No. 23-1189

In the Supreme Court of the United States

JERYL TURCO,
Petitioner,

v.

CITY OF ENGLEWOOD, NEW JERSEY,
Respondent.

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

BRIEF OF THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

The fact pattern here is a familiar one—to the Commonwealth of Kentucky and to the Court. It is about a city's attempt to justify a buffer-zone law prohibiting speech on a public sidewalk outside of an abortion clinic. And it is about a sidewalk counselor's challenge to that law. Jeryl Turco wants to counsel women outside the clinic through peaceful, quiet, and compassionate conversations. But she cannot do so within the buffer zones.

Kentucky knows that situation all too well. Just as in other cities or counties across the nation, Kentucky's largest city passed a similar law in 2021. And its citizens' free-speech rights were curtailed for almost two years before the Sixth Circuit ordered the entry of a preliminary injunction. *See Sisters for Life, Inc. v. Louisville-Jefferson County*, 56 F.4th 400, 409 (6th Cir. 2022). Of course, review here would affect that law in the Bluegrass State and other laws like it.

So Kentucky has a significant interest in the Court granting review to protect its citizens' free-speech rights. Buffer-zone laws like that here affect those rights when they are needed most. They cut off speech on a hotly contested moral and political issue. And they do so at the last place where the speech could be effective—outside an abortion clinic before a life-altering decision is made.

Likewise, the Court knows this situation all too well. It's almost *McCullen v. Coakley*, 573 U.S. 464 (2014), to a T. And this case is the best opportunity yet for the Court to address the tension between *McCullen*

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[1] Kentucky timely notified the parties' counsel of its intent to file this brief under Rule 37.2.

and *Hill v. Colorado*, 530 U.S. 703 (2000). No doubt, *Hill* was wrong. It conflicts with *McCullen* and other cases. It "distorted" our free-speech law. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 (2022). And it has become all but a dead letter in this Court's cases, which the Court has rightly refused to resuscitate. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022).

Yet *Hill* continues to distort jurisprudence in the lower courts and undermine free-speech rights. Those courts are bound by the decision when directly on point. And even when not, they turn to *Hill* to uphold a buffer-zone law—just what the Third Circuit did here. Indeed, that danger is not past in Kentucky. The district court in *Sisters for Life* has yet to resolve the merits.

So Kentucky has an interest in ensuring consistency of the rule of law on this critical issue. It has an interest in the Court overruling *Hill* and in making sure that courts correctly apply *McCullen*. Kentucky urges the Court to do just that: fix our free-speech jurisprudence as applied outside of abortion clinics. Allow, where it matters most, the "uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen*, 573 U.S. at 476 (citation omitted). Only this Court can do so. And the time is long past due.

SUMMARY OF THE ARGUMENT

This case warrants the Court's review—several times over. On the one hand, it offers the perfect chance to finally overrule *Hill*. To be sure, other cases have presented that opportunity too. But those cases had potential problems weighing against review. That is not true here: this case presents the ideal vehicle to put *Hill* to bed. Indeed, *Hill* is the throughline of the decision below. Almost all its flaws trace to its misguided reliance on *Hill*—even though that called-into-question decision was not directly on point. And it is critical that the Court be willing to grant review to overrule *Hill*. Otherwise, its rule that lower courts must follow a suspect decision if directly on point makes no sense. Plus, governments and courts continue to rely on *Hill* to justify buffer-zone laws that infringe on free-speech rights throughout the nation.

And on the other hand, this case checks all the normal boxes favoring a grant. The decision below presents an exceedingly important federal question. It conflicts with *McCullen* and other decisions of this Court. It creates a circuit split. And it offers the chance to provide needed guidance to the lower courts on how to apply *McCullen*.

