No. 18-_____

In The
Supreme Court of the United States

VERONICA PRICE, DAVID BERGQUIST, ANN SCHEIDLER, PRO-LIFE ACTION LEAGUE, INC., LIVE PRO-LIFE GROUP, and ANNA MARIE SCINTO MESIA,

Petitioners,

v.

CITY OF CHICAGO, RAHM EMANUEL, as Mayor of the City of Chicago, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Chicago has made it a crime for a speaker to approach within eight feet of another person "for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling," without express consent. This "bubble zone" ordinance applies within 50 feet of the entrance to an abortion clinic or other medical facility. Petitioners brought a §1983 suit alleging that the Chicago ordinance violated the First Amendment.

The district court upheld Chicago's speech restriction based on this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000). The Seventh Circuit affirmed on the ground that *Hill* is still binding precedent on the lower courts, but emphasized that *Hill* is "incompatible with current First Amendment doctrine as explained in *Reed* [*v. Town of Gilbert*, 135 S. Ct. 2218 (2015)] and *McCullen* [*v. Coakley*, 134 S. Ct. 2518 (2014)]." App. 21. The panel recognized that "*Hill*'s content-neutrality holding is hard to reconcile with both *McCullen* and *Reed* . . . and [*Hill*'s] narrow-tailoring holding is in tension with *McCullen*." App. 2.

The question presented is whether this Court should reconsider *Hill* in light of the Court's intervening decisions in *Reed* and *McCullen*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Veronica Price, David Bergquist, Ann Scheidler, Pro-Life Action League, Inc., Live Pro-Life Group, and Anna Marie Scinto Mesia.

None of the corporate Petitioners has a parent company, and no publicly held company owns 10 percent or more of any corporate Petitioner's stock.

Respondents are the City of Chicago, Rahm Emanuel, Mayor of the City of Chicago, Rebekah Scheinfeld, Commissioner of Transportation for the City of Chicago, and Eddie T. Johnson, Superintendent of the Chicago Police Department, all in their official capacities. Respondents were defendants below.

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INTRODUCTION

The First Amendment prohibits the government from banning speech based on its content. But the City of Chicago has done just that. Within 50 feet of the entrance to an abortion clinic or other medical facility, it is a crime for a speaker to approach within eight feet of another individual without his or her consent "for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling." Chicago, Ill., Code §8-4-010(j)(1) ("Ordinance"). All other categories of speech are permitted.

Under the Ordinance, one can, without consent, approach a person within the "bubble zone" to solicit donations for a charity, sell Cubs tickets, campaign for a candidate, or panhandle. One can also approach without speaking at all. But certain speech is declared illegal: it is unlawful to approach that same person to "educate" or "counsel" her about alternatives to abortion, or to offer her literature, at the precise moment when this speech is most likely to matter. This is a paradigmatic example of an unconstitutional infringement of the right to free speech: the law is content based on its face because it applies to some types of speech but not others, and it is not narrowly tailored to any legitimate government interest such as preventing obstruction of clinic entrances (which is already addressed by other laws). For these reasons, Chicago's speech restriction is presumptively invalid under this Court's decisions in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Petitioners engage in "sidewalk counseling" outside abortion clinics. They brought this challenge to the Ordinance under 42 U.S.C. §1983, alleging that it violates the First Amendment. But the district court and Seventh Circuit concluded that they were bound by *Hill v. Colorado*, 530 U.S. 703 (2000). The Seventh Circuit unanimously concluded that *Hill* cannot be reconciled with current First Amendment doctrine in *Reed* and *McCullen*, but found itself constrained by *Hill* since this Court had not explicitly overruled it. App. 21. The Seventh Circuit concluded that "[o]nly the Supreme Court can bring harmony to these precedents." App. 26.

This Court should grant certiorari to reconsider *Hill* and restore uniformity to its First Amendment jurisprudence. *Hill* was a doctrinal anomaly when decided, is inconsistent with this Court's more recent decisions, and continues to cause confusion among the lower courts, which are required to follow *Hill* until this Court directs otherwise. *Hill* has sanctioned bubble zone ordinances in a number of states and cities across the country, depriving millions of Americans of their core First Amendment right to speak in a public forum about critically important issues.

From the outset, *Hill* has been an outlier in this Court's First Amendment jurisprudence. Justice Kennedy emphasized at the time that the Court had deviated from "more than a half century of well-established First Amendment principles" by "approv[ing] a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue,

to a fellow citizen on a public sidewalk." 530 U.S. at 765 (Kennedy, J., dissenting). And scholars from across the ideological spectrum—including Laurence Tribe, Michael McConnell, Richard Fallon, Jamie Raskin, and Kathleen Sullivan—sharply criticized *Hill* at the time it was decided, characterizing the decision as an "aberration," "troublesome," "blatantly erroneous," and "inconsistent with the usual rule that, in the public forum . . . offended listeners must simply turn the other cheek." *Infra* 14-15.

In the nineteen years since it was decided, the flaws in *Hill*'s reasoning have become only more apparent. Indeed, this Court's more recent decisions have flatly rejected *Hill*'s approach to the First Amendment in at least three conspicuous ways.

