No. ______

In the Supreme Court of the United States

DEBRA A. VITAGLIANO,

Petitioner,

v.

COUNTY OF WESTCHESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hill* v. *Colorado*, 530 U.S. 703 (2000), this Court upheld a law that banned approaching within eight feet of another person in public fora outside abortion clinics "for the purpose of * * * engaging in oral protest, education, or counseling," unless that person consents. On the day it was decided, members of this Court recognized that *Hill* stands "in stark contradiction of the constitutional principles [the Court] appl[ies] in all other contexts" outside abortion. *Id.* at 742 (Scalia, J., dissenting); see also *id.* at 765 (Kennedy, J., dissenting) (*Hill* "contradicts more than a half century of well-established First Amendment principles"). Three Justices have since recognized that intervening precedents have "all but interred" *Hill*'s analysis, leaving it "an aberration in [the Court's] case law." *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1484, 1491 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting). And the Court has observed that *Hill* was a "distort[ion]" of "First Amendment doctrines." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022).

In June 2022, Westchester County passed a law materially identical to the one upheld in *Hill*. The Second Circuit upheld the law based solely on *Hill*'s continued precedential force.

The question presented is whether the Court should overrule *Hill*.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Vitagliano* v. *County of Westchester*, No. 23-30, U.S. Court of Appeals for the Second Circuit. Judgment entered June 21, 2023.
- *Vitagliano* v. *County of Westchester*, No. 7:22-cv-9370, U.S. District Court for the Southern District of New York. Judgment entered January 3, 2023.

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INTRODUCTION

If the First Amendment protects anything, it protects the right to engage in peaceful, face-to-face conversations about important matters on a public sidewalk. But last year, in response to *Dobbs,* Westchester County prohibited approaching others in public fora near abortion clinics "for the purpose of * * * engaging in oral protest, education, or counseling," "unless such other person consents." Laws of Westchester County §425.31(*i*). A paradigmatic example of First Amendment activity—approaching a fellow citizen on a public way and engaging with her on an issue of public concern—is now a crime punishable by jail time.

Under the County's law, if a person approaches another to protest, educate, or counsel without consent, she has committed a crime. Yet it remains perfectly legal to approach without consent to communicate any other content—for example, to ask the time, seek directions, take a poll, solicit donations, or wish a woman good luck with her abortion. Whether a speaker must obtain consent before approaching turns entirely on what she intends to say. The law is content based on its face and therefore presumptively unconstitutional.

Petitioner Debra Vitagliano is a Westchester County resident who believes in the dignity of all human beings and wants to help women considering abortion who may not have full information about their options. She seeks to engage in sidewalk counseling outside a Westchester abortion clinic—that is, to stand on the public way, approach women entering the clinic, and initiate gentle, compassionate conversation about the woman's situation and available resources

to support her if she chooses to carry her child to term. Yet Westchester County is depriving women of this final opportunity to receive additional information and offers of help.

If the lower courts were writing on a clean slate, it would be obvious that the County's law violates the First Amendment—peaceful speakers should be permitted to speak on a public sidewalk, and women should be permitted to receive their information. The County's ban undeniably regulates speech based on its content, banning approaches to engage in "protest, education, or counseling" but not other speech. And the provision is not even related to, much less necessary for, the purposes the County asserts—maintaining clinic access and avoiding sidewalk congestion—particularly when the County has so many other tools for directly promoting those ends, several of which appear in other subsections of the same law.

But the lower courts were not writing on a clean slate. Twenty-three years ago, a divided Supreme Court upheld a materially identical law in *Hill* v. *Colorado*, 530 U.S. 703 (2000). *Hill* was an aberration at the time and is irreconcilable with intervening decisions. Three Justices have said as much. See *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting). And this Court has described *Hill* as a "distort[ion]" of "First Amendment doctrines." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022). Yet lower courts remain bound by *Hill* until this Court overrules it.

The County brazenly passed its law knowing that *Hill* is on unsure footing. In a committee meeting leading to the law's passage, the County Attorney warned

that, "[a]lthough *Hill* is still on the books," "[i]f this legislation * * * ever got [to the Supreme Court], I have real questions" and "we know what the Supreme Court would rule if this ever got there," "so hopefully our legislation never gets to the Supreme Court."

That legislation has now reached this Court, having deprived many women of their right to receive petitioner's lawful offers of help. This Court should grant certiorari to overrule *Hill*, purge its First Amendment jurisprudence of the distorting effects of *Roe* and *Casey*, and return the public sidewalks to their rightful position as a place where citizens can peacefully exchange information and offer to help one another without fear of imprisonment.

OPINIONS BELOW

The Second Circuit's opinion is reported at 71 F.4th 130 and reproduced at Pet.App.1a. The district court's opinion is unreported but available at 2023 WL 24246 and reproduced at Pet.App.23a.

JURISDICTION

The Second Circuit entered judgment on June 21, 2023. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I.

Westchester County's Reproductive Health Care Facilities Access Act is reprinted in full at

Pet.App.32a. The provision challenged here provides that it shall be unlawful for any person to:

> knowingly approach another person within eight (8) feet of such person, unless such other person consents, for the purpose of passing any material, item, or object to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of one-hundred (100) feet from any door to a reproductive health care facility.

Laws of Westchester County §425.31(*i*).

This provision is, as the Second Circuit recognized, "modeled after" and "materially identical to" the Colorado law upheld in *Hill*. Pet.App.10a, 20a. That law provided:

> 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.

Colo. Rev. Stat. §18-9-122(3).

STATEMENT OF THE CASE

A. Petitioner Debra Vitagliano

Petitioner Debra Vitagliano is a sixty-five-year-old mother of three and a devout Catholic. Pet.App.45a-46a. Her lifelong work as an occupational therapist with special-needs children has led her to recognize the inherent worth and dignity of all people, no matter

their level of functioning. *Ibid.* Consistent with her Catholic faith, she opposes abortion, believing it is the deliberate taking of innocent human life. *Id.* at 46a-47a.

In late 2020, Vitagliano felt spiritually called to get involved in life-affirming advocacy. Pet.App.47a. She began participating in a peaceful prayer vigil outside the Planned Parenthood abortion clinic in White Plains, New York. *Ibid.* Vitagliano observed other participants engage in sidewalk counseling—approaching women on their way into the clinic, speaking with them about their pregnancies, and distributing pamphlets containing information about abortion and its alternatives. *Ibid.* She too desired to engage in sidewalk counseling. *Ibid.* She believes most women who consider abortion are not fully informed of the procedure and feel they have no viable alternatives. *Id.* at 43a, 48a. She views sidewalk counseling as a final attempt to encourage pregnant women's hearts away from abortion and to save innocent unborn lives. *Id.* at 47a-48a.

