

No. 24-57

In The
Supreme Court of the United States

COALITION LIFE,

Petitioner,

v.

CITY OF CARBONDALE, ILLINOIS,

Respondent.

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

**AMICUS BRIEF OF JEANNIE HILL
AND THE AMERICAN CENTER FOR
LAW AND JUSTICE IN SUPPORT OF
PETITIONER**

JAY ALAN SEKULOW

Counsel of Record

STUART J. ROTH

JORDAN A. SEKULOW

COLBY M. MAY

WALTER M. WEBER

GEOFFREY R. SURTEES

AMERICAN CENTER FOR

LAW & JUSTICE

██

██

████████████████████████████████████

████████████████████████████████████

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

INTRODUCTION. 2

SUMMARY OF ARGUMENT. 2

ARGUMENT 3

**THE DECISION IN *HILL v. COLORADO* WAS
IRRECONCILABLE WITH PREEXISTING
CONSTITUTIONAL STANDARDS
GOVERNING FREE SPEECH, THEREBY
PROFOUNDLY DESTABILIZING THE
LAW.** 3

 1. Audience presumed unwilling 4

 2. Explicit content restriction deemed
 content-neutral. 5

 3. Leafletting hobbled 6

 4. Prophylactic restrictions on speech
 approved 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page
<i>American Steel Foundries v. Tri-City Central Trades Council</i> , 257 U.S. 184 (1921)	5
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001)	6
<i>Dobbs v. Jackson Women’s Health Org.</i> , 142 S. Ct. 2228 (2022)	3-4
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1983)	9
<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123 (1992)	8
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	1-9
<i>Jamison v. Texas</i> , 318 U.S. 413 (1943)	6, 8
<i>Loper Bright Enters. v. Raimondo</i> , 144 S. Ct. 2244 (2024)	2
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	6, 7
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943) . . .	5
<i>McCullen v. Coakley</i> , 573 U.S. 464 (2014)	4
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995)	7
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	9

<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	6
<i>Riley v. Nat’l Fed’n of the Blind</i> , 487 U.S. 781 (1988)	9
<i>Rowan v. United States Post Office Dep’t</i> , 397 U.S. 728 (1970)	5, 7
<i>Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980)	9
<i>Schenck v. Pro-Choice Network of Western NY</i> , 519 U.S. 357 (1999)	1, 9
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	6, 7
<i>Thomas v. Chicago Park Dist.</i> , 534 U.S. 316 (2002)	7
<i>Turco v. City of Englewood</i> , No. 23-1189 (U.S. Apr. 30, 2024)	1-2
<i>Turner Broadcasting System v. FCC</i> , 512 U.S. 622 (1994)	6
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	6-7
Constitutional provisions and rules	
S. Ct. R. 37.2(a)	1
U.S. Const. Amend. I	1-4, 6-7

INTEREST OF AMICUS¹

Leila Jeanne Hill is a veteran sidewalk counselor in Colorado. She was one of the plaintiffs this Court referred to as “thoughtful and law-abiding sidewalk counselors” who challenged the “floating bubble zone” speech restriction in *Hill v. Colorado*, 530 U.S. 703, 727 (2000), the case which petitioner in the present litigation correctly asks this Court to overrule. Mrs. Hill describes the floating bubble zone restriction as a “perpetual stifling” and “threat” hanging over efforts to reach women considering abortion. Mrs. Hill remains dismayed by the anti-speech shadow which *Hill* casts and longs to see the injustice of the *Hill v. Colorado* decision overturned.

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court on the side of First Amendment free speech claims, *e.g.*, *Schenck v. Pro-Choice Network of Western NY*, 519 U.S. 357 (1999). In fact, ACLJ attorneys represented plaintiffs, including Mrs. Hill, in *Hill v. Colorado*. ACLJ attorneys also currently represent a petitioner asking this Court, in a separate case, to overturn *Hill*. *See Turco v. City of Englewood*, No. 23-1189 (U.S. Apr. 30, 2024). This case is therefore of special interest to the ACLJ.

¹Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici or counsel for amici made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

This Court has before it petitions for certiorari seeking review of two separate lower court decisions upholding speech-free zones (one a fixed buffer zone, *Turco v. City of Englewood*, No. 23-1189 (U.S. Apr. 30, 2024), and one a floating bubble zone, namely, the current *Coalition Life* case). Both cases reflect the malignant influence this Court’s decision in *Hill v. Colorado*, 530 U.S. 703 (2000), continues to exert on the constitutional law of free speech. This Court should therefore grant plenary review in one, the other, or both cases² and place “a tombstone” on *Hill* “that no one can miss.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2275 (2024) (Gorsuch, J., concurring).

