No. _____

In the

Supreme Court of the United States

JERYL TURCO,

Petitioner,

v.

CITY OF ENGLEWOOD, NEW JERSEY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Jeryl Turco has been sidewalk counseling peacefully for years on a public sidewalk outside an abortion facility. In response to the arrival of new and reportedly unruly protesters outside that clinic, Respondent City of Englewood created speech-suppressing buffer zones against, not just the protesters, but also peaceful sidewalk counselors like Petitioner Turco, and it did not just authorize zones at the relevant abortion facility, but outside all health care and "transitional" facilities in the City. Except for the smaller size of the buffer zones and its broader application to other facilities, Englewood's ordinance is, in all material respects, *identical* to the law this Court unanimously declared unconstitutional in *McCullen v. Coakley*, 573 U.S. 464 (2014). The Third Circuit's decision upholding that ordinance mangles *McCullen*, conflicts with a Sixth Circuit decision involving similar legislation, *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400 (6th Cir. 2022), embraces a novel "substantial burden" test for limits on speech on public sidewalks, and hides behind *Hill v. Colorado*, 530 U.S. 703, 744 (2000), which this Court has observed is a "distort[ion]" of "First Amendment doctrines." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022). The questions presented are:

1. Whether the City of Englewood's speech-free buffer zones, including zones outside an abortion clinic, violate the First Amendment.

2. Whether this Court should overrule *Hill v. Colorado*.

PARTIES

The caption of the case contains the names of all the parties.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Turco v. City of Englewood*, No. 22-2647, U.S. Court of Appeals for the Third Circuit. Judgment entered January 31, 2024.
- *Turco v. City of Englewood*, No. 17-3716, U.S. Court of Appeals for the Third Circuit. Judgment entered August 19, 2019.
- *Turco v. City of Englewood*, No. 2-15-cv-3008-SDW, U.S. District Court for the District of New Jersey. Judgment entered August 12, 2022.
- *Turco v. City of Englewood,* No. 2-15-cv-3008-SDW, U.S. District Court for the District of New Jersey. Judgment entered November 14, 2017.

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OPINIONS BELOW

The district court's opinion granting Petitioner's motion for summary judgment is unreported but is available at 2017 U.S. Dist. LEXIS 189042 (D.N.J. Nov. 14, 2017) and reprinted at Pet.App.G.

The Third Circuit's opinion vacating the district court's summary judgment order is reported at 935 F.3d 155 (3d Cir. 2019) and reprinted at Pet.App.E.

The Third Circuit's decision denying Petitioner's petition for rehearing en banc is reprinted at Pet.App.I.

The district court's trial opinion granting judgment in favor of Respondent is reported at 621 F. Supp. 3d 537 (D.N.J. 2022) and reprinted at Pet.App.C.

The Third Circuit's opinion affirming the judgment of the district court is unreported but is available at U.S. App. LEXIS 2122 (3d Cir. Jan. 31, 2024) and reprinted at Pet.App.A.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2024. Pet.App.B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I

The challenged law, City of Englewood, NJ, Ordinance §307-3, is set forth in Pet.App.J.

INTRODUCTION

In *McCullen v. Coakley*, 573 U.S. 464 (2014), this Court invalidated a fixed speech-free buffer zone on First Amendment grounds. The Third Circuit, however, held that a speech-free buffer zone that took a *smaller* bite out of the First Amendment was constitutional, especially where the *fixed* buffer zones had the same spatial dimension as the *floating* bubble zones this Court previously upheld in *Hill v. Colorado*, 530 U.S. 703, 744 (2000), a decision which this Court has observed is a "distort[ion]" of "First Amendment doctrines," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022), but which has not yet been overruled. Along the way, the Third Circuit held that what triggers First Amendment scrutiny is not whether a restriction places a *burden* on speech, but rather whether it places a "*substantial*" *burden* on speech. Pet.App.8a, 9a, 11a, 12a.

The Sixth Circuit, in *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400 (6th Cir. 2022), applied straightforward First Amendment analysis to invalidate, on speech grounds, an ordinance quite similar to the one at issue here. The Third Circuit's ruling therefore creates not just doctrinal disarray, but a conflict in the circuits. This Court should grant review to resolve that conflict and to straighten out the Third Circuit's First Amendment errors before they spread further. Along the way, it should clarify that *Hill v. Colorado* is no longer to be followed or used to shield First Amendment violations.

This Court should grant review.

STATEMENT OF THE CASE

A. City of Englewood's Speech-Suppressing Buffer Zones

In 2014, Respondent, the City of Englewood, New Jersey, enacted a buffer zone ordinance that, except for the size of the zones imposed and breadth, is in "all material respects," Pet.App.63a, the same as the law unanimously held unconstitutional by this Court in *McCullen v. Coakley*, 573 U.S. 464, 471 (2014). The Ordinance provides that no non-exempt person

> shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Pet.App.107a.

As in *McCullen*, the Ordinance identifies four classes of exempt persons: (1) persons entering or leaving the facility; (2) employees and agents of the facility; (3) municipal agents; and (4) persons who wish to reach a destination other than such facility. Pet.App.107a–8a; 573 U.S. at 472. Also, as in *McCullen*, the buffer zones are only in effect during business hours and when the lines have been clearly marked and posted. Pet.App.108a; 573 U.S. at 472.

While the Ordinance authorizes eight-foot zones, instead of *McCullen*'s 35-foot zone, the Ordinance does not just apply to "a reproductive health care facility," as in *McCullen*, 573 U.S. at 471. Instead, the Ordinance authorizes speech-suppressing zones outside every health care and transitional facility in the City. Pet.App.107a. "Health care facilities" include places such as mental hospitals and dementia care homes. *Id*. "Transitional facilities" include "[c]ommunity residences for the developmentally disabled and community shelters for victims of domestic violence" as defined by New Jersey law. *Id*.

