APPENDIX

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23-30
Vitagliano v. County of Westchester

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

(Argued: May 9, 2023 Decided: June 21, 2023)

No. 23-30

DEBRA A. VITAGLIANO,
Plaintiff-Appellant

– v. –

COUNTY OF WESTCHESTER,
*Defendant-Appellee.**

Before: LIVINGSTON, *Chief Judge*, REENA RAGGI, and SUSAN L. CARNEY, *Circuit Judges.*

Plaintiff-Appellant Debra Vitagliano, an aspiring sidewalk counselor, brought a First Amendment challenge to Westchester County's recently enacted "bubble zone" law, which makes it illegal to approach within eight feet of another person for the purpose of engaging in "oral protest, education, or counseling" when inside a one-hundred-foot radius of a reproductive health care facility. The district court dismissed the complaint, holding that Vitagliano lacks standing to mount a pre-enforcement challenge to the bubble zone law, and that, in any event, the Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000),

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* The Clerk of Court is directed to amend the caption as set forth above.

forecloses her First Amendment claim. We conclude that Vitagliano has standing to seek pre-enforcement relief because she has pleaded sufficient facts to support a credible threat that Westchester County will enforce the bubble zone law if she pursues her stated intention to engage in sidewalk counseling. We nevertheless affirm the judgment of dismissal because the district court correctly recognized that *Hill* dictates the conclusion that Westchester County's bubble zone law withstands First Amendment scrutiny. Accordingly, the judgment of the district court is **VACATED IN PART** and **AFFIRMED IN PART**.

For Plaintiff-Appellant:

JOSEPH C. DAVIS (Mark L. Rienzi, Daniel L. Chen, Daniel M. Vitagliano, *on the brief*), The Becket Fund for Religious Liberty, Washington, DC.

(Edward M. Wenger, Caleb B. Acker, Andrew B. Pardue, Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Washington, DC, *for* Eleanor McCullen, as *amicus curiae*)

For Defendant-Appellee:

JOHN M. NONNA, Westchester County Attorney (Justin R. Adin, Deputy County Attorney, Shawna C. MacLeod, Senior Assistant County Attorney, *on the brief*), Westchester County Attorney's Office, White Plains, NY.

(Stephanie Schuster, Emily Booth, Tanya Tiwari, Caiti Zeytoonian,

Bichnga T. Do, Morgan, Lewis & Bockius LLP, Washington, DC, Boston, MA, and Los Angeles, CA, *for* Westchester Coalition for Legal Abortion – Choice Matters, Inc., Hope's Door, Westchester Women's Agenda, and Planned Parenthood Hudson Peconic, Inc., as *amici curiae*).

PER CURIAM:

Plaintiff-Appellant Debra Vitagliano ("Vitagliano") is an aspiring pro-life sidewalk counselor who wishes to approach women entering abortion clinics and engage them in peaceful conversation about abortion alternatives. Vitagliano sued Westchester County (the "County"), pursuant to 42 U.S.C. § 1983, asserting a First Amendment challenge to its recently enacted "bubble zone" law, which makes it illegal to approach within eight feet of another person for the purpose of engaging in "oral protest, education, or counseling" when inside a one-hundred-foot radius of a reproductive health care facility. Vitagliano contends that the County's bubble zone law is a content-based restriction on speech that cannot survive strict or intermediate scrutiny.

Vitagliano appeals from a judgment dismissing her claim. The district court (Halpern, *J.*) determined *sua sponte* that she lacks standing to assert a pre-enforcement challenge to the County's bubble zone law and that, in any event, the Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld a materially identical bubble zone law in Colorado, forecloses Vitagliano's First Amendment claim. We

disagree in part. The district court's standing analysis failed to credit Vitagliano's well-pleaded allegations detailing the efforts she undertook to become a sidewalk counselor and her plans to engage in such counseling. Because Vitagliano has alleged facts that demonstrate a credible threat of prosecution under the County's bubble zone law if she pursues her plans to counsel on the sidewalk, she has articulated an injury in fact that is sufficiently concrete and imminent to confer Article III standing. Accordingly, we vacate the district court's ruling insofar as it dismissed Vitagliano's suit for lack of standing. We nevertheless affirm the judgment on the merits because the district court correctly concluded that *Hill* is dispositive of Vitagliano's First Amendment claim.

BACKGROUND

I. Factual Background

A. Westchester County's Bubble Zone Law

On June 27, 2022, Westchester County enacted the Reproductive Health Care Facilities Access Act (the "Act"). Westchester Cnty., N.Y., Charter & Admin. Code ch. 425 (2023). The Act's stated purpose is to "prohibit interference with accessing reproductive health care facilities and obtaining reproductive health care services[.]" *Id.* § 425.11. The Act contains nine separate prohibitions on conduct and speech outside of "reproductive health care facilit[ies]." *Id.* § 425.31(a)–(i).[1]

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[1] The Act defines a "[r]eproductive health care facility" as "any building, structure, or place, or any portion thereof, at which licensed, certified, or otherwise legally authorized persons provide reproductive health care services." Westchester Cnty., N.Y.,

The focal point of this appeal is § 425.31(i), the provision of the Act that creates the so-called bubble zone. This section provides that it shall be unlawful 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.

Id. § 425.31(i).[2]

Although not challenged in the instant appeal, the Act also makes it illegal to: (1) "[k]nowingly physically obstruct or block another person" from entering or exiting a reproductive health care facility; (2) "[s]trike, shove, restrain, grab, kick, or otherwise subject to unwanted physical contact or injury" anyone seeking to legally enter or exit a reproductive health care facility; (3) "[k]nowingly follow and harass another person" within 25 feet of a reproductive health care facility or its parking lot; (4) "[k]nowingly engage in a course of

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Charter & Admin. Code § 425.21(k). "Reproductive health care services" is, in turn, defined as "medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." *Id.* § 425.21(l).

[2] The Act defines "[a]pproach" as "to move nearer in distance to someone." Westchester Cnty., N.Y., Charter & Admin. Code § 425.21(a). It also specifies that "'[e]ight (8) feet' shall be measured from the part of a person's body that is nearest to the closest part of another person's body, where the term 'body' includes any natural or artificial extension of a person, including, but not limited to, an outstretched arm or hand-held sign." *Id.* § 425.21(b).

conduct or repeatedly commit acts when such behavior places another person in reasonable fear of physical harm" within 25 feet of a reproductive health care facility or its parking lot; (5) "knowingly injure, intimidate, or interfere with" another by force, threat of force, or physical blocking "to discourage such other person" from "obtaining or providing" reproductive health care services; (6) "knowingly injure, intimidate, or interfere with" another by force, threat of force, or physical blocking "because such person was or is obtaining or providing" reproductive health care services; (7) "[p]hysically damage a reproductive health care facility so as to interfere with its operation"; and (8) "[k]nowingly interfere with the operation of a reproductive health care facility[.]" *Id.* § 425.31(a)–(h).

Violations of the Act are misdemeanors, with a first conviction punishable by up to $1,000 in fines and six months' imprisonment. *Id.* § 425.41(a). Subsequent convictions are punishable by up to $5,000 in fines and one year's imprisonment. *Id.* § 425.41(b). The Act also allows the County Attorney to bring civil enforcement actions for injunctive relief. *Id.* § 425.61. It further creates a private civil cause of action for treble damages and injunctive relief, which can be brought by "any person whose ability to access the premises of a reproductive health care facility has been interfered with," or by any "owner," "operator," "employee," "volunteer," and "invitee" of a reproductive health care center. *Id.* § 425.51. And the Act provides for joint and several liability for individuals who "acted in concert" to violate any of its prohibitions. *Id.* § 425.71.

B. Vitagliano and Her Pro-Life Activities[3]

Vitagliano is a 64-year-old mother of three and a resident of Westchester County. App'x 1, 4. She has worked as an occupational therapist for 42 years, primarily assisting special needs children. *Id.* at 4–5. She is a devout, practicing Catholic and, consistent with her faith, opposes abortion as contrary to her sense of morality. *Id.* at 5.

Moved by her faith, in February 2021, Vitagliano began participating in a peaceful prayer-vigil campaign at the Planned Parenthood facility in White Plains, New York. *Id.* As part of the campaign, Vitagliano held signs with pro-life messages and prayed on the sidewalk and public way outside the facility. *Id.* at 6. During her activities outside of Planned Parenthood, Vitagliano observed others engage in sidewalk counseling by approaching women on their way into the clinic, speaking with them, and distributing pamphlets and other materials. *Id.* Vitagliano felt compelled to engage in sidewalk counseling, hoping to inform women about abortion alternatives and advise them of available resources if they decide to forego abortion procedures. *Id.*

Vitagliano "did not immediately engage in sidewalk counseling because she felt she first needed proper training." *Id.* In particular, she wanted to learn effective techniques for approaching pregnant women, develop ideas for what to say to them, and prepare herself for handling the different situations she may

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[3] The facts concerning Vitagliano and her pro-life activities are taken from her complaint and are accepted as true for purposes of this appeal. *See Yamashita v. Scholastic Inc.*, 936 F.3d 98, 100 n.2 (2d Cir. 2019).

confront. *Id.* Vitagliano thus enrolled in and completed two online classes (an introductory course and an eight-week advanced course) on consulting pregnant women considering abortion. *Id.* at 7. In spring 2022, Vitagliano obtained pamphlets from local pro-life organizers, "which she planned to distribute while engaging in future sidewalk counseling." *Id.* Upon completing her training, she volunteered as a "life consultant" at a local crisis pregnancy center, meeting with women experiencing unplanned pregnancies and consulting with them about their options. *Id.* Vitagliano began volunteering by shadowing other life consultants and now volunteers in this capacity for two hours every week. *Id.*

