No. 18-1516

In the
Supreme Court of the United States

VERONICA PRICE, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* JUSTICE AND FREEDOM FUND IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE PETITION SHOULD BE GRANTED TO RECONSIDER *HILL v. COLORADO* AND CLARIFY THE CONFUSION WITHIN THIS COURT'S PRECEDENTS 3

II. UNDER *McCULLEN* AND *REED*, THE *HILL* STATUTE AND THE CHICAGO ORDINANCE ARE BOTH TEXTBOOK EXAMPLES OF CONTENT-BASED LAWS. 5

A. *Reed* made clear that a benign government purpose would not salvage either the *Hill* statute or the Chicago ordinance 7

B. *Hill* conflated content discrimination and viewpoint discrimination, exactly like the Ninth Circuit holding overruled in *Reed* . . . 10

C. As in *Hill*, the government must examine the content to determine the speaker's purpose. Under *McCullen* and *Reed*, such examination renders the ordinance content-based 12

D. The location requirement for application of the ordinance, as in *Hill*, masks the underlying bias against pro-life speech 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 7

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 11

Clatterbuck v. City of Charlottesville,
708 F.3d 549 (4th Cir. 2013) 8

Frisby v. Schultz,
487 U.S. 474 (1988) 10

Hill v. Colorado,
530 U.S. 703 (2000) . . . . . *passim*

Lamb's Chapel v. Ctr. Moriches Union Sch. Dist.,
508 U.S. 384 (1993) 11

Madsen v. Women's Health Center, Inc.,
512 U.S. 753 (1994) 6

March v. Mills,
867 F.3d 46 (2017) 8

McCullen v. Coakley,
573 U.S. 464 (2014) . . . . . *passim*

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 7

Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 5

Price v. City of Chicago,
915 F.3d 1107 (7th Cir. 2019) 4, 11, 13, 16

R. A. V. v. City of St. Paul,
505 U.S. 377 (1992). 6, 11

Reed v. Town of Gilbert,
707 F.3d 1057 (9th Cir. 2013). 7, 10

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015). . . . . *passim*

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995). 11

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991). 5, 7

Snyder v. Phelps,
562 U.S. 443 (2011). 10

Thayer v. City of Worcester,
755 F.3d 60 (1st Cir. 2014) 8

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994). 8

Ward v. Rock Against Racism,
491 U.S. 781 (1987). 8, 9

STATUTE

CHI., ILL., CODE § 8-4-010(j)(1). 2

OTHER AUTHORITIES

Chemerinsky, Erwin, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49 (November 2000) 5

Chen, Alan K., *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose,* 38 Harv. C.R.-C.L. L. Rev. 31 (Winter 2003) 3

Krotoszynski, Ronald J., Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. Rev. 1239 (2008) 11

Lee, William E., *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. Davis L. Rev. 387, 390 (January 2002) 16

Raskin, Jamin B. & 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 (2001) 4, 12, 15, 16

Volokh, Eugene, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277 (2005) 5, 9

INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund as *amicus curiae*, respectfully urges this Court to grant the Petition for a Writ of Certiorari to reconsider *Hill v. Colorado*, 530 U.S. 703 (2000) and reverse the decision of the Seventh Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae* in cases involving the First Amendment, including *McCullen v. Coakley*, 573 U.S. 464 (2014) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Co-counsel Deborah Dewart is the author of a book, *Death of a Christian Nation*.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae* Justice and Freedom Fund's intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Imagine a speaker approaching a fellow citizen in one of Chicago's prohibited bubble zones, "chant[ing] in praise of [this] Court and its abortion decisions." *Hill*, 530 U.S. at 769 (Kennedy, J., dissenting). As long as the speaker does not pass a leaflet or handbill, display a sign, or engage in "oral protest, education, or counseling," that speech is lawful. But "*[i]f the opposite message is communicated . . . a prosecution to punish protest is warranted*" (*id.*, emphasis added) under CHI., ILL., CODE § 8-4-010(j)(1).[2] In *Hill*, this Court allowed a nearly identical statute to pass constitutional scrutiny. In recent years, this Court has abruptly shifted course and sharpened its analysis of content discrimination—but without explicitly overruling or even limiting the reach of *Hill*. The time has come to reexamine *Hill* and bring clarity to this Court's First Amendment jurisprudence. *Hill* was wrong when it was decided nineteen years ago, and later cases place its flaws under a magnifying glass.

