NO. 19-1184

In the
Supreme Court of the United States

NIKKI BRUNI, JULIE COSENTINO, CYNTHIA RINALDI, KATHLEEN LASLOW, AND PATRICK MALLEY,

Petitioners,

v.

CITY OF PITTSBURGH, PITTSBURGH CITY COUNCIL, AND MAYOR OF PITTSBURGH,

Respondents.

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

BRIEF OF AMICI CURIAE FORTY DAYS FOR LIFE, PRO-LIFE ACTION LEAGUE, SIDEWALK ADVOCATES FOR LIFE, PRO-LIFE ACTION MINISTRIES, and PRO-LIFE WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus 40 Days for Life is a biannual campaign in which individuals, families, churches, and other groups engage in 40 days of prayer, fasting, community outreach, and prayerful vigil to peacefully bring an end to abortion. After beginning in 2004 in Bryan-College Station, Texas, 40 Days for Life now has campaigns in over 950 cities across 63 countries. These campaigns have saved the lives of more than 17,000 unborn children from abortion and inspired more than 200 abortion facility workers to leave the abortion industry, all through participants' peaceful witness on public ways outside abortion facilities.

Amicus Pro-Life Action League is a non-profit corporation located in the City of Chicago and dedicated to saving unborn children through non-violent direct action. Founded in 1980 by Joseph Scheidler, it is one of the oldest and most effective outreaches for life in the country. Its members regularly practice their faith and exercise their First Amendment rights to pray, speak to women and their partners considering abortion, and offer literature in order to provide alternatives and to

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. All parties have received timely notice and have consented to the filing of this brief.

dissuade them from choosing an abortion within the City of Chicago and elsewhere around the country.

Amicus Sidewalk Advocates for Life is a nationally-coordinated effort which trains, equips, and supports local advocates in peaceful "sidewalk counseling" and in offering effective charitable aid and comfort to pregnant mothers who are considering entering a local abortion facility. Sidewalk Advocates for Life launched its program on April 1, 2014, and has trained advocates in hundreds of communities around the United States and the world. Over 9,000 children are living today as a result of this effort through which their mothers heard about alternatives and chose not to abort their unborn babies.

Amicus Pro-Life Action Ministries is a non-profit organization located in St. Paul, Minnesota; Duluth, Minnesota; and Altamonte Springs, Florida, with a mission to peacefully promote the sanctity of unborn human life. The organization's primary activities include peaceful prayer vigils outside abortion facilities and sidewalk counseling performed by trained volunteers. Pro-Life Action Ministries began in 1981 and has saved the lives of more than 3,300 unborn children from abortion through participants' prayerful public witness.

Amicus Pro-Life Wisconsin is a non-profit Christian organization located in Brookfield, Wisconsin and dedicated to educating policymakers and communities about the personhood of all unborn children. The organization began in 1992 and

includes local affiliate groups throughout the state which seek to spread "the Gospel of Life" to as many people as possible in their communities.

SUMMARY OF ARGUMENT

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *McCullen v. Coakley*, 573 U.S. 464 (2014), this Court made clear that in discerning whether a speech regulation is content neutral, courts must evaluate whether the law (a) regulates speech based not only on its subject matter, but also on its function or purpose, (b) requires enforcement authorities to evaluate the content of the speech, and (c) was adopted to protect listeners in a traditional public forum from being offended or feeling uncomfortable. "Yes" to any of these questions means the law is content-based and must undergo strict scrutiny.