Vitagliano underwent training to prepare herself to engage in effective sidewalk counseling. She first completed courses on counseling abortion-vulnerable women. Pet.App.48a. She then started volunteering as a "life consultant" at a local pregnancy resource center, meeting with women experiencing unplanned pregnancies and discussing options and available resources. *Id.* at 48a-49a.

Having completed her training, Vitagliano now seeks to counsel pregnant women as they approach the White Plains Planned Parenthood. Pet.App.49a. But before she could put her training into practice,

Westchester County passed a law prohibiting side-walk counseling. *Id.* at 51a.

B. Respondent Westchester County's Side-walk Counseling Ban

In June 2022, days after the leak of this Court's draft opinion in *Dobbs* v. *Jackson Women's Health Organization*, Westchester County legislators introduced the Reproductive Health Care Facilities Access Act. See Laws of Westchester County §§425 *et seq*. The Act's stated purpose is to "prohibit interference with accessing reproductive health care facilities and obtaining reproductive health care services." §425.11.

Section 425.31(*i*) of the Act (the "Sidewalk Counseling Ban") makes it unlawful for any person to

> knowingly approach another person within eight (8) feet of such person, unless such other person consents, for the purpose of passing any material, item, or object to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of one-hundred (100) feet from any door to a reproductive health care facility.

§425.31(*i*). Violations are criminal misdemeanors punishable by fines and imprisonment—six months for a first conviction and up to one year for subsequent convictions. §425.41.

In addition to the Sidewalk Counseling Ban, the Act imposes eight other restrictions on activities near covered facilities, which are not challenged here.

These restrictions prohibit, *inter alia*, obstructing access, violence, unwanted physical contact, following and harassing, threats and intimidation, and "interfer[ing] with" (or attempting to interfere with) a facility's operations. §425.31(a)-(h).

The Sidewalk Counseling Ban was modeled after the Colorado law upheld in *Hill* v. *Colorado*, 530 U.S. 703 (2000).[1] But the County was aware that *Hill* is on unsure footing and ripe for overruling by this Court. In a committee meeting leading to the Act's passage, outside legal experts warned that the Sidewalk Counseling Ban "invit[es] a challenge in litigation," the Supreme Court "is looking for a case [to] reverse *Hill*," and "this could well be the case where they take it."[2] The experts also opined that *Hill* is "on too shaky ground now" and "may get overturned."[3] The County Attorney expressed similar concerns, advising that, "[a]lthough *Hill* is still on the books," "[i]f this legislation * * * ever got [to the Supreme Court], I have real questions" and "I think we know what the Supreme Court would rule if this ever got there," "so hopefully our legislation never gets to the Supreme Court and

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[1] Board of Legislators Meeting Agenda at 26 (June 27, 2022), https://perma.cc/E26U-W3GQ; see *Territory of Alaska* v. *American Can Co.*, 358 U.S. 224, 226-227 (1959) (taking judicial notice of legislative history).

[2] Joint Meeting of the Westchester County Legislature Committees on Health and Legislation at 43:55-44:01, 52:00-52:04, 1:40:54-1:41:00 (June 1, 2022), https://westchestercountyny.granicus.com/player/clip/1454.

[3] Joint Meeting, *supra* n.2, at 47:31-47:35, 48:50-48:53.

gets only to the Second Circuit."[4] In a subsequent committee meeting, the Senior Assistant County Attorney reiterated these warnings but counseled that the County "can include" the Sidewalk Counseling Ban in the Act "until [*Hill* is] expressly overturned by the Supreme Court."[5] So apprised of *Hill*'s status, the County still passed the Act with the Sidewalk Counseling Ban, three days after this Court decided *Dobbs*.

C. Proceedings Below

1. Vitagliano filed this lawsuit in November 2022, asserting one claim: the Sidewalk Counseling Ban is an unconstitutional content-based restriction on speech that cannot survive strict, or even intermediate, scrutiny. Pet.App.62a-65a.

Vitagliano's lawsuit acknowledged that this Court upheld a materially identical law in *Hill*. But she argued that *Hill* was wrongly decided, is irreconcilable with intervening precedent, and should be overruled by this Court. Pet.App.43a-44a, 65a. The County moved to dismiss on the sole ground that "*Hill* is directly on point and binding here, and remains controlling precedent." C.A.App.30.

The district court dismissed the complaint. It determined *sua sponte* that Vitagliano lacked Article III standing to assert a pre-enforcement challenge and

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[4] Joint Meeting, *supra* n.2, at 38:53-39:00, 39:55-40:00, 40:35-40:39, 1:53:12-1:53:16.

[5] Joint Meeting of the Westchester County Legislature Committees on Health and Legislation at 2:16:24-2:17:08 (June 6, 2022), https://westchestercountyny.granicus.com/player/clip/1463.

that, in any event, *Hill* "provides a separate and independent basis for the dismissal." Pet.App.31a. Because the Sidewalk Counseling Ban "is 'materially identical' to the law * * * upheld in *Hill*," the district court held that Vitagliano's claim is "foreclosed by directly relevant Supreme Court precedent." *Id.* at 29a-30a.

2. On appeal, the Second Circuit (Livingston, C.J., Raggi & Carney, JJ.) held that Vitagliano has Article III standing to bring a pre-enforcement challenge to the Sidewalk Counseling Ban. It explained that Vitagliano's complaint "more than suffices to establish" her intention to engage in sidewalk counseling, the "threat of prosecution under the County's bubble zone law" was "highly 'credible,'" and thus she "has articulated an injury in fact that is sufficiently concrete and imminent to confer Article III standing." Pet.App.4a, 15a, 18a. Accordingly, the Second Circuit "vacate[d] the district court's ruling insofar as it dismissed [the] suit for lack of standing." *Id.* at 4a.

But the Second Circuit "nevertheless affirm[ed] the judgment on the merits," finding "the district court correctly concluded that *Hill* is dispositive of Vitagliano's First Amendment claim." Pet.App.4a. Acknowledging Vitagliano's arguments that *Hill* is irreconcilable with intervening Supreme Court precedent, the Second Circuit nevertheless concluded that "*Hill* remains controlling precedent and dictates that the [Sidewalk Counseling Ban] withstands First Amendment scrutiny." *Id.* at 21a-22a. The Second Circuit explained that although *Hill* "appears to rest on reasons rejected in some other line of decisions," it has "direct application" here and so must be "follow[ed]," "leaving to [the Supreme] Court the prerogative of overruling

its own decisions." *Id.* at 22a (quoting *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)).

