No. 19-1184

In The Supreme Court of the United States

NIKKI BRUNI, ET AL.,

Petitioners,

v.

CITY OF PITTSBURGH, PENNSYLVANIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES SUPPORTING PETITIONERS

THOMAS R. MCCARTHY
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

April 29, 2020

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STATEMENT OF INTEREST[1]

Amici curiae are members of the U.S. Senate and House of Representatives (listed in the Appendix) who are committed to protecting the free-speech rights guaranteed by the First Amendment. Free speech is critical to our democracy. It creates an open "marketplace of ideas" in which individuals can freely and respectfully debate the political, economic, and social issues of the day. It furthers the search for truth by allowing all ideas to compete free of government censorship or compulsion.

Amici believe that the court below disregarded these longstanding principles. *Amici* therefore urge this Court to grant the petition and reverse the decision below.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent of *amici curiae* to file this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves yet another "abortion-speech edition of the First Amendment"—one that "giv[es] abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents." *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in the judgment). The City of Pittsburgh enacted an ordinance that is content-based, viewpoint-based, and aimed at restricting discussion of abortion. Yet the Third Circuit allowed that ordinance to stand despite its serious imposition on Petitioners' speech.

In doing so, the court distorted *McCullen v. Coakley's* narrow-tailoring test by imposing a novel burden on Petitioners: The court required Petitioners to show—as a threshold matter—that the government's imposition on their speech was a "significant" burden as opposed to a "de minimis" one. Pet. App. 29a. But *McCullen* established no such requirement. And neither do three other circuits that have applied *McCullen*.

After throwing that hurdle in front of Petitioners, the lower court concluded that Petitioners failed to clear it and, on that basis, eased the burden on the City to prove that its suppression of speech comports with the First Amendment. Specifically, the court imposed a lesser form of scrutiny on the City that fails to comport with the traditional strong protection of First Amendment activity on public sidewalks.

On top of that, Pittsburgh's ordinance is a textbook example of a content-based law that should be subject to strict scrutiny. By design, it targets and primarily impacts pro-life speech. Indeed, the ordinance's sponsor confessed that the ordinance aimed to "protect[] the listen[er] from unwanted communication." Pet. 6. Unsurprisingly, that "unwanted communication" concerns only one topic: abortion. Moreover, the ordinance applies only to Pittsburgh's two abortion clinics.

The City of Pittsburgh may not prohibit sidewalk counselors from sharing their peaceful, pro-life message simply because the City or the listeners dislike that speech. "[P]revent[ing] individuals from saying what they think on important matters[,] … undermines" our democracy and the search for truth. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018). Allowing the decision below to stand will flout that high purpose and stifle the free speech rights of citizens across the country who seek to spread their pro-life message.

ARGUMENT

I. The Third Circuit's decision contravenes this Court's governing precedent and conflicts with decisions of several other circuits.

Public streets and sidewalks serve a "historic role as sites for discussion and debate;" indeed, they "occupy a 'special position in terms of First Amendment protection.'" *McCullen,* 573 U.S. at 476 (quoting *United States v. Grace*, 461 U.S. 171, 180

(1983)). Accordingly, a state's ability to restrict speech on public streets and sidewalks is "very limited." *Id.* at 477 (quotation omitted). When a person challenges a law on First Amendment grounds, the government bears the burden to show that law is narrowly tailored. Here, the Third Circuit allowed Pittsburgh to maintain an ordinance that imposes serious burdens on Petitioners' speech by applying intermediate scrutiny. That decision plainly alters *McCullen's* narrow-tailoring test for content-neutral laws. And it conflicts with decisions of three other circuits that have applied *McCullen*. On top of that, the Third Circuit should have applied strict scrutiny given that the City of Pittsburgh's ordinance is content based.

A. The Third Circuit distorted *McCullen v. Coakley*'s narrow-tailoring test.

This Court's decision in *McCullen* provides the framework for analyzing free speech challenges. If a law is content neutral, it must survive intermediate scrutiny. To do so, the government must show that the law is "narrowly tailored to serve a significant governmental interest." *Id.* at 486 (quotation omitted). But if a law is content based, it is subject to strict scrutiny. To survive strict scrutiny, the government must show that the law is the "least restrictive means of achieving a compelling state interest." *Id.* at 478.

In *McCullen*, this Court held that a Massachusetts statue restricting speech in sidewalk zones outside abortion clinics was content neutral. The statute nevertheless failed because it was not

narrowly tailored to advance the State's purported goals. *See id.* at 496-97. To be narrowly tailored, a law "must not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 486 (quotation omitted). The Court concluded that the statute was not narrowly tailored because "the Commonwealth ha[d] available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id.* at 494.