But after invoking *Reed* and *McCullen* to conclude the City of Pittsburgh's ("City's") Buffer Zone Ordinance ("Ordinance") did not apply to individual sidewalk counseling as a matter of constitutional avoidance, the Third Circuit nonetheless relied on now-defunct pre-*Reed* and pre-*McCullen* standards in finding the Ordinance (which prohibits speech within the buffer zone only for certain purposes) to be content neutral. In doing so, the Third Circuit restricted Petitioners' pro-life speech unrelated to sidewalk counseling inside the buffer zone, in blatant derogation of the First Amendment. Viewed charitably, it also exemplified the widespread confusion among lower courts about

how to determine content neutrality after *Reed* and *McCullen*, particularly in light of ostensibly conflicting principles applied in this Court's previous (and as-yet undistinguished) bubble- and buffer-zone cases like *Hill v. Colorado*, 530 U.S. 464 (2000) and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), respectively. This Court's intervention is necessary to vindicate Petitioners' First Amendment rights and to end the now-common lower-court practice of determining content neutrality by grasping blindly (or cherry picking) from this Court's painfully conflicting precedents.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Ruling Adopted a Pre-*Reed* and Pre-*McCullen* View of Content Neutrality Offensive to the First Amendment.

Although the Third Circuit acknowledged the Pittsburgh Ordinance would be "highly problematic" under *Reed* and *McCullen* if it "prohibit[ed] one-on-one conversations about abortion but not about other subjects within the zone" (consistent with the City's interpretation), it ruled that the buffer against abortion-related speech even for the purpose of "demonstrat[ing]" is content neutral. *Bruni v. City of Pittsburgh*, 941 F.3d 73, 85, 87 (3d Cir. 2019). This decision wrongly ignored the principles of *Reed* and *McCullen* in direct contravention of the First Amendment.

Under *Reed*, restricting speech for the purpose of "demonstrating"—including Plaintiffs' speech-related activities as participants in 40 Days for Life (see Pet. for Cert. at 5)—is necessarily a "subtle" content-based distinction "defining regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227. Under *McCullen*, the need to examine the content of Petitioners' message to determine if it constitutes "demonstat[ing]" under the Ordinance renders it a content-based regulation of speech. *McCullen*, 573 U.S. at 479.

Similarly, the City's claimed interest in protecting women on the public sidewalk from the "undesirable effects that arise from" pro-life speech, *see* J.A. 764a, 772a, 775a, is also content-based. *Id.* at 481. The Third Circuit ignored all of these issues and the principles that underlie them from *Reed* and *McCullen*, manifesting confusion, at best, about how to determine content-neutrality under the ostensibly conflicting principles of *Hill* on the one hand, and *Reed* and *McCullen* on the other. (See Section II below.)

The Third Circuit's confusion led it to conduct a constitutional avoidance analysis that only exacerbated a circuit split over a serious issue of federalism. *See Bruni*, 941 F.3d at 84-88; Pet. for Cert. at 22-24. Had the Third Circuit adopted the proper content-neutrality standard in accord with the First Amendment, it would have been constrained to find the Ordinance unconstitutional. This Court should thus grant certiorari to correct the confusion in the lower courts and reverse the Third

Circuit's unconstitutional decision. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J.) ("This Court has not hesitated to overrule decisions offensive to the First Amendment.").

A. *Reed* and *McCullen* corrected the previously misconstrued content-neutrality test.

As Judge Hardiman acknowledged in his concurring opinion below, *Reed* "expanded the types of laws that are facially content based" to include not just facial distinctions based on "particular subject matter," but also "subtle" facial distinctions "defining regulated speech by its function or purpose." *Bruni*, 941 F.3d at 93 (Hardiman, J., concurring) (quoting *Reed*, 135 S. Ct. at 2227). To be sure, this Court had previously found regulations of speech based on function or purpose to be content-based. *See, e.g., Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993) (invalidating statute prohibiting dissemination of "commercial messages" by newsracks as content-based speech regulation); *FCC v. League of Women Voters*, 468 U.S. 364, 381-83 (1984) (holding that law prohibiting PBS outlets from engaging in "editorializing" was facially content-based).

But this Court later veered off course. In *Madsen v. Women's Health Ctr., Inc.*, for example, in determining whether an injunction was a content-based regulation of speech when it enjoined pro-life individuals from "congregating, picketing, patrolling, demonstrating or entering" a 36-buffer

zone outside an abortion facility, this Court "look[ed] to the government's purpose as the threshold consideration." 512 U.S. 753, 759, 763 (holding the injunction was content neutral because the court "imposed the restrictions on petitioners incidental to their antiabortion message").