REASONS FOR GRANTING THE PETITION

Hill v. *Colorado* was demonstrably erroneous, as explained by the dissents of Justices Scalia and Kennedy. Its core premises have since been rejected, as explained by three Justices in *City of Austin* v. *Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1481, 1484, 1490-1492 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting). And the decision exemplified the doctrinal "distort[ions]" and "engineer[ed] exceptions" that riddled this Court's abortion decisions in the era of *Roe* and *Casey*, as the Court recognized in *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228, 2276 & n.65 (2022).

Yet "*Hill* remains controlling precedent" for lower courts. Pet.App.22a; see *Price* v. *City of Chicago*, 915 F.3d 1107, 1119 (7th Cir. 2019) (*Hill* "remains binding on us"); see also *Turco* v. *City of Englewood*, 621 F. Supp. 3d 537, 550 n.9 (D.N.J. 2022) (*Dobbs* and *City of Austin* are "not a sufficient basis for this Court to ignore *Hill*'s precedential status"). Only this Court can change that. See Pet.App.22a; *Price*, 915 F.3d at 1119.

A distortion with consequences as grave as *Hill*'s should not be allowed to linger. The Court should grant review, overrule *Hill*, and reaffirm the bedrock First Amendment principle that speakers may peacefully engage their fellow citizens on important matters in traditional public fora.

I. *Hill*'s distortion of First Amendment law is a matter of exceptional importance.

This Court granted certiorari in *Hill* v. *Colorado* "[b]ecause of the importance of the case." 530 U.S. 703, 714 (2000). The conflict between abortion-clinic bubble-zone laws and the First Amendment remains exceptionally important today—warranting certiorari here.

Indeed, the importance of the issue has only grown. When this Court decided *Hill*, Colorado was the only State with a similar bubble-zone law.[6] Today, however, Colorado is joined by Montana and several major cities, including Chicago and Oakland.[7] And although *Hill*'s approach has "long [been] discredited," *City of Austin*, 142 S. Ct. at 1481 (Thomas, J., dissenting), the problem isn't going away. Chicago just indicated enforcement as a priority.[8] And as this case demonstrates, legislatures continue to enact *new* laws

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[6] See New York & States Br. at 19, *Hill* v. *Colorado*, 530 U.S. 703 (2000) (No. 98-1856), 1999 WL 1186258.

[7] See Mont. Code Ann. §45-8-110(1) (2005); Boulder, Colo., Code §5-3-10 (1986); Carbondale, Ill., Code §14-4-2(H) (2023); Charleston, W.V., Code §78-235(c) (2019); Chicago, Ill., Code §8-4-010(j)(1) (2009); Denver, Colo., Code §38-114(b) (1990); Oakland, Calif., Code §8.52.030(B) (2007); Sacramento, Calif., County Code §9.110.030 (2003); Walsenburg, Colo., Code §10-3-60(c) (2014).

[8] See Chicago for the People, Building Bridges and Growing the Soul of Chicago: A Blueprint for Creating a More Just and Vibrant City for All 135 (July 2023), https://perma.cc/8AZJ-XVWJ.

modeled after *Hill*—since, as a County lawyer here explained, they "can," "until [*Hill* is] expressly overturned."[9]

Hill laws impose dire First Amendment harms. "One-on-one communication" and "[l]eafletting * * * on matters of public concern are classic forms of speech that lie at the heart of the First Amendment." *McCullen* v. *Coakley*, 573 U.S. 464, 488-489 (2014). *Hill* laws target these precise forms of speech, banning would-be counselors from approaching within eight feet to engage in them. "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* at 489. Indeed, as a Seventh Circuit panel including then-Judge Barrett explained, *Hill* laws do not just make sidewalk counseling more difficult—they "effectively prohibit[] [it] by banning the close approach it requires." *Price*, 915 F.3d at 1110; accord Pet.App.16a (the law here prohibits "precisely what sidewalk counseling entails").

This close approach is required because sidewalk counselors' method depends on "quiet conversations," rather than "a strained voice or a waving hand." *McCullen*, 573 U.S. at 489; see also *Hill*, 530 U.S. at 757 (Scalia, J., dissenting) ("cannot be done at a distance and at a high-decibel level"). As the complaint here explains, to counsel effectively, Vitagliano must "pay close attention to the woman's every word and body language," maintain "eye contact to establish trust," use a "gentle tone of voice," and respect the "sensitivity of the discussion"—all of which requires "close proximity." Pet.App.49a-50a, 53a. Nor does the

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[9] Joint Meeting, *supra* n.5, at 2:16:14-2:17:08.

grudging "consent" exception in *Hill* laws fix the burden. Few women, however in need, are inclined to grant a stranger's vague and unusual request for "consent" to "approach." A friendly figure simply walking up and delivering a compassionate message from the get-go—"You are not alone. We can help you," *id.* at 49a—is a different story. See also *id.* at 49a-50a.

Regardless, "if liberty means anything at all, it means the right to tell people what they do not want to hear." *303 Creative LLC* v. *Elenis*, 143 S. Ct. 2298, 2321 (2023) (cleaned up). That, after all, is the difference between persuading the unconvinced and "preaching to the choir." *McCullen*, 573 U.S. at 476. The "very point of free speech is to persuade"; "a solicitude for changing minds" "run[s] through and shape[s] our First Amendment doctrines, precedents, and values." Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. St. Thomas L.J. 453, 457, 463 (2005). *Hill* "tears away" this guarantee when sidewalk counselors "most need it." 530 U.S. at 792 (Kennedy, J., dissenting).

Worse, it does so in a context involving exceptionally high stakes. "Millions of Americans believe that * * * an abortion is akin to causing the death of an innocent child." *Stenberg* v. *Carhart*, 530 U.S. 914, 920 (2000). Yet *Hill* laws deprive these Americans of the opportunity to prevent that result by ordinary means of peaceful conversation and persuasion. As this Court recounted in *McCullen*, sidewalk counseling can be successful: "unrefuted testimony" showed that petitioners there had "collectively persuaded hundreds of women to forgo abortions." 573 U.S. at 473. But *Hill* laws can prevent such persuasive conversations from ever occurring.