"Now properly trained and with experience as a life consultant," Vitagliano avers that she "is prepared to engage in sidewalk counseling," "would like to counsel women on the public way as they approach the White Plains Planned Parenthood," and would do so "[b]ut for" the County law at issue in this litigation *Id.* at 7, 15. If permitted, Vitagliano hopes to engage women entering the abortion clinic to explore the details of their stories through active listening and asking about their needs, feelings, and the reactions of their family members. *Id.* at 7–8. She would initiate conversations by telling women something to the effect of "[y]ou are not alone . . . [w]e can help you," and would inform pregnant women seeking abortions that there are people who will love and care for them and their children. *Id.* at 8. Drawing on her experience as a mother and occupational therapist, Vitagliano wants to share options besides abortion and encourage them to carry their babies to term. *Id.* at 9. Before she could implement her training and engage in sidewalk counseling, the County enacted the bubble zone law. *Id.*

II. Procedural History

In November 2022, Vitagliano filed suit against the County, asserting a First Amendment claim under § 1983 characterizing the County's bubble zone law as a content-based restriction on speech that fails strict scrutiny.[4] *Id.* at 18–22. The County filed a premotion letter concerning its anticipated motion to dismiss Vitagliano's claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at 29–31. The County argued in this letter that the Supreme Court's decision in "*Hill* is directly on point and binding here, and remains controlling precedent unless and until the Supreme Court overturns it." *Id.* at 30. In response, Vitagliano acknowledged that *Hill* directly controls her claim and expressed her view that "*Hill* was wrongly decided, is irreconcilable with intervening precedent, and should be overruled by the Supreme Court." *Id.* at 32. Because she could not obtain her desired relief in the district court, Vitagliano suggested that "[i]n the interest of judicial economy, [the district court] may therefore wish to dispense with formal briefing, treat [the County's] pre-motion letter as the motion, and dispose of it." *Id.* at 35.

In January 2023, the district court granted the County's motion to dismiss without further briefing. *See Vitagliano v. County of Westchester*, No. 22 Civ. 9370 (PMH), 2023 WL 24246 (S.D.N.Y. Jan. 3, 2023).

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[4] Vitagliano named Westchester County, County Executive George Latimer, and County Attorney John M. Nonna as defendants in her complaint. App'x 3–4. After the parties stipulated that Latimer and Nonna would be "bound by and subject to any injunction or declaratory judgment [Vitagliano] obtains against the County in this action," the parties agreed to drop Latimer and Nonna from the case. *Id.* at 24-28.

The district court determined that Vitagliano lacks Article III standing and, even if she has standing, *Hill* forecloses her claims. On standing—which the parties did not discuss in their premotion letters—the district court held that Vitagliano had not adequately alleged an injury in fact stemming from the County's bubble zone restriction because "she has never engaged in sidewalk counseling" and "does not allege any concrete plans to do so at any point in the future." *Id.* at *3. As the court construed the complaint, Vitagliano "only alleged, in the most general fashion, that . . . her exercise of free speech has been chilled by the enactment of the Buffer Zone Provision." *Id.* (internal quotation marks omitted). The district court emphasized that Vitagliano alleged that she "would need 'proper training' before she would even consider sidewalk counseling." *Id.* Vitagliano thus harbored only an abstract and subjective fear about the bubble zone law, which, according to the district court, is insufficient to confer Article III standing. *Id.*

On the merits, the district court, applying *Hill*, concluded that the bubble zone law withstands intermediate scrutiny. *Id.* at *3–4. Recognizing that the County's bubble zone law is materially identical to the Colorado law the Supreme Court previously upheld in *Hill*, the district court determined that the County's law is content neutral because "[i]t applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision." *Id.* at *3 (quoting *Hill*, 530 U.S. at 726). The district court further concluded that the law "is clearly narrowly tailored to advance Westchester County's significant governmental interest in protecting individuals attempting to enter

health care facilities from 'unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.'" *Id.* (quoting *Hill*, 530 U.S. at 729).

DISCUSSION

Vitagliano concedes that the Supreme Court's decision in *Hill* is binding precedent, and that the district court correctly applied this precedent in dismissing her claim. Vitagliano nevertheless pursues this appeal in the hope that the Supreme Court will revisit and overrule *Hill* and hold that bubble zone restrictions like the County's violate the First Amendment. Vitagliano also asserts error as to the district court's standing ruling, contending that the district court premised its reasoning on an erroneous reading of her complaint and a misapplication of standing precedent. We review *de novo* both the district court's dismissal of a complaint for lack of standing and for failure to state a claim. *See Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 93 (2d Cir. 2015).

I. Standing

We begin with standing "because it is a 'jurisdictional' requirement and 'must be assessed before reaching the merits.'" *Calcano v. Swarovski N. Am. Ltd.*, 36 F.4th 68, 74 (2d Cir. 2022) (quoting *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018)). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014)). The district

court determined that Vitagliano had not suffered an injury in fact and thus failed on the first standing requirement. This conclusion, however, minimizes the concreteness of Vitagliano's plans to engage in sidewalk counseling, fails to credit her allegations concerning the efforts she took to learn how to become a sidewalk counselor, and overlooks the details as to how and where she plans to engage in such counseling. Under applicable precedent, Vitagliano has adequately alleged that she suffered an injury in fact and, furthermore, that this alleged injury was caused by the law at issue and is redressable by a ruling in her favor. Accordingly, Vitagliano has standing to bring this pre-enforcement challenge to the County's bubble zone law.

An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). An allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013) (emphasis and internal quotation marks omitted). "Pre-enforcement challenges to criminal statutes"—such as the County's bubble zone law—"are cognizable under Article III," as it is well established that a "plaintiff need not first expose [her]self to liability before bringing suit to challenge . . . the constitutionality of a law threatened to be enforced." *Picard*, 42 F.4th at 97 (internal quotation marks and citations omitted). Courts apply a three-prong test to assess the existence of a cognizable injury in fact in the context of pre-enforcement challenges, which requires a plaintiff to demonstrate: (1) "an intention to engage in a course of

conduct arguably affected with a constitutional interest"; (2) that the intended conduct is "proscribed by" the challenged law; and (3) that "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (internal quotation marks and citation omitted). In other words, "a plaintiff has standing to make a preenforcement challenge 'when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative.'" *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (quoting *Hedges v. Obama*, 724 F.3d 170, 196 (2d Cir. 2013)). Vitagliano has satisfied all three elements to establish that she has suffered an injury in fact related to the prospect of the County's enforcement of its bubble zone law.

First, Vitagliano's desire to engage in sidewalk counseling involves a course of conduct affected with a constitutional interest. Vitagliano alleges that she wishes to "stand on the public way outside of a White Plains abortion clinic, approach women entering the clinic, and initiate gentle, compassionate conversations about the woman's situation and resources available should she decide to carry her child to term." App'x 1–2. As part of her intended sidewalk counseling, Vitagliano plans to distribute pamphlets containing information about the services and resources available to women who have children. *Id.* at 7, 9. These plans are clearly affected with a First Amendment interest. For one, "traditional public fora," such as the sidewalks and public ways where Vitagliano wishes to engage in sidewalk counseling, "are areas that have historically been open to the public for speech activities." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). Furthermore, "[l]eafletting and commenting on matters of public concern are classic forms of speech that

lie at the heart of the First Amendment," especially in traditional public fora where speech "is at its most protected[.]" *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997); *see also Hill*, 530 U.S. at 715 ("[L]eafletting, sign displays, and oral communications are protected by the First Amendment."). Because Vitagliano's intended activities involve peaceful communication on an issue of public concern in a public area, she has satisfied the first prong of the pre-enforcement injury-in-fact test.

The district court denied Vitagliano standing because she "only alleged, in the most general fashion, that . . . her exercise of free speech has been chilled by the enactment of the Buffer Zone Provision." *Vitagliano*, 2023 WL 24246, at *3 (internal quotation marks omitted). The district court emphasized that Vitagliano had "never engaged in sidewalk counseling," did not "allege concrete plans to do so at any point in the future," and needed "'proper training' before she would even consider sidewalk counseling." *Id.* The last statement, however, misconstrued the complaint, which explained that Vitagliano has now received such training. App'x 7. Further, a plaintiff asserting a pre-enforcement challenge need only allege "an intention to engage in a course of conduct," which does not necessarily require specification of the date and time she plans to do something of constitutional significance. *Picard*, 42 F.4th at 97 (quoting *Susan B. Anthony List*, 573 U.S. at 159). Vitagliano included in her complaint descriptions of the origin of her desire to become a sidewalk counselor, the steps she took to train and prepare to serve as a sidewalk counselor, the abortion clinic outside which she intends to provide sidewalk counseling, and the approach she plans to take when

having sidewalk-counseling conversations. App'x 5–12.

