No. 23-74

In the Supreme Court of the United States

DEBRA A. VITAGLIANO,
Petitioner,

v.

COUNTY OF WESTCHESTER,
Respondent.

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

BRIEF OF *AMICI CURIAE* LIFE LEGAL DEFENSE FOUNDATION AND WALTER B. HOYE II IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead, as with Respondent County of Westchester, to seek out ways to make this expressive activity unlawful.

Amicus Walter B. Hoye II, a client of LLDF, is an ordained minister whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No person or entity other than Life Legal Defense Foundation made any financial contribution toward the preparation or submission of the brief. Counsel for all parties were timely notified of Amici's intent to file.

through public speaking and his website, Rev. Hoye seeks to offer immediate assistance to women seeking abortion, a message he sought to convey by engaging in one-on-one conversations with them as they approached an abortion clinic in Oakland, California.[2]

In December 2007, the city of Oakland passed an ordinance, similar to the statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), but applying only to non-hospital-affiliated abortion clinics. Rev. Hoye immediately challenged the ordinance in federal court. In 2011, the Ninth Circuit ruled that the ordinance was being enforced unconstitutionally, in that the city's enforcement policy exempted speech "facilitating access" from prosecution. However, the court upheld the ordinance on its face, despite its narrow application to abortion facilities. *Hoye v. Oakland*, 653 F.3d 855 (9th Cir. 2011).

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the ordinance. No patient or other person seeking access to the clinic complained of his conduct, nor did any purported "victim" testify against him at trial. Indeed, no "victim" was ever specified. The conviction was appealed and ultimately overturned on procedural grounds—one of which was failure to instruct the jury that standing still was not an "approach" by the defendant. However, prior to that successful appellate outcome, the trial court refused to stay sentencing unless Rev. Hoye would agree to

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[2] The Oakland clinic is no longer in business.

stay away from the clinic for three years. Rev. Hoye did not agree.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail. The judge refused to stay his sentence pending appeal, thus Rev. Hoye completed his sentence before his conviction was overturned.

In sum, Rev. Hoye was threatened with two years in jail and in fact went to jail for engaging in undisputedly peaceful, non-obstructive constitutionally protected speech activity on a public sidewalk. Thirty years ago, one would have wondered how that could happen. But now we know the answer: the corrupting effect of legalized abortion on "important but unrelated legal doctrines," including the First Amendment. *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2275-76 (2022).

SUMMARY OF THE ARGUMENT

What motivates ordinary citizens to voluntarily set out, day after day, week after week, rain or shine, to quietly talk with passersby entering a clinic? They receive no pay for this work. They act out of an earnest desire to do good, a desire deeply rooted in moral conviction and sometimes personal experience.

Petitioner Debra Vitagliano shares this same underlying goal with thousands of her fellow citizens across the nation: to save women from the pain,

regret, and remorse that come with abortion and to save nascent human life from destruction.

Laws such as the Westchester ordinance at issue and the Colorado statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), have been enacted to blunt the effectiveness of Vitagliano and other sidewalk counselors in reaching women. Not surprisingly for laws specifically designed to inhibit free speech, they violate the First Amendment in several ways. This brief will address two of those ways.

First, despite the best efforts of the *Hill* majority to show the law was content-neutral, those efforts were inadequate. In theory and in practice, the law is content-based.

Moreover, even if the Colorado statute and those modeled on it contained no mention of the content of speech but simply prohibited uninvited approaches for the purpose of uttering any message or proffering any leaflet, they would still be unconstitutional infringements on the right of sidewalk counselors to reach their audience using the peaceful and effective method of communication of their choice.

Hill v. Colorado was wrongly decided. The Court should grant Vitagliano's petition for certiorari and overrule that decision.