The Ordinance was adopted in response to aggressive protesters associated with a group called the Bread of Life. Pet.App.21a, 27a. These protesters, who would gather outside an Englewood abortion clinic, Metropolitan Medical Associates ("MMA"), for a few hours on Saturday mornings, would reportedly engage in loud, intimidating, and harassing behavior towards patients and others—even other pro-life groups. *Id*.

Before the Ordinance's passage, and even though Lynn Algrant, an elected official with the City, was sent detailed weekly reports by an abortion clinic escort documenting the activities of the Bread of Life protesters, including photographic and video evidence of their activities, Pet.App.24a–25a, the City did not "prosecute any protestors for activities taking place on the sidewalk"; nor did the City "seek injunctive relief against individuals whose conduct was the impetus for the Ordinance." Pet.App.74a.

Even though a police presence would calm things down at the time the protesters were gathered outside

MMA on Saturday mornings, Pet.App.23a, the City allegedly could not afford $100 an hour to pay for a few hours of police presence on Saturday mornings. Pet.App.24a. Nonetheless, Englewood's City Manager, Timothy Dacey, never performed a full calculation of the costs involved "because using taxpayer funds to protect a private organization was against City policy." *Id*.

Despite the absence of any evidence of access issues to any health care or transitional facility other than MMA, the Ordinance included all health care and transitional facilities because, according to the testimony of City Manager, Timothy Dacey, "protests can pop up any day for any reason anywhere." Pet.App.46. Ms. Algrant testified at trial that it would "seem[] very narrowly focused," if the Ordinance "singl[ed] out an abortion clinic and the protestors that it would attract." (3d Cir. Rec., Doc. 13-1, Appx196, Trial Transcript.)

B. Petitioner Jeryl Turco

Petitioner Jeryl Turco has been sidewalk counseling outside MMA for over 15 years. Pet.App.33a. As part of her counseling, Turco approaches women entering MMA to attempt to engage in peaceful, nonconfrontational conversations. *Id*. She reassures women by telling them things such as, "we can help you" and "we are praying for you," and has invited some women to a pregnancy care center across the street from MMA. Pet.App.58a. In addition to this one-on-one speech, Turco offers women literature about prenatal care and has handed out rosaries. *Id*. Like the sidewalk counselors in *McCullen*, 573 U.S. at 472–73, Turco believes that a

conversational interaction is far more effective way of sharing her message than using aggression or confrontation. Pet.App.58a. A photo of Turco, introduced by the City at trial, demonstrates how close Turco tries to connect with women to share her message and materials. Pet.App.K.

Turco is not associated with the Bread of Life group. In fact, the Bread of Life protesters put a strain on her ability to communicate with women, and Turco testified that she would "be able to counsel better . . . if they weren't there." Pet.App.11a.

Shortly after adoption of the Ordinance, officials began the process of painting buffer zones outside facilities in the City, including on the public sidewalk outside MMA. (*See* 3d Cir. Rec., Doc. 13-2, Appx529, "Parties Statement of Undisputed Facts"). Because MMA has both an entrance and driveway adjoining the public sidewalk, application of the Ordinance outside MMA carves up the sidewalk into numerous zones that ban the speech of nonexempt persons: "Two semicircular buffer zones extending outwards eight feet from either side of the facility's entrance and driveway, as well as a third buffer zone spanning the width of the facility's entrance and driveway and extending to the street." Pet.App.27a–28a (brackets and quotation marks removed).

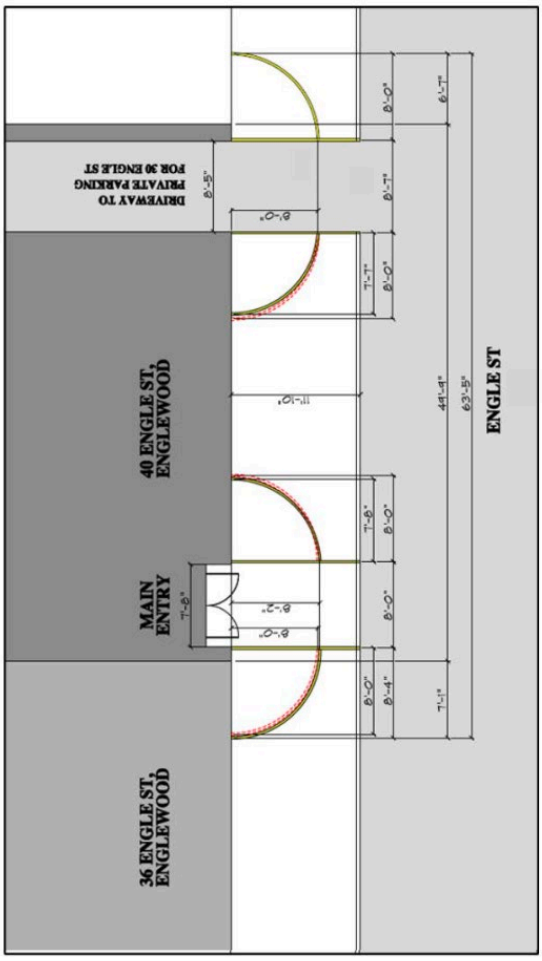

Diagram of Sidewalk, Pet.App.30a.

Before the Ordinance's enactment, Turco could use the entire sidewalk in front of MMA to speak with women and accompany them all the way to MMA's entrance. Pet.App.34a. She could do so "without being hindered by the buffer zones in front of the MMA main entrance and driveway." *Id*. If Turco "was standing

south of the clinic doorway area and saw a patient approaching from north beyond the driveway, she was free to proceed up the sidewalk to the patient in a straight line, try to engage in conversation, hand literature to the patient, and walk with the patient all the way back to the clinic door." *Id.*

Once the buffer zones were painted on the sidewalk, and because she is not an exempt speaker, to comply with the ordinance Turco had to move around the zones in an attempt to engage in close conversation and hand out materials. As the district court described the practical effect of the zones:

> [I]f Plaintiff is standing to the south of the doorway area and sees a patient approaching from north beyond the driveway, she must walk around the radius arc to the left of the doorway, sidestep to the street to avoid the rectangular zone in front of the doorway, hurry to the next rectangular zone by the driveway, and sidestep that zone by going into the street, before she can try to engage the patient. While trying to converse with that patient on the way back toward the clinic door, Plaintiff must sidestep to avoid the driveway radius arcs and rectangular area, and then reconnect with the patient who has likely continued walking in a straight line. If successful, Plaintiff must then stop at the radius arc to the north of the door or at the doorway rectangular zone.