ARGUMENT

I. The Court should grant review because of *Hill*.

1. No doubt about it: *Hill* was wrong. The Court confirmed as much in *Dobbs*. Citing just *Hill*, it noted how its abortion cases "have distorted First Amendment doctrines." 597 U.S. at 287. Of course, if *Hill* was a distortion, it was also wrong. Now, some have tried to dismiss *Dobbs* on this point as dicta—including the

district court below. Pet. App. 42a n.9. But the statement was necessary to the Court's stare decisis holding. It supported that *Roe* and *Casey* had disrupted other areas of the law. *Dobbs*, 597 U.S. at 286–87. So even though *Dobbs* did not overrule *Hill*, it authoritatively made clear that the decision was wrong.

Still, briefly consider some of *Hill*'s basic flaws. First, *Hill* wrongly held that the law at issue was content neutral. It prohibited anyone within 100 feet of an abortion clinic from approaching within eight feet of another to engage in education or counseling without consent. *Hill*, 530 U.S. at 707. Even though the law required an examination of "the content of a communication," the Court held that did not make it content-based. *Id.* at 721. That holding cannot square with *McCullen* and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). *See, e.g.*, *Bruni v. City of Pittsburgh*, 141 S. Ct. 578, 578 (2021) (Thomas, J., statement respecting denial of cert.); *Price v. City of Chicago*, 915 F.3d 1107, 1117–18 (7th Cir. 2019) (joined by Barrett, J.). Nor can it find support in *City of Austin*.

That latter point is worth drawing out. In *City of Austin*, the Court expressly disclaimed resuscitating *Hill*'s content-neutrality holding—for good reason. *City of Austin*, 596 U.S. at 76. There, the Court held that a sign code distinguishing between on- and off-premises signs was not content-based. *Id.* Even though the distinction required reading the sign to know whether it was allowed, that did not make it based on content. The distinction was "agnostic as to content," requiring "an examination of speech only in service of drawing neutral, location-based lines." *Id.* at 69. In other words, the substance of the message was irrelevant. *Id.* at 71.

The same was not true for the law in *Hill*. To be sure, the Court there held that the law was not content-based even though it required hearing the oral communication to discern whether it was for the purpose of counseling or education. *Hill*, 530 U.S. at 721. But that is not like "the neutral, location-based lines" in *City of Austin*. 596 U.S. at 69. Whether a sign is located on or off premise is not about content. Whether a statement provides counseling or education very much is. Put differently, the law in *Hill* was anything but "agnostic as to content." *Id.* It cared precisely about the content of the speech: whether the content provided counseling or education. The bottom line is *Hill* can find no support in *City of Austin*. And the corollary is that, if the Court grants review to overrule *Hill*, that in no way calls *City of Austin* into question.

Second, *Hill* erred by relying on the purported government interest of protecting unwilling listeners in a public forum to support its holding that the law was content neutral. 530 U.S. at 716–18. The Court in *McCullen* expressly noted that a statute would not be content neutral if it were concerned with listeners' reactions to speech or making them feel uncomfortable. 573 U.S. at 481. And that must be right. The content of the speech is what would cause offense, not the mere speech itself.

Third, *Hill*'s narrow-tailoring analysis for a time-place-or-manner restriction also directly conflicts with *McCullen*. The latter rejected the government's use of broad prophylactic measures that were easier to enforce than violator-specific measures; the former endorses them. *Compare McCullen*, 573 U.S. at 486, 492, *with Hill*, 530 U.S. at 729. And *Hill* did not require

any showing that other measures substantially burdening less speech were insufficient—the central holding of *McCullen*. *See McCullen*, 573 U.S. at 490–95.

