No. 23-74

In the Supreme Court of the United States

DEBRA A. VITAGLIANO,
Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK,
Respondent.

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

BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONER

Eric N. Kniffin
Ethics & Public Policy Center
1730 M Street N.W.
Suite 910
Washington, D.C. 20036
202.682.1200
ekniffin@eppc.org

Daniel N. Nightingale
Counsel of Record
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street
Suite 4500
Denver, Colorado 80202
303.244.1800
nightingale@wtotrial.com

Counsel for Amicus Ethics and Public Policy Center

QUESTION PRESENTED

Should the Court overrule *Hill* v. *Colorado*, 530 U.S. 703 (2000)?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and applying the Judeo-Christian moral tradition to critical issues of public policy. EPPC has a strong interest in this case because the ruling below illustrates the manner in which abortion, even after the Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), continues to inflict damage on the integrity of our national culture, our political institutions, and the rule of law.[1]

[1] Counsel of record received timely notice of EPPC's intent to file this amicus brief under Supreme Court Rule 37.2. No counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Nearly four decades ago, Justice Sandra Day O'Connor decried that "[t]his Court's abortion decisions ha[d] already worked a major distortion in the Court's constitutional jurisprudence." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). As she remarked, it was "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." *Id.* On no other matter had the Court shown itself incapable of "even-handedly applying uncontroversial legal doctrines to cases that come before it." *Id.*

This "ad hoc nullification machine," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part), has kicked into gear time and again in the years since Justice O'Connor denounced it. As this Court observed last year in *Dobbs v. Jackson Women's Health Organization*, the "Court's abortion cases have diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standing doctrine," "disregarded standard res judicata principles," and "flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality." 142 S. Ct. 2228, 2275–76 (2022).

Most relevant here, the Court's abortion rulings have also "distorted First Amendment doctrines." *Id.* at 2276. Indeed, Justice Antonin Scalia identified the

First Amendment as the "greatest, and most surprising victim" of the abortion distortion that has plagued judicial decision-making. *Madsen*, 512 U.S. at 785 (opinion of Scalia, J.).

This Court listed abortion's "disruptive effect on other areas of the law" as a factor that "weigh[ed] strongly in favor of overruling *Roe* and *Casey*." *Dobbs*, 142 S. Ct. at 2276. But that case did not present the Court with an opportunity to correct any of those disruptions. This one does.

In this case, Petitioner, Respondent, and the Second Circuit all agree on one thing: *Hill v. Colorado*, 530 U.S. 703 (2000), is out of step with this Court's First Amendment jurisprudence.

Although the Second Circuit held that the County's bubble zone ordinance was constitutional under *Hill*, it tacitly acknowledged that *Hill* was wrongly decided. The court said nothing in favor of the ordinance except that it was "materially identical" to the Colorado statute upheld in *Hill*. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 132, 140 (2d Cir. 2023). The court acknowledged appellant's arguments against *Hill*, but pointed to this Court's unambiguous instructions in such a case:

> The Supreme Court has stated in clear terms that "[i]f a precedent of this Court has direct application in a case, ***yet appears to rest on reasons rejected in some other line of decisions***, the Court of Appeals should follow the case [that] directly controls, ***leaving to this Court the prerogative of overruling its own decisions***." *Agostini v. Felton*, 521 U.S. 203,

> 237, 117 S. Ct. 1997, 138 L. Ed.2d 391 (1997) (internal quotation marks and citation omitted). Accordingly, *Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny.

Id. at 141 (emphases added).

Even before it imposed its carbon-copy bubble zone, Westchester accepted that without *Hill* its ordinance would be virtually impossible to defend. Lawyers advising the County predicted in June 2022 that lower courts would be obligated to uphold their bubble zone, because *Hill* "is still on the books." But the County was warned that *Hill* stood on "shaky ground" and would likely be overturned if Westchester's ordinance were reviewed by this Court.

