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 TEXAS RIGHT TO LIFE AND AMERICA FIRST LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Court should reconsider and overrule *Hill v. Colorado*, 530 U.S. 703 (2000).

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INTEREST OF AMICI CURIAE[1]

Founded in 1973, Texas Right to Life is the largest Texas Christian non-profit organization dedicated to legally, peacefully, and prayerfully protecting the God-given right to life of innocent human beings from fertilization to natural death. Texas Right to Life is opposed to abortion and spearheads the legislative efforts in the Texas State Capitol to protect innocent human life.

1. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Rule 37.2.

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution and federal statutes.

SUMMARY OF ARGUMENT

The Court should grant certiorari and overrule *Hill v. Colorado*, 530 U.S. 703 (2000), a relic from the days in which the court-invented right to abortion led members of this Court to subordinate or disregard legal principles that apply in cases where the subject matter involves anything other than abortion. This well-documented phenomenon,[2] which has been variously labelled as "abortion exceptionalism,"[3] "abortion-speech-only jurisprudence,"[4] and the creation of "proabortion novelties,"[5] continues to linger in the precedents of this Court despite the overruling of *Roe v. Wade*, 410 U.S. 113 (1973). *Dobbs* repudiated the substantive-due-process right to abortion, and it invoked the "distortion" that pro-abortion jurists have

2. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814–15 (1986) (O'Connor, J., dissenting); *Hill v. Colorado*, 530 U.S. 703, 764–65 (2000) (Scalia, J., dissenting); *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in the judgment); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330–31 (2016) (Alito, J., dissenting); *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2275–76 (2022).

3. *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409, 457 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part).

4. *McCullen*, 573 U.S. at 497 (Scalia, J., concurring in the judgment).

5. *Hill*, 530 U.S. at 764–65 (Scalia, J., dissenting).

inflicted on "unrelated legal doctrines" as a reason for overruling *Roe* and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2275–76 (2022). But *Dobbs* did not overrule these court-created distortions, even as it criticized them as regrettable by-products of the *Roe/Casey* regime. The upshot is that the lower courts remain bound to apply many of the special dispensations that this Court has conferred on pro-abortion litigants—despite the overruling of *Roe* and *Casey*—and they will remain bound to these pronouncements unless and until this Court explicitly overrules them. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court 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, leaving to this Court the prerogative of overruling its own decisions."); Pet. App. 21a–22a (acknowledging that *Hill* "remains controlling precedent" and "dictates that the County's bubble zone withstands First Amendment scrutiny.").

Hill should be overruled for many reasons. Its ruling and rationale are not only wrong, they are indefensible. Even Professor Tribe says that *Hill* was "slam-dunk simple and slam-dunk wrong." *Colloquium, Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001). And a perusal of the Court's opinion makes evident why its analysis has been panned by commentators from across the ideological and jurisprudential spectrums. *See* Pet. for Cert. at 18–19 & n.12 (citing authorities).

To begin, the statute in *Hill* was content-discriminatory on its face, as it imposed criminal sanctions on anyone who knowingly entered a buffer zone "for the purpose of . . . engaging in oral protest, education, or counseling," while simultaneously allowing anyone to enter the buffer zone for the purpose of engaging in other types of speech, such as greeting or cheering on the person approaching an abortion clinic. *See Hill*, 530 U.S. at 708 (quoting Colo. Rev. Stat. § 18-9-122(3)).[6] Yet the Court somehow managed to hold that this explicit content-based speech restriction was "content neutral," even though it was written to explicitly protect the right of clinic escorts and those with pro-abortion messages to enter the buffer zone and engage in speech while withholding that same prerogative from anti-abortion sidewalk counselors. *See Hill*, 530 U.S. at 719–25; *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 (2007) (criticizing *Hill* for "maintaining that a content-based restriction on speech is not really content-based.").

Hill's analysis on the narrow-tailoring point was even worse. The *Hill* Court claimed that Colorado's statute was "narrowly tailored" to the state's interest in "protecting" individuals entering health-care facilities "from unwanted encounters, confrontations, and even assaults." *See id.* at

6. The full text of Colo. Rev. Stat. § 18-9-122(3) says: "No person shall knowingly approach another person within eight feet of such person, unless such other person consents, 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 in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor."

729. Yet the *Hill* opinion simultaneously characterizes Colorado's statutory restriction as "prophylactic" because it punishes sidewalk counselors who engage in "harmless" encounters after entering the buffer zone without the consent of the person being approached. *See id.* at 729.[7] "Prophylactic," however, is the antonym of "narrowly tailored." And the recognition that Colorado's statute reached beyond acts of harassment and intimidation by sweeping in "harmless" (and constitutionally protected) speech activities should have led the Court to enjoin the statute's enforcement as applied to the three plaintiffs—as it was undisputed that each of those plaintiffs had behaved peacefully and respectfully in their previous sidewalk counseling and had no intention of entering the buffer zone to threaten or obstruct. *See id.* at 710 ("There was no evidence . . . that the sidewalk counseling conducted by petitioners in this case was ever abusive or confrontational." (internal quotation marks omitted)). The majority conceded that the plaintiffs' "leafletting, sign displays, and oral communications" were all "protected by the First Amendment,"[8] so it was constitutionally obligated to protect the plaintiffs' acknowledged First Amendment rights against Colorado's efforts to suppress them.

