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

BRIEF OF *AMICI CURIAE* ELEANOR MCCULLEN AND KELSEY FIOCCO IN SUPPORT OF PETITIONER

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IDENTITY & INTEREST OF AMICI CURIAE[1]

Eleanor McCullen was the lead petitioner in *McCullen* v. *Coakley*, 573 U. S. 464 (2014). Back when Mrs. McCullen filed her petition for a writ of certiorari, she spent her days helping women outside a Planned Parenthood clinic. In addition to offering messages of love and support to women footsteps away from terminating a pregnancy, Mrs. McCullen and her husband have spent thousands of dollars of their own money to pay for baby showers, lodging, utilities, food, diapers, and more for women in need who choose to have their babies. Mrs. McCullen believes that every human life, from the child in the womb to the woman dealing with a crisis pregnancy, is precious and worthy of dignity, respect, love, and protection. That is why she has devoted her time to sidewalk counseling, and that is why she petitioned the Supreme Court a decade ago to protect her First Amendment right to do so.

As another sidewalk counselor brings her own petition to this Court to vindicate her First Amendment right to express her message of hope to women facing profound, difficult decisions, Mrs. McCullen, returning to this Court as *amici curiae* along with another sidewalk counselor (Kelsey

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of *amici curiae*'s intent to file this brief on August 14, 2023.

Fiocco), offers the following to crystallize the exceptional burdens that laws restricting speech outside abortion clinics continue to inflict on sidewalk counselors. Mrs. McCullen, as a petitioning sidewalk counselor whose rights were vindicated here despite *Hill* v. *Colorado*, 530 U. S. 703 (2000), can provide considerable help to this Court with her unique perspective and experience.

INTRODUCTION & SUMMARY OF THE ARGUMENT

In *McCullen*, this Court recognized that sidewalk counselors are not abortion protestors. 573 U. S., at 472. And it unanimously concluded that prophylactic restrictions on speech outside abortion clinics violate the First Amendment when they choke off the expression of support that sidewalk counselors provide to women receptive to information about abortion alternatives. *Id.*, at 496–497. In the process, this Court reiterated several foundational tenets of First Amendment law—that traditional public fora like sidewalks have a "special position in terms of First Amendment protection," *United States* v. *Grace*, 461 U. S. 171, 180 (1983); that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse," *Meyer* v. *Grant*, 486 U. S. 414, 424 (1988); and that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression," *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 347 (1995). Those principles led to a natural conclusion that sidewalk counseling has "historically been more closely associated with the transmission of ideas than" other types of speech. *McCullen*, 573 U. S., at 488.

Mrs. McCullen can, and does, attest that sidewalk counseling is speech concerning a very specific and personal subject matter. In a mirroring way, regulations like the one in this case single out that specific speech for differential treatment. Under *City of Austin* v. *Reagan Nat. Advertising of Austin, LLC*, 596 U. S. ___ (2022), and *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015), the sort of laws upheld in *Hill* v.

Colorado are content-based and should face strict scrutiny. Whereas the regulations in *City of Austin* were content-neutral, inherent in the content of the off-premises directional signs, Westchester's buffer-zone regulations are content-based because of the specific nature of the speech that sidewalk counselors offer—i.e., abortion information and alternatives. It is no more complicated than that. This Court should therefore explicitly recognize that *Hill* has not survived *City of Austin* and *Reed*.

City of Austin, following *Reed*, laid this groundwork by setting out the test for determining content-neutrality, and that test is no longer *Hill*'s. See 596 U. S., at ___ (slip op., at 6) (using *Reed*'s test of whether a regulation "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed[]'" instead of *Hill*'s formulations (quoting *Reed*, 576 U.S., at 163)). Petitioner's case is a pristine vehicle through which this Court can explain how *City of Austin*'s rule about particular speech applies in the modern era to regulations targeting specific types of speech.

The Petition well documents the need for *Hill*'s demise. See Pet. for Cert., No. 23-74, p. 15–31. To supplement those points, Mrs. McCullen offers the following not only to underscore why she brought her case to the Supreme Court in 2013 but also to emphasize the unique peril inflicted by laws like the one at issue here on those who adhere to the view that, "[w]hen the conduct of men is designed to be influenced, persuasion, kind, unassuming persuasion, should ever be adopted." The Collected Works of Abraham Lincoln 273 (Wildside Press 2008).

ARGUMENT

I. This Court should take this case now to clarify how its newest content neutrality jurisprudence in *Town of Austin* applies to sidewalk counselors.

