No. 18-1516

In the Supreme Court of the United States

VERONICA PRICE, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL RIGHTS UNION AND STUDENTS FOR LIFE IN AMERICA IN SUPPORT OF PETITIONERS

July 8, 2019

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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 the light of the Court's intervening decisions in *Reed* and *McCullen*.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union ("ACRU"), is a nonpartisan, non-profit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statemen in the Nation on matters of free speech. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the First Amendment rights, and it carries out that mission by participating in cases that present free speech issues. Those cases include *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018);

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[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

McCutcheon v. Federal Election Commission, 134 S. Ct. 1434 (2014); and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Students for Life in America ("Students for Life") exists to recruit, train, and mobilize the pro-life generation to abolish abortion. It launches and supports Students for Life groups in colleges, high schools, middle schools, law schools, and medical schools throughout the nation to educate other young people about the violence of abortion and the resources available to help pregnant and parenting students. In carrying out these activities, Students for Life relies on sidewalk counseling, that is, person-to-person contacts that include passing out literature and engaging in oral education and counseling. It carries out these activities in Chicago, so the challenged ordinance adversely affects its ability to convey a message of life. More generally, the courts' continued reliance on *Hill v. Colorado* 530 U.S. 703 (2000), to the exclusion of *McCullen v. Coakley* 134 S. Ct. 2536 (2014), and *Reed v. Town of Gilbert* 135 S. Ct. 2281 (2015), pose a threat to Students for Life's constitutionally protected interest in persuading pregnant students to carry their babies to term instead of aborting them.

SUMMARY OF ARGUMENT

As the Seventh Circuit found, *Hill* is "incompatible with current First Amendment doctrine." App. 21. Nonetheless, as a lower court in the federal judicial system, the Seventh Circuit was

obligated to follow *Hill*, which it saw as controlling. This case presents this Court with the opportunity to confront that incompatibility.

"[W]hile the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others." *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014). The Chicago ordinance substantially burdens both normal conversation and leafletting, just as the Massachusetts law was found to do in *McCullen*. The result in *McCullen* is attributable, at least in part, to the value it saw and gave to the peaceful and considerate way the *McCullen* Petitioners exercised their First Amendment rights. The Price Petitioners want to do the same thing, but *Hill*, not *McCullen*, drove the lower courts' analysis.

Hill's conclusions regarding content and viewpoint discrimination cannot be reconciled with *Reed v. Town of Gilbert*, 135 S. Ct. 2281 (2015), and *Matal v. Tam*, 137 S. Ct. 1344 (2017), respectively. As the Seventh Circuit noted, "How else could the authorities distinguish between a sidewalk counselor (illegal) and a panhandler, pollster, or a passerby who asks for the time (all legal)" without considering the content or viewpoint of the communication. J. App. at 24. This Court should revisit *Hill* and conclude that the Chicago ordinance is an exercise in content discrimination, viewpoint discrimination, or both.

In addition, *Hill* undervalues the interests of the speakers and overweighs the interest of the listeners. The balance it strikes is inconsistent with the balance struck in *McCullen*, and so is its reasoning with respect to narrow tailoring.

ARGUMENT

I. This Court should overrule its decision in *Hill v. Colorado* because its rationale has been superseded.

Hill has not aged well. In the 19 years since *Hill* was decided, this Court has undercut its reasoning in three significant ways. First, its conclusions that the Colorado law at issue were content and viewpoint neutral are incorrect. Second, the *Hill* Court's reliance on "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication," *see* 530 U.S. at 714, is misplaced. Third, its treatment of narrow tailoring is flawed. In view of these problems with *Hill*, this Court should overrule it.

A. This Court's First Amendment jurisprudence since *Hill* has undermined its reasoning.

Amici recognize that, in both *Hill* and *McCullen*, the Court found that the ordinances at issue were neither content nor viewpoint based. They note, however, that, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court held that the Town's sign

ordinance was content based on its face. Likewise, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court concluded that a federal law denying trademark protection to trademarks that "may 'disparage . . . or bring . . .into contemp[t] or disrepute' any 'persons, living or dead,' "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751 (quoting 15 U.S.C. § 1052(a)). In other words, the disparagement clause "constitutes [unconstitutional] viewpoint discrimination." *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgement).

The Chicago ordinance should be subject to the same scrutiny that the Court gave to the Town of Gilbert's sign ordinance and to the disparagement provision in federal statutory law.

1. *Reed v. Town of Gilbert* shows that the Chicago ordinance is a content-based restriction on speech.