The urgent need for this Court's review is underscored by the many laws patterned after *Hill*. Chicago is not alone. Other jurisdictions across the nation have enacted virtually identical bubble zone

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[2] CHI., ILL., CODE § 8-4-010(j)(1): A person commits disorderly conduct when he ... knowingly approaches another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility.

laws. Pet., Sect. II, 29-35. As recently as June 3, 2019, the City Council of Charleston, WV passed an ordinance parroting *Hill*'s language.[3] Violators face a $500 fine or up to 30 days in jail. The constitutional flaws have not gone unnoticed.[4] But unless this Court steps in to correct the confusion in its precedent, the new ordinance is certain to be upheld under *Hill*.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO RECONSIDER *HILL v. COLORADO* AND CLARIFY THE CONFUSION WITHIN THIS COURT'S PRECEDENTS.

Before the ink was dry on the *Hill* opinion, it was "condemned by progressive and conservative legal scholars alike." Chen, Alan K., *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose,* 38 Harv. C.R.-C.L. L. Rev. 31 (Winter 2003). An "abundance of scathing academic commentary describe[s] how *Hill* stands in contradiction to our First Amendment jurisprudence." *McCullen*, 573 U.S. at 505 (Scalia, J., concurring in the judgment). One commentator quickly warned that "[i]f left uncorrected, this precedent could proliferate facially neutral but functionally discriminatory speech regulations that will chill and diminish the free public

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[3] https://charlestonwv.civicclerk.com/Web/GenFile.aspx?ad=382. See Sect. 78-235(c). (last visited 07/06/19)

[4] https://www.lifenews.com/2019/06/06/west-virginia-city-passes-ordinance-denying-pro-life-free-speech-to-sidewalk-counselors/ (last visited 07/06/19).

discourse vital to popular democracy." Raskin, Jamin B. & 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, 182-183 (2001). Indeed, this case is evidence that this commentator was correct. Nineteen years have passed since *Hill* and two intervening decisions have virtually nullified its reasoning. *McCullen* erodes its rationale and *Reed v. Town of Gilbert* dooms it altogether. Yet the case still stands as an obstacle to free speech on public streets near abortion clinics.

Even without an explicit circuit split, this case presents a question of national importance that will impact public debate on other issues and in other contexts. The Seventh Circuit exercised exemplary judicial restraint, respecting this Court's precedent and declining to create a circuit split while explaining that "*McCullen* and *Reed* have deeply shaken *Hill*'s foundation." *Price v. City of Chicago*, 915 F.3d 1107, 1119 (7th Cir. 2019). The Petition should be granted to clarify the conflict within this Court's own precedents, namely, *Hill*, *McCullen* and *Reed*.

In *McCullen*, this Court initially granted certiorari on the question of "whether *Hill* should be cut back or cast aside" but "[t]he majority avoid[ed] that question by declaring the Act content neutral . . . ." *McCullen*, 573 U.S. at 504-505 (Scalia, J., concurring). The Court arguably has already "*sub silentio* (and perhaps inadvertently) overruled *Hill*." *Id*. at 505. The time has come to face the question head-on and explicitly overrule this deeply flawed and troublesome precedent.

II. UNDER *McCULLEN* AND *REED*, THE *HILL* STATUTE AND THE CHICAGO ORDINANCE ARE BOTH TEXTBOOK EXAMPLES OF CONTENT-BASED LAWS.[5]

Content is an essential element of speech. Freedom of speech is "the right to communicate - to persuade and to inform people through the *content* of one's message." Volokh, Eugene, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1304 (2005) (emphasis added). Content regulation, even when masked by seemingly benign motives, "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). "Content-based restrictions risk the government targeting particular messages and attempting to control thoughts on a topic by regulating speech." Chemerinsky, Erwin, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49, 50 (November 2000). Accordingly, this Court has repeatedly affirmed the "guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen,* 573 U.S. at 477, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This principle "applies with full force in a

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[5] *Amicus curiae* focuses this brief on *Hill*'s flawed analysis of content neutrality, recognizing that there are other equally problematic aspects of the ruling, e.g., narrow tailoring.

traditional public forum" (*id.*) such as the places implicated in this case.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226. This principle is hardly novel. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("content-based laws are presumptively unconstitutional"). It is not that content-based regulation "is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill*, 530 U.S. at 743-744 (Scalia, J., dissenting) (quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 794 (1994)). And when a speech regulation targets only "speech that communicates a message of protest, education, or counseling," the risk is present. *Id.*

The Seventh Circuit concluded that it was bound by this Court's decision in *Hill*. *Hill*'s conclusions about content neutrality rest on legal quicksand. 530 U.S. at 719-720 (finding content neutrality for "three independent reasons"). Later cases challenge each of these reasons. First, content neutrality does not hinge on benign government motives or the absence of viewpoint discrimination. (Sect. IIA, B.) Second, the government may not regulate content to protect listeners from offense, particularly in a traditional public forum. (Sect. IIC.) Finally, although some "place" regulations are constitutional, other restrictions may be a convenient disguise to target a message—such as the peaceful pro-life message Petitioners want to deliver. (Sect. IID.)

