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 FOR HUMAN COALITION, FEMINISTS CHOOSING LIFE OF NEW YORK, FREDERICK DOUGLASS FOUNDATION, AND NEW WAVE FEMINISTS AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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## QUESTION PRESENTED

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

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

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

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are providers of pregnancy-related counseling and social services, feminist organizations, and organizations engaged in expressive activities near abortion clinics.[1]

**Human Coalition** is a nonprofit organization committed to rescuing children, serving families, and making abortion unthinkable and unnecessary by offering pregnant mothers life-affirming counsel and tangible, needed services. Human Coalition operates its own specialized women's care clinics and virtual clinics in major cities across the country, caring for women who face a crisis pregnancy as well as women who chose abortion. Human Coalition has a strong interest in ensuring that women have adequate information to make an informed choice about abortion. The staff and volunteers at Human Coalition's clinics have seen firsthand the harm that results when women lack important information about the abortion procedure, its mental and physical effects, and information about available services to support women facing an unplanned pregnancy.

**Feminists Choosing Life of New York** (FCLNY) is a human rights coalition that embraces and promotes pro-life feminism and the consistent life ethic. FCLNY's public advocacy connects the root causes of violence, inequality, and the social forces that dehumanize, and calls for life-affirming resources, especially for marginalized populations. FCLNY believes abortion oppresses rather

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[1] Counsel of record received timely notice of the intent to file the brief under Supreme Court Rule 37.2. Pursuant to Rule 37.6, undersigned counsel certifies that no person other than *amici curiae* or their counsel authored the brief in whole or in part nor made a monetary contribution intended to fund the preparation or submission of the brief.

than empowers women. FCLNY is pro-woman and pro-life, and recognizes that women have agency, and the right to receive all information relevant to life-impacting decisions, which abortion clinic bubble zone restrictions substantially curtail.

The **Frederick Douglass Foundation** ("FDF") is a national grassroots education and public policy organization with local chapters across the United States. FDF supports strengthening the Black Family. Reflecting its namesake's focus on promoting the long-term interests of African-Americans and the equality of all persons, the FDF is pro-life and speaks out against the damage that the abortion epidemic has disproportionately wreaked on the African-American community.

FDF has an interest in exposing the racist and eugenic history of the abortion movement, which has had catastrophic effects on their communities. FDF members were arrested for attempting to write "Black Pre-Born Lives Matter" in washable chalk on public sidewalks outside Planned Parenthood's Carole Whitehill Moses Center in Washington D.C., though the city permitted painted street art that omitted the word "Pre-Born." FDF therefore knows firsthand how laws like Westchester County's Reproductive Health Care Facilities Access Act squelch protected speech and are used to weaponize law enforcement authority against disfavored viewpoints.

**New Wave Feminists** is a secular, non-partisan non-profit dedicated to promoting the consistent life ethic, which recognizes the dignity of all human life from womb to tomb. NWF does this by promoting systemic change in areas like immigration, racial justice, and human

trafficking, while providing prenatal and postnatal resources for women. NWF seeks to end the dehumanization and insufficient support that leads to the coercion or exploitation of marginalized and vulnerable groups. This case concerns NWF because it implicates their community members' abilities to offer resources and education to women seeking abortion, which empowers women for the wellbeing of themselves and their children alike.

## SUMMARY OF ARGUMENT

*Hill v. Colorado* is an aberration in the Court's First Amendment jurisprudence. It sanctions the restriction of historically protected modes of speech—one-on-one communication and leafleting—in an archetypical public forum—the public sidewalk. The only possible explanations for the Court's detour from precedent is the majority's paternalistic belief that women are so fragile that they need protection from speech they may not want to hear, and the fact that this speech occurs outside abortion clinics.

This detour was misguided on several levels. First, it contradicts bedrock constitutional principles and "distort[ed]" First Amendment law, as this Court has already recognized. *Dobbs*, 142 S. Ct. at 2276 (citing *Hill*, 530 U.S. at 741–42 (Scalia, J., dissenting), *id.* at 765 (Kennedy, J., dissenting)).

