No. 23-74

In The
Supreme Court of the United States

DEBRA A. VITAGLIANO,

Petitioner,

v.

COUNTY OF WESTCHESTER,

Respondent.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional provisions and rules

INTEREST OF AMICUS [1]

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), and in fact ACLJ attorneys represented the plaintiffs, including Mrs. Hill, in *Hill v. Colorado.* This case is therefore of special interest to the ACLJ.

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[1]Counsel 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.

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 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. 22a (wrongness of *Hill* has "no bearing on the disposition of the case" because the Supreme Court reserves to itself "the prerogative of overruling its own decisions").

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

ARGUMENT

THE DECISION IN *HILL v. COLORADO* WAS IRRECONCILABLE WITH PREEXISTING CONSTITUTIONAL STANDARDS 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.

Petitioner has highlighted how the *Hill* decision is also inconsistent with this Court's *subsequent* First Amendment case 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 "antithetical to our entire First Amendment tradition," 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.

1. 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," 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).

2. 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).

3. 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; 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.

4. Prophylactic restrictions on speech 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); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612, 616 (2003) (noting condemnation of prophylactic restrictions on charitable solicitation). *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,

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