NO. 23-74

IN THE
Supreme Court of the United States

DEBRA A. VITAGLIANO,
Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK,
Respondent.

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

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should reconsider its decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), because that decision conflicts directly with *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), and *McCullen* v. *Coakley*, 573 U.S. 464 (2014).

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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life. Since 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court protecting the right to free speech, including *303 Creative LLC* v. *Elenis*, 143 S. Ct. 2298 (2023), *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373 (2021), *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021), *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), and *McCullen* v. *Coakley*, 573 U.S. 464 (2014), and hundreds more cases in lower courts.

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

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

SUMMARY OF THE ARGUMENT

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

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

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

ARGUMENT

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

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

Those "privacy interest[s]," the Court conceded, have "special force in the privacy of the home" and its "immediate surroundings." 530 U.S. at 717. But the Court refused to cabin the State's interest in protecting "unwilling listeners" to such settings. *Id.* at 718.

Instead, the Court held that the State can protect a listener's "right to avoid unwelcome speech" in "confrontational settings," even in "'quintessential' public forums for free speech" like "public sidewalks, streets, and ways." 530 U.S. at 715, 717. Armed with that expansive state interest, the Court had no trouble upholding a law that "empower[ed] private

citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear." *Id.* at 734.

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

But the Court had "never made the absurd suggestion that a pedestrian is a 'captive' of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly by." *Ibid.* "'*Outside the home*, the burden is generally on the observer or listener to avert his eyes or plug his ears against the … 'offensive' intrusions which increasingly attend urban life.'" *Id.* at 752–53 (emphasis added) (quoting L. Tribe, *American Constitutional Law* § 12–19, p. 948 (2d ed. 1988)). By expanding the scope of the captive-audience doctrine, the Court "elevate[d] the abortion clinic to the status of the home." *Id.* at 753.

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

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

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

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

The court upheld the injunction despite recognizing that "[p]ublic sidewalks, streets, and ways are the 'quintessential' public fora for free speech, and leafletting, signs, and displays are time-honored methods of communication enjoying First Amendment protection." *Ibid.* (citing *Hill*, 530 U.S. at 715). How? *Hill*: "[T]he Supreme Court has consistently recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Ibid.* (quoting *Hill*, 530 U.S. at 718). For the court, the injunction struck "the appropriate balance between the First Amendment rights of the protestors and the rights of customers and other pedestrians to avoid unwelcome approaches" and "unwanted intrusions," *id.* at 30, 34, in Central Park.

Moving to the West Coast, in *Berger* v. *City of Seattle*, a street performer sued Seattle, challenging rules prohibiting certain types of speech activities on an "84-acre parcel of land" "home to museums, theaters, sports arenas, and other entertainment and cultural destinations, including the Space Needle." No. C03-3238JLR, 2005 WL 8161729, at *1 (W.D. Wash. Apr. 22, 2005). One rule disallowed all "speech activities" within 30 feet of any "captive audience," to address "visitors' complaints about unwanted harangues and solicitations." *Id.* at *3–4.[2]

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

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

The Ninth Circuit, while not specifically citing *Hill*, relied on this Court's captive-audience case law to support its conclusion that City "authorities had the right to protect captive audiences seeking to enjoy" the area's "public entertainment, relaxation, and edification." *Berger* v. *City of Seattle*, 512 F.3d 582, 605 (9th Cir. 2008). The panel took great comfort in knowing that the rule did "not silence a message in the Seattle Center, but only prevent[ed] it from being expressed in locations where it would pose a serious threat to order and to the *convenience and peace of patrons*." *Id.* at 605–06 (emphasis added).

The en banc Ninth Circuit reversed, singling out the captive-audience rule as the "most troublesome of the challenged regulations." *Berger* v. *City of Seattle*, 569 F.3d 1029, 1053 (9th Cir. 2009) (en banc). According to the majority, this Court's captive-audience case law "fully supports" the "conclusion that public parkgoers, in general, are not a protectable captive audience for constitutional purposes." *Id.* at 1054. Incredibly, three judges dissented, calling the rule a "reasonable method of achieving the City's legitimate interest in the safety and convenience of" visitors. *Id.* at 1081 (Gould, J., dissenting). Stating the point more bluntly, the dissent insisted that the City had a

"significant governmental interest in ensuring that these patrons [had] an enjoyable experience, so that Seattle Center and the City as a whole [could] continue to be a desirable and commercially profitable destination." *Id.* at 1080–81.

