No. 17-3716

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JERYL TURCO,

Plaintiff-Appellee,

v.

CITY OF ENGLEWOOD, NEW JERSEY,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Jersey
Case No. 2:15-cv-03008 (Hon. Susan D. Wigenton)

PLAINTIFF'S PETITION FOR REHEARING OR REHEARING EN BANC

EDWARD L. WHITE III*
ERIK M. ZIMMERMAN**
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

FRANCIS J. MANION*
Lead Counsel
GEOFFREY R. SURTEES**
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

* Admitted to Third Circuit Bar
** Not admitted in this jurisdiction

Counsel for Plaintiff-Appellee

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CIRCUIT RULE 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decision of the Supreme Court of the United States in *McCullen v. Coakley*, 573 U.S. 464 (2014), and that this appeal involves questions of exceptional importance: (1) whether, and to what extent, the government has the authority to impose no-speech zones on all speakers in the abortion context, and (2) whether the geographical over-inclusiveness of the legislation in this case is consistent with the First Amendment's requirement of narrow tailoring as articulated in *McCullen*.[1]

s/ Francis J. Manion
FRANCIS J. MANION
Counsel for Plaintiff-Appellee

[1] Pursuant to Local Rule 35.2(a), copies of the panel's Opinion ("Slip Op.") and judgment, each dated August 19, 2019, are attached hereto as Exhibits A and B, respectively.

INTRODUCTION[2]

This case involves a city ordinance (the "Ordinance") that, except for its scope and the size of the zones it imposes, is *word-for-word* the same as the abortion buffer zone law unanimously struck down by the Supreme Court in *McCullen v. Coakley*, 573 U.S. 464 (2014). *See* Pl. Br. Add. A (comparing language of two laws side-by-side).

In reversing summary judgment entered in favor of Plaintiff, Jeryl Turco, a longtime sidewalk counselor, the panel decision—representing the vote of only one Third Circuit judge[3]—makes two errors of law that necessitate rehearing or consideration by the full Court. First, though recognizing that the speech-banning, buffer zone Ordinance at issue in this case is "[i]n nearly all material respects" the same as the law struck down in *McCullen*, Slip Op. at 9, the panel decision does what *McCullen*

[2] This petition is timely filed. September 2, 2019, the date the petition would have otherwise been due, is a legal holiday. *See* F. R. App. P. 26(a)(1)(C) and (a)(6)(A).

[3] A second Third Circuit judge retired before the decision issued, and the third member of the panel was a visiting judge from the Sixth Circuit. Slip Op. at 1.

explicitly did not: use *Hill v. Colorado*, 530 U.S. 703 (2000), to measure the burden on speech the Ordinance creates.[4]

Second, in considering the scope of the Ordinance, the panel decision conflates overbreadth with narrow tailoring. Instead of subjecting the scope of the Ordinance to narrow tailoring review, as did the Supreme Court in *McCullen*, the panel decision subjects it only to an overbreadth analysis, relying on *Hill* in doing so. A proper analysis would have noted the serious over-inclusiveness: it is undisputed that (1) the Ordinance was created to address protests at one abortion clinic on one day of the week, yet (2) the Ordinance authorizes permanent buffer zones at locations beyond that one location and on days beyond that one day.

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[4] A recent decision of the Seventh Circuit recognized that *Hill v. Colorado* is "incompatible" with subsequent Supreme Court case law. *Price v. City of Chicago*, 915 F.3d 1107, 1117-19 (7th Cir. 2019). The plaintiffs in that case have filed a petition for certiorari, now pending before the Supreme Court, asking the Court formally to overrule *Hill*. *See Price v. City of Chicago*, U.S. No. 18-1516 (scheduled for the Oct. 1 Supreme Court conference). In lieu of granting rehearing, and given the imminence of Supreme Court consideration of the *Price* case, this Court could hold the petition for rehearing pending Supreme Court action on the *Price* petition. If the Supreme Court grants review in *Price*, it would make sense to continue to hold the present case pending a Supreme Court ruling, whereupon this Court could then grant rehearing en banc, vacate the panel decision, and return this case to a panel for further consideration in light of *Price*.

In addition, currently pending before this Court are two additional cases involving legal questions similar to the ones at issue here. *See Bruni v. Pittsburgh*, No. 18-1084 (argued Feb. 6, 2019) (appeal of summary judgment in favor of city's buffer zone ordinance),[5] and *Reilly v. Harrisburg*, No. 18-2884 (same) (filed, Aug. 27, 2018; case being held C.A.V. pending *Bruni*). Plaintiff suggests that, if necessary, the instant petition should be held in abeyance pending a decision by this Court in *Bruni*. *See also supra* note 4 (suggesting this case be held pending Supreme Court action on the case of *Price v. Chicago*).

