it. The Court described the law, which prohibited approaching without consent for speech-related purposes, as "tak[ing] a prophylactic approach" to dealing with

alleged "harassment" outside abortion clinics. *Hill* has been harshly criticized by both judges and legal scholars, *inter alia*, for turning a blind eye to the inherently content- and viewpoint-based nature of a speech restriction defined by the controversial location in which the speech takes place. E.g.,

> "If oral protest, education, or counseling on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State. It does not. It applies only to a special class of locations: entrances to buildings with health care facilities. We would close our eyes to reality were we to deny that 'oral protest, education, or counseling' outside the entrances to medical facilities concern a narrow range of topics-indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content."

*Id*. at 767 (Kennedy, J., dissenting). *See also, e.g.,* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association 16 Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) ("*Hill* was notable for the Court's unwillingness to pierce the veil of the law's apparent facial content-neutrality. . . *Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a

facially neutral statute to achieve goals clearly targeting particular content."); Jamie B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights*, 51 Am. U. L. Rev. 179, 216 (2001) ("The legislative history and the fact that there is no other plausible way of understanding the statute should have alerted the majority to the overwhelming prospect that this is a statute whose entire purpose and function are targeted at a particular category of political speech and protest. . . . [T]he suddenly credulous *Hill* Court refused to look beyond facial neutrality").

In *McCullen*, this Court tried to erect some hurdles to cities and states passing injordinances, chiefly by holding that, to satisfy the narrow tailoring prong, the government must "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." 573 U.S. at 467. However, *McCullen* left intact this Court's earlier finding, in *Hill*, that injordinances are content-neutral.

But it "blinks reality" to claim that "a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur . . . is not content-based." *McCullen*, 573 U.S. at 501 (Scalia, J., concurring). Commonsense says "there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact." *Id.* at 512 (Alito, J., concurring).

This Court's refusal to confront the content-based nature of injordinances led Justice Scalia to predict:

> "By engaging in constitutional dictum here (and reaching the wrong result), the majority can preserve the ability of jurisdictions across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring requirements applied in Part IV of the majority's opinion."

*Id.* at 498-99 (Scalia, J., concurring).

Indeed, that is the result in the instant case. Pittsburgh tailored its zone by making it smaller than the zone at issue in *McCullen*, and the Third Circuit tailored the law further with an interpretation explicitly rejected by the City, namely, that it did not apply to "calm and peaceful one-on-one conversations." App. 26a.[6] The Third Circuit then pronounced the burden on the public's speech insignificant and held that the minimal efforts undertaken or the "consideration" given by Pittsburgh to a few less burdensome alternatives, and the City's pronouncement that these alternatives would not or did not work, were

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[6] The Third Circuit apparently did not consider the constitutional challenges that could be brought to a statute restricting speech other than that carried out in "calm and peaceful one-on-one conversations." In addition to vagueness, a challenger other than Petitioners could argue that such a restriction precluded an important part of his or her message of urgency in the face of imminent, irreparable, and lethal harm to a human being.

sufficient to satisfy the narrow tailoring requirements of *McCullen*. App. 31a – 33a.

As Justice Scalia foresaw, once the fundamental constitutional objection to injordinances was glossed over by declaring them content- and viewpoint-neutral despite the site-specific nature of the speech restrictions, reviewing lower courts were very likely to defer to the government's judgment in matters relating to the degree of narrow tailoring -- whether the size of the zone, the strains on the police budget, the diligence of the government's attempt to enforce pre-existing laws, or the adequacy of the government's "consideration" of less burdensome alternatives. While thanks to this Court's decision in *McCullen*, a thirty-five foot radius is probably too big for most lower courts to swallow, they are not going to quibble over a few feet for distances less than that.[7]

This Court should take the opportunity presented by this petition, as well as the petitions in *Reilly v. City of Harrisburg*, No. 19-983, and *Price v. City of Chicago*, No. 18-1516, to reconsider its approval of injordinances as content and viewpoint-neutral restrictions on speech.

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[7] Petition for Certiorari, *Reilly v. City of Harrisburg*, No. 19-983, at 18a ("[T]he fact that the [20-foot] buffer zone is five feet larger than the zone in *Bruni II* is not enough to render the burden on speech significant. See *Bruni II*, 941 F.3d [73, 89] ("[W]e afford some deference to a municipality's judgment in adopting a content-neutral restriction on speech.") (simplified).

## CONCLUSION

Seventy-one years ago, Justice Robert Jackson observed,

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

*Railway Express v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

The phony neutrality of injordinances must be rejected. This Court should grant the petition for certiorari.

Respectfully submitted,

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