This level of detail more than suffices to establish Vitagliano's "earnest desire to engage in sidewalk counseling" "but for" the enactment of the bubble zone restriction. *Id.* at 15; *see also, e.g.*, *Silva v. Farrish*, 47 F.4th 78, 87 (2d Cir. 2022) (finding that a group of fishermen could bring a pre-enforcement challenge to state fishing laws when they alleged the regulations "deterred and chilled" them from fishing and that "they would fish if they did not fear prosecution"); *Picard*, 42 F.4th at 95, 97–101 (finding standing for a pre-enforcement challenge to a criminal statute restricting activity outside of courthouses for a plaintiff who alleged "[a]bsent his fear" of prosecution "he would continue to promote jury nullification outside New York courthouses"). That Vitagliano had not engaged in sidewalk counseling prior to the Act's passage does not require a different result. *See Susan B. Anthony List*, 573 U.S. at 159 (requiring only an "intention to engage in a course of conduct" (internal quotation marks omitted)); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1172 (10th Cir. 2021) (finding intent to engage in conduct where "[a]lthough Appellants have not yet offered wedding website services," they "provided clear examples of the types of websites they intend to provide"), *cert. granted on different question*, 142 S. Ct. 1106 (2022); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (finding standing where plaintiff planned to "enter" business that would be affected by challenged law).

Second, Vitagliano's sidewalk counseling is squarely proscribed by the Act. In evaluating this prong of the standing analysis, a plaintiff's intended

conduct need only be "'*arguably* proscribed' by the challenged statute," not necessarily "*in fact* proscribed." *Picard*, 42 F.4th at 98 (quoting *Susan B. Anthony List*, 573 U.S. at 162). Vitagliano's allegations exceed the applicable standard. The challenged provision of the Act makes it illegal within 100 feet of an abortion clinic to "[k]nowingly approach another person within eight (8) feet," absent that person's consent, "for the purpose of passing any material, item, or object to, displaying a sign to, or engaging in oral protest, education, or counseling." Westchester Cnty., N.Y., Charter & Admin. Code § 425.31(i). This is precisely what sidewalk counseling entails and Vitagliano's allegations make it clear that her desired course of conduct is proscribed by the Act.

Third, and finally, Vitagliano has demonstrated that she faces a credible threat of enforcement if she follows through with her intention to engage in sidewalk counseling. The County contends that Vitagliano "has not identified a credible threat of enforcement, outside of the general existence of the law," and argues that she must plead something more than an intention to engage in conduct clearly proscribed by the Act. Appellee's Br. 8; *see also id.* at 7–10. To be sure, "[t]he identification of a credible threat sufficient to satisfy the imminence requirement of injury in fact necessarily depends on the particular circumstances at issue." *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015). But the County's argument ignores the well-established proposition that "[w]here a statute specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019) (internal quotation marks and

citation omitted). Rather, we "presume[ ] such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Id.* (internal quotation marks and citation omitted). The credible-threat standard "sets a low threshold and is quite forgiving to plaintiffs seeking such preenforcement review, as courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund." *Cayuga Nation*, 824 F.3d at 331 (internal quotation marks and citation omitted).

The County enacted the bubble zone restrictions in June 2022, just months before Vitagliano brought this action—hardly moribund—and Vitagliano's intended course of conduct falls squarely within the Act's prohibitions. Moreover, there is no indication that the County has disavowed enforcement of the bubble zone restriction; to the contrary, when asked at oral argument, the County declined to represent that county officials would not enforce the law. With no reason to doubt that the County will enforce its recently enacted law against those who violate its terms, we may presume that Vitagliano faces a credible threat of enforcement if she pursues her intention to counsel on the sidewalk.

The County relies on *Adam v. Barr*, 792 F. App'x 20 (2d. Cir. 2019), in which we held that a *pro se* plaintiff lacked standing to sue federal officials to enjoin potential enforcement of the Controlled Substances Act ("CSA"), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*, against him because he wished to possess and use marijuana for religious purposes. But *Adam*, an unpublished summary order, is not analogous to the instant case. *Adam* arose out of a suit against the federal

government, involving a supposed threat of prosecution under a decades-old law with nationwide scope. We explained that the presumption that the government will enforce its own laws "in and of itself, is not sufficient to confer standing, as courts also consider the extent of that enforcement in determining whether a credible threat of prosecution exists." *Adam*, 792 F. App'x at 23. Despite the CSA's extensive enforcement history, the plaintiff was unable to marshal examples of enforcement actions that involved the kind of personal religious use of marijuana in which he planned to partake. *Id.* at 22–23. Because the plaintiff had not "partizularize[d] the CSA's enforcement in relation to" his conduct, he was "simply . . . at risk just like any other person in the country who might violate the CSA." *Id.* at 23. We thus held that "the threat of enforcement against him [was] insufficiently imminent to confer Article III standing." *Id.* (citation omitted).

The circumstances of Vitagliano's case present an eminently more credible threat of prosecution. Vitagliano seeks to enjoin a newly enacted law aimed specifically at Westchester County reproductive health care facilities and designed to curb the very conduct in which she intends to engage outside such facilities. Far from the facts of *Adam*, Vitagliano's allegations reveal her intent to engage in conduct only recently criminalized and in the precise location that the new law targets. We are convinced that the "particular circumstances at issue" here make the threat of prosecution highly "credible." *Knife Rights*, 802 F.3d at 384.

The County additionally cites several cases in which a plaintiff faced either previous enforcement actions or a stated threat of future prosecution under a challenged law. *See* Appellee's Br. 8. While evidence of

such activity is, of course, relevant to assessing the credibility of an enforcement threat, none of these cases suggest that such evidence is *necessary* to make out an injury in fact. *See, e.g.*, *Susan B. Anthony List*, 573 U.S. at 164 (observing "that past enforcement against the same conduct is *good evidence* that the threat of enforcement is not chimerical" (emphasis added) (internal quotation marks and citations omitted)). Weakening the County's argument, we have explained that requiring an "overt threat to enforce" a criminal prohibition "would run afoul of the Supreme Court's admonition not to put 'the challenger to the choice between abandoning his rights or risking prosecution.'" *Tong*, 930 F.3d at 70 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). And we have previously found standing where there was no "express threat of prosecution specifically directed at the plaintiff." *Cayuga Nation*, 824 F.3d at 332 n.9 (citing *Knife Rights*, 802 F.3d at 384 n.4, 386–87). Likewise, the Supreme Court and at least four other circuits have sustained pre-enforcement standing without a past enforcement action or an overt threat of prosecution directed at the plaintiff.[5]

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[5] *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988) (permitting a pre-enforcement challenge to a statute initiated before the statute became effective); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (finding pre-enforcement standing without a specific threat of prosecution and even though the criminal prohibition had "not yet been applied and may never be applied" to a particular course of conduct); *see also Speech First, Inc. v. Fenves*, 979 F.3d 319, 336–37 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003).

Vitagliano has thus adequately alleged an injury in fact for Article III purposes. She additionally satisfies the causation and redressability requirements, in that her injury is fairly traceable to the challenged bubble zone law and can be redressed by her requested relief, *i.e.*, a declaration that the bubble zone law is unconstitutional and an injunction enjoining its enforcement. *See Lujan*, 504 U.S. at 560–61. Therefore, Vitagliano has standing to bring this pre-enforcement challenge to the County's bubble zone law.

II. Merits

We need not dwell on the merits of Vitagliano's First Amendment challenge to the County's bubble zone law, as Vitagliano concedes (and we agree) that the district court correctly applied *Hill* in dismissing her claim. At issue in *Hill* was a 1993 Colorado statute that made it unlawful within 100 feet of any health care facility to "'knowingly approach' within eight feet of another person, without that person's consent, '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[.]'" *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)). Although not identical in all respects, the County's bubble zone law was modeled after this Colorado law.[6]

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[6] For instance, § 425.31(i) of the Act prohibits passing "any material" within the prescribed bubble zone, whereas Colorado's law restricted the passing of "leaflet[s] or handbill[s]." *Compare* Westchester Cnty., N.Y., Charter & Admin. Code § 425.31(i), *with* Colo. Rev. Stat. § 18-9-122(3). Moreover, the County's bubble zone restrictions operate only outside of facilities that offer reproductive health care services (including abortion facilities and anti-abortion pregnancy centers), whereas Colorado's law applies outside of all facilities licensed to provide medical treatment.

Similar to Vitagliano, the petitioners in *Hill* were sidewalk counselors who alleged that Colorado's bubble zone chilled the exercise of their fundamental right to free speech. *Id.* at 708–09. Furthering the similarities between the two cases, the *Hill* petitioners asserted that Colorado's law was a content-based restriction on speech that failed strict scrutiny. *Id.* at 709.

The Supreme Court determined that Colorado's bubble zone law was content-neutral because it "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723. "Instead of drawing distinctions based on the subject that the approaching speaker may wish to address"—a paradigmatic regulation targeting content—the restriction "applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," permitting each to "attempt to educate unwilling listeners on any subject," so long as they did not approach within eight feet without consent to do so. *Id.* Applying intermediate scrutiny, the Court held that the Colorado law was a valid time, place, and manner regulation that (1) was narrowly tailored to serve the important governmental interests of safeguarding public health and safety and shielding captive listeners from unwanted communication and (2) left open ample alternative channels for communication. *Id.* at 714–18, 725–30.