First, the Court has repudiated *Hill*'s content-neutrality analysis. *Hill* said that the test for determining content neutrality was "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719. But in *Reed*, this Court explained that such an approach skips the first step in the content-neutrality inquiry: whether the challenged law is "content based on its face." 135 S. Ct. at 2228. A "regulation of speech is content based if [the] law applies to particular speech because of the topic discussed." *Id.* at 2227. And to the extent a law subjects different "categories [of speech] to different restrictions," it is plainly content based. *Id.* *Reed*'s holding built on the teachings of *McCullen*, which explained that a law "would be content based if it required enforcement authorities to examine the

content of the message that is conveyed to determine whether a violation has occurred." 134 S. Ct. at 2531. In stark contrast, *Hill* concluded that Colorado's bubble zone statute was content neutral even though it banned certain categories of speech (counseling, education, and protest) while permitting others.

Second, *Hill* held that the government had a legitimate interest in "protect[ing] listeners from unwanted communication" and safeguarding the right "to be let alone"—even in a public forum. 530 U.S. at 715-16, 724. But the Court's more recent First Amendment decisions teach exactly the opposite: "speech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). Indeed, *McCullen* emphasized that a law is *per se* content based and subject to strict scrutiny when it is enacted to prevent the "undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." 134 S. Ct. at 2531-32.

Third, the *Hill* majority concluded that Colorado's bubble zone was narrowly tailored because a "bright-line prophylactic rule may be the best way to provide protection . . . by offering clear guidance and avoiding subjectivity, to protect speech itself." 530 U.S. at 729. Once again, *McCullen* took a different approach: "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier." 134 S. Ct. at 2540. *Hill* required no such showing. Had it done so, it is difficult to see how a

"bright-line prophylactic rule" could have survived any level of tailoring analysis, much less the strict scrutiny required of this content-based speech regulation.

In sum, "[i]n the wake of *McCullen* and *Reed*, it is not too strong to say that what *Hill* explicitly rejected is now prevailing law." App. 23. Certiorari is warranted to address the irreconcilable tension between *Hill* and the Court's current First Amendment jurisprudence, and to restore uniformity to this critical area of the law.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 915 F.3d 1107 and is reproduced at App. 1-27. The opinion of the Northern District of Illinois is unpublished but is available at 2017 WL 36444 and is reproduced at App. 28-60.

JURISDICTION

The Seventh Circuit issued its opinion on February 13, 2019. On April 29, 2019, Justice Kavanaugh granted an extension of time to file a petition for writ of certiorari to June 4, 2019. *See* 18A1114. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in full at App. 61-62. The key statutory provision at issue here, Chicago, Ill., Code §8-4-010(j)(1), provides that a person commits disorderly conduct when he or she:

> knowingly approaches another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility.

STATEMENT OF THE CASE

A. Chicago's Bubble Zone Ordinance

Petitioners are four individuals and two organizations that engage in "sidewalk counseling" on the sidewalks and public ways outside Chicago abortion clinics. This counseling involves respectful approaches to women entering the clinics to offer them pro-life literature, discuss the risks of and alternatives to abortion, and offer support if the women want to carry their pregnancies to term. App. 3. These conversations must take place face-to-face and in close proximity so that Petitioners can convey a gentle and caring manner,

maintain a normal tone of voice, and protect the privacy of those involved. *Id*. In short, Petitioners "wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history." *McCullen*, 134 S. Ct. at 2541.

Respondents—the City of Chicago and several of its officials—have imposed severe restrictions on sidewalk counseling because they disagree with the content and message of this speech. In October 2009, the Chicago City Council "adopted an ordinance that effectively prohibits sidewalk counseling." App. 4. It bars Petitioners and others from approaching within eight feet of another person within a radius of 50 feet from the entrance of an abortion clinic "if their purpose is to engage in counseling, education, leafletting, handbilling, or protest." App. 1-2. The Ordinance—commonly known as a "bubble zone" law—is facially content based, as it prohibits approaching a person *only* "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way. . . ." Chi., Ill., Code §8-4-010(j)(1). Approaching for any other purpose is lawful.

Chicago's Ordinance is nearly identical to the Colorado statute this Court upheld in *Hill v. Colorado*, 530 U.S. 703.[1] In *Hill*, the Court said the Colorado law was

[1] The only notable difference between the two laws is that the Colorado statute creates an 8-foot bubble zone within 100 feet of a clinic entrance, while the Chicago ordinance applies within a 50-foot radius. *See* App. 4.

content neutral—notwithstanding the fact that it applied only to "oral protest, education, or counseling"—because it was "not a 'regulation of speech,' " but rather "a regulation of the places where speech may occur." *Id.* at 719. And the Court further declared that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech." *Id.* at 719-20. According to the Court, the law "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723.

Turning to whether the statute was narrowly tailored, the Court conceded that an 8-foot buffer zone "certainly can make it more difficult for a speaker to be heard," and "could hinder the ability of a leafletter to deliver handbills." *Id.* at 727. But the Court found that "[a] bright-line prophylactic rule may be the best way to provide protection," and that "the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech." *Id.* at 728-29.

B. District Court Proceedings

In August 2016, Petitioners sued Respondents under 42 U.S.C. §1983 arguing (as relevant here) that Chicago's Ordinance is facially unconstitutional under the First and Fourteenth Amendments. Petitioners argued that the ordinance is a content-based restriction on speech that is incompatible with this Court's post-*Hill* decisions in *McCullen* and *Reed*.