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7. *See Hill*, 530 U.S. at 729 ("We recognize that [Colorado's statute] will sometimes inhibit a demonstrator whose approach in fact would have proved harmless.").

8. *Hill*, 530 U.S. at 715; *see also id.* ("[P]etitioners . . . correctly state that their leafletting, sign displays, and oral communications are protected by the First Amendment.").

Hill has also been undermined by subsequent decisions of this Court. The Court's most recent opinion on the free-speech rights of sidewalk counselors does not even mention *Hill* in its analysis, let alone attempt to defend it. *See McCullen v. Coakley*, 573 U.S. 464, 472–97 (2014). And a majority of this Court now admits that *Hill* "distorted First Amendment doctrines,"[9] acknowledging what the *Hill* dissenters and critics have been saying for decades. *Hill* is hanging by a thread, yet the lower courts remain bound to apply its holding and analysis despite the present-day Court's obvious unease with the decision.

The amici offer two arguments for certiorari that go beyond the arguments in the petition. First, the Court should grant certiorari even if it is unwilling (or unready) to overrule *Hill*, as lawmakers and litigants need clarity from this Court on whether *Hill* will survive—and they need that clarity sooner rather than later. Second, the Court should grant certiorari despite the County's recent decision to repeal section 425.31(i), as Ms. Vitagliano is asserting claims for nominal and compensatory damages that remain live even after the County's repeal of the disputed ordinance.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI EVEN IF IT IS UNWILLING OR UNREADY TO OVERRULE HILL V. COLORADO

The petition for certiorari asks this Court to grant for the purpose of overruling *Hill v. Colorado*. But the Court should grant the petition even if it is unwilling (or not yet

9. *Dobbs*, 142 S. Ct. at 2276.

ready) to take that step. Lawmaking bodies and those who litigate on behalf of sidewalk counselors need to know whether (and to what extent) this Court intends to stand by its pronouncement in *Hill* before investing time and resources into legislation or litigation that may or may not succeed in court. And they need clearer guidance than what this Court provided in *McCullen*, which broadens the ability of sidewalk counselors to attack buffer zones on narrow-tailoring grounds, yet leaves lawmakers without an idea of how much a buffer zone can overshoot without making itself vulnerable to a First Amendment lawsuit.

Lawmaking bodies such as the Westchester County Board of Legislators are currently in a tough spot. In normal circumstances, lawmakers can rely on statutes previously upheld by this Court as a template for their own enactments—and they can avoid expensive litigation (and the risk of an even more expensive attorneys' fee award) by replicating what this Court has already approved. Yet Westchester County has found itself haled into Court despite its decision to enact an ordinance that closely tracks the buffer-zone statute upheld in *Hill*. And any lawmaking body that enacts a similar law will face litigation (and threats of litigation) from opponents of *Hill* who sense that this Court may be ready to overrule it. If the Court is no longer willing to stand by the holding and rationale of *Hill*, then it should overrule the decision now rather than leaving lawmaking bodies guessing about the Court's

future intentions.[10] And if the Court is unwilling to overrule *Hill*, then it should grant certiorari and say so, which will provide needed assurance and guidance to state and local governments that are drafting and considering clinic-access laws.

The Court should also resolve the future of *Hill* now because litigants who oppose the decision are investing time and resources into lawsuits in the hopes of getting *Hill* overruled. If the Court has no interest in revisiting or modifying *Hill*, then it should grant certiorari and reaffirm the decision so that opponents of *Hill* can re-direct their efforts toward more fruitful goals. Right now, litigants and legislators perceive (rightly or wrongly) that *Hill* is on the chopping block, and the Court should grant certiorari either to overrule *Hill* or to disabuse them of that notion. Whatever this Court decides, a ruling that reaffirms or modifies the holding of *Hill* is preferable to a denial of certiorari, which merely prolongs the uncertainty.

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10. Waiting until a future case to overrule *Hill* will also leave municipal entities such as Westchester County on the hook for larger damages awards because they will have violated the constitutional rights of sidewalk counselors for longer periods of time. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (qualified immunity does not apply to damages awards sought against municipal entities).