The Second Circuit's comments and Westchester County's fears are well-founded: *Hill* was wrongly decided and only this Court can correct this error. Westchester County knows *Hill*'s abortion distortion will not remain if this Court grants certiorari. That is why Planned Parenthood urged the County to scuttle its ordinance, and why the County did so on August 7.

Two other pending petitions from the Ninth Circuit give this Court an additional reason to grant certiorari here. Both involve the Center for Medical Progress ("CMP") and its undercover work exposing aspects of the abortion industry. Amicus has filed a brief in support of each petition for certiorari to demonstrate how these decisions depart from how the Ninth Circuit and this Court have applied the same First Amendment doctrines outside the abortion context.

In *National Abortion Federation v. Center for Medical Progress*, No. 21-15953, 2022 WL 3572943 (9th Cir. Aug. 19, 2022) ("*NAF*"), the court held that CMP waived its First Amendment rights when it signed boilerplate non-disclosure agreements in registering for NAF conferences. That holding departed from the normal rules regarding waiver of constitutional rights *See* Br. for EPPC as Amicus Curiae Supporting Pet'rs, *CMP v. NAF*, No. 21-15953 (filed July 6, 2023).[2]

In *Planned Parenthood Federation of America, Inc. v. Newman* ("*PPFA*"), 51 F.4th 1125 (9th Cir. 2022), the court affirmed the district court's damages award against CMP, departing from the normal rules regarding publication damages and general tort liability for protected speech. *See* Br. for EPPC as Amicus Curiae Supporting Pet'rs, *CMP v. PPFA*, No. 22-1168 (filed July 3, 2023).[3]

This case squarely presents the Court an opportunity to rectify one of the most egregious examples of abortion distortion in its jurisprudence and to remedy this longstanding problem more generally. The Court should grant certiorari to take advantage of this opportunity.

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[2] Available at https://www.supremecourt.gov/DocketPDF/22/22-1135/270520/20230706145946431_22-1135%20Amicus%20EPPC.pdf.

[3] Available at https://www.supremecourt.gov/DocketPDF/22/22-1168/270319/20230703141812463_22-1168%20Amicus%20Brief%20EPPC.pdf.

ARGUMENT

I. Abortion-Rights Litigants Have Long Received Favored Treatment.

Abortion distortion is not new. It dates to *Roe v. Wade* itself. *See* 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228. The Court in *Roe* "made little effort" to follow settled rules of constitutional interpretation. *Dobbs*, 142 S. Ct. at 2266–67. Instead, it offered a "remarkably loose … treatment of the constitutional text," and, in sharp departure from the usual method for recognizing unenumerated constitutional rights, failed "to show that history, precedent, or any other cited source supported its scheme." *Id.* at 2245, 2267.

After *Roe*, the abortion distortion metastasized beyond bans on abortion to anything that touched on this controversial subject. *See Dobbs*, 142 S. Ct. at 2275–76.

This practice is particularly troubling in First Amendment cases. The Court's habit "of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents" has generated "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring).

The most egregious example of abortion distortion in the First Amendment context—and the one directly relevant to the petition here—is the Court's 2000 ruling in *Hill v. Colorado*. 530 U.S. 703 (2000). The Court there upheld a statute that regulated speech within 100 feet of the entrance to any health care facility,

including abortion clinics, making it unlawful within those zones to approach within eight feet of another person to distribute literature, protest, or educate or counsel that person without their consent. *Id.* at 707–08. The Court declined to subject the speech restraint to "the exacting scrutiny [applicable] to content-based suppression of speech in the public forum," this time by holding that a restriction expressly "directed to only certain categories of speech (protest, education, and counseling) [was] *not* content-based." *Id.* at 741 (Scalia, J., dissenting) (emphasis added). It also found that the restriction was "narrowly tailored to serve a government interest" that had never before justified *any* speech regulation—"protection of citizens' right to be let alone." *Id.* Both holdings were "patently incompatible with the guarantees of the First Amendment." *Id.*