In *Reed v. Town of Gilbert*, the Court held that the town's sign ordinance was an unconstitutional content-based restriction of speech that violated the First Amendment. It explained that a law can be content-based if it "applies to particular speech because of the topic discussed or the message expressed." *Id.* at 2227. In addition, laws that are content neutral on their face can be an unconstitutional content-based restriction of speech if they "cannot be justified without reference to the content of the regulated speech" or were adopted "because of disagreement with the message the speech conveys." *Id.* (quoting *Ward v. Rock Against*

Racism, 491 U.S. 781, 791 (1989) (internal brackets omitted)).

Noting that it has "repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose," *id*. at 2228, the Court concluded that the town's sign ordinance was content based. It explained that the classification of signs, as, for example, "Temporary Directional Signs" or "Political Signs," and the resulting limitations, "depend[ed] entirely on the communicative content of the sign." *Id*. at 2227. The Court observed that "the church's signs inviting people to attend its worship service are treated differently from signs conveying other types of ideas." *Id*.

In the same way, the Chicago ordinance requires consideration of the content of Petitioners' speech. As the Seventh Circuit noted, "How else could the authorities distinguish between a sidewalk counselor (illegal) and a panhandler, pollster, or a passerby who asks for the time (all legal)" without considering the content of the communication. J. App. at 24; *cf*. *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 listeners' reactions to speech.") (internal quotations omitted). Accordingly, it should be treated as a content- based restriction on speech.

2. *Matal v. Tam* shows that the Chicago ordinance mandates unconstitutional viewpoint discrimination.

Alternatively, or in addition, the Chicago ordinance is an unconstitutional exercise in viewpoint discrimination. If "a panhandler, a pollster, or a passerby who asks for the time" can speak, but the sidewalk counselor cannot, see J. App. at 24, the ordinance favors some viewpoints over others, which it cannot do constitutionally.

"[T]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment). As Justice Kennedy explained, "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 1767.

In his opinion, Justice Alito observed that the disparagement clause, by "den[ying] registration to any mark that is offensive to a substantial percentage of the members of any group," constituted viewpoint discrimination because "[g]iving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763 (Alito, J.). The effect of the disparagement clause was to allow the registration of "positive or benign" marks, but not "derogatory" ones. *Id.* at 1766; *see also id.* at 1765 ("[I]t is a happy-talk clause.") (Alito, J.).

The Chicago ordinance does precisely the same thing. It singles out the message of the sidewalk counselor for disapproval. See J. App. at 24. But, as Justice Kennedy pointed out, the First Amendment "protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas." *Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring in part and concurring in the judgement). Chicago cannot constitutionally silence some viewpoints, but not others.

3. This Court should revisit its conclusions that the Colorado law in *Hill* and the Massachusetts law in *McCullen* are content and viewpoint neutral.

As acknowledged above, in both *Hill* and *McCullen*, the Court found that the laws in question were not either content or viewpoint based. In each case, though, those findings were addressed in dissent. Those dissents have become all the more persuasive given this Court's more recent First Amendment decisions.

In *McCullen*, Justice Scalia, joined by Justices Kennedy and Thomas, dissented, concluding that the Massachusetts law was content-based for two reasons. First, he noted that the law "burden[ed] only the public spaces outside abortion clinics." 134 S. Ct. at 2544 (Scalia, J., dissenting). He explained, "Showing that a law that suppresses speech on a specific subject is so far reaching that it applies even when the asserted non-speech-related problems are

not present is persuasive evidence that the law is content based." *Id.* at 2544-45. In addition, the law gave a pass to the clinic employees and agents acting within the scope of their employment. As Justice Scalia rhetorically asked, "Is there any serious doubt that abortion clinic employees or agents 'acting within the scope of their employment' near clinic entrances may—indeed, often will—speak in favor of abortion." *Id.* at 2546. Accordingly, he found the Massachusetts law to be "unconstitutional root and branch." *Id.* at 2549.

In his *McCullen* dissent, Justice Alito found that the Massachusetts law discriminated on the basis of viewpoint. He noted, "Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination." 134 S. Ct. at 2549 (Alito, J., dissenting).

Similarly, in *Hill*, Justice Scalia, joined by Justice Thomas, pointed out that a law like Colorado's, which "operates only on speech that communicates a message of protest, education, or counseling," presents the risk of "invidious thought-control." 503 U.S. at 743-44 (Scalia, J., dissenting). 'When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion." *Id.* at 744. He concluded, "In sum, it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum." *Id.* at 748.