Pet.App.34a.

With the buffer zones in place, Turco faced levels of obstruction and difficulty in her desire to speak and engage with women "at least 50 percent of the time."

Pet.App.36a. The district court further noted that "[t]he difficulty involved with navigating the buffer zones, and being forced to go out into the street, is compounded by the presence of cars, delivery trucks, and sometimes snow." *Id.*

While Turco would walk in the street gutter to avoid the rectangular buffer zones and access also the area between the two rectangular buffer zones by crossing Engle Street, Pet.App.35a, these activities are technically illegal under New Jersey law. *See* N.J.S.A. § 39:4-34 ("Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway."); *id.* ("pedestrians shall cross the roadway within a crosswalk or, in the absence of a crosswalk . . . at right angles to the roadway.").

Before enactment of the Ordinance, at least four persons filed complaints with the police about the conduct of those associated with the Bread of Life. Pet.App.27a n.4. After enactment, two clinic escorts associated with MMA filed a total of eight complaints. *Id.*

C. Proceedings Below

Turco filed suit in 2015 challenging the legality of the Ordinance on federal and state constitutional grounds. The district court granted summary judgment in Turco's favor. Pet.App.103a–04a. Relying on this Court's decision in *McCullen*, it held that because the Ordinance creates buffer zones around all health care facilities in the City, despite evidence of problems only outside one facility (MMA), "[o]n this ground alone, Defendant's Ordinance violates the

First Amendment." Pet.App.99a; Pet.App.98a–99a ("Applying the Supreme Court's reasoning in *McCullen*, it can hardly be argued that the Ordinance is narrowly tailored"). In addition, the district court ruled that the City had not provided evidence that it "seriously tried or considered any less restrictive alternatives" to regulating speech. Pet.App.99a. In light of testimony by the City Manager that he never "undertook a cost study to determine the resources the City would need to pay for additional police coverage in front of the Clinic," and in the absence of any recent history of prosecutions or injunctions against any bad actors, the court held the City could not "make a good-faith argument that it seriously considered and employed alternative measures before adopting the Ordinance." Pet.App.100a.

The City appealed and the Third Circuit reversed. Pet.App.86a–87a. Relying in part on this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), the Third Circuit held that issues of material fact precluded summary judgment as to three issues: (1) whether the buffer zones imposed "an inappropriate burden on speech as a matter of law"; (2) whether the City demonstrated that it "considered alternative means of restricting speech around the clinic"; and (3) whether the Ordinance is overbroad, based on the lack of "factual development concerning the 'legitimate sweep' of the buffer zones." Pet.App.70a, 77a, 85a.

Despite the fact this Court in *McCullen* nowhere discussed or applied *Hill* in addressing the constitutionality of the Massachusetts buffer zone law, the Third Circuit chided the district court for

failing to do so. Pet.App.73a. ("The District Court did not explain why the eight-foot buffer zone here was unconstitutional despite the Supreme Court's conclusion that the eight-foot buffer zone in *Hill* passed constitutional muster. In fact, the District Court did not even cite *Hill*.").

The court said that the district court's ruling that buffer zones imposed a speech burden as a matter of law was "directly at odds with the Supreme Court's decision in *Hill v. Colorado*," which held that a floating eight-foot-no-approach zone within 100 feet of a healthcare facility was narrowly tailored. Pet.App.70a.

On the issue of less restrictive alternatives, the court found summary judgment inappropriate because a "jury could find that financial restraints and fear of reprisal prevented" less restrictive measures, such as increasing police presence and pursuing bad actors through prosecutions and injunctions, from being effective. Pet.App.78a.

Finally, on the issue of overbreadth, the court relied on *Hill*'s remark that "[w]hen a buffer zone broadly applies to health care facilities, we may conclude 'the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.'" Pet.App.82a (quoting *Hill*, 530 U.S. at 730-31). It rejected the district court's contention, which cited *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy"), that "[t]o meet the narrowly-tailored requirement, Defendant must create an Ordinance

that targets the exact wrong it seeks to remedy." *Id*. Once again relying on *Hill*, the Third Circuit said that "the Supreme Court has rejected the District Court's assertion that an Ordinance must precisely target the acts it was passed to remedy." Pet.App.82a (citing *Hill*, 530 U.S. at 730-31).

On remand, a bench trial was held. This time around, relying on the Third Circuit's decision and its use of *Hill*, the district court ruled in favor of the City. Pet.App.50a–51a. It held that even though the buffer zones added "some difficulty" to Turco's efforts to reach patients "at least 50 percent of the time," the Ordinance's burden on Turco's speech was not substantial because "the overall impact" on her ministry "has been relatively small." Pet.App.36a, 39a. It held that the facts of this case are more akin to *Hill* than *McCullen* because, unlike Massachusetts's 35-foot buffer zone, "[a]n eight-foot gap is sufficiently narrow for Plaintiff and patients to converse in a normal tone with ease." Pet.App.42a (citing *Hill*, 503 U.S. at 726-27). The court stated that patients wishing to receive literature from Turco could always step towards her to receive it. Pet.App.41a.

Because the court found that the burden on Turco's speech was not "substantial," a "less demanding inquiry" under narrow tailoring was called for. Pet.App.43a (quoting *Bruni v. City of Pittsburgh*, 941 F.3d 73, 89 (3d Cir. 2019), *cert. denied*, 141 S. Ct. 578 (2021)). Under the law of the Third Circuit, "[W]here the burden on speech is *de minimis*, a regulation may be viewed as narrowly tailored," because "challengers would struggle to show that alternative measures would burden substantially less speech.'" *Id*. (quoting

Bruni, 941 F.3d at 89). *But see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.").