BACKGROUND

In response to a group of "aggressive" protestors demonstrating outside of one abortion facility (Metropolitan Medical Associates, or "MMA"), one day a week, for a limited period of time, the City of Englewood enacted the Ordinance. Slip Op. at 2-3; 5 n.3. The Ordinance, all but verbatim with the law struck down in *McCullen*, creates buffer zones outside all health care and "transitional" facilities. *Id.* at 3-4 (quoting the Ordinance). According to the district court, a fact the panel

[5] Appellant-Defendant identified *Bruni* in its Statement of Related Cases. Def. Br. at 2.

decision does not question, the effect of the Ordinance at MMA is to ban speech within an area of forty-eight feet on the public sidewalk. [Ja6.]

The district court granted summary judgment in favor of Plaintiff, Jeryl Turco, a pro-life sidewalk counselor who has been counseling at the abortion facility, MMA, for many years. Turco is not one of the "aggressive protestors" that gave rise to the Ordinance. Slip Op. at 5. Turco is, rather, a "sidewalk counselor," and the panel decision notes that it is "undisputed" that Turco's practice is "to calmly approach women entering the clinic and attempt to engage in peaceful, nonconfrontational communication." *Id*.

On cross-motions for summary judgment, the district court held that the Ordinance was not narrowly tailored under the Supreme Court's decision in *McCullen* and failed under the overbreadth doctrine. [Ja11-13.]

On appeal, a two-member panel reversed.[6] The panel decision held that there were genuine issues of fact with respect to two issues (the burden created by the Ordinance and whether the City considered

[6] Judge Vanaskie retired on January 1, 2019, after the submission of this case, but before the filing of the opinion. Slip Op. at 1.

alternative means to regulating speech, other than banning speech outright) which precluded summary judgment.

ARGUMENT

I. The Panel Incorrectly Relied Upon *Hill v. Colorado*.

The panel decision states that if the buffer zones outside the MMA clinic imposed an "inappropriate burden" on Turco's speech, "such a conclusion would be directly at odds with the Supreme Court's decision in *Hill v. Colorado*." Slip Op. at 14. This is incorrect as a matter of law.

The panel decision should have placed as much reliance on *Hill* as did the Supreme Court in *McCullen* (as well as the district court below): *none*. Even though both *Hill* and *McCullen* considered legislation involving the regulation of speech in the abortion context, *McCullen* nowhere relied upon, explained, or applied *Hill*. In fact, except to note that the prior Massachusetts law was modeled after the Colorado statute at issue in *Hill*, 573 U.S. at 471, *McCullen* does not even cite the decision.[7]

[7] As previously noted, *supra* at note 4, the Seventh Circuit recently observed that *Hill* is "incompatible with current First Amendment doctrine," as articulated in the subsequent decisions, *McCullen* and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). *Price*, 915 F.3d at 1117.

One apparent reason *McCullen* did not apply *Hill* (in addition to the clear possibility that the Court no longer thinks *Hill* is good law),[8] and the reason it was error for the panel decision to do so, is that the buffer zone in *McCullen*, which imposed a flat ban on speech for all speakers, is different in kind than the bubble zone in *Hill*, which allowed speakers to approach listeners who consented.

Indeed, *Hill* did *not* involve an "eight-foot *buffer* zone," as the panel decision states. Slip Op. at 16 (emphasis added). *Hill*, rather, involved an eight-foot floating *bubble* zone that prohibited individuals from knowingly approaching another person within eight feet of that person to pass a leaflet, counsel, or hold a sign *unless that person consents*. 530 U.S. at 707-8. In other words, and unlike the buffer zones at issue here, Colorado's bubble zone could be "pierced," as it were, when the listener consented, or the speaker stood in one place and was approached by the listener. *Id*. at 708 (noting that the Colorado bubble zone did "not require a standing speaker to move away from anyone passing by."). Indeed, *Hill* repeatedly emphasized that the statute only prohibited approaches to

[8] In the nearly twenty years since *Hill* was decided, the Supreme Court has never applied *Hill*'s reasoning in any meaningful way in any other decision. *See* Reply Brief of Petitioner, *Price v. Chicago*, 18-1516, at 8.

unwilling listeners, allowing communications with willing listeners to proceed. *See*, *e.g.*, *id*. at 715-16, 718.