Hill earned immediate criticism from scholars across the ideological spectrum. In remarks at a constitutional law symposium shortly after *Hill* was decided, Professor Michael McConnell said it was "inexplicable on standard free-speech grounds" and called the "reasoning that [this Court] gave" to support its holding "shameful." *Const. Law Symp., Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747 (2001). "[O]n so many doctrinal points," Professor McConnell continued, "those who voted to uphold that statute did so when, in another context not involving abortion protest, there is not a chance that legislation of this sort would be upheld." *Id.* Professor Laurence Tribe weighed in with his own condemnation of the

ruling in *Hill*: "I think [*Hill*] was slam-dunk simple and slam-dunk wrong." *Id* at 750.[4]

In upholding the speech restriction in *Hill*, the Court exacerbated the distortion of First Amendment principles that occurred in *Madsen*, a 1994 ruling that upheld an injunction barring protesters from entering public streets or sidewalks in the vicinity of an abortion clinic's property line. 512 U.S. 753, 757 (1994). In *Madsen*, Justice Scalia explained, the Court "depart[ed] so far from the established course of [First Amendment] jurisprudence that, in any other context, [the case] would have been regarded as a candidate for summary reversal." *Id.* at 784 (opinion of Scalia, J.). Eschewing the strict- and even intermediate-scrutiny standards that normally apply to speech restrictions, the Court "created a brand new additional standard" that was "not as rigorous as strict scrutiny." *Id.* at 791 (cleaned up). "An injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797. But rather than requiring a showing of "compelling public need and surgical precision of restraint," the Court simply asked whether the injunction "burden[ed] no more

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[4] *See also* Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 199 (2001) (arguing that *Hill* "suppressed essential free speech principles" on reasoning that "fails to stand on its own terms"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("The *Hill* dissenters also raised serious questions whether the Court here had selectively departed from speech-protective principles out of cultural affinity for abortion seekers over abortion protestors.").

speech than necessary to serve a significant government interest." *Id.* at 791, 798.

The *Madsen* decision also generated substantial scholarly criticism. "By giving its imprimatur to the [injunction's] bubble zone," one scholar observed, *Madsen* "legitimized viewpoint discrimination against anti-abortionists exercising their free speech rights." Charles Lugosi, *The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand*, 79 DENV. U. L. REV. 91, 126 (2001). "[T]he Court employed the wrong standard to determine the constitutionality of the permanent injunction at issue in *Madsen*," argued another, and "the entire injunction should have been struck down as violative of the First Amendment." Keli N. Osaki, Madsen v. Women's Health Center, Inc.*: Striking an Unequal Balance Between the Right of Women to Obtain an Abortion and the Right of Pro-Life Groups to Freedom of Expression*, 24 PEPP. L. REV. 203, 204–05 (1996).

In 2014, the abortion distortion appears to have affected the Court's conclusion in *McCullen v. Coakley* that a restriction on speech around abortion clinics was content-neutral. 573 U.S. at 485–86. The state law in question established a 35-foot buffer zone around abortion clinics that only clinic employees and three other categories of individuals could enter. *Id.* at 471–72. In any context except abortion, Justice Scalia charged, the Court never would have held "that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur … is not content based." *Id.* at 501 (Scalia, J., concurring in the judgment). It would

never, for instance, "exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention," "those used annually to commemorate the 1965 Selma–to–Montgomery civil rights marches," or "those outside the Internal Revenue Service." *Id.* Yet that is what it did in *McCullen* where the regulated area consisted of abortion clinics, "giving abortion-rights advocates [another] pass when it comes to suppressing the free-speech rights of their opponents." *Id.* at 497. *McCullen* illustrated once again that the Court's "abortion jurisprudence … is in stark contradiction of the constitutional principles [that] apply in all other contexts." *Hill*, 530 U.S. at 742 (Scalia, J., dissenting); *see also* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in* McCullen v. Coakley, 2014 SUP. CT. REV. 215, 242 (2014) (*McCullen* illustrates the Court's past willingness "to jettison rule-like frameworks and rely upon [its] own sense of what the [state] legislature did, or what effects it had" in conducting content-neutrality analysis in the abortion context).