ARGUMENT

I. THE COLORADO STATUTE, LIKE THE WESTCHESTER ORDINANCE, IS CONTENT-BASED.

Petitioner Vitagliano's argument and authorities amply demonstrate that *Hill* represents an "unprecedented departure from this Court's teaching," 530 U.S. at 772 (Kennedy, J., dissenting), in many areas of First Amendment jurisprudence, and particularly with regard to content-neutrality, Pet. at 15-17. Amici here supplement that argument specifically to deconstruct two critical paragraphs in the *Hill* opinion concerning the content-neutrality of the Colorado statute at issue. Specifically, *Hill* states:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. 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 often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether

> "sidewalk counselors" are engaging in "oral protest, education, or counseling" rather than pure social or random conversation.
>
> Theoretically, of course, cases may arise in which it is necessary to review the content of the statements made by a person approaching within eight feet of an unwilling listener to determine whether the approach is covered by the statute. But that review need be no more extensive than a determination of whether a general prohibition of "picketing" or "demonstrating" applies to **innocuous** speech. The regulation of such expressive activities, by definition, does not cover social, random, or other everyday communications. . . . Nevertheless, we have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.

Hill, 530 U.S. at 721-22 (emphasis added).

The flaws in the opinion's reasoning were myriad. The more it tried to explain, the deeper the hole it dug.

First, the opinion falsely analogized the Colorado statute with laws that criminalize various forms of speech (e.g. threats, blackmail). In the case of the latter, the speech itself causes harm and is therefore unprotected speech under the First Amendment. *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (rejecting the idea that "the constitutional freedom for speech and press

extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"). Such laws thus are irrelevant in considering the constitutionality of laws that restrict protected speech.

The second set of analogies drawn by the Court were to types of speech that are inextricably entwined with conduct routinely subject to government oversight and regulation: offers to sell goods or securities. Again, such comparisons are flawed. The expressive conduct restricted by the Colorado statute—face-to-face conversations and hand-to-hand leafleting—sits at the traditional core of First Amendment protection, at the furthest remove from government regulation. *See, e.g., Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("what we have had recent occasion to say with respect to the vital importance of protecting this essential liberty [of handbilling] from every sort of infringement need not be repeated"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("speech . . . at a public place on a matter of public concern . . . is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.")

Next, the opinion went on to dispute whether, or how often, it would be necessary to know "exactly what words were spoken" in order to distinguish prohibited "protest, education, or counseling" from permitted "pure social or random conversation." This distinction distills the unconstitutional essence of the Colorado statute: it criminalizes only that speech that is important enough to need First

Amendment protection, while leaving incidental or "random" speech, that has little need for such protection, unregulated.

Continuing to dig, the opinion next states that a review of the speech need be "no more extensive" than necessary to distinguish the prohibited speech from "innocuous speech." Common antonyms of "innocuous" are "harmful" and "pernicious." MERRIAM-WEBSTER.COM THESAURUS, available at https://www.merriam-webster.com/thesaurus/innocuous. In other words, the pretense that the Colorado statute is about unwanted physical approaches is here dropped. The Court implicitly acknowledged what everyone already knew to be true: that the purpose of the statute is to prevent only those approaches accompanied by speech deemed by the lawmakers to be harmful or pernicious—which happens to coincide with the speech of pro-life sidewalk counselors. *Hill*, 530 U.S. at 742 (Scalia, J., dissenting) ("We know what the Colorado legislators, by their careful selection of content ('protest, education, and counseling'), were taking aim at, for they set it forth in the statute itself: the 'right to protest or counsel against certain medical procedures' on the sidewalks and streets surrounding health care facilities.") For that reason, approaches for the purpose of other speech deemed "innocuous," e.g., panhandling, asking for directions, distributing pizza coupons, conducting on-camera man-on-the-street interviews, or soliciting money for charity, are not prohibited by the statute.

Finally, the assertion that the purportedly harmful speech or protest, education, or counseling is easily distinguishable from "social, random, or

other everyday communications" is also flawed. Consider the following examples:

> Good morning.
> God bless you.
> God loves you.
> Jesus loves you and your baby.
> Good morning. How are you doing?
> Good morning. How are you feeling today?
> Good morning. What brings you here today?
> It's a beautiful morning, isn't it?
> Isn't this a great day to be alive?
> Life is beautiful, isn't it?
> Can I help you?
> Is there anything I can do for you?

