NO. 18-1516

IN THE

# Supreme Court of the United States

VERONICA PRICE, et al.,

*Petitioners,*

v.

CITY OF CHICAGO, et al.,

*Respondents.*

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

## BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether this Court should reconsider its decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), because that decision conflicts directly with *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), and *McCullen* v. *Coakley*, 573 U.S. 464 (2014).

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## INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and litigation services to protect our First Amendment freedoms—including free speech. Since 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (representing Christian cake artist Jack Phillips), *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) (representing pro-life pregnancy centers), *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015) (representing church and its pastor, Clyde Reed), *McCullen* v. *Coakley*, 573 U.S. 464 (2014) (representing pro-life sidewalk counselor Eleanor McCullen), and hundreds more cases in lower courts.

Alliance Defending Freedom submits this brief to highlight the damage that *Hill* v. *Colorado*, 530 U.S. 703 (2000), has done to free speech rights in the years since the Court decided it.

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[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All counsel were timely notified of this filing as required by Supreme Court Rule 37.2, and counsel for all parties consented to the filing of this brief.

## SUMMARY OF THE ARGUMENT

In all but the most "narrow circumstances," the "Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210 (1975). Such narrow circumstances include situations where "government may properly act . . . to prohibit intrusion *into the privacy of the home* of unwelcome views and ideas which cannot be totally banned from the public dialogue." *Cohen* v. *California*, 403 U.S. 15, 21 (1971) (emphasis added).

*Hill* did not implicate privacy in the home. It involved Colorado's alleged interest in "protect[ing] listeners from unwanted communication," even on public sidewalks. 530 U.S. at 715–16. Unsurprisingly, lower courts have since used *Hill* to uphold state-sanctioned limits on speech in many traditional public fora. Unless and until the Court overrules *Hill*, "the First Amendment is a dead letter" in these jurisdictions. *Id.* at 748–49 (Scalia, J., dissenting).

*Hill* remains "an unprecedented departure from this Court's teachings respecting unpopular speech in public fora." 530 U.S. at 772 (Kennedy, J., dissenting). And the Court's more recent attempts to correct course have not worked. This Court should grant the petition, vacate the decision of the court of appeals, and decisively reaffirm that government "shall make no law . . . abridging the freedom of speech," even speech that the intended audience may not wish to hear. U.S. CONST. amend. I.

## ARGUMENT

### I. *Hill* drastically expanded the scope of the captive-audience doctrine.

*Hill* framed the issue before the Court as requiring it to find "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners." 530 U.S. at 714. On one side, pro-life sidewalk counselors argued that a statute regulating "speech-related conduct within 100 feet of the entrance to any health care facility" had chilled their efforts to counsel women considering abortion. *Id.* at 707, 708–09. On the other, the Court placed the State's broad "police powers to protect the health and safety of their citizens," including the more specific power to "protect listeners from unwanted communication." *Id.* at 715, 716 (internal quotation marks omitted). Such protection, the Court believed, would allow states to preserve the "unwilling listener's . . . broader 'right to be let alone.'" *Id.* at 716–17 (quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Those "privacy interest[s]," the Court conceded, have "special force in the privacy of the home" and its "immediate surroundings." 530 U.S. at 717. But the Court refused to cabin the State's interest in protecting "unwilling listeners" to such settings. *Ibid.*

Instead, the Court held that the State can protect a listener's "right to avoid unwelcome speech" in "confrontational settings," even in "'quintessential' public forums for free speech" like "public sidewalks,

streets, and ways." 530 U.S. at 715, 717. Armed with that expansive state interest, the Court had no trouble upholding a law that "empower[ed] 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." *Id.* at 734.

Justice Scalia dissented: "[I]f protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter." *Id.* at 748–49 (Scalia, J., dissenting). He was right. This Court had "upheld limitations on a speaker's exercise of his right to speak on the public streets *when that speech intrudes into the privacy of the home*." *Id.* at 752 (Scalia, J., dissenting). And the Court had also "recognized the interests of unwilling listeners" in "public conveyances" like city buses, where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* at 753 n.3 (Scalia, J., dissenting) (internal quotation marks omitted).

