No. 23-74

IN THE
Supreme Court of the United States

DEBRA A. VITAGLIANO,

Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK,

Respondent.

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

BRIEF OF *AMICI CURIAE* EUGENE VOLOKH, RICHARD W. GARNETT, & MICHAEL STOKES PAULSEN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Other

INTEREST OF *AMICI CURIAE**

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

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* Under Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to fund its preparation or submission. Counsel of record for all parties were timely notified under Rule 37.2 of *amici curiae*'s intent to file this brief.

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SUMMARY OF ARGUMENT

I. Even many steadfast supporters of abortion rights believed that the Court erroneously applied the First Amendment in *Hill v. Colorado*, 530 U.S. 703 (2000). As put bluntly by leading liberal scholar Professor Laurence Tribe, *Hill* was among the candidates for "most blatantly erroneous" decisions of the 1999 Term. Tribe added that the case was "slam-dunk simple" yet the Court got it "slam-dunk wrong."

Pro-choice and pro-life scholars alike agreed that the *Hill* majority wrongly declared the Colorado statute "content-neutral." The ACLU, for instance, called the statute "fundamentally flawed," and urged the *Hill* Court to strike down the law because it "distinguishes among speakers based on what they are saying and not on what they are doing . . . [s]uch distinctions are plainly content-based and trigger strict scrutiny." Kathleen Sullivan and Erwin Chemerinsky also opposed the *Hill* majority's content-neutrality finding.

Pro-choice and pro-life scholars also disagreed with the *Hill* majority's willingness to protect a listener's "interest" in being let alone above a speaker's freedom of speech on a public sidewalk.

Dean Sullivan called this a "listener preclearance requirement." Scholars observed that the Court's treatment of privacy interests on a public sidewalk contradicted decades of First Amendment precedent. And they worried that the State's interest in protecting the unwilling listener could serve as a tool for government to infringe on the free speech of other disfavored groups.

II. *Hill* was wrong the day it was decided and has only gotten worse. First, this Court effectively rejected *Hill*'s content-neutrality analysis in *McCullen v. Coakley*, 573 U.S. 464 (2014). *McCullen* held that a hypothetical restriction of speech outside abortion clinics "would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *Id.* at 481. But that hypothetical describes *Hill*'s justification for speech restrictions to a T. *See, e.g.*, 530 U.S. at 716 (relying on "[t]he unwilling listener's interest in avoiding unwanted communication").

Second, *Hill*'s conclusion that the targeted speech restriction was content-neutral cannot be squared with even more recent cases. Subsequent precedent clarifies that laws applying "to particular speech because of the topic discussed or the idea or message expressed" are content-based. *See, e.g.*, *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Yet the statute in *Hill* (like the statute upheld below) carved out speech bearing "protest, education, or counseling" messages for

disfavored treatment. That content discrimination is nothing like the on-vs.-off-premises advertising distinction held content-neutral in *Austin*, and far worse than even the political-vs.-ideological sign distinction held content-based in *Reed*.

ARGUMENT

I. Principled supporters of free speech opposed the anomaly of *Hill* regardless of their views on abortion rights.

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court voted 6 to 3 to uphold a speech restriction around abortion clinics. The Colorado statute applied within 100 feet of health care facilities, and outlawed "'knowingly approach[ing]' within 8 feet of another person, without that person's consent, '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.'" *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1993)). The law effectively banned unconsented, up-close "sidewalk counseling" around abortion clinics.

Pro-life sidewalk counselors challenged the law under the First Amendment. Upholding the statute for a six-justice majority, Justice Stevens first determined that the law qualified as "content neutral," then that it was "narrowly tailored" to significant government interests, and lastly that it left open "ample alternative channels for communication." *Hill*, 530 U.S. at 725-26. Justices Kennedy, Scalia, and Thomas dissented. They disputed every step of the majority's analysis, but in particular its "content-

neutrality" finding. *E.g.*, *id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based."). The *Hill* dissenters believed that the Court had bent the First Amendment badly out of shape.

Leading liberal scholars agreed. Just months after *Hill*, Professor Laurence Tribe opined that it was "right up there" among the "candidates for most blatantly erroneous" cases of the 1999 Term. Laurence Tribe, quoted in *Colloquium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001). Tribe added that the case was "slam-dunk simple" and the Court got it "slam-dunk wrong." *Id.* The ACLU (which had asked the Court to strike down the Colorado law), as well as Kathleen Sullivan and Erwin Chemerinsky, all also disapproved of the *Hill* majority's analysis.