II. *Dobbs* Cited *Hill v. Colorado* as a Prime Example of Abortion Distortion.

This Court unequivocally condemned the abortion distortion in *Dobbs*, listing abortion's "disruptive effect on other areas of the law" as one of five factors that "weigh[ed] strongly in favor of overruling *Roe* and *Casey*." 142 S. Ct. at 2276. The Court lamented that its "abortion cases have diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standing doctrine," "disregarded standard res judicata principles," and "flouted the ordinary

rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality." *Id.* at 2275–76.

Most relevant here, the Court lamented that *Roe* and *Casey* had also "distorted First Amendment doctrines." *Id.* at 2276. To support this claim, the Court cited Justice Scalia's dissent in *Hill v. Colorado*. *Id.* at 2276 n.65. There Justice Scalia said:

> What is before us, after all, 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. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785, 114 S. Ct. 2516, 129 L. Ed.2d 593 (1994) (Scalia, J., concurring in judgment in part and dissenting in part)…. [L]ike the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts….

Hill, 530 U.S. at 741–42 (Scalia, J., dissenting).

Hill distorted First Amendment law in a number of ways. It disregarded the rule that "public streets and sidewalks" are "traditional public fora" that "occupy a special position in terms of First Amendment protection." *Boos v. Barry*, 485 U.S. 312, 318 (1988). It held that the speech restriction in question was content neutral even though it applied to speech based on "the topic discussed or the idea or message expressed,"

Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015), namely whether the speech included "efforts to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives," *Hill*, 530 U.S. at 708. It applied intermediate scrutiny rather than strict scrutiny. *Compare id.* at 725–30 (applying intermediate scrutiny) *with United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("[A] content-based speech restriction … can stand only if it satisfies strict scrutiny."). And it upheld the law under the more lenient standard even though the speech restriction was not, in truth, "narrowly tailored to serve a significant governmental interest." *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475–76 (2022) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).[5]

Dobbs did not, however, present the Court with the occasion to overturn *Hill's* abortion distortion. This case does.

III. This Case Presents the Court with an Opportunity to Correct Its Egregious Error in *Hill*.

In the decision below, the Second Circuit found that the ordinance at issue was "materially identical" to the Colorado floating bubble zone at issue in *Hill*.

[5] For example, the "significant government interest" on which the decision rested—the "right to be let alone"—was "patently incompatible with the guarantees of the First Amendment," and, in any case, preserving even that interest did "not remotely require imposing upon all speakers who wish to protest, educate, or counsel a duty to request permission to approach closer than eight feet." *Hill*, 530 U.S. at 741, 754 (Scalia, J., dissenting).

Vitagliano, 71 F.4th at 132, 140. Its merits analysis therefore took only one sentence:

> We need not dwell on the merits of Vitagliano's First Amendment challenge to the County's bubble zone law, as Vitagliano concedes (and we agree) that the district court correctly applied *Hill* in dismissing her claim.

Id. at 140.

The court acknowledged appellant's arguments that *Hill* was wrongly decided, but pointed to this Court's unambiguous instructions in such a situation:

> The Supreme Court has stated in clear terms that "[i]f a precedent of this Court has direct application in a case, ***yet appears to rest on reasons rejected in some other line of decisions***, the Court of Appeals should follow the case [that] directly controls, ***leaving to this Court the prerogative of overruling its own decisions***." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997) (internal quotation marks and citation omitted). Accordingly, *Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny.

Id. at 141 (emphases added). The panel thus indicated that it agrees with Petitioner: *Hill* "rest[s] on reasons rejected in some other lines of decisions."