The district court granted the City's motion to dismiss, concluding that *Hill* "forecloses the facial First Amendment challenge and the due-process vagueness claim." App. 5. The court noted that where "a precedent of the [Supreme Court] has direct application in a case," it remains binding until explicitly overruled by the Supreme Court. App. 43-44 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). Thus, even though "*Reed* seemingly conflicts with some of *Hill*'s reasoning," the district court concluded that it was obligated to follow *Hill* as binding precedent. App. 49.[2]

C. The Seventh Circuit's Decision

The Seventh Circuit affirmed in an opinion by Judge Sykes. Petitioners had argued that "*Hill* is no longer an insuperable barrier to suits challenging abortion clinic bubble zone laws" because this Court's "more recent decisions in *Reed* and *McCullen*" have "thoroughly undermined Hill's reasoning." App. 6. The Seventh Circuit agreed with Petitioners that *Hill* is "incompatible with current First Amendment doctrine as explained in *Reed* and *McCullen*," but determined it was bound by *Hill*. App. 21. It urged this Court to

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[2] Petitioners' complaint also documented many examples of biased enforcement of the bubble zone ordinance. *See* Dkt. No. 30 ¶¶ 56-132. The district court denied the City's motion to dismiss Petitioners' as-applied First Amendment challenge and equal protection claim alleging selective enforcement. App. 5. Thereafter, the parties settled these claims and jointly moved to dismiss them. The district judge entered final judgment on those claims on May 31, 2017, and they are not the subject of this petition.

reconsider *Hill* in light of those intervening decisions. App. 26.

The Seventh Circuit identified several specific ways in which *Hill*'s reasoning had been undermined by *Reed* and *McCullen*:

First, *Hill* held that the "principal inquiry" in determining whether a statute is content based or content neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719. But "after *Reed* that's no longer correct." App. 21. Under *Reed*, "strict scrutiny applies *either* when a law is content based on its face or when the purpose and justification for the law are content based." 135 S. Ct. at 2228 (emphasis added). The *Hill* Court never considered "whether the challenged law [was] 'content based on its face.'" App. 22 (quoting *Reed*, 135 S. Ct. at 2228). *Reed* makes clear that a lack of viewpoint or subject-matter discrimination cannot save a facially content-based law—such as the Chicago bubble zone ordinance—from strict scrutiny. App. 23.

Second, in upholding the Colorado bubble zone statute, *Hill* repeatedly noted the need to prevent the purportedly undesirable effects of the speech on listeners. App. 24. For example, *Hill* noted that Colorado had an interest in "protect[ing] listeners from unwanted communication," safeguarding the "right to be let alone," and preventing the "emotional harm suffered when an unwelcome individual delivers a message . . . at close range." 530 U.S. at 715-16, 718 n.25,

724. But "after *McCullen* that's not a content-neutral justification." App. 24. *McCullen* held that a law must be characterized as content based if it is "concerned with [the] undesirable effects that arise from the direct impact of speech on its audience or listeners' reaction to speech." 134 S. Ct. at 2531-32; App. 24.

Finally, "*Hill*'s narrow-tailoring analysis conflicts with *McCullen*'s insistence that 'the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier.'" App. 24 (quoting *McCullen*, 134 S. Ct. at 2540). *McCullen*'s tailoring analysis specifically warned against the use of broad prophylactic measures when protected speech is at stake. App. 24-25. After all, "[a] painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen*, 134 S. Ct. at 2540. When there are "vital First Amendment interests at stake," a broad prophylactic prohibition cannot be upheld merely because "other approaches have not worked" as well. *Id.* But "in stark contrast," the Seventh Circuit explained, "*Hill* specifically *approved* the 'bright-line prophylactic' aspect of Colorado's bubble zone law precisely *because* other less restrictive measures—*e.g.*, laws against harassment and breach of the peace—were harder to enforce." App. 25.

In sum, the Seventh Circuit concluded that "*Hill* directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*." App. 26. The panel explained that while this Court has "deeply unsettled *Hill*, it has

not overruled the decision," and it thus "remains binding on us." App. 27. The court concluded: "Only the Supreme Court can bring harmony to these precedents." App. 26.

REASONS FOR GRANTING THE PETITION

"This Court has not hesitated to overrule decisions offensive to the First Amendment." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J.). And the Court has repeatedly held that "*stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent developments of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). Reconsideration of a prior precedent is warranted when the Court's "jurisprudence has changed significantly" and the prior decision has become "inconsistent with our current understanding" of the law. *Id.* at 236.

The Court should grant certiorari to reconsider *Hill* and restore uniformity to its First Amendment jurisprudence. The *Hill* majority found content neutrality in a statute that discriminated against whole categories of speech, introduced a never-before-recognized right to avoid unpopular speech in public forums, and held that a statute was narrowly tailored despite conceding that it had adopted a bright-line prophylactic rule. But "in the nineteen years since *Hill* was decided, the Court has refined the concept of content neutrality and clarified the requirement of narrow

tailoring in a First Amendment challenge of this type." App. 7. Today, *Hill* is in irreconcilable conflict with this Court's more recent First Amendment decisions, including *Reed* and *McCullen*. This conflict is sowing doctrinal confusion among the lower courts and has permitted the suppression of core speech in states and municipalities across the country.

