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

BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the natural right of freedom of speech. The Center has previously appeared before this Court as counsel of record or *amicus curiae* in several cases addressing these issues, including *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023); *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (*NIFLA*); and *McCullen v. Coakley*, 573 U.S. 464 (2014), to name a few.

SUMMARY OF ARGUMENT

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), this Court described as a "fixed star in our constitutional constellation" the precept that "no official, high or petty, can prescribe what shall be orthodox … in … matters of opinion. Since the decision in *Hill v Colorado*, 530 U.S. 703 (2000), that star seems to be setting. *Hill* allowed a state to prohibit sharing of ideas on the topic of abortion with women traveling to and from an abortion clinic. In the decades since that decision, government and private actors have become more brazen in their attempts to shut down disfavored speech.

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[1] All parties were notified of the filing of this brief more than 10 days prior to filing. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Government officials pressure social media outlets to suppress ideas and even truthful information that runs counter to the government-backed narrative. Reporters Matt Taibbi, Michael Shellenberger, and Bari Weiss, who were given access to the "Twitter Files," have written about how government officials pressured Twitter to suppress unwanted viewpoints and even deplatform some speakers. *See*, *e.g.*, Julia Shapero, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022[2]; Joseph A. Wulfsohn, *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022[3]. United States Senator Elizabeth Warren used her office to pressure Amazon to suppress a book backed by current presidential candidate Robert Kenney, Jr. that was critical of government policies concerning Covid-19. *Kennedy v. Warren*, 66 F.4th 1199, 1204 (9th Cir. 2023). The current administration continues to work with Facebook to suppress unwanted points of view. *Missouri v. Biden*, 2023 WL 1335270 at *2 (2023). Apparently, those in power believe that they have the authority to decree what shall be orthodox opinion and what information can and cannot be shared.

Speakers at college campuses, and even law schools, are regularly shouted down by protestors who want to prevent the speakers from sharing their ideas. In one recent episode, a Fifth Circuit Judge Kyle Duncan was prevented from speaking at a law school by

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[2] https://thehill.com/policy/technology/3768087-former-nyt-columnist-bari-weiss-releases-twitter-files-part-two/ (last visited August 22, 2023).

[3] https://www.foxnews.com/media/twitter-files-part-6-reveals-fbis-ties-tech-giant (last visited August 22, 2023).

protestors. An official from the law school intervened on behalf of the protestors! Katelynn Richardson, *Stanford Admin Eggs Students On As They Shout Down, Heckle Federal Judge During Talk*, Daily Caller News Foundation, March 10, 2023.[4]

The First Amendment was intended to protect speech that challenged the listener – speech intended to change the listener's mind. The Westchester ordinance and the law upheld in *Hill* are examples of government intervening to change the terms of the debate – to decree what opinions will be allowed. This Court should grant review to overrule *Hill* and to once again set the natural right of freedom of speech as a fixed star of our constitutional constellation.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Protect Citizens' Rights to Share Ideas, Even on Controversial Topics.

Westchester County does not want pro-life advocates speaking to women going to and from abortion clinics.[5] The county did not seek to prevent intimidation, harassment, or even physical interference with access to the clinic. Instead, the county bars communication – it suppresses speech that it dislikes.

Westchester County, however, cannot forbid discussion of alternatives to abortion simply because it

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[4] https://dailycaller.com/2023/03/10/federal-judge-censured-dei-dean-law-students-stanford/ (last visited August 22, 2023).

[5] The County appears to be preparing a temporary repeal of the ordinance, apparently to deny this Court an opportunity for review. However, voluntary cessation does not moot a case. *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587, 2607 (2022).

wishes to promote abortion or even to promote the commercial interests of abortion providers. There is no exception in the First Amendment to protect others from controversial speech in a public forum. The First Amendment preserves the natural right to liberty of conscience. That right to one's own opinions, and to share those opinions with others to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them."). Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. at 642.

The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431).

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. (That prohibition extends to state and local governments. *Gitlow v. New*

York, 268 U.S. 652, 666 (1925).) As Thomas Cooley notes, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Paine thus chose to publish *Common Sense* anonymously in its first printing. *See id.* Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both issued Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. Abolition of slavery was a topic that divided the nation in the late 1700's and that would

send the nation into civil war in the 1800's. The Pennsylvania Abolition Society, formed in 1775, was one organization that pushed its views on others. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. The Society and other abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id.* at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery. In their own way, the abolitionists were an early example of a right to life organization, promoting the view that we are equal in the eyes of our Creator and entitled to life and liberty.

