No. 17-2196

In the
United States Court of Appeals for the Seventh Circuit

VERONICA PRICE, *ET AL.*,
Plaintiffs-Appellants,
v.
CITY OF CHICAGO, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Brief *Amicus Curiae* of Family PAC Illinois, Lake County Right to Life, Inc., Pro Life Legal Defense Fund, Inc., Eleanor McCullen, Pass the Salt Ministries, Conservative Legal Defense and Education Fund, Capitol Hill Prayer Alert Foundation, The Transforming Word Ministries, Mission America, United States Justice Foundation, and Eberle Associates in Support of Plaintiffs-Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, Family PAC Illinois, Lake County Right to Life, Inc., Pro Life Legal Defense Fund, Inc., Eleanor McCullen, Pass the Salt Ministries, Conservative Legal Defense and Education Fund, Capitol Hill Prayer Alert Foundation, The Transforming Word Ministries, Mission America, United States Justice Foundation, and Eberle Associates, through their undersigned counsel, submit this Disclosure Statement pursuant to Rule 26.1(b), Federal Rules of Appellate Procedure ("Fed. R. App. P."), Rule 26.1(c), Rules of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit Local Rules"), and Fed. R. App. P. 29(c).

The *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them, except for Eberle Associates. Eberle Associates has no parent company and is a privately held corporation whose stock is not publicly traded. *Amici Curiae* are represented herein by William J. Olson, Esquire, who is counsel of record, Herbert W. Titus, Esquire, Jeremiah L. Morgan, Esquire, and Robert J. Olson, Esquire, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, VA 22180-5615. *Amicus Curiae* U.S. Justice Foundation also is represented herein by Joseph W. Miller, 932 D Street, Suite 3, Ramona, CA 92065-2355. *Amicus Curiae* Conservative Legal Defense and Education Fund also is represented herein by J. Mark Brewer of Brewer & Pritchard, P.C., 800 Bering, Suite 201, Houston, TX 77057.

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INTEREST OF *AMICI CURIAE*[1]

Family PAC Illinois is a political committee. Lake County Right to Life, Inc., Pro Life Legal Defense Fund, Inc., Pass the Salt Ministries, Capitol Hill Prayer Alert Foundation, The Transforming Word Ministries, Mission America, United States Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code ("IRC"). Eleanor McCullen has a pro-life counseling ministry and was the lead plaintiff in McCullen v. Coakley, 134 S.Ct. 2518 (2014). Eberle Associates is a closely-held for-profit Virginia corporation. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. In recent years, several of these *amici* have filed *amicus* briefs in other cases involving the right to life, including the following:

- National Institute of Family and Life Advocates v. Becerra, U.S. Supreme Court No. 16-1140 (Apr. 20, 2017)
- Stormans, Inc. v. Wiesman, U.S. Supreme Court No. 15-862 (Feb. 5, 2016)
- Whole Woman's Health v. Hellerstedt, U.S. Supreme Court No. 15-274 (Feb. 3, 2016)
- Zubik v. Burwell, U.S. Supreme Court Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191 (Jan. 11, 2016)
- Conestoga Wood Specialties Corp. v. Sebelius, U.S. Supreme Court No. 13-356 (Jan. 28, 2014)
- Personhood Oklahoma v. Barber, U.S. Supreme Court No. 12-145 (Aug. 31, 2012)

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. THE CHICAGO BUFFER ZONE ORDINANCE DOES NOT WITHSTAND TRADITIONAL FIRST AMENDMENT ANALYSIS.

The district court saw this case as being on all fours with, and controlled by, the Supreme Court's decision in Hill v. Colorado, 530 U.S. 703 (2000). Applying Hill, it rejected appellants' facial challenge to the Chicago buffer zone ordinance. In doing so, the district court ignored long-established First Amendment principles, ruling instead that the ordinance passed intermediate scrutiny. *See* Appellants' Brief Appendix ("App.") 11-12. As discussed in Section II, *infra*, there has been considerable judicial concern expressed that constitutional challenges, especially First Amendment challenges, must be analyzed under neutral and fixed principles of constitutional law, regardless of the subject matter of the case. Specifically, courts must ensure that special rules are not devised to govern cases involving abortion.

