UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1084

NIKKI BRUNI, JULIE COSENTINO; CYNTHIA RINALDI; KATHLEEN LASLOW; and PATRICK MALLEY,
Plaintiffs-Appellants,

v.

CITY OF PITTSBURGH, *et al*.,

Defendants-Appellees.

On Appeal from United States District Court
for the Western District of Pennsylvania
Civil Action No. 14-1197
Judge Cathy Bissoon

BRIEF OF *AMICI CURIAE* THE NATIONAL LEGAL FOUNDATION, THE PACIFIC JUSTICE INSTITUTE, AND CONCERNED WOMEN FOR AMERICA, *in support of Appellants and urging reversal*

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, The National Legal Foundation, Pacific Justice Institute, and Concerned Women for America have not issued shares to the public, and no *Amicus* has any parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTERESTS OF *AMICI CURIAE*[1]

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Pennsylvania, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and individuals, especially with respect to contentious issues like abortion.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under § 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of the First Amendment. Such includes civil litigation and criminal defense to vindicate the rights of free speech in public fora. As such, PJI has a strong interest in the development of the law in this area.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state that no party's counsel authored this brief either in whole or in part, and that no party or party's counsel, or person or entity other than *Amici*, *Amici's* members, and their counsel, contributed money intended to fund preparing or submitting this Brief.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

Amici file this Brief pursuant to consent by all Parties.

SUMMARY OF THE ARGUMENT

This Court in *Bruni v. Pittsburgh*, 824 F.3d 353, 364 (3d Cir. 2016) ("*Bruni I*"), found it a "compelling argument that *Reed* [*v. Town of Gilbert*, 135 S. Ct. 2218 (2015),] has altered the applicable analysis of content neutrality" from that used by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703 (2000), and instructed the district court to reanalyze the issue in light of *Reed* and the factual development it had ordered. 824 F.3d at 365 n.14. The district court on remand ruled that the Supreme Court in *Reed* did not "expressly or implicitly" overrule *Hill* and, on the

facts, found *Reed* "entirely distinguishable." *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 367 (W.D. Pa. 2017).

Amici write to address this issue. As this Court indicated in *Bruni I*, *Reed* undercuts the rationale of *Hill* as applied by this Court in *Brown v. Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), when it found the Pittsburgh ordinance content-neutral on its face. *Reed*'s undercutting of *Hill* was foreshadowed in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and the Pittsburgh's ordinance, as interpreted and enforced as illuminated by further factual development after remand, is different from the regulations found content-neutral in *Hill* and *McCullen*. The ordinance is content-discriminatory under *McCullen* and *Reed*.

ARGUMENT

I. The Content-Neutrality Analysis of *Hill* Has Been Refined in *McCullen* and *Reed.*

The Supreme Court in *Hill* tested the buffer zone regulation on its face against the following standard articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989): "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719. The Ninth Circuit in *Reed*, relying on exactly this language in *Hill*, found a local ordinance "content-neutral" on its face

because the legislators adopted it without showing any "disagreement with the message" of the regulated speech. 707 F.3d 1057, 1071-72 (9th Cir. 2013).

The Supreme Court reversed, ruling that the Ninth Circuit (and impliedly the *Hill* majority) had misused the *Ward* test in a facial challenge analysis. While discriminatory intent can invalidate a speech regulation in some circumstances, the *Reed* Court reiterated at length that the lack of such an intent cannot save an ordinance if it makes distinctions based on the message or its associated function or purpose:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulation speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
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> . . . .
>
> . . . A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct 1505, 123 L.Ed.2d 99 (1993). . . . Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

Id. at 2227-28 (citations omitted). The Court then elaborated by relying on the two *dissents* in *Hill*:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U.S., at 787, and n. 2, 109 S. Ct. 2746. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "justified without reference to the content of the speech." *Id.*, at 791, 109 S. Ct. 2746. But *Ward*'s framework "applies only if a statute is content neutral." *Hill*, 530 U.S., at 766, 120 S. Ct. 2480 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*, at 765, 120 S. Ct. 2480.
>
> The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech" —rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. "'The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."' *Hill, supra*, at 743, 120 S. Ct. 2480 (SCALIA, J., dissenting).

Id. at 2228-29. Finally, the *Reed* Court required a heightened concern for suppression of speech by localities regulating its function or purpose:

> [I]t is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. of N.Y. v. Pub.c Serv. Comm'n of N.Y.*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid*. For example a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra*, at 428, 113 S.Ct. 1505.
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> . . . .
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> In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner* [*Broadcasting Sys. Inc. v. FCC*], 512 U.S. [622], at 658, 114 S.Ct. 2445 [(1994)].

Id. at 2230.

The *Reed* Court's correction of the expansive reading of *Hill* and *Ward* in facial challenges was foreshadowed in *McCullen*, a buffer-zone case decided after *Hill*. The Supreme Court took pains to explain that legislation "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." 134 S. Ct. at 2531 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). And it also emphasized in *McCullen* that regulation cannot be justified by concern about the reaction of those who hear the speech, which was a major concern of the *Hill* majority. *Id.* at 2531-32. As just set out, the Court two years

later in *Reed* went the next step and repudiated the Ninth Circuit's reliance in that case on *Hill*'s treatment of content-neutrality and embraced the reasoning of the *Hill* dissenters.

