No. 23-74

In the Supreme Court of the United States

DEBRA A. VITAGLIANO,

Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONER

STEVEN H. ADEN
Counsel of Record
CAROLYN MCDONNELL
DANIELLE PIMENTEL
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW,
Suite 500
Washington, DC 20036
Steven.Aden@aul.org
Tel: (202) 741-4917

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the original national pro-life legal advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has committed over fifty years to protecting human life from conception to natural death. Supreme Court opinions have cited briefs and scholarship authored by AUL attorneys. *See*, *e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022) (citing Clarke D. Forsythe, Abuse of Discretion: The Inside Story of *Roe v. Wade* 127, 141 (2012)). AUL is an expert on pro-life litigation and public policy, tracking and analyzing bioethics cases across the nation and publishing life-affirming model legislation. *Life Litigation Reports*, Ams. United for Life, https://aul.org/topics/life-litigation-reports/ (last visited Aug. 21, 2023); *Pro-Life Model Legislation and Guides*, Ams. United for Life, https://aul.org/law-and-policy/ (last visited Aug. 21, 2023). AUL has issued policy papers about *Dobbs*' impact upon abortion law and policy in the United States. *See*, *e.g.*, Steven H. Aden et al., *One Year Later: The Landscape of America's Life-Protecting Laws After* Dobbs, Ams. United for Life 1 (June 2023), https://aul.org/wp-content/uploads/2023/06/2023-06-One-Year-Later-The-Landscape-for-Life-After-Dobbs.pdf. AUL has fought against the abortion

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file this brief.

distortion since the Supreme Court decided *Roe*, but even post-*Roe*, has continued to contend with *Roe*'s distorting effects upon First Amendment jurisprudence.

SUMMARY OF ARGUMENT

This Court may have overturned *Roe v. Wade*, but *Roe*'s distortion of First Amendment law continues to infringe upon the fundamental rights of sidewalk counselors. In *Hill v. Colorado*, the Supreme Court upheld a statute that, within 100 feet of a health care facility's entrance, prohibited individuals from "'knowingly approach[ing]' within eight feet of another person, without that person's consent, '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 . . . .'" 530 U.S. 703, 707 (2000) (ellipsis in original). Relying upon *Hill*, the Second Circuit upheld a Westchester County, New York ordinance that is materially identical to the statute in *Hill*, and in fact, was based upon *Hill*'s statute. *Vitagliano v. Cnty. of Westchester*, No. 23-30, slip op. at 4, 25 (2d Cir. June 21, 2023). Yet, *Hill* was a result of *Roe*'s abortion distortion, creating an aberration in First Amendment jurisprudence to further pro-abortion policies. *Hill*, 530 U.S. at 753 (Scalia, J., dissenting). As Justice Kennedy lamented in his *Hill* dissent, "[t]he Court's holding contradicts more than a half century of well-established First Amendment principles. 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." *Id*. at 765.

Hill rests on tenuous legal reasoning, which is further unsettled by *Dobbs v. Jackson Women's Health Organization*. *See* 142 S. Ct. 2228. In *Dobbs*, the Supreme Court overruled *Roe*, denounced the abortion distortion, and returned the abortion issue to the democratic process. *Id*. at 2242–2243, 2275–2276. The *Dobbs* Court particularly censured *Hill* for warping First Amendment doctrines. *Id*. at 2276 n.65.

Amicus Curiae agrees with Petitioner that *Hill* was wrongly decided, conflicts with intervening First Amendment cases, and is not entitled to *stare decisis*. Pet. for a Writ of Cert. 15–32. *Amicus* writes separately to give further background about *Roe*'s *ad hoc* nullification machine, contextualize *Hill* as part of this abortion distortion, and highlight how *Hill* is in tension with *Dobbs* by continuing to infringe upon the free speech rights of sidewalk counselors. Accordingly, *Amicus* urges the Court to grant *certiorari* and consider whether to overturn *Hill*.

ARGUMENT

I. *ROE V. WADE* DEVISED AN "*AD HOC* NULLIFICATION MACHINE" OF ABORTION LAWS.

"*Roe* was egregiously wrong from the start." *Dobbs*, 142 S. Ct. at 2243. The Court contrived an abortion right nebulously based in the Constitution, which was not "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered

liberty.'" *Id*. at 2242 (citation omitted). As the *Dobbs* decision noted:

> [The *Roe* Court] held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

Id. 2245 (citations omitted). The *Roe* Court then instituted a trimester test, balancing the State's interests against a woman's purported abortion right at different stages of pregnancy, and imposed an arbitrary viability line as part of this test. *Roe*, 410 U.S. at 164–165. Yet, "the viability line ma[de] no sense." *Dobbs*, 142 S. Ct. at 2261. "[*Roe*'s] elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that 'viability' should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed." *Id*. at 2266.