This harms not only sidewalk counselors but also the women they seek to help—who, especially if their decisions are "not fully informed," may suffer "devastating psychological consequences" after "elect[ing] an abortion." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 882 (1992) (plurality opinion), *overruled on other grounds*, *Dobbs*, 142 S. Ct. 2228. Meanwhile, academic studies show that many women seek abortion for reasons that may make them receptive to information about alternatives and resources facilitating childbirth.[10] This is exactly what sidewalk counselors seek to provide—information about resources and support available to mothers who need financial help or lack family support.

Moreover, after *Dobbs*, more abortions are being funneled into jurisdictions with *Hill* laws.[11] That means more abortions are occurring without women

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[10] See, *e.g.*, Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persps. on Sexual & Reprod. Health 110, 113 (2005) (reasons given for abortion: "Can't afford a baby now," 73%; "Don't want to be a single mother or having relationship problems," 48%; "Husband or partner wants me to have an abortion," 14%); M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the U.S.*, BMC Women's Health 13:29, at 5-6 (2013) (reasons given for abortion: "Financial reasons," 40%; "Not the right time for a baby," 36%; "Partner-related reasons," 31%).

[11] See, *e.g.*, Angie Leventis Lourgos, *Six Months After the End of Roe, Illinois Abortion Providers Treat a 'Historic High' Number of Out-of-State Patients*, Chi. Trib. (Dec. 27, 2022), https://perma.cc/W246-CA38; Saja Hindi, *Abortions Up 33% in Colorado, Fueled by Out-of-State Residents Seeking Treatment*, Denver Post (Nov. 4, 2022), https://perma.cc/7HQZ-CCTT; *cf.* Joseph Spector, *'A Safe Harbor': Hochul Vows New York Will Provide Abortion Services for Out-of-State Patients*, Politico (May 6, 2022), https://perma.cc/DHB7-RX52.

having the benefit of the additional information and helping hand that sidewalk counselors seek to offer. *Dobbs*, of course, leaves the lawfulness of abortion to "the democratic process." 142 S. Ct. at 2304-2305 (Kavanaugh, J., concurring). But while "[o]ur federal system prizes state experimentation," it does not prize "'state experimentation in the suppression of free speech.'" *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2660-2661 (2020).

Hill's status as binding precedent is a matter of exceptional importance that only this Court can resolve.

II. The Court should overrule *Hill*.

As this Court observed last year, *Hill* "distorted First Amendment doctrines." *Dobbs*, 142 S. Ct. at 2276 & n.65. It was an "unprecedented departure from this Court's teachings respecting unpopular speech in public fora." *Hill*, 530 U.S. at 772 (Kennedy, J., dissenting). And it is "incompatible with" this Court's intervening precedents. *Price*, 915 F.3d at 1117. *Stare decisis* does not require adhering to it.

A. *Hill* was wrongly decided.

Hill flouted established First Amendment doctrine the day it was decided. Both its key holdings—on content neutrality and narrow tailoring—were demonstrably erroneous.

1. Start with content neutrality. Under the First Amendment, "content-based" speech restrictions trigger strict scrutiny. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Content-based laws "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc.* v.

FCC, 512 U.S. 622, 642 (1994). Such laws "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The *Hill* law was content based on its face. As with the Sidewalk Counseling Ban here, its restrictions applied only to speakers whose intended speech included certain content—"protest, education, or counseling." Colo. Rev. Stat. §18-9-122(3). In other words, whether a speaker's words were regulated turned "entirely on *what he intends to say*." *Hill*, 530 U.S. at 742 (Scalia, J., dissenting). If the speaker intended to ask the time, solicit donations, or conduct an interview, that was permitted. If the speaker intended to educate her on alternatives to abortion, that was a crime.

Such a rule is "obviously and undeniably content based." *Hill*, 530 U.S. at 742 (Scalia, J., dissenting). And it plainly raises the specter that certain ideas or viewpoints—namely, that a woman entering an abortion clinic could instead obtain alternative help—will be driven from the discussion.

But *Hill* elided the question whether the law was content based on its face. Instead, it looked to the government's purpose in enacting the law, holding that the content-neutrality inquiry depended on whether the "government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719 (cleaned up). Applying this test, the Court held the law was content neutral because the legislature's motive was to "protect listeners from unwanted communication," which in this context could lead to "potential trauma." *Id.* at 714-720.

This motive—to protect listeners from unwanted content—is itself content based. *Infra* Part II.B.1. But even if it weren't, the law was still *facially* content based. The rule against content discrimination is a "proxy" for direct inquiries into legislative motive—so the first question is whether a "restriction[] * * * *by* [*its*] *terms* limit[s] expression on the basis of what is said." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 438-441, 443-446 (1996) (emphasis added). Thus, pre-*Hill* law was clear: "the mere assertion of a content-neutral purpose" is not "enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-643. In other words—and contra *Hill*—"[i]llicit legislative intent is not the *sine qua non* of a violation." *Simon & Schuster*, 502 U.S. at 117.

2. Equally unmoored from precedent was *Hill*'s application of intermediate scrutiny. Having deemed the law content neutral, the Court considered whether it served a "significant and legitimate" governmental interest and was "narrowly tailored" to that end. 530 U.S. at 725. The Court answered yes to both questions. The law served the allegedly significant and legitimate interest of protecting citizens' "right to be let alone" from "unwanted communication." *Id.* at 715-718. And although the law was concededly "prophylactic"—forbidding even approaches that ultimately "would have proved harmless"—that purportedly cut in its *favor*, since its "bright-line * * * rule" offered "clear guidance" for enforcement. *Id.* at 729-731.

Both these holdings departed from settled principles. Never before had this Court recognized as legitimate an interest in protecting citizens' "right to

be free from unwanted speech when on the public streets and sidewalks." *Hill*, 530 U.S. at 752 (Scalia, J., dissenting). To the contrary, the Court had held that when faced with unwanted speech in a public forum, "the burden normally falls" on the listener to plug his ears or "avert[] his eyes." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210-211 (1975) (cleaned up). Indeed, three years before *Hill*, the Court had applied this reasoning *specifically* in the context of speech outside abortion clinics, rejecting any alleged "right of the people approaching and entering [abortion] facilities to be left alone." *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997).

Hill's narrow-tailoring analysis was likewise an innovation. Again, in *Hill*, the Court considered the law's "prophylactic aspect" a *positive*, since it could be "difficult[]" to prohibit only harmful approaches. 530 U.S. at 729. Yet this Court had long explained that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). And the Court had been "emphatic[]" that "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The "prophylaxis" *Hill* embraced is, as a matter of language and logic, "the antithesis of narrow tailoring." 530 U.S. at 762 (Scalia, J., dissenting).