Indeed, both pro-choice and pro-life scholars raised concerns about the Court bending the First Amendment to accommodate abortion rights. Professor Michael McConnell worried that "we're in very serious trouble" when "the Court lines up on free-speech cases according to whether they agree with the speakers or not." McConnell, 28 PEPP. L. REV. at 747. Professor William E. Lee agreed that "[r]egardless of one's stance on reproductive autonomy as a constitutional right and the power of governments to punish private action that interferes with the exercise of constitutional rights, the *Hill* decision is problematic." William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002). By

2003, *Hill* had been "condemned by progressive and conservative legal scholars alike." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).

Two aspects of *Hill* drew particularly fierce criticism from an array of critics. First, hardly anyone seemed to agree with the *Hill* majority that the Colorado statute was "content-neutral." After all, on its face the law required examining the content of the speech to determine whether a crime had been committed. And by addressing advocacy around health care facilities, the law clearly targeted anti-abortion speech. Second, many critics rebuked the Court for accepting a "listener preclearance requirement," thereby elevating amorphous interests in being let alone or avoiding offense in a public place to a level where they could balance out the First Amendment right to free speech.

A. *Hill* rejected the ACLU's position on content neutrality and drew immediate criticism from leading liberal scholars.

The issue of content-neutrality loomed large in *Hill*. Finding the statute content-neutral led to weaker scrutiny and all but invited the Court to uphold the law. On the other hand, if the Court had found the statute *not* content-neutral, that would have led to often "fatal in fact" strict scrutiny. On *Hill's* facts, scholars quickly recognized that finding the law

content-neutral did not stand up to dispassionate analysis. Their criticisms took two main paths.

First, it was widely understood that the Colorado statute did in fact target anti-abortion speech. The ACLU, for one, had always recognized this. Although the ACLU staunchly favors abortion rights, it believed the Colorado statute was "fundamental[ly] flaw[ed]." Br. for ACLU as Amicus Curiae Supporting Petitioners, *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1045141, at *1, *7. In particular, the ACLU repeatedly contended that the Colorado law was *not* content-neutral: "the floating buffer zone created by the [new] Colorado law cannot be described as content-neutral"; the statute "distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content-based and trigger strict scrutiny"; and it is "only by evaluating the content of speech that a factfinder can determine [whether the law has been violated]." *Id.* at *7, *10. The ACLU's root position in *Hill* was that the Court should not "avoid the hard choices that the Constitution requires by mislabeling Colorado's statute as content-neutral." *Id.* at *13. Yet that is exactly what the *Hill* Court did.

Agreeing with the ACLU, Kathleen Sullivan, (then-dean of Stanford Law School) described §18-9-122(3) as "the Colorado legislature's effort to draw a facially neutral statute to achieve goals *clearly targeting particular content."* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term,* 28 PEPP. L. REV.

723, 737 (2001) (emphasis added). "After all," she added, "the motivation for this facially neutral law had to do with its effect in shielding patients (abortion patients) known to be the recipients of a particular kind of speech (anti-abortion speech)." *Id.* at 737-38 (parentheticals in original). Dean Sullivan also noted that the Court's "striking" acceptance of facial neutrality clashed with *Santa Fe Independent School District v. Doe*, where the Court—during the same 1999 Term—struck down a facially-neutral invitation to student speeches at football games under the Establishment Clause because "it was truly a thinly veiled effort to showcase student-led prayer." *Id.* at 737.

Other scholars offered more in-depth criticisms of the content-neutrality holding in *Hill*. One elaborated on Dean Sullivan's view, noting that "the legislature was indeed disfavoring a particular message." Timothy Zick, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 101 (University of Cambridge Press 2008). And others expanded on the inconsistency between abortion in *Hill* and the Court's approaches to other types of constitutional cases. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1262-63 (2008) (citing *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964)).