This Court has taken free speech cases to clarify its rules even in the absence of a clear circuit split. In fact, Mrs. McCullen's case arrived at this Court (arguably) without one. Similarly, *City of Austin* presented no clear split. See Pet. for Cert. in *City of Austin*, No. 20-1029, p. 21 ("There may not be a direct circuit conflict in terms of specific holdings"). This Court, however, has spoken in free-speech cases to clarify these questions of exceptional importance. It should do so here as well. This case, like *McCullen*, is about a sidewalk counselor, about *Hill*, and about basic, important constitutional questions regarding political expression in the precious few moments when it will either make a difference or an unborn life will be forever lost.

A. Sidewalk counselors like Petitioner and Mrs. McCullen have a long, venerable, and fruitful history of engaging in specific, purpose-driven communication.

1. Mrs. McCullen, Petitioner, and others like them communicate particular and purposeful ideas to women considering abortion.

The public area outside of abortion facilities have evolved into "a forum of last resort" in the pro-life/pro-

choice debate. See *Hill*, 530 U. S., at 763 (Scalia, J., dissenting). Some in this marketplace are the abortion-facility employees themselves who obviously offer "[s]peech in favor of the clinic and its work." *McCullen*, 573 U. S., at 512 (Alito, J., concurring in the judgment). There too are "protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation." *Id.*, at 472 (majority opinion). A third group populates that forum as well—sidewalk counselors, who "take a different tack." *Id.* These speakers do not shout slogans, don provocative t-shirts, trot out inflammatory signs, or block entryways to abortion clinics. Though they believe that abortion ends the life of a human child, their approach is not that of those "fairly described as protestors." *Id.* Sidewalk counselors believe a message of hope and love, expressed through gentle, intimate conversation, carries far more communicative power than any criticism or condemnation ever could.

Distilled to its core, that message is one of respect and dignity for all—the unborn and the woman deciding whether to carry her baby to term. Sidewalk counselors know that many women choose to end a pregnancy because of fear, pressure, isolation, and the mistaken assumption that they have no other choice. As Mrs. McCullen has explained to this Court once before, her long-practiced approach was to "engage women who may be seeking abortions in close, kind, personal communication with a calm voice, caring demeanor, and eye contact." Pet. for Cert. in *McCullen* v. *Coakley*, No. 12-1168, p. 11.

This approach works. By offering a hand instead of a holler, Mrs. McCullen has helped scores of women (approximately eighty by the time of her case before the Court) to "effectuate their own choice to pursue an alternative to abortion." *Id.*, at 14. Mrs. McCullen greeted women, asked "Is there anything I can do for you?", and offered, "I'm available if you have any questions." *McCullen*, 573 U. S., at 472.

This approach often leads to lasting relationships between sidewalk counselors and the counseled. Years after a sidewalk conversation, Mrs. McCullen has received messages of appreciation from women who chose not to terminate their pregnancies. The women frequently relay their pride and joy in their children's development. Mrs. McCullen has by request been present during the birth of some of the children she helped save, and she is a proud godmother to others. Some women have chosen to name their children after her. In Mrs. McCullen's case, a dozen women vouched for the positive and specific impact sidewalk counseling could have had in influencing their own abortion decisions. See Brief of 12 Women Who Attest to the Importance of Free Speech in Their Abortion Decisions as *Amici Curiae* in *McCullen* v. *Coakley*, No. 12-1168.

But how is this specific and purposeful message communicated and received? That depends entirely on the freedom to engage with pregnant women in a close, quiet, intimate, personal manner. For sidewalk counselors, a calm voice is essential, eye contact critical, and openness from the recipient non-negotiable.

As this Court recognized, being "seen and heard by women within the buffer zones" is not enough. *McCullen*, 573 U. S., at 489 (internal quotation omitted). Because "[i]t is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm," allowing only the message expressed by "vociferous opponents of abortion" to be received "effectively stifle[s]" the sidewalk counselors' message. *Id.*, at 489–490. Before this Court intervened in Mrs. McCullen's case, a Massachusetts buffer-zone law made it difficult, and sometimes impossible, for Mrs. McCullen to "distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter[ed] the buffer zone." *Id.*, at 487. When she did "manage to begin a discussion outside the zone," she was forced to "stop abruptly at its painted border, which she believe[d] cause[d] her to appear 'untrustworthy' or 'suspicious.'" *Id.* For that reason, she was "often reduced to raising her voice at patients from outside the zone"—a self-defeating approach anathema to the "compassionate message she wishe[d] to convey." *Id.*

Clear and specific communication was vital for the women who wrote in support of Mrs. McCullen in 2013. Several stated they needed information on the impact of abortions in their lives but were not provided that by clinic personnel. Brief of 12 Women in *McCullen*, No. 12-1168, p. 22. And several others asserted they would not have chosen abortion had they received accurate information. *Id.*, at 28. These stories of regret are a reminder of the communicative power of sidewalk counselors. Counselors like Mrs. McCullen calmly and kindly provide the accurate

information so desperately needed by women coming to these clinics.

