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 Writ of Certiorari
to the Seventh Circuit Court of Appeals

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should reconsider *Hill v. Colorado*, 530 U.S. 703 (2000) in light of the Court's intervening decisions in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) and *McCullen, v. Coakley*, 573 U.S. 464 (2014) .

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT 2

I. The First Amendment Was Intended To Protect Citizens' Rights To Share Ideas, Even on Controversial Topics 2

II. This Court Should Grant Review to Overrule *Hill v. Colorado*. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Boos v. Berry,
485 U.S. 312 (1988) 13

Burson v. Freeman,
504 U.S. 191 (1992) 14

Cornelius v. NAACP Legal Defense and Education Fund, Inc.,
473 U.S. 788 (1985) 13

Frisby v. Schultz,
487 U.S. 474 (1984) 13

Grayned v. City of Rockford,
408 U.S. 104 (1972) 13

Hague v. CIO,
307 U.S. 496 (1939) 12

Hill v. Colorado,
530 U.S. 703 (2000) ....passim

International Society for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) 13

Knox v. Serv. Employees Int'l Union,
567 U.S. 298 (2012) 1

Lovell v. City of Griffin,
303 U.S. 444 (1938) 12

McCullen v. Coakley,
573 U.S. 464 (2014) ....i, 1, 2, 15

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 11

National Inst. of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) 1

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 10

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 13

Police Dep't of City of Chicago v. Mosley,
408 U.S. 92 (1972) 11, 13

Reed v. Town of Gilbert,
135 S.Ct. 2218 (2015).................................i, 1, 2, 15

Schneider v. State of New Jersey,
308 U.S. 147 (1939) 12

Snyder v. Phelps,
131 S.Ct. 1207 (2011)...14

Thornhill v. Alabama,
310 U.S. 88 (1940) 6

United States v. Grace,
461 U.S. 171 (1983) 13

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 2

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 3

Statutes and Constitutional Provisions

Colo. Rev. Stat. § 18–9–122(1) (1999)..........................1

Declaration of Independence, ¶ 2 (U.S. 1776) 7

Sedition Act of 1798, 2 Stat. 596,
ch. 74, § 2 (1798)... 9, 10

U.S. Const. Amend. I ....passim

Other Authorities

4 ANNALS OF CONGRESS, p. 934 (1794) 10

Agrippa XII, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 (John P. Kaminski, et al. eds. 2009) 8

Americans Speak Freely, United States Department of State, Bureau of International Information Programs, March 2013....................................... 7, 16

Cahn, Edmond, *The Firstness of the First Amendment*, 65 Yale L.J. 464 (1956) 4, 9

Candidus II, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 (John P. Kaminski, et al. eds. 2009) 8

Cooley, Thomas, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) 4

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Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987)......8

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George Mason's Objections, Massachusetts Centinel, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION,

Commentaries on the Constitution No. 2 (John P. Kaminski, et al. eds. 2009)......................................7

History of Congress, February, 1799...........................9

Journal of the Continental Congress, 1904 ed., vol. I5

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Letter of Thomas Jefferson to James Madison, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, et al. eds. 2009) 8

Madison, James, *On Property*, Mar. 29, 1792.........3, 5

Needles, Edward, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848)...6

New York Ratification of Constitution (July 26, 1788), reprinted in 5 The Founders' Constitution (Philip B. Kurland & Ralph Lerner, eds. 1987)......8

The Dissent of the Minority of the Convention, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania (John P. Kaminski, *et al*. eds. 2009)........................8

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) 6

Thorpe, Francis N., THE FEDERAL AND STATE CONSTITUTIONS (William S. Hein 1993)...................5

Virginia Ratification Debates reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 (John P. Kaminski, et al. eds. 2009)..8

Rules

Sup. Ct. Rule 37.2(a)...1

Sup. Ct. Rule 37.6 1

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. The Center has previously appeared before this Court in several cases addressing First Amendment issues similar to those raised in this case, including *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (counsel for petitioner), and *McCullen v. Coakley*, 573 U.S. 464 (2014) (amicus).