Each of these above remarks is commonly utilized by sidewalk counselors, yet all of them could equally be used by solicitors, panhandlers, or just passersby seeing someone in distress. However, only the pro-life sidewalk counselors could find themselves in jail, as did amicus Rev. Hoye, for approaching while uttering these statements.

The officer enforcing the law—and the citizen trying to abide by the law—is guided only by the bizarre standard that the closer the speech is to the core of constitutional protection, the more likely the speech is prohibited under the law. If the speech is farther from the core of constitutional protection, then it is permitted.

II. THE MOTIVATION, MESSAGE, AND METHODS OF PRO-LIFE SIDEWALK COUNSELORS REQUIRE PROXIMITY.

The late Justice Scalia described the motives and methods of pro-life sidewalk counselors to a tee:

> The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?" . . .
>
> For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur, is outside the entrances to abortion facilities.

Hill, 530 U.S. at 757, 763 (Scalia J., dissenting).

In a later, unanimous decision, this Court aptly described the conduct of Vitigliano and others who wish to "approach and talk to women outside facilities, attempting to dissuade them from having abortions." *McCullen v. Coakley*, 573 U.S. 464, 469

(2014). Contrary to the stereotyped portrayal of pro-life advocates as hurling epithets and blocking passage, people like Vitagliano "attempt to engage women approaching the clinics in what they call 'sidewalk counseling,' which involves offering information about alternatives to abortion and help pursuing those options." *Id.* at 472. They "consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges." *Id.* at 473.

These encounters are very brief. A few seconds—rarely more than ten seconds, frequently less than five—is all the time a sidewalk counselor has in which to communicate her message and her invitation for further conversation, even when there is no restriction on uninvited approaches in place. The sidewalk counselor may not even know if the pedestrian intends to enter the facility until that individual is within a few feet of the door.

In order for these methods of communication to be successful, pro-life counselors must meet their audience where it is—on the public sidewalks at the entrances to abortion clinics, in close enough proximity to be able to be heard over ambient noise without shouting and to place a leaflet into an outstretched hand. "Even today, [sidewalks] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Id.* at 476.

The lack of alternatives is precisely why the sidewalk counselors have to communicate their message while on the portions of the sidewalk closest to the abortion facilities: to reach the audience they would not otherwise be able to reach.

As Justice Kennedy stated regarding the no-approach zone at issue in *Hill*,

> For these protesters the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it.

530 U.S. at 791 (Kennedy, J., dissenting).

Oddly, the *Hill* opinion consistently referred to the Colorado statute as precluding only "unwanted" approaches toward "unwilling" clients. *See id.* at 708, 714, 716, 718, 721, 723, and 727. Indeed, this Court seemed to think that the statute's prohibition was only triggered when the person approached took some affirmative action to decline the offer to converse. *Id.* at 734 ("This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear"); *see also id.* at 718 (invoking right "to be let alone" "after an offer to communicate has been declined"). This approach totally conflates two very different things: forbidding speech once declined (itself of dubious constitutionality); and forbidding speech absent express consent.

The Colorado statute, like the Westchester ordinance at issue here, takes the latter approach, precluding not just *unwanted* but also *uninvited* approaches toward undecided clients. Individuals

approaching clinics may not know in advance whether or not they want to accept a proffered pamphlet or pause to hear more from a speaker. Being able to see the pamphlet, easily hear the voice, and look into the face of the speaker helps them decide; the conversational proximity of being only a few feet away can be enough to have the person pause to accept what they might not have otherwise. By treating the undecided as if they were all unwilling listeners fending off unwelcome speech, the Colorado statute forbids the proximity that would afford counselors an opportunity to turn the undecided into willing listeners.

In sum, despite the fact that in many states "[t]he public forum involved here—the public spaces outside of health care facilities—has become, by necessity . . . , a forum of last resort for those who oppose abortion,"[3] *Hill*, 530 U.S. at 763 (Scalia, J., dissenting), the Court in *Hill* allowed the closure of that forum for those who wished to approach women briefly to offer them compassionate alternatives to abortion.