Appellants appropriately begin by establishing the importance of the First Amendment protections: "Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." Benjamin Franklin, "On Freedom of Speech and the Press," *The Pa. Gazette*, Nov. 1737. Innumerable authorities are in accord. Whenever a law runs up against the guarantees of the First Amendment, "First Amendment standards ... 'must give the benefit of any doubt to protecting rather than stifling speech.'" Citizens United v. FEC, 558 U.S. 310, 327 (2010) (citing FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469 (2007)).

In fact, the more controversial the speech, the greater protection it should be provided by the courts. As the Supreme Court has observed:

> handing out leaflets in the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression. That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. [McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (citations omitted).]

Surely, speaking to pregnant women as they are about to enter an abortion clinic is at the time that it is most needed to educate those women on all the options available to them. This is a message that many women, if allowed, choose to hear. As the Supreme Court acknowledged in McCullen v. Coakley, 134 S.Ct. 2518, 2527 (2014), "[i]n unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions."

The Appellants here explain that one of the ways that they reach out to women considering abortion is through the distribution of educational literature. They point out that "[h]andbilling" via "pamphlets and leaflets" is "protected under the First Amendment," citing Lovell v. Griffin, 303 U.S. 444 (1938) and McCullen. Appellants' Br. at 9-10.

Indeed, the Supreme Court has consistently held that:

> Leafletting and commenting on matters of public concern are classic forms of speech that lie at the **heart of the First Amendment**, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. [Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997) (emphasis added).]

Appellants expound on this point later in their brief, explaining how the ordinance effectively prevents their distribution of literature to the target audience. *Id*. at 28-31. In McIntyre, the Supreme Court actually stated that "the speech in which Mrs. McIntyre engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is **the essence of First Amendment expression**." McIntyre at 347 (emphasis added). Here, the Chicago ordinance is

specifically designed to prevent, *inter alia*, the protected act of public handbilling and leafletting. Appellants state that their "expression occurs on the public sidewalks, the quintessential forum for such expression" and "occupies the highest rung of protection because it occurs on the public sidewalks and streets, the traditional public fora 'held in trust for the use of the public....'" Appellants' Br. at 6 and 10.

These principles were memorialized by the Supreme Court in 1939:

> Wherever the title of **streets** and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing **public questions**. Such use of the **streets** and **public places** has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939) (emphasis added).]

These principles have been repeated on numerous occasions since, including in United States v. Grace, 461 U.S. 171 (1983), where the Supreme Court addressed the constitutionality of a statute prohibiting the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" on the grounds around the Supreme Court building, including public sidewalks. Grace laid the predicate that "'public places' historically associated with the free exercise of expressive activities, such as **streets**, sidewalks, and parks, are considered, without more, to be '**public forums**.'" *Id*. at 177 (emphasis added). Thus, the Court struck down the challenged statute "insofar as its prohibitions reach to the public sidewalks." *Id*. at 181.

Five years later, the Supreme Court again noted the special emphasis that public forums such as public sidewalks have held in our republic's robust protection of the speech freedom:

> the display clause bars such speech on public **streets** and **sidewalks**, traditional public fora that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."... [S]uch places ... occupy a "special position in terms of First Amendment protection." [Boos v. Barry, 485 U.S. 312, 318 (1988) (citations omitted) (emphasis added).]

There is no dispute that appellants' activities took place "'on the public sidewalks and rights of way....'" App. 5. The ordinance challenged in this case clearly prohibits protected speech on public sidewalks, insofar as such locations are within 50 feet of an abortion clinic. Indeed, it targets only communication which takes place "in the **public way** within a radius of 50 feet from any entrance" to an abortion clinic. *See id*. (citing MCC § 8-4-010(j)(1)) (emphasis added).

If the longstanding precedents discussed *supra* are applied impartially, appellants' challenge would be upheld.

II. THIS COURT HAS A DUTY TO TREAT APPELLANTS' CHALLENGE AS ANY OTHER FIRST AMENDMENT CHALLENGE, NOT AS AN ABORTION RIGHTS CASE.

As demonstrated in Section I, *supra*, the appellants present to this Court a classic First Amendment challenge, which these *amici* urge be resolved by the application of long-standing First Amendment precedents. If these are the principles on which this case is decided, the challenge necessarily will be sustained and the district court decision reversed. It is only when the challenge is considered in the context of sidewalk pro-life counseling does the case become confused — clouded by the politics infecting a long line of abortion-related cases.