Justice Kennedy also dissented, noting, "For the first time, the Court approves 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." 503 U.S. at 756 (Kennedy, J., dissenting). He observed that prohibitions against picketing or leafletting were content free, as was impeding access. In contrast, "Under the Colorado enactment, . . .the State must review content to determine whether a person has engaged in criminal 'protest, education, or counseling.'" *Id*. at 766. Furthermore, by limiting the law's reach to entrances to medical facilities, which is where the prohibited activity occurs, the law draws a line based on content. *Id*. at 767.

The analysis in these dissents parallels the Court's holdings in *Reed v. Town of Gilbert* and *Matal v. Tam*. More to the point, the Court found that a Minnesota law that barred the wearing of a "political badge, political button, or other political insignia" inside a polling place on Election Day swept too broadly in suppressing speech to be narrowly tailored in protecting the State's interest in protecting the right to vote. *Minnesota Voters Alliance v. Mansky*. In addition, the Court held that the First Amendment protected Westboro Baptist Church's "hurtful' picketing at a soldier's funeral from a state-law-based tort claim. *Snyder v. Phelps*, 562 U.S. 443 (2011). There, the Court concluded, "As a Nation we have chosen . . .to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id*. at 461. Put simply, free speech is widely protected, and it should be protected here.

Moreover, the Chicago ordinance, just like Colorado's law burdens only the space outside abortion clinics and stifles only speech opposed to the medical facilities. It represents the statutory creation of an eight-foot bubble near a 50-foot no-go zone "in which a particular group, which ha[s] broken no law, cannot exercise its rights of speech, assembly, and association." *Madsen v. Women's Health Center*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting). This Court should use this case to embrace the dissents in *Hill* and *McCullen*.

B. The *Hill* Court's balancing of interests has been superseded by *McCullen*.

This Court has made it clear that the First Amendment takes little account of the difference between willing and unwilling listeners. As Justice Alito wrote, "We have said time and again that 'the public expression of ideas may not be prohibited just because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. at 1763 (Alito, J.) (quoting *Street v. New York*, 394 U.S. 396 (1969) (collecting cases); see also *id*. at 1766 ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." (Kennedy, J., concurring in part and concurring in the judgment). As Justice Kennedy explained, "[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise." *Id*. at 1767.

That is, however, precisely what the *Hill* Court did: Allow the chilling of speech out of solicitude for

"unwilling listeners." 530 U.S. at 714. It acknowledged, "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Id*. at 716. Of course, turned out to be not so because the Court went on to protect what it saw as "captive listeners." *Id*. at 718. Indeed, it criticized the dissent for "appear[ing] to consider recognizing any of the interest of unwilling listeners—let alone balancing those interest against the rights of speakers—to be unconstitutional." *Id*.

In *McCullen*, the Court took a far different approach to the balancing of interests. As it recognized, the *McCullen* petitioners did not engage in aggressive action, but rather in sidewalk counseling. The Court explained, "McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during the[ir]exchanges." 134 S. Ct. at 2527; see also *id*. at 2563 ("They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioner believe that they can accomplish this objective only though personal, caring, consensual conversations."). The buffer zone created by the Massachusetts law made it "substantially more difficult" to exercise their First Amendment rights.

The experience of Students for Life is consistent with the Court's understanding in *McCullen*. Through its Pregnant on Campus and Building a Better Future initiatives, it seeks to make sure that pregnant and parenting students are empowered to choose life and

to succeed. In 2018-19, through its work, Students for Life can document eight instances in which a mother considering abortion chose instead to bear the child due to the influence and support of Students for Life, and it can point to 68 mother assisted with childcare, financial assistance, legal help, and parenting supplies.[2]

Moreover, just as the *McCullen* Court emphasized the importance of one-on-one communication and leafletting, it refused to let Massachusetts dictate how they might exercise their First Amendment rights. It observed that the contention that the *McCullen* Petitioners could still engage in some forms of protest "miss[ed] the point." 134 S. Ct. at 2536. As the Court noted, if all that the McCullen Petitioners could do was to raise their voices and be seen as "vociferous opponents of abortion, then the buffer zones have effectively stilled petitioners' message." *Id.* at 2537. Chicago, likewise, should not be allowed to tell the Price Petitioners how they can exercise their First Amendment rights.

The experience of the *McCullen* Petitioners and Students for Life show that the *Hill* Court's assumptions regarding unwilling listeners are overstated. Chicago should not be permitted to infringe on Petitioners' First Amendment rights to protect the interest of putative unwilling listeners.

