No. 18-1516

IN THE

Supreme Court of the United States

VERONICA PRICE, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, *et al.*,

Respondents.

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

REPLY BRIEF

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INTRODUCTION

As the Seventh Circuit explained, *Hill v. Colorado*, 530 U.S. 703 (2000), is "incompatible with current First Amendment doctrine as explained in *Reed* [*v. Town of Gilbert*, 135 S. Ct. 2218 (2015)] and *McCullen* [*v. Coakley*, 134 S. Ct. 2518 (2014)]," and it is imperative for this Court to "bring harmony to these precedents." App. 21, 26. "This Court has not hesitated to overrule decisions offensive to the First Amendment," *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J.), and it should do so again here. Respondents do not dispute the importance of the First Amendment issues at stake, nor do they dispute that this case would be an appropriate vehicle to reconsider *Hill*.

Although Respondents attempt to defend *Hill* on the merits, their primary argument is that overruling *Hill* would also call into question other areas of this Court's jurisprudence. Not so. In the 20 years since *Hill* was decided, this Court has never again endorsed or reaffirmed its approach to the First Amendment, nor has it relied on *Hill* in other areas of First Amendment doctrine. The Court should grant certiorari to restore uniformity to its jurisprudence and correct *Hill*'s "unprecedented departure" from core First Amendment principles. *Hill*, 530 U.S. at 772 (Kennedy, J., dissenting).

I. The Court Should Grant Certiorari To Reconsider *Hill v. Colorado*.

A. *Hill*'s reasoning is incompatible with the Court's current jurisprudence.

Hill's approach to the First Amendment was wrong from the outset and is irreconcilable with this Court's subsequent decisions. *See* Pet. 17-24. *Stare decisis* does not prevent this Court from "overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235-26 (1997).

1. Respondents assert (at 9) that the Chicago ordinance (which was modeled after the law in *Hill*) is not content-based because it applies "no matter what the speaker's subject, message, or point of view." But the statute, by its plain terms, prohibits approaching within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral *protest, education, or counseling* ...." Chi., Ill., Code §8-4-010(j)(1) (emphasis added). That is, the statute prohibits certain disfavored types of speech, while allowing any other type of speech within the restricted zone. "To restrict the right of the speaker to hand [a person entering a clinic] a leaflet, to hold a sign, or to speak quietly is … to deny the neutrality that must be the first principle of the First Amendment." *Hill*, 530 U.S. at 789 (Kennedy, J., dissenting).

Reed sets forth the test for content neutrality that should apply here: "Some facial distinctions based on a message are obvious, defining regulated speech by

particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227 (emphasis added). Given that the Chicago Ordinance expressly defines prohibited speech by its "purpose"—banning "protest, education, or counseling" within the bubble zone—it falls squarely within the category of regulation that *Reed* deemed content-based. *See also id.* (law is content-based if it subjects different "categories [of speech] to different restrictions").

Contrary to Respondents' assertion (at 7, 14 n.3), *McCullen* does not undermine this argument—in fact, it supports it. The Court in *McCullen* was clear that the Massachusetts statute at issue—which banned *all* non-exempt individuals from entering the buffer zone—was content-neutral only because the concerns it addressed ("congestion," "interference with ingress or egress," and "security") were content-neutral. *McCullen*, 134 S. Ct. at 2531-32. Conversely, the Court explained, "the Act 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." *Id.* (cleaned up). Similarly, if "the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort *would not give the Commonwealth a content-neutral justification to restrict the speech*." *Id.* (emphasis added). It is thus ironic that Respondents defend the Ordinance as content-neutral while simultaneously contending that it is needed to "protect individuals from unwanted expression." BIO at 8, 15-16. Whereas *Hill* repeatedly cited concerns

about listeners' reaction as an acceptable justification for a bubble-zone law, *see* 530 U.S. at 715-18, 724, *McCullen* makes clear that a statute designed to prevent "offense or discomfort" is a content-based restriction subject to strict scrutiny.

Respondents (at 8-11) attempt to characterize the Ordinance as a "place and manner" restriction that is reviewed under a standard less demanding than strict scrutiny. But this Court has long held that the less-demanding level of scrutiny for "time, place, or manner" restrictions applies only if the challenged regulation is content-neutral. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-93 (1989) (rejecting First Amendment challenge to regulations of the "volume of amplified music" in Central Park). As noted above, Respondents are flatly wrong to suggest (at 9) that the Ordinance applies equally "no matter what the speaker's subject, message, or point of view." To the contrary, the Ordinance identifies certain disfavored types of speech—education, counseling, or protest—and bans them within the bubble zone while allowing discussion of any other matters. There is nothing "content neutral" about the Chicago Ordinance or the Colorado statute upheld in *Hill*.

2. The Ordinance is also independently unconstitutional due to its lack of narrow tailoring, and *Hill*'s holding to the contrary is inconsistent with *McCullen*. *See* Pet. 22-24. Whereas the *Hill* majority concluded that "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself," 530 U.S. at 729, the Court held in *McCullen* that "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures

that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier," 134 S. Ct. at 2540.