3. *Hill*'s errors were widely recognized. Indeed, its reasoning was criticized by "First Amendment scholars from across the ideological spectrum." *City of Austin*, 142 S. Ct. at 1491 (Thomas, J., dissenting).

Professor Michael McConnell remarked that while *Hill* "said that this statute is content-neutral[,] I just literally cannot see how they could possibly come to

that conclusion." Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 748 (2001). Professor Laurence Tribe agreed, stating, "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id*. at 750. And Professor Richard Fallon explained that the *Hill* Court "unconvincingly * * * maintain[ed] that a content-based restriction on speech is not really content-based." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 (2007). Further criticisms abound.[12]

B. *Hill* is irreconcilable with intervening precedent.

Not only was *Hill* wrong at the time, it remains "an abberation in [the Court's] case law." *City of Austin*, 142 S. Ct. at 1484 (Thomas, J., dissenting). As the Second Circuit here observed, *Hill* "appears to rest on reasons rejected in some other line of decisions." Pet.App.22a. Specifically, in *McCullen* and *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), this Court rejected each core premise underlying *Hill*. And this

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[12] See, *e.g.*, Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) ("*Hill* is unusual" and "inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek"); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights*, 51 Am. U. L. Rev. 179, 189 (2001) (*Hill* "mark[ed] a dramatic downward departure from this [Court's] core First Amendment tradition" and should "be remembered as a flash-in-the-pan aberration"); see also Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* was "condemned by progressive and conservative legal scholars alike").

Court has increasingly considered history and tradition in evaluating the Constitution's guarantees—further undermining *Hill*'s result.

1. In *McCullen*, this Court held that a Massachusetts law forbidding speakers from standing within thirty-five feet of abortion-clinic entrances violated the First Amendment. The Court held that the law was content neutral because its prohibition was triggered merely by a person's proximity to an abortion clinic, not by the content of her speech. 573 U.S. at 479-480. But in explicating the meaning of content neutrality, this Court opined that the law "*would be* content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 479 (emphasis added). This is the precise test *Hill* refused to adopt, claiming that "we have never suggested" that needing an "examination" of content would make a law content based. 530 U.S. at 721-722.

McCullen further explained that the Massachusetts law "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 (cleaned up). "If, for example," the regulated speech "caused offense or made listeners uncomfortable, such offense or discomfort would not give the [government] a content-neutral justification to restrict the speech." *Ibid.*

This reasoning is irreconcilable with *Hill*'s core holding that the Colorado law was content neutral. Again, *Hill* identified the governmental interest allegedly justifying the law as protecting abortion-clinic patients from the "potential trauma * * * associated with confrontational protests." 530 U.S. at 715. That

interest is indisputably one "concerned with * * * 'the direct impact of speech on its audience.'" *McCullen*, 573 U.S. at 481. Indeed, it is indistinguishable from the specific example offered as content based in *McCullen*.

Turning to intermediate scrutiny, here too *McCullen* undermined *Hill*. In *Hill*, the Court held that the law's "bright-line prophylactic rule" was justified by the "great difficulty" of protecting clinics and patients with more tailored "legal rules that focus exclusively on the individual impact of each instance of behavior." 530 U.S. at 729. Echoing *Hill*, the government in *McCullen* defended its law as a prophylactic measure and an easily enforceable bright-line rule, even if it restricted more speech than necessary to advance the government's interests. 573 U.S. at 495-496.

But *McCullen* rejected this argument in language flatly irreconcilable with *Hill*. Although "[a] painted line on the sidewalk is easy to enforce," the Court explained, "the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495. Rather, narrow tailoring requires the government to show that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Ibid.* Because Massachusetts failed to make that showing, its law was unconstitutional. See *id.* at 490-496.

2. After *McCullen* came *Reed*, where this Court held that a city "sign code" violated the First Amendment. Relying on *Hill*, the lower courts found the sign code content neutral on the ground that the city "'did not adopt its regulation of speech because it disagreed with the message conveyed' and its 'interests [were] unrelated to * * * content.'" *Reed*, 576 U.S. at 162-

163. But citing the *Hill* dissents, this Court held that focusing on "governmental motive" is "incorrect" and "misunderstand[s]" content neutrality. *Id.* at 166-167 (citing *Hill*, 530 U.S. at 766 (Kennedy, J., dissenting); and *Hill*, 530 U.S. at 743 (Scalia, J., dissenting)).

Reed held instead that a law that is facially content based triggers strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 576 U.S. at 165. In other words, a law is content based "*either* when [it] is content based on its face *or* when the purpose and justification for the law are content based." *Id.* at 166 (emphasis added). *Reed* thus makes clear that by focusing on Colorado's allegedly content-neutral justification for its law, rather than the law's plainly content-based text, the *Hill* Court "skip[ped] the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Id.* at 165.

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Hill is thus in "glaring tension" with *McCullen* and *Reed*. *Bruni* v. *City of Pittsburgh*, 141 S. Ct. 578 (2021) (Thomas, J., respecting the denial of certiorari). Multiple lower courts have so observed. See *Sisters for Life, Inc.* v. *Louisville-Jefferson County*, 56 F.4th 400, 408 (6th Cir. 2022) (Sutton, C.J.) (noting the "tension between *Hill* * * * and *McCullen*"); *Price*, 915 F.3d at 1119 (Sykes, J.) ("*Hill* * * * [is] inconsisten[t] with *McCullen* and *Reed*."); see also *Bruni* v. *City of Pittsburgh*, 941 F.3d 73, 93 (3d Cir. 2019) (Hardiman, J., concurring) ("*Reed* 'overturn[ed] the standard that [the Court] had previously used to resolve a particular class of cases'—a class that includes * * * *Hill*.").

3. Even aside from *McCullen* and *Reed*, this Court's precedents have increasingly "focus[ed] on history" in "assess[ing] many * * * constitutional claims." *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). Speech claims are no exception. *Ibid.*; see, *e.g.*, *National Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2371-2372 (2018). This focus only confirms *Hill*'s incompatibility with the First Amendment.

In *City of Austin*, for example, this Court upheld a law prohibiting the digitization of signs advertising things not located on the site where the sign is installed. In reaching that conclusion, the Court stressed an "unbroken tradition" of such "on-/off-premises distinctions." 142 S. Ct. at 1475. The challenged law was part of a "regulatory tradition" stretching back to the late 1860s, a law drawing such a distinction had been unanimously "approved" by this Court in 1932, and other such regulations had "proliferated" across the country "for the last 50-plus years." *Id.* at 1469-1470, 1474-1475.