This should have been an easy case under *McCullen*. But rather than follow *McCullen*, the court below sharply departed from it. The court distorted *McCullen's* narrow-tailoring test here by adding a threshold requirement that the government's imposition on Petitioners' speech be "significant" as opposed to "de minimis." Pet. App. 29a. The court explained that "where the burden on speech is de minimis, a regulation may 'be viewed as narrowly tailored." Pet. App. 29a. That is not the law. It is instead, as Petitioners aptly note, "a novel precondition." Pet. 28-29. By imposing this additional precondition on Petitioners—one that has no basis in *McCullen*—the court made their task as challengers harder by imposing a lesser burden on the City to prove that its speech-restricting ordinance comports with the First Amendment. Specifically, Petitioners purported failure to meet the court's "significant" harm precondition afforded the City a lesser form of scrutiny that fails to comport with the traditional strong protection of First Amendment activity on public sidewalks.

In *McCullen*, the Court did not employ (or even mention) a threshold level of interference with speech required to warrant First Amendment protection. That is unsurprising given the vital importance of free speech. To the contrary, *McCullen* instructs that the government bears the burden to show that it has not unduly interfered with speech, whether or not it considers that interference to be "de minimis." The government must show a lack of other feasible alternatives to achieve its purpose. *McCullen*, 573 U.S. at 495. That showing imposes a higher burden than "simply to say that other approaches have not worked." *Id.* at 496. Indeed, the government must "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 495.

That demonstration is especially important with regards to traditional public fora like public sidewalks. Because "while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others." *Id.* at 488. Indeed, that is why public sidewalks "occupy a special position in terms of First Amendment protection." *Id.* at 476 (quotation omitted). Yet the Third Circuit disregarded that "special position." Here, like in *McCullen*, the ordinance "compromise[d] petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'" *Id.* at 487. That in itself "impose[s] serious burdens on petitioners' speech." *Id.* In keeping sidewalk

counselors from speaking in specific zones, the ordinance challenges their ability to share their messages. *See id.*

B. The Third Circuit's application of *McCullen* conflicts with the approach of several other circuits.

The Third Circuit's approach in this case conflicts with the First, Fourth, and Tenth Circuits' approaches. Each of those courts have applied *McCullen* where challengers have shown *some* burden on their speech. But none have required challengers to show a *significant* burden. Indeed, each of those courts have applied the narrow-tailoring inquiry without discussing a requisite burden level.

For example, in *Cutting v. City of Portland,* 802 F.3d 79 (1st Cir. 2015), the First Circuit held that Portland's "sweeping" ordinance prohibiting "lingering" in the city's medium strips was not narrowly tailored. *Id.* at 92-93. In doing so, the First Circuit drew a distinction between content-based and content-neutral restrictions and between public and private fora—and rightly so—but not between "significant" and "de minimis" impositions on speech. *See id.* at 83-86.[2] The court explained that "a content-neutral restriction on speech in a traditional public forum is facially unconstitutional if it does not survive the narrow-tailoring inquiry, even though that ordinance might seem to have a number of legitimate

[2] *See also Rideout v. Gardner*, 838 F.3d 65, 71-72 (1st Cir. 2016) (applying *McCullen's* narrow-tailoring analysis to "ballot selfies" but discussing no threshold requirement).

applications." *Id.* at 86. The First Circuit recognized that the goal of the ordinance at issue—to prevent people from being in the median for public safety reasons—was "a perfectly understandable desire." *Id.* at 92. But it nonetheless held that the regulation failed the narrow-tailoring analysis because the city did not "show that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* (quoting *McCullen*, 573 U.S. at 494) (cleaned up). The court explained that the regulation "'sacrificed speech for efficiency,' and, in doing so, failed to observe the 'close fit between ends and means' that narrow tailoring demands.'" *Id.* (quoting *McCullen*, 573 U.S. at 486) (cleaned up). But it did not require the burden on speech to reach any particular threshold to qualify for First Amendment protection.