2. In short, *Hill* was wrong—and badly so. But the Court has yet to overrule it. In part, that is likely because recent cases teeing up the issue have had alleged vehicle problems. For example, just this term, the Court was presented with a challenge to a law modeled on that in *Hill*, which the lower court upheld because *Hill* controlled. *Vitagliano v. County of Westchester*, No. 23-74 (U.S. denying pet. Dec. 11, 2023). But there, the county repealed the law after the petitioner sought this Court's review. That perhaps called into question whether there was still a live controversy and arguably complicated any potential review. Or take *Bruni*. There, the lower court had sua sponte construed the statute not to apply to sidewalk counselors. *Bruni v. City of Pittsburgh*, 941 F.3d 73, 86 (3d Cir. 2019). So the case involved "unclear, preliminary questions about the proper interpretation of state law." 141 S. Ct. at 578 (Thomas, J., statement respecting denial of cert.).

Neither problem exists here. The city has not repealed its law. Without question, this controversy remains live. And the decision below did not interpret the law not to cover sidewalk counseling. Indeed, that would have been some stretch given that the law is modeled almost word for word on that in *McCullen*, with the only real difference being the size of the buffer zone. *See Turco v. City of Englewood* (*Turco I*), 935 F.3d 155, 163 (3d Cir. 2019).

Instead, the lower court repeatedly turned to *Hill* to justify its holding that the law is constitutional. First, it relied on *Hill* to characterize the government

interests that the law furthers. *Turco v. City of Englewood* (*Turco II*), No. 22-2647, 2024 WL 361315, at *2 nn.25–27 (3d Cir. Jan. 31, 2024). That included protecting unwilling listeners and preventing potential discomfort to them despite the Court in *McCullen* making clear that any listener-reaction-based interest would render the law content-based. 573 U.S. at 481.

Second, the decision below relied on *Hill* to support its holding that the burden on Turco's speech was insubstantial. *Turco II*, 2024 WL 361315, at *3. The court zeroed in on *Hill*'s statement that an eight-foot zone allowed communication at a "normal conversational distance." *Id.* (citation omitted). Yet it never addressed the tension with *McCullen* on that point given the Court's focus there on the "close, personal conversations" or "quiet conversations" that the counselors viewed as essential. 573 U.S. at 487, 489. Standing eight feet away hardly fits the bill. Nor did the lower court address the effect of *McCullen* foreclosing any reliance on the unwilling-listeners interest. Rejecting that interest likely matters to *Hill*'s normal-conversational-distance point. Remember, the Court in *Hill* was conducting narrow tailoring. So the asserted government interest makes a difference. Perhaps keeping speakers at a conversational distance of at least eight feet away could be tailored to protecting unwilling listeners. But the same can hardly be said about ensuring unobstructed access.

Third, the lower court also turned to *Hill* to reason that the law could "alleviate the need for Turco to follow and communicate closely with each patient" by affecting the protestors. *Turco II*, 2024 WL 361315, at *4. Yet *McCullen* undermines that too. The Court there focused on how the sidewalk counselors believed

they could best accomplish their objective "through personal, caring, consensual" or "quiet conversations." *McCullen*, 573 U.S. at 489–90. And that they could not speak in the way they thought most effective mattered. *Id.*; *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988) ("The First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it.").

Fourth, the decision below relied in part on *Hill* to support its holding that the city sufficiently considered less-restrictive alternatives. The court concluded that, because it found the burden on Turco's speech insubstantial, it did not need to determine whether the city had considered less-restrictive alternatives. *Turco II*, 2024 WL 361315, at *4. And it held that, even if doing so, it could afford the city a large degree of deference. *Id. Hill* played an explicit part in the former and likely an implicit one in the latter. *See id.* at *3 n.43. In fact, the lower court held both even though *McCullen* is clear that the extent of a burden need not be significant to warrant narrow tailoring and that such review is not deferential. When "the government makes it more difficult to engage in" one-on-one conversations and handing out leaflets, "it imposes an especially significant First Amendment burden." *McCullen*, 573 U.S. at 489. The burden is significant simply because it is harder to engage in such speech. *Id.*; *see also Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610–611 (2021). Plus, the Court engaged in a searching inquiry to determine whether the government had seriously considered less-restrictive alternatives. *McCullen*, 573 U.S. at 494.