Vitagliano argues in her briefing why she believes *Hill* was wrongly decided and is irreconcilable with intervening Supreme Court precedent. These arguments have no bearing on the disposition of the appeal now

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Compare Westchester Cnty., N.Y., Charter & Admin. Code § 425.21(k)–(l), *with* Colo. Rev. Stat. § 18-9-122(4)

before us. The Supreme Court has stated in clear terms that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case [that] directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks and citation omitted). Accordingly, *Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, we **VACATE** the portion of the district court's judgment finding that Vitagliano lacked standing and **AFFIRM** the dismissal of Vitagliano's challenge to the County's bubble zone law on the merits.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEBRA A. VITAGLIANO, *Plaintiff,* – against – COUNTY OF WESTCHESTER, *Defendant.*	**MEMORANDUM OPINION AND ORDER** **22-CV-09370 (PMH)**

PHILIP M. HALPERN, United States District Judge:

Debra A. Vitagliano ("Plaintiff") commenced this case on November 1, 2022 against the County of Westchester ("County" or "Defendant"). (Doc. 1, "Compl."). Plaintiff asserts a single claim for relief under 42 U.S.C. § 1983, alleging that Westchester County Law § 425(i) violates the First Amendment of the U.S. Constitution. (Compl. ¶¶ 79-98). Defendant filed a pre-motion conference letter in anticipation of its motion to dismiss on December 16, 2022, arguing that Plaintiff's claim is foreclosed by the Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000). (Doc. 28). Plaintiff responded on December 21, 2022, conceding that "*Hill* remains binding on this Court and forecloses [Plaintiff's] claims" and requesting that the Court "treat Defendant's pre-motion letter as the motion, and dispose of [this case]" (Doc. 29 at 4).

Accordingly, the Court waives its pre-motion conference requirement, construes Defendant's pre-motion letter as its motion, and GRANTS the motion to dismiss for the reasons set forth below. *See Brown v. New York*, 2022 WL 221343, at *2 (2d Cir. Jan. 26,

2022); *StreetEasy, Inc. v. Chertok*, 730 F. App'x 4, 6 (2d Cir. 2018) (holding that the district court "acted within its discretion" in deeming a pre-conference letter as the party's motion and denying it when "the parties offered detailed arguments in pre-motion letters that evidenced the clear lack of merit in [the] contemplated motion"); *In re Best Payphones, Inc.*, 450 F. App'x 8, 15 (2d Cir. 2011) ("Given the length and detail of the Pre-motion Letter and responses, and the clear lack of merit of the sanctions argument, the district court did not abuse its discretion in construing the letter as a motion and denying the motion.").

BACKGROUND

Westchester County Law § 425.31(i) 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.

Westchester Cnty. Law § 425.31(i) ("Buffer Zone Provision"). "Approach" is defined as "to move nearer in distance to someone." *Id.* § 425.21(a). "Reproductive health care facility" is defined as "any building, structure, or place, or any portion thereof, at which licensed, certified, or otherwise legally authorized persons provide reproductive health care services," and "reproductive health care services" is in turn defined to include "services relating to pregnancy or the termination of a pregnancy." *Id.* § 425.21(k)-(l). Violations of

the Buffer Zone Provision are misdemeanors punishable by fines and imprisonment. *Id.* § 425.41(a)-(b). The statute authorizes civil actions by abortion clinics, abortion-clinic employees, and their invitees related to violations of the Buffer Zone Provision, and further authorizes civil enforcement actions by the Westchester County Attorney "for injunctive and other appropriate equitable relief in order to prevent or cure a violation." *Id.* §§ 425.51, 425.61.

In February 2021, Plaintiff began participating in "prayer vigils, where she would stand and peacefully pray on the sidewalk and other portions of the public way outside the White Plains Planned Parenthood." (Compl. ¶ 26). Plaintiff does not currently—nor has she ever—participated in "sidewalk counseling," a practice that violates the Buffer Zone Provision wherein individuals "approach[] women on their way into Planned Parenthood[,]" in order to speak with them and distribute pamphlets and other literature. (*Id.* ¶ 27). Plaintiff alleges that while she "felt called to engage in sidewalk counseling" (*id.* ¶ 28) she has never done so because "she felt she first needed proper training" (*id.* ¶ 29). Plaintiff alleges that she continues to refrain from engaging in sidewalk counseling, "[d]espite her earnest desire" to do so, "because of the [Buffer Zone Provision]." (*Id.*¶ 64). She alleges that "[b]ut for the [Buffer Zone Provision], Plaintiff would engage in sidewalk counseling." (*Id.* ¶ 65). Plaintiff further alleges that she will be "irreparably harmed" by the Buffer Zone Provision "because of the chilling of her constitutionally protected speech." (*Id.* ¶ 66).

STANDARD OF REVIEW

A Rule 12(b)(6) motion enables a court to dismiss a complaint for "failure to state a claim upon which

relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "When there are well-ple[d] factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*. at 679. The presumption of truth "is inapplicable to legal conclusions[,]" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Therefore, a plaintiff must provide "more than labels and conclusions" to show entitlement to relief. *Twombly*, 550 U.S. at 555.

ANALYSIS

I. Article III Standing

"'[I]t is common ground that in our federal system of limited jurisdiction any party or the court *sua sponte*, at any stage of the proceedings, may raise the question of whether the court has subject-matter jurisdiction.'" *United Food & Commercial Workers Union, Local 919, AFLCIO v. CenterMark Prop. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) (quoting *Manway Constr. Co., Inc. v. Hous. Auth. of the City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983)); *see* Fed. R.

Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative"); *Marom v. Town of Greenburgh*, No. 20-CV-03486, 2021 WL 797648, at *4 (S.D.N.Y. Mar. 2, 2021) (dismissing claims for want of subject-matter jurisdiction *sua sponte* pursuant to the Court's "inherent authority to evaluate the existence of subject-matter jurisdiction under Rule 12(h)(3)").

"[C]onstitutional ripeness" can be seen "as a specific application of the actual injury aspect of Article III standing." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). "Constitutional ripeness, in other words, is really just about the first *Lujan* factor—to say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury, if any, is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (setting forth the various factors for courts to consider in determining constitutional standing)). Pre-enforcement First Amendment claims, such as the one Plaintiff brings here, are assessed "under somewhat relaxed standing and ripeness rules." *Id.* at 689. Nevertheless, "[a] plaintiff must allege something more than an abstract, subjective fear that his rights are chilled in order to establish a case or controversy." *Id.* (citing *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). A plaintiff must allege "a real and imminent fear of such chilling" to satisfy Article III standing. *Id.*; *see also Kounitz v. Slaatten*, 901 F. Supp. 650, 654 (S.D.N.Y. 1995) (holding that the plaintiff failed to allege an injury in fact because he asserted "in the most general fashion" that he had been

"chilled in the exercise of his First Amendment rights").

Plaintiff admits in her Complaint that she has never engaged in sidewalk counseling. (Compl. ¶ 29). Although Plaintiff alleges that she has an "earnest desire to engage in sidewalk counseling" she does not allege any concrete plans to do so at any point in the future. (*Id.* ¶ 64). Plaintiff has only alleged, "in the most general fashion," that that her exercise of free speech has been chilled by the enactment of the Buffer Zone Provision. This is distinguishable from the facts the Second Circuit considered in *Walsh*. 714 F.3d 682 (2d Cir. 2013). There, the plaintiff brought a pre-enforcement action challenging a New York statute regarding the designation of certain entities as "political committees" and argued that such designation would chill its right to distribute certain advertisements. *Id.* The plaintiff in *Walsh* attached to its complaint "several advertisements it wanted to broadcast *immediately*, not in the future." *Id.* at 691 (emphasis in original). In assessing ripeness, the Second Circuit noted that the advertisements that the plaintiff sought to immediately broadcast showed that its speech had been chilled and that "[f]or ripeness purposes, [plaintiff's] future plans are of less relevance." *Id.* Here, Plaintiff has no concrete plans, either in the immediate-term or in the future, to engage in sidewalk counseling. Plaintiff's concerns regarding the Buffer Zone Provision amount to nothing more than "abstract, subjective fear[s] that h[er] rights are chilled" and cannot therefore serve as the basis for Article III standing. *Id.* at 688. Indeed, Plaintiff mentions that she would need "proper training" before she would even consider sidewalk counseling. (Compl. ¶ 29).

Accordingly, the Complaint is dismissed for failure to establish Article III standing.

II. *Hill v. Colorado*

Even if Plaintiff had established Article III standing, which she has not, her action is foreclosed by directly relevant Supreme Court precedent. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. Amend. I. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The Supreme Court has also recognized "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulation of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys'" *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)). "[A]bsent a content-based purpose or justification," a content-neutral regulation "does not warrant the application of strict scrutiny." *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022).

As Plaintiff acknowledges, the Buffer Zone Provision is "materially identical" to the law the Supreme Court upheld in *Hill v. Colorado*, 530 U.S. 730 (2000). (Compl. ¶ 6). The statute at issue in *Hill* created a 100-foot buffer zone around entrances to all healthcare facilities, in which a person could not knowingly approach within eight feet of another person, without that person's consent, 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." *Id.* at 707 & n.1. The *Hill* plaintiffs were anti-abortion activists engaged in sidewalk counseling who argued, just as Plaintiff does here, that the law was content-based because it regulated "oral protest, education, or counseling." *Id.* The Supreme Court rejected that argument and held that the law was content-neutral because "[i]t applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision." *Id.* at 726.

Just like the law upheld in *Hill*, the Buffer Zone Provision "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723. The Buffer Zone Provision leaves open ample alternative channels of communication. Oral protest, education, and counsel are all allowed "as long as they are not done while approaching within eight feet of an individual who has not provided consent." (Doc. 28 at 2). People are free to distribute leaflets to approaching individuals if they "choose to stand close to the entrances of the reproductive health care facilities" so long as they do so "without physically approaching individuals entering the facility." (*Id.*). The Buffer Zone Provision is clearly

narrowly tailored to advance Westchester County's significant governmental interest in protecting individuals attempting to enter health care facilities from "unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach." *Hill*, 530 U.S. at 729.

Accordingly, the Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 730 (2000) forecloses Plaintiff's claims as a matter of law and provides a separate and independent basis for the dismissal of the Complaint.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED. The Clerk of Court is respectfully directed to (i) terminate the motion sequence pending at Doc. 28 and (ii) close this case.