II. THE COUNTY OF WESTCHESTER'S DECISION TO REPEAL THE DISPUTED PROVISION DOES NOT MOOT THE CASE OR CREATE ANY VEHICLE PROBLEMS

On August 7, 2023—17 days after Ms. Vitagliano filed her petition for certiorari—the County of Westchester repealed the eight-foot floating-bubble zone in section 425.31(i), apparently in an attempt to moot the case or create a vehicle problem that would counsel against certiorari.[11] The County can hardly be faulted for attempting this gambit, given that this Court allowed the city of New York to (largely) moot a constitutional challenge to a gun-control measure by amending it after this Court granted certiorari. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). But none of the County's post-filing maneuvering affects the certworthiness of the petition or the jurisdiction of this Court to review the constitutionality of section 425.31(i).

Vitagliano's complaint specifically requests an award of nominal and compensatory damages arising from the County's past enforcement of section 425.31(i).[12] Her

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11. *See Westchester BOL Bursts 8-Foot Personal Bubble Zone Outside Abortion Facilities*, Yonkers Times (August 15, 2023), available at bit.ly/3QTdOxl [perma.cc/L4QW-WDLH]; Jeremiah Poff, *Westchester, New York, scrambles to update abortion clinic law: 'Afraid of the Supreme Court,'* Washington Examiner (August 1, 2023), available at bit.ly/45kOswH [perma.cc/BL7S-REZ3].

12. *See* Complaint, *Vitagliano v. County of Westchester*, No. 7:22-cv-09370-PMH (S.D.N.Y.), ECF No. 1, at p. 22 ("Plaintiff requests that the Court: . . . d. Award Plaintiff compensatory damages for the harm suffered as a result of Defendants' deprivation of her constitutional rights; . . . f. Award Plaintiff nominal damages").

claims for retrospective relief are indisputably live, so the repeal of section 425.31(i) cannot moot or in any way undermine this Court's ability to rule on Vitagliano's First Amendment claims. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). This case is unlike *New York State Rifle & Pistol*, where the plaintiffs never requested damages in their pleadings[13] and this Court had to remand for the lower courts to determine whether the plaintiffs could salvage their constitutional claims by adding a newly asserted claim for damages. *See New York State Rifle & Pistol*, 140 S. Ct. at 1526–27; *but see Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (expressing skepticism toward the idea that "a claim for nominal damages, extracted late in the day from [a] general prayer for relief and asserted solely to avoid otherwise certain mootness" can maintain an Article III case or controversy). Vitagliano, by contrast, sought an award of damages from the get-go, and she specifically pleaded injury from the County's past enforcement of its eight-foot floating-bubble zone.[14] The Court's jurisdiction to resolve the constitutional questions in Vitagliano's petition is entirely secure.

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13. *See New York State Rifle & Pistol*, 140 S. Ct. at 1526 ("Petitioners . . . have not previously asked for damages with respect to the City's old rule"); *id.* ("Petitioners did not seek damages in their complaint; indeed, the possibility of a damages claim was not raised until well into the litigation in this Court.").

14. *See* Complaint, *Vitagliano v. County of Westchester*, No. 7:22-cv-09370-PMH (S.D.N.Y.), ECF No. 1, at ¶ 64 ("Despite her earnest desire to engage in sidewalk counseling outside the White Plains Planned Parenthood, Plaintiff has not done so because of the Sidewalk Counseling Ban.").

The repeal of section 425.31(i) does not even present a jurisdictional complication or wrinkle that might counsel in favor of waiting for a different vehicle. Vitagliano has asserted claims for nominal and compensatory damages since the outset of the lawsuit—so the repeal does not even raise a *possible* question of mootness, and it does not implicate any of the issues that divided the members of this Court in *New York State Rifle & Pistol*. *Compare New York State Rifle & Pistol*, 140 S. Ct. at 1526–27 (per curiam), *with id.* at 1533–40 (Alito, J., dissenting). Matters would of course be different if Vitagliano had never sought retrospective relief in her complaint, but she did. So it is hard to understand why the County would think that a sudden repeal of section 425.31(i) would do anything to help its efforts to beat back the certiorari petition.

If anything, the County's repeal of section 425.31(i) should make this Court more eager to select this petition as the vehicle for reconsidering *Hill*. A denial of certiorari will be perceived as a vindication of the County's keep-away tactics, even though the County's efforts are a flop, and it will embolden lawmaking bodies into thinking that they can throw a monkey wrench into a certiorari petition whenever they repeal a provision of law that the Court is being asked to review. The Court's disposition of *New York State Rifle & Pistol* may have already created that impression among those who fail to understand the nuances of the Court's ruling, and the County of Westchester's alacrity in repealing section 425.31(i) suggests as much. All the more reason for this Court to grant the petition and make clear that the respondents in *New York State Rifle & Pistol* succeeded in ducking this Court's

review only because the petitioners in that case had failed to assert a claim for damages in the lower courts—and that mootness-by-repeal efforts are useless when a litigant is seeking damages alongside its requests for prospective relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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