The district court held that even assuming the burden on Turco's speech was substantial, it was satisfied that the City had "tried" or "seriously considered" "substantially less restrictive alternatives." Pet.App.44a. Even though the City "did not avail itself" of the "multiple alternative measures" Massachusetts could have taken instead of banning speech in *McCullen*, Pet.App.45a (citing *McCullen*, 573 U.S. at 490–93), the court held that this is not dispositive. *Id*. The City's financial struggles and inability to increase a police presence (presence which had been shown to lead to protesters being more peaceful), as well as the fear of patients, escorts, and staff in filing criminal complaints, rendered the alternative measures mentioned in *McCullen* "less ineffective." *Id*.

Finally, the district court rejected Turco's overbreadth claim because, even though the Ordinance authorizes buffer zones outside all healthcare and transitional facilities in the City, there was no realistic danger that the Ordinance would significantly compromise the First Amendment protections of parties not before the Court. Pet.App.48a. Even though the City demonstrated no history of access issues outside any healthcare or transitional facility other than at MMA, a City official testified that the Ordinance was intended to reach all health care and transitional facilities because

"'protests can pop up any day for any reason anywhere.'" Pet.App.46a.

Turco appealed and the Third Circuit affirmed. Pet.App.17a–18a. Like the district court, the Third Circuit held that the Ordinance does not place a "substantial" burden on Turco's protected speech and that the City tried and considered less restrictive alternatives. Again, even though *McCullen* did not apply *Hill* to the Massachusetts buffer zone law, the Third Circuit relied on *Hill* in holding that the Ordinance is narrowly tailored.

Like the district court, and the prior Third Circuit panel, the immediate decision below emphasized that "the thirty-five-foot buffer zone in *McCullen* is a 'substantial distinction' from the eight-foot one here." Pet.App.10a. The court noted that "[i]n *Hill v. Colorado*, the Supreme Court held that an eight-foot buffer zone withstood intermediate scrutiny because an '8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" Pet.App.9a (quoting *Hill*, 530 U.S. at 726–27). The court found that Turco's speech was not *substantially* burdened because she is still able to communicate with some patients on a regular basis, could go around the buffer zones to try and reach her audience, and could still speak with patients far away from the clinic when Turco noticed women approaching MMA. Pet.App.8a. The court also emphasized that this Court "has upheld fixed-buffer zones far larger than those the Ordinance here authorizes." Pet.App.10a (citing *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. at 371, 380–81 (1997)), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 757 (1994)), although those

cases involved injunctions targeted at the putative bad actors, rather than ordinances applicable to law-abiding and to troublemaker alike.

In keeping with Third Circuit law, the court below held that the lack of a "substantial" burden on Turco's speech completed the narrow tailoring inquiry, i.e., without addressing less restrictive alternatives. Like the district court, however, the court went ahead and concluded that "the City properly tried and considered less restrictive alternatives." Pet.App.12a.

The court held that the City could not more directly focus its efforts on the protesters who were the impetus behind the Ordinance because "police were limited in how often they could patrol the streets surrounding MMA," and "when they did patrol, de-escalations were temporary." Pet.App.13a. Even when the police temporarily created a "no-go zone" in front of MMA's entrance, "protestors ignored the zone, taunting and filming the police officers in the process." *Id*.

In addition, according to the court, clinic escorts would not file complaints against the protesters for fear of retribution, *id*., though, as the district court stated, clinic escorts have filed complaints against protesters for violating the buffer zone. Pet.App.27a n.4.

Finally, the court affirmed the district's court ruling on overbreadth. Even though the record states that buffer zones were created at health care centers other than MMA, there was no evidence that the City "enforced" those zones. As the Third Circuit had previously noted, again relying on *Hill*, "'[w]hen a

buffer zone broadly applies to health care facilities' we may 'conclude the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.'" Pet.App.15a (quoting *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 731)).

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision holding that Respondent's speech-restricting buffer zone ordinance satisfies narrow tailoring under this Court's precedents is wrong as a matter of law. It conflicts squarely with this Court's decision in *McCullen* and the decision of the Sixth Circuit in *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400 (6th Cir. 2022). In addition, the lower courts' reliance on *Hill*, a decision this Court has since observed is a distortion of First Amendment doctrine, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022), provides more than ample reason why this Court should overturn that decision. *Hill* was wrong when it was decided, is wrong today, and is generating error and confusion in the lower courts, as illustrated in this case.

I. The Decisions Below Conflict with Decisions of this Court and the Sixth Circuit.

The Third Circuit's decisions conflict with this Court and the Sixth Circuit on an issue of exceptional constitutional importance: the First Amendment freedom to engage in core protected speech on public sidewalks. The Third Circuit, relying in part on *Hill*, has mangled in multiple ways the meaning of narrow tailoring in the context of regulating speech on public

sidewalks. This Court should grant the petition to resolve that conflict.

A. The Third Circuit's "Substantial" Burden Requirement Conflicts with this Court's Decision in *McCullen* and the Sixth Circuit's Decision in *Sisters For Life*.

1. Conflict with *McCullen*

McCullen is clear: one-on-one communication and leafletting, the very activities involved in Turco's sidewalk counseling, are "classic forms of speech that lie at the heart of the First Amendment." 573 U.S. 464, 489 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)). Government restrictions that make "it more difficult to engage in these modes of communication" impose "an especially significant First Amendment burden." *Id.* The government must therefore show both that the restriction is "narrowly tailored" to further a "significant governmental interest," *id.* at 486, and that "alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 495.

The decisions of the court below turn *McCullen*'s narrow tailoring analysis on its head. According to the *Turco* decisions, and other Third Circuit decisions which the ruling below invokes, a restriction on speech on a public sidewalk is perfectly permissible unless the burden on the plaintiff's speech is "substantial." *See* Pet.App.8a ("The District Court properly found that the Ordinance is narrowly tailored, and thus survives intermediate scrutiny, because . . . the Ordinance does not place a substantial burden on

Turco's ability to communicate"); Pet.App.9a ("the Ordinance does not place a substantial burden on Turco's speech"); Pet.App.12–13a ("Because we agree with the District Court that the burden on Turco's speech is not substantial, our inquiry can end there.").