In *Doe v. Bolton*, *Roe*'s companion case, the Court crafted a broad health exception that swallowed the trimester test. 410 U.S. 179 (1973). Under *Doe*, the Court directed "that the medical judgment [of a doctor] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health." *Id*. at 192. Under this definition, virtually any situation could fit the medical exception. "The apparently

graduated scheme thus actually amounted in law to abortion on demand throughout the entire pregnancy." Joseph W. Dellapenna, Dispelling the Myths of Abortion History 699 (rev. ed. 2023).

Roe and *Doe* tore the abortion issue from the democratic process in "an exercise of raw judicial power." *Doe*, 410 U.S. at 222 (White, J., dissenting). The cases "sparked a national controversy that . . . embittered our political culture for a half century," *Dobbs*, 142 S. Ct. at 2241, while also "depriv[ing] abortion opponents of the political right to persuade the electorate that abortion should be restricted by law." *Hill*, 530 U.S. at 741 (Scalia, J., dissenting). *Roe* "enflamed debate and deepened division," and became a standard litmus test for political candidates and judicial nominees. *Dobbs*, 142 S. Ct. at 2243. But the cases' "damaging consequences" did not end there. *Id*.

These abortion cases manufactured an "ad hoc nullification machine" that wreaked havoc on the democratic process. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) (citation omitted). As Justice White dissented in *Roe* and *Doe*, the cases' "upshot [wa]s that the people and the legislatures of the 50 States [we]re constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." *Doe*, 410 U.S. at 222. "[*Roe*] imposed the same highly restrictive regime [*i.e.*, the trimester test] on the entire Nation, and it effectively struck down the abortion laws of every single State." *Dobbs*, 142 S. Ct. at 2241.

"By striking down the abortion laws of all fifty states, the Justices created a public health vacuum that they c[ould] not fill." Forsythe, Abuse of Discretion 212. "Abortion was declared to be a *constitutional* right—the only medical procedure to ever have that status—which shielded abortion and abortion providers from the regulation to which medical procedures and doctors have been traditionally subjected." *Id*. at 10 (emphasis in original). No abortion law was safe from *Roe*'s *ad hoc* nullification machine. "Between 1973 and 1984, courts in virtually all of the federal circuits struck down clinic regulations." *Id*. at 229–232 (listing cases).

To conform state laws with *Roe*'s contrived abortion right, the Supreme Court took a scalpel to provisions that safeguarded the health and safety of women and girls seeking abortion, as well as protections for unborn children. In *Planned Parenthood of Central Missouri v. Danforth*, the Court struck down a prohibition on saline-induced abortions, a spousal consent requirement, a parental consent requirement for unmarried minors, and the requirement that a physician exercise professional care to preserve the unborn child's life and health. 428 U.S. 52 (1976). In *Bellotti v. Baird*, the Court determined a judicial bypass procedure for minors seeking abortion without a parent's consent contravened *Roe*'s purported abortion right. 443 U.S. 622 (1979). In *Colautti v. Franklin*, the Court held unconstitutional the requirement that a physician determine whether a fetus is viable, and if so, exercise care to preserve the unborn baby's life and health. 439 U.S. 379 (1979). In *City of Akron v. Akron*

Center for Reproductive Health, Inc., it invalidated provisions requiring: 1) the performance of all second and third trimester abortions in a hospital; 2) parental consent for unmarried girls under the age of fifteen; 3) the attending physician give informed consent disclosures, such as about the baby's development; 4) the attending physician discuss abortion risks; 5) the woman receive a twenty-four hour reflection period as part of her informed consent process; and 6) the disposal of fetal remains in a "humane and sanitary manner." 462 U.S. 416 (1983). In *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, the Court struck down a statute requiring abortions to be performed in hospitals after 12 weeks' gestation. 462 U.S. 476 (1983).

The Court's *ad hoc* nullification of abortion laws continued. In *Thornburgh v. American College of Obstetricians & Gynecologists*, the Court held unconstitutional provisions directing abortion doctors to: 1) receive a woman's informed consent and disclose the procedure's risks and alternatives; 2) provide printed materials about the unborn child's development and social assistance if the mother chooses childbirth; 3) report demographic information and the basis of his determination that a child is not viable; 4) exercise care to preserve a viable unborn child; and 5) have a second physician present during an abortion performed post-viability. 476 U.S. 747 (1986). In *Hodgson v. Minnesota*, the Court held unconstitutional the requirement that abortion providers notify both parents that their minor daughter is seeking an abortion. 497 U.S. 417 (1990).