Thirty years of Supreme Court opinions, including four current Supreme Court Justices (Justices Kennedy, Thomas, Roberts, and Alito), as well as prominent past Justices (Chief

Justices Burger and Rehnquist, and Justices O'Connor and Scalia), have all observed that the presence of abortion in a case has, in the past, seriously distorted the application of general legal principles of law. In reverse chronological order, the most notable of these opinions provide ample proof of the corrosive effect of abortion rights, particularly on the First Amendment rights of pro-life advocates.

A. Whole Woman's Health v. Hellerstedt (2016): Justices Thomas, Alito, and Chief Justice Roberts.

Only a few months after the death of Justice Scalia, Justice Thomas began his dissent in Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016), by quoting from an earlier Scalia dissent, concluding that the majority decision striking down health restrictions on abortion clinics and doctors:

> exemplifies the Court's troubling tendency "to **bend the rules** when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S. 914 (2000) (Scalia, J., dissenting). [Whole Woman's Health at 2321 (Thomas, J., dissenting) (emphasis added).]

Of course, this observation was made by Justice Thomas who, like Justice Scalia, has repeatedly asserted his "oppos[ition] to the Court's abortion jurisprudence" (*Id*. at 2324), but the same criticism also has come from several other justices over three decades, and that critique deserves to be considered and evaluated.

Most recently, also in Whole Woman's Health, Justice Alito, joined by Chief Justice Roberts and by Justice Thomas, addressed this issue. Although the dissent asserts that "this case does not require us to delve into" abortion, which it described as "one of the most controversial issues in American law" (*id*. at 2330 (Alito, J. dissenting)), it instructed that no special rules may apply in controversial cases.

> As a court of law, we have an obligation to apply [legal] rules in a **neutral** fashion in all cases, **regardless of the subject** of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be **scrupulously neutral** in applying such rules. [*Id*. (emphasis added).]

And, after stating that rule, the Alito dissent concluded that the Court was:

> **determined to strike down** two provisions of a new Texas abortion statute in all of their applications, [and] the Court simply **disregards basic rules that apply in all other cases**.... When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here. [*Id*. at 2330, 2353 (emphasis added).]

B. McCullen v. Coakley (2014): Justices Scalia, Kennedy, and Thomas.

In McCullen v. Coakley, 134 S.Ct. 2518 (2014), Justice Kennedy joined Justices Scalia and Thomas in criticizing the notion of a special set of rules for abortion-related cases. The McCullen Court rejected a challenge to an abortion clinic buffer zone based on content neutrality, only striking down the law for being insufficiently tailored. The concurring opinion by Justice Scalia focused on the Court's content neutrality decision, causing it to read more like a dissent than a concurrence.

> Today's opinion carries forward **this Court's practice of giving abortion-rights advocates a pass** when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, **abridged edition of the First Amendment** applicable to speech against abortion. [*Id*. at 2541 (Scalia, J., concurring) (emphasis added).[2]]

[2] In a separate dissent, Justice Alito explained his view of the Massachusetts statute: "[s]peech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination." *Id*. at 2549 (Alito, J., dissenting).

C. Hill v. Colorado (2000): Justices Scalia, Thomas, and Kennedy.

The case principally relied on by the court below was Hill v. Colorado, 530 U.S. 703 (2000). In that case, in a dissent joined by Justice Thomas, Justice Scalia criticized the abandonment of established legal principles whenever abortion was involved:

> What is before us ... is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the **"ad hoc nullification machine"** that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.... Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent. [*Id*. at 741-42 (Scalia, J., dissenting) (emphasis added).]

Also dissenting, Justice Kennedy embraced Justice Scalia's analysis in even more bold terms, stating:

> The Court's holding **contradicts more than a half century of well-established First Amendment principles. For the first time**, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on **a profound moral issue**, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum. [*Id*. at 765 (Kennedy, J., dissenting) (emphasis added).]

Justice Kennedy continued his dissent, discussing recent Supreme Court abortion cases:

> **So committed is the Court to its course** that it **denies these protesters**, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, **a handheld papper seeking to reach a higher law**. I dissent. [*Id*. at 792 (Kennedy, J., dissenting) (emphasis added).]