The Third Circuit's approach flies in the face of *McCullen*. *McCullen* states that when a speech restriction makes it "more difficult" (not *substantially* burdensome) to engage in one-on-one communication and leafletting, narrow tailoring applies, and the government must prove both narrow tailoring and that measures less restrictive than regulating speech would not have adequately furthered the government's interests. As this Court has stated, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000). This makes perfect sense—were only "substantial" burdens on speech to matter, government could enact all manner of "modest" limits on leafletting, conversation, etc., without even needing to satisfy intermediate scrutiny. Making a speaker jump through "small hoops" would be constitutional. Talk no more than ten minutes with any person, even a willing listener? Navigate around a checkerboard of no-speech sidewalk tiles? A robust First Amendment does not tolerate such nonsense, regardless of whether the burden is deemed "substantial" or merely a burden *simpliciter*.

The Third Circuit compounds the error of its substantial burden analysis by comparing the size of the Ordinance's fixed buffer zones with *injunctive*

fixed buffer zones this Court approved in *Schenck* and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)), and the *floating* bubble zone in *Hill*. But this Court did not hold Massachusetts's buffer zone law unconstitutional simply because it was larger than the eight-foot bubble zone in *Hill* or the fifteen-foot zone in *Schenck*. It did not contend with the fact that the court approved a larger buffer zone in *Madsen* (36 feet). *McCullen* held the Massachusetts law unconstitutional because, first, it sweeps the good away with the bad: it "categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech," 573 U.S. at 492–93, and second, the government had "not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 494.

Indeed, among the numerous suggested alternatives, *McCullen* nowhere suggests that Massachusetts could have addressed its concerns with a smaller and allegedly less burdensome zone. *McCullen* stands for the proposition that where there are alternative ways of dealing with purported problems that would not entail the use of *any* buffer zone, even a relatively small buffer zone is impermissible.[1] That simple proposition escaped the Third Circuit, which emphasized that the "thirty-five-

[1] After *McCullen* was decided, Massachusetts did not amend its law by imposing a smaller buffer zone. Instead, the state created a new law, modeled on FACE. *See* Mass. Gen. Laws, ch. 266, § 120E½(d) ("Impeding Access to or Departure from Reproductive Health Care Facility").

foot buffer zone in *McCullen* is a 'substantial distinction' from the eight-foot one here." Pet.App.10a.

2. Conflict with Sixth Circuit's *Sisters For Life*

In stark contrast to the court below, the Sixth Circuit correctly understands that *McCullen*'s narrow tailoring analysis does not require a speaker to demonstrate a substantial burden on speech before the government must prove less restrictive alternatives. In *Sisters For Life*, sidewalk counselors challenged a law similar to the one in this case. Louisville-Jefferson County adopted an ordinance prohibiting non-exempt persons (the same classes here and in *McCullen*) from "knowingly enter[ing]" or "remaining . . . within" a buffer zone which extends "from the entrance of a healthcare facility to the closest adjacent sidewalk curb and 10 feet from side to side." *Id*. at 402-03.

In reversing the denial of a preliminary injunction, Chief Judge Sutton, writing for the panel, rejected the government's argument that the 10-foot size of its buffer zone made it a permissible burden on the free speech activities of the sidewalk counselors:

> [*McCullen*] does not create distinct sets of rules for a 35-foot buffer zone near an entrance, a 10-foot buffer zone near an entrance, and all manner of buffer zones in between. It instead says that narrow tailoring is required for all such burdens on speech. *Once a buffer zone burdens speech, McCullen demands narrow tailoring*. *Id*. at 489 (explaining that narrow

> tailoring takes effect "[w]hen the government makes it more difficult to engage in" speech).

Id. at 407 (6th Cir. 2022) (emphasis added).

As the Sixth Circuit succinctly put it, in direct contrast to the approach of the court below, "[n]arrow tailoring turns on whether a law sweeps more broadly than necessary, not on whether its yoke is heavy or light." *Id*. (citing *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384–85 (2021) (rejecting the view that narrow tailoring is required only for laws that impose severe burdens)). *See also Reynolds v. Middleton*, 779 F.3d 222, 226, 231–32 (4th Cir. 2015) (where plaintiff makes the initial showing his speech was "restricted," "the burden then falls on the government to prove the constitutionality of the speech restriction") (citing *McCullen*, 573 U.S. at 464).

Even still, there can be no doubt that Turco's ability to engage in free speech activities was significantly burdened by the difficulty she had in navigating the overlapping buffer zones outside MMA. *See Price v. City of Chi.*, 915 F.3d 1107, 1110 (7th Cir. 2019) (observing that an eight-foot bubble zone modeled on the Colorado law in *Hill* "effectively prohibits sidewalk counseling by banning the close approach it requires"). The district court itself noted that the zones resulted in Turco facing "some obstruction" and "some difficulty" "at least 50 percent of the time." Pet.App.36a. It further noted that "[t]he difficulty involved with navigating the buffer zones, and being forced to go out into the street, is compounded by the presence of cars, delivery trucks, and sometimes snow." *Id.*

There is no dispute that Turco is still able to counsel some women outside MMA. But given the close, private, and intimate conversations Turco wishes to engage in, there can likewise be no doubt that such conversations are unduly burdened by the presence of the zones. It is "no answer to say that [Turco] can still be 'seen and heard' by women within the buffer zones." *McCullen*, 573 U.S. at 489. *See also id.* at 487 (noting that even after the buffer zone law was adopted in Massachusetts, McCullen was still able to persuade "about 80 women not to terminate their pregnancies.").