Ultimately, "[t]he scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body," but failed to "provide . . . any cogent justification for the lines it drew." *Dobbs*, 142 S. Ct. at 2268 (emphasis in original). The Supreme Court had assumed the mantle of the nation's "*ex officio* medical board" on abortion. *Danforth*, 428 U.S. at 99 (White, J., concurring in part and dissenting in part). Accordingly, the Court legislated from the bench, engaged in the "enterprise of devising an Abortion Code." *Hodgson*, 497 U.S. at 480 (Scalia, J., concurring in the judgment in part and dissenting in part).

The decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* only ramped up the abortion *ad hoc* nullification machine. 505 U.S. 833 (1992). In *Casey*, the Court identified abortion as a substantive due process right, but overruled *Roe*'s trimester test and contrived the undue burden standard to analyze the constitutionality of abortion regulations. *Id.* at 846, 876–877 (plurality opinion). The test was a "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. Ultimately, this was a "verbal shell game [that would] conceal raw judicial policy choices concerning what [was] 'appropriate' abortion legislation." *Id.* at 987 (Scalia, J., concurring in the judgment in part and dissenting in part).

The Court used *Casey*'s undue burden standard to hold unconstitutional state laws prohibiting

gruesome partial-birth abortions, *Stenberg v. Carhart*, 530 U.S. 914 (2000), even as it later upheld the federal ban on partial-birth abortions under the same standard. *Gonzales v. Carhart*, 550 U.S. 124 (2007). It struck down Texas' laws requiring abortion providers to have active admitting privileges at a hospital within thirty miles of the location where the abortion is performed to ensure a woman receives timely care for medical complications, and abortion facilities to adhere to the minimum health standards for ambulatory surgical centers. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Court in *June Medical Services L. L. C. v. Russo* likewise held unconstitutional Louisiana's admitting privileges law that brought abortion facilities up to the preexisting standards for physicians at ambulatory surgical centers. 140 S. Ct. 2103 (2020).

Casey's undue burden standard embroiled the federal judiciary in the abortion issue. Federal courts enjoined laws prohibiting grisly dismemberment abortions, *see*, *e.g.*, *Hopkins v. Jegley*, 510 F. Supp. 3d 638 (E.D. Ark. 2021), *vacated*, No. 21-1068 (8th Cir. July 12, 2022), *voluntarily dismissed*, No. 4:17-cv-404-KGB (E.D. Ark. July 13, 2022), and prohibitions on eugenics-based abortions based solely on the unborn child's sex, race, or disability. *See*, *e.g.*, *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson*, 1 F.4th 552 (8th Cir. 2021), *vacated*, No. 19-2882 (8th Cir. July 8, 2022), *voluntarily dismissed*, No. 2:19-cv-4155-BP (W.D. Mo. July 13, 2022). During *Roe* and *Casey*'s reign, states could not limit abortion based upon when an unborn child's heart began beating around six weeks' gestation, *see*, *e.g.*, *SisterSong Women of Color*

Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297 (N.D. Ga. 2020), *rev'd*, 40 F.4th 1320 (11th Cir. 2022), *j. entered for defs.*, No. 1:19-cv-2973-SCJ (N.D. Ga. Oct. 24, 2022), nor when the unborn child began to feel pain at approximately fifteen weeks' gestation. *See*, *e.g.*, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *overruled by* 142 S. Ct. 2228, *j. entered for defs. sub nom. Jackson Women's Health Org. v. Edney*, No. 3:18-cv-171-CWR-FKB (S.D. Miss. Sept. 21, 2022).

Federal courts blocked health and safety and informed consent protections for women and girls seeking abortion. *See*, *e.g.*, *Planned Parenthood Minn., N.D., S.D. v. Noem*, 556 F. Supp. 3d 1017 (D.S.D. 2021), *vacated*, No. 21-2922 (8th Cir. Oct. 6, 2022), *voluntarily dismissed*, No. 4:11-cv-4071-KES (D.S.D. Oct. 21, 2022). *Roe* and *Casey* limited parents' abilities to become involved in and counsel a minor, pregnant daughter in her abortion decision. *See*, *e.g.*, *Reprod. Health Servs. v. Strange*, 3 F.4th 1240 (11th Cir. 2021), *vacated*, No. 17-13561 (11th Cir. July 21, 2022), *voluntarily dismissed*, No. 2:14-cv-1014-CWB (M.D. Ala. Aug. 8, 2022). While the Supreme Court was deciding *Dobbs*, federal courts were considering a handful of omnibus-style lawsuits that sought to enjoin twenty-plus informed consent and health and safety provisions. *See*, *e.g.*, *Whole Woman's Health All. v. Rokita*, No. 21-2480 (7th Cir. July 11, 2022), *dismissed per stipulation*, No. 1:18-cv-1904-SEB-MJD (S.D. Ind. Oct. 21, 2022). In sum, *Roe*'s purported abortion right authorized an *ad hoc* nullification machine of abortion laws that wreaked havoc on the democratic process and threatened the welfare of women and girls.