And fifth, the Third Circuit relied on *Hill* for its holding that the law was not overbroad. It reasoned that there was no problem with the law applying to facilities that had shown no need for it because *Hill* said so. *Turco II*, 2024 WL 361315, at *5. Yet the Court in *McCullen* was clear that imposing a buffer-zone law at clinics with no record of a problem was improper. 573 U.S. at 493. The lower court never even tried to square *McCullen* and *Hill* on that point.

At bottom, this case cleanly presents whether to overrule *Hill*. There are no potential vehicle problems like those in some other cases that raised the issue. And *Hill* is the throughline of the lower court's analysis. The court relied on it even though not directly on point and even when it conflicted with *McCullen* and other cases.

3. And overruling *Hill* is necessary. Consider three reasons for that. First, even though it conflicts with *McCullen*, *Reed*, and other cases, *Hill* remains binding on the lower courts when directly on point. The Court has made clear that if one of its precedents "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 which directly controls," and leave to this Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). That's why the Second Circuit in *Vitagliano* upheld the law. *Vitagliano v. County of Westchester*, 71 F.4th 130, 141 (2d Cir. 2023). And it's why the Seventh Circuit in *Price* did the same. 915 F.3d at 1119.

To be sure, the rule in *Agostini* is a good one. This Court is the final arbiter of federal law. And so it is not

for the lower courts to ignore its cases unless overruled. But a necessary component of that rule is that this Court be willing to grant review to overrule a case that later ones have called into question. Otherwise, the suspect case remains on the books and binding on the lower courts. They have no choice but to follow likely bad precedent—even if the consequences include the loss of First Amendment freedoms. In other words, the rule in *Agostini* makes sense only if this Court is willing to grant review to resolve a "glaring tension" in its precedents. *Bruni*, 141 S. Ct. at 578 (Thomas, J., statement respecting denial of cert.). If not, then it is individuals and their rights that lose out.

Second, a suspect case remaining on the books, even when not directly on point, can lead courts astray. This case is a prime example of that. But there are plenty more. Take Kentucky's own experience in *Sisters for Life*.

That case involved a Louisville law creating a 10-foot buffer zone on public sidewalks in front of healthcare facilities. *Sisters for Life*, 56 F.4th at 402. Like Turco here, the plaintiffs there were sidewalk counselors seeking to have "quiet, compassionate, non-threatening one-on-one conversations" with women entering an abortion clinic. *Id.* They had no intention of blocking access or harming anyone. But when the sidewalk counselors challenged the law, the district court denied a preliminary injunction based on *Hill*—even though *McCullen* controlled. *Sisters for Life, Inc. v. Louisville-Jefferson Cnty. Metro Gov't*, Nos. 3:21-cv-367-RGJ, 691-RGJ, 2022 WL 586785, at *6–9, *14 (W.D. Ky. Feb. 25, 2022).

Nearly two years after Louisville enacted the law, the Sixth Circuit ordered the district court to enter a preliminary injunction. It concluded that the law likely failed narrow tailoring just like that in *McCullen*. *Sisters for Life*, 56 F.4th at 404–07. But the Sixth Circuit could not undo the nearly two-year-long loss of the sidewalk counselors' rights. The counselors were robbed of their ability to speak in the way they thought most effective on a key matter of public concern. And they cannot get that loss back. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citation omitted)).

Plus, the counselors' ability to minister successfully to women dropped significantly. For example, one group of counselors had previously helped change the minds of three to six women per month who were dropped off in front of the clinic to get an abortion. Minter Dep. at 54–55, *Sisters for Life*, No. 3:21-cv-367-RGJ, 2022 WL 586785. But while the buffer zone was enforced, that number dropped to *zero*. *Id.* at 55. On top of all that, who knows what will happen now that the case is back in district court. Perhaps the Kentucky district court doubles down on narrow tailoring, much like the lower courts here. Then the law could again infringe on the sidewalk counselors' rights.