Although Turco's ability to try and reach her audience has not been *completely* eliminated (neither was McCullen's), this does not change the fact that there is much that Turco *cannot do* (e.g., cross through a buffer zone to meet a person on the other side); *must do* (e.g., walk into the busy street to circumnavigate the zones, in violation of state law); and *cannot do without difficulty* (e.g., walk alongside a woman sharing her message in an intimate and private way for the full extent of the sidewalk) simply to exercise her First Amendment freedoms. Creating an obstacle course of painted zones on a public sidewalk that limits the ability to engage in core protected speech activities (one-on-one communication and leafletting) plainly "abridges" the right to free speech. The government cannot escape First Amendment scrutiny simply because its actions "can somehow be described as a burden rather than outright suppression." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 826 (2000).

B. The Third Circuit's Ruling Conflicts with *McCullen*, *Sisters For Life*, and Other Circuits Regarding Narrow Tailoring and Overbreadth.

In *McCullen*, this Court held that even if less restrictive approaches would not have worked in furthering the state's interests of ensuring access to reproductive facilities, the Massachusetts buffer zone faced "another" problem. 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).

In *Sisters For Life*, despite no evidence of any problems (protests or otherwise) at any site other than one abortion clinic, the county adopted an ordinance imposing a buffer zone on all healthcare facilities in the county. 56 F.4th at 405. Relying squarely on *McCullen*, the Sixth Circuit held that the breadth of the speech restriction lacked the "requisite degree of fit" required of narrow tailoring:

> Because the County may not "burden substantially more speech than is necessary" to further the County's order and access interests, *McCullen*, 573 U.S. at 486, and because the County has not made any showing that *all* medical facilities need this kind of regulation, *the ordinance lacks any*

> *tailoring*, to say nothing of narrow tailoring. "For a problem shown to arise only . . . at one clinic," authorizing buffer zones "at every" Louisville-Jefferson facility "is hardly a narrowly tailored solution."

Id. (first emphasis in original).

Similar to the facts of *McCullen* and *Sisters For Life*, Englewood adopted a law authorizing speech-suppressing zones outside *all* healthcare and transitional facilities in the City, even though it only faced problems outside only *one* clinic (MMA) for a few hours on Saturday mornings. The Ordinance does not just apply to reproductive centers, as in *McCullen*; it does not just apply to healthcare centers, as in *Sisters For Life*. It applies to all "health care facilities," *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." Pet.App.107a.

If the law in *McCullen* failed narrow tailoring because it authorized buffer zones around numerous abortion facilities within the state, despite problems only at one facility on one day of the week, 573 U.S. at 493, Englewood's law is *a fortiori* even less tailored than the Massachusetts' law. Indeed, it "lacks any tailoring" at all. *Sisters For Life*, 56 F.4th at 405.

Instead of relying on *McCullen*'s discussion of how the scope of the law alone renders it "hardly a narrowly tailored solution," the court below sloughed off this problem by turning to *Hill* and its discussion of overbreadth—even though *McCullen* nowhere relies upon, invokes, or applies *Hill*. Pet.App.14a–15a.

The court held that Turco failed to meet her burden in demonstrating overbreadth by reiterating what it said in the prior Turco appeal: "'[w]hen a buffer zone broadly applies to health care facilities' we may 'conclude the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.'" Pet.App.15a (quoting *Turco*, 935 F.3d at 171; in turn quoting *Hill*, 530 U.S. at 731).

Yet again, the Third Circuit's reasoning flies in the face of *McCullen*. That decision, which does not cite this or any other part of *Hill*, did *not* address the scope of the Massachusetts law in terms of overbreadth. The Court explicitly stated it did not consider the overbreadth arguments of the petitioners. 573 U.S. at 496 n.9. The Court instead said that the scope of the Massachusetts law was a failure of *narrow tailoring*. This difference is critical. Under narrow tailoring, the burden is on the government to prove its actions. Under overbreadth, the burden is on the plaintiff to demonstrate that "substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (citation omitted).

Finally, the Third Circuit improperly excuses the breadth of the Ordinance by pointing out that the buffer zones painted at six additional locations were not "enforced." Pet.App.16a. In contrast, as the Sixth Circuit accurately put it, "the First Amendment 'does not leave us at the mercy of *noblesse oblige*.'" *Sisters For Life*, 56 F.4th at 408 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). "[W]e would not bless an ill-tailored statute if the government enforced it only in particularly worthy cases." *Id.* In other

words, a "blanket ban on solicitation would not become constitutional if a municipality enforced it only after citizens reported pushy solicitors." *Id.*

The Third Circuit's conflict with both *McCullen* and the Sixth Circuit could not be more palpable. In fact, the decisions below conflict with decisions of many other lower courts regarding narrow tailoring on this very point. *See e.g.*, *Reynolds*, 779 F.3d at 231 ("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 . . . 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.").

C. The Third Circuit's Ruling Conflicts with *McCullen* and *Sisters For Life* Regarding Less Restrictive Alternatives.

In holding that the Massachusetts buffer zone law failed narrow tailoring, *McCullen* observed that the state had a wide array of means of dealing with access and congestion issues without suppressing speech.

The state could have (1) used an unchallenged subsection of the law that prohibited blocking doors and driveways; (2) enacted a state version of the federal Freedom of Access to Clinic Entrances Act (FACE Act); (3) adopted a law specifically prohibiting harassment, if drafted within First Amendment parameters; (4) applied existing laws against obstruction of doors and driveways; (5) used "generic criminal statutes"; and (6) sought injunctive relief as necessary against specific persons with a history of obstructing access. *McCullen*, 573 U.S. at 490–93; *see also* Pet.App.44a.

McCullen rejected the state's assertion that "We have tried other approaches, but they do not work." 573 U.S. at 494. The state could not identify a single prosecution brought under local laws within the previous 17 years. *Id*. And while though the state claimed it had previously tried injunctions, the last injunction dated back to the 1990s. *Id*. The Court also rejected the relevance of proving deliberate obstruction, intimidation, or harassment: "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id*. at 495.