SUMMARY OF ARGUMENT

The Seventh Circuit noted that it was bound by this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), but that *Hill* was inconsistent with later decisions of this Court defining content neutrality for purposes of a public forum and applying the narrow tailoring test for regulations that were facially content neutral. This Court in *Hill* ruled that a bubble zone ordinance was content neutral even though it was enacted to protect patients of abortion clinics from "potential trauma" caused by people exercising their "right to protest or counsel *against*" abortion. *Hill*, 530 U.S. at 715; *id.* at 744 (Scalia, J., dissenting) (quoting Colo. Rev. Stat. § 18–9–122(1) (1999), emphasis added). In *Reed v. Town of Gilbert, AZ*, however,

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. 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 *amici* made a monetary contribution to fund the preparation and submission of this brief.

this Court explained that there is "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.'" *Reed v. Town of Gilbert, AZ*, , 135 S.Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Similarly, the *Hill* Court's narrow tailoring analysis is incompatible with narrow tailoring as applied by this Court in *McCullen v. Coakley*, 573 U.S. 464 (2014). In *McCullen*, this Court ruled that a buffer zone prohibiting speech in a traditional public forum burdened substantially more speech than necessary to achieve the asserted interest. The *Hill* Court did not conduct a similar analysis.

The First Amendment was intended to protect speech that challenged the listener – speech intended to change the listener's mind. The Chicago ordinance at issue here and the law upheld in *Hill* are instead intended to ensure that those visiting an abortion clinic will not be approached by someone with a "caring demeanor, a calm tone of voice, and direct eye contact" who wishes to discuss a matter of utmost importance. The First Amendment does not allow such a purpose and this Court should grant review to overrule its prior decision in *Hill*.

REASONS FOR GRANTING THE WRIT

I. The First Amendment Was Intended To Protect Citizens' Rights To Share Ideas, Even on Controversial Topics

The City of Chicago does not want pro-life advocates speaking to women going to and from abortion

clinics. Prolife counselors are permitted to shout and scream from eight feet away – but they are not permitted to engage in normal conversation. This does not prevent intimidation or harassment; it prohibits calm and caring conversation. The city bars simple human communication not because it supports a woman's right to choose whether or not to have an abortion, but because it does not want the woman to choose something other than an abortion.

The city, however, cannot forbid discussion of alternatives to abortion simply because it wishes to promote abortion. Even if the city's purpose is to avoid conversations on uncomfortable or controversial topics, there is no such exception to the free speech guaranty. 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, in an attempt 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. 624, 642 (1943). 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. As Thomas Cooley noted, 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. Understandably, Paine 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 adopted 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. The Pennsylvania Abolition Society was formed in 1775. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. 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 – a position that was highly controversial in many parts of the colonies.

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).

This example of the abolitionist speech activities is one that the Obama administration highlighted as an example of the type of free speech guaranteed by the First Amendment. Adapting a speech by then Assistant Attorney General Thomas Perez given to the Conference on the Transformation of Security and

Fundamental Rights Legislation in Kuala Lumpur, Malaysia, the State Department published a pamphlet of its own to tell citizens in other countries about the importance of freedom of speech.[2] *Americans Speak Freely*, United States Department of State, Bureau of International Information Programs, March 2013. Secretary Perez's speech and the State Department pamphlet specifically identify the "writings of abolition pamphleteers" as the type of activity protected by the First Amendment Freedom of Speech. *Id*. at 2-3

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, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at

[2] Oddly, however, the State Department's pamphlet asserted that "citizens right to think, believe, pray, write or speak as their conscience dictates" is something that is granted by the government. *Americans Speak Freely*, *supra*, at 2. Such rights are not gifts from government officials, but are instead inalienable and bestowed by our Creator. Declaration of Independence, ¶ 2 (U.S. 1776).

250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 722 (John P. Kaminski, et al. eds. 2009).

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, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). 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 (Philip B. Kurland & Ralph Lerner eds., 1987). 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, Pennsylvania (John P. Kaminski, *et al*. eds. 2009).

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 its 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, 2 Stat. 596, ch. 74, § 2 (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 of the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled 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.