Similarly, in *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015), the Fourth Circuit applied *McCullen* after the plaintiff made an initial showing that there was *a* burden placed on his speech. *Id.* at 226. The court did not consider the degree of the burden in question, only that it existed. *See id.* In fact, the court recognized that the "threshold determination triggering application of First Amendment scrutiny is *whether [the] challenged regulation burdens speech*"—not whether the challenged regulation significantly burdens speech. *Id.* (quoting *American Legion Post 7 v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001) (emphasis added)). Once a challenger shows some burden on his speech, "the burden then falls on the government to prove the constitutionality of the speech restriction." *Id.*

Finally, in *Verlo v. Martinez*, 820 F.3d 1113 (10th Cir. 2016), the Tenth Circuit outlined the steps *McCullen* requires. *Id.* at 1135-37. First, the court must analyze whether a statute or ordinance "operate[s] to restrict speech." *Id.* at 1136. Then, the court must determine to whether the statute in question was content neutral and, if so, whether that statute was narrowly tailored to serve a significant government interest. *Id.* The court required no threshold determination that the impact on speech was "significant" before traditional free-speech analysis applies. *See id.* at 1137 (holding that although there was a compelling state interest in reducing speech in a plaza outside a state courthouse, the statute was "not narrowly tailored, as even content-neutral regulations in a public forum must be").

Consequently, had this case arisen in the First, Fourth, or Tenth Circuit, Petitioner would have won. Indeed, the Third Circuit acknowledged as much when it explained that the ordinance could not satisfy *McCullen's* narrow-tailoring test. *See* Pet. App. 30. This uneven application of precedent between circuits warrants review by this Court.

C. Although the ordinance easily fails under *McCullen's* test for content-neutral laws, the law is content based and strict scrutiny should apply.

As explained above, even if treated as a content-neutral law, Pittsburgh's ordinance fails intermediate scrutiny. Yet the ordinance "discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions" and is therefore content based. *McCullen*, 573 U.S. at 478. Accordingly, the ordinance "must satisfy strict scrutiny." *Id.*

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Yet that is exactly what the City of Pittsburgh did here. Pittsburgh's ordinance is content-based, viewpoint-based, and aimed at restricting discussion of abortion. It restricts discussion of abortion by Petitioners and others with a similar pro-life message. It is therefore "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *id.* at 2227 ("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.").

Though Pittsburgh purports to more broadly ban "congregat[ing], patrol[ling], picket[ing], or demonstrat[ing] in a zone extending 15 feet from any entrance to the hospital and or health care facility," Pet. App. 9a, that is a "convenient yet obvious mask

for the legislature's true purpose and for the prohibition's true effect," *Hill v. Colorado*, 530 U.S. 703, 768 (2000) (Kennedy, J., dissenting). In reality, the ordinance is confined to the painted buffer zones located on public sidewalks and streets in front of the City's two abortion clinics. *See* Pet. 27.

That the City's ordinance applies only to two facilities in the whole of Pittsburgh is telling. If "counseling on every subject within [the regulated] zone present[s] a danger to the public, the statute should apply to every building entrance in the [City]." *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting). But the ordinance does not so apply. Instead, "[i]t applies only to a special class of locations: entrances to [abortion clinics]." *Id.* This Court need not "close [its] eyes to reality" that "'counseling' outside the entrances to [abortion clinics] concern[s] a narrow range of topics—indeed, one topic in particular." *Id.* By confining the ordinance's application to the City's two abortion clinics, it "has made a content-based determination" and limited the substance of Petitioners' message. *Id.* Indeed, the City Council Chair admitted that the ordinance's real goal was to "protect[] the listen[er] from unwanted communication" about abortion. Pet. 6. Accordingly, the City's buffer-zone law is only designed to curb a specific message regarding abortion.

Restrictions because of the "impact that speech has on its listeners ... is the essence of content-based regulation." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (citation and quotations omitted). In *McCullen*, this Court explicitly acknowledged that laws "concerned with undesirable

effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech'" are not content neutral. *McCullen*, 573 U.S. at 481. It clarified that if speech "outside [] abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the [government] a content-neutral justification to restrict the speech." *Id.* Yet preventing listeners from "unwanted communication" is precisely what Pittsburgh enacted the ordinance to do. Pet. 6.

Moreover, the City does not ban other kinds of speech in the buffer zones that it considers non-demonstrating speech. *See id.* The City allows peaceful one-on-one conversations in the buffer zone about a variety of topics, such as the weather, directions, and sports. Yet it prohibits peaceful one-on-one conversations about abortion. That is plainly regulation of speech "based on the message a speaker conveys." *Reed*, 576 U.S. at 2227. Since the Constitution abhors restrictions on speech because of the message being conveyed or the way in which the speaker chooses to convey that message, *see Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019), the decision below cannot stand.