Respondents (at 16) assert that the Ordinance is narrowly tailored to preventing "close-approach physical intrusiveness." But *McCullen* already disposed of that argument. One of Massachusetts' asserted interests there was "preventing harassment and intimidation of patients and clinic staff." 134 S. Ct. at 2537. Yet the Court nonetheless found that a fixed buffer zone around clinic entrances was insufficiently tailored because the State had failed to explain why it could not protect that interest through less-speech-restrictive measures such as laws barring assault, harassment, threats, and physical obstruction, as well as injunctions targeted at specific individuals who engage in unlawful behavior. *Id.* at 2537-40. Unlike the statute at issue in *McCullen* (or the Ordinance at issue here), these less-restrictive alternatives would *not* prohibit peaceful, respectful conversations, leafletting, and protest. The City does not even attempt to explain why similar measures could not be used to prevent abusive, aggressive, or unlawful conduct without stifling the speech of those who seek to have respectful conversations with women considering abortions. *See McCullen*, 134 S. Ct. at 2535 (Massachusetts buffer zone "compromise[d] petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling").

B. *Hill* is a stark outlier in this Court's First Amendment jurisprudence.

1. As Justice Scalia explained in his dissent in *Hill*, that decision stands "in stark contradiction of the

constitutional principles we apply in all other contexts." 530 U.S. at 742. Justice Kennedy similarly characterized *Hill* as "an unprecedented departure" from the Court's First Amendment jurisprudence. *Id.* at 772.

Respondents (at 28-30) seek to brush those critiques aside on the ground that they were purportedly focusing on the Colorado statute's "hostility to the views expressed by opponents of abortion." But, although the *Hill* dissents certainly argued that the statute discriminated based on viewpoint, they also addressed content-neutrality and narrow tailoring. Justice Kennedy's dissent argued that the statute "is content based" because it "restricts speech on particular topics"—namely, "oral protest, education, or counseling." *Id.* at 767. And Justice Scalia's dissent (which Justice Thomas joined) emphasized that "the regulation as it applies to oral communications is obviously and undeniably content based" because "[a] speaker wishing to approach another for the purpose of communicating any message except one of protest, education, or counseling may do so without first securing the other's consent." *Id.* at 742. He further explained that the statute was not narrowly tailored because there were less-speech-restrictive ways to prevent "the obstruction of access to health facilities." *Id.* at 759. In short, the dissenting opinions in *Hill* anticipated the *precise* issues that were later addressed in *Reed* and *McCullen*, and comprehensively explained why *Hill* was wrong from the day it was decided.

2. Respondents (at 18-21) seek to recast *Hill* as the "product of a careful evolution" in the Court's doctrine that was the culmination of a "series of decisions" regarding access to abortion clinics. But Respondents cite only

two decisions in support of that theory, both of which involved injunctions directed at specific parties rather than generally applicable statutes or ordinances.

In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762–63 (1994), the Court emphasized that "[a]n injunction, by its very nature, applies only to a particular group" and imposes requirements "because of the group's past actions in the context of a specific dispute between real parties." *Id.* Because the focus of an injunction is stopping a specific violation of someone's rights, "the court hearing the action is charged with fashioning a remedy for a specific deprivation, *not with the drafting of a statute addressed to the general public*." *Id.* at 762-63 (emphasis added).

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997), is inapposite for the same reasons. Like *Madsen*, *Schenck* emphasized that the Court was analyzing an injunction entered in response to illegal activity. *Id.* at 362. The Court upheld certain portions of the injunction (while invalidating other parts as overbroad) because, "[b]ased on defendants' past conduct," and "the record in [that] case," there was reason to believe that a buffer zone was needed to prevent the defendants from "aggressively follow[ing] and crowd[ing] individuals right up to the clinic door and then refus[ing] to move…" *Id.* at 381-82. A prophylactic injunction was thus needed because "the specific targets of that measure [] demonstrated an inability or unwillingness to engage in protected speech activity without also engaging in *conduct* that the Constitution clearly does not protect." *Hill*, 530 U.S. at 761 (Scalia, J., dissenting) (distinguishing *Schenck* from bubble-zone ordinance in *Hill*). In sum, neither *Madsen* nor *Schenck* purported to make any judgments about the

constitutionality of imposing a bubble zone or buffer zone as a matter of general applicability rather than through a tailored injunction directed at specific parties based on their alleged past wrongdoing.

C. Overturning *Hill* would not "destabilize" other areas of the law.

Respondents further contend (at 21-28) that overruling *Hill* would "draw into question a number of settled decisions of this Court" in other First Amendment contexts. But *Hill*—despite its far-reaching consequences for free speech, *see* Pet. 29-35—has hardly become ingrained in this Court's broader jurisprudence. Since *Hill* was decided nearly 20 years ago, the Court has cited it just eight times. Two of those cases were *McCullen* and *Reed*. *Reed* faulted the Ninth Circuit for *relying* on *Hill* in finding the challenged sign ordinance content-neutral, *see* 135 S. Ct. at 2229, and Justice Scalia's concurrence in *McCullen* argued that *Hill* was wrongly decided, *see* 134 S. Ct. at 2545-46. Other than that, the Court has cited *Hill* only in passing,[1] or in separate opinions by Justices who criticized its reasoning.[2] This Court has never endorsed or reaffirmed *Hill*'s reasoning, nor has it meaningfully relied on *Hill* in other areas of First Amendment jurisprudence.