It did the same thing in *Hill*. *See Hill*, 530 U.S. at 719 ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The *Hill* Court thus found that the government's allegedly benign motive rendered the bubble zone content neutral. *Id*. at 719. The *Hill* Court also thought the regulation content neutral because it did not discriminate based on a particular viewpoint or subject matter, *id*. at 723, even though it did restrict speech within the zone "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." *Id*. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999) (emphasis added)). The *Hill* Court explained "that the kind of cursory examination that might be

required" to discern prohibited speech has never been considered problematic. *Id*. at 722.[2]

This Court diagnosed and corrected this divergence in *Reed*. There, in a unanimous decision, this Court rebuked the Ninth Circuit for relying on *Hill* in deeming a local sign code to be content neutral simply because of the government's benign motive. *Reed*, 135 S. Ct. at 2226. This Court clarified that "the crucial first step in the content-neutrality analysis" is "determining whether the law is content-neutral on its face." *Id*. at 2228. And this means evaluating a law not only for regulating speech by particular subject matter (which is an "obvious" content-based facial distinction), but also for "more subtle" facial distinctions that define speech "by its function or purpose." *Id*. at 2227. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.*

This Court relied here on *Sorrell v. IMS Health, Inc*., 564 U.S. 552 (2011), which held that a law prohibiting brand name drug manufacturers from using data for the purposes of "marketing," but not for the purpose of education, was facially content-based. *Reed*, 135 S. Ct. at 2227 (citing *Sorrell*, 564 U.S. at 565-66). This Court thus held the sign code

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[2] *Hill's* continued validity is the subject of another pending petition for certiorari. *Price v. City of Chicago*, No. 18-1516 (U.S. June 6, 2019)).

at issue was content-based because it provided more or less favorable treatment to signs based on whether they were "Ideological Sign[s]," "Political Sign[s]," or "Temporary Directional Signs Relating to a Qualifying Event"—that is, based on their subject matter, function, and purpose. *Id.* at 2224-25, 2229-30.

Following *Reed*, courts have found other regulations of speech content-based by its function or purpose. *See, e.g., Thomas v. Bright*, 937 F.3d 721, 730 (6th Cir. 2019), *pet. for cert. filed*, No. 19-1201 (Apr. 8, 2020) (classification of sign as on-premises sign required considering sign content to see if content was sufficiently related to conduct on the premises); *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019) (robocall statute "plainly content-based" where it prohibited use of automated telephone system "for the purpose of," among other things, "offering goods or services for sale" or "promoting a political campaign or any use related to a political campaign"); *Centro De La Communidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112-13 (2d Cir. 2017) (regulation prohibiting approaching cars "for the purpose of soliciting employment of any kind from the occupants" is content-based); *Vugo, Inc. v. City of New York*, 309 F.Supp.3d 139, 147 (2018), *rev'd on other grounds*, 931 F.3d 42 (2d Cir. 2019) (regulation of advertising, as a form of commercial speech, was content-based); *McClauglin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015) (ordinance

distinguishing solicitations for immediate donation from all others was content-based).

And in *McCullen*, this Court recognized that the 35-foot buffer zone at issue "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 481 (internal quotation marks omitted). But this Court explained that it required no such examination given that "petitioners can violate the Act *merely by standing* in a buffer zone, without displaying a sign or uttering a word." *Id*. (emphasis added).

This Court also explained in *McCullen* that the buffer zone "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or [l]isteners' reactions to speech," including if it were enacted because speech outside abortion clinics "caused offense or made listeners uncomfortable." *Id*. at 481 (holding that the state's interests in protecting public safety, clinic access, and passable sidewalks were unrelated to listeners' reactions to speech). This principle superseded *Hill's* finding that Colorado's bubble zone was justified as protecting an "unwilling listener's interest in avoiding unwanted communication." *Hill*, 530 U.S. at 716; *see also Bruni*, 941 F.3d at 94 (Hardiman, J., concurring) (stating that after *McCullen*, "[e]ven some purposes previously held content neutral may now be content based").