Second, it provides cover for laws like Westchester County's that actually *harm* the women they seek to protect. Informed consent is essential for any medical procedure, and as this Court has recognized repeatedly, it is even more critical in the context of abortion, where not one, but two, lives are at stake. Evidence shows that women *want* more information when making an abortion decision, especially about resources for the economic and social concerns leading many women to feel that they have no choice but abortion. And evidence also demonstrates that when a woman has incomplete information about abortion, it can have devastating consequences. Women do not receive all relevant information at abortion clinics, so sidewalk counselors are vital to ensuring that women can make informed decisions.

Third, the rest of the Court's First Amendment precedents acknowledge that robust protection of speech sometimes means people must encounter speech they disagree with or that offends them. While the *Hill* majority apparently found it chivalrous to swoop in to rescue helpless damsels from the distress of potential offense, the *Amici* feminist groups—and most women in 2023—would object to being patronized in such a fashion. That the Court went to these lengths to block only *women seeking abortion* from receiving alternative information, while telling virtually everyone else to grow a thicker skin, reveals the exceptionally condescending (and content discriminatory) nature of the ruling.

*Hill*'s blatant detour from the First Amendment, its paternalistic underpinnings, and the harmful laws that it continues to spawn require that it be overruled.

## ARGUMENT

### I. *Hill v. Colorado* is an aberration in First Amendment jurisprudence and should be overruled.

Petitioner seeks to engage "in sidewalk counseling—approaching women on their way into the clinic" on public sidewalks, "speaking with them about their pregnancies, and distributing pamphlets containing information about abortion and its alternatives." Pet. at 5. She is prevented from doing so by the Westchester County "Reproductive Health Care Facilities Access Act." Pet. at 5–6. The Act is modeled on the law upheld by *Hill*. Pet. at 7. But for *Hill*, the Act would be unconstitutional because it prohibits historically significant and protected speech in an archetypical public forum. *Hill* departs from the

rest of the Court's First Amendment precedent and should be overruled.

### A. History and tradition support the protection of expressive activity like sidewalk counseling.

Public streets and sidewalks are "traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). "In such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Id.* (quoting *United States v. Grace*, 461 U.S. 171, 177, 180 (1983)).

And "[l]eafletting and commenting on matters of public concern"—the exact expression Petitioner wishes to engage in, *see* Pet. at 12–13—are "classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997) (citing *Boos*, 485 U.S. at 322, *Grace*, 461 U.S. at 180). History teems with examples of how the distribution of broadsides, leaflets, and pamphlets were critical to communicating thoughts and information and influencing public opinion.[2] Thomas

[2] *See, e.g.*, Amanda Foreman, *The Power of Pamphlets: A Brief History*, Wall. St. J. (Oct. 19, 2017), https://www.wsj.com/articles/the-power-of-pamphlets-a-brief-history-1508426138.

Paine's "Common Sense" helped to inspire the Revolution,[3] along with similar publications:

> It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form.

*McCullen v. Coakley*, 573 U.S. 464, 489 (2014) (quoting B. Bailyn, *The Ideological Origins of the American Revolution* 2 (1967)). Quite simply, pamphlets are "historical weapons in the defense of liberty." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 162 (1939).

### B. *Hill* contradicts this Court's longstanding precedent.

1. This Court has held for many years that the First Amendment protects the expression Petitioner wishes to engage in: the right to hand out leaflets and information in public fora. In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the Court invalidated an ordinance forbidding the distribution of literature without a permit. The Court noted:

> [t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own

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[3] *Id.*; *see also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

> history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.

*Id.* at 452 (citations omitted).

One year later, in *Schneider*, the Court held that a series of municipal ordinances prohibiting the distribution of handbills on public streets to prevent littering were unconstitutional. While citizens may not enjoy a right to force an unwilling person to accept a leaflet, they do have a protected right to tender it. 308 U.S. at 160. This is especially so on streets and sidewalks: "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163.