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[2] See "Two Years Ago Maddi Runkles Graduated High School; Here's How We Helped Pregnant & Parenting Students Since Then," available at https://studentsforlife.org/2019/06/03/two-years-ago-maddi-runkles-graduated-high-school-heres-how-weve-helped-pregnant-parenting-students-since-then/.

C. The Chicago ordinance is not narrowly tailored.

The Chicago ordinance has two parts: one that suppresses speech, and another that criminalizes obstructive conduct. The second part shows that the City has tools to control disruptive activity that do not depend on the suppression of speech. Accordingly, even if this Court chooses not to revisit its conclusion that speech restrictions like those in *McCullen* and *Hill* are content and viewpoint neutral, the Chicago ordinance remains suspect.

In *McCullen*, the Court explained, "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." 134 S. Ct. at 2540. As it noted, "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.*; see also *Hill*, 503 U.S. at 762 ("Prophylaxis is the antithesis of narrow tailoring.") (Scalia, J., dissenting); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . .Precision of regulation must be the touchstone in an area touching our most precious freedoms.").

Section 8-4-010(j)(2) vindicates Chicago's interest in keeping the peace and insuring access to medical facilities. It prohibits any person from knowingly "by force or threat of force or by physical obstruction, intentionally injur[ing], intimidat[ing], or interfer[ing] or attempt[ing] to injure, intimidate,

or interfere with any person entering or leaving any hospital, medical clinic or healthcare facility." J. App. at 61. The prohibition of "passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," each of which is a First Amendment-protected activity, is only tangentially related to Chicago's interest in assuring access to medical facilities.

In *McCullen*, the Court pointed to provisions like subsection (2) as well as more general criminal laws "forbidding assault, breach of the peace, trespass, vandalism, and the like." 134 S. Ct at 2538. These laws showed that Massachusetts "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id*. at 2359. The Court also rejected the claim that those other approaches had not worked.

The Court's approach to narrow tailoring in *McCullen* is far more rigorous than the *Hill* Court's. In *Hill*, the Court explained, "A bright-line prophylactic approach may be the best way to provide protection, and at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." 503 U.S. at 729. As noted above, the prophylactic rationale was dismissed in *McCullen*, as well as by Justice Scalia in his *Hill* dissent. The Court also opined that, even as restricted, the law allowed for "adequate means of communication." *Id*. In so doing, it minimized the burden on free speech. Compare *McCullen*, 135 S. Ct. at 2535 (noting that "the buffer zones impose serious burdens on petitioners' speech."). Indeed, the Court noted, "The

Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech." *Id*. at 2536.

The *McCullen* Court observed that "[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id*. at 2357. As a result, the Commonwealth was required to show that it had not "too readily foregone options that could serve its interest just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *Id*.

At the very least, the same burden should be imposed on the City of Chicago.

II. *Stare decisis* does not require this Court to adhere to *Hill*.

As demonstrated above, this Court's decisions have shown *Hill* to be all but expressly overruled. Cf. *McCullen*, 134 S. Ct. at 2546 ("[T]he Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*.") (Scalia, J., dissenting.). This Court should take the last step.

Stare decisis is "not an inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Indeed, it is "at its weakest when [the Court] interprets the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling . . . prior decisions. *Agostini v. Felton*, 521 U.S 203, 235 (1997). Moreover, "*stare decisis* applies with perhaps least force of all to

decisions that wrongly denied First Amendment rights." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

The *Hill* Court's understanding of the First Amendment has been overtaken in several important ways. First, its (and *McCullen's*) conclusion that the Colorado law did not unconstitutionally discriminate on the basis of content or viewpoint are inconsistent with *Reed v. Town of Gilbert* and *Matal v. Tam*, respectively. The *Hill* Court's balancing of the interests of speakers and listeners and its narrow tailoring conclusion cannot be reconciled with *McCullen v. Coakley*. Even if its reasoning were correct in the first instance, as to which there is substantial doubt, see Pet.at 14-17, that is no longer the case.

Nonetheless, *Hill* continues to preclude legal challenges to the cookie cutter ordinances that it spawned. It blocked the lower courts in this case, and in other case. See *Bruni v. City of Pittsburgh*, 283 F. Supp. 357, 367 (W.D. Pa. 2017). Only this Court can decide whether *Hill* can survive even if its reasoning has been superseded.

CONCLUSION

This Court should grant the petition for writ of certiorari and, on review, reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

July 8, 2019

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