There are many indications that Westchester County agrees. Last year, ten days after *Politico* published the leak of the draft decision in *Dobbs*, the

President & CEO of Planned Parenthood Hudson Peconic urged the County to pass a law "with eight and twenty-five foot buffer zones" as "critically important to our patients."[6] The County was eager to assist, but was wary that such a law was constitutional. Professor Emily Gold Waldman of Pace Law School advised the County that "even though *Hill v. Colorado* is still on the books, there have been more recent cases that call it into question" and it was reasonable to see *Hill* as on "too shaky ground now."[7] Waldman nonetheless advised the County that the safest way to proceed would be to follow *Hill* as closely as possible so "the only way that this can get struck down is if you outright overrule *Hill v. Colorado*."[8]

County Attorney John Nonna agreed with Professor Waldman's assessment:

> *Hill* is still good law. I think we know how the Supreme Court would rule if this ever got there, but it hasn't gotten there yet and who knows when it'll get there.[9]

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[6] Video Recording, Westchester Cnty. Bd. of Legislators, Legislation Comm. at 36:20 (May 12, 2022), available at https://westchestercountyny.legistar.com/MeetingDetail.aspx?ID=965818&GUID=59C37FF3-9C1C-4B1D-B1D9-1C3FF0EDF623.

[7] Video Recording, Westchester Cnty. Bd. of Legislators, Joint Mtg. of Legislation and Health Comms. at 48:20, 48:52 (June 1, 2022), available at https://westchestercountyny.legistar.com/MeetingDetail.aspx?ID=979689&GUID=63EA8884-3A65-4DA4-9534-EDBF06F4BEE5.

[8] *Id*. at 1:44:10.

[9] *Id*. at 1:53:10.

Westchester County—eager to do Planned Parenthood's bidding *and* to avoid Supreme Court review—has followed this advice to the letter. Five days after this Court decided *Dobbs*, Westchester passed a law that was a carbon copy of the Colorado statute upheld in *Hill*. When Petitioner filed suit, the County defended its law on that basis, and as predicted the lower courts found they were compelled to follow *Hill*:

> The Buffer Zone Provision is materially identical to the law the Supreme Court upheld in *Hill*. Accordingly, the Supreme Court's decision in *Hill v. Colorado* forecloses Plaintiff's claims as a matter of law.

Vitagliano v. Cnty. of Westchester, No. 22-CV-09370 (PMH), 2023 WL 24246, at *3–4 (S.D.N.Y. Jan. 3, 2023) (cleaned up).

> *Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny.

Vitagliano, 71 F.4th at 141.

As noted above, Planned Parenthood worked hand and glove with Westchester County to pass the bubble zone the former had deemed "critical" to abortion access. Both also zealously defended the law before the Second Circuit. Planned Parenthood claimed the law "is critical to achieving" "safe access to abortion services."[10] The County likewise defended its buffer zone

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[10] Br. of Amici Curiae Westchester Coalition for Legal Abortion, et al., in support of Defendant-Appellee, *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130 (2d Cir. 2023) (No. 23-30), available at

as "narrowly tailored to protect … access to reproductive health care facilities."[11]

But after the decision below was issued on June 21, Planned Parenthood and the County did an about face. Less than a month later, Planned Parenthood told the County it was "in support of repealing the bubble zone provision. [W]e have not seen the eight-foot floating bubble zone as being beneficial to patients and guests of our health centers."[12] The County again followed Planned Parenthood's lead: "After consultation with representatives of reproductive rights organizations … [the Legislation and Health Committees] determined that [the eight-foot bubble zone] is not necessary…."[13] On August 7, the County repealed the bubble zone provision.[14]

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https://becketnewsite.s3.amazonaws.com/20230801204152/2023-04-07-87-Amicus-Br-of-Westchester-Coalition-for-Legal-Abortion-et-al.pdf.

[11] Br. for Appellees at 6, *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130 (2d Cir. 2023) (No. 23-30).

[12] Video Recording, Westchester Cnty. Bd. of Legislators, Joint Mtg. of Legislation and Health Comms. at 4:46 (July 10, 2023) (testimony of Lauren LaMagna), available at https://westchestercountyny.legistar.com/MeetingDetail.aspx?ID=1112009&GUID=8A226B9C-9D01-49BE-A713-1798F8880445.