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

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

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

Similarly, in *Brown* v. *City of Pittsburgh*, the Third Circuit held that a "bubble zone" ordinance challenged by a pro-life sidewalk counselor was constitutional on its face because, like the statute upheld in *Hill*, the ordinance "impair[ed] primarily the effort to communicate with unwilling listeners."[3] 586 F.3d 263, 272 (3d Cir. 2009). "As the bubble zone created by the Ordinance at issue here [was] a virtually verbatim copy of the *Hill* statute," the court found "this portion of the Ordinance, taken alone, to be facially valid under the First Amendment's Free Speech Clause." *Id.* at 273.[4]

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

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[3] *Amicus* represented the sidewalk counselor in *Brown*.

[4] The court ultimately "vacate[d] the denial of the preliminary injunction with respect to Brown's claim that the Ordinance [was] unconstitutional *as applied to specific clinic sites*." *Id.* at 297 (emphasis added). The district court permanently enjoined the bubble zone on remand, *Brown* v. *City of Pittsburg*, No. 06-393, 2010 WL 2207935, at *2 (W.D. Pa. 2010), but left the buffer zone in place. *Bruni* v. *City of Pittsburgh*, 283 F. Supp. 3d 357 (W.D. Pa. 2017). The Third Circuit affirmed that decision. *Bruni* v. *City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019).

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

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

There had "undoubtedly been demonstrations, *confrontational or otherwise*, outside of various health care facilities across the country." *Ibid.* (emphasis added). So, the absence of "confrontational demonstrations in the record," the district court continued, did not "lessen the legitimacy" of the City's desire to protect the "'unwilling listener's interest in avoiding unwanted communication.'" *Ibid.* (quoting *Hill*, 530 U.S. at 716). The court rejected even this modest attempt to limit the captive-audience doctrine's scope. Such reasoning opens the door to any government rule protecting citizens from unwelcome speech.

And in *Price* v. *City of Chicago*, the Seventh Circuit upheld another speech-restricting buffer zone, by applying *Hill*. 915 F.3d 1107, 1109 (7th Cir. 2019). The court of appeals noted that "*Hill* is incompatible with current First Amendment doctrine as explained in *Reed* [v. *Town of Gilbert*, 576 U.S. 155 (2015),] and *McCullen* [v. *Coakley*, 573 U.S. 464 (2014)]." *Id.* at 1117. Indeed, "it's not too strong to say that what *Hill* explicitly rejected is now prevailing law. *Id.* at 1118. Still, "neither *McCullen* nor *Reed* overruled *Hill*, so it remains binding on" the lower courts. *Id.* at 1109.

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

For example, in *Phelps-Roper* v. *Strickland*, the Sixth Circuit cited *Hill* to support the court's holding that the State's "important interest in the protection of funeral attendees" justified a "Funeral Protest Provision" preventing Westboro from picketing and protesting within 300 feet of a funeral or burial service for one hour before, during, and for one hour after the event. 539 F.3d 356, 358, 366 (6th Cir. 2008). "[T]he *Hill* Court found a significant interest because the audience to unwanted communication was captive." *Id.* at 364. And "mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service." *Id.* at 366. So, the Sixth Circuit affirmed the district court's decision rejecting Westboro's First Amendment challenge. *Id.* at 373.

The Eighth Circuit Court of Appeals reached the same conclusion in a trio of post-*Snyder* funeral-protest cases. In *Phelps-Roper* v. *City of Manchester,* the court used *Hill* to overrule two of its earlier decisions "limit[ing] the government's interest in

protecting unwilling listeners to residential settings." 697 F.3d 678, 692 (8th Cir. 2012) (en banc). "That reasoning [did] not withstand scrutiny, however, given" *Hill*'s holding that "government can show such an interest 'in confrontational settings,' and in certain instances when the 'offensive speech . . . is so intrusive that the unwilling audience cannot avoid it.'" *Ibid.* (quoting *Hill*, 530 U.S. at 716, 717) (internal citation omitted).

Noting that mourners must "be in a certain place at a certain time to participate in a funeral or burial and are therefore unable to avoid unwelcome speech at that place and time," the court held that the City had "shown a significant government interest in protecting the peace and privacy of funeral attendees for a short time and in a limited space." 697 F.3d at 692, 693. Ultimately, the court reversed the district court's ruling that the challenged ordinance violated the First Amendment. *Id.* at 695.