In contrast to the scenario in *Hill*, Turco cannot cross into a buffer zone imposed by the Ordinance to continue speaking one-on-one with a patient, *even if the patient wishes to hear* what Turco has to say. Moreover, though the Court suggested that sidewalk counselors in *Hill* "might easily stand on the sidewalk at entrances" to hand out literature, 530 U.S. at 730, Turco is *not* permitted to do that under the Ordinance, as entrances, including the one at MMA, are at the heart of the no-speech zones. In fact, along with driveways and exits, entrances are the points from which the buffer zones are measured. *See* Ordinance, Sec. B (quoted in Slip Op. at 3).[9]

The impregnable barriers created by the Ordinance do not therefore just impact Turco's rights, they implicate the rights of women visiting the clinic. *Cf. Doe v. Gov. of New Jersey*, 783 F.3d 150, 155 (3d Cir. 2015)

[9] While another sidewalk counselor, Rosemary Garrett, testified she was not "bothered" by the buffer zones at MMA, Slip Op. at 13, Ms. Garrett's opinion is irrelevant as to whether the buffer zones affect Turco's speech. The extent to which a speech-restrictive law imposes a chilling effect upon one person's expression is not measured by *another* person's subjective beliefs about his or her *own* expression.

("[T]he First Amendment protects both the speaker and the recipient of information. . . . The listener's right to receive information is reciprocal to the speaker's right to speak.").

In sum, there is an important difference in kind between a categorical ban on *all speech by all speakers* within fixed zones, as the Ordinance creates, and a ban on *uninvited* speech within a bubble zone, as in *Hill*. In fact, except with respect to residential picketing, the Supreme Court has *never* upheld a legislatively enacted flat ban on speech as to *all speakers* in the abortion context. In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762-63 (1994), a thirty-six feet buffer zone did not apply to all speakers, but only to those subject to a state court injunction. Similarly, the fifteen-feet buffer zone in *Schenck v. Pro-Choice Network*, 519 U.S. 357, 362 (1997), applied only to individuals and groups subject to a federal court injunction, not to the general public. In *Hill*, as explained, Colorado did not outright ban all speech within an eight-foot bubble zone, as it allowed sidewalk counselors to speak within that zone when consent was given.

McCullen could not be plainer: "When the government makes it more difficult to engage in these modes of communication [*i.e.*, "one-on-

one communication" and leafletting], it imposes an especially significant First Amendment burden." 573 U.S. at 489. Blocking out portions of a traditional public forum to ban quintessential free speech activities, as the Ordinance does on its face, does not just make these activities "more difficult," it makes them *impossible* in those no-speech zones. Yes, Turco can go *outside* the zones to speak—just as Cohen could have worn his "F--k the Draft" jacket outside the courthouse, *Cohen v. California*, 403 U.S. 15, 16 (1971)—but "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

Assuming *arguendo* that there are disputed facts as to the "exact impact" of the Ordinance on Turco's speech, Slip Op. at 13, there is *no dispute* that portions of the public sidewalk once available to Turco to counsel women have been transformed into areas where free speech is now *verboten*. The government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums . . . ." *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981).

For these reasons, it is little wonder that, among *McCullen*'s numerous suggestions as to how Massachusetts could have created a more narrowly tailored statute than its 35-feet buffer zone, one suggestion is notably absent: *a smaller zone*. 573 U.S. at 490-93. In fact, after *McCullen* was decided, Massachusetts did not impose a smaller buffer zone. It enacted a new law, modeled on The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, targeting, *inter alia*, anyone "who, by force, physical act or threat of force, intentionally injures or intimidates or attempts to injure or intimidate a person who attempts to access or depart from a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½(d) ("Impeding Access to or Departure from Reproductive Health Care Facility").

In sum, the panel decision deviates radically from *McCullen* in relying on *Hill* as providing a legal standard to measure the burden the buffer zones have on Turco's speech. That deviation warrants rehearing.

II. The Scope of the Ordinance is Not Narrowly Tailored on its Face and in its Direct Application.

Assuming *arguendo* that there are genuine issues of fact as to whether the City considered "alternative means of regulating speech," other than banning it outright, Slip Op. at 13, those factual disputes are

not *material*: there is no dispute as to what the Ordinance states and commands on its face. While the panel decision suggests that the district court conflated overbreadth and narrow tailoring in evaluating the scope of the Ordinance, *id.* at 22, the panel decision made that very error here.

In *McCullen*, the Supreme Court held that even if other, more narrowly tailored laws would have been ineffective in furthering the Commonwealth's interests, the Massachusetts buffer zone faced *another* constitutional impediment. 573 U.S. at 493. The record before the Court pertained "mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings." *Id.* Nothing in the record revealed that "individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access." *Id.* The Court held that "[f]or a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is *hardly a narrowly tailored solution*." *Id.* (emphasis added).