II. The Pittsburgh Ordinance Is Distinguishable from the Regulations in *Hill* and *McCullen* and, in Any Event, Is Not Distinguishable from the Content-Discriminatory Infirmities Identified in *Reed.*

The Pittsburgh ordinance does not allow persons knowingly to "congregate, patrol, picket, or demonstrate" fifteen feet from any entrance to a "health care facility." This is being enforced only at the two abortion clinics in the city.

The action at issue here—one-on-one discussions and leafleting of a quiet and consensual nature—does not fall within any of these categories by a normal understanding of the words. It is not congregating or patrolling or picketing or demonstrating. However, the city has interpreted the ordinance to prohibit those who wish to discuss the topic of abortion with pregnant women from doing so within the zone, but not discussions within the zone of other topics. The ordinance on its face exempts "agents of the hospital, medical office or clinic engaged in assisting patients. . . to enter or exit . . .," but, to avoid constitutional infirmity, this Court in *Brown* interpreted the ordinance not to allow the employees to discuss abortion within the buffer zone, either. 586 F.3d at 275. As interpreted and enforced by the city, the ordinance is materially different from those in *Hill* and

McCullen and overlaps with the defective provisions of the sign ordinance the Supreme Court invalidated in *Reed*.

A. The Pittsburgh Ordinance Varies from the Regulation Found Content-Neutral in *Hill.*

As discussed above, there is little question that some of the language of *Hill* may not be read either literally or expansively for facial challenges after *McCullen* and *Reed*. In particular, the *Hill* majority's approval of the Colorado act because it was "unlikely" that there would "often" be any need to know "exactly" what words were spoken in order to determine whether "sidewalk counselors" are engaging in "oral protest, education, or counseling," rather than other social or random conversation, 530 U.S. at 721, indulges in a "sliding scale" analysis repudiated in *Reed*. To apply this passage of *Hill*, a reviewing court would have to ask questions such as: How "unlikely" must a resort to an examination of the content of speech be to pass muster? How "often" would there be a need to know what is spoken? How often is too often? How close to having to know "exactly" what is said will invalidate the regulation? None of this formulation of *Hill* survives *Reed*.

But the Pittsburgh ordinance can also be distinguished from that in *Hill* in these respects: the *Hill* majority found it determinative that the Colorado act was applied to all medical facilities in the state and not just abortion clinics, *id*. at 711, 713-15, and it emphasized that the Colorado act, as interpreted, did "not place any

restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas." *Id*. at 708. The Pittsburgh ordinance is interpreted and enforced differently. It is used just at abortion clinics, and it prohibits speech based on its content, with abortion topics (but not others) being construed as "demonstrating" and, thus, out-of-bounds.[2] This abortion content discrimination differentiates the Pittsburgh ordinance from that in *Hill*, as now understood through the clarifying lens of *Reed*.

The Pittsburgh ordinance is also unconstitutional because it relies on a rationale for its enactment that was repudiated by the Court in *McCullen*. The first stated purpose of the ordinance (quoted by the district court, *Bruni*, 283 F. Supp. 3d at 360) is to "avoid violent confrontations" at "two locations within the City," a/k/a the abortion clinics. But speech cannot be prohibited just because a scenario can be conjured up in which things might turn violent. Even the Court in *Hill* cautioned that the "right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." 530 U.S. at 716. The

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[2] While the majority in *McCullen* upheld the Massachusetts act against the challenge that it was defective solely because it applied only to abortion clinics, 134 S. Ct. at 2530-31, as discussed below, the *McCullen* Court warned against the very way the Pittsburgh ordinance has been interpreted to target enforcement at abortion clinics.

ordinance in *Hill* nevertheless survived scrutiny because it only proscribed such speech inside the buffer zone *without the other person's consent*. *See id*. at 716-18 (applying "unwilling participant" or "captive audience" law). The Pittsburgh ordinance prohibits speech on abortion *even when the person is willing to listen*. Thus, it is different than the act upheld in *Hill*, and the following language of *McCullen* directly applies:

> [T]he Act 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." *Ibid*. If, for example, the 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.

134 S. Ct. at 2531-32; *see also Snyder v. Phelps*, 562 U.S. 443 (2011) (striking down damages awarded to unwilling listener due to speech he considered patently offensive). As a result, it cannot be upheld.

B. The Pittsburgh Ordinance Varies from the Regulation Found Content-Neutral in *McCullen*.

In *McCullen*, the majority, while invalidating the Massachusetts buffer-zone law as overly restrictive, also found that it was content-neutral.[3] 134 S. Ct. at 2530-

[3] Justices Scalia, Kennedy, and Thomas (who authored *Reed*) in concurrence criticized the majority's discussion of content neutrality as dicta and overly expansive for reasons echoed two years later in *Reed*. 134 S.Ct. at 2541-48 (Scalia, J., concurring in the judgment).