The arguments offered by the abolitionist were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator", "I do not wish to think, or speak, or write, with moderation … I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 The Documentary History of the Ratification of the Constitution at 149-50; *Letter*

of George Lee Turberville to Arthur Lee, reprinted in 8 The Documentary History of the Ratification of the Constitution at 128; *Letter of Thomas Jefferson to James Madison*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 250-51; *Candidus II*, Independent Chronicle, reprinted in 5 The Documentary History of the Ratification of the Constitution at 498; *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution at 722.

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution at 1553. North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18. New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders' Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 The Documentary History of the Ratification of the Constitution.

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF

RIGHTS (Helen Veit, *et al*. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

Congress quickly tested this limit on their power with the enactment of the Sedition Act. The question for the new country was whether the free speech and press guarantees only protected against prior restraint, as was the case in England, or whether they guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 ANNALS OF CONGRESS, p. 934 (1794)." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id*. at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id*.

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id*. at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id*. More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of that the people intended the First Amendment's speech and press clauses to be much broader than a simple bar on prior restraints. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original

understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

In this case, Westchester County has rejected liberties the founders included in the Constitution. The County prohibits sidewalk counselors from approaching women going to and from an abortion clinic, an area traditionally open to free speech, in order to censor those who wish to discuss alternatives to abortion. The whole purpose of this ordinance is to suppress not only a particular viewpoint (promoting life for the unborn child), but also information about the effects of abortion procedures on the mother. The County has taken a side in this debate and means to censor those that disagree. But this Court has held: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Westchester County has no power under the Constitution to silence all that oppose the county's view on abortion. Like the City of Chicago in *Mosley*, the county seeks to silence opposing speakers and messages in area traditionally held open to free speech activities. As this Court noted in *Mosley*, however, gov-

ernment may not "select which issues are worth discussing or debating" and may not censor speech based on its content. *Id*. at 96.

This Court should grant review to rule that even with regard to abortion, government may not choose which opinions and messages may be spoken.

II. This Court Should Grant Review to Overrule *Hill v. Colorado*.

Recent decisions of this Court place *Hill* in serious tension with the Court's jurisprudence on "content-based" regulations. The statute at issue in *Hill* prohibited approaching a woman within one hundred feet of an abortion clinic for the purpose of education, counseling, protest, or handing out literature. This law, like the regulation in this case, was designed to silence sidewalk counselors who oppose abortion. *Hill*, 530 U.S. at 720. The Court reasoned that the regulation was content neutral even if the state had to assess the motive of the person approaching a woman (i.e., what the content of that speech might be) to determine whether the law was violated. *Id*. at 721.

As Justice Scalia (joined by Justice Thomas) in dissent noted, the Colorado law was clearly a speech regulation "directed against the opponents of abortion." *Id*. at 741 (Scalia, J., dissenting). For his part, Justice Kennedy noted that the analysis in *Hill* "contradicts more than a half century of well-established First Amendment principles." *Id*. at 765 (Kenndy, J., dissenting).

This Court in *Dobbs v. Jackson Women's Health Organization*, cited *Hill* as an example of how the Court's abortion jurisprudence had "distorted First Amendment doctrines." 142 S.Ct. 2228, 2276 (2022).

That distortion is described in the dissenting opinion of Justice Scalia to the decision in *Hill*. There, he noted that a regulation "directed against the opponents of abortion … enjoys the benefit of the 'ad hoc nullification machine'" to dispose of any "doctrines of constitutional law stand in the way of that highly favored practice" of abortion. *Hill*, 530 U.S. at 732 (Scalia, J., dissenting). In a later decision, Justice Scalia, joined by Justices Thomas and Kennedy, noted that the Court had created "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." *McCullen*, 573 U.S. at 497 (Scalia, J., dissenting).