B. The Third Circuit erroneously relied on pre-*Reed* and pre-*McCullen* precedent to find the Ordinance content neutral.

Here the Third Circuit failed to consider whether the Ordinance's ban on "demonstrat[ing]" within the 15-foot buffer zone regulates speech based on its function or purpose under *Reed*, or whether it requires enforcement authorities to examine the content of Petitioners' message.[3] Instead, after concluding the Ordinance did not apply to individual sidewalk counseling, it held "the activities that the Ordinance does prohibit render it content neutral under binding Supreme Court precedent"—precedents whose standards pre-dated and were corrected or clarified by *Reed* and *McCullen*. *See Bruni*, 941 F.3d at 87.

For instance, the Third Circuit explained that *Madsen* deemed "the precise language at issue here, 'congregating, picketing, patrolling, [and] demonstrating,'" to be content neutral. *Id.* (alteration in original) (quoting *Madsen*, 512 U.S. at 759, 763-64). But as shown above, *Madsen* found that language content neutral simply because of the

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[3] The Supreme Court in *Hill* noted that Webster's Third International Dictionary defines "demonstrate" as "to make a public display of sentiment for or against a person or cause," and observed that such speech, "by definition, does not cover social, random, or other everyday communications." 530 U.S. at 721.

government's benign motive, *Madsen*, 512 U.S. at 763—an insufficient justification after *Reed*. And even had it looked to facial content-neutrality, the injunction there forbade even *entering* the buffer zone (a fact omitted in the Third Circuit's brackets), rendering it content neutral under *McCullen* and distinguishing it from the Ordinance here (which prohibits congregating, patrolling, demonstrating, or picketing—but not standing—in the buffer zone). *See Bruni*, 941 F.3d at 86 ("The Ordinance prohibits [these] four—and only [these] four—activities within the zone.").

The Third Circuit's other purportedly "binding Supreme Court precedent" included *Schenck v. Pro-Choice Network of Western New York*, which deemed an injunction imposing a 15-foot buffer zone outside abortion-clinic entrances to be content neutral simply by relying on *Madsen*. 519 U.S. 357, 384-85 (1997). The Third Circuit also cited to *Hill* at 721, where this Court said it is *not* improper "to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct," *Hill*, 530 at 721, in direct conflict with this Court's later ruling in *McCullen* that "[t]he Act *would be* content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (internal quotation marks omitted) (emphasis

added).[4] In short, the "binding precedents" the Third Circuit relied on to find content neutrality are not actually binding after *Reed* and *McCullen*, which stand for key First Amendment principles that the Third Circuit failed to apply.[5]

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[4] The Third Circuit rounded out its list of supposedly binding precedents by citing to *United States v. Grace*, 461 U.S. 171, 181-82 (1983), which analyzed a ban on displaying "any flag, banner, or device designed to bring into public notice any party, organization, or movement" on U.S. Supreme Court grounds under the reasonable-time-place-manner framework; and to *Snyder v. Phelps*, 562 U.S. 443, 456 (2011), which noted that the Westboro Baptist Church's demonstrations may be subject to reasonable time, place, or manner restrictions. But no one argues the government may not restrict demonstrations via reasonable time, place, and manner regulations, say, for example, by regulations on noise. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 113-14 (1972). The question here is whether the Ordinance restricts Petitioners' speech by reference to its content, rather than by reference to its time, place, or manner.