Applying the correct standard of review—the content-neutrality framework set forth in *Reed* and the tailoring standard set forth in *McCullen*—Chicago's bubble zone ordinance is clearly unconstitutional. It bans certain categories of speech while permitting others and is therefore clearly content based. Under *Reed*, this means the statute is subject to strict scrutiny, which it cannot survive. And even if the statute were content neutral, it fails narrow tailoring since the City has not shown it tried more focused, less speech-restrictive alternatives, including Chicago's laws against harassment, assault, intimidation, and physical obstruction of clinic entrances, before opting for a broad prophylactic regulation.

Hill was "an unprecedented departure" from the Court's First Amendment jurisprudence when it was decided, 530 U.S. at 772 (Kennedy, J., dissenting), but the passage of time has further underscored the scope and stakes of that departure. Certiorari is warranted to resolve the significant tension in this critical area of the law.

I. The Court Should Grant Certiorari To Reconsider *Hill v. Colorado*.

A. *Hill* was wrong when it was decided.

1. *Hill* was wrong when it was decided in its analysis of both content neutrality and narrow tailoring. In the principal dissent, Justice Scalia (joined in full by Justices Kennedy and Thomas) argued that the decision stood in "stark contradiction of the constitutional principles" previously applied by the Court. 530 U.S. at 742 (Scalia, J., dissenting). As that opinion explained, the Colorado bubble zone statute was "obviously and undeniably content based" because a "speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent." *Id.* In other words, this prohibition "depends entirely on *what he intends to say*." *Id.* (emphasis in original).

Justice Scalia also concluded that the law was not narrowly tailored. In his view, the "right to be let alone" in a public forum, recognized by the *Hill* majority as a key basis for its decision, was wholly inconsistent with the Court's precedent and "not an interest that may be legitimately weighed against the speakers' First Amendment rights." *Id.* at 751-52. Justice Scalia argued that it ran counter to precedent and a proper understanding of the First Amendment to countenance broad prophylactic measures in the sphere of constitutionally protected speech: after all, "[p]rophylaxis is the antithesis of narrow tailoring." *Id.* at 762.

Justice Kennedy filed a separate dissent to emphasize that "[t]he Court's holding contradicts more than a half century of well-established First Amendment principles" by "approv[ing] a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." 530 U.S. at 765 (Kennedy, J., dissenting). He argued that the *Hill* majority erred by treating the bubble zone statute as a mere "time-place-manner" restriction because that doctrine "applies only if a statute is content neutral." *Id.* at 765-66. The statute was content based, Justice Kennedy emphasized, because it "restricts speech on particular topics." *Id.* at 767. He further criticized the Court's recognition of a right to be left alone as a "glaring departure from precedent." *Id.* at 771. For sidewalk counselors, he explained, the area outside an abortion clinic "is not just the last place where the message can be communicated. It is likely the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." *Id.* at 789.

2. Given *Hill*'s marked deviation from established doctrine, the decision was roundly condemned by First Amendment scholars across the ideological spectrum. Kathleen Sullivan criticized *Hill* for "giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that, in the public forum . . . offended listeners must simply turn the other cheek." Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association*

Decisions in the October 1999 Term, 28 Pepp. L. Rev. 723, 737 (2001); *see also id.* ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content.").

Similarly, Michael McConnell argued that *Hill* "departed from standard First Amendment free-speech analysis" in troublesome ways. *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 747 (2001). He asserted that the Court stretched the "idea of content neutrality" to its breaking point; sanctioned a law that was "extraordinarily" broad compared to its "legitimate objectives"; and "inverted ordinary free-speech principles" by recognizing a listener's right to avoid political speech in a public forum. *Id.* at 748.

Many other scholars leveled similar critiques. Laurence Tribe, for example, called *Hill* "blatantly erroneous" and "slam-dunk wrong." Laurence Tribe, quoted in *Colloquium, Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001). Richard Fallon argued that the *Hill* majority "unconvincingly . . . maintain[ed] that a content-based restriction on speech [was] not really content-based." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 & n.174 (2007). And Jamie Raskin asserted that "the *Hill* majority upheld a remarkable ban" on speech that "marks a dramatic downward departure from this [Court's] First Amendment tradition." Jamie B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights*, 51 Am. U. L. Rev. 179, 182, 189 (2001). In Raskin's view, the Court applied a "pinched"

interpretation of the doctrine of content and viewpoint discrimination that "if left uncorrected . . . will chill and diminish the free public discourse vital to popular democracy." *Id.* at 182-83. Raskin concluded that *Hill* ought to be considered a "flash-in-the-pan aberration" rather than an accepted part of First Amendment doctrine. *Id.* at 189.

B. *Hill*'s reasoning is incompatible with the Court's current First Amendment jurisprudence.

Even putting aside whether *Hill* was correctly decided in 2000, this Court's subsequent decisions have fatally undermined each aspect of *Hill*'s approach to the First Amendment. As the Seventh Circuit explained, *Hill*'s approach to content neutrality and narrow tailoring is "incompatible" with this Court's later decisions in *Reed* and *McCullen*. App. 21.