SUMMARY OF ARGUMENT

This Court’s decision in *Hill v. Colorado*, 530 U.S. 703 (2000), deeply unsettled the constitutional law of free speech. In several crucial respects, *Hill* rejected – without overruling – well-established norms of First Amendment jurisprudence. In particular, the *Hill* Court embraced (1) a presumption of an unwilling audience for speech, (2) the treatment of an expressly content-based restriction as content-neutral, (3) strait-jacket limitations on leafletting on public sidewalks, and (4) prophylactic restrictions on speech. None of these holdings were reconcilable with prior precedent. Hence, *Hill* created an internal conflict in the

²If this Court grants one of the petitions, it should hold the other and then grant, vacate, and remand the other in light of its forthcoming merits ruling.

constitutional law governing free speech activities. In short, as this Court recently recognized, *Hill* “distorted First Amendment doctrines.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 & n.65 (2022). That distortion continues, as demonstrated by the decision below, Pet. App. 3a (“We remain bound by *Hill* because the Supreme Court—though it has questioned the case’s viability—has not expressly overruled it.”) (citation omitted).

This Court should grant review to overrule *Hill* and eliminate that conflict.

ARGUMENT

***HILL v. COLORADO* WAS IRRECONCILABLE WITH PREEXISTING CONSTITUTIONAL LAW GOVERNING FREE SPEECH, THEREBY PROFOUNDLY DESTABILIZING THE LAW.**

The simultaneous existence of contradictory precedents is profoundly destructive of the rule of law. Such internal inconsistency puts even the most conscientious jurists to the challenge of reconciling the irreconcilable, risking legally incoherent or arbitrary outcomes. Moreover, real-world parties and their counsel cannot predictably gauge the law governing activities which fall into the regions governed by incompatible rules. When the uncertainty of dueling precedents arises in the context of free speech, the consequence is especially bad: the uncertainty of legal sanctions deters speech by all but the heroic, the foolhardy, and the judgment proof.

This Court’s decision in *Hill v. Colorado*, 530 U.S. 703 (2000), has had precisely this destabilizing effect

on the rule of law. Because *Hill* was irreconcilable with numerous prior decisions of this Court, yet did not purport to overrule such decisions, *Hill* generated an unresolved contradiction, the simultaneous existence of diametrically opposed constitutional norms. This is *not* the rule of law.

This amicus brief seeks to highlight the perniciousness of *Hill* under *preexisting* case law, urging this Court to grant review and to overrule *Hill* before it further corrodes the fabric of the law.

Hill was in many respects a “distort[ion]” of “First Amendment doctrines.” *Dobbs*, 142 S. Ct. at 2276 & n.65, and “antithetical to our entire First Amendment tradition,” *Hill*, 530 U.S. at 768 (Kennedy, J., dissenting). *See also id.* at 762 (Scalia, J., dissenting) (“an unabashed repudiation of our First Amendment doctrine”). While not providing an exhaustive list, amici wish to highlight some of the ways the *Hill* decision created contradictory points in First Amendment jurisprudence.

A. Audience presumed unwilling

The *Hill* Court presumed as a matter of law that anyone approaching an abortion business is an “unwilling recipient” of any message a pro-life sidewalk counselor has to offer. 530 U.S. at 716-18, 727. This was flatly inaccurate as a matter of fact, as many abortion patients *do* accept leaflets or conversation from sidewalk counselors, and some ultimately choose not to abort. *See, e.g.*, Brief for Petitioners at 3-4, *Hill v. Colorado* (No. 98-1856); *McCullen v. Coakley*, 573 U.S. 464, 473 (2014) (“In unrefuted testimony, petitioners say they have

collectively persuaded hundreds of women to forgo abortions”). There are plenty of “thoughtful and law-abiding sidewalk counselors like petitioners,” *Hill*, 530 U.S. at 727, as to whom there is no reason to presume the audience will find them repellant or off-putting. But in any event, the presumption of unwelcomeness is flatly inconsistent with this Court’s case law. As long ago as *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court has held invalid restrictions on speech that deem such speech categorically unwelcome. As this Court noted in *Martin*, truly unwilling listeners can properly be protected by enforcing the “previously expressed will” not to receive such messages, *id.* at 148. *Hill*, by contrast, inverted the rule: no one could speak unless they obtain *previously expressed consent*. 530 U.S. at 734 (“regulations . . . apply if the pedestrian does not consent”). Compare *Rowan v. United States Post Office Dep’t*, 397 U.S. 728 (1970) (homeowner can take initiative to rebuff particular mailings, in advance, at will); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (offer of message may rightfully be declined; by contrast, initial offer, if done in an inoffensive way, is within traditional bounds of free speech).