34. The key point for the majority was that the act simply excluded all persons from the zone whether or not they were talking or pamphleteering, except "persons entering or leaving" and "employees or agents of such facility acting within the scope of their employment." *Id*. at 2526, 2531. The act made no reference to speech, and the majority found that there was "no suggestion in the record that any of the clinics authorize[d] their employees to speak about abortion in the buffer zones." *Id*. at 2533.

Here, Pittsburgh does not ban *all* speech in the zone, but only that of a certain type. Moreover, the Pittsburgh ordinance does not limit the activity of employees in the zone to "the scope of their employment," which the Court found dispositive in *McCullen*, as it assumed that provision was inserted to allow clinics to avoid constitutional infinity by not authorizing their employees to speak within the buffer zone:

> It would be very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. See *post*, at 3549 (Alito, J., concurring in judgment). In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment. The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the

> clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.

Id. at 2534 (footnote omitted). Here, Pittsburgh has not included a similar prophylactic in its ordinance for clinic employees, and but for this Court's limiting construction in *Brown*, it would be unconstitutional under *McCullen* as a result.

It is certainly debatable whether the limiting construction used by this Court in *Brown* to save the Pittsburgh ordinance from viewpoint discrimination in consistent with *McCullen*, which relied on the *express* "within the scope of their employment" language of the Massachusetts act, language absent from the Pittsburgh ordinance. This Court in *Brown* did not deal with this distinction with *McCullen*, and it should revisit the issue in this appeal. *See also id*. at 3549-50 (Alito, J., concurring in the judgment) (finding the Massachusetts act, even with the "within the scope of their employment" provision, to allow employees but not others to discuss abortion and, thus, viewpoint discriminatory and unconstitutional on its face).

C. The Pittsburgh and *Reed* Ordinances Have Overlapping Constitutional Defects.

The *Reed* Court established a bright-line test: if enforcement of the regulation requires the official to consider the content of the speech, the regulation is not content-neutral. 135 S. Ct. at 2227. The Pittsburgh ordinance requires exactly that, because the city allows some speech within the buffer zone but not

other speech. Police officers must assess the content of the speech before knowing if the ordinance has been violated. Under *Reed*, that makes the ordinance content-discriminatory and subject to strict scrutiny.

Nor would the ordinance be saved if this Court were to adhere to its limiting construction that employees of the abortion clinics, like others, were not permitted to talk about abortion within the buffer zone. The *Reed* Court also clarified that a regulation is *not* content-neutral if it excludes an entire topic from discussion. *Id.* at 2230. Here, those in the buffer zone may speak without violating the ordinance on many topics of interest—weather, sports, community events, latest news stories, etc.—but not abortion. That carve-out makes the ordinance content-discriminatory under *Reed*.[4] *See also Boos v. Barry*, 485 U.S. 312, 318-20 (1988) (finding ordinance that outlawed picketing with signs critical of a foreign government within a buffer zone around its embassy to be content-discriminatory because it prohibited speech on an entire topic); *Consol. Edison*, 447 U.S. at 537 (regulation is content-based if it prohibits "discussion of an entire subject," quoted in *Reed*, 135 S. Ct. at 2230).

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[4] It is ironic that the district court relied on Justice Alito's concurring opinion in *Reed* to support its view that *Reed* did not undermine the rationale of the *Hill* majority. He "join[ed] fully" the majority opinion in *Reed* and only wrote to identify several examples of truly content-neutral signage regulations. 135 S. Ct. at 2223-24 (Alito, J., concurring).

CONCLUSION

The expansive language of *Hill* on which this Court relied in finding the Pittsburgh ordinance content-neutral has been limited and refined by the Supreme Court in *McCullen* and *Reed.* Especially considering the further development of the record concerning how the city interprets and enforces the ordinance, it is a content-discriminatory regulation that must be subjected to strict scrutiny. The district court erred in finding otherwise.

Respectfully submitted,
this 20th day of April, 2018.

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COMBINED CERTIFICATIONS

1. I, Steven W. Fitschen, Counsel of Record for *Amici Curiae*, am admitted to the bar of the Third Circuit Court of Appeals.

2. I certify that this Brief complies with the type-volume limitations of F.R.A.P. 32(a)2.7(B)(i) and F.R.A.P. 29(a)(5). Exclusive of the exempted portions, this Brief contains 3,420 words, including footnotes, in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2016.

3. On April 20, 2018, I filed this Brief with the Clerk of the Third Circuit Court of Appeals using the CM/ECF system, which will send notice of the electronic filing to all Counsel for the Parties, all of whom are registered users.

4. The electronic version of this Brief was scanned and found virus-free using the anti-virus component of AVG Internet Security, version 18.3.3051, updated April 20, 20138

5. The text of the hard copy of this Brief and the text of the Brief filed electronically via the CM/ECF system are identical.

/s/ Steven W. Fitschen

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