No. 23-74

In the Supreme Court of the United States

DEBRA A. VITAGLIANO, *Petitioner,*

v.

COUNTY OF WESTCHESTER, NEW YORK

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

BRIEF OF KNIGHTS OF COLUMBUS AND MARCH FOR LIFE EDUCATION AND DEFENSE FUND AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTRODUCTION AND INTEREST OF *AMICI*[1]

Hill v. *Colorado* was an aberration in this Court's First Amendment jurisprudence, explainable only by the "ad hoc nullification machine" that this Court, in a bygone era, "set in motion to push aside whatever doctrines of constitutional law stand in the way" of abortion. 530 U.S. 703, 741 (2000) (Scalia, J., dissenting). But its reasoning poses a threat not only to those who wish to engage in sidewalk counseling like Petitioner, but to all individuals and organizations with unpopular views. The Court should therefore grant review to expressly overrule *Hill*.

To be sure, recognizing the threat *Hill* poses to First Amendment rights, this Court *implicitly* overruled it in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015). And since then, this Court has explicitly stated that *Hill* "distorted First Amendment doctrines." *Dobbs* v. *Whole Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022).

But that was not enough to persuade the Second Circuit in this case. When Petitioner Debra Vitagliano asked that court to hold unconstitutional a law materially identical to that challenged in *Hill*, the lower court reasoned that its hands were tied. This Court's long and sad experience with the lower courts'

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. All parties were notified by *amici curiae* of their intent to file this brief at least 10 days prior to its due date.

refusal to let go of other overruled precedent should be a cautionary tale: No matter the number of current members of this Court who have, in majorities and "in their own opinions, personally driven pencils through [*Hill*'s] heart," or "joined an opinion doing so,"[2] *Hill* will continue to stalk free speech jurisprudence until this Court buries it "fully six feet under." See *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). This petition is the right vehicle, and now is the right time.

Hill's distortion of the First Amendment content-neutrality analysis directly affects *amici* and their members, who share a commitment to the pro-life cause and to the First Amendment rights of all individuals and organizations to express their views in the public square.

Amicus Knights of Columbus is a Catholic fraternal benefit society with more than two million members worldwide. As part of its charitable mission, the Knights of Columbus respects, defends, and promotes the dignity of every human person, at every moment and in every condition. Consistent with that mission, its members support women in crisis pregnancies by donating time and money to pregnancy care centers, including facilities to which women would be referred by sidewalk counselors.

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[2] *Dobbs*, 142 S. Ct. at 2276 (majority opinion joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett); *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1481, 1484, 1490-1492 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting).

Amicus March for Life Education and Defense Fund is a pro-life, non-religious, non-profit advocacy organization that has existed for over 50 years to defend and protect life from the moment of conception. March for Life has a growing state march program, where it peacefully rallies and marches for life in state capitals across the country. One of the state march routes utilizes roadways and sidewalks near an abortion facility like those covered by the law challenged in this case. The California March for Life in Sacramento consists of a pro-life rally and march at the State Capitol building—which happens to sit across the street from a Planned Parenthood facility. Future state marches may also occur in close proximity to abortion facilities as the state march program expands throughout the nation. Laws that place restrictions on speech with the purpose of education and protest near abortion facilities thus have direct bearing on March for Life's expressive activities.

The First Amendment rights of *amici* and their members to engage in peaceful pro-life speech outside of health care facilities have been eroded by *Hill* for far too long—and only this Court can restore those rights.

STATEMENT

Debra Vitagliano is an occupational therapist who has been trained to counsel pregnant women who are considering abortion. Pet. 4-5. She wishes to use her training by counseling pregnant women as they approach an abortion clinic in Westchester County, New York. Pet. 1. But she is prohibited from doing so by a County law that is modeled on the Colorado law upheld in *Hill*. Pet. App. 32a-41a.

Vitagliano sued the County for violating her free speech rights. Pet. App. 42a-66a. The district court dismissed her complaint on standing grounds and decided that, in the alternative, *Hill* foreclosed her claims. Pet. App. 23a-31a. The Second Circuit vacated the district court's standing ruling, but affirmed on the merits, stating that it was bound by *Hill* and that only this Court has "the prerogative of overruling its own decisions." Pet. App. 22a (quoting *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)).