One year after *Schneider*, the Court again emphasized the protected nature of distributing literature on public sidewalks in *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Court rejected a statute that prohibited "loitering or picketing" near a business, which was evidently aimed at labor protestors. *Id.* at 91. Such a statute prohibited "whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise … so long as it occurs in the vicinity of the scene of the dispute." *Id.* at 101. The Court recognized that safeguarding the rights of individuals to engage in these activities *in that location* "is essential to the securing of an informed and educated

public opinion with respect to a matter which is of public concern." *Id.* at 104.

The Court underscored this holding with its opinion in *Carlson v. California*: "[P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." 310 U.S. 106, 113 (1940). And a few years later, the Court held that door-to-door distribution of literature was also protected by the First Amendment. *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943). The Court has since rejected other laws that foreclose "a venerable means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

2. Despite this history and tradition, *Hill* upheld a law that has spawned many others like the one at issue—a law that prohibits sidewalk counseling, which amounts to one-on-one speech to others and distributing literature on a public sidewalk. *See* Pet. at 12–13. In doing so, the Court carved out an exception to its venerable First Amendment jurisprudence for pro-life speech near abortion clinics, permitting undeniably content-based restriction of speech in a quintessential public forum. As Justice Kennedy noted in dissent, recounting many of the cases above, "[i]t must be remembered that the whole course of our free speech jurisprudence, sustaining the idea of open public discourse which is the hallmark of the American constitutional system, rests to a significant extent on cases involving picketing and leafletting." 530 U.S. at 781 (Kennedy, J., dissenting).

Yet in *Hill*, the Court made an exception based on the "fictitious" "right to be left alone" or to be protected from an unwanted message. 530 U.S. at 750 (Scalia, J., dissenting); *id.* at 717–18. This is despite the Court's otherwise consistent holdings, and the "universally understood state of First Amendment law," that "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. Jacksonville*, 422 U.S. 205, 210 (1975). *Hill*'s justification was to "protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics." *Hill*, 530 U.S. at 777 (Kennedy, J., dissenting). But the majority admitted that "[t]here was no evidence …that the 'sidewalk counseling' conducted by petitioners in [that] case was ever abusive or confrontational." *Id.* at 710. *Hill* still sanctioned prophylactic action based on the unsupported assumption "that most citizens approaching a health care facility are unwilling to listen to a fellow citizen's message and that face-to-face communications will lead to lawless behavior within the power of the State to punish." *Id.* at 778 (Kennedy, J., dissenting).

As this Court recently acknowledged (though understated), this was a "distort[ion of] First Amendment doctrines." *Dobbs*, 142 S. Ct. at 2276 (citing *Hill*, 530 U.S. at 741–42 (Scalia, J., dissenting), *id.* at 765 (Kennedy, J., dissenting)). The Court should take this opportunity to remove this "abortion distortion" from its First Amendment jurisprudence.

## II. *Hill* protects laws that harm women by preventing them from receiving wanted and beneficial information.

### A. The unique nature of the abortion procedure underscores the need for women to receive full and accurate information about the implications of abortion.

Patients are entitled to receive full information about a proposed medical procedure so that they can intelligently and voluntarily consent to the procedure. This is "the cornerstone of modern biomedical ethics." O. Carter Snead, *The (Surprising) Truth About Schiavo: A Defeat for the Cause of Autonomy*, 22 Const. Comment. 383, 388 (2005). The Court has recognized that this principle is so fundamental, it has constitutional dimensions. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). The patient must also have capacity and must make the decision freely and without coercion. *Id.* at 280.

Informed consent is even more critical in the abortion context because of the unique nature of the procedure and its impact on not one, but two, lives. As this Court acknowledges, "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980); *accord Dobbs*, 142 S. Ct. at 2243 ("[A]bortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) ("Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision …

and, depending on one's beliefs, for the life or potential life that is aborted.").

This Court has also repeatedly recognized the importance of ensuring abortion decisions are fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). "Whether to have an abortion requires a difficult and painful moral decision. . . . The State has an interest in ensuring so grave a choice is well informed." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (citation omitted).

Indeed, even before *Dobbs*, this Court upheld laws that go beyond simply informing a woman of the medical risks of an abortion to her, but also explaining the truth about her unborn child, its development, and the availability of child support and state services to support the mother and her child. "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882.