Still others plumbed what had actually happened in the Colorado legislature when it passed the statute in 1993. They found "explicit evidence that many members of the legislature itself objected to the

content of the protestors' speech. The legislature 'heard descriptions of demonstrations that were highly offensive in both their content and in their location . . . .' During debate, members of the legislature discussed the 'extremely offensive terms' used by anti-abortion demonstrators. Legislators listened to testimony about protestors 'flashing their bloody fetus signs,' and yelling 'you are killing your baby.'" Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado*, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 215 (2001) (citations omitted). Indeed, "there is powerful evidence that the legislature's principal or only concern was anti-abortion protestors." Chen, 38 HARV. C.R.-C.L. L. REV. at 56; *id.* at 75 ("[A]lmost everyone in Colorado knew that the state adopted the bubble law solely to restrict anti-abortion protestors."). Even the majority opinion itself in *Hill* conceded that "the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics." 530 U.S. at 715. Dean Sullivan was right: the Colorado law "clearly target[ed] particular content." Sullivan, 28 PEPP. L. REV. at 737.

Finally, Professor Erwin Chemerinsky was "troubled by the rationale that was given" in *Hill*, particularly on the issue of content-neutrality.[1] Erwin Chemerinsky, quoted in *Colloquium*, 28 PEPP. L. REV.

[1] Chemerinsky did not, however, disagree with the ultimate result in *Hill;* he believed that the Court should have recognized that the law was not content-neutral, but upheld it under *strict* scrutiny.

at 752. Chemerinsky observed that the Court had taken views of content-neutrality in *City of Renton v. Playtime Theatres* and *Erie v. Pap's A.M.* that were inconsistent with *Hill*, and he was "concerned" that "the Court tried to find a content-neutral regulation."[2] *Id.*

B. Scholars immediately recognized *Hill*'s reliance on protecting the unwilling listener as dubious.

A second focus of criticism was that the *Hill* majority had embraced "avoiding offense to listeners" as a reason to squelch speech in a traditional public forum. This subverted normal First Amendment principles by elevating unwilling listeners' presumed "interest" in being let alone on a public sidewalk above speakers' freedom of speech. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones,* 90 CORNELL L. REV. 1277, 1304 & n.127 (2005) (explaining that, with narrow exceptions that do not apply to an entire category of

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[2] Shortly after *Hill,* Chemerinsky published an article titled *Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000). In the article, Chemerinsky noted that one "major problem with the Court's application of the principle of content-neutrality has been its willingness to find clearly content-based laws to be content-neutral because they are motivated by a permissible content-neutral purpose." *Id.* at 59. *Cf. Hill*, 530 U.S. at 719-20 ("The Colorado statute passes [the content-neutrality] test for three independent reasons.... Third, the State's interest in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.").

speech in a traditional public forum, the right to free speech must "generally include . . . the right to offend people through that content, since much speech that persuades some people also offends others"). Dean Sullivan called this a "listener preclearance requirement." Sullivan, 28 PEPP. L. REV. at 737.

Scholars considered this preclearance arrangement between listeners and speakers in a traditional public forum both remarkable and unwelcome. Dean Sullivan, for instance, observed that *Hill* was "a holding inconsistent with the usual rule that, in the public forum . . . offended listeners must simply turn the other cheek." *Id.* Professor McConnell agreed: "*Hill v. Colorado* inverted ordinary free-speech principles" by restricting the speaker to protect unwilling listeners in a traditional public forum. McConnell, 28 PEPP. L. REV. at 748.

Others took an even stronger view. "[T]he Supreme Court's apparent recognition of a public 'right to be let alone' is in tension with literally decades of First Amendment jurisprudence. . . . [P]rior to *Hill* no such right or interest had ever been recognized." Zick, SPEECH OUT OF DOORS at 101; *see also* Lee, 35 U.C. DAVIS L. REV. at 426 ("In stark terms, the privacy interest in *Hill* contradicts more than a half-century of First Amendment doctrine. Protection for the unwilling listener markedly alters the structure of dialogue on public streets."). Looking to the future, scholars worried that "this novel 'interest'" in avoiding unwelcome speech had been accorded "sufficient weight to justify balancing it against the constitutional bedrock of free speech rights in the

public forum." Raskin & LeBlanc, 51 AM. U. L. REV. at 199. "Consequently, the state's interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups." *Id.*

In sum, the *Hill* majority embraced at least two positions that were widely recognized as very strange—at best. First, it found that laws creating advocacy-free bubbles around health institutions were content-neutral, thus denying the obvious targeting of pro-life speakers around abortion clinics. Second, it elevated the protection of unwilling listeners far beyond prior doctrine.