Dated: White Plains, New York
December 30, 2022

SO ORDERED.

/s/ Philip M. Halpern
PHILIP M. HALPERN
United States District Judge

CHAPTER 425
REPRODUCTIVE HEALTH CARE FACILITIES ACCESS ACT

Sec. 425.01. Short title.

This title shall be known as and may be cited as the "Reproductive Health Care Facilities Access Act."

Sec. 425.11. Legislative intent.

The County Board of Legislators finds that the right to access reproductive health care facilities and the right to obtain reproductive health care services, treatments, and/or procedures are essential personal rights protected by state and federal law. Equally, the right to peaceably protest and express one's views is an essential right protected by state and federal law. Such actions include, but are not limited to, the right to speak, march, demonstrate, picket, pray, associate with others in expressive behavior, or engage in other activity protected by the First Amendment.

The County Board is aware that there are individuals and/or groups of individuals who may exceed the boundaries of lawful First Amendment expression by engaging in activities that prevent individuals from accessing reproductive health care facilities or obtaining reproductive health care services, treatments, or procedures, or by engaging in activities that unlawfully harass or intimidate individuals trying to access such facilities and services. Such activities unlawfully interfere with both the operators of reproductive health care facilities and all individuals seeking free entrance to and egress from such facilities.

The County Board finds that current law does not adequately protect reproductive health care facilities, and those who work in, seek access to, or obtain services from such facilities. Therefore, the County Board of Legislators has determined that it is appropriate to enact legislation to prohibit interference with accessing reproductive health care facilities and obtaining reproductive health care services, in order to: protect and promote the public health, safety, and welfare; ensure order; protect the freedom of access to reproductive health care facilities; protect the freedom to obtain reproductive health care services; promote the free flow of traffic in the public way; advance medical privacy and the well-being of patients seeking access to reproductive health care facilities and obtaining reproductive health care services; and safeguard private property. This proposed Local Law protects persons seeking access to reproductive health care facilities and services both inside facilities as well as outside said facilities. The County Board finds that this Local Law does not prohibit conduct normally protected by the First Amendment. However, "true threats" and expression that takes place while trespassing on private

property are not protected under the First Amendment. The right to engage in legitimate First Amendment activity does not shield individuals who trespass on private property or otherwise run afoul of the law. And to the extent any First Amendment conduct is affected by this Local Law at all, the law acts as a modest and reasonable time, place, and manner restriction that leaves ample room to communicate messages through speech and other protected First Amendment activity.

The County Board has further determined that persons harmed by such interfering conduct should be able to seek redress in the courts, including state courts, for injunctive relief, damages, and attorney's fees and costs, and that the County of Westchester should be able to obtain appropriate injunctive relief under this Local Law.

Sec. 425.21. Definitions.

Whenever used in this Chapter, the following words and phrases shall have the meanings indicated, unless the context or subject matter otherwise requires:

a. "Approach" shall mean to move nearer in distance to someone.

b. "Eight (8) feet" shall be measured from the part of a person's body that is nearest to the closest part of another person's body, where the term "body" includes any natural or artificial extension of a person, including, but not limited to, an outstretched arm or handheld sign.

c. "Harass" shall mean to engage in a course of conduct or repeatedly commit conduct or acts

that alarm or seriously annoy another person and which serve no legitimate purpose. For the purposes of this definition, conduct or acts that serve no legitimate purpose include, but are not limited to, conduct or acts that continue after an express or implied request to cease has been made.

d. "Interfere with" shall mean to restrict a person's freedom of movement, or to stop, obstruct, or prevent, through deceptive means or otherwise.

e. "Intimidate" shall mean to place a person in reasonable apprehension of physical injury to such person or to another person.

f. "Invitee" shall mean an individual who enters another's premises as a result of an express or implied invitation of the owner or occupant for their mutual gain or benefit.

g. "Person" shall mean an individual, corporation, not-for-profit organization, partnership, association, group, or any other entity.

h. "Physically obstruct or block" shall mean to physically hinder, restrain, or impede, or to attempt to physically hinder, restrain or impede, or to otherwise render ingress to or egress from, or render passage to or from the premises of a reproductive health care facility impassable, unreasonably difficult, or hazardous.

i. "Premises of a reproductive health care facility" shall include the driveway, entrance, entryway, or exit of the reproductive health care facility, the building in which such facility is located,

and any parking lot in which the facility has an ownership or leasehold interest.

j. "Public parking lot serving a reproductive health care facility" shall mean any public parking lot that serves a reproductive health care facility and that has an entrance or exit located within one-hundred (100) feet of any door to that reproductive health care facility.

k. "Reproductive health care facility" shall mean any building, structure, or place, or any portion thereof, at which licensed, certified, or otherwise legally authorized persons provide reproductive health care services.

l. "Reproductive health care services" shall mean medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

Sec. 425.31. Prohibited conduct.

It shall be unlawful for any person to do the following:

a. knowingly physically obstruct or block another person from entering into or exiting from the premises of a reproductive health care facility or a public parking lot serving a reproductive health care facility, in order to prevent that person from obtaining or rendering, or assisting in obtaining or rendering, medical treatment or reproductive health care services; or

b. strike, shove, restrain, grab, kick, or otherwise subject to unwanted physical contact or injury any person seeking to legally enter or exit the

premises of a reproductive health care facility; or

c. knowingly follow and harass another person within twenty-five (25) feet of (i) the premises of a reproductive health care facility or (ii) the entrance or exit of a public parking lot serving a reproductive health care facility; or

d. knowingly engage in a course of conduct or repeatedly commit acts when such behavior places another person in reasonable fear of physical harm, or attempt to do the same, within twenty-five (25) feet of (i) the premises of a reproductive health care facility or (ii) the entrance or exit of a public parking lot serving a reproductive health care facility; or

e. by force or threat of force, or by physically obstructing or blocking, knowingly injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing, or assisting in obtaining or providing, reproductive health care services; or

f. by force or threat of force, or by physically obstructing or blocking, knowingly injure, intimidate, or interfere with, or attempt to injure, intimidate or interfere with, another person because such person was or is obtaining or providing, or was or is assisting in obtaining or providing, reproductive health care services; or

g. physically damage a reproductive health care facility so as to interfere with its operation, or attempt to do the same; or

h. knowingly interfere with the operation of a reproductive health care facility, or attempt to do the same, by activities including, but not limited to, interfering with, or attempting to interfere with (i) medical procedures or treatments being performed at such reproductive health care facility; (ii) the delivery of goods or services to such reproductive health care facility; or (iii) persons inside the facility; or

i. 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.

Sec. 425.41. Violations.

a. Any person who shall violate any provision of section 425.31 shall be guilty of a misdemeanor, punishable by a fine not to exceed one thousand dollars ($1,000), or imprisonment not to exceed six (6) months, or both, for a first conviction under section 425.31; and

b. For a second and each subsequent conviction under section 425.31, the penalty shall be a fine not to exceed five thousand dollars ($5,000), or imprisonment not to exceed one (1) year, or both.

Sec. 425.51. Civil cause of action.

Where there has been a violation of section 425.31, any person whose ability to access the premises of a

reproductive health care facility has been interfered with, and any owner or operator of a reproductive health care facility or owner of a building in which such facility is located, and any employee, paid or unpaid, and any volunteer working for such facility, and any invitee, may bring a civil action in any court of competent jurisdiction, within five years of such violation, for any or all of the following relief: injunctive relief; actual damages suffered as a result of such violation, including, where applicable, pain and suffering, psychological, and emotional distress damages; treble the amount of actual damages suffered as a result of such violation; and attorney's fees and costs.

Sec. 425.61. Civil action by County of Westchester.

The County Attorney may bring a civil action on behalf of the County, in accordance with the provisions of Sec. 158.11(3) of the Laws of Westchester County, in any court of competent jurisdiction for injunctive and other appropriate equitable relief in order to prevent or cure a violation of section 425.31.

Sec. 425.71. Joint and several liability.

If it is found, in any action brought pursuant to the provisions of this chapter, that two (2) or more of the named defendants acted in concert pursuant to a common plan or design to violate any provision of section 425.31, such defendants shall each be held jointly and severally liable for any fines or penalties imposed or any damages, costs, and fees awarded.

Sec. 425.81. Construction.

a. No provision of this chapter shall be construed or interpreted so as to limit the right of any person or entity to seek other available criminal penalties or civil remedies, including either the Attorney General for the State of New York or the District Attorney for the County of Westchester.

b. No provision of this chapter shall be construed or interpreted so as to prohibit expression protected by the First Amendment of the Constitution of the United States or section eight of article one of the Constitution of the State of New York.

c. No provision of this chapter shall be construed or interpreted so as to limit the lawful exercise of any authority vested in the owner or operator of a reproductive health care facility, the owner of the premises in which such a facility is located, or a law enforcement officer of Westchester County or of any municipality within Westchester County, or of New York State or the United States, acting within the scope of such person's official duties.

Sec. 425.91. Severability.

If any clause, sentence, paragraph, section, or part of this Local Law shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof

directly involved in the controversy in which such judgment shall have been rendered.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEBRA A. VITAGLIANO,

Plaintiff,

v.

COUNTY OF WESTCHESTER;

GEORGE LATIMER, in his official capacity as County Executive of the County of Westchester;

– and –

JOHN M. NONNA, in his official capacity as County Attorney of the County of Westchester,

Defendants.