### B. Data shows that women need and appreciate having more information to inform their choice, and an informed choice is critical to avoiding harm.

1. Because of their work with hundreds of thousands of women, *Amici* are familiar with the negative consequences the Court recognized when a woman lacks

information relevant to her abortion decision. *Amici* seek to reach women in the critical period after discovering an unplanned pregnancy but before undergoing abortion because statistics show that most women would choose to keep their babies if they had additional information or resources. The reality is that *76% of pregnant women seeking abortion report that they would choose to parent if their life circumstances were different*.[4] Data from the pro-choice Guttmacher Institute supports this statistic. Quantitative data from two surveys show that life circumstances such as economic status are the main reasons women cite for choosing abortion, and qualitative data from in-depth interviews with women who chose abortion shows that they "typically felt that they had no other choice."[5]

*Amici*, and sidewalk counselors like Petitioner, seek to ensure that women *do* have a genuine choice by providing services aimed at addressing the circumstances that lead many women to believe that abortion is the only answer. Sidewalk counselors like Petitioner often seek to direct women to clinics and organizations like *Amici*'s, where they will receive additional information and resources.

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[4] Ericka Anderson, *Greater Level of Desperation: As COVID-19 Rages, Pregnancy Centers See Surge in Demand*, USA Today (Aug. 9, 2020), *available at* https://perma.cc/ZNS4-2D2X.

[5] Guttmacher Inst., *Women's Reasons for Having an Abortion, available at* https://web.archive.org/web/20220128140415/https://www.guttmacher.org/perspectives50/womens-reasons-having-abortion (citing Lawrence B. Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reprod. Health 110–18 (2005), *available at* https://perma.cc/7Z6Z-9KRC).

Human Coalition's brick-and-mortar clinics provide women contemplating abortion with free pregnancy tests and ultrasounds, and their virtual clinics connect women with these resources and provide referrals for prenatal care and STI testing. *Amici* also provide material assistance to women, including baby supplies like diapers, formula, car seats, clothing, and breast pumps. Human Coalition also helps women enroll in local, state, and federal programs like Medicaid, CHIP, TANF, SNAP, WIC, and Section 8 housing.

Even women who ultimately decide to get an abortion appreciate having the information provided by organizations like *Amici*. In a recent internal exit survey among women who visited their clinics, which includes women who ultimately chose to abort, Human Coalition found that 96.8% (or 3301 out of 3408 women surveyed in the last year) either "agree" or "strongly agree" that they would recommend Human Coalition's services to a friend. 98.6% of respondents agreed that Human Coalition provided them with all the information they needed to make an informed decision about their pregnancy. And over 99% of respondents agreed that they felt cared for and respected by the staff.

*Amici* reach out to women through advertising and personal connections, but a critical time to reach women contemplating abortion—and indeed possibly the last opportunity to do so—is as the woman approaches the abortion clinic. As Justice Scalia explained, this is a critical time and place for the information to be imparted and offers of help to be given, and being kept several feet away as the Act requires impedes the message of compassion and support individuals like Petitioner intend to convey "in the last moments before another of her sex is

to have an abortion." *Hill*, 530 U.S. at 757 (Scalia, J., dissenting). As to the particular message of support and compassion that sidewalk counselors wish to impart, as Justice Kennedy acknowledged, the area near abortion clinic entrances "is not just the last place where the message can be communicated. It likely is the only place." *Id.* at 789 (Kennedy, J., dissenting).

2. Data also tells us what happens when women are *not* informed as to the implications of their choice: they suffer. Women who report that their pre-abortion counseling was inadequate are more likely to report "relationship problems, symptoms of intrusion, avoidance, and hyperarousal, and meeting the full diagnostic criteria for posttraumatic stress disorder."[6]

Data also shows that many women ultimately regret their abortions, which can lead to serious consequences. Women who have abortions have a greater risk of suicide. In one study of 173,279 low-income women in California, researchers "found that women who underwent abortions had nearly double the chance of dying in the following two years, and 'had a 154 percent higher risk of death from suicide' than if they gave birth."[7] Foreign studies paint a bleaker picture. When Italian researchers

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[6] Coyle, C.T., et al., *Inadequate preabortion counseling and decision conflict as predictors of subsequent relationship difficulties and psychological stress in men and women*, 16(1) Traumatology 16–30 (2010), https://psycnet.apa.org/doiLanding?doi=10.1177%2F1534765609347550.