The *Hill* Court's departure from First Amendment principles has only become more pronounced with this Court's analysis of content neutrality in other laws (i.e., ones that do not involve abortion). For instance, in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), this Court ruled that "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. The content regulated in *Reed* was temporary directional signs. Here, as in *Hill*, the content is "counseling" and "education." This is a regulation of speech based on its communicative content because it cannot be justified "without reference to the content" of the speech. *Id*. at 164. As this Court explained, a regulation "targeted at specific subject matter is content based even if it does not discriminate among viewpoints." *Id*. at 169. Here, however, it is quite clear that the regulation is aimed precisely at the content of the speech. As Justice Kennedy observed in relation to the California law challenged in *NIFLA*, "viewpoint discrimination is inherent in the design and structure" of the challenged regulation.

See NIFLA, 138 S.Ct. at 2379 (Kennedy, J., concurring). The analysis in *Hill* simply cannot be reconciled with the analysis of the later decisions in *Reed* and *NIFLA*.

Hill stands as an outlier on the issue of speech in a traditional public forum. As noted below, this Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. Further, this Court has consistently rejected attempts to ban speech in "special areas" of an otherwise open public sidewalk. In light of *Hill*'s inconsistency with these cases and its inconsistency with the purpose of the free speech guaranty, this Court should overrule *Hill*.

Prior to *Hill*, this Court had long recognized that the public sidewalks were held open for speech activity subject only to regulation to ensure that traffic was not impeded. *Schneider v. State of New Jersey*, 308 U.S. 147, 160 (1939). Prior to *Schneider*, the Court ruled that cities could not require a permit to distribute literature on the city streets. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). These rulings were joined by the decision in *Hague v. CIO*, 307 U.S. 496 (1939), where a fractured Court held that the Free Speech guaranty protected speech activities in public parks and city streets. In his lead plurality opinion Justice Roberts noted: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id*. at 515 (opinion of Roberts, J.). This Court has repeatedly cited this observation of

Justice Roberts as a truism of American constitutional law. *See*, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985); *Frisby v. Schultz*, 487 U.S. 474, 481 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Even when the sidewalk or street fronted a "sensitive area," this Court has upheld speech activities on the public areas traditionally open to speech. Thus, while excessive noise in front of schools could be prohibited, peaceful picketing could not. *Compare Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) *with Mosley*, 408 U.S. at 100. Similarly, a city might prohibit picketing on the sidewalk in front of a single house but, as a general matter, the sidewalks of even residential neighborhoods are part of the traditional public forum open to free speech activities. *Frisby v. Schultz*, 487 U.S. at 482-84.

Sidewalks in front of foreign embassies are not off limits to free speech activity. *Boos v. Berry*, 485 U.S. 312, 329 (1988). Even the sidewalk in front of this Court is open to picketers and speakers. *United States v. Grace*, 461 U.S. at 176-80. As this Court noted in *Grace*, public sidewalks are part of the public forum and attempts to withdraw them from that forum are "presumptively impermissible." *Id*. at 180.

Even the most sensitive areas do not qualify as No Free Speech Zones. In *Snyder v. Phelps*, 562 U.S. 443 (2011), this Court struck down a tort judgment against Westboro Baptist Church for its display of particularly offensive signs on a public street outside of a funeral for a fallen soldier. *Id*. at 457.

Hill simply does not fit in, neatly or otherwise, with this Court's prior decisions rejecting speech restrictions on public sidewalks. As Justice Scalia noted in his dissenting opinion in *Hill*, the only possible way to explain the decision is to say it is about abortion, and the Court's decisions on that sensitive subject stand "in stark contradiction of the constitutional principles [the Court applies] in other contexts." *Hill*, 530 U.S. at 742 (Scalia, J. dissenting).

In *Reed*, this Court noted "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech." *Id.* at 164; *see NIFLA*, 138 S.Ct. at 2371 (2018). The Westchester ordinance at issue in this case is just such a law – it can only be justified by the speech it seeks to prohibit. Yet under *Hill*, such a law would be characterized as content neutral.

There is no basis in the original understanding of the free speech guaranty, however, for an "abortion" exception, or indeed any similar subject matter exception. This Court should grant the petition and overrule *Hill*.

CONCLUSION

It is time to return the natural right of freedom of speech to its place as a fixed star in our constitutional constellation. This Court should grant review to overrule its decision contrary to the principle in *Hill v. Colorado*.

August 2023

Respectfully submitted,

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