In *Hill*, Justice Kennedy cautioned that the Colorado statute restricts content by "the terms it uses, the categories it employs, and the conditions for its enforcement." 530 U.S. at 766 (Kennedy, J., dissenting). Such a law "invit[es] screening and censoring" of speech. *Id.* The same is true of the Chicago ordinance at issue here.

A. *Reed* made clear that a benign government purpose would not salvage either the *Hill* statute or the Chicago ordinance.

Innocent government motives do not salvage a facially content-based statute. In *Reed*, the Ninth Circuit relied on *Hill* to find content neutrality, reasoning that the town "did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1071-1072 (9th Cir. 2013). This Court disagreed: "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,* 135 S. Ct. at 2228 (emphasis added). This is not new: *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993) (lack of "animus toward the ideas" does not establish content neutrality); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 592 (1983) ("illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"); *Simon & Schuster*, 502 U.S. at 117 (rejecting argument that "discriminatory . . . treatment is suspect under the

First Amendment only when the legislature intends to suppress certain ideas").

Following *Ward,* some courts continued to misinterpret its "disagreement with the message" language. *See, e.g.*, *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013) ("a distinction is only content-based if it distinguishes content with a censorial intent to value some forms of speech over others"). The First Circuit replicated the error when it upheld a noise provision that stifled *only* abortion-related speech. *March v. Mills*, 867 F.3d 46, 63 (2017) (Maine's targeting "only this subset of loud noise" was not "because of any disagreement with any message that may be expressed"). Similarly, in a panhandling case, the First Circuit reasoned that "a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive." *Thayer v. City of Worcester*, 755 F.3d 60, 68 (1st Cir. 2014) (Souter, J.). Following *Reed*, this Court vacated and remanded the case. *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015).

In *Reed*, this Court explained that "disagreement with the message" is not a condition required for a content-based statute, but a "separate and additional category." 135 S. Ct. at 2227, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1987). Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." 135 S. Ct. at 2228, quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). Another "separate and additional category"

is laws that cannot be "justified without reference to the content of the regulated speech." *Id*. *Hill* strategically plucked words from *Ward* to equate content neutrality with a government's lack of disagreement with the message. 530 U.S. at 719 ("*The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys*.") (italics in original). As *Reed* explained, "[i]nnocent motives do not eliminate the danger of censorship" because "future government officials may one day wield such statutes to suppress disfavored speech." 135 S. Ct. at 2229.

One of *Hill*'s justifications for finding content neutrality was Colorado's alleged interest in protecting "access and privacy"—an interest supposedly "justified without reference to the content." 530 U.S. at 720. But "[w]hen speech is punished precisely because of what it communicates . . . because it may offend some listeners . . . the law is operating as a content-based speech restriction." Volokh, *Speech as Conduct*, 90 Cornell L. Rev. at 1310. *McCullen* jettisoned *Hill*'s rationale, holding that the law "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." 573 U.S. at 481 (internal quotation marks and citations omitted).

The "captive audience" doctrine does not warrant the "access and privacy" rationale. The danger of the captive audience doctrine is its potential to cut off access to a speaker's intended audience. In *McCullen*, this Court suggested that audience "captivity" in a

traditional public forum "is a virtue, not a vice." 134 S. Ct. at 2529. Public streets and sidewalks are "one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Id*. This Court has applied the "captive audience" doctrine "only sparingly" (*Snyder v. Phelps*, 562 U.S. 443, 459 (2011)), *e.g.*, where residential privacy is at stake. "Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). The home is a sanctuary where privacy is paramount. But in the public forum, our nation has chosen "to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*, 562 U.S. at 460-461.

B. *Hill* conflated content discrimination and viewpoint discrimination, exactly like the Ninth Circuit holding overruled in *Reed*.