In *New York Times*, this Court 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," however, 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 that the people intended the First Amendment's speech and press clauses to protect the natural right to share opinions on controversial topics. *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, Chicago has rejected liberties the founders protected in the Constitution. The city prohibits normal human conversation in a traditional public forum in order to censor those who wish to discuss alternatives to abortion with women visiting the abortion clinic. "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).

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

This Court's decision in *Hill v. Colorado* invited Chicago and other govern entities to enact laws similar to the one under review in this case. In *Hill*, this Court ruled that a law prohibiting approaching a person near an abortion clinic "'for the purpose of ... engaging in oral protest, education, or counseling'" was a content neutral regulation. *Hill*, 530 U.S. at 720-21. The Court stated that the Colorado law did not prohibit a "particular viewpoint." *Id*. at 723. But the Court ignored the clear intent of the law to prohibit anti-abortion messages – an intent made clear by the

use of language like "protest," "education," and "counseling" that plainly aimed at one, and only one, point of view. Indeed, later in the opinion the Court explicitly recognized that the state had targeted particular messages. The Court noted the state's concession that the law was designed to ensure that women entering an abortion clinic would be free from "unwanted encounters" with people opposed to abortion. *Id*. at 729.

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, certiorari is warranted so that this Court can restore consistency in its First Aendment jurisprudence by overruling *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*, 131 S.Ct.

1207 (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 1217.

The one exception to this line of authority, other than *Hill*, involved a prohibition of campaigning within 100 feet of a polling place on Election Day. *Burson v. Freeman*, 504 U.S. 191 (1992). The plurality opinion upholding the prohibition found the statute narrowly tailored and supported by the compelling state interest in preventing voter intimidation and election fraud. *Id*. at 198-202 (plurality opinion of Blackmun, J.) Justice Scalia concurred in the judgment but on the basis that he believed long-standing restrictions on campaigning near a polling place had withdrawn those areas from the public forum – at least for the brief period of time necessary of the actual conduct of the election. *Id*. at 215-16 (Scalia, J., concurring in the judgment).

The restrictions of the type approved in *Hill*, by contrast, are quite different from the polling place restrictions. The statute in *Burson* did not prohibit all speech, but only prohibited active campaigning. *Id*. at 193-94 (plurality opinion of Blackmun). Where the type of statute at issue in *Burson* had been in effect in a number of states for nearly a century (*id*. at 215-16 (Scalia, J., concurring in the judgment), the restrictions on speech near abortion clinics are a recent invention. In *Burson*, the restriction was only in place for Election Day. The statute at issue in this case restricts freedom of speech every day of every year.

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).

Nor does *Hill* fit in with recent developments in this Court's First Amendment jurisprudence. 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."" *Reed*, 135 S.Ct. at 2227. The Chicago 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. Similarly, *Hill*'s approach to narrow tailoring is inconsistent with this Court's more recent decision in *McCullen*. In *McCullen*, this Court noted that the ordinance swept far too broadly, especially considering that it prohibited speech in a traditional public forum. *McCullen*, 573 U.S. at 490, 497. That analysis is missing from the decision in *Hill*.

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 for writ of certiorari and overrule *Hill*.

CONCLUSION

The history behind the free speech clause shows an intent to protect the citizen's right to share opinions with other citizens on controversial topics. This

is Madison's theory that the people have "a property" in their opinions and their ability to share those opinions.

It does not matter if the opinions at issue are on a matter of controversy. As the Obama Administration noted in explaining the Free Speech guaranty to citizens of other countries, the importance of the right rests in the ability of citizens to move public opinion on matters of intense controversy – like abolition. *Americans Speak Freely*, *supra*, at 2-3. It would hardly advance these ideals to say that abolitionist speech is fine in general, but it should not happen anywhere close to an actual slave auction. The value of a free speech guaranty is that allow citizens to go directly to those whose opinion they need to change. Review should be granted to overturn the decision in *Hill* as inconsistent with this Court's First Amendment Jurisprudence.

July 2019 Respectfully submitted,

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