These history-and-tradition considerations played no role in *Hill*. And if they had, they would have cut sharply against its result. *Hill* laws regulate face-to-face communication about important matters on public streets and sidewalks—which have been used "immemorially" for "communicating thoughts between citizens, and discussing public questions." *McCullen*, 573 U.S. at 476. "Such areas occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *Ibid.*

Meanwhile, the first law prohibiting unconsented approaches outside abortion clinics was adopted by the

City of Boulder in 1986.[13] Such laws were controversial from the start, with pre-*Hill* courts invalidating even less restrictive variations as First Amendment violations. See *Edwards* v. *City of Santa Barbara*, 150 F.3d 1213, 1215 (9th Cir. 1998) (per curiam) (holding unconstitutional an ordinance permitting abortion-clinic patients to "create" an eight-foot bubble zone by "asking the demonstrator to withdraw"); *Sabelko* v. *City of Phoenix*, 120 F.3d 161 (9th Cir. 1997) (same). These provisions—late in time and hotly disputed ever since—"hardly evince a tradition that should inform our understanding of the Free [Speech] Clause." *Espinoza*, 140 S. Ct. at 2259.

C. *Stare decisis* does not favor upholding *Hill*.

Stare decisis does not require adherence to *Hill*'s errors. That doctrine is at its weakest for constitutional decisions, and it "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus* v. *American Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018).

In revisiting a precedent, this Court has considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020). Each supports overruling here.

1. *Hill* was poorly reasoned. As explained above, *Hill*'s content-neutrality holding ignored the "textbook" content distinction on the statute's face.

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[13] *Boulder Passes Abortion 'Buffer-Zone' Law*, AP News (Oct. 22, 1986), https://perma.cc/8J7F-EUS5 ("first of its kind").

530 U.S. at 766 (Kennedy, J., dissenting). Its paean to prophylaxis is irreconcilable with the very concept of what it means for a speech restriction to be "narrowly tailored." See *Button*, 371 U.S. at 438. And the governmental interest that *Hill* held the law permissibly advanced—protecting listeners from potentially offensive speech—is itself content based and, in any event, defies our "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos* v. *Barry*, 485 U.S. 312, 318 (1988). Indeed, while the County below purported to wrap itself in *Hill*'s mantle, it never even asserted this interest as a justification for its law, relying instead on preserving clinic access and preventing obstruction. That's because, as a First Amendment matter, the interest is indefensible. *Supra* Part II.A.2.

Hill's reasoning is weaker still because this unwanted-speech interest was entirely "fictitious"—"invented" by the Court. 530 U.S. at 750 (Scalia, J., dissenting). Colorado (like the County here) had argued the law advanced interests in preventing "crowding" and "obstruction" outside healthcare facilities. *Id.* at 749-750. It had even expressly disclaimed any interest in protecting citizens from "'offensive or controversial' speech" or ensuring their "right to be left alone on public sidewalks," dismissing these as "straw interests" invoked to "knock down" the law. Resp'ts Br. at 25 n.19, *Hill*, 530 U.S. 703 (No. 98-1856), 1999 WL 1146869. The Court thus "relied upon a governmental interest not only unasserted by the State, but positively repudiated." 530 U.S. at 750 (Scalia, J., dissenting). Intermediate scrutiny, "[u]nlike rational-basis review," "does not permit [courts] to supplant the precise interests put forward

by the State with other suppositions." *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993).

Hill also played fast and loose with precedent in defending this repudiated interest. *Hill*'s primary source was Justice Brandeis's reference to a "right to be let alone" in a 1928 dissent. 530 U.S. at 716-717 (quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). But Justice Brandeis was describing a "right" "'*as against the government*'"—not a right "to be free from hearing the unwanted opinions of one's fellow citizens." *Id.* at 751 (Scalia, J., dissenting). *Hill* also cited *Frisby* v. *Schultz*, 487 U.S. 474 (1988), and *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), as supporting protection against "intrusive" and "offensive" speech. 530 U.S. at 716. But those cases upheld limitations on speech that intrudes "*into the privacy of the home*." *Id.* at 752 (Scalia, J., dissenting). They expressly recognized that "outside the sanctuary of the home" we are "often * * * subject to objectionable speech." *Frisby*, 487 U.S. at 484 (quoting *Rowan*, 397 U.S. at 738).

Recognizing the problem, the *Hill* majority pivoted to *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184 (1921), which discussed "free passage in going to and from work." See 530 U.S. at 717. But that was a labor case that did not involve the First Amendment at all. *Id.* at 753 (Scalia, J., dissenting). In any event, *American Steel* discussed an interest in avoiding "following and dogging" *once* an "offer [to communicate] is declined." 257 U.S. at 204. *Hill* laws, by contrast, require speakers to seek permission to communicate in the first place. Indeed, the statute at issue here underscores the distinction:

the Sidewalk Counseling Ban prohibits unconsented approaches, while a *separate* provision (unchallenged here) prohibits "follow[ing] and harass[ing]," defined to include any "conduct or acts * * * after an express or implied request to cease has been made." §§425.21(c), 425.31(c). Given the reality of what *Hill* laws do, *American Steel*—to the extent it is at all relevant—cuts the other way: "We are a social people and the accosting by one of another in an inoffensive way * * * with a view to influencing the other's action [is] *not regarded as * * * a violation of that other's rights*." 257 U.S. at 204 (emphasis added).

Hill's attempt to minimize the law's burden was no better reasoned. *Hill* claimed the "8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-727. But as Justice Scalia explained, it is "absurd" to suggest speakers normally "walk[] along the public sidewalk * * * 'conversing' at an 8-foot remove." *Id.* at 756 (Scalia, J., dissenting). The idea that eight feet is "normal" would likely come as even greater surprise to Americans today, who for years were told to *depart* from normal interaction by "social distancing" at six feet.

Reasoning as poor as *Hill*'s can only be explained by "the 'ad hoc nullification machine' that the Court ha[d] set in motion to push aside whatever doctrines of constitutional law st[ood] in the way" of abortion. *Hill*, 530 U.S. at 741-742 (Scalia, J., dissenting); accord *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The Court acknowledged this in *Dobbs*, citing *Hill* as an example of "[t]he Court's abortion cases" "distort[ing] First Amendment doctrines." 142

S. Ct. at 2275-2276 & n.65. Those distortions should not be allowed to linger. See, *e.g.*, *SisterSong Women of Color Reprod. Just. Collective* v. *Governor of Ga.*, 40 F.4th 1320, 1328 (11th Cir. 2022) (Pryor, C.J.) ("to the extent that this Court has distorted legal standards because of abortion, we can no longer engage in those abortion distortions" after *Dobbs*).