In *Hill*, the restrictions "appl[ied] equally to all demonstrators, *regardless of viewpoint*, and the statutory language ma[de] no reference to the content of the speech." 530 U.S. at 719 (emphasis added). In *Reed v. Town of Gilbert,* 707 F.3d 1057 (9th Cir. 2013), the Ninth Circuit replicates *Hill*'s confusion in collapsing content and viewpoint discrimination. The circuit court found the town's sign code was *content neutral* because it was *viewpoint neutral*, conflating two overlapping but independent concepts. The Ninth Circuit's error, like that of *Hill*, arose from its reliance on the government's viewpoint neutral motives for the law. This Court later "clarified that the lack of viewpoint or subject-matter discrimination does not spare a facially content-based law from strict scrutiny."

Price, 915 F.3d at 1117, citing *Reed,* 135 S. Ct. at 2230. These are "two distinct but related limitations." *Reed*, 135 S. Ct. at 2229. Viewpoint discrimination, regulating speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination is a subset that falls under the broader umbrella of content discrimination. *Id.* at 831; *see also R. A. V. v. St. Paul*, 505 U.S. at 391. Viewpoint neutrality is required even in a nonpublic forum, where limits on subject matter and speaker are permissible. *Lamb's Chapel v. Ctr. Moriches Union Sch. Dist.*, 508 U.S. 384, 394 (1993). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The viewpoint neutrality of a statute modeled after *Hill* exists "[o]nly on a purely theoretical level . . . pro-choice groups simply do not picket women's health clinics." Krotoszynski, Ronald J., Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. Rev. 1239, 1262 (2008). To claim neutrality for such a statute "ignores both the intent of the enactors and the real-world effects of the law." *Id.* Justice Souter implicitly admitted the viewpoint discrimination behind the *Hill* statute when he acknowledged the "correlation" between a statute and a viewpoint where "the law regulates conduct that has become the signature of one side of a controversy." 530 U.S. at 737 (Souter, J., concurring). Justice Kennedy was more

explicit: "The statute's operation reflects its objective." *Id*. at 769 (Kennedy, J., dissenting).

A law that by its terms applies only at abortion clinics and in actual practice applies only to anti-abortion messages, cannot rationally be characterized as viewpoint neutral. *Hill* created a "virtual template" facilitating blatant viewpoint discrimination in statutes that "maintain the thinnest facade of neutrality." Raskin & LeBlanc, *Disfavored Speech About Favored Rights,* 51 Am. U. L. Rev. at 182. Chicago followed the "template" and the Seventh Circuit found itself caught in the clutches of *Hill* in spite of this Court's later precedent discrediting its rationale.

C. As in *Hill*, the government must examine the content to determine the speaker's purpose. Under *McCullen* and *Reed*, such examination renders the ordinance content-based.

Hill seems to have manufactured a time-place-manner-*message-motive* inquiry that distorts the traditional framework and jettisons the threshold content neutrality requirement. *Content* (message) and *intent* (motive/purpose) are inextricably intertwined—it is virtually impossible to determine the speaker's intent without examining the content of the message. As the Seventh Circuit expressed it:

> [D]ivining purpose clearly requires enforcement authorities "to examine the content of the message that is conveyed." *McCullen*, 134 S. Ct. at 2531 (quotation marks omitted). How else could the authorities distinguish between a

> sidewalk counselor (illegal) and a panhandler, a pollster, or a passerby who asks for the time (all legal)?

Price, 915 F.3d at 1118. Content distinctions may be facially obvious but are sometimes "more subtle, defining regulated speech by its *function or purpose*." *Reed*, 135 S. Ct. at 2227 (emphasis added). That is exactly the case here, as it was in *Hill*. The ordinance is "undeniably content-based" because "*any* message except one of protest, education, or counseling" may be freely communicated—the statute's application to a speaker "depends entirely on *what he intends to say*." 530 U.S. at 742 (Scalia, J., dissenting) (emphasis in original). In *Reed*, this Court declared the town's sign code content-based because its application "depend[ed] entirely on the communicative content of the sign." 135 S. Ct. at 2227. Here, as in *Hill*, the terms describing prohibited content are all imprecise—"protest is an imprecise word; counseling is an imprecise word; education is an imprecise word." 530 U.S. at 773 (Kennedy, J., dissenting) (internal quotation marks omitted). These "substantial imprecisions will chill speech, so the [ordinance] violates the First Amendment." *Id*.