1. *Hill* started from the premise that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Court treated this test—which originated in *Ward* in the context of "time-place-manner" restrictions—as dispositive of the content-neutrality inquiry. It therefore concluded that the Colorado bubble zone statute was content neutral even though it banned whole categories of speech—"counseling," "education," and "oral protest"—because

the state purportedly did not adopt the statute due to disagreements with the message being conveyed. *Id.* at 707.

In its 2015 decision in *Reed*, this Court expressly repudiated that approach to content neutrality. *Reed* involved a First Amendment challenge to a sign code that regulated various categories of signs differently depending on the type of information they conveyed. *Id.* at 2224-25. Applying *Hill*, the Ninth Circuit upheld the ordinance, holding that the law was content neutral because the town "did not adopt its regulation of speech because it disagreed with the message conveyed." *Id.* at 2226.

This Court reversed, holding that a "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message conveyed." *Id.* at 2227. The Court explained that "[s]ome facial distinctions based on a message are obvious." *Id.* For example, "defining regulated speech by particular subject matter." *Id.* "[O]thers are more subtle, defining regulated speech by its function or purpose." *Id.* Nonetheless, both "are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* Where a law subjects different "categories [of speech] to different restrictions," it is plainly content based. *Id.*

The statute at issue in *Hill* would have been deemed content based under the Court's approach in *Reed*. First, the Colorado ordinance expressly regulated speech based on its subject matter: education, counseling, and protest were off limits within the

bubble zone, but any other type of speech was permissible. *Hill*, 530 U.S. at 720. Second, the Colorado statute banned speech based on its function or purpose. By its own terms, the statute at issue in *Hill* applied only if a sidewalk counselor approached another person "*for the purpose of* . . . engaging in oral protest, education, or counseling." *Id.* (emphasis added).

Hill did not even consider these factors in its analysis of content neutrality. Instead, the Court's entire analysis of the issue turned on the *Ward* test, which asks "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. 719 (quoting *Ward*, 491 U.S. at 791). But as the Court later explained in *Reed*, that test is for "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech" because of an improper motive underlying their enactment. *Reed*, 135 S. Ct. at 2227. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Net.*, *Inc*., 507 U.S. 410, 429 (1993)). By failing to consider whether the Colorado statute facially regulated speech based on its "subject matter," "function," or "purpose," *Hill* skipped the entire "first step in the content neutrality inquiry." App. 18 (citing *Reed*, 135 S. Ct. at 2228).

Hill's analysis of content neutrality also sharply conflicts with this Court's 2014 decision in *McCullen*,

which was the first bubble or buffer zone case to reach the Court after *Hill* was decided in 2000. In *McCullen*, Massachusetts had imposed a fixed 35-foot buffer zone around the entrance, exit, and driveway of every abortion clinic in the state. Massachusetts law made it a crime to "knowingly stand" in this buffer zone, with the exception of certain exempted personnel. *Id.* at 2525-26.

Sidewalk counselors challenged the law as a content-based restriction on speech. *Id.* at 2530. Unlike Chicago's ordinance—which bans certain types of speech within the bubble zone—the Massachusetts law categorically banned non-exempt individuals from entering the area. The Court thus found that the law in *McCullen* did not "draw content-based distinctions on its face." *Id.* at 2531. (As explained below, the Court nonetheless found the Massachusetts law to be unconstitutional on tailoring grounds.)

The Court cautioned, however, that the law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* The Court also explained that "the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *Id.* at 2531-32 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). "If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give

the Commonwealth a content-neutral justification to restrict the speech." *Id.* at 2532.

Hill's approach to content neutrality is incompatible with these teachings. According to the *Hill* majority, this Court had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." 530 U.S. at 721. But as the Seventh Circuit panel observed, "*McCullen* explained in no uncertain terms that a law is indeed content based if enforcement authorities must 'examine the content of the message that is conveyed to determine whether a violation has occurred.'" App. 23 (quoting *McCullen*, 134 S. Ct. at 2531).

Moreover, *McCullen* "emphasized that a law is content based if it is 'concerned with [the] undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech.'" App. 24 (quoting *McCullen*, 134 S. Ct. at 2531-32 (cleaned up)). "Yet *Hill* repeatedly cited concern for listeners' reactions as an *acceptable justification* for Colorado's bubble zone law." App. 24 (citing *Hill*, 530 U.S. at 715-16, 724). Indeed, the statute at issue in *Hill* "was aimed in substantial part at guarding against the undesirable effect of the regulated speech on listeners," but "[a]fter *McCullen* that's not a content-neutral justification." App. 24.

Even apart from *McCullen*, the *Hill* majority's recognition of a government interest in preventing offensive or unwanted speech in public places runs

headlong into a half-century of this Court's First Amendment jurisprudence. As the Court explained in *Snyder v. Phelps*, "speech cannot be restricted simply because it is upsetting or arouses contempt." 562 U.S. 443, 458 (2011). For decades, this Court has recognized as "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969); *see also Schenck v. Pro-Choice Network*, 519 U.S. 357, 383 (1997) (explaining that "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech"); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (holding a regulation imposing a dignity standard on public speech is inconsistent with the First Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (protecting religious and political speech on a sidewalk even though it "naturally would offend . . . all . . . who respect the honestly held religious faith of their fellows"). Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

2. *Hill*'s approach to narrow tailoring is also at odds with the Court's modern First Amendment doctrine. In *Hill*, the Court found that Colorado's eight-foot floating bubble zone around incoming patients was narrowly tailored to serve important government interests. 530 U.S. at 726-30. With respect to whether

Colorado could have achieved its objectives through less restrictive means—such as by enforcing its laws against harassment or disorderly conduct—the *Hill* majority concluded that the law's broad "prophylactic aspect" was not only justified, but a good thing for free speech: "A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." *Id.* at 729.