2. *Hill* is also inconsistent with "related decisions." *Ramos*, 140 S. Ct. at 1405. As Justice Kennedy explained, *Hill* "contradict[ed] more than a half century of well-established First Amendment principles." 530 U.S. at 765 (Kennedy, J., dissenting).

Pre-*Hill* precedents aside, the most closely related decision is *McCullen*—the only other case where this Court has "review[ed] a generally applicable law" restricting speech outside abortion clinics. *Price*, 915 F.3d at 1113. And even beyond the inconsistencies already discussed, *Hill* and *McCullen* take vastly different tacks. In *McCullen*, this Court required a rigorous showing from Massachusetts to justify its law, asking it to demonstrate not only "a close fit" with its stated interests—preserving access and avoiding obstruction—but also that it "seriously undertook" to advance these interests "with less intrusive tools readily available to it." 573 U.S. at 486, 494. In *Hill*, meanwhile, this Court simply supposed that enforcing less intrusive laws would be too "difficult." 530 U.S. at 729. And *Hill* did not hesitate to uphold the law even while acknowledging it would "inhibit a demonstrator whose approach in fact would have proved harmless." *Ibid.*

The contrast is striking. Indeed, to the extent *Hill* laws should be treated differently, if anything the leniency should go the other way. The *McCullen* law

"sa[id] nothing about speech on its face"—it could be violated "merely by standing in a buffer zone, without displaying a sign or uttering a word." 573 U.S. at 476, 479-480. By contrast, the *only* way to violate the *Hill* law was to speak (or at least intend to). Yet under current precedent, the key question for lower courts in evaluating an abortion-clinic speech restriction is whether it "more closely resembles the fixed buffer zone invalidated in *McCullen*"—and thus is "likely unconstitutional"—or "the floating bubble zone upheld in *Hill*"—and thus is likely permissible. *Sisters for Life*, 56 F.4th at 408; cf., *e.g.*, *Hoye* v. *City of Oakland*, 653 F.3d 835, 842-843 (9th Cir. 2011) (upholding bubble zone under *Hill*); *Brown* v. *City of Pittsburgh*, 586 F.3d 263, 270-273 (3d Cir. 2009) (same). That dichotomy has no basis in the First Amendment.

Hill also sits uneasily with this Court's approach in the related context of the Free Exercise Clause. There, the Court asks whether laws "treat *any* comparable secular activity more favorably than religious exercise"—not whether some secular activity is *also* treated poorly. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021). In *Hill*, however, the Court rejected the content-discrimination claim in part because some other content was also prohibited, 530 U.S. at 723—ignoring that still other content was (unlike sidewalk counseling) *permitted*. This divergence makes little sense for "Clauses [that] appear in the same sentence of the same Amendment," "work in tandem," and "doubly protect[]" the sort of "religious speech" at issue here. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 2426 (2022).

3. Further, developments since *Hill* have "'eroded' the decision's 'underpinnings,'" leaving it "an outlier

among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482-2483. Three Justices and a unanimous Seventh Circuit panel have said so. See *City of Austin*, 142 S. Ct. at 1481, 1484, 1491 (Thomas, J., dissenting) ("*Hill* is an aberration"; its "long-discredited approach" has assumed "defunct status"); *Price*, 915 F.3d at 1111 (*McCullen* and *Reed* "have eroded *Hill*'s foundation").

Hill's emphasis on protecting listeners from unwanted speech in a public forum stands in especially sharp contrast with recent caselaw. Since *Hill*, this Court has reiterated that speech "at a public place on a matter of public concern" "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011). Indeed, just last Term, this Court held that although public-accommodations laws "vindicate the deprivation of personal dignity" accompanying service denials, "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech * * * likely to cause 'anguish or 'incalculable grief.'" *303 Creative*, 143 S. Ct. at 2312, 2314; cf. *Hill*, 530 U.S. at 715, 718 n.25 ("avoidance of potential trauma," "emotional harm").

Last Term's decision in *Counterman* v. *Colorado* further cements *Hill*'s outlier status. 143 S. Ct. 2106 (2023). There, this Court considered whether, "in a true-threats case," the State must "prove that the defendant was aware in some way of the threatening nature of his communications." *Id.* at 2113. The Court answered yes, holding that even if a statement objectively threatens violence, the speaker also must have subjectively "disregarded a substantial risk" it

would be viewed as such—or else the First Amendment bars prosecution. *Id.* at 2112-2118.

Contrast that with *Hill*—where this Court held that governments could criminalize *all* unconsented approaches for purposes of education or counseling because *some* approaches "can" "impl[y]" a "threat of physical touching" or cause "trauma." 530 U.S. at 715, 723-724. In other words, under *Hill*, even if an approach is *neither* objectively threatening *nor* subjectively understood to be so, it nonetheless can be prosecuted—and the First Amendment has nothing to say. It is now harder for Colorado to prosecute someone for privately telling a woman "Die" and "Staying in cyber life is going to kill you," *Counterman*, 143 S. Ct. at 2112, than it is for Colorado to prosecute a sidewalk counselor for peacefully approaching a woman outside an abortion clinic with a leaflet and a smile. That cannot be the law.

4. Nor is this a case in which reliance supports adhering to *Hill*'s errors. Traditional reliance interests "develop in 'cases involving property and contract rights.'" *Dobbs*, 142 S. Ct. at 2276. Here, however, the only conceivable reliance is that of state and local governments in maintaining laws that violate the First Amendment—which this Court has repeatedly explained "is not a compelling interest for *stare decisis*." *Janus*, 138 S. Ct. at 2485 n.27 (citing *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010)).

Indeed, any such reliance would be misplaced, since the public has been "on notice for years regarding this Court's misgivings about" *Hill*. *Janus*, 138 S. Ct. at 2484. This case vividly illustrates the point. In a committee meeting leading to the passage of the Sidewalk Counseling Ban, Westchester's County

Attorney cited *Price* and *City of Austin*'s "dissent excoriating *Hill*," warned that "[i]f this legislation * * * ever got [to the Supreme Court], I have real questions," and stated that "I think we know what the Supreme Court would rule if this ever got there," "so hopefully our legislation never gets to the Supreme Court and gets only to the Second Circuit."[14] Outside legal experts echoed these points.[15] No one expressed a different view, at any stage of the legislative process as the public record reflects it. Yet the County passed the law anyway.