Case No. 7:22-cv-09370

COMPLAINT

DEMAND FOR JURY TRIAL

NATURE OF THE ACTION

1. If the right to free speech includes anything, it includes the right to engage in peaceful, face-to-face conversations on important matters in a public forum. Yet that is exactly what Westchester County has banned—prohibiting citizens from approaching others in public fora near an abortion clinic to peacefully discuss and distribute pamphlets and literature about alternatives to abortion, unless they first obtain consent.

2. Plaintiff is a Westchester County resident who believes in the dignity of all human life, including the

unborn. She seeks to stand on the public way outside of a White Plains abortion clinic, approach women entering the clinic, and initiate gentle, compassionate conversations about the woman's situation and resources available should she decide to carry her child to term. Such conversations can be successful; indeed, in Plaintiff's experience most women who consider abortions do so only because they feel that they have no viable alternative and that no one cares about them.

3. Yet Westchester County does not want women to have this final opportunity to make a more fully informed choice. In June 2022, the County passed a new law that makes it illegal, within 100 feet of an abortion clinic, to "knowingly approach" within eight feet of another person to speak or distribute literature, "unless such other person consents."

4. The ban is content-based on its face—it applies only if the approach is "for the purpose of passing any material, item, or object to, displaying a sign to, or engaging in oral protest, education, or counseling" with the other person.

5. And the ban is not even related to, much less necessary for, maintaining clinic access or avoiding violence. To the contrary, the new law includes eight other overlapping subsections prohibiting every conceivable way in which a person could block access to a clinic or engage in violence near one, to say nothing of the numerous other applicable federal and state laws.

6. Instead, Defendants seem to have banned sidewalk counseling simply because the Supreme Court said they could, in a 2000 decision upholding a materially identical law in Colorado. *Hill v. Colorado*, 530

U.S. 703 (2000). Yet *Hill* was wrong the day it was decided, as the dissenting Justices explained. Its core legal premises have been expressly rejected in the Court's intervening cases. It has been subjected to withering academic criticism, from all sides of the spectrum. And most recently, a majority of the Court recognized it as a "distort[ion]" of ordinary "First Amendment doctrines." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022).

7. *Hill* reflects how the Court, having once "deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law," erroneously permitted governments to take away "their individual right to persuade women contemplating abortion" to make a different choice. *Hill*, 530 U.S. at 741-42 (Scalia, J., dissenting). The Court has fixed the first problem. *See Dobbs*, 142 S. Ct. 2228. It is time to fix the second. Plaintiff's First Amendment rights have been violated, and she is entitled to relief.

JURISDICTION AND VENUE

8. This action arises under the Constitution and laws of the United States. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

9. The Court has authority to issue the declaratory and injunctive relief sought under 28 U.S.C. §§ 2201 and 2202.

10. Venue lies in this district under 28 U.S.C. § 1391(b)(1) and (2).

PARTIES

11. Plaintiff Debra Vitagliano is a United States citizen and resident of Port Chester, New York, in Westchester County.

12. Defendant County of Westchester is a duly incorporated county of the State of

New York. A Westchester County law is the subject of this suit.

13. Defendant George Latimer is the County Executive of the County of Westchester. Defendant Latimer signed the challenged provision into law and is responsible for its enforcement. He is sued in his official capacity.

14. Defendant John M. Nonna is the County Attorney for the County of Westchester. The County Attorney is authorized in the challenged law to bring civil actions enforcing it. He is sued in his official capacity.

FACTUAL ALLEGATIONS

Plaintiff's speech

15. Plaintiff is an individual who—motivated by her belief in the inherent dignity of all human life—wishes to peacefully approach women entering abortion clinics and speak with them about alternatives to abortion. The County's law renders her a criminal, and subjects her to severe civil penalties, if she does so.

16. Plaintiff Debra Vitagliano is 64 years old and a mother of three.

17. Debra has worked as an occupational therapist for 42 years. She discerned this vocation at a young age after seeing a little girl using Lofstrand crutches on an Easterseals "Child of the Year" poster. Debra

told herself that she wanted to work with children like that.

18. Debra primarily works with special needs children. Early in her career, her caseload was full of children diagnosed with spina bifida, hydrocephalus, Down syndrome, amelia, and various neurological disorders. In recent years, Debra has seen a significant decrease of these types of disorders in the children she treats. She believes this is a result of abortions of children prenatally diagnosed with these conditions.[1]

19. Debra's work with special needs children has led her to see the inherent worth and dignity of all people, no matter their level of functioning.

20. Debra is a devout, practicing Catholic. Her religious beliefs are sincere and meaningful; they are the foundation of her life.

21. The Catechism of the Catholic Church teaches that life begins at conception and that abortion is "gravely contrary to the moral law." Catechism of the Catholic Church ¶¶ 2270-71.

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[1] *See, e.g.*, Candice Y. Johnson et al., *Pregnancy Termination Following Prenatal Diagnosis of Anencephaly or Spina Bifida: A Systematic Review of the Literature*, 94 Birth Defects Rsch. 857 (2012), https://onlinelibrary.wiley.com/doi/10.1002/bdra.23086; Stina Lou et al., *Termination of Pregnancy Following a Prenatal Diagnosis of Down Syndrome: A Qualitative Study of the Decision-Making Process of Pregnant Couples*, 97 Acta Obstetricia et Gynecologica Scandinavica 1228 (2018), https://obgyn.onlinelibrary.wiley.com/doi/epdf/10.1111/aogs.13386; Mary O'Callaghan, *Teaching Human Dignity: Prenatal Diagnosis & Disability Selective Abortion,* McGrath Inst. for Church Life (2019), https://perma.cc/XS8Y-JYA3; Sarah Zhang, *The Last Children of Down Syndrome*, The Atlantic (Nov. 18, 2020), https://perma.cc/SPC8-MVXY.

22. Consistent with her Catholic faith, Debra opposes the practice of abortion, because she believes it is the deliberate destruction of innocent human life.

23. Two years ago, Debra felt called spiritually to live out her faith by getting involved with the pro-life movement.

24. In February 2021, Debra began participating in a peaceful prayer-vigil campaign at the Planned Parenthood in White Plains, New York.

25. At the outset of her participation, Debra reviewed materials from organizers that provide guidance for safe, lawful prayer vigils. These materials instruct participants to obey all laws and not to trespass, threaten, touch others, display or discuss weapons, curse, or block anyone's path or right-of-way.

26. As part of the campaign, Debra engaged in prayer vigils, where she would stand and peacefully pray on the sidewalk and other portions of the public way outside the White Plains Planned Parenthood. At times she held signs that read, "Women Do Regret Abortion," "Men Regret Lost Fatherhood," and "Pray to End Abortion." Debra complied with the guidance she reviewed, making sure to remain on the public right-of-way and not to trespass or obstruct any lawful passage.

27. Some campaign participants engaged in sidewalk counseling, approaching women on their way into Planned Parenthood, speaking with them, and distributing pamphlets and other literature.

28. Debra felt called to engage in sidewalk counseling. She views it as a final attempt to turn pregnant

women's hearts away from abortion and to save innocent unborn lives. She feels women who seek abortions are not fully informed of the procedure and their options. She wants to educate women on abortion, inform them of alternatives, and advise them of services and resources available to them if they carry their babies to term.

29. Debra did not immediately engage in sidewalk counseling because she felt she first needed proper training. She wanted to learn methods and techniques for approaching pregnant women, ideas for what to say to them, and how to handle the many different circumstances she may encounter.

30. Debra registered for and completed multiple online classes—one introductory course, and one advanced course lasting eight weeks—on consulting pregnant women at risk of abortion. She planned to use the knowledge she gained in the classes to engage in sidewalk counseling and to volunteer at crisis pregnancy centers.

31. In spring 2022, Debra requested and received pamphlets from local organizers, which she planned to distribute while engaging in future sidewalk counseling.

32. Upon completing her training courses, Debra signed up to volunteer as a "life consultant" at a crisis pregnancy center. Life consultants meet virtually one-on-one with women experiencing unplanned pregnancies and consult with them about their options and services available to them if they decide to carry their babies to term.

33. Debra first shadowed life consultants in their consultations at an in-person crisis pregnancy center

so she could see in action the training she received in her classes. She observed pregnant women so grateful for help. One pregnant woman previously had an abortion and did not want to have another one but needed support. Another woman, who had no family in this country except her fiancé, cried joyfully in the consultation room because the life consultants were so helpful to her.

34. Debra now volunteers as a virtual life consultant for two hours each week.

35. Now properly trained and with experience as a life consultant, Debra is prepared to engage in sidewalk counseling. Debra would like to counsel women on the public way as they approach the White Plains Planned Parenthood.

36. Consistent with her training, she seeks to explore a woman's pregnancy issue and the details of her story by active listening and learning. She would ask about the woman's needs, strengths, and areas of awareness (feelings, thoughts, wants, values, and beliefs), as well as the attitudes, feelings, and responses of the woman's parents and the unborn child's father.

37. Debra intends to begin her conversations outside the clinic by approaching a woman and saying, "You are not alone. We can help you" (or language to similar effect). She would inform the woman that there are people who will be there to love and care for her and her child should she carry the child to term, and she would seek to learn from the woman what in her life was leading her to consider abortion.

38. It is critical to Debra's ministry that she pay close attention to the woman's every word and body language, ask open-ended questions, interpret what

she believes she is hearing, and observe and listen for contradictions and ambivalence to understand more deeply. Given the sensitivity of the discussion, and the need for close attention and eye contact to establish trust, Debra would need to approach within eight feet and within arm's reach to initiate her conversations and to distribute pamphlets, which is a distance that in any event Debra would view as normal for talking in a noisy public space. (The White Plains Planned Parenthood is located just off a busy, four-lane highway, near an exit ramp from the Cross Westchester Expressway.)