McCullen counsels otherwise. "For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 799). Moreover, *McCullen* makes clear that the government bears the burden of proof on this issue: "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier." *Id.* at 2540. Indeed, "mere convenience" is not a permissible basis to adopt a broad prophylactic measure. *Id.* at 2534.

In *McCullen*, the Commonwealth failed to show that "it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 2539. For example, instead of enacting a prophylactic buffer zone, the Commonwealth could have enforced laws banning physical obstruction of clinics, intimidation, assault, and threats. *Id.* at 2537-38. Since the buffer zone "compromise[d] petitioners' ability to

initiate the close, personal conversations that they view as essential to 'sidewalk counseling,'" *id.* at 2535, the statute therefore "burden[ed] substantially more speech than necessary" and was not narrowly tailored. *Id.* at 2537.

As the Seventh Circuit explained, "*Hill's* narrow-tailoring analysis conflicts with *McCullen's* insistence that 'the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier.'" App. 24 (quoting *McCullen*, 134 S. Ct. at 2540). Whereas *McCullen* exhorted that "[a] painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency," *id.* at 2540, *Hill* endorsed the bright-line prophylactic aspect of Colorado's bubble zone law, "*precisely because* other less restrictive measures—e.g., laws against harassment and breach of the peace—were harder to enforce." App. 25 (citing *Hill*, 530 U.S. 729).

C. The Chicago ordinance is plainly unconstitutional under this Court's current First Amendment jurisprudence.

Applying the principles articulated in this Court's recent First Amendment decisions, the Chicago bubble zone ordinance is unconstitutional. The statute is content based, is not permissibly tailored, and is unconstitutionally vague. This case thus presents an ideal vehicle for reconsidering *Hill* and resolving

the conflict among this Court's First Amendment precedents.

First, the ordinance is content based. The "crucial first step" in the content-neutrality analysis asks whether a law is "content neutral on its face." *Reed*, 135 S. Ct. at 2228. The Court made this explicit in *Reed*, but in the past had consistently considered facial neutrality before turning to its tests designed to smoke out impermissible justifications. *Id.* (collecting cases); *see, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011) ("On its face, [the] law enacts content-and speaker-based restrictions"); *United States v. Eichman*, 496 U.S. 310, 315 (1990) (examining facial neutrality before turning to law's justification).

Under this first step, government "regulation of speech is content based if a law applies to particular speech because of the topic discussed." *Reed*, 135 S. Ct. at 2227. The Chicago ordinance does exactly that. It bans "knowingly approaching" within eight feet of another person within 50 feet of an abortion clinic or other medical facility "for the purpose of . . . engaging in oral protest, education, or counseling." Chi., Ill., Code §8-4-010(j)(1). One can therefore approach a person within the bubble zone to raise funds for charity, sell Cubs tickets, make small talk about the weather, or panhandle. Yet one commits a crime by standing in the same spot and speaking about the alternatives to abortion at the precise moment when this speech is most likely to matter. And, of course, the only way an officer could determine whether an individual had engaged in banned speech is to " 'examine the content of

the message that is conveyed.'" *McCullen*, 134 S. Ct. at 2531 (quoting *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 365 (1984)). *McCullen* teaches that this makes the ordinance *per se* "content based." 134 S. Ct. at 2531.

Reed also makes clear that when a statute defines "regulated speech by particular subject matter," it is facially content based. 135 S. Ct. at 2227. Here, the Chicago ordinance does just that—banning entire subjects of speech such as education, counseling, and protest, while permitting all others. *Reed* further explains that where a statute defines "regulated speech by its function or purpose," it is facially content based. *Id.* Once again, the Chicago ordinance does that by its own terms, banning speech that is done "*for the purpose* of" engaging in disfavored categories of speech. Chi., Ill., Code §8-4-010(j)(1). Because the city has regulated "various categories of [speech] based on the type of information they convey," the provision is content based and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2224.

Second, the Chicago ordinance is not appropriately tailored. Since the ordinance is content based, strict scrutiny is the appropriate standard of review. *Reed*, 135 S. Ct. at 2231. But even if intermediate scrutiny were the correct standard, the ordinance would fail it. Intermediate scrutiny permits content-neutral speech regulations only if they are "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (quoting *Ward*, 491 U.S. at 796). The government "may not regulate expression in such a manner that a substantial portion of the burden on

speech does not serve to advance its goals." *Id.* at 2535 (quoting *Ward*, 491 U.S. at 799). Thus, for a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535.

The Chicago ordinance fails both strict and intermediate scrutiny because it cannot survive the tailoring analysis outlined in *McCullen*. There, this Court applied intermediate scrutiny and explained that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve its interest." 134 S. Ct. at 2540. Massachusetts could not make that showing in light of the countless alternatives that were substantially less burdensome to protected speech, such as laws barring assault, harassment, threats, physical obstruction, and the like. *Id.* Here, too, Chicago can achieve its goals of ensuring safe clinic access by enforcing its existing laws outlawing physical obstruction, threats, or intimidation designed to interfere with access to a medical facility. *See* Chi., Ill., Code §8-4-010(j)(2).