[5] It is also clear the City enacted the Ordinance for the content-based reason of protecting listeners from feeling offended or uncomfortable by abortion-related speech, *see McCullen*, 573 at 481, in particular by seeking to (a) place an allegedly "minor restriction on an extremely broad category of communications with unwilling listeners," J.A. 721a (emphasis added), (b) protect allegedly "captive audience[s]" on the public right-of-way, J.A. 764a, and (c) protect women from "feel[ing] intimidated," J.A. 775a. This is especially clear from the fact that the Ordinance was passed alongside a bubble zone materially identical to the one at issue in *Hill*, *see Bruni*, 941 F.3d at 80, and the insistence of the bill sponsor (who also

To be sure, the Third Circuit did assume that "demonstrat[ing]" (including holding "signs") has an "easily identifiable nature" and thus can be regulated "based on the manner" in which this "expressive activity occurs, not its content." *Bruni*, 941 F.3d at 87. But that assumption is not realistic and directly conflicts with *Reed*. For example, the Ordinance here does not altogether prohibit holding signs, and thus it does not regulate only the manner of proclaiming a message that any sign might contain—contrary to the indications of Judge Hardiman in his concurrence. *See id.* at 94-95 (Hardiman, J., concurring) (stating that the Ordinance will require evaluating only "things usually unrelated to the content or intent of speech," and quoting *Reed*, 135 S. Ct. at 2232, for the principle that "entirely forbidding the posting of signs" is content neutral).

The Ordinance prohibits speech (and thus holding signs) *only* for the purpose of, among other things, *demonstrating*. *Bruni*, 941 F.3d at 86. Thus, holding signs that advertise for businesses in the vicinity of the abortion facility at 933 Liberty Avenue along the busy downtown Pittsburgh street would not be prohibited by the Ordinance. Nor would any other sign displayed for *any* purpose other

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chaired the City Council) that it was therefore valid under *Hill*, J.A. 771a. The sponsor even flatly admitted that "what is trying to be done here . . . is not restricting a speaker's right to address a willing audience, but protecting the listen [sic] from unwanted communication." J.A. 772a.

than demonstrating or picketing. But Petitioners, who partake in 40 Days for Life and "sometimes hold signs or wear shirts supporting life" (Pet. For Cert. at 5), recognize they cannot enter the buffer zone when they're holding or wearing these pro-life signs or messages.[6] *See, e.g.*, J.A. at 141a, 1011a.

This restriction is based purely on the "function or purpose" of Petitioners' speech akin to the different treatment for "[I]deological signs" in *Reed*, see *Reed*, 135 S. Ct. at 2224, except inverted here to give ideological speech less favorable treatment. It also requires "examin[ing] the content of the message that is conveyed," e.g., discerning whether an individual's shirt says "Pray To End Abortion"[7]

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[6] Indeed, Petitioners' activities as part of 40 Days for Life are inherently speech for the purpose of demonstrating. Notably, the national 40 Days for Life organization states that its "visual, public centerpiece . . . is a focused, 40-day, non-stop . . . prayer vigil" outside abortion facilities, which is a "peaceful and educational presence" for the purpose of "stand[ing] witness . . . [to] send a powerful message to the community about the tragic reality of abortion. It also serves as a call to repentance for those who work at the abortion center and those who patronize the facility." 40 Days for Life, About, Helping to end the injustice of abortion, Constant Vigil, available at https://www.40daysforlife.com/about-overview.aspx (last visited April 27, 2020).

[7] See 40 Days For Life Pittsburgh, Facebook Home Page, available at https://www.facebook.com/pg/40daysforlifepgh/photos/?ref=page_internal (displaying Facebook "profile picture" stating "Pray To End Abortion") (last visited April 27, 2020).

or rather advertises, say, for the nearest pizza restaurant, "to determine whether a violation has occurred," *McCullen*, 573 U.S. at 479 (internal quotation marks omitted). It is thus plainly a content-based regulation under *Reed* and *McCullen*.

Had the Third Circuit properly adopted and applied these precedents, it would have been obliged to find the Ordinance a content-based regulation. Instead the Third Circuit erroneously deemed the Ordinance content neutral and manifested confusion, as discussed in Section II, about whether *Reed* and *McCullen* supersede the ostensibly contrary principles underlying *Hill* and other cases of that era. This Court should thus grant certiorari to distinguish, narrow, or overrule cases like *Schenck*, *Madsen*, and *Hill* in light of the conflicting principles in *Reed* and *McCullen* and thus reverse the Third Circuit's decision in vindication of Petitioners' First Amendment rights.