Third, there are plenty more situations in which individuals are losing their free-speech rights based on laws relying on *Hill*. Consider a few examples. In Montana, a law prohibits "approaching within 8 feet of a person" to "protest, counsel, or educate about a health issue" if the person "does not consent" and "is

within 36 feet of" a healthcare facility. Mont. Code. Ann. § 45-8-110(1). That is just like the law in *Hill* except with a smaller radius.

In Carbondale, Illinois, there is another copycat *Hill* law. It bans anyone from approaching another person within eight feet to engage in "oral protest, education, or counseling" within 100 feet of a healthcare facility. Carbondale, Ill. Code § 14-4-2(H). The Seventh Circuit recently upheld the law only because of *Hill. Coal. Life v. City of Carbondale*, No. 23-2367, 2024 WL 1008591, at *1 (7th Cir. Mar. 8, 2024).

And in Charleston, West Virginia, there is a similar law. It also prohibits anyone from approaching within eight feet of another without consent to engage in "oral protest, education, or counseling" within 100 feet of a healthcare facility. Charleston, W. Va. Code § 78-235(c). No doubt, the law is based on *Hill*: the "ordinance was carefully written drawing from language that has previously been upheld in courts." Shauna Johnson, *Charleston council considers language regarding access to health care facilities*, MetroNews (May 29, 2019), https://perma.cc/YY7T-226B.

Plus, in Colorado, the law at issue in *Hill* remains in effect. Colo. Rev. Stat. § 18-9-122(3). A challenge to it is pending in district court because sidewalk counselors are still prevented from speaking in the way they think most effective. *Faustin v. Polis*, No. 1:23-cv-01376 (D. Colo. filed Jun. 1, 2023).

All in all, *Hill* continues to strip individuals of their free-speech rights throughout the nation. It has done so for almost 25 years. And it will continue to do so until the Court steps in and expressly overrules it. This case is that chance. And the time is long past due.

II. The Court should grant review because of all the other factors.

Even putting *Hill* aside, this case warrants review. It checks practically all the boxes guiding this Court's discretion. *See* Sup. Ct. R. 10; *Camreta v. Greene*, 563 U.S. 692, 709 (2011). The case presents an exceedingly important question of federal law, a conflict with this Court's precedent, a circuit split, and a chance to provide needed guidance on complying with *McCullen*. Consider just a few points about each.

1. It almost goes without saying how important this issue is. It is about Turco's constitutional free-speech rights on a public sidewalk. Of course, that's a traditional public forum that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *McCullen*, 573 U.S. at 476 (citation omitted).

And that is exactly what Turco wants to do. She wants to discuss a public question—a morally and politically charged one—with her fellow citizens. Indeed, Turco wants to do so in the way she thinks most effective and at the last place her speech could be effective. And the likely consequence of her inability to do so is what she and "[m]illions of Americans believe . . . is akin to causing the death of an innocent child." *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). For Turco, it doesn't get more important than that. And the same should go for the rest of us—no matter our respective views on abortion. Our commitment to free speech on such topics is a big part of what makes our nation what it is. A law cutting off that speech deserves this Court's consideration.

Besides, this case is not just about Turco and her free-speech rights. No doubt, the Court resolving it would affect the many similar cases and accompanying laws throughout our nation. That means this case affects all those whose free-speech rights are infringed by those laws. It is about the rights of Angela Minter, Ed Harpring, Mary Kenney, and their organizations in Kentucky. *See Sisters for Life*, 56 F.4th at 402. And it is about all those like them.

2. On to the conflict with this Court's precedent. The decision below conflicts throughout with *McCullen* and other cases. Kentucky has alluded to much of that already. So focus on just two points in more detail.

First, the lower court's holding on the extent of the burden conflicts with *McCullen*—and with *Bonta*. The court determined that the burden on Turco's speech was insubstantial because she could "still engage in several forms of communication." *Turco II*, 2024 WL 361315, at *3. That cannot square with *McCullen*.