In a narrow category of legal contexts, examination of content is appropriate in order to apply a rule of law to a course of conduct—for example, to determine "whether a particular statement constitutes *a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods*." *Hill*, 530 U.S. at 721 (emphasis added). Each italicized example involves a specific "rule of law"

where content is uniquely relevant to legal rights and/or liability. The cursory examination applicable in those cases is not a free pass for content-based regulation. Chicago's ordinance does not involve any such rule of law. Its application hinges on the speaker's intent and invites a more extensive examination into the speaker's purpose. As Justice Scalia explained, "the distinction is almost too obvious to bear mention: Speech of a certain content is constitutionally proscribable. The Court has not yet taken the step of consigning 'protest, education, and counseling' to that category." *Hill*, 530 U.S. at 746 (Scalia, J., dissenting).

In *McCullen*, this Court made clear that a law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." 573 U.S. at 479 (internal quotation marks and citations omitted). This pronouncement upholds the First Amendment's prohibition on government control of private speech, and it sounds the death knell for *Hill*'s contrary rationale.

D. The location requirement for application of the ordinance, as in *Hill*, masks the underlying bias against pro-life speech.

Hill and its progeny have chipped away at the traditional public forum. This Court sustained the *Hill* statute by calling it "a *minor* place restriction on an *extremely broad* category of communications with unwilling listeners," and thus a reasonable time-place-manner restriction. 530 U.S. at 723 (emphasis added).

There was nothing either reasonable or "minor" about the *Hill* statute, and the same is true here. Both laws chill speech at the very time and place where it is most effective. Indeed, "the public space outside of health care facilities" has become a "forum of last resort." *Hill*, 530 U.S. at 763 (Scalia, J., dissenting). It "blinks reality" to claim content neutrality for "a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur." *McCullen*, 573 U.S. at 501 (Scalia, J., concurring). "[T]here are circumstances in which a law forbidding all speech at a particular location," even if it is facially neutral, "would not be content neutral in fact." *Id*. at 512 (Alito, J., concurring). That is true here, as it was in *Hill*. Chicago's "content-based determination" to limit the law's application to specific places is a "convenient yet obvious mask" to "restrict speakers on one side of the debate." *Hill*, 530 U.S. at 767-768 (Kennedy, J., dissenting).

Hill erroneously created "an unheard-of 'right to be let alone' on the public streets," where "uninhibited, robust, and wide open" debate should be zealously guarded. 530 U.S. at 765 (Scalia, J., dissenting). No compelling state interest exists in protecting citizens' ears from unwanted speech. On the contrary, such an alleged "state interest" is not even legitimate. The traditional public forum was intended to be a "sanctuary for free speech" and an "incubator of democratic change." Raskin & LeBlanc, *Disfavored Speech About Favored Rights,* 51 Am. U. L. Rev. at 184. American democracy hinges on "the wide-open availability of the traditional public forum" for free speech (*id*.), yet *Hill* "cavalierly dethroned free political

speech from its preeminent constitutional position" to protect a flimsy right to "listener privacy and solitude" (*id.* at 189). This Court's "construction of a privacy interest that for the first time overrides the First Amendment right of speakers in a public forum" is a unique and aberrant feature of *Hill* that "could be the basis for laws restricting speech near other places." Lee, William E., *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. Davis L. Rev. 387, 390 (January 2002).

This Court must not waver in safeguarding the traditional public forum. Other modes of communication allow listeners to avoid messages they do not wish to hear. They can "turn the page, change the channel, or leave the Web site," but "[n]ot so on public streets and sidewalks." *McCullen*, 573 U.S. at 476. That is the one forum where a speaker is assured that he is "not simply preaching to the choir" (*id.*), and therefore, may attempt to persuade fellow citizens. As both *McCullen* and the Seventh Circuit recognized, "direct one-on-one communication has long been recognized as the most effective, fundamental, and perhaps economical avenue of political discourse." *Price*, 915 F.3d at 1112, citing *McCullen*, 573 U.S. at 488 (internal quotations and citations omitted). In Chicago, as in Massachusetts, sidewalk counselors wish to initiate private conversations "to convey a gentle and caring manner, maintain eye contact and a normal tone of voice, and protect the privacy of those involved." *Price*, 915 F.3d at 1110; *McCullen*, 573 U.S. at 473 ("petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges"). The ordinance

thwarts these attempts at peaceful conversation that pose no threat to public safety or any other legitimate government interest.

Hill cut a huge hole in the First Amendment by allowing a content-based restriction in a public forum to masquerade as a "minor" restriction on the place where speech may occur. This Court should grant the Petition in order to close that hole and seal it, protecting the traditional public forum as a place for free public discourse.

CONCLUSION

This Court should grant the Petition and reconsider the continued viability of *Hill v. Colorado*.

Respectfully submitted,

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