REASONS FOR GRANTING THE PETITION

Hill was wrong the day it was decided. Pet. 15-19. And Petitioner is far from the only critic to recognize that. As Justice Kennedy wrote in his dissent, *Hill* "contradicts more than a half century of well-established First Amendment principles." 530 U.S. at 765 (Kennedy, J., dissenting). Justice Scalia, joined by Justice Thomas, explained that the majority opinion there stands "in stark contradiction of the constitutional principles we apply in other contexts." *Id.* at 742 (Scalia, J., dissenting). And scholars of all ideological viewpoints have decried the decision as "an abuse of the idea of content neutrality,"[3] "inexplicable on standard free-speech grounds,"[4] not "mak[ing] much sense,"[5] "unconvincing[],"[6] "a dramatic downward departure from [the] core First Amendment tradition,"[7] "cavalierly dethron[ing] free political speech from its preeminent constitutional position in the public forum,"[8] a "sudden erosion of public forum

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[3] Colloquium, Professor Michael W. McConnell's Response, 28 Pepp. L. Rev. 747, 748 (2001).

[4] *Id.* at 747.

[5] *Id.* at 752 (statement by Professor Erwin Chemerinsky).

[6] Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1298 (2007).

[7] 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, 189 (2001).

[8] *Ibid.*

speech rights,"[9] a "flash-in-the-pan aberration,"[10] and "slam-dunk wrong."[11]

But even if there were some doubt as to its correctness in the first instance, this Court implicitly overruled *Hill* in *Reed*. It made clear, contrary to *Hill*, that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 165 (internal quotation marks omitted). And it also established that a law is content-based whenever it distinguishes speech based on its specific subject matter—and rested that holding on subject matter even less specific than the categories of speech restricted in *Hill* and in this case. *Id.* at 168-169.

Under that clear standard, *Hill* is dead, and the later opinion in *City of Austin*—which some have argued is in tension with *Reed*—clearly stated that it did *not* "resuscitate" it. *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) (brackets omitted). But until this Court explicitly overrules *Hill*, that decision will continue to inflict immeasurable damage on the free speech rights of individuals and organizations with unpopular views.

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[9] Raskin & LeBlanc, *supra* n. 7, at 189.

[10] *Ibid.*

[11] Professor Michael W. McConnell's Response, *supra* n. 3, at 750 (statement by Professor Lawrence Tribe).

I. *Stare Decisis* Is No Barrier to Revisiting and Overruling *Hill.*

Certainly *stare decisis* poses no serious barrier to a decision expressly overruling *Hill.* When subsequent legal developments have "eroded the decision's underpinnings and left it an outlier among *** First Amendment cases," the case for *stare decisis* is weak. *Janus* v. *American Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482 (2018) (internal quotation marks omitted). Petitioner explains that *Reed* corrected at least one basis for *Hill*'s erroneous decision that the challenged law was content-neutral. Pet. 21-22. *Amici* write to explain that *Reed* also overturned the other bases for *Hill*'s finding of content neutrality, and that *City of Austin* did not change that.

A. In All Relevant Respects, *Hill* Was Implicitly Overruled by *Reed.*

The *Hill* court asserted that laws like those in this case are content-neutral for three reasons: (1) the restrictions were not adopted "because of disagreement with the message [speech] conveys," (2) the government's interests were not "related" to the content of the restricted speech, and the law was therefore "justified without reference to the content of regulated speech," and (3) the challenged laws regulate "the places where some speech may occur," not speech itself. 530 U.S. at 719-720. *Reed* implicitly rejected all three of these reasons.

1. As to the first reason, *Hill* turned the content-based inquiry on its head by asserting that a lack of a discriminatory motive renders a law content-neutral. *Hill*, 530 U.S. at 719-720. As Petitioner explains (at

21-22), *Reed* made clear that *Hill*'s approach "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. If it is, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 166.

In this respect, *Reed* implicitly overruled *Hill* and restored the longstanding principle that a content-based law is subject to strict scrutiny,[12] no matter the reason for its passage.

2. *Hill*'s related assertion that a challenged law is content neutral if it can be "justified without reference to the content of the regulated speech," 530 U.S. at 720, does not survive *Reed* either. Indeed, service of a discriminatory interest is simply the other side of the discriminatory motive coin. This Court thus explained in *Reed* that, like a law enacted because of the government's disapproval of the restricted speech, a law that is justified only by reference to the burdened message's contents falls into the "separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech." 576 U.S. at 164. This Court made clear in *Reed* that the content-neutrality inquiry must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose"—another principle which had been

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[12] As this Court made clear in *Reed*, that principle was well-established before *Hill*. *Reed*, 576 U.S. at 165-166 (collecting cases from the half century before *Hill*). *Hill* is thus plainly inconsistent with both prior and subsequent Supreme Court precedent.

repeatedly recognized before *Hill*. *Id.* at 166 (emphasis in original) (collecting cases).