There, the Court explained that the inquiry is not about the extent of the burden on the sidewalk counselors' speech. The inquiry is whether the buffer zone is narrowly tailored not to burden substantially more speech than necessary to further its interest. *McCullen*, 573 U.S. at 486. A law can burden substantially more speech than necessary and still not impose that great of a burden on speech. As the Court explained: "When the government makes it more difficult to engage in" one-on-one conversations and handing out leaflets, "it imposes an especially significant First Amendment burden." *Id.* at 489. Merely making it more difficult to engage in those modes of communication *itself* imposes a significant burden. The burden on

those modes does not have to be significant. (Of course, that is not to say the burden here is not significant—it is.)

Indeed, this Court in *Bonta* made that same point in considering the narrow tailoring required for exacting scrutiny—directly analogous to the scrutiny for time, place, or manner restrictions—concerning compelled disclosures. 594 U.S. at 607–08. The Court rejected the dissent's view that "narrow tailoring is required only for disclosure regimes that 'impose a severe burden on associational rights.'" *Id.* at 610 (citation omitted). Instead, it held that the narrow-tailoring inquiry is the starting point for *any* burden on the First Amendment right, which requires "an understanding of the extent to which the burdens are unnecessary." *Id.* at 611. That dovetails exactly with what the Court said in *McCullen*.

Second, the lower court's deference to the city's alleged consideration of less-restrictive alternatives also conflicts with *McCullen*. The court held that its characterization of the burden as insubstantial meant that it could either not do a less-restrictive-alternatives analysis or afford a high degree of deference in doing so. *Turco II*, 2024 WL 361315, at *4–5. Neither is right.

The former cannot get around *McCullen*'s point that merely making it harder to engage in one-on-one communication or hand out leaflets itself "imposes an especially significant" burden. 573 U.S. at 489. So to comply with *McCullen* the lower court had to do a less-restrictive-alternatives analysis.

And the latter cannot get around that *McCullen* showed nowhere near the level of deference to the government that the lower court did. After identifying several other potential laws that the government could employ to further its interests, the Court addressed the government's response that it had "tried other approaches, but they do not work." *Id.* at 494. Merely saying that was not enough. The Court demanded proof that the government had "*seriously* undertook to address the problem with less intrusive tools readily available to it." *Id.* (emphasis added). And the Court went through and poked holes in each of the government's arguments about the inadequacy of alternatives. *Id.*

For example, the Court pointed out that the record showed that the government had been able to compile a record of obstruction to support its preferred law. *Id.* That meant it could do the same to support targeted injunctions and prosecutions under less speech-restrictive laws. *Id.* Put differently, the Court in *McCullen* required a legitimate showing that the government had seriously considered less-restrictive alternatives.

Yet the lower court did none of that. It simply accepted the city's claim that it had considered other methods and run into problems. For example, the court just took the city at its word that enforcing other laws was hindered by clinic escorts' reluctance to file police reports. *Turco II*, 2024 WL 361315, at *4–5. But the record showed that—both before and after the city passed the law—multiple people filed multiple complaints. *See* Pet. App. 27a n.4. Plus, it showed that the clinic filed weekly reports with police, including photos and videos of alleged bad actors, before the city passed the law. *See id.* at 24a–25a. The court never

addressed either despite both showing other avenues for police to enforce less-restrictive laws. That is nothing like *McCullen*'s analysis.[2]

3. Turn to the circuit split. At a minimum, the decision below conflicts with the Sixth Circuit's in *Sisters for Life*. And that's simply because Chief Judge Sutton's opinion correctly applied *McCullen*. Consider just a couple of points there too.