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[3] Although this Court returned the power to weigh arguments for and against abortion to the "people and their elected representatives," *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2259, 2284 (2022), the supreme courts in over a dozen states have discovered an implied right to abortion in the state constitution and removed from the people and the state legislatures all or virtually all power to restrict abortion. *See* https://reproductiverights.org/state-constitutions-abortion-rights/ (last visited August 15, 2023).

III. USING AMPLIFICATION AND STANDING STATIONARY NEAR ENTRANCES HAVE PROVEN TO BE INADEQUATE ALTERNATIVE CHANNELS OF COMMUNICATION.

The *Hill* majority repeatedly justified upholding the eight-foot no-approach zones by arguing that "the 8-foot zone does not affect demonstrators . . . who remain in place," *Hill* at 726, regardless of their volume, *id.* The Court noted—as if it were a positive—that because of the "level of background noise and competition for pedestrian's attention," the statute it upheld "place[d] no limitation on the number of speakers or the noise level, *including the use of amplification equipment*." *Id.* at 726 (emphasis added). Ironically, the Court then upheld the statute based on the state's interest in "avoidance of potential trauma to patients associated with confrontational protests" in furtherance of which the State is permitted to proscribe a potential "deliberate 'verbal or visual assault'" on an "unwilling audience" occasioned by uninvited approaches. *Id.* at 715-16 (citations omitted). The Court's newly-recognized "right to be let alone" on a public sidewalk *id.* at 716, *excluded* quiet sidewalk counselors yet *permitted* (or even encouraged or necessitated) demonstrators with large signs or amplification. According to the Court, the "potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range, i.e., within eight feet," *id.* at 718 n. 25, is somehow dissipated if the speaker

instead shouts at and follows a woman from nine feet away with a bullhorn.

To say this is counterintuitive is an understatement; it is likely that few would prefer being addressed through a bullhorn to being approached quietly by a sidewalk counselor, an individual prohibited by multiple layers of laws from touching, threatening, or blocking her. And even if some *would* prefer the shouting voice, it is not for the recipients to choose the manner in which they are addressed; the speaker has the right to choose their approach so long as they respect any applicable laws. *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.")

Moreover, though the Court said that "special problems" such as where clinics have "wide entrances" could be addressed as the statute is applied, 530 U.S. at 730, "special problems" can also arise when a city layers a restriction on amplification on top of a no-approach law, as it recently has in Sacramento, California. SACRAMENTO, CAL., CODE ch. 8.68.100 (2023) ("Sound amplifiers in certain areas"); *id*. at ch. 12.96 (2022) ("Access To Health Care Facilities") . This is particularly problematic as the clinic which performs abortions in Sacramento is located quite close to a highway. If pro-lifers cannot approach passersby nor can they use amplification to be heard over the ambient noise, there is little hope that they can verbally speak at all. They are limited to signs which are inadequate to convey the message of

personal concern and care that a sidewalk counselor wishes to express.

Secondly, police officers and prosecutors in multiple jurisdictions have misunderstood—whether intentionally or unintentionally—the Court's restriction on the words "knowingly approach." Amicus Walter Hoye was arrested and found guilty of violating an ordinance enacted in Oakland, California, that, like the Westchester ordinance, was modeled on the Colorado statute at issue in *Hill*. At trial, Hoye was refused a jury instruction clarifying the meaning of "knowingly approach" under *Hill*. When the jury itself explicitly asked for a definition of the meaning of "approach" the criminal court told them to use the "ordinary everyday meaning[]" of the word rather than explaining the narrowly constitutional meaning supplied by this Court. *People v. Hoye*, 188 Cal. App. 4th Supp. 1, 6, 8 (2010). Hoye's conviction was overturned on appeal, but only after he had served a 30-day sentence in jail because the judge would not stay it until the appeal was concluded. Colette Wilson, *The Persecution of Rev. Walter Hoye*, CELEBRATE LIFE (Jul-Aug. 2009).[4]

Sidewalk counselors in Chicago faced similar issues with police when a bubble zone modeled on *Hill* was enacted. Police officers repeatedly told them they could not stand within eight feet of patients or the clinic's door. *Price v. City of Chi.*, 2017 U.S. Dist. LEXIS 519, at *5-12 (N.D. Ill. 2017). One pro-lifer who was simply praying within eight