Criticism of *Hill*'s anomalous analysis has persisted. As one amicus explained over a decade later when this Court heard *McCullen*, "Critics of *Hill*'s treatment of the content neutrality issue have been legion." Br. for IJ as Amicus Curiae Supporting Petitioners, *McCullen v. Coakley*, 573 U.S. 464 (2014) (No. 12-1168), 2013 WL 5274832, at *26. And in the wake of *McCullen*, Professor Tribe (a self-described "committed supporter of a woman's—increasingly imperiled—right to choose") reiterated his criticism of content-neutrality analysis in cases addressing speech outside reproductive health facilities. Laurence Tribe, *The Supreme Court was right to allow anti-abortion protests*, N.Y. TIMES (June 27, 2014), https://www.nytimes.com/2014/06/27/opinion/the-supreme-court-was-right-to-allow-anti-abortion-protests.html. Tribe extended his criticism of *Hill*'s content-neutrality analysis to *McCullen*'s, finding it "implausibl[e]" that the Massachusetts statute was

"neutral as between anti-abortion speech and abortion rights speech." *Id.* In the end, "neither empathy for their anguish, nor the need to protect the safety of women seeking such services, nor the clear need to guard against the rising tide of state laws designed to restrict access to abortions, can justify far-reaching measures that restrict peaceful conversation in public spaces." *Id.*

II. *Hill* has become an even greater constitutional aberration over time.

As both pro-choice and pro-life scholars recognized, *Hill* was wrong the day it was decided. But it has not improved with age. To the contrary, this Court's subsequent content-neutrality decisions have destroyed whatever foundation *Hill* once had.

A. *McCullen* eviscerated *Hill.*

Though the *McCullen* majority opinion steered clear of *Hill* by name, it demolished *Hill*'s rationale for content neutrality.

McCullen addressed a Massachusetts statute creating a "35-foot fixed buffer zone from which individuals are categorically excluded" near abortion clinic entrances. 573 U.S. at 471. It held that statute content-neutral precisely *because* the Massachusetts law did not rely on *Hill*'s rationale. Specifically, the majority held the law was content-neutral because it was purportedly justified as a remedy for sidewalk congestion—not as a cure for undesired effects on listeners. 573 U.S. at 480; *id.* at 479-80 ("Indeed, petitioners can violate the Act merely by standing in a

buffer zone, without displaying a sign or uttering a word.").

McCullen held, however, that a hypothetical alternative justification would have doomed the law's content-neutral status: "To be clear, 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 '[l]isteners' reactions to speech.'" *Id.* at 481. "If, for example, 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.*

Yet the justification for content neutrality that *McCullen* rejected is the same justification that *Hill* had relied on: "[t]he unwilling listener's interest in avoiding unwanted communication." 530 U.S. at 716. The purpose of the Colorado statute "is to protect those who seek medical treatment from the . . . harm suffered *when an unwelcome individual delivers a message*." *Id.* at 718 n.25 (emphasis added). And the *Hill* majority identified a permissible legislative "special focus" on "the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715. Those justifications all point to what *McCullen* held was content *discrimination*: attempting to avoid "offense or discomfort." 573 U.S. at 481.

Nor could the Colorado statute claim content neutrality on *McCullen*'s sidewalk-decongestion rationale. The Massachusetts statute applied to the loiterer and the protestor alike. *See id.* at 480-81 ("A

group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients."). Yet the Colorado statute would *not* be violated by loiterers or any other non-protestor/educator/counselor: "With respect to persons who are neither leafletters nor sign carriers, however, the statute does not apply unless their approach is 'for the purpose of . . . engaging in oral protest, education, or counseling.'" 530 U.S. at 720.

Under *McCullen*, then, the Colorado statute and its Westchester twin now present an easy case for content discrimination. Each lacks a content-neutral justification under *McCullen.* And each relies on what *McCullen* held to be a content-based rationale. So this Court should make explicit what is implicit in *McCullen*: *Hill* should be overruled.