B. Explicit content restriction deemed content-neutral

The *Hill* Court ruled that a statute that is expressly content-based – restricting only oral “protest, education, or counseling,” 530 U.S. at 707 n.1 (quoting statute), while leaving unrestricted the remaining universe of messages, such as “pure social”

conversation, *id.* at 721 (or, for that matter, commercial sales pitches) – was nevertheless content-neutral if the *justification* for the restriction is content-neutral, *id.* at 720. This directly contradicted the precedents of this Court.

[W]hile a content-based purpose may be *sufficient* . . . to show that a regulation is content-based, it is not *necessary* to such a showing in all cases Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

Turner Broadcasting System v. FCC, 512 U.S. 622, 642-43 (1994) (emphasis added). *Accord Bartnicki v. Vopper*, 532 U.S. 514, 526 & n.9 (2001).

C. Leafletting hobbled

While the *Hill* statute did not *absolutely* ban leafletting outside abortion facilities, it did drastically hobble such leafletting. Under the *Hill* statute, leafletters could not approach close enough merely to *offer within reach* a flyer, without first obtaining the passerby’s consent. 530 U.S. at 707 & n.1, 727-28. At best, leafletters could stand still “near the path of oncoming pedestrians and proffering” the material like a ticket dispensing machine in a parking garage. *Id.* at 727. By contrast, the precedents of this Court, prior to *Hill*, had upheld vigorous First Amendment protection for leafletting. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *United*

States v. Grace, 461 U.S. 171 (1983); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

Notably, this constitutional protection for leafletting holds true even when the ban is not geographically *absolute*. As *Grace* illustrates, it is unconstitutional to ban leafletting on the sidewalks of just one particular building. *See also Schneider*, 308 U.S. at 163 (“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”).

Nor can the *controversial* nature of the topic of the handbills justify such a restriction. “Indeed, . . . handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression.” *McIntyre*, 514 U.S. at 347.

Nor need the ban be *unconditional* to be unconstitutional; requiring prior permission to offer the material, as in *Lovell* and *Schneider*, is likewise invalid. To be sure, the *Hill* statute required that the necessary “permission” to offer a leaflet must be obtained, not from the government, but from private pedestrians. But this makes the permission requirement *worse*, not better. The government must at least follow non-arbitrary, non-discretionary standards when licensing speech. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Private individuals face no such constraints, and thus can be wholly arbitrary, even viewpoint-based, in withholding consent. While this is perfectly acceptable when a private individual is controlling the flow of information *into the home*, *Rowan*, or deciding whether to *accept* a handbill from a leafletter, giving private parties licensing power over the mere *offer* of information *on a public way* is an entirely different matter. To

suppress the right to speak, picket, or leaflet in a public place absent license from unconstrained private parties, under penalty of criminal enforcement, is even worse than an unconstitutional after-the-fact heckler's veto. Indeed, if it is unconstitutional merely to charge a higher permit fee based upon potential adverse audience reaction, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992), then it is necessarily unconstitutional to ban the speech altogether absent actual approval from the audience.

Under this Court's precedents, then,

one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.

Jamison, 318 U.S. at 416.

Hill's miserly allowance of minimal freedom to leaflet was entirely inconsistent with the jealous constitutional protection recognized in these other cases.

D. Prophylactic speech restrictions approved

Hill expressly approved a statute taking "a prophylactic approach" to speech regulation, 530 U.S. at 729, i.e., sweeping up substantial amounts of "harmless" (*id.*) speech as part of an effort to address proscribable misconduct. It is difficult to imagine a proposition more antithetical to this Court's free

speech case law. “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone” *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Accord Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same); *Edenfield v. Fane*, 507 U.S. 761, 777 (1983) (quoting *Button* and noting that even commercial speech may not be subjected to broad prophylactic restrictions). *But cf. Schenck v. Pro-Choice Network of Western NY*, 519 U.S. 357, 382 (1997) (approving prophylactic *injunctive* restrictions on *particular defendants*).

* * *

The *Hill* decision, by announcing several novel constitutional rules in profound tension with this Court’s preexisting free speech jurisprudence, deeply destabilized the law. This Court should grant review and overrule *Hill*.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record

Stuart J. Roth
Jordan A. Sekulow
Colby M. May
Walter M. Weber
American Center for
Law & Justice

██
██
██

August 5, 2024