The only possible interest these less restrictive measures might not serve is Chicago's supposed interest in protecting listeners from unwelcome speech. The City emphasized this point at length in its briefing below. *See* Brief of Defendants at 23-25, *Price v. City of Chicago*, No. 17-2196 (7th Cir. Dec. 18, 2017). But to the extent Chicago relies on this purported interest, it means the statute is not content neutral and strict scrutiny applies. *McCullen*, 134 S. Ct. at 2531-32 ("[T]he

Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' "). In all events, this Court has rejected such an interest time and time again. "[S]peech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder*, 562 U.S. at 458. Indeed, it is "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street*, 394 U.S. 576, 592 (1969); *see also Johnson*, 491 U.S. at 414 (state cannot ban speech because it is "offensive or disagreeable"). Chicago's attempt to ban speech on the public sidewalk so that unwilling listeners do not have to hear it is wholly foreign to the First Amendment.

Finally, the Ordinance is unconstitutionally vague under the Due Process Clause and overbroad under the First Amendment. A law is void for vagueness if its prohibitions are not clearly defined, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), or if it fails to establish standards sufficient to guard against the arbitrary deprivation of liberty interests. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The test is whether the law "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Where, as here, the ordinance "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,

499 (1982). Thus, as Justice Kennedy explained in his *Hill* dissent, "[i]n the context of a law imposing criminal penalties for pure speech, 'protest' is an imprecise word; 'counseling' is an imprecise word; 'education' is an imprecise word." 530 U.S. at 773 (Kennedy, J., dissenting). "No custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech." *Id.*

II. The Ongoing Validity Of *Hill* Is A Question Of Significant National Importance.

A. A number of jurisdictions across the country have continued to maintain "bubble zone" and "buffer zone" laws notwithstanding *Reed* and *McCullen*.

The prevalence of anti-speech bubble zone and buffer zone laws underscores the national importance of the question presented here. Unfortunately, *Hill* "opened the door widely to a new era of restrictive speech regulation within traditional public fora." Raskin & LeBlanc, *supra* at 179. The situation presented in this case is thus far from unique. At least two states have enacted statewide statutory bubble zones, as have some of the nation's largest cities, rendering millions of Americans subject to these bans on core protected speech. And a number of other jurisdictions have continued to maintain broad, prophylactic "buffer zones" notwithstanding *McCullen*.

The statute upheld in *Hill* is still in effect throughout Colorado. Colo. Rev. Stat. §18-9-122(3).

Additionally, in 2005 Montana enacted a statute imposing an 8-foot floating bubble zone within 36 feet of the entrance of an abortion clinic. *See* Mont. Code Ann. §45-8-110(1). Montana's statute is modeled after Colorado's and bans "approaching . . . a person who is entering or leaving a health care facility to give the person written or oral information, to display a sign, or to protest, counsel, or educate about a health issue." New Hampshire also maintains a statewide 25-foot buffer zone law notwithstanding this Court's decision in *McCullen*. N.H. Rev. Stat. §132:38 (No non-exempt person "shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to 25 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility.").

Many cities have adopted bubble zone and buffer zone measures as well. Oakland, California, for example, imposes an 8-foot bubble zone within 100 feet of the entrance of "a reproductive health care facility." Oakland, Calif., Mun. Code §§8.52.020 & 8.52.030(B)-(C). The City prohibits approaching within eight feet of another person "for the purpose of passing a leaflet or handbill, to display a sign to, or engage in oral protest, education, or counseling with such other person in a public way or on a sidewalk area within one hundred feet" of an abortion clinic. *Id.* Oakland's ordinance was modeled after Colorado's, and the Ninth Circuit rejected a facial challenge to the ordinance because *Hill* "mostly control[s]." *Hoye v. City of Oakland*, 653 F.3d 835, 845 (9th Cir. 2011). The Ninth Circuit did,

however, find "grave constitutional problems" with how the City applied the policy—*i.e.*, "only to efforts to persuade women approaching reproductive health clinics *not* to receive abortions or other reproductive health services, and not to communications seeking to encourage entry into the clinic for the purpose of undergoing treatment." *Id.* at 849-50.

In 2005, Pittsburgh, Pennsylvania enacted an 8-foot bubble zone and a 15-foot buffer zone around the entrance to abortion clinics. Pittsburgh, Pa. Code §§623.03-623.05. When a group of sidewalk counselors sued, the Third Circuit held that although each was facially constitutional standing alone, in combination they burdened substantially more speech than necessary. *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009). On remand, the district court permanently enjoined the bubble zone. *Brown v. City of Pittsburgh*, No. 06-393, 2010 WL 2207935, at *2 (W.D. Pa. 2010). Nearly a decade later, litigation continues regarding the constitutionality of Pennsylvania's buffer zone in light of *Reed* and *McCullen*. *See Bruni v. City of Pittsburgh*, 283 F.Supp.3d 357, 367 (W.D. Pa. 2017), *appeal pending*.