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

Four years later, the Eighth Circuit went even further, this time upholding Nebraska's buffer zone prohibiting "picketing within *500 feet* of a cemetery, mortuary, or church from one hour prior through two hours following the commencement of a funeral."

Phelps-Roper v. *Ricketts*, 867 F.3d 883, 888, 893–94 (8th Cir. 2017) (emphasis added). Highlighting expert testimony that mourners "felt victimized by [Westboro's] pickets" and that "the 500-foot buffer zone helps," the court found a "significant government interest" in ensuring "vulnerable friends and family can mourn and honor their deceased loved one in a respectful environment of peace and privacy free from unwanted public exploitation." *Id.* at 894.

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

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

It is difficult to square *McCullen* with *Central Park*'s assertion that this Court has "*consistently* recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" 157 A.D.3d at 34 (quoting *Hill*, 530 U.S. at 718) (emphasis added). And the *Central Park* court should not have tried to "balance . . . the First Amendment rights of the protestors and the rights of customers and other pedestrians to avoid unwelcome

approaches" and "unwanted intrusions." *Id.* at 30, 34. If the buffer-zone statute in *McCullen* would have been content-based if it were premised on an asserted interest in protecting unwilling listeners "from the direct impact of speech," 573 U.S. at 481 (cleaned up), surely the challenged injunction in *Central Park* was also content-based.

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

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

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

Yet, less than two years later, in *Phelps-Roper* v. *City of Manchester*, the Eighth Circuit distinguished *Snyder* and applied *Hill* instead, recognizing a "significant government interest" in protecting mourners' "privacy" and shielding them from "unwelcome speech." 697 F.3d at 692–93. The court's subsequent decisions in *Phelps-Roper* v. *Koster* and *Phelps-Roper* v. *Ricketts* followed suit. *Koster*, 713 F.3d at 951; *Ricketts*, 867 F.3d at 893–94.

Finally, the decision below demonstrates that—so long as speech restrictions resemble the statute upheld in *Hill* more than the statute struck down in *McCullen*—lower courts will apply *Hill* despite its overly expansive view of the captive-audience doctrine and its substantial diminishment of First Amendment freedoms. Westchester County passed a law materially identical to the one upheld in *Hill*. The Second Circuit did not even bother to examine the ordinance through the lens of this Court's modern First Amendment jurisprudence. Instead, the court dutifully affirmed the district court's "judgment on the merits [for the County] because the district court correctly concluded that *Hill* is dispositive of Vitagliano's First Amendment claim." *Vitagliano* v. *Cnty. of Westchester*, 71 F.4th 130, 132 (2d Cir. 2023) (per curiam). "*Hill* remains controlling precedent and dictates that the County's bubble zone withstands First Amendment scrutiny." *Id.* at 141. No further analysis or thought required.

IV. Hostility toward the pro-life community has exacerbated the need for an end to *Hill*.

Lack of tolerance and outright violence toward the pro-life community—particularly religious pro-life Americans—has accelerated in the wake of *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

On May 2, 2022, Politico leaked a draft of this Court's *Dobbs* majority opinion. Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, Politico (May 2, 2022), https://bit.ly/3OHS2tL. Over the ensuing months, there were "39 known attacks on Catholic sites—an average of one site attacked every three days. The sites were predominantly churches, plus three pregnancy resource centers, and four schools." Religious Freedom Institute, *Religious Pro-Life Americans Under Attack: A Threat Assessment of Post*-Dobbs *America* 7 (Sept. 2022), https://bit.ly/47OVbRo.

These were hardly isolated incidents. "Attacks on crisis pregnancy centers and a Congressman's office have been made in" the name of Jane's Revenge—a radical pro-abortion group that Facebook has labeled a "terrorist organization"—"in New York, North Carolina, Washington, Wisconsin, Ohio, Maryland, Pennsylvania, Minnesota, Michigan, Iowa, Florida, the District of Columbia, Virginia, and potentially Oregon." Wikipedia, *Jane's Revenge* (last visited Aug. 18, 2023), https://bit.ly/3OYaXln. Attack sites often bear the group's members' signature slogan: "If Abortions Aren't Safe, Neither Are You."