But the Court had "never made the absurd suggestion that a pedestrian is a 'captive' of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly by." *Ibid.* (Scalia, J., dissenting). "'*Outside the home*, the burden is generally on the observer or listener to avert his eyes or plug his ears against the . . . 'offensive' intrusions which increasingly attend urban life.'" *Id.* at 752–53 (Scalia, J., dissenting) (emphasis added) (quoting L. Tribe, *American Constitutional Law* § 12–19, p. 948 (2d ed. 1988)). By expanding the

scope of the captive-audience doctrine, the Court had "elevate[d] the abortion clinic to the status of the home." *Id.* at 753 (Scalia, J., dissenting).

Expressing equal displeasure, Justice Kennedy wrote separately to highlight the "glaring departure from precedent" in the Court's holding that "citizens have a right to avoid unpopular speech *in a public forum*." 530 U.S. at 771 (Kennedy, J., dissenting) (emphasis added). None of the cases the Court cited had "establishe[d] a right to be free from unwelcome expression aired by a fellow citizen in a traditional public forum." *Ibid.* (Kennedy, J., dissenting). "Instead, the Court [had] admonished that citizens usually bear the burden of disregarding unwelcome messages." *Id.* at 772 (Kennedy, J., dissenting). By deviating from that principle, *Hill* represented "an unprecedented departure from this Court's teachings respecting unpopular speech in public fora." *Ibid.* (Kennedy, J., dissenting).

## II. Lower courts have followed *Hill*'s lead, shielding listeners from unwelcome speech even in public places.

1. After *Hill* equated public sidewalks with the home, lower courts ran with the captive-audience doctrine, extending it to a forum as quintessentially public as Central Park. In *Central Park Sightseeing LLC* v. *New Yorkers for Clean, Livable & Safe Streets, Inc.*, animal rights protesters appealed an injunction to one of New York's intermediate appellate courts in a case involving a dispute between the protesters and a horse-drawn carriage ride operator. 157 A.D.3d 28, 30 (N.Y. App. Div. 2017).

Citing *Hill*, the appellate court upheld a modified version of the injunction—preventing the protesters from, among other things, "knowingly approaching within nine feet of another person in the loading/unloading zone, without that person's consent, for the purpose of handing a leaflet or bill or displaying a sign or engaging in oral protest or education of such other person." *Id.* at 34.

The court upheld the injunction even while recognizing that "[p]ublic sidewalks, streets, and ways are the 'quintessential' public fora for free speech, and leafletting, signs, and displays are time-honored methods of communication enjoying First Amendment protection." *Ibid.* (citing *Hill*, 530 U.S. at 715). On what basis? *Hill*: "Nonetheless, the Supreme Court has consistently recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Ibid.* (quoting *Hill*, 530 U.S. at 718). According to the court, the modified injunction struck "the appropriate balance between the First Amendment rights of the protestors and the rights of customers and other pedestrians to avoid unwelcome approaches" and "unwanted intrusions," *id.* at 30, 34, even in Central Park.

Moving from the East Coast to the West, in *Berger* v. *City of Seattle*, a street performer sued the City of Seattle, challenging city rules prohibiting certain types of speech activities on an "84-acre parcel of land" called "Seattle Center," which is "home to museums, theaters, sports arenas, and other entertainment and cultural destinations, including the Space Needle." No. C03-3238JLR, 2005 WL

8161729, at *1 (W.D. Wash. Apr. 22, 2005). One such rule disallowed all "speech activities" within 30 feet of any "captive audience," and was designed to address "visitors' complaints about unwanted harangues and solicitations while waiting in line for Seattle Center events." *Id.* at *3–4.[2]

The district court held that the rule violated the First Amendment, but not for the obvious reason that its purpose was to limit speech in a traditional public forum merely because the intended audience did not wish to hear it. *Id.* at *6. Instead, the court declined to reach that issue and merely held that because the rule contained exceptions, it was "not narrowly tailored to advance [the City's] interest in protecting captive audiences." *Ibid.*

A panel for the Ninth Circuit Court of Appeals, while not specifically citing *Hill*, relied on this Court's captive-audience case law to support its conclusion that Seattle Center's "authorities had the right to protect captive audiences seeking to enjoy" the Center's "public entertainment, relaxation, and edification." *Berger* v. *City of Seattle*, 512 F.3d 582, 605 (9th Cir. 2008). The panel took great comfort in knowing that the rule did "not silence a message in the Seattle Center, but only prevent[ed] it from being expressed in locations where it would pose a serious

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[2] "Speech activities" included "political speech and commercial speech" but not "activity conducted by City employees or licensed concessionaires," while a "captive audience" included "any person or group waiting in line to attend a Seattle Center event or purchase tickets, goods, or services; attending a Seattle Center event; or eating in a designated location." *Id.* at *6.

threat to order and to the *convenience and peace of patrons*." *Id.* at 605–06 (emphasis added).