[7] Hannah Howard, *New Study: Elevated Suicide Rates Among Mothers After Abortion*, Charlotte Lozier Inst. (Sept. 10, 2019), https://lozierinstitute.org/new-study-elevated-suicide-rates-among-mothers-after-abortion/ (citing David C. Reardon et al., *Deaths associated with pregnancy outcome: a record linkage study of low income women*, 95 Southern Med. J. 834–41 (Aug. 2002)).

studied suicide rates "during pregnancy or within 1 year after giving birth," they concluded that "of the maternal suicides [studied]"—the suicide rate of women who underwent an abortion "was more than *double* the suicide rate of women who gave birth."[8] In a similar study, Finnish researchers found that within one year of an abortion, "women were three times more likely to commit suicide than the general population, and nearly *six times* more likely to [do so] than women who gave birth," while most of these deaths occur in the first two months.[9] It is "self-evident" that women who discover facts relevant to their abortion decision later will suffer greater regret and psychological harm. *Gonzales*, 550 U.S. at 159–60.

3. Everyone should agree that if a woman chooses abortion, her choice should be fully informed with truthful and complete information. Yet evidence shows that the work of sidewalk counselors is even more critical because women will often not receive this information inside the abortion clinic.

The experience of *Amici* is that women are often uninformed about what to expect from abortion. Human Coalition's clinic staff often serve women who were not provided accurate information about medication abortion by abortion providers, as one example. Abortion providers are reported to minimize concerns or side effects and focus on the positive—using phrases like "easy

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[8] *Id.* (emphasis added) (citing Ilaria Lega, et al., Maternal suicide in Italy, Archives of Women's Mental Health 23, 199–206 (2020) https://doi.org/10.1007/s00737-019-00977-1).

[9] *Id.* (emphasis added) (citing M. Gissler, et al., *Suicides after pregnancy in Finland, 1987-94: register linkage study*, 313 British Med. J. 1431–34 (Dec. 1996) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2352979/pdf/bmj00571-0021.pdf).

process," "quick recovery," and "like taking over-the-counter meds." Some Human Coalition clients who were prescribed medication abortion pills said they were told by the abortion provider that "it is as easy as taking Advil." Many clients also report that they were not warned about the pain or that they might see fetal remains. Staff have been told things like, "I had no idea that the pill was going to be as painful as it was," "I bled way more than I was told. The whole procedure was more painful than I was led to believe," "I saw the baby come out in the toilet … It was very traumatic. And no one told me I would see a baby. I didn't know what to do." Women call Human Coalition nurses panicking in the middle of their abortions because of these unexpected results, and the nurses support them over the phone.[10]

A lack of pertinent information is not only common to medication abortions. As this Court noted in *Gonzales*, women were not being told about the brutality of the partial-birth-abortion procedure, which could have devastating effects:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

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[10] These experiences track with trial testimony given by one woman who underwent a medication abortion in Texas. *See* Tr. Transcript, Vol. III of V, at 94:24-95:20, 96:7-8, *Whole Woman's Health v. Hellerstedt*, No. 1:14-cv-00284-LY (W.D. Tex. Aug. 21, 2014), ECF No. 195.