Predictably, this hostility has extended even to pro-life citizens and organizations who have held prayer vigils and other peaceful protests near abortion clinics—both before and after *Dobbs*, both here and abroad—often with absurd results.

For example, in spring 2020, in Greensboro, North Carolina, police arrested pro-life members of the Christian ministry "Love Life" for engaging in peaceful prayer outside an abortion facility. The citizens complied with the local county emergency proclamation pertaining to the coronavirus. Yet the city defended its actions because the Love Life members traveled to the facility by car, not by foot, and traveled there from outside the county—even though neither prohibition appeared anywhere in the emergency proclamation or local law. Incredibly, the city claimed that the "state of emergency" gave officials the authority to prohibit all First Amendment activity. *Global Impact Ministries, Inc.* v. *City of Greensboro*, 2022 WL 801714, at *1–2, 5 (M.D.N.C. Mar. 16, 2022); Am. Compl. ¶¶ 125, 127, R. 39, *Global Impact Ministries, Inc.* v. *City of Greensboro*, No. 1:20-cv-329 (Apr. 7, 2021).

In Birmingham, England, officials used a so-called "Anti-Social Behavior, Crime and Policing Act" to arrest a woman who was silently praying outside of an abortion clinic. Emma Camp, *In Britain, You Can Be Arrested for Silently Praying Outside an Abortion Clinic*, Reason (Feb. 10, 2023), https://bit.ly/45g75SD. (A short time later, she was arrested a second time.) This prompted a Catholic priest to stand nearby the clinic with a sign that said, "Praying for Freedom of Speech." Although the sign said nothing about abortion, police charged him under the law for "intim-

idating service users." *Ibid.* And for good measure, they filed "a second charge because his car, which was parked within the enforcement zone, had a bumper sticker reading 'Unborn Lives Matter' on it." *Ibid.*

Perhaps most famously, pro-life sidewalk counselor Mark Houck was federally indicted for two violations of the Freedom of Access to Clinic Entrances (FACE) Act. The indictment alleged Houck twice shoved an abortion-clinic escort; Houck explained that he was trying to protect his 12-year-old son whom the abortion-clinic escort was harassing. Despite Houck's attorneys telling authorities that he would come in for questioning peacefully, Houck said that he was forcefully arrested by more than 20 federal agents and Pennsylvania state troopers at 6:45 a.m. at his home, in front of his wife and seven children. A federal jury eventually acquitted Houck of all charges. Joe Bukuras, *Acquitted pro-life activist Mark Houck reveals details of 'reckless' FBI raid; will press charges*, Catholic News Agency (Feb. 1, 2023), https://www.catholicnewsagency.com/news/253523/acquitted-pro-life-activist-mark-houck-reveals-details-of-fbi-raid-will-press-charges.

Hill is even influencing lower courts in cases that regulate pro-life speech conducted exclusively on pro-life property. For example, in *Right to Life of Central California* v. *Bonta*, 562 F. Supp. 3d 947 (E.D. Cal. 2021), a pro-life advocacy group was forced to file suit to enjoin a 30-foot government speech zone outside vaccine sites. The problem? The group couldn't engage in expressive activity *in its own parking lot or on the sidewalk in front if its own building* because a Planned Parenthood located next door offered vaccines.

In defending the speech zone, the California Attorney General relied heavily on *Hill*. And although the district court ultimately ruled in favor of the pro-life advocacy group, it reached that conclusion primarily because the 30-foot buffer zone in California's law was much larger than the eight-foot in *Hill*: 562 F. Supp. 3d at 963–64. Had the vaccine speech zone been closer to eight feet, it appears the court would have upheld it under *Hill* even though such a law would have had an obviously impermissible effect on pro-life (and other) speech.

In sum, *Hill* sends the message to radical pro-abortionists that pro-life speech and silent prayer are not worth protecting. And to a movement that often equates speech with violence,[7] that message sometimes translates to violent acts against pro-life organizations and their members. In a post-*Dobbs* world, there is an urgent need for this Court to overrule *Hill* and clarify that the First Amendment protects pro-life speech—as well as those who speak it.

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[7] *E.g.*, Jonathan Turley, *'Your speech is violence': the left's new mantra to justify campus violence*, The Hill (June 3, 2023), https://bit.ly/44qEOr8.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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