D. Madsen v. Women's Health Center (1994): Justices Scalia, Kennedy, and Thomas.

In Madsen v. Women's Health Center, 512 U.S. 753 (1994), Justice Scalia again took the lead in a dissent joined by Justices Kennedy and Thomas, describing what had heretofore become

labeled as the Court's "ad hoc nullification machine" whenever abortion was involved. He observed:

> The entire injunction in this case departs so far from the established course of our jurisprudence that **in any other context** it would have been regarded as a candidate for summary reversal. **But the context here is abortion**.... Today the **ad hoc nullification machine** claims its latest, greatest, and most surprising victim: the First Amendment. [*Id*. at 785 (Scalia, J., dissenting) (emphasis added).]

Although the epithet "ad hoc nullification machine" certainly was popularized by Justice Scalia, in Madsen, he gave full credit to the Justices who coined that term, as he put it, a "long time ago in a dissent from another abortion-related case." Madsen at 785. By a "long time ago," Justice Scalia was referring to the period before he became an Associate Justice on September 26, 1986.

E. Thornburgh v. American College of Obstetricians & Gynecologists (1986): Justices O'Connor and Rehnquist.

Three months before Justice Scalia joined the court, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), was decided. In dissent, Justice O'Connor and then Justice Rehnquist charged that: "the Court prematurely decide[d] serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Id*. at 315 (O'Connor, J., dissenting). These justices described the problem that had developed during the 13 short years since Roe v. Wade, 410 U.S. 113 (1973).

> This Court's abortion decisions have already worked a **major distortion in the Court's constitutional jurisprudence**. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from **ad hoc nullification** by this Court when an occasion for its application arises in a case involving state regulation of abortion.... **[E]xcept** when it comes to **abortion** — the Court has

> generally refused to let such disagreements ... prevent it from **evenhandedly applying uncontroversial legal doctrines** to cases that come before it. [Thornburgh at 814 (O'Connor, J., dissenting) (citation omitted) (emphasis added).]

F. Hill v. Colorado, Reprise.

That the subject of abortion uniquely and profoundly clouds the minds of judges and Justices is unmistakably true. The seedbed of the "ad hoc nullification machine" was clearly the Court's decision in Roe v. Wade, as clearly illustrated in then Justice Rehnquist's powerful dissent.

In dissent Justice Rehnquist set out a remarkable list of the legal principles and precedents trampled by the majority on its way to imposing abortion on demand on the States, including: (i) allowing a plaintiff to seek the vindication of the constitutional rights of others; (ii) deciding hypothetical issues not raised by the plaintiff; (iii) formulating a rule of constitutional law broader than required; (iv) creation of a new, atextual right of "privacy"; (v) transporting the "compelling state interest" test from the Equal Protection Clause to the Due Process Clause; (vi) returning Justice Peckham's view of substantive due process expressed in Lochner v. New York, 198 U.S. 45, 74 (1905); (vii) finding a right to an abortion "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" despite the fact that a majority of the States have had restrictions on abortion for at least a century; (viii) finding a right within the scope of the Fourteenth Amendment not only that was "apparently completely unknown to the drafters of the Amendment"; (ix) finding a right within the scope of the Fourteenth Amendment that the drafters never intended; and (x) striking down the Texas law *in toto*, even though the Court conceded that at later periods of pregnancy Texas might impose limitations on abortion,

rather than finding the statute unconstitutional as applied. *See* Roe at 171-78 (Rehnquist, J., dissenting).

Having jettisoned every legal principle on the way to this exercise of raw judicial will, it is no surprise that Roe has contaminated American constitutional jurisprudence. As Justice Scalia wrote in his Hill dissent:

> Having deprived abortion opponents of the **political right** to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their **individual right** to persuade women contemplating abortion that what they are doing is wrong. [Hill at 741-42 (Scalia, J., dissenting) (emphasis added).]

Should the judiciary continue to allow the muzzling of the American people at that one last opportunity to persuade a mother not to kill her unborn child, that choice can be better understood as less focused on protecting a woman who may want to learn of alternatives, and more focused on protecting itself and its prior decision from criticism and dissent. This case should be decided based on generally applicable First Amendment principles — not special rules for abortion cases.