Here, it is undisputed, as the panel decision recognizes, that the Ordinance was adopted to address certain "antiabortion protests that had been regularly occurring outside" one abortion facility, MMA. Slip

Op. at 2. Those protests would only take place for a few hours on one day of the week: Saturday. [Ja294.] *See also* Slip Op. at 5 n.3.

But, as the face of the Ordinance clearly provides, the Ordinance does not just apply to that site, nor is it limited to Saturdays. Slip Op. at 3-4 (quoting the Ordinance). Unlike in *McCullen*, where the law applied only to "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed," 573 U.S. at 464, the Ordinance applies broadly to both "health care facilities," as defined in N.J.S.A. 26:2H-2, and "[c]ommunity residences for the developmentally disabled and community shelters for victims of domestic violence as those terms are defined in N.J.S.A. 40:55D-66.2." Slip Op. at 2. In other words, the Ordinance does not just apply to a facility where abortions are offered or performed.

Nor does the Ordinance apply solely to the site, *i.e.,* MMA, that gave rise to the Ordinance in the first place. It applies, as well, *e.g.*, to "halfway houses" for "mentally ill persons," *see* N.J.S.A. 40:55D-66.2(a), as well as, for example, bioanalytical laboratories, nursing homes, and rehabilitation centers, *see* N.J.S.A. 26:2H-2. This is not conjectural. Though the panel decision does not mention the fact, it is undisputed

that, pursuant to the Ordinance, and shortly after it was adopted, city officials began marking out buffer zones at numerous locations in the City, in addition to the zones marked at the clinic. [Ja469-470.]

If the Massachusetts law was not narrowly tailored because it authorized buffer zones around numerous abortion facilities within the state, despite problems only at one facility on one day of the week, *McCullen*, 573 U.S. at 493, it stands to reason that the Ordinance here is even less tailored than the Massachusetts law in *McCullen*.

The panel decision correctly recognizes overbreadth and narrow tailoring are related, and correctly points out that the "breadth" of a challenged law "plays a role in the narrow-tailoring analysis of [a] free speech claim." Slip Op. at 23. Nonetheless, in its application of these two free speech rubrics, the panel decision makes the same legal error that it accused the district court of making: conflating overbreadth with narrow tailoring. According to the clear command of the Ordinance, permanent buffer zones were not just painted on the sidewalk at MMA, but at other locales as well. While the panel decision states that "record is essentially devoid of any factual development" with respect to Plaintiff's overbreadth claim, Slip Op. at 25, no more factual development is necessary with

respect to Plaintiff's narrow tailoring claim *vis-à-vis* the scope of the Ordinance.

As in *McCullen*, the City has not just created a no-speech zone at the location that gave rise to the Ordinance, but at other locations as well—locations with no evidence of the need for such zones. Such geographical over-inclusiveness cannot, by definition, be a narrowly tailored solution. *McCullen*, 573 U.S. at 493; *see also Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) ("Given the absence of evidence of a county-wide problem, the county-wide sweep of the Amended Ordinance [banning solicitation within all county roadways] burdens more speech than necessary, just as the statute in *McCullen*—a statewide statute aimed at a problem in one location—burdened more speech than necessary."); *Cutting v. City of Portland*, 802 F.3d 79, 89 (1st Cir. 2015) (citing *McCullen*, 573 U.S. at 493) (holding that a city-wide ban on lingering on median strips was "geographically over-inclusive" because of a lack of evidence of a city-wide problem); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) ("The Ordinance is also geographically overinclusive. The Ordinance applies citywide to all streets and sidewalks in the City, yet

the City has introduced evidence of traffic problems only with respect to a small number of major streets and medians.").

The panel decision does not subject *the scope* of the Ordinance to a narrow tailoring analysis, as did the Supreme Court in *McCullen*, and as briefed in detail by Plaintiff. *See* Pl. Br. at 37-41. It subjects it only to an overbreadth analysis, principally using *Hill* in doing so. Slip Op. at 22-25. That error requires rehearing.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that the panel decision be either reconsidered or considered by the full Court. If necessary, the petition should be held in abeyance pending a decision by this Court in *Bruni v. Pittsburgh*, No. 18-1084 (argued Feb. 6, 2019), or action by the Supreme Court in *Price v. City of Chicago*, U.S. No. 18-1516, both of which are currently pending.

Respectfully submitted, this 3d day of September 2019.

EDWARD L. WHITE III*
ERIK M. ZIMMERMAN**
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

s/ Francis J. Manion
FRANCIS J. MANION*
Lead Counsel
GEOFFREY R. SURTEES**
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

* Admitted to Third Circuit Bar
** Not admitted in this jurisdiction

Counsel for Plaintiff-Appellee