550 U.S. at 159–60 (emphasis added). "It is … precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State." *Id.* at 159. Similarly, the Fifth Circuit recounted evidence that abortion clinics do not explain to women what second-trimester D&E abortion procedures entail:

> Women who receive live-dismemberment D&Es are not being told what is going to happen to the fetus. In this case, the plaintiffs' consent forms do not explain in 'clear and precise terms' what a live-dismemberment abortion entails. For example, Plaintiff Southwestern's form tells the patient that 'the pregnancy tissue will be removed during the procedure' and does not explain that the fetus's body parts—arms, legs, ribs, skull, and everything else—will be ripped apart and pulled out piece by piece. Plaintiff Alamo's consent form states that the doctor will 'empt[y] the uterus either by vacuum aspiration or evacuation (manual removal of the fetus by forceps).' Plaintiff Whole Woman's Health's form states: 'The physician will use … instruments such as forceps to remove the pregnancy from the uterus … in multiple fragments.'

*Whole Woman's Health v. Paxton*, 10 F.4th 430, 444 (5th Cir. 2021) (citation omitted). Yet as this Court recognized, "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." *Casey*, 505 U.S. at 882. This is exactly the type of information sidewalk counselors often seek to give women entering clinics. And it is especially critical in states like New York, which lack abortion-related informed consent laws. In New York, a woman can abort

her baby without ever being shown what he or she looks like on an ultrasound screen, or without ever being informed that she can seek free services from the state and how to receive child support from the baby's father—facts that many women would deem relevant to their decision.

4. Finally, sidewalk counselors like Petitioner are another line of defense to prevent coercive abortions and protect women from abusive partners, perhaps by detecting a situation that seems "off" before the woman enters the clinic, or by offering a place where the woman can go for help and services. As a recent study found, over 60% of women report at least one form of coercion related to her abortion decision.[11] Intimate partner violence is of particular concern in the population of women seeking abortions, who are at increased risk for reproductive coercion. In 2007, the prevalence of intimate partner violence was nearly three times greater for women seeking abortions than for women who continued their pregnancies.[12]

This is particularly true for women who are victims of sex trafficking.[13] In a study examining reproductive

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[11] David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women's Emotional Responses and Mental Health*, 15(1) Cureus (Jan. 31, 2023), *available at* https://perma.cc/W6SX-KS78.

[12] ACOG Committee Op. No. 554, *Reproductive and Sexual Coercion* (February 2013; Reaffirmed 2019), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2013/02/reproductive-and-sexual-coercion.

[13] Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 Annals Health L. 61 (2014), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1410&context=annals.

harm in survivors of sex trafficking, 55.2% of the 67 survivors examined for the study reported at least 1 abortion, and almost 30% reported multiple abortions.[14] "More than half (eighteen) of [the responsive] group indicated that one or more of their abortions was at least partly forced upon them."[15] One woman reported having 17 total abortions and noted that some were forced upon her.[16] If a woman is being coerced or trafficked, the short walk from the parking lot to the door of the clinic may be the only chance she has to make contact with individuals who seek to help her. Keeping those individuals at a distance lessens the chance that they will be able to help.

## III. Laws sanctioned by *Hill* are rooted in the sexist assumption that women are too fragile to hear alternative viewpoints.

As demonstrated above, the history and tradition of speech and leafleting on the public sidewalk is firmly grounded in the Constitution. *See* Part I *supra*. The Court has also recognized for many years that providing information to women before they undergo abortion is critical to ensuring their choice is informed and avoiding negative consequences. *See* Part II.A *supra*. And even abortion-determined women appreciate being given more information and options for support and benefit from that information. *See* Part II.B *supra*. So why did *Hill* sanction laws like the Act here, even though it represented an extreme departure from the Court's established First Amendment jurisprudence?

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[14] *Id.* at 73.
[15] *Id.*
[16] *Id.* at 73–74.

Simple: The Court assumed that women seeking abortions uniquely need to be protected from speech that could offend them. *See Hill*, 530 U.S. at 777 (Kennedy, J., dissenting). *Hill*'s conclusion stands out like a sore thumb from the rest of the Court's First Amendment precedent, which acknowledges that there is no right not to be offended, and that the First Amendment protects even speech offensive to the listener, especially in a quintessential public forum. *See* Part I.B *supra.* Case after case rejects state regulation of offensive speech, a "bedrock principle underlying the First Amendment." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting cases). And case after case acknowledges that, except where an individual is a captive audience (*i.e.*, in one's home, *see Frisby v. Schultz*, 487 U.S. 474 (1988)), the obligation falls on a listener to avert their eyes in a public forum, where we should expect to run into expression that offends, *e.g.*, *Erznoznik*, 422 U.S. at 210; *Cohen v. California*, 403 U.S. 15, 21 (1971)).