The en banc Ninth Circuit reversed, singling out the captive-audience rule as the "most troublesome of the challenged regulations." *Berger* v. *City of Seattle*, 569 F.3d 1029, 1053 (9th Cir. 2009) (en banc). According to the majority, this Court's captive-audience case law "fully supports" the "conclusion that public park-goers, in general, are not a protectable captive audience for constitutional purposes." *Id.* at 1054.

The majority got it right, but three judges dissented, calling the rule a "reasonable method of achieving the City's legitimate interest in the safety and convenience of Seattle Center patrons." *Id.* at 1081 (Gould, J., dissenting). Stating the point more bluntly, the dissent insisted that the City had a "significant governmental interest in ensuring that these patrons [had] an enjoyable experience, so that Seattle Center and the City as a whole [could] continue to be a desirable and commercially profitable destination." *Id.* at 1080–81 (Gould, J., dissenting).

Under this broad reasoning, Seattle could respond to a march for life by banning all speech activities in the City's commercial district. Montgomery, Alabama, could respond to a pro-choice rally by doing the same. When the government can implement speech bans in public places to ensure that citizens have "an enjoyable experience," the First Amendment has ceased to protect anything. Yet *Hill* justifies that outcome.

2. Peaceful pro-life sidewalk counselors have not fared any better in *Hill*'s wake. In *McGuire* v. *Reilly*, the First Circuit held that *Hill* controlled its consideration of a Massachusetts statute creating a "floating six-foot buffer zone around pedestrians and motor vehicles as they approach[ed] reproductive health care facilities." 260 F.3d 36, 38–39 (1st Cir. 2001). Pro-life sidewalk counselors brought a First Amendment challenge, and the district court granted a preliminary injunction. *Id.* at 41–42.

The First Circuit reversed. *Id.* at 42. Rejecting the district court's conclusion that exemptions for clinic workers made the statute content-based, the court reasoned that the legislature rationally could have believed clinic employees were less likely to direct "unwanted speech toward captive listeners—a datum that the *Hill* Court recognized as justifying the statute there." *Id.* at 44–46.

Similarly, in *Brown* v. *City of Pittsburgh*, the Third Circuit held that a "bubble zone" ordinance challenged by a pro-life sidewalk counselor was constitutional on its face because, like the statute upheld in *Hill*, the ordinance "impair[ed] primarily the effort to communicate with unwilling listeners."[3] 586 F.3d 263, 272 (3d Cir. 2009). "As the bubble zone created by the Ordinance at issue here [was] a virtually verbatim copy of the *Hill* statute," the court found "this portion of the Ordinance, taken alone, to

[3] *Amicus* represented the sidewalk counselor in this case.

be facially valid under the First Amendment's Free Speech Clause." *Id.* at 273.[4]

And in *Madison Vigil for Life, Inc.* v. *City of Madison*, the District Court for the Western District of Wisconsin denied a motion for a temporary restraining order filed by various pro-life groups and individuals seeking protection from a city ordinance similar to the Colorado statute upheld in *Hill*.[5] 1 F. Supp. 3d 892, 894, 900 (W.D. Wis. 2014). In so holding, the court discarded one of the few limits on the unwelcome-speech doctrine that *Hill* articulated.

In addition to privacy in the home, the *Hill* opinion emphasized a government interest to protect citizens from unwelcome speech "*in confrontational settings*." 530 U.S. at 717 (internal citations omitted) (emphasis added). In *Madison Vigil*, the City failed to proffer any evidence of confrontational demonstrations at any of the protected abortion clinics. 1 F. Supp. 3d at 896. Undeterred, the district court rationalized that it was not "clear the City need[ed] to do so to prevail, since the Supreme Court in *Hill* [did] not appear to rely heavily on [such] confrontations." *Ibid.*

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[4] The court ultimately "vacate[d] the denial of the preliminary injunction with respect to Brown's claim that the Ordinance [was] unconstitutional *as applied to specific clinic sites*." *Id.* at 297 (emphasis added). As the petitioners note in their petition, Pet. at 31, the district court permanently enjoined the bubble zone on remand, *Brown* v. *City of Pittsburg*, No. 06-393, 2010 WL 2207935, at *2 (W.D. Pa. 2010). And *amicus* remains involved in litigation over the buffer zone. *See Bruni* v. *City of Pittsburgh*, 283 F. Supp. 3d 357 (W.D. Pa. 2017), *appeal pending*.