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1. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010); *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J.); *United States v. Williams*, 553 U.S. 285, 304 (2008).

2. *See Johnson v. United States*, 135 S. Ct. 2551, 2566, 2571 n.6 (2015) (Thomas, J.); *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J.); *Citizens United v. FEC*, 558 U.S. 310, 484 n.2 (2010) (Thomas, J.).

Respondents are thus wrong to suggest that overturning *Hill* would disrupt other areas of the law. For example, Respondents contend (at 21-22) that overturning *Hill* would threaten longstanding limitations on solicitation. But their primary cases for that proposition involved *limited public fora* rather than traditional public fora such as streets and sidewalks. For example, in *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), the Court upheld a ban on "the repetitive solicitation of money or distribution of literature" at New York-area airports. Central to the Court's holding was the fact that, although solicitation is a form of speech, "it is … well settled that the government need not permit all forms of speech on property it owns and controls." *Id.* at 675-78. Thus, "[w]here the government is acting as a *proprietor*, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, *its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.*" *Id.* at 678 (emphasis added). And the Court further emphasized that the airport terminals "have never been dedicated … to expression in the form sought to be exercised here: *i.e.*, the solicitation of contributions and the distribution of literature." *Id.* at 682.

So, too, in *United States v. Kokinda*, 497 U.S. 720 (1990), where the Court upheld a regulation prohibiting "soliciting alms and contributions" on Postal Service property. The plurality held that postal property was not a traditional public forum akin to "public sidewalks traditionally open to expressive activity" and that the Postal Service had reasonably concluded that solicitation of money would be "disruptive of business." *Id.* at 727-34 (plurality op.). And, in his controlling concurrence,

Justice Kennedy concluded that the regulation should be upheld because it was limited to in-person solicitation of money and did *not* ban citizens from "engag[ing] in political speech on topics of their choice and [distributing] literature soliciting support." *Id.* at 739 (Kennedy, J., concurring in the judgment). Justice Kennedy strongly suggested—as he later made explicit in his dissent in *Hill*—that he would have found the ban unconstitutional had it prohibited political speech or peaceful leafletting.

Respondents also argue (at 24) that *Frisby v. Schultz*, 487 U.S. 474 (1988)—which upheld a ban on picketing directed at a specific residence—would be in jeopardy if *Hill* were overruled. But *Frisby* repeatedly relied on the "unique nature of the home," and the fact that "individuals are not required to welcome unwanted speech into their own homes." *Id.* at 484-85. The Court found that the picketing at issue sought to "intrude upon the targeted resident, and to do so in an especially offensive way" that "inherently and offensively intrudes on residential privacy." *Id.* at 486. A ban on targeted picketing of a person's home is a far cry from an ordinance that prohibits—on a sidewalk in a commercial area—"even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law." *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting).

Respondents further contend (at 24-28) that *Hill* can be justified as upholding a reasonable restriction on "face-to-face expression." But that argument erroneously assumes that any contact with a sidewalk counselor is necessarily "offensive" or "unwanted." *See Hill*, 530 U.S. at 716-18 (assuming that persons entering clinics are "'unwilling recipient[s]'"). In fact, "some would-

be abortion patients do accept leaflets or conversation from sidewalk counselors, and some ultimately choose not to abort." ACLJ Amicus Br. at 3. Having to say "no thank you" to a counselor offering literature or polite conversation is a minimal burden for anyone who wishes to avoid this speech. In all events, as noted above, even if there is a legitimate interest in restricting "face-to-face" communications, the City had numerous less-speech-restrictive avenues to achieve that objective.

Finally, Respondents assert (at 27, 30) that overruling *Hill* would jeopardize "established First Amendment doctrine" regarding state or federal regulations limiting protests near funeral services. But in *Snyder v. Phelps*, 562 U.S. 443, 456-57 (2011), this Court noted that it had "no occasion to consider" whether such laws "are constitutional." Respondents cannot plausibly contend that overruling *Hill* would "unsettle" the law on an issue that this Court has expressly acknowledged remains an open question.

II. The Ongoing Validity Of *Hill* Is A Question Of Significant National Importance.

Respondents do not dispute that *Hill* implicates questions of profound national importance, *see* Pet. 29-35, or that this case is an appropriate vehicle in which to reconsider *Hill*. And the eight amicus briefs filed in this case underscore that *Hill* is anathema to the First Amendment's history and purpose, *see* Ctr. for Constitutional Jurisprudence Br. at 2-11, that *Hill* is being used to deprive women of vital information about alternatives to abortion, *see* Am. Family Ass'n Br. at 7-13; 40 Days for Life Br. at 8-11, and that *Hill*'s misguided

"captive audience" doctrine continues to be invoked by lower courts to restrict speech in public places, *see* Alliance Defending Freedom Br. at 5-14. The ongoing validity of *Hill* is a question of profound importance that warrants the Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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