Again, the facts of *McCullen* are remarkably similar to the facts here. As the district court specifically noted, the City "did not avail itself of any of [the] less restrictive alternatives" in *McCullen*. Pet.App.45.

It is undisputed that the City did not prosecute anyone for any criminal activity outside MMA for several years prior to the adoption of the Ordinance, despite laws already on the books, prohibiting

harassment, N.J.S.A. § 2C:33-4, disorderly conduct, N.J.S.A. § 2C:33-2, and simple and aggravated assault, N.J.S.A. § 2C:12-1.

It is also undisputed that the City failed to obtain injunctive relief against any bad actors, despite numerous reports by a clinic escort documenting and detailing the activities of the Bread of Life group. There is no evidence that City officials went to state or federal court seeking to enjoin any bad actors under FACE. In fact, as in *McCullen*, 573 U.S. at 494, an injunction had been imposed on protesters outside MMA in the 1990s. *See United States v. Gregg*, 32 F. Supp. 2d 151, 153 (D.N.J. 1998).[2]

Even in the face of these undisputed facts, the Third Circuit downplayed the lack of prosecutions and injunctions against the readily identifiable bad actors outside MMA. The court below affirmed the excuses of the city for two reasons. First, even though police patrols would temporarily de-escalate the situation outside MMA, financial restraints and a lack of off-duty officers precluded more frequent patrols. Pet.App.13a. Second, the court observed that clinic escorts feared retribution by protesters if they filed criminal complaints against them. Pet.App.13a–14a.

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[2] In *McCullen*, this Court emphasized the "the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures." 573 U.S. at 492. Injunctive relief "focuses on the precise individuals and the precise conduct causing a particular problem." *Id*. Here, by contrast, the Ordinance "categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech." *Id*. at 492–93.

In light of *McCullen*'s holding that enforcing conduct-based laws is a more constitutionally appropriate way to ensure patient safety and access than banning speech (*even if this approach is less "efficient"*), the Third Circuit's consideration of a government's resources as a factor in determining narrow tailoring cannot stand. No government has infinite resources, and under the Third Circuit's rationale, a government could ban pamphleteering if did not have the resources to prosecute litterbugs. *Cf. Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). Suppressing protected speech on a public sidewalk that is unrelated to crime is to apply a sledgehammer to a problem where a scalpel is necessary. *See id.* at 801 ("'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'") (citation omitted).

As this Court noted long ago:

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property . . . *[s]o long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature.*

Schneider, 308 U.S. at 160 (emphasis added). While it may have required some effort or expense for the City to keep the peace at one location, on the morning of one day of the week, there is no reason why Turco

must instead pay by forfeiting First Amendment liberties. *Cf. Palmer v. Thompson*, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their constitutional rights because officials . . . desire to save money").

In *Schneider*, where the Supreme Court struck down ordinances that prohibited the distribution of flyers on public streets, the Court noted, "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Id.* at 162. The court below should have applied that same principle here. As the Sixth Circuit correctly observed in another case:

> In a balance between two important interests—free speech on one hand, and the state's power to maintain the peace on the other—the scale is heavily weighted in favor of the First Amendment. *Maintenance of the peace should not be achieved at the expense of the free speech.*

Bible Believers v. Wayne Cty., 805 F.3d 228, 252 (6th Cir. 2015) (en banc) (internal citation omitted) (emphasis added).

In addition, if Englewood cannot be expected to enforce existing laws protecting patient safety outside abortion clinics, or if clinic escorts are unwilling to file complaints against lawbreakers, the court below does not explain how the buffer zones themselves are to be

enforced.[3] Like laws criminalizing obstruction and harassment, a buffer zone does not enforce itself. Any argument in response that buffer zones are *easier* in terms of compliance and enforcement runs smack in the face of *McCullen*: "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." 573 U.S. at 495.

There is no doubt that Englewood may "prevent people from blocking sidewalks, obstructing traffic . . . committing assaults, or engaging in countless other forms of antisocial conduct." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In furthering these goals, however, the City was required to do so "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Id.* If the City "could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). By restricting the peaceful speech of Turco *in addition* to the less peaceful conduct of some of the protesters, the City's approach sweeps much too far. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) ("[I]t would be quite remarkable to hold that speech by a law-abid[er] . . . can be suppressed in order to deter conduct by a non-law-abiding third party.").

The Third Circuit has given the green light to governments to invoke budgetary concerns to avoid narrowly tailoring their laws to preserve free speech.

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[3] The district court noted that *after* the Ordinance was in effect, clinic escort team leaders filed complaints against protesters who remained in the buffer zone and continued to harass or threaten patients or escorts despite requests to stop. Pet.App.27 n.4.

In light of the government's obligation to preserve and protect First Amendment freedoms, especially in traditional public fora, this approach cannot stand.

II. This Court Should Overturn *Hill v. Colorado*.

In *Kennedy v. Bremerton*, this Court observed that it "long ago abandoned" the Establishment Clause jurisprudence of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). 142 S. Ct. 2407, 2427 (2022). While undoubtedly true, lower courts were nonetheless compelled to apply *Lemon* in relevant cases under the rule of *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (noting that this Court alone retains the "prerogative of overruling its own decisions"), until this Court gave an unambiguous signal to the contrary.

What this Court said in *Kennedy* about *Lemon* holds true with *Hill v. Colorado*. In fact, unlike *Lemon*, *Hill* was all but abandoned the day after it was decided. In the 24 years since *Hill* was decided, this Court has never applied *Hill*'s reasoning in any meaningful way in any subsequent decision. Yet, under *Agostini*, the lower courts, such as the court below, are not free to set it aside, ignore it, or recognize the fact that this Court has essentially abandoned *Hill*.