[5] *Amicus* represented the plaintiffs in this case.

There had "undoubtedly been demonstrations, *confrontational or otherwise*, outside of various health care facilities across the country." *Ibid.* (emphasis added). So, the absence of "confrontational demonstrations in the record," the district court continued, did not "lessen the legitimacy" of the City's desire to protect the "'unwilling listener's interest in avoiding unwanted communication.'" *Ibid.* (quoting *Hill*, 530 U.S. at 716). In so holding, the court rejected even this modest attempt to limit the captive-audience doctrine's scope. Such reasoning opens the door to any government regulation designed to protect citizens from unwelcome speech, which is nothing less than the power to shut down *all* speech whatsoever.

3. Most illuminating, lower courts have used *Hill* to uphold the very kind of speech restrictions that this Court struck down in *Snyder* v. *Phelps*, 562 U.S. 443 (2011). Perhaps no form of "speech in public fora" has been more unpopular, *Hill*, 530 U.S. at 772 (Kennedy, J., dissenting), than the Westboro Baptist Church's pickets and protests conducted near our nation's military funerals. Although this Court in *Snyder* declined to "expand the captive audience doctrine" to protect mourners from Westboro's speech, 562 U.S. at 460, lower courts have used *Hill*'s captive-audience reasoning to uphold laws intended to limit Westboro's ability to express its views in public.

For example, in *Phelps-Roper* v. *Strickland*, the Sixth Circuit cited *Hill* to support the court's holding that the State's "important interest in the protection of funeral attendees" justified a "Funeral Protest Provision" preventing Westboro from picketing and protesting within 300 feet of a funeral or burial

service for one hour before, during, and for one hour after the event. 539 F.3d 356, 358, 366 (6th Cir. 2008). "[T]he *Hill* Court found a significant interest because the audience to unwanted communication was captive." *Id.* at 364. And "mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service." *Id.* at 366. So, the Sixth Circuit affirmed the district court's decision rejecting Westboro's First Amendment challenge. *Id.* at 373.

The Eighth Circuit Court of Appeals reached the same conclusion in a trio of post-*Snyder* funeral-protest cases. In *Phelps-Roper* v. *City of Manchester*, the court used *Hill* to overrule two of its earlier decisions "limit[ing] the government's interest in protecting unwilling listeners to residential settings." 697 F.3d 678, 692 (8th Cir. 2012) (en banc). "That reasoning [did] not withstand scrutiny, however, given" *Hill*'s holding that "government can show such an interest 'in confrontational settings,' and in certain instances when the 'offensive speech . . . is so intrusive that the unwilling audience cannot avoid it.'" *Ibid.* (quoting *Hill*, 530 U.S. at 716, 717) (internal citation omitted).

Noting that mourners must "be in a certain place at a certain time to participate in a funeral or burial and are therefore unable to avoid unwelcome speech at that place and time," the court held that the City had "shown a significant government interest in protecting the peace and privacy of funeral attendees for a short time and in a limited space." 697 F.3d at 692, 693. Ultimately, the court reversed the district

court's ruling that the challenged ordinance violated the First Amendment. *Id.* at 695.

One year later, the Eighth Circuit applied that decision in *Phelps-Roper* v. *Koster*, upholding a Missouri statute making it unlawful "to engage in picketing or other protest activities within three hundred feet of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral." 713 F.3d 942, 947, 954 (8th Cir. 2013).

Four years later, the Eight Circuit went even further, this time upholding Nebraska's buffer zone prohibiting "picketing within *500 feet* of a cemetery, mortuary, or church from one hour prior through two hours following the commencement of a funeral." *Phelps-Roper* v. *Ricketts*, 867 F.3d 883, 888, 893–94 (8th Cir. 2017) (emphasis added). Highlighting expert testimony that mourners "felt victimized by [Westboro's] pickets" and that "the 500-foot buffer zone helps," the court found a "significant government interest" in ensuring "vulnerable friends and family can mourn and honor their deceased loved one in a respectful environment of peace and privacy free from unwanted public exploitation." *Id.* at 894.