Bubble zone ordinances also remain in effect in a number of major cities. *See* Burlington, Vt., Code §§21-112(d)(2) & 21-113(a) (indefinite bubble zone); Concord, N.H., Code, tit. I, ch. 4, §§4-8-2(d) (8-foot bubble zone on request); Phoenix, Ariz., Code §23-10.1 (8-foot bubble zone on request); Sacramento, Calif., City Code §12.96.020 (8-foot bubble zone); Sacramento, Calif., County Code §9.110.030 (indefinite bubble zone);

San Francisco, Calif., Pol. Code art. 43, §§4302(a)-4303 (8-foot bubble zone); San Jose, Calif., Mun. Code §10.08.030 (8-foot bubble zone on request). And many cities still maintain buffer zones on the books as well. *See* Harrisburg, Pa., Code §3-371.4A; Pittsburgh, Pa., Code §623.04; San Diego, Calif. Code, ch. 5, §52.1001; Santa Barbara, Calif., Code §9.99.020.

B. *Hill* has led to confusion in the lower courts about the proper approach to content neutrality.

Even outside the context of bubble or buffer zones, this Court's irreconcilable decisions in *Hill, Reed*, and *McCullen* have led to significant confusion in the lower courts about the proper methodology for adjudicating First Amendment claims.

Some courts, for example, continue to apply *Hill*'s approach to content neutrality, which omits the analysis mandated by *Reed* and *McCullen*. In *Recycle for Change v. City of Oakland*, the Ninth Circuit held that an ordinance was content neutral even if an officer must examine the content of the message in order to determine whether the ordinance applied. 856 F.3d 666, 670-71 (9th Cir. 2017). "[T]hat an officer must inspect a . . . message to determine whether it is subject to the Ordinance does not render the Ordinance per se content based." *Id.* (citing *Hill*, 530 U.S. at 721). While this is consistent with *Hill*, it conflicts with *McCullen*, where the Court explained that a law "would be content based if it required enforcement authorities to

examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 134 S. Ct. at 2531 (cleaned up).

The U.S. District Court for the Southern District of California reached a similar conclusion in a case that required the police to determine the message conveyed by the honking of a car horn. *See Porter v. Gore*, 354 F.Supp.3d 1162, 1173 (S.D. Cal. 2018). The plaintiffs argued that under *McCullen* a statute requiring police to determine the content of a message generated by the honking of horn rendered it content based. The district court rejected the argument out of hand because "the Supreme Court has 'never suggested that the kind of cursory examination that might be required to exclude [unregulated expressions] from the coverage of a regulation . . . would be problematic.'" *Id.* (quoting *Hill*, 530 U.S. at 722); *see also O'Connell v. City of New Bern, North Carolina*, 353 F.Supp.3d 423, 430-31 (E.D.N.C. 2018) (citing *Hill* as the proper content-neutrality test and explaining that "[t]he pertinent issue with respect to content neutrality is whether the city has regulated speech 'because of disagreement with the message it contains.'"); *Roy v. City of Monroe, Louisiana*, 2018 WL 4120013, *5 n.7 (W.D. La. 2018) (citing *Hill* and finding ordinance facially constitutional because there was no evidence it was adopted because of disagreement with any particular message).

In *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017), moreover, the Eighth Circuit relied on *Hill* to conclude that a law was content neutral despite

banning a single category of speech—protests in the vicinity of funeral services. *Id*. at 892. The court failed to consider whether the legislation was content based under *Reed* for singling out categories of speech for differential treatment or for regulating based on the purpose of the prohibited speech. *Reed*, 135 S. Ct. at 2227.

The lower courts have also continued to rely on *Hill*'s erroneous recognition of a right to avoid unwanted communications in a public forum. At least one Sixth Circuit judge has cited *Hill* for the proposition that "governing precedent . . . reflects a 'recognizable privacy interest in avoiding unwanted communication.'" *McGlone v. Metro. Gov't of Nashville*, 749 Fed. Appx. 402, 411 (6th Cir. 2018) (Moore, J., dissenting) (citing *Hill*, 530 U.S. at 716). She concluded that the government may "legitima[tely]" enact time, place, and manner restrictions on speech solely to further individuals' purported interest in avoiding unwanted communications in public. *Id.*

Several state courts have relied on *Hill* for the same proposition. *See*, *e.g.*, *Keyes v. Biro*, 2018 WL 272849, *6-7 (Cal. App. 2018) ("the right to approach someone on the way to a healthcare facility to hand the person a leaflet . . . may be constitutionally restricted in order to protect the 'unwilling listener's interest in avoiding unwanted communication'") (quoting *Hill*, 530 U.S. at 716); *Cent. Park Sightseeing LLC v. New Yorkers for Clean, Livable & Safe Streets, Inc.*, 157 A.D.3d 28 (N.Y. App. Div. 2017) (although public sidewalks and streets are "the 'quintessential' public fora for free speech, . . . the Supreme Court has consistently

recognized 'the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'") (quoting *Hill*, 530 U.S. at 718). While these decisions recognizing a right to avoid unwanted communications may be consistent with *Hill*, they are directly contrary to *McCullen* and this Court's current First Amendment doctrine. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

In sum, the fact that lower courts continue to apply *Hill*'s outdated approach to the First Amendment notwithstanding this Court's more recent teachings in *Reed* and *McCullen* further underscores the need for the Court to grant certiorari to "bring harmony to these precedents." App. 26.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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