3. That leaves *Hill*'s content-neutrality finding with only one leg to stand on: its assertion that the challenged law regulated only "places where some speech may occur," and did not regulate speech itself. 530 U.S. at 719.[13] That conclusion depended on the Court's reasoning that a regulation that applies only to protests, education, and counseling does not restrict "either a particular viewpoint or any subject matter," because it theoretically applies to all protest, education, or counseling, whether for or against abortion. *Id.* at 723-725. And the *Hill* court went so far as to claim that this "level of neutrality" is all "the Constitution demands." *Id.* at 725.

But *Reed* made clear that the Constitution demands more. As this Court stated there, "a speech regulation targeted at specific subject matter is content based *even if* it does not discriminate among viewpoints within that subject matter." 576 U.S. at 169 (emphasis added).

The "specific subject matter" that rendered the sign code in *Reed* content-based was "political" and "ideological" speech. 576 U.S. at 169. That subject matter is even *less* specific than the categories

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[13] This "simply baffling" claim was, like the arguments discussed above, wrong the day it was made: numerous pre-*Hill* cases stated the self-evident fact that restriction on the place where speech occurs is still a restriction on speech. *Hill*, 530 U.S. at 748 n.2 (Scalia, J., dissenting) (collecting cases). And in any event, the fact that a regulation imposes its restrictions on location has nothing to do with whether the law discriminates based on content. *Ibid.*

targeted for restriction in *Hill*. The *Reed* law's definition of "ideological" swept broadly, including any sign "communicating a message or idea" that did not fit into a different sign code category. 576 U.S. at 159. A category so expansive as "communicating a message or idea" is plainly less specific than speech for the purpose of "protest," "education," or "counseling." Likewise, *Reed*'s clarification that "a law banning the use of sound trucks for political speech—and only political speech" is "targeted at specific subject matter" confirms that a law regulating the specific subject matter of protest—a classic type of political speech—is also content based. *Id.* at 169. *Reed* thus makes plain that the law *Hill* declared content-neutral was in fact a "paradigmatic example of content-based discrimination." *Ibid*.

Furthermore, this Court made clear in *Reed* that restrictions are content-based not only when they are "obvious, defining regulated speech by particular subject matter," but also when they are "more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. That is precisely what the law in *Hill* and the law challenged here do: they use the functions of "protest," "education," and "counseling" as proxies for the content of the regulated speech. Under those laws, if a speaker's message seeks to protest, counsel, or educate, she may not approach an individual outside a reproductive care facility to communicate that message. But if her message serves a different function or purpose, such as a simple greeting, she may approach the person with whom she intends to communicate. Thus, someone who wishes to tell a woman approaching a Planned Parenthood facility "good luck with your abortion" is permitted to come and share that message at a normal

conversational distance, while Ms. Vitagliano must stand at a distance and raise her voice to tell the same woman, "You have other options—here is a pamphlet with resources for you."

That distinction cannot be made on any grounds other than the function and subject matter of the speech in question. Accordingly, both the *Hill* and Westchester laws are content-based under the clear test articulated in *Reed*.

B. *City of Austin* Does Not Resurrect *Hill*.

Any tension that may exist between *City of Austin* and *Reed* does not save *Hill*. Indeed, the *City of Austin* majority explicitly stated that it did not "resuscitate" *Hill*—an odd word choice if *Hill* is still good law. 142 S. Ct. at 1475 (brackets omitted).

Nor does anything in *City of Austin*'s reasoning change *Reed*'s implicit overruling of *Hill*. *City of Austin* simply held that a regulation is not *automatically* content-based when a reader must ask "who is the speaker and what is the speaker saying" to apply the regulation. *City of Austin*, 142 S. Ct. at 1471. It did not change the fact that "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 1472 (quoting *Reed*, 576 U.S. at 169) (cleaned up). Nor did it purport to overturn the longstanding principle that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Ibid.* (quoting *Reed*, 576 U.S. at 169). Under that standard, *Hill* remains a dead letter.

And, although *City of Austin* stated that not every classification of speech based on function or purpose is *always* content based, *id.* at 1474, it did not change *Reed*'s holding that "subtler forms of discrimination" that achieve subject-matter discrimination based on a message's "function or purpose" are still content-based restrictions subject to strict scrutiny. *Ibid.* A regulation of speech still "cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Ibid.* As discussed above, at best, the *Hill* and Westchester laws' categories of protest, education, and counseling are proxies for a message's communicative contents.