39. Debra would of course cease approaching if asked. But she could not begin by seeking permission to approach. Such a request would cut into her valuable window to communicate, would be easily ignored, and would undermine her message.

40. Next, Debra would share with the woman information about other options she might wish to consider. She would draw from her personal experiences as a mother and, if appropriate, as an occupational therapist.

41. Debra would then seek to offer the woman a vision for a fuller life and help the woman to value herself and her unborn child differently. Debra would tell the woman that she is made in the image and likeness of God, and that God loves her and even died for her.

42. Debra would also seek to empower the woman to choose life. She would offer her a pamphlet that contains information for services and resources available to the woman if she carries her baby to term.

43. Before she could begin putting her training into practice by sidewalk counseling, Westchester County passed the law at issue in this litigation.

The County's Sidewalk Counseling Ban

44. In June 2022, Westchester County banned Plaintiff from engaging in sidewalk counseling by making it illegal to approach a woman entering an abortion clinic to engage in peaceful, gentle, and caring conversation about alternatives to abortion.

45. In particular, on June 27, 2022, the Westchester County Board of Legislators voted to enact the "Reproductive Health Care Facilities Access Act," adding Chapter 425 to the Laws of Westchester County. Defendant Latimer, the County Executive, signed the new Chapter 425 into law the next day.

46. Section 425(*i*) of the Laws of Westchester County—hereafter, the "Sidewalk Counseling Ban"—now reads as follows:

> It shall be unlawful for any person to do the following:
>
> i. 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.

47. "Approach" is defined as "to move nearer in distance to someone." Laws of Westchester County

§ 425.21(a). "Reproductive health care facility" is defined as "any building, structure, or place, or any portion thereof, at which licensed, certified, or otherwise legally authorized persons provide reproductive health care services," with "reproductive health care services" in turn defined to include "services relating to pregnancy or the termination of a pregnancy." *Id.* § 425.21(k)-(l).

48. Violations of the Sidewalk Counseling Ban are misdemeanors punishable by fines and imprisonment. "[F]or a first conviction" a sidewalk counselor can be forced to pay a fine of up to $1,000 and be imprisoned for up to six months. Subsequent convictions are punishable by fines up to $5,000 and imprisonment of up to one year. *Id.* § 425.41(a)-(b).

49. The law also permits civil actions by abortion clinics, abortion-clinic employees, and their "invitee[s]," authorizing treble damages for, *inter alia*, "pain and suffering, psychological, and emotional distress damages … suffered as a result of" violations. *Id.* § 425.51. It further authorizes civil enforcement actions by the County Attorney "for injunctive and other appropriate equitable relief in order to prevent or cure a violation." *Id.* § 425.61.

The impact on Plaintiff's speech

50. The Sidewalk Counseling Ban prohibits Plaintiff's ministry of sidewalk counseling, by banning the close approach it—or any other normal conversation—requires.

51. Plaintiff's sidewalk-counseling ministry depends on initiating conversations at the time at which women are most focused on their abortion decision—

as they are on their way into the clinic. Yet the Sidewalk Counseling Ban's 100-foot radius encompasses the entire public sidewalk in front of the White Plains Planned Parenthood, and reaches well into the street on either side of the driveway leading into the clinic's parking lot. Plaintiff's intended ministry would take place within the 100-foot radius. She cannot effectively reach at-risk women if she is forced to remain outside the 100foot radius.

52. Thus, if Plaintiff wanted to engage in her ministry of discussing abortion with women at the time they may need her support most, Plaintiff could either (a) raise her voice at women from eight feet away; or (b) ask for explicit permission before approaching for a conversation at normal range.

53. Yet Plaintiff seeks to discuss abortion and abortion alternatives with women in a loving, caring manner, making eye contact and listening carefully to the woman's own motivations and concerns. Such conversations cannot be conducted at a shout, but rather require close proximity and a gentle tone of voice. It is essential to Plaintiff's ministry that these conversations be conducted within eight feet and within arm's reach. This is so for numerous reasons—for Plaintiff's message of compassion and support to be effectively conveyed, for Plaintiff to accurately discern the woman's position, for the conversation to be respectful of the woman's privacy, and for Plaintiff to hand the woman a pamphlet or other literature about alternatives to abortion and resources available to her if she carries her baby to term.

54. Nor can the problem be solved by requesting explicit consent to approach. Such a request is easily ignored—especially when voiced from eight feet away or

when the woman is arriving at the clinic by car. Meanwhile, Plaintiff believes that women are more likely to respond positively—and seek more information and come to a more informed decision—when the first words they hear from a counselor consist of a loving message of sympathy and support.

55. The Sidewalk Counseling Ban is content-based on its face. The consent requirement applies only if a speaker's speech includes certain categories of content—"protest, education, or counseling." If a speaker wishes to approach a woman to engage in speech of any other content—say, to take a poll, solicit donations, or ask for directions—she is free to do so.

56. The Board of Legislators committee report states that the Sidewalk Counseling

Ban was justified to "maintain a person's right to safely access" abortion clinics and "avoid the potential for physical confrontation."

57. Yet the Sidewalk Counseling Ban is not limited to actions that impede "access" or threaten violence. Rather, it prohibits peaceful, one-on-one conversations on an issue of great public concern, which lie at the heart of the First Amendment.

58. Moreover, the committee report identified only one prior incident at a Westchester abortion clinic that supposedly motivated passage of the law: a November 2021 trespassing where a Catholic priest and two other pro-life advocates entered a White Plains abortion clinic and remained inside for two hours, despite requests to leave from staff and police.

59. Yet that incident—which occurred *inside* the abortion clinic, rather than on the public right-of-

way—was addressed under preexisting criminal trespass law, with the advocates being convicted and sentenced to jail time for their actions.

60. Further, the Sidewalk Counseling Ban is simply one of many restrictions addressing activities near abortion clinics adopted in Chapter 425. The law independently prohibits, *inter alia*, obstructing access; violence and any other unwanted physical contact; following and harassing; threats and intimidation; and "interfer[ing] with" (or attempting to interfere with) an abortion clinic's operations.

61. Indeed, the Sidewalk Counseling Ban is the last subsection of Section 425.31.

The remainder of that section reads as follows:

> Sec. 425.31. Prohibited conduct.
>
> It shall be unlawful for any person to do the following:
>
> a. knowingly physically obstruct or block another person from entering into or exiting from the premises of a reproductive health care facility or a public parking lot serving a reproductive health care facility, in order to prevent that person from obtaining or rendering, or assisting in obtaining or rendering, medical treatment or reproductive health care services; or
>
> b. strike, shove, restrain, grab, kick, or otherwise subject to unwanted physical contact or injury any person seeking to legally enter or exit the premises of a reproductive health care facility; or

c. knowingly follow and harass another person within twenty-five (25) feet of (i) the premises of a reproductive health care facility or (ii) the entrance or exit of a public parking lot serving a reproductive health care facility; or

d. knowingly engage in a course of conduct or repeatedly commit acts when such behavior places another person in reasonable fear of physical harm, or attempt to do the same, within twenty-five (25) feet of (i) the premises of a reproductive health care facility or (ii) the entrance or exit of a public parking lot serving a reproductive health care facility; or

e. by force or threat of force, or by physically obstructing or blocking, knowingly injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing, or assisting in obtaining or providing, reproductive health care services; or

f. by force or threat of force, or by physically obstructing or blocking, knowingly injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with, another person because such person was or is obtaining or providing, or was or is assisting in obtaining or providing, reproductive health care services; or

g. physically damage a reproductive health care facility so as to interfere with its operation, or attempt to do the same; or

h. knowingly interfere with the operation of a reproductive health care facility, or attempt to do the same, by activities including, but not limited to, interfering with, or attempting to interfere with (i) medical procedures or treatments being performed at such reproductive health care facility; (ii) the delivery of goods or services to such reproductive health care facility; or (iii) persons inside the facility[.]

62. Moreover, numerous other federal and state laws address violence or obstructive conduct at abortion clinics, without prohibiting Plaintiff's intended speech.

63. The Freedom of Access to Clinic Entrances (FACE) Act, for example, makes it a federal crime to, "by force or threat of force or by physical obstruction," intentionally injure, intimidate, or interfere with abortion-clinic patients and providers. 18 U.S.C. § 248(a)(1). New York has a statutory analogue to the FACE Act. N.Y. Penal Law § 240.70. New York law likewise prohibits entering the property of another (including an abortion clinic) without permission, subjecting that conduct to both civil and criminal penalties. *Id.* § 140.10; *see Long Island Gynecological Servs. v. Murphy*, 298 A.D.2d 504, 748 N.Y.S.2d 776 (2d Dep't 2002) (affirming permanent injunction for trespassing at abortion clinic). And New York has generally applicable criminal statutes forbidding, *inter alia*, assault, N.Y. Penal Law § 120.00, harassment, *id.* §§ 240.25-26, and disorderly conduct, *id.* § 240.20.

64. Despite her earnest desire to engage in sidewalk counseling outside the White Plains Planned Parenthood, Plaintiff has not done so because of the Sidewalk Counseling Ban.

65. But for the Sidewalk Counseling Ban, Plaintiff would engage in sidewalk counseling.

66. Plaintiff has been—and, absent injunctive relief, will continue to be—irreparably harmed by the Sidewalk Counseling Ban, because of the chilling of her constitutionally protected speech.