B. *Hill* is bad law under *City of Austin* and *Reed* too.

Even outside the context of abortion-clinic speech restrictions, this Court's recent content-neutrality precedent confirms that *Hill* is bad law. *City of Austin* and *Reed* both hold that applying different rules to different speech based on the message expressed is content discrimination. That sort of discrimination is the whole point of the Colorado and Westchester laws.

Hill was built on a stingy test for content discrimination: "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." 530 U.S. at 719 (emphasis added). Indeed, that test threatens to elide content discrimination with *viewpoint* discrimination—which is meant to be a narrower, more "obnoxious" form of regulation.[3]

Reed, however, held that content discrimination is *not* limited to laws motivated by a message-suppression purpose. Rather, "[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." 135 S. Ct. at 165; *see also id.* at 164 (recognizing the "separate and additional category" of content-based laws "adopted by the government because of disagreement with the message [the speech] conveys"). *Reed* thus holds that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163; *City of Austin*, 142 S. Ct. at 1471 (same).

Reed and *City of Austin* illustrate why the Colorado and Westchester laws are content-based under that test. *Reed* addressed a sign ordinance that applied different rules to "temporary directional signs," "political signs" ("designed to influence the

[3] Although the Court may resolve the fate of the Westchester law as content-based, there is reason to suspect the law is even viewpoint-based. *See Hill*, 530 U.S. at 768 (Kennedy, J., dissenting) ("The purpose and design of the statute—as everyone ought to know and as its own defenders urge in attempted justification—are to restrict speakers on one side of the debate: those who protest abortions.").

outcome of an election"), and "ideological signs" (that "communicat[e] a message or ideas" otherwise not categorized). 135 S. Ct. at 164. Because that ordinance discriminated based on each sign category's message expressed, it was "facially content-based." *Id.* at 167.

City of Austin held that "a very different regulatory scheme" addressing on-premises vs. off-premises signs was content neutral. 142 S. Ct. at 1471. The Court held that this distinction was "content-agnostic" and "location-based" rather than message based. *Id.* at 1475. The majority opinion concluded that such a regulation presented only a modest risk to "democratic self-government and the search for truth," *id.* at 1472 n.4, especially given the long history of similar regulations without any evidence of compromising First Amendment values, *id.* at 1469, 1474. Of course, the on-premises vs. off-premises distinction requires no determination of the effect of the speech on the listener to determine whether it falls within the proscribed category.

The Colorado statute and its progeny are "facially content based" as in *Reed* because they discriminate on the basis of the message expressed: "oral protest, education, or counseling" messages are prohibited within the floating buffer zone, but not other messages. *See* 530 U.S. at 742 (Scalia, J., dissenting) ("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."). Indeed, the *Hill* majority refused to "assume that the state courts tacitly construed the terms 'protest, education,

or counseling' to encompass 'all communication.'" *Id.* at 720-21.

That majority opinion asserts, however, that the statute would apply to a speaker expressing a message supporting abortion rights, *id.* at 725, but offers no textual reason why. And the opinion undercuts its own assertion by holding that "The statutory phrases 'oral protest, education, or counseling,' distinguish speech activities likely to have those consequences [harassment etc.] from speech activities . . . that are most unlikely to have those consequences." *Id.* at 724. So by *Hill*'s own logic, the statute would cover "a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon [clinic patients]," *id.*, but not an abortion-rights supporter wishing to offer a "You go, girl" and a high-five. Under *Reed*, that is facial content discrimination (if not sheer viewpoint discrimination).

So too under *City of Austin*. Unlike that sign ordinance, the Colorado statute singles out three specific messages for disfavored treatment: protesting, education, and counseling. The Colorado statute also lacks the nearly century-long tradition underlying the on-premises vs. off-premises distinction. 142 S. Ct. at 1474-75. To the contrary, the *Hill* statute was an innovation, and the Westchester statute at issue was passed in response to *Dobbs* last year. Pet. App. 17a. And unlike a sign ordinance posing little threat to First Amendment values, even pro-choice scholars recognize the Colorado statute as an attempt to suppress their opponents in the democratic process.

See supra at 4-6. *City of Austin* and *Reed* should be the final nails in *Hill*'s coffin.

CONCLUSION

Amici ask this Court to grant the Petition, reverse the judgment of the Second Circuit, and overrule the anomalous content-neutrality holding of *Hill v. Colorado*.

Respectfully submitted,

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