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[4] https://www.clmagazine.org/topic/pro-life-champions/the-persecution-of-rev-walter-hoye/ (last visited August 15, 2023).

feet of the clinic's door was actually arrested for violating the bubble zone—despite standing still and never attempting to speak to a patient. *Id.* at *7; FOX NEWS, *Charges Dropped Against Man Arrested While Praying Outside Chicago Abortion Clinic* (Nov. 29, 2015).[5] Another was arrested for speaking to a patient although he himself never moved and the patient approached him. FOX NEWS, *Chicago Drops Charges in Latest 'Bubble Zone' Case at Abortion Clinic* (Nov. 20, 2015).[6] Both cases were dismissed.

In other instances, authorities used the fact that sidewalk advocates were employing the alternative means explicitly approved by the *Hill* Court—standing stationary near clinic entrances—as the justification for enacting 35-foot no-protest zones, later unanimously rejected by this Court in *McCullen*. *See McCullen v. Coakley*, 573 F. Supp. 2d 382, 392 (D. Mass. 2008) (testimony at legislative hearing in 2007 complaining that, after enactment of *Hill*-type no-approach statute, "protesters are able to stand close to the entrance, with some protesters standing right at the entrance. . . . The protesters are moving closer and closer to the main door.")

The *Hill* opinion also expressed confidence that the statute would be applied equally to all—whether for or against abortion. Any person who

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[5] https://www.foxnews.com/us/charges-dropped-against-man-arrested-while-praying-outside-chicago-abortion-clinic (last visited August 15, 2023).

[6] https://www.foxnews.com/us/chicago-drops-charges-in-latest-bubble-zone-case-at-abortion-clinic (last visited August 15, 2023).

engaged in "'oral protest' and 'education'" would be prevented from approaching another person's bubble because "[t]hat is the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725. However, history has not borne out this prediction of neutrality. *See, e.g.*, *Hoye v. City of Oakland*, 653 F.3d 835, 849-51 (9th Cir. 2011) (enforcement policy for facially neutral *Hill*-type ordinance exempted speech that "facilitated access"); *Price*, 2017 U.S. Dist. LEXIS 519, at *8-12. Law enforcement personnel understand full well that these no-approach statutes and ordinances are intended to apply to only one set of speakers and one side in the abortion debate, and they enforce them accordingly.

Finally, this Court itself undercut that promise of neutrality in *McCullen*, where it found that the Massachusetts statute's exemption for clinic employees and agents did not render the law viewpoint- or content-based. *McCullen*, 573 U.S. at 483-84. But "[t]here is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners." *Id.* at 508 (Scalia, J., dissenting).

In light of these examples, it is almost inconceivable that the Court could still believe that "rules [like the statute in *Hill*] that provide specific guidance to enforcement authorities serve the interest in even-handed application of the law." *Hill*, 730 U.S. at 715.

In short, the statute upheld in *Hill* forbids sidewalk counselors from making calm, gentle approaches to women. As framed by this Court, pro-

lifers can do just as well with alternatives such as amplification, which alienates their target audience, or standing stationary, which limits their ability to reach all passersby and risks arrest anyway. This forced choice is premised on a dubious "right to be let alone" of an "unwilling audience" on a public sidewalk.

This Court has made clear in other contexts that the legislature *may not* dictate how speakers approach their target audience. *Meyer, supra*; *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.") While the legislature can ban certain offensive conduct—*see, e.g.,* Pet. at 20-21 (explicitly not challenging bans on "obstructing access, violence, unwanted physical contact, following and harassing, threats and intimidation, and 'interfer[ing] with' (or attempting to interfere with) a facility's operations" (alteration in original))—on a clean slate it would be obvious that the prohibition on uninvited approaches cannot stand. It is time for this Court to wipe the slate clean of *Hill*.

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to grant certiorari and overturn the clearly erroneous decision in *Hill v. Colorado*.

Respectfully submitted,

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