II. The Third Circuit's Decision Exemplifies the Confusion in the Lower Courts About the Proper Approach to Content Neutrality.

In concluding its content-neutrality analysis, the Third Circuit admitted it has "continued to rely on *Hill* since *McCullen* and *Reed* were handed down . . . as have some of our sister circuits." *Bruni*, 941 F.3d at 87 n.17 (citing *March v. Mills*, 867 F.3d 46, 64 (1st Cir. 2017), *cert. denied*, 138 S.Ct. 1545 (2018); *Act Now to Stop War & End Racism Coal & Muslim Am. Soc'y Freedom Found.*, 846 F.3d 391, 403-04 (D.C.

Cir.), *cert. denied sub nom., Muslim Am. Soc'y Freedom Found. v. Dist. of Columbia*, 138 S.Ct. 334 (2017)). But it acknowledged that "the content neutrality holding of *Hill* may be 'hard to reconcile with both *McCullen* and *Reed*.'" *Id.* (quoting *Price v. City of Chicago*, 915 F.3d 1107, 1109 (7th Cir. 2019) (Sykes, J.), *pet. for cert. filed*, No. 18-1516 (U.S. June 6, 2019). Judge Hardiman recognized as much in his concurrence. *See id.* at 92 (Hardiman, J., concurring) (stating "*Reed* weakened precedents cited in the Court's content neutrality analysis").

These admissions, along with the Third Circuit's failure to properly adopt and apply the requisite standards of *Reed* and *McCullen*, are only the latest signs of lower-court confusion concerning how to determine content neutrality under this Court's as-yet unreconciled precedents in *Hill*, *McCullen*, and *Reed*. This Court should grant certiorari and end the lower courts' scattershot application of these precedents.

For instance, some courts continue to believe that in light of *Hill*, and despite *McCullen*, a law is content neutral even if it requires enforcing authorities to examine the content of a message in order to determine if the law applies. *See, e.g.*, *Recycle for Change v. City of Oakland*, 856 F.3d 666, 670-71 (9th Cir.), *cert. denied*, 138 S.Ct. 557 (2017) (citing *Hill* in finding an ordinance content neutral even where an officer must inspect a speaker's message in order to determine whether the ordinance applies); *Porter v. Gore*, 354 F. Supp. 3d 1162, 1173 (S.D. Cal. 2018) (citing *Hill* in holding

that the need for authorities to examine the content of the message contained within a horn honk does not render the horn honking ordinance content-based); *O'Connell v. City of New Bern, North Carolina*, 353 F. Supp. 3d 423, 430-31 (E.D.N.C. 2018) (citing *Hill* in finding picket ordinance content neutral given that "[t]he pertinent issue with respect to content neutrality is whether the city has regulated speech because of disagreement with the message it contains" (internal quotation marks omitted)).

Additionally, many courts continue to rely on *Hill* in holding that regulations of speech are content neutral even if based on the undesirable effects of speech on listeners in a public forum. *See, e.g.*, *Keyes v Biro*, 2018 WL 272849, *6-7 (Cal. App. 2018) ("[T]he right to approach someone on the way to a healthcare facility to hand the person a leaflet . . . may be constitutionally restricted in order to protect the 'unwilling listener's interest in avoiding unwanted communication'") (quoting *Hill*, 530 U.S. at 716); *Cent. Park Sightseeing LLC v. New Yorkers for Clean, Livable & Safe Streets, Inc.*, 157 A.D.3d 28 (N.Y. App. Div. 2017) (noting that even in traditional public fora, "the Supreme Court has consistently recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'") (quoting *Hill*, 530 U.S. at 718).

Given the apparently contradictory principles in *Hill*, *Reed*, and *McCullen*, "[t]he lower courts should not have to struggle to make sense of this tension in

[this Court's] case law." *Parking Ass'n of Georgia Inc v. City of Atlanta, Ga.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of petition for writ of certiorari). This Court should grant certiorari and correct the Third Circuit's confusion, shared by so many lower courts, about how to properly determine content neutrality after *McCullen* and *Reed*.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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