III. THE CHICAGO DISORDERLY CONDUCT ORDINANCE VIOLATES APPELLANTS' RIGHT PEACEABLY TO ASSEMBLE.

The District Court, as courts generally are wont to do, addressed the appellants' First Amendment challenge to the constitutionality of the Chicago Disorderly Conduct Ordinance solely under the First Amendment's ban against laws "abridging the freedom of speech." 2017 U.S. Dist. LEXIS 519, *13. As a consequence, the court focused its analysis on whether the Ordinance was content-based or content-neutral, as those tests have been applied in three Supreme Court precedents. *See id.* at *13-*28. But the First Amendment question raised by the

text of the Ordinance, as well as the several incidents involving the Ordinance's uneven enforcement, concerns not the content of the appellants' communications, but the physical context in which they took place. *See id.* at *2-*12. The District Court erred in its attempt to resolve the constitutionality of the Ordinance solely by reference to the freedom of speech. Instead, it also should have addressed the question under a different provision in the First Amendment — "the right of the people peaceably to assemble," as pled by appellants in their Third (¶ 144) and Fourth (¶ 151) Causes of Action. *See* App. 44-45.

A. The First Amendment Contains Six Discrete Limits on the Government.

The First Amendment forbids any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." According to the elementary rules of grammar and punctuation, there are two discrete rules limiting the power of government over religion and four other rules, each separate and distinct from each other: speech, press, assembly, and petition. Although courts have honored the distinction between the first two and the last four, they have lapsed into mixing the last four together — using "First Amendment rights" as a generic term. Having propelled "free speech" into a kind of First Amendment workhorse, the courts not only have lost sight of the other "cognate"[3] First Amendment freedoms, but diverted the freedom of speech away from its original meaning — banning laws, like seditious libel, that are designed to protect the reputation of the government officials currently in power. *See* New York Times v. Sullivan, 376 U.S. 254, 293-305 (1964) (Goldberg, J., concurring).

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[3] *See* DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

Although the Supreme Court has given the freedom of speech a more expansive definition from it original meaning, Justice Hugo Black once warned that "[o]ne of the most effective ways of diluting ... a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words ... more or less restricted in meaning."[4] *See* Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting). Such is, and has been, the case with the First Amendment's guarantee of the right of the people to peaceable assembly.

B. The Right of the People to Peaceably Assemble as It Is Written.

The people's right to assemble predates the 1789 federal Bill of Rights. In the 1774 Declaration and Resolves, the First Constitutional Congress charged the English King and Parliament with having misused their power by suspending the authority of the American colonial legislatures, flatly proclaiming the action to be "contrary to the rights of the people," violating the right of the "colonies ... peaceably to assemble, consider of their grievances, and petition the king." *See* R. Perry & J. Cooper, eds., Sources of Our Liberties at 276, 281, 283, 287, and 288 (ABA Found., Rev. Ed.: 1978).

Although this 1774 document linked the right to assemble with a petition to the king for redress of grievances, the right to assemble extended beyond petition to established civil authorities to "the right of men to associate and covenant to form a church and civil government and to choose their own officers to administer both religious and civil affairs." *See* A. McLaughlin, The Foundations of American Constitutionalism (1932), reprinted in Sources at 57.

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[4] *See, e.g.,* Barnes v. Glen Theatre Inc., 501 U.S. 560 (1991) (nude dancing may be constitutionally protected by the First Amendment's guarantee of the so-called "freedom of expression," an unwritten freedom found nowhere in the Constitution).

The right of the people to assemble, then, transcended the constituted civil order as a check against tyranny, serving as a permanent right "to consult for their common good." *See, e.g.,* Constitution of Pennsylvania, Article XVI (1776), reprinted in Sources at 331. Thus, the right to assemble embraces meetings of the people for any "lawful" purpose. *See* Hague at 519 (Stone, J., concurring). *See also* United States v. Cruikshank, 92 U.S. 542, 551 (1875).

At the heart of the right to assemble, then, is the right of the people to initiate a meeting or conversation without interference by the State as to person, subject matter, viewpoint, or other rules of order. Such matters belong to the people, unsupervised by the State. As the Supreme Court in DeJonge v. Oregon, 299 U.S. 353 (1937), put it, even though the State may protect itself against "abuse[] by using speech or press or assembly in order to incite to violence and crime[,] [t]he rights themselves must not be curtailed." *Id.* at 364-65. But, the DeJonge Court observed:

> peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. [*Id.* at 365.]