[13] Agenda Packet, Westchester Cnty. Bd. of Legislators, Joint Mtg. of Legislation and Health Comms. at 2 (July 10, 2023), https://westchestercountyny.legistar.com/View.ashx?M=PA&ID=1112009&GUID=8A226B9C-9D01-49BE-A713-1798F8880445.

[14] Meeting Minutes, Westchester Cnty. Bd. Of Legislators, Joint Mtg. of Legislation and Health Comms. at 21-22 (Aug. 7, 2023) (passing LL-23023-309, "Amendment to Clinic Access Law"),

In April, the County's bubble zone was "critical to achieving" "safe access to abortion services." In July, the same party said the same law wasn't even "beneficial." The law had not changed. The facts on the ground had not changed. The difference, of course, was the looming possibility that this Court—the only body with authority to revisit *Hill*—might hear this case. As the County told the Second Circuit, "Appellant ... simply seeks to use this Court as a stepping stone on the way to the Supreme Court, where she hopes to overturn 23-year-old precedent."[15]

Petitioner has maintained the same arguments throughout this litigation. The County's flip-flop is yet another transparent "gambit to duck Supreme Court review."[16]

This Petition thus presents the Court with a rare case where the court below, the Petitioner, and the Respondent *all appear to agree* on the central legal issue: *Hill v. Colorado* is a prime example of abortion distortion; the only way to reconcile the Court's 2000

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https://westchestercountyny.legistar.com/View.ashx?M=M&ID=1073566&GUID=CE27F5C7-08F6-4274-B571-2625CBB67ACA. See also *Westchester BOL Bursts 8-Food Personal Bubble Zone Outside Abortion Facilities*, YONKERS TIMES, Aug. 15, 2023, https://yonkerstimes.com/westchester-bol-bursts-8-foot-personal-bubble-zone-outside-abortion-facilities/.

[15] Br. of Appellee at 1, *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130 (2d Cir. 2023) (No. 23-30).

[16] Editorial Board, *A Gambit to Duck Supreme Court Review*, WSJ, Aug. 7, 2023, https://www.wsj.com/articles/a-gambit-to-duck-supreme-court-review-93c99aac.

decision with its Free Speech jurisprudence is to overturn it.

Amicus agrees and urges the Court to grant the Petition and do just that.

IV. Granting the Petition and Overturning *Hill* Would Also Help Correct Other Examples of post-*Dobbs* Abortion Distortion.

Two other pending petitions present additional reasons for the Court to grant certiorari here and overturn *Hill*. As the Eleventh Circuit correctly acknowledged, *Dobbs* requires courts to "treat parties in cases concerning abortion the same as parties in any other context." *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1328 (11th Cir. 2022) (Pryor, J.). Unfortunately, it appears the Ninth Circuit is less willing to "take [*Dobbs*] at its word." *Id.*

1. First, in *National Abortion Federation v. Center for Medical Progress*, No. 21-15953, 2022 WL 3572943 (9th Cir. Aug. 19, 2022) ("*NAF*"), the Ninth Circuit reviewed an order by the district court that broadly enjoined the Center for Medical Progress ("CMP") and its undercover journalists from "disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned at the 2014 and 2015 NAF Annual Meetings." *See Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 533 F. Supp.

3d 802, 821 (N.D. Cal. 2021); *see also* Sup. Ct. Case No. 22-1135.[17]

"[P]ermanent injunctions … that actually forbid speech activities" like this one "are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). And "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Indeed, "the gagging of publication has been considered acceptable only in exceptional cases," and this Court has refused to sanction this remedy "[e]ven where questions of allegedly urgent national security or competing constitutional interests are concerned." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994). Accordingly, when reviewing the district court's injunction in *NAF*, the Ninth Circuit was required to apply "a heavy presumption against its constitutional validity" and to put respondent to "a heavy burden of showing justification for the imposition of such a restraint," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971),[18] as it has done for prior restraints outside the abortion context.[19]

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[17] See Br. for EPPC as Amicus Curiae Supporting Pet'rs, *CMP* v. *NAF*, No. 21-15953 (filed July 6, 2023), available at https://www.supremecourt.gov/DocketPDF/22/22-1135/270520/20230706145946431_22-1135%20Amicus%20EPPC.pdf.