The same burdens plague the Petitioner in this case, sidewalk counselors wishing to show compassion and offer assistance to women seeking services from Westchester's abortion clinics but who may have never been told help is available. Mrs. McCullen was not an abortion protestor in her case. Neither is this Petitioner. Although they are all pro-life, they seek not to shout that; rather, their goal is to inform pregnant women heading towards an abortion clinic that there is another way, the other way is feasible, and help is available.

This communication remains susceptible to regulation that imposes distance. As the Court recognized in *McCullen*, and as it recognizes each time it protects the free expression rights of speakers who do not necessarily exhibit the same level of civility demonstrated by Mrs. McCullen and Petitioner, the First Amendment demands more.

2. Although sidewalk counseling abides within a venerable tradition, regulating it does not.

Mrs. McCullen, the Petitioner, and other sidewalk counselors have not operated in a historical vacuum. This Court has long recognized the value of public speech like sidewalk counseling. Some forms of expression "such as normal conversation and leafletting on a public sidewalk . . . have historically been more closely associated with the transmission of ideas than others." *McCullen*, 573 U. S., at 488; see also *Meyer*, 486 U. S., at 424 ("[O]ne-on-one

communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse."); *McIntyre*, 514 U. S., at 347 ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression."); *Schenck* v. *ProChoice Network of Western N.Y.*, 519 U. S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment."). So too, the Court recognized long ago a "well established" principle "that the Constitution protects the right to receive information and ideas." *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969). Both sidewalk counselors and the women with whom they communicate operate within a long-recognized sphere of robust constitutional protection.

Meanwhile, on the regulatory side of the coin, cities and states have no analogous tradition endorsed by the courts of prohibiting sidewalk counseling. See Opening Brief of Appellant in *Vitagliano* v. *County of Westchester*, No. 23-30 (CA2), p. 56 (recounting the spotty, checkered, and often-unsuccessful attempts to regulate speech post-*Hill*). History and tradition do not always clearly pick a side. Here, however, the unbroken line is one-sided. Sidewalk counselors like Mrs. McCullen and the Petitioner sit comfortably within a venerable speech heritage, while regulators of that speech look more like outliers whose attempts at cabining speech fare poorly in our judicial system.

B. Regulations like those in Westchester County and Colorado single out sidewalk counseling—speech on a specific subject matter—for differential treatment, and so cannot be squared with *City of Austin*.

1. *City of Austin* held that regulations singling out speech on a sufficiently specific subject matter for differential treatment are content-based, a determination guided by history and tradition.

In *City of Austin*, this Court reaffirmed *Reed* but consciously and conspicuously avoided doing the same for *Hill*. 596 U. S., at ___ (slip op., at 6, 13). After *City of Austin* and *Reed*, the "principal inquiry in determining content neutrality" is not *Hill*'s test of "whether the government has adopted a regulation of speech because of disagreement with the message it conveys," 530 U. S., at 719 (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)), but whether a regulation "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin*, 596 U. S., at ___ (slip op., at 6) (alteration in original) (quoting *Reed*, 576 U. S., at 163).

The Austin regulations targeting "off-premises" signs—signs that advertised businesses, persons, products, or services "not located on the site where the sign is installed"—were content-neutral because they did not single out a topic, idea, message, or subject for differential treatment. *Id*., at ___ (slip op., at 3, 8).

The signs' *general* location content—not the *specific* topic or subject matter content—were targeted. *Id.* The Court thus vindicated the district court's conclusion that a regulation of speech is content-based if it "curtail[s] discussion of any *specific* topics, ideas or viewpoints." *Reagan Nat. Adv. of Austin, Inc.* v. *City of Austin*, 377 F. Supp. 3d 670, 681 (W.D. Tex. 2019) (emphasis added).

Deciding when a regulation singles out a specific subject matter, idea, or message is guided by an inquiry into the "Nation's history of regulating" certain types of speech. *City of Austin*, 596 U. S., at ___ (slip op., at 12). And a half-century of undisturbed and unbroken speech distinctions is a good indication that the First Amendment should permit such regulations. *Id.* The opposite, then, must be true. A spotty semblance of a through-line composed of outlier regulations is a good indication that the First Amendment cannot tolerate those regulations.