The time has come for the Court to put an end to *Hill*'s lingering power to create confusion in the lower courts. Recently, in *Dobbs*, this Court accurately described *Hill* as a "distort[ion]" of "First Amendment doctrines." 142 S. Ct. at 2276 & n.65. And that observation came only three months after the Court issued its decision in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022). In his

dissent in that case, Justice Thomas, joined by Justices Gorsuch and Barrett, directly criticized *Hill*, calling it "erroneous," "long-discredited," "an aberration," "'absurd,'" and "defunct," among other criticisms. *Id*. at 1481-91 (Thomas, J., dissenting). The majority's response was not to defend *Hill* but to say, "[w]e do not 'resuscitat[e]' a decision that we do not cite. . . ." *Id*. at 1475 (majority op.). While *Dobbs* did not pronounce a formal end to *Hill*, it has certainly placed that decision on its deathbed.

This Court should not leave lower courts in the awkward position of needing to apply a decision that this Court has already disparaged as a distortion of the First Amendment. But until this Court overrules *Hill*, or at least explicitly recognizes that it "long ago abandoned" that decision, lower courts must, where relevant, continue to apply it—to the detriment of First Amendment rights. Indeed, this case provides a clear example as to the mischief *Hill* creates, despite *McCullen* directly countermanding that decision's applicability to a law restricting speech in traditional public fora. Even though Englewood's ordinance was modeled on the law at issue in *McCullen*, and even though *McCullen* ignored *Hill* in deciding that case, the lower courts applied *Hill*, and other Third Circuit cases applying *Hill*, in reaching their ruling.

The Third Circuit said that the district court's first decision granting Turco summary judgment (relying on *McCullen* and not *Hill*) was "directly at odds" with *Hill*. Pet.App.70a. In discussing *Hill*, the Third Circuit quoted that decision's remark that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the

unwilling audience cannot avoid it." Pet.App.71 (quoting *Hill*, 530 U.S. at 715–16). It treated *Hill*'s observation that an "8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech," as a statement of law that an eight-foot ban on speech is constitutional on a public sidewalk. Pet.App.72a (quoting *Hill*, 530 U.S. at 729).

All of this conflicts squarely with *McCullen*. As to unwilling listeners, *McCullen* held that if "speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech." 573 U.S. at 481. *McCullen* emphasized that on public streets and sidewalks, a listener often encounters speech that might be unwelcome. *Id*. at 476. Protecting that potential for an exchange of ideas, however, is "a virtue, not a vice." *Id*.

As for *Hill*'s blessing of the eight-foot distance, if *McCullen* thought that the size of the Massachusetts zone was the only problem with the law, it would have said so. Instead, *McCullen* ultimately focused on the fact that the state had at its disposal a multitude of avenues to further its interests without restricting speech. As the Sixth Circuit aptly noted, "[s]olving policy problems by regulating speech is a means of last resort, not first resort." *Sisters For Life*, 56 F.4th at 404.

In contrast to the Third Circuit's reliance on *Hill* for "broadly defer[ing]" to Englewood's judgment on matters touching upon First Amendment freedoms, Pet.App.12, *McCullen* is clear that "it is not enough for

[the City] simply to say that other approaches have not worked." 573 U.S. at 496. It is solely the burden of the government to "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*. at 495. And while *Hill* specifically approved the "bright-line prophylactic" nature of Colorado's speech restriction because other less restrictive measures, such laws against harassment and breaching the peace, were harder to enforce, 530 U.S. at 729, *McCullen* reaffirmed that "the prime objective of the First Amendment is not efficiency." 573 U.S. at 495. *See also Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2472 (2018) (laws that impinge on First Amendment rights are entitled to "considerably less deference").

In addition, what the Third Circuit approvingly called the "comprehensiveness" of the Ordinance, relying on *Hill*, Pet.App.15a, is under *McCullen* "hardly a narrowly tailored solution." 573 U.S. at 493. In this case, the overreach of the Ordinance in authorizing buffer zones at all health care and transitional facilities cannot by any stretch of reason be called a "virtue, not a vice." The true virtue, as *McCullen* notes, is protecting free speech in a public forum, and insisting that the government only restrict such speech in a narrowly tailored fashion. 573 U.S. at 476. In truth, *Hill* is "the antithesis of narrow tailoring." 530 U.S. at 762 (Scalia, J., dissenting).

Finally, Turco is not the only sidewalk counselor hamstrung by the all-but-abandoned precedent of *Hill*. In March of this year, the Seventh Circuit was compelled to reject a free speech claim brought by

sidewalk counselors against a law modeled on the law at issue in *Hill*. *Coal. Life v. City of Carbondale*, No. 23-2367, 2024 U.S. App. LEXIS 5657 (7th Cir. Mar. 8, 2024). The court held that "[w]e remain bound by *Hill* because the Supreme Court—though it has questioned the case's viability—has not expressly overruled it." *Id*. at *2-3.[4]

Similarly, just last year, the Second Circuit was forced to reject a claim by sidewalk counselors against bubble zone law modeled after the Colorado law in *Hill*. *Vitagliano v. Cty. of Westchester*, 71 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 486 (2023). The court held that "*Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny." *Id*. at 141. After a petition for a writ of certiorari was filed in this Court in June 2023, the county repealed the challenged law, presumably in an effort to evade Supreme Court review. *See* Br. of Resp. at 4–5 (No. 23-74).

Hill was anomalous when it was decided, and it remains so. Until this Court formally overturns *Hill*, a decision it has declared distorted, *Hill* will continue to stand in the way of core protected speech in places that have "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *McCullen*, 573 U.S. at 476 (quoting *Pleasant Grove City v. Summum*, 555

[4] This is yet another case where the Seventh Circuit was forced to dismiss a buffer zone challenge under *Hill*. In *Price*, the court articulated in great detail how *McCullen* and *Reed v. Town of Gilbert* "have deeply shaken *Hill*'s foundation." 915 F.3d at 1119. Nonetheless, the court noted, *Hill* "remains binding on us." *Id*.

U.S. 460, 469 (2009)).This Court has clearly signaled, by act (condemnation in *Dobbs*) and by omission (not relying upon *Hill* even once since its issuance), that *Hill* is not good law. But "there is a proper way to inter an established decision," *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993). The time has come to do so with *Hill v. Colorado*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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