[18] *Accord, e.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980); *Nebraska Press*, 427 U.S. at 558; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

[19] *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 746–47 (9th Cir. 2015) (en banc); *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for*

Instead, the court relied exclusively on the rule that a party can waive its First Amendment rights, and it wrongly concluded that petitioners had done so by signing NAF's form non-disclosure agreements. *NAF*, 2022 WL 3572943, at *1. That conclusion departs from the normal rules regarding waivers of constitutional rights. Although the Ninth Circuit nominally acknowledged the requirement that a First Amendment "waiver must be freely given and shown by *clear and compelling evidence*," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (emphasis added); *NAF*, 2022 WL 3572943, at *1, it made no real effort to apply that rule, as it undoubtedly would have in any context other than abortion. The court did not "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It also failed to consider the defendants' countervailing evidence regarding their own understanding of the enforceability of the agreements or the assurances they received from NAF employees that the agreements did not prevent publication. These are critical factors in determining whether petitioners truly made "an intentional relinquishment or abandonment of a known right or privilege." *Id.* In short, the Ninth Circuit considered only one side of the equation to decide whether the alleged waiver was established by "clear and compelling evidence." *Janus*, 138 S. Ct. at 2486. This approach "is inconsistent with this Court's pronouncements on waiver of

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Cent. Dist. of Cal., 729 F.2d 1174, 1183–84 (9th Cir. 1984); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247–50 (9th Cir. 1981).

constitutional rights." *Barker v. Wingo*, 407 U.S. 514, 525 (1972).

Worse, the Ninth Circuit also refused to consider the defendants' public-policy challenge to the enforceability of the NAF agreements. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."); *NAF*, 2022 WL 3572943, at *1. The closest the court came to addressing this argument was its cursory holding that the "balancing of competing public interests favored … enforcement of the confidentiality agreements," supported by a citation to circuit precedent for the inapposite proposition that "[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 685 F. App'x 623, 627 (9th Cir. 2017). This curt treatment of the defendants' central public policy argument contrasts sharply with the approach the Ninth Circuit has taken to similar arguments challenging the enforceability of similar contracts outside the abortion context. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 890–92 (9th Cir. 1993) (carefully considering policies for and against enforceability of speech-restricting contract); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (same for contract that waived right to run for office); *United States v. Northrop Corp.*, 59 F.3d 953, 963–69 (9th Cir. 1995) (same for release of statutory right to bring *qui tam* claim).

2. The Ninth Circuit's post-*Dobbs* abortion distortion continued in *Planned Parenthood Federation of America, Inc. v. Newman* ("*PPFA*"), where it departed from the rules regarding publication damages and general tort liability for protected speech in affirming a district court's damages award against CMP. *See* 51 F.4th 1125, 1133–35 (9th Cir. 2022); *see also* Sup. Ct. Case No. 22-1168.[20] The Court's ruling in *Hustler Magazine, Inc. v. Falwell* is the controlling authority on these issues. 485 U.S. 46, 49–52 (1988). There, this Court reversed a jury verdict on an intentional infliction of emotional distress claim that awarded damages arising from the defendant's publication of speech offensive to the plaintiff. The Court ruled that such an award must meet the heightened standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Id. Hustler* confirms that "[t]he Free Speech Clause of the First Amendment … can serve as a defense in state tort suits," *Snyder v. Phelps*, 562 U.S. 443, 451 (2011), particularly where the plaintiff's damages are "caused by the publication" of protected speech, *Hustler*, 485 U.S. at 50.[21]

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[20] See Br. for EPPC as Amicus Curiae Supporting Pet'rs, *CMP* v. *PPFA*, No. 22-1168 (filed July 3, 2023), available at https://www.supremecourt.gov/DocketPDF/22/22-1168/270319/20230703141812463_22-1168%20Amicus%20Brief%20EPPC.pdf.