## III. This Court's attempts to limit *Hill* without explicitly overruling it have not worked.

*Central Park* was decided two-and-a-half years after this Court's decision in *McCullen*. In *McCullen*, this Court was clear that the challenged statute "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." 573 U.S. at 481 (internal quotation marks omitted). On the contrary, the Court praised public streets and sidewalks as "venues for the exchange of ideas" given that, in these fora, "a listener often encounters speech he might otherwise tune out." *Id.* at 476. "[T]his aspect of traditional public fora," the Court continued, "is a virtue, not a vice." *Ibid.*

It is difficult to square *McCullen* with *Central Park*'s assertion that this Court has "*consistently* recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" 157 A.D.3d at 34 (quoting *Hill*, 530 U.S. at 718) (emphasis added). And the *Central Park* court should not have tried to "balance . . . the First Amendment rights of the protestors and the rights of customers and other pedestrians to avoid unwelcome approaches" and "unwanted intrusions." *Id.* at 30, 34. If the buffer-zone statute in *McCullen* would have been content-based if it were premised on an asserted interest in protecting unwilling listeners "from the direct impact of speech," 573 U.S. at 481, surely the challenged injunction in *Central Park* was also content-based.

But *Central Park* never cites *McCullen*, relying instead on *Hill* and holding that the injunction was content-neutral. 157 A.D.3d at 34. Regardless of the court's reason for ignoring *McCullen*, *Central Park* proves that the damage done in *Hill* cannot easily be undone until this Court takes the affirmative step to overrule *Hill* explicitly.[6]

The trio of post-*Snyder* Eighth Circuit cases proves the same point. Again, in *Snyder*, this Court explicitly "decline[d] to expand the captive audience doctrine to the circumstances presented" there. 562 U.S. at 460. The Court noted that it had applied the doctrine "only sparingly to protect unwilling listeners from protected speech." *Id.* at 459. As examples, the Court cited its decisions to uphold a statute "allowing a homeowner to restrict the delivery of offensive mail to his home, and an ordinance prohibiting picketing 'before or about' any individual's residence." *Id.* at 459–60 (internal citations omitted). Noticeably absent from the Court's discussion in *Snyder* was any mention of *Hill*.

Yet, less than two years later in *Phelps-Roper* v. *City of Manchester*, the Eight Circuit distinguished *Snyder* and applied *Hill*, recognizing a "significant government interest" in protecting mourners' "privacy" and shielding them from "unwelcome

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[6] *McCullen* did at least provide relief for the pro-life plaintiffs in *Madison Vigil*. Press Release, Alliance Defending Freedom, City of Madison officially rescinds censorship zones (Aug. 7, 2014), http://www.adfmedia.org/News/PRDetail/8906. But that resulted from a *legislative* change, so it remains unclear whether the district court would have felt compelled to change course.

speech." 697 F.3d at 692–93. The court's subsequent decisions in *Phelps-Roper* v. *Koster* and *Phelps-Roper* v. *Ricketts* merely followed suit. *Koster*, 713 F.3d at 951; *Ricketts*, 867 F.3d at 893–94.

Finally, the decision below demonstrates that—so long as speech restrictions more closely resemble the statute upheld in *Hill* than the statute struck down in *McCullen*—lower courts will apply *Hill* despite its overly expansive view of the captive-audience doctrine and its substantial diminishment of First Amendment freedoms. *Price* v. *City of Chicago*, 915 F.3d 1107, 1118 (7th Cir. 2019) (noting that the "bubble-zone law upheld in *Hill* was aimed in substantial part at guarding against the undesirable effects of the regulated speech on listeners," which was "not a content-neutral justification" after *McCullen*).

The Seventh Circuit "felt bound to apply" *Hill*, but the court "facilitated [this Court's] review" by "plainly expressing its doubts." *Eberhart* v. *United States*, 546 U.S. 12, 19–20 (2005). Presented with this opportunity to undo the damage *Hill* has inflicted, the Court should grant the petition and overrule *Hill* as inconsistent with the First Amendment.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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