Instead, the State is obligated by the right of assembly to keep public ways, such as streets, sidewalks, and parks open, in a way that "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague at 515. Access to streets, sidewalks, and parks may not be denied altogether. If access is restricted, the Government would put itself into a position of comparative advantage over the people, where government officials could assemble unrestricted, indeed at public expense, while denying such a right to the people.

C. As Applied Here, the Chicago Ordinance Violates Appellants' Right of Peaceable Assembly.

Applying the principles of peaceable assembly, a plaintiff need not establish that the Chicago Disorderly Conduct Ordinance is content-based, or viewpoint-based. Nor is there any need for the court to determine any level of scrutiny, much less conduct any inquiry whether the Government has met the applicable scrutiny standard. Those inquiries and tests are left by the wayside when the Ordinance is examined under the First Amendment right of the people peaceably to assemble.[5] Indeed, it is the text and historic purpose that governs, not judicially invented balancing tests.

First, the Ordinance must be examined to determine if it abridges the right of the people to assemble. According to the plain text in the First Amendment, it is the people's right, not the Government's, to initiate a meeting of two or more persons. The Ordinance unconstitutionally transfers that power to the Government which, in turn, transfers the initiative power to the woman seeking an abortion. If the woman does not consent, then the pro-life initiator may be charged with a criminal offense and arrested. Additionally, if a person breaks one or more of the two buffer zones — 8 or 50 feet — he can be charged with violating the Government's rules governing the assembly. Under the right to associate, self-governing people, not the government officials, set their own "Robert's Rules of Order."

Second, the Ordinance is not calibrated in a way for the State to ensure that communication exchanges do not endanger the peace of the community. The Ordinance on its face applies to all "approaches," not just those that may be turned away because of attempts to

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[5] One could argue that that, in essence, is what the Supreme Court did in McCullen v. Coakley, 134 S.Ct. 2518 (2014).

"'obstruct[], detain[], hinder[], impede[] or block[] another person's entry to or exit from'"[6] a hospital, medical clinic, or healthcare facility. Without such limitations as these, designed to keep the peace, the assembly allowed by the Chicago Ordinance falls short of the assembly guaranteed.

Third, the Ordinance permits persons to be engaged in speaking, education, and counseling "in the public way," a place from which appellants cannot be excluded because such public ways have been "immemorially ... held in trust for the use of the public ... for purposes of **assembly** [and] communicating thoughts between citizens ...." *See* McCullen at 2529 (emphasis added). On its face, the ordinance abridges this right of the people.

Instead of protecting the right of the people to peaceably assemble, the Ordinance turns a peaceable assembly into a criminal offense.

Just 80 years ago, in DeJonge v. Oregon, the Supreme Court ranked the First Amendment's protection of the people's right to peaceably assembly as a "right cognate to those of free speech and free press and ... equally fundamental." *Id.* at 364. In today's First Amendment world, litigants and courts oftentimes face intractable problems in First Amendment, wrestling with judicial precedents of balancing interests and baffling levels of scrutiny. It is time to return to the constitutional baselines of the First Amendment. A good place to start would be to apply the DeJonge holding to this case and pronounce that the Chicago Disorderly Conduct Ordinance is unconstitutional because, "consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime." *Id.* at 365.

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[6] *See* McCullen v. Coakley, 134 S.Ct. 2518, 2537 (2014).

CONCLUSION

For the reasons set out above, the decision of the district court should be vacated and the Ordinance should be declared to be unconstitutional on its face.

Respectfully submitted,

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August 25, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Family PAC Illinois, *et al*. in Support of Plaintiffs-Appellants and Reversal complies with the limitation set forth by Fed. R. App. P. 29(a)(5), because this brief contains 4,817, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 12-point Times New Roman.

/s/ William J. Olson

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William J. Olson
Attorney for *Amici Curiae*

Dated: August 25, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Family PAC Illinois, *et al.*, in Support of Plaintiffs-Appellants and Reversal was made, this 25th day of August 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson

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William J. Olson
Attorney for *Amici Curiae*