Legal background

67. According to the committee report recommending its adoption, the Sidewalk Counseling Ban was based on a Colorado statute upheld by a divided Supreme Court in *Hill v. Colorado*, 530 U.S. 703 (2000). The Sidewalk Counseling Ban is materially identical to the law at issue in *Hill*.

68. Like the Sidewalk Counseling Ban, the law in *Hill* made it unlawful, within 100 feet of an abortion-clinic entrance, to "knowingly approach" within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," without that person's consent. Colo. Rev. Stat. § 18-9-122(3).

69. The *Hill* majority held that this law was content-neutral. On the face of the law, whether the consent requirement applied to an approach "depend[ed] entirely on *what* [*the speaker*] *intends to say*" upon accomplishing it. 530 U.S. at 742 (Scalia, J., dissenting). Yet the Court held that it "was not adopted 'because of disagreement with the message'" regulated speakers conveyed, and it could be "justified without reference

to the content of regulated speech." *Id.* at 719-20 (majority opinion). It was therefore "content neutral." *Id.* at 725.

70. The Court thus declined to apply strict scrutiny, instead asking whether the law served "significant" government interests and was "narrowly tailored" to accomplishing them. *Id.* at 725-26.

71. The Court held that the law passed this test. The Court said the law served an interest in protecting the "right to avoid unwelcome speech." *Id.* at 716-17. And although the Court recognized the law would "sometimes inhibit a demonstrator whose approach in fact would have proved harmless," this "prophylactic aspect" did not render it not narrowly tailored. *Id.* at 729. Rather, it was "justified" because of the "difficult[y]" characterizing "each individual movement" "within the 8-foot boundary." *Id.*

72. *Hill* was a departure from prior First Amendment precedent, as Justices Scalia and Kennedy explained in separate dissents. The Court had "never held that the universe of content-based regulations" was limited to the categories identified by the majority; instead, laws were also content-based if they facially distinguished based on content. *Id.* 742-43, 746-47 (Scalia, J., dissenting). Nor had the Court ever before "establishe[d] a right to be free from unwelcome expression aired by a fellow citizen in a traditional public forum." *Id.* at 771 (Kennedy, J., dissenting); *see also id.* at 765 ("The Court's holding contradicts more than a half century of well-established First Amendment principles.").

73. And as the Seventh Circuit has observed, recent Supreme Court decisions have "deeply shaken *Hill*'s

foundation." *Price v. City of Chicago*, 915 F.3d 1107, 1119 (7th Cir. 2019).

74. First, in *McCullen v. Coakley*, the Court held that a Massachusetts law forbidding speakers from standing within 35 feet of abortion-clinic entrances violated the First Amendment. 573 U.S. 464 (2014). Explicating the meaning of content neutrality, the Court held 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—the precise test for content neutrality the *Hill* majority had rejected, 530 U.S. at 720-21.

75. Then, in *Reed v. Town of Gilbert*, the Court held that a city "sign code" violated the First Amendment. 576 U.S. 155 (2015). Citing *Hill*, the lower courts had upheld the sign code on the ground that the city "'did not adopt its regulation of speech because it disagreed with the message [it] conveyed' and its 'interests [were] unrelated to … content.'" *Id.* at 162-63. But citing the *Hill* dissents, *Reed* explained that the focus on "governmental motive" "misunderstand[s]" content neutrality. *Id.* at 166-67 (citing *Hill*, 530 U.S. at 766 (Kennedy, J., dissenting)). Rather, a law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. And "strict scrutiny applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based." *Id.* at 166 (emphasis added). That is, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165.

76. *McCullen* also undermined *Hill*'s narrow-tailoring holding. While *Hill* had approved the "bright-line prophylactic" nature of the Colorado law, 530 U.S. at 729, *McCullen* reaffirmed the traditional understanding that "the prime objective of the First Amendment is not efficiency," 573 U.S. at 495. Rather, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier." *Id.* at 467.

77. In short, "*Hill* is incompatible with current First Amendment doctrine as explained in *Reed* and *McCullen*." *Price*, 915 F.3d at 1117.

78. Indeed, *Hill* is an artifact of an era in which the Court could be criticized for carving out special rules from ordinary constitutional principles to protect abortion and disfavor those who oppose it. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting); *see Dobbs*, 142 S. Ct. at 2276 (citing *Hill* dissents for proposition that abortion has "distorted First Amendment doctrines"). That era is now over. *See generally Dobbs*, 142 S. Ct. 2228. The Sidewalk Counseling Ban violates the First Amendment.

CLAIMS FOR RELIEF

Count I

42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Speech Clause
Content Discrimination

79. Under the First Amendment, "a government … 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed*, 576 U.S. at 163.

80. Thus, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Id.*

81. There are at least two ways in which a law can be content-based: first, if it "'on its face' draws distinctions based on the message a speaker conveys"; second, if it "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government because of disagreement with the" speech's message. *Id.* (cleaned up). A law that fails either test triggers strict scrutiny.

82. The Sidewalk Counseling Ban is content-based under both tests.

83. First, the Sidewalk Counseling Ban facially distinguishes based on content.

84. A law that defines "regulated speech by its function or purpose" is facially content-based. *Id.* The Sidewalk Counseling Ban does that. It applies only if a speaker approaches "*for the purpose of* passing" material, displaying a sign, or "engaging in oral protest, education, or counseling." Laws of Westchester County §

425.31(*i*) (emphasis added). If the speaker approaches for another purpose, it is permitted.

85. A law is also facially content-based if enforcement authorities must "examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (internal quotation marks omitted). The Sidewalk Counseling Ban requires that. The only way to determine if an approach was "for the purpose of … protest, education, or counseling" is to examine whether the speaker's message includes protest, education, or counseling.

86. Even if the Sidewalk Counseling Ban were facially content-neutral, it would still be content-based under the second part of *Reed*'s disjunctive test.

87. The interest purportedly justifying laws like the Sidewalk Counseling Ban is protecting abortion-clinic patients from the alleged harms of encountering pro-life speech. But a law is content-based if it is "concerned with [the] undesirable effects" of speech on its audience or "listeners' reactions to speech." *McCullen*, 573 U.S. at 481.

88. The Sidewalk Counseling Ban therefore triggers strict scrutiny—a "demanding standard." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000).

89. The Sidewalk Counseling Ban cannot survive strict scrutiny.

90. To the extent the interest underlying the Sidewalk Counseling Ban is insulating women entering abortion clinics from hearing pro-life viewpoints, that

interest is not even legitimate, much less compelling. In a public forum, the government may not "selectively … shield the public from some kinds of speech on the ground that they are more offensive than others." *McCullen*, 573 U.S. at 477.

91. To the extent the interests underlying the Sidewalk Counseling Ban are protecting access to abortion clinics and guarding against harassment and violence, the ban is not narrowly tailored to achieving those interests.

92. Under *McCullen*, a speech regulation allegedly advancing these interests fails even *intermediate* scrutiny if the government has at its disposal other options aimed at promoting them—such as direct prohibitions on "obstruct[ing] … entry," "injur[ing]" or "intimidat[ing]" patients or workers, and "follow[ing] and harass[ing]" near clinics. 573 U.S. at 490-94.

93. Here, other provisions of the very law containing the Sidewalk Counseling Ban address those interests.

94. In subsections (a)-(h), the law prohibits obstructing access to abortion clinics; violence and any other unwanted physical contact near abortion clinics; following and harassing people near abortion clinics; threats and intimidation of abortion-clinic patients and employees; physically damaging abortion clinics; and "interfer[ing] with" (or attempting to interfere with) an abortion clinic's operations.

95. The federal FACE Act and its New York analogue likewise criminalize obstructing access to abortion clinics, and New York has generally applicable laws forbidding, *inter alia*, assault, harassment, disorderly conduct, and trespass. *See supra* ¶ 63.

96. In light of this multitude of other prohibitions, the only *additional* function served by the Sidewalk Counseling Ban is prohibiting peaceful, non-threatening, nonharassing speech engaged in at the only range at which it is likely to be effective— which strikes "at the heart of the First Amendment." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997).

97. For the same reasons, even if the Sidewalk Counseling Ban were content-neutral, it would still be unconstitutional, because it is not narrowly tailored to serve significant governmental interests.

98. Although the Supreme Court upheld a materially identical ban on sidewalk counseling in *Hill*, *Hill* is wrongly decided, irreconcilable with *McCullen* and *Reed*, and should be overruled by the Supreme Court.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that the Court:

a. Declare that the Sidewalk Counseling Ban, Laws of Westchester County § 425.31(*i*), violates the Free Speech Clause of the First Amendment to the United States Constitution;

b. Issue a permanent injunction prohibiting Defendants, Defendants' agents and employees, and all those acting in concert with Defendants, from enforcing the Sidewalk Counseling Ban, Laws of Westchester County § 425.31(*i*);

c. Issue a permanent injunction prohibiting Defendants, Defendants' agents and employees, and all those acting in concert with Defendants, from penalizing Plaintiff for exercising her First Amendment right to engage in sidewalk counseling at an abortion clinic;

d. Award Plaintiff compensatory damages for the harm suffered as a result of Defendants' deprivation of her constitutional rights;

e. Award Plaintiff reasonable attorneys' fees and costs under 42 U.S.C. § 1988;

f. Award Plaintiff nominal damages;

g. Award such other relief as the Court may deem equitable, just, and proper.

JURY REQUEST/DEMAND

Plaintiff requests a trial by jury on all issues so triable.

Respectfully submitted this 1st day of November, 2022.

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