Following these principles, the Court has held that a Jewish community including Holocaust survivors must tolerate Nazis parading down their streets. *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). The Court determined that people have the right to burn the American flag that other Americans have sacrificed their lives to defend. *Texas*, 491 U.S. 397. Even the grieving family of Lance Corporal Matthew Snyder, a Marine killed during Operation Iraqi Freedom, was essentially told by the Court to suck it up in favor of robust protection of free speech, even outrageously offensive speech directed at their family during one of the hardest days of their lives—the day they buried their 20-year-old son. *Snyder v. Phelps*, 562 U.S. 443 (2011).

Yet in *Hill*, the Court found it necessary to uniquely protect women from "*potential* trauma … associated with confrontational protests," 530 U.S. at 715 (emphasis added), even while admitting that "[t]here was no evidence, however, that the 'sidewalk counseling' conducted by petitioners in th[at] case was ever abusive or confrontational," *id.* at 710. Their crime, it would seem, is simply engaging in "unwanted communication." *Id.* at 716. And the Court *assumed on behalf of women* that they do not want sidewalk counselors' information. *Id.* at 778 (Kennedy, J., dissenting). In other words, the Court sanctioned the restriction of core protected speech to simply protect from mere "offense" it believed might occur. The evidence discussed above shows that women in fact *do* appreciate the types of information sidewalk counselors seek to provide and benefit from it. *See* Part II.B.1. But even if some women would rather not hear it, "'[i]f liberty means anything at all, it means the right to tell people what they do not want to hear.'" *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321 (2023) (citation omitted). *Hill*, in its paternalistic effort to "save" women from receiving more information, violated its own settled precedent: "[T]he 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*, 422 U.S. at 210.

While the *Hill* majority apparently considered it chivalrous to swoop in to rescue helpless damsels from the distress of potential offense, the *Amici* feminist groups and most women today would object to being patronized in such a fashion. That the Court went to these lengths only to protect *women seeking abortion*, while telling virtually everyone else to grow a thicker skin,

reveals the exceptionally condescending (and content discriminatory) nature of the ruling. Only women seeking abortion are seen as so fragile that they cannot withstand potential offense. The women of 2023 would disagree that abortion-minded women need special protection from communication designed to give her more information to facilitate her choice. Knowledge is power—and a woman does not need the State to lay its coat over the truth so that she need not muddy her feet with it.

To be sure, this is not to say that the State may not criminalize assault, blocking clinic entrances, or violence. Both the federal government and New York already do, which reiterates that the law at issue is aimed purely at expression. *See* 18 U.S.C. §248; N.Y. Penal Law §240.70(1); *see also Hill*, 530 U.S. at 777–78 (Kennedy, J., dissenting).[17] *Amici* are strongly anti-violence and do not condone such activities. Nor do *Amici* condone verbally attacking or condemning women seeking abortions. All the *Amici* seek to educate, care for, and empower women, and do not engage in such behavior.

Yet this Court has recognized for many years that "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos*, 485 U.S. at 322. That some might choose to

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[17] This is not to say that these laws are always applied appropriately. *See, e.g.,* U.S. House of Reps. Judiciary Cmte., *Jim Jordan Launches Congressional Inquiry Into FBI Raid on Mark Houck, DOJ's Political Enforcement of FACE Act*, (Oct. 7, 2022), https://judiciary.house.gov/media/press-releases/jim-jordan-launches-congressional-inquiry-into-fbi-raid-on-mark-houck-dojs. The federal FACE Act expressly excludes protected expressive conduct from its scope. 18 U.S.C. §248(d)(1).

use their right to speak in an offensive, unkind, or unwise way does not justify the restriction of all speech, especially not in a quintessential public forum, and especially not when the desired speech will largely benefit those the Act seeks to shield.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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AUGUST 2023