2. *City of Austin* lays bare how buffer-zone laws like Westchester's target speech on specific subject matter and flout this Nation's free speech traditions.

Sidewalk counseling is speech on a specific subject. And buffer-zone laws like Westchester's specifically regulate that subject matter. Sidewalk counseling brims with content; its very essence about some of the most distinct and profound matters in the American political community. Mrs. McCullen has provided an example of this in her time as a sidewalk counselor. Her personal communications with women

featured information about abortion and the options available to those women.

Also, naturally, those close communications sometimes dealt with the emotions and pressures facing those women. This kind of counseling—that done by Mrs. McCullen and the Petitioner—is specific enough to have the power to change hearts and minds about abortion. See Brief of 12 Women in *McCullen*, No. 12-1168, p. 28; see also Opening Brief of Appellant in *Vitagliano*, No. 23-30 (CA2), p. 5–8, (describing Petitioner's desire to engage in the same type of speech on the same specific subject matter).

No matter the purpose of counseling (pro-life or otherwise), the counseling is being regulated, and the regulations are unconstitutional. The Westchester County law, modeled after the "bubble" zone regulation by Colorado in *Hill*, regulates speech where the content—expressly defined by the law—is protest, education, or counseling. See Laws of Westchester County § 425.31(i) (regulating "engaging in oral protest, education, or counseling"); see also Colo. Rev. Stat. § 18-9-122(3) (same). This Court in *Hill* regarded these types of laws as regulating "an extremely broad category of communications," rendering them, in the view of that Court, content neutral. *Hill*, 530 U. S., at 723.

That was (and is) wrong on its own terms. Counseling is speech on a very specific subject matter, so laws directly regulating counseling are not regulating some broad category. If Mrs. McCullen or the Petitioner approached a woman to engage in the close, personal, and specific communications described above, they would violate Westchester's law

by "engaging in . . . counseling." Laws of Westchester County § 425.31(i). The regulation applies only to speech outside reproductive health care facilities, meaning the regulated counseling would be counseling speech about abortion and pregnancy—the very speech Mrs. McCullen and the Petitioner engage in.

This regulation is nothing like the broad location-based distinction in *City of Austin*. The Austin regulation was constitutional because of the general nature of its regulating off-premises signs. The very broad location regulation did not deal with the specific subject matter of the advertisements themselves, or the idea or message expressed. The opposite is true here. The specific subject matter of counseling (and, by the way, education and protest) is the distinguishing mark of the speech regulated. General location is not regulated as in Austin; for example, directing someone to a different location is general enough speech to be liable to regulation as neutral in content, as it was in Austin. That's not what's happening here. Giving directions about location is not regulated by the Westchester law. Instead, the law "curtail[s] discussion of any specific topics, ideas or viewpoints." *City of Austin*, 377 F. Supp. 3d at 681.

Buffer-zone laws therefore fail First Amendment scrutiny because they fall on the impermissibly specific-speech-targeting side of the general-specific spectrum established by this Court in *City of Austin*. But even if their placement on that spectrum was ambiguous, history lends more confidence. The *City of Austin* Court held that, for closer cases, courts should look for any indication of a long tradition of governments making similar restrictions based on

similar ideas, topics or subject matters. 596 U. S., at ___ (slip op., at 12). Here, though, any argument about the "Nation's history" of regulating sidewalk counseling is legless. *Hill* itself was an outlier. It's true that after this Court let Colorado's law stand, a variety of jurisdictions passed *Hill* laws. But, gladly, regulating speech in that way is a minority approach. On the contrary, governments throughout this Nation, diachronically and synchronically, have participated in a grand history of allowing robust speech in public fora. See *McCullen*, 573 U. S., at 488.

Counselors like Mrs. McCullen and the Petitioner stand within a venerable tradition of discourse on important, specific topics in the public square. To the extent such an "unbroken tradition" puts a thumb on the scale for distinguishing between content-based and content-neutral regulations, *City of Austin*, 596 U. S., at ___ (slip op., at 12), it favors one side only—and not Colorado's or Westchester County's.

Hill withers before the rules in *Reed* and *City of Austin*. It is high time for this Court not just to recognize *Hill* as a "distort[ion]" of "First Amendment doctrines," *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (slip op., at 63 & n.65), nor just to avoid resuscitating or citing *Hill*, see *City of Austin*, 596 U. S., at ___ (slip op., at 13), but instead to end *Hill*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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