First, the law here is almost identical to the law in *Sisters for Life*. Both were based on the law in *McCullen*, just with different buffer-zone sizes: 35 feet in *McCullen*, 10 feet in *Sisters for Life*, and eight feet here. But the Sixth Circuit held the size immaterial. *McCullen* demands narrow tailoring for all burdens on speech caused by a buffer zone on a public sidewalk. *Sisters for Life*, 56 F.4th at 407. Unlike the Third Circuit here, which thought narrow tailoring unneeded for so-called insubstantial burdens, the Sixth Circuit reasoned that *McCullen* and *Bonta* demand it no matter the burden's size. *Id.* As the court put it: "Narrow tailoring turns on whether a law sweeps more broadly than necessary, not on whether its yoke is heavy or light." *Id.*

Second, the Sixth Circuit's less-restrictive-alternatives analysis correctly applied *McCullen*'s searching inquiry—not the Third Circuit's overly deferential one. The Sixth Circuit refused to defer to the government's arguments "that clinic entrants often refuse to

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[2] It's worth pointing out that the court's failure to correctly apply *McCullen*'s less-restrictive-alternatives analysis undermines any suggestion of an alternative basis to affirm. And it does the same for any argument that the holding was fact-intensive. The lower court's analysis was wrapped up in its legal errors about the effect of the burden's extent and the amount of deference owed.

file police reports and that county police cannot stand perpetual vigil over the Clinic." *Id.* at 408. But those are exactly the kinds of arguments to which the Third Circuit deferred. *Turco II*, 2024 WL 361315, at *4–5.

One more point on the circuit split. It matters not that the Third Circuit's decision is unpublished. For one thing, we still have two circuits deciding almost the same case the exact opposite. And for another, the decision below relied heavily on the prior published decision of *Turco I*. And that decision conflicts with *Sisters for Life* just as badly as that below. *See, e.g.*, *Turco I*, 935 F.3d at 167 (requiring the law to impose a "severe burden on speech"). That means the decision below raises a circuit split between two published decisions—one that the Court should resolve.

4. Finally, consider the need for guidance on applying *McCullen*. Both the district court and the Third Circuit badly erred in doing so, rubber-stamping the government's proffer that it had considered alternative methods. Of course, *McCullen* requires more. But the Court should clarify how much more. It should reiterate that a searching inquiry is needed to vet that a government did seriously consider alternative methods and show that those methods are insufficient.

Otherwise, lower courts may well continue to use *McCullen*'s analysis as a shield to uphold unconstitutional buffer-zone laws. All a government need do is put forward some modest showing that it considered the alternatives identified in *McCullen*. It can say it found them inadequate for whatever reason. And then it can unnecessarily restrict sidewalk counselors' free-speech rights outside of abortion clinics.

Indeed, the danger of that happening is real. Look to *Sisters for Life* one more time. Recall, that case is back in district court. That court recently held an evidentiary hearing to determine whether Louisville sufficiently considered less-restrictive alternatives to its buffer-zone law. *See* Order at 1, *Sisters for Life*, Nos. 3:21-cv-367-RGJ, 691-RGJ (Apr. 10, 2024). Perhaps the court will correctly apply *McCullen* this time around. Or perhaps not. It could double down and rule much like the lower courts here. Either way, that court and others would benefit from this Court's further guidance. The decision below shows that such guidance is needed.

* * *

This case warrants review. It offers a golden opportunity to finally overrule *Hill*. And that could not be more needed. *Hill* was wrong. It infringes on First Amendment freedoms and leads courts astray when directly on point and when not. And only this Court can fix that. Plus, the case independently checks all the boxes for a grant. The decision below conflicts with *McCullen*, creates a circuit split, and shows that lower courts need guidance. And it is does so on an issue that could not be more important. It is about free speech on a public sidewalk on a matter of intense public concern—speech about abortion outside of a place performing abortions. If such speech is silenced, gone is any chance for truth to ultimately prevail in the "uninhibited marketplace of ideas," *McCullen*, 573 U.S. at 476 (citation omitted), right where it matters most.

CONCLUSION

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

Respectfully submitted,

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