This sort of bad-faith lawmaking is all the more reason to grant certiorari. For over a year, the County has silenced sidewalk counselors on pain of criminal penalties, denying vulnerable women their assistance, based on little more than a gamble that this Court won't vindicate their First Amendment rights—or ever get the chance to. The chance is here. The County should lose its bet.

III. This is the case in which to overrule *Hill*.

This case presents an ideal vehicle for revisiting *Hill*, for five reasons.

First, the County's Sidewalk Counseling Ban is "modeled after" and "materially identical to" the

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[14] Joint Meeting, *supra* n.2, at 39:55-40:40, 1:53:12-1:53:16.

[15] See, *e.g.*, Joint Meeting, *supra* n.2, at 24:20-24:28 ("several commentators have read [*McCullen*] as also calling into question the reasoning of *Hill*"); *id.* at 47:31-47:35 ("I think it's true that *Hill* may get overturned."); *id.* at 48:50-48:53 (*Hill* is "on too shaky ground now"); *id.* at 1:40:32-1:41:01 ("The Court might strike it down, which I think if it did take [the case], it's likely that it would[.] * * * I think, yes, that the Court would strike it down.").

Colorado law upheld in *Hill*. Pet.App.10a, 20a. There are two slight differences, neither of which affects *Hill*'s content-neutrality or narrow-tailoring holdings. The Colorado law prohibited "passing a leaflet or handbill," Colo. Rev. Stat. §18-9-122(3), while the Sidewalk Counseling Ban prohibits "passing any material," §425.31(*i*). And the Colorado law applied to all "health-care facilit[ies]," Colo. Rev. Stat. §18-9-122(3)-(4), while the Sidewalk Counseling Ban applies only to "*reproductive* health care facilit[ies]," §425.31(*i*) (emphasis added). The Sidewalk Counseling Ban is thus even more targeted and restrictive. But these differences are immaterial under *Hill*'s blunt-instrument reasoning, as the Second Circuit recognized below. Pet.App.20a-22a.

Second, *Hill* is all that stands between Vitagliano and the women she seeks to help. The district court's merits analysis relied on *Hill* alone. See Pet.App.29a-31a. And the Second Circuit "agree[d] that the district court correctly applied *Hill* in dismissing [Vitagliano's] claim." *Id.* at 20a.

Third, the district court resolved the case on a motion to dismiss. There are no factual disputes and the issues are purely legal.

Fourth, the County's position on narrow tailoring only underscores the conflict with *McCullen*. Again, the County has never asserted the interest that this Court accepted as legitimate in *Hill*—protecting citizens from unwanted speech in public fora. Instead, the County primarily argued its law was justified by the interests Colorado asserted in *Hill* but this Court ignored—"promoting the free flow of traffic" on sidewalks and preventing obstruction of clinic entrances. C.A.Resp.Br.19.

These are the same interests Massachusetts asserted in *McCullen*. 573 U.S. at 480, 486, 493 ("free flow of traffic," "patient access"). And they fail here for the same reasons they failed in *McCullen*—because the County has many "options" for addressing these interests without "burdening the kind of speech in which petitioner[]" seeks to engage. *Id.* at 490. Indeed, the County has the exact same options at its disposal that this Court identified in *McCullen*, and has already enacted many of them:

- *McCullen* pointed to local laws prohibiting "obstruction" on sidewalks generally. *Id.* at 492-493. New York law already prohibits that. N.Y. Penal Law §240.20(5).

- *McCullen* said Massachusetts could enact a law "requir[ing] crowds blocking a clinic entrance to disperse when ordered." 573 U.S. at 493. New York law already requires that. N.Y. Penal Law §240.20(6).

- *McCullen* identified a "separate provision" of the same law that specifically prohibited obstructing access to abortion clinics. 573 U.S. at 490-491. A separate provision of the County's law also prohibits that. §425.31(a).

- *McCullen* pointed to "generic criminal statutes forbidding," *e.g.*, assault, harassment, and trespass. 573 U.S. at 492. New York law has those. N.Y. Penal Law §§120.00, 140.10, 240.25-26.

- *McCullen* said if all this was not enough, Massachusetts "could enact legislation similar to the federal" Freedom of Access to Clinic Entrances ("FACE") Act, 18 U.S.C. 248. 573

> U.S. at 491-493. New York law already has a FACE Act analogue. N.Y. Penal Law §240.70. And separate provisions of the County's law are also FACE Act analogues. §§425.31(e)-(f).

Given these overlapping prohibitions, the only conduct uniquely prohibited by the Sidewalk Counseling Ban is peaceful speech like Vitagliano's. That the County's law is so plainly unconstitutional under *McCullen*—but for *Hill*—confirms this case as a strong vehicle.[16]

Fifth, while prior petitions have challenged *Hill*, this is the first to do so after *City of Austin*. As explained above, *City of Austin*'s references to history and tradition only highlight the unconstitutionality of *Hill* laws. According to the *City of Austin* dissent, however, other aspects of the majority's analysis "risk resuscitating *Hill*," "[en]danger[ing] * * * the First Amendment." 142 S. Ct. at 1490-1492 (Thomas, J., dissenting). The majority demurred, saying *Hill* was "a decision that we do not cite." *Id.* at 1475 (majority opinion). Unless this Court squarely addresses the issue, however, jurisdictions eager to ban sidewalk counseling may read *City of Austin* as renewing their license. Here, for example, the County told the Second Circuit that "even if *Hill* did not exist, the County's law is constitutional"—with *City of Austin* as its lead case. C.A.Resp.Br.2, 14-15.

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[16] The County also asserted below that the law protects a "right to privacy," keeping women from "being identified" on their way into clinics. C.A.Resp.Br.20. But there is no "privacy" right not to be seen using public streets and sidewalks. See, *e.g.*, *United States* v. *Knotts*, 460 U.S. 276, 281-282 (1983). Even if there were such a right, the Sidewalk Counseling Ban prohibits speaking, not looking, and so does not advance it.

Granting this case would allow the Court to make clear that this isn't so. In *City of Austin*, the alleged content distinction turned solely on "relative location"—*i.e.*, whether the thing discussed was on the same premises as the sign. 142 S. Ct. at 1471-1473. *Hill* laws, meanwhile, turn not on the location of the thing the speaker is discussing but on the speaker's substantive message—whether it constitutes "protest, education, or counseling." That is "textbook" content discrimination, *Hill*, 530 U.S. at 766 (Kennedy, J., dissenting), before and after *City of Austin*, and this Court should not allow it to stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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