In short, notwithstanding *City of Austin*, this Court's decision in *Reed* has already made clear that *Hill* is no longer good law. And this case provides an ideal opportunity to make that reality explicit.

II. *Hill* Has Curtailed the Free Speech Rights of Those with Unpopular Viewpoints.

Practical considerations also militate in favor of review. As Petitioner explains (at 12-14), by allowing laws like Colorado's and Westchester's to masquerade behind a façade of neutrality, *Hill* has permitted governments to target unpopular viewpoints and make it more difficult to communicate them in the public square. That abrogation of First Amendment free speech rights has been permitted to stand for too long, and this Court should explicitly correct its error now.

Even the *Hill* court acknowledged that the First Amendment interests implicated in cases like these "are clear and undisputed" and that laws like those challenged here have the potential to restrict speech throughout wide swaths of public forums. 530 U.S. at 714-715. It further admitted that "leafletting, sign displays, and oral communications" are all protected by the First Amendment, and that the fact that some people may be offended by the messages individuals like Ms. Hill and Ms. Vitagliano seek to convey is not a reason to eradicate that constitutional protection. *Id.* at 715. And the Court did not dispute that laws prohibiting individuals from approaching others on the "quintessential public forums" of public streets and sidewalks "unquestionably lessen[]" speakers' "ability to communicate effectively with persons in the regulated zones." *Id.*

Yet *Hill* cast those constitutionally protected First Amendment rights aside in favor of a right to avoid unwanted or offensive communication on a public way. That interest was "not only unasserted" by the government in *Hill*, "but positively repudiated." 530

U.S. at 750 (Scalia, J. dissenting). Tellingly, Westchester does not rely on that interest in this case, either (see Pet. 25)—perhaps because this Court has said "time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal* v. *Tam*, 582 U.S. 218, 244 (2017) (internal quotation marks omitted).

That constitutional guarantee applies not only to outright viewpoint discrimination, but also to broader content-based restrictions, which present or future government officials "may one day wield" as proxies "to suppress disfavored speech." *Reed*, 576 U.S. at 167. Indeed, laws like Colorado's and Westchester's prove the point: On the surface, they might "appl[y] to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision." Pet. App. 30a (*Vitagliano* district court opinion, quoting *Hill*, 530 U.S. at 726). But no one seriously suggests that a restriction on "protest, education, or counseling" outside of an abortion clinic is anything other than a "means of impeding speech against abortion." *Hill*, 530 U.S. at 744 (Scalia, J., dissenting).[14] After all, "[h]ow

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[14] In fact, neither the Colorado nor the Westchester lawmakers made any effort to hide their purpose—they helpfully included the pro-abortion aim of their laws explicitly in their statutes. Colorado stated that it was balancing a person's "right to obtain medical counseling and treatment in an unobstructed manner" against the "right to protest or counsel *against* certain medical procedures" on the sidewalks and streets surrounding health care facilities. Colo. Rev. Stat. § 18–9–122(1) (1999) (emphasis added). And Westchester's statement of legislative intent declares the County's belief that its prior law "does not adequately protect

many medical procedures are there that there are protests about?"[15]

Hill's targeting of pro-life speech is of great concern to *amici* and their members, who regularly engage in education, prayer, and demonstrations of their pro-life viewpoints in the public square, and who support the pregnancy care facilities to which sidewalk counselors might refer women who are considering abortion. But it should likewise concern any other individual or group that holds unpopular or contested views. Today, in Westchester County, it may be pro-life viewpoints that are suppressed. But another day, in another jurisdiction, government officials could use *Hill*'s contorted content-neutrality analysis to justify restrictions on all manner of disfavored speech. This Court should not permit them to do so.

CONCLUSION

Hill has prevented pro-life individuals and organizations from effectively advocating for their views in a quintessential public forum for too long. Its convoluted reasoning threatens other forms of unpopular speech as well. *Stare decisis*, which applies with "least force of all to decisions that wrongly denied First Amendment rights," *Janus*, 138 S. Ct. at 2478, is certainly no barrier where the Court has already implicitly overruled *Hill*'s erroneous analysis. The time has come to do so explicitly.

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reproductive health care facilities" and those who work in or use them. Pet. App. 33a.

[15] Professor Michael W. McConnell's Response, *supra* n. 3, at 749.

Respectfully submitted,

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