II. The Court should grant the petition to ensure that individuals can fully exercise their First Amendment rights.

The outcome of this case is important—to Petitioners and to countless other sidewalk counselors seeking to spread their pro-life message. "Whenever the Federal Government or a State prevents individuals from saying what they think on important

matters[,] … it undermines" our democracy and the search for truth. *Janus*, 138 S. Ct. at 2464. This is especially true on public streets and sidewalks where a listener "encounters speech he might otherwise tune out." *McCullen*, 573 U.S. at 476. Indeed, that feature is "a virtue, not a vice" because "the First Amendment's purpose [is] 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *Id.* (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)). Allowing the decision below to stand will flout that high purpose and stifle the free speech rights of citizens across the country.

First, Pittsburgh's ordinance targets and primarily impacts pro-life speech. The City Council Chair and sponsor of the ordinance admitted as much when she confessed that the ordinance's real goal was to "protect[] the listen[er] from unwanted communication." Pet. 6. Unsurprisingly, that "unwanted communication" concerns only one topic: abortion. *See* discussion *supra*, at section I.C. That is not a legitimate goal. The City cannot prohibit sidewalk counselors from sharing a peaceful, pro-life message simply because the City or the listeners dislike the content of the speech. This Court has long recognized that protecting disfavored speech or speech that offends the listener is a "bedrock First Amendment principle." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). *See also, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011); *Virginia v. Black*, 538 U.S. 343 (2003); *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992); *Nat'l Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). "It

is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969).

"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975). Indeed, this Court has repeatedly recognized that free speech "'may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949) (cleaned up)). Although Petitioners seek only to spread the message of "kindness, love, hope, gentleness, and help," Pet. 4, the City finds their message offensive, *see* Pet. 6. Yet, this "is a reason for according it constitutional protection." *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

Worse still, overbroad speech regulations like the one here threaten not only Petitioners but all "who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution" or attempt to challenge the law themselves. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Indeed, "[t]he reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). After all, "First Amendment interests are

fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute" or regulation. *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

This Court's overbreadth "doctrine seeks to strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292 (2008) (citing *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003)). The social costs implicated here clearly weigh in Petitioners' favor. The City purports to prevent harm—like "violent confrontations"—outside of abortion clinics, but Petitioners "peacefully express[] [their] message of caring support." Pet. App. 9a; 143a. In fact, no one has ever accused Petitioners of violence, obstruction, or harassment. *See* Pet. 5. And most "disputes" in front of the City's abortion clinics are verbal, not physical. *See* Pet. App. 46a-47a (noting that incidents at the clinics were "not as severe," "[n]ot on a much regular basis," and that "[a] lot of [the incidents] w[ere] verbal."). Thus, rather than preventing violent incidents, the City's ordinance serves to deter Petitioners and any other individual seeking to speak on public sidewalks in front of abortion clinics from speaking.

Moreover, under the City's own interpretation, the ordinance puts *anyone* in Pittsburgh at the mercy of the police to determine what speech violates the law. *See* Pet. App. 45a. This includes individuals and groups ranging from pro-life sidewalk counselors to those protesting the president or the Iraq war. *See, e.g.*, Elise Lavallee, *Hundreds Rally in Pittsburgh in Support of Impeaching President Trump*, City Paper (Dec. 17, 2019), bit.ly/2wBCsvH; *Pittsburgh Holds*

Protest to Condemn Trump Administration's Policies in Iran and Iraq, CBS Pittsburgh (Jan. 4, 2020), cbsloc.al/3a3jzj6. "'[C]onfer[ing] on police a virtually unrestrained power to arrest and charge persons with a violation' of the [ordinance] is unconstitutional because 'the opportunity for abuse … is self-evident.'" *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135-36 (1974) (Powell, J., concurring)). That opportunity for abuse is especially pertinent given the "practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents." *McCullen*, 573 U.S. at 497 (Scalia, J., concurring in the judgment).

Unfortunately, the City does not treat disfavored speech with the same reverence as this Court. Allowing a city to silence Petitioners' message of "kindness, love, hope, gentleness, and help," Pet. 4, simply because it is pro-life or may be "unwanted communication" runs afoul of the First Amendment. The Court should grant the petition to fully protect Petitioners and all those who want to share a similar message.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

THOMAS R. MCCARTHY
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

April 29, 2020

Counsel for Amici Curiae

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U.S. Senate

Steve Daines (MT)

John Barrasso, M.D. (WY)
John Boozman (AR)
Mike Braun (IN)
Bill Cassidy, M.D. (LA)
Tom Cotton (AR)
Kevin Cramer (ND)
Michael B. Enzi (WY)
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James Lankford (OK)
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Jerry Moran (KS)
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Guy Reschenthaler (PA)
Glenn "GT" Thompson (PA)
House Minority Leader Kevin McCarthy (CA)
House Minority Whip Steve Scalise (LA)
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