[21] *See also Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 523 (4th Cir. 1999) ("*Hustler* confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*."). Long before *Hustler*, the Court had recognized that First Amendment defenses are available against general tort claims. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Time, Inc. v. Hill*, 385 U.S. 374 (1967);

The Ninth Circuit has applied these rules outside the abortion context to facts materially identical to *PPFA*. In *Medical Laboratory Management Consultant v. American Broadcasting Companies, Inc.* ("*ABC*"), a laboratory sought relief for business torts, including "tortious interference with contractual relations and prospective economic relations," allegedly caused by undercover journalists who exposed the laboratory's negligent testing through the same reporting tactics as petitioners. 306 F.3d 806, 810–11, 821–26 (9th Cir. 2002). Consistent with *Hustler*, the court subjected those torts to "the same [F]irst [A]mendment requirements that govern actions for defamation" and "require[d] [the lab] to demonstrate the falsity of the statements made in the television segment, as well as [d]efendants' fault in broadcasting them, before recovering damages." *Id.* at 821 (quoting *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990)). Because the plaintiff did "not raise any triable issues of fact regarding [the publication's] falsity," the Ninth Circuit "affirm[ed] the district court's grant of summary judgment in [d]efendants' favor." *Id.* at 826.

But that case did not involve abortion. *PPFA* does. The Ninth Circuit deviated from the commands of *Hustler* and found a way to uphold the jury's verdict in *PPFA*, even though Planned Parenthood's damages were "caused by the publication" of the results of an undercover investigation just as much as in *ABC*. *Hustler*, 485 U.S. at 50. To reach this result, the court interpreted *Hustler* more narrowly than it did in *ABC*, claiming that *Hustler* applied only to "emotional

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United Mine Workers v. Pennington, 381 U.S. 657 (1965); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

distress or reputational loss" damages. *PPFA*, 51 F.4th at 1134. Likewise, the court adopted an overly broad reading of *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), as foreclosing *any* First Amendment protection for undercover investigations that include allegedly illegal conduct. *PPFA*, 51 F.4th at 1133–35. In short, the Ninth Circuit distorted First Amendment doctrine to Planned Parenthood's benefit.

V. This Case Affords the Court a Chance to Overrule *Hill*, Unify First Amendment Jurisprudence, and Clarify that Abortion-Rights Litigants Should Not Receive Favored Treatment.

Perhaps more than any other case, *Hill* demonstrates the lengths to which this Court has been willing to go in the past to uphold speech restrictions on abortion opponents, no matter how inconsistent with broader First Amendment doctrines that apply in every other context. Given the ample evidence that the abortion distortion persists post-*Dobbs*—both here and in the *Center for Medical Progress* cases—this case presents an ideal vehicle for this Court to revisit its holding in *Hill* specifically, clarify that abortion-rights cases generally are not entitled to special treatment, and put an end to the "ad hoc nullification machine" that has operated in so many cases since *Roe*.

By affording Petitioner the First Amendment protections that *Hill* constrained the Second Circuit into denying her, the Court can make clear that neither *Hill* nor the abortion distortion survives *Dobbs*. While *Dobbs* implicitly condemned this practice by citing it as an additional reason for overturning *Roe* and *Casey*, this case would allow the Court to make explicit what

was implicit in *Dobbs*: courts are no longer to "engineer exceptions to longstanding background rules" to benefit abortion-rights litigants. *Dobbs*, 142 S. Ct. at 2276; *see also SisterSong*, 40 F.4th at 1328 ("[W]e can no longer engage in … abortion distortions in the light of a Supreme Court decision instructing us to cease doing so."). Certiorari should be granted to clarify this point.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERIC N. KNIFFIN
ETHICS & PUBLIC POLICY CENTER
1730 M Street N.W.
Suite 910
Washington, D.C. 20036
202.682.1200
ekniffin@eppc.org

DANIEL N. NIGHTINGALE
Counsel of Record
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street
Suite 4500
Denver, Colorado 80202
303.244.1800
nightingale@wtotrial.com

Counsel for Amicus Ethics and Public Policy Center

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