II. *ROE*'S ABORTION DISTORTION WARPED OTHER LEGAL DOCTRINES, INCLUDING FIRST AMENDMENT JURISPRUDENCE.

"The jurisprudence of this Court has a way of changing when abortion is involved." *Hill*, 530 U.S. at 742 (Scalia, J., dissenting). Even before deciding *Roe*, the Supreme Court departed from the ordinary rules of litigation. "*Roe* and *Doe* began, in the Supreme Court, as a serious procedural mistake that left the Justices without any factual record to consider the complex historical, legal, medical, and constitutional issues surrounding abortion." Forsythe, Abuse of Discretion 17. The Supreme Court took up the cases on the issue of *Younger* abstention "because a doctor who was prosecuted for abortion in state court might file a case in federal court to block the state prosecution." *Id*. at 17–19. In fact, the Court was trying to avoid "controversial cases" since Justices Hugo Black and John Harlan were retiring, and the Court would be down to seven members during the initial consideration of the cases. *Id*. at 18. Yet, after the first round of oral arguments, the Court pivoted, and began considering the question of whether the Constitution protects elective abortion. *Id*. at 22, 41–42. "The thin record available to the Court might have been adequate to decide the jurisdictional issues, but not to address the complexities of abortion, much less the sweeping way that the Court addressed abortion." Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 Ave Maria L. Rev. 48, 86 (2020). Consequently, [a]ll of the factual, medical, and sociological assertions in the *Roe* and *Doe* opinions were either assumptions

adopted from parties' and amicus briefs, or the result of Justice Blackmun's personal research." *Id*.

The Supreme Court then manufactured an abortion right "not mentioned in the Constitution," and not "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2242 (citation omitted). As Chief Justice Rehnquist noted in *Webster v. Reproductive Health Services*, "[s]ince the bounds of [*Roe*'s abortion right] are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." 492 U.S. 490, 518 (1989) (plurality opinion). As the federal judiciary upheld *Roe*'s devised abortion right, it not only led to the *ad hoc* nullification of abortion laws, *supra* Section I, but also to "the distortion of many important but unrelated legal doctrines." *Dobbs*, 142 S. Ct. at 2275. Under the abortion distortion, "'no legal rule or doctrine [wa]s safe from ad hoc nullification by [the Supreme] Court when an occasion for its application arises in a case involving state regulation of abortion.'" *Id*. (citations omitted).

To uphold *Roe*'s devised abortion right, abortion cases contrived corollary doctrines that distorted other areas of law. *See id*. at 2275–2276 (listing impacted doctrines). Pro-life voters did not have the political right to pass laws through their elective representatives to protect women and unborn children from the harms of abortion violence. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting). Abortion providers had third-party standing to vindicate their

patients' abortion rights, even when challenging health and safety laws that protected women from unscrupulous medical practices. *June Med.*, 140 S. Ct. at 2167–2168 (Alito, J., dissenting); *id.* at 2173–2174 (Gorsuch, J., dissenting). Federal courts could enjoin abortion statutes *in toto*, rather than severing the unconstitutional provisions. *Roe*, 410 U.S. at 177–178 (Rehnquist, J., dissenting). Despite *res judicata*, parties could relitigate abortion cases regardless of a final judgment on the merits of the claim. *Whole Woman's Health*, 136 S. Ct. at 2330–2331 (Alito, J., dissenting). When interpreting a statute, federal courts construed constitutional violations even when they could have avoided the constitutional question. *Stenberg*, 530 U.S. at 977–978 (Kennedy, J., dissenting); *id.* at 996–997 (Thomas, J., dissenting). Facial challenges proceeded under *Casey*'s amorphous undue burden standard, rather than *United States v. Salerno*'s stricter test that requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." *Compare Casey*; 505 U.S. at 895 *with Salerno*, 481 U.S. 739, 745 (1987). *Stare decisis* may account for social reliance upon abortion, "an intangible form of reliance with little if any basis in prior case law," even though the "Court is ill-equipped to assess 'generalized assertions about the national psyche.'" *Dobbs*, 142 S. Ct. at 2272, 2276 (citation omitted). When applying privacy case law in the abortion context, federal courts may "conflate[] two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference," and moreover, involve

caselaw that does not involve the death of an unborn child. *Id*. at 2267–2268 (citation omitted).

Constitutional rights were not exempt from the abortion distortion. Besides free speech principles discussed below, the abortion distortion also interfered with parental rights. Even though the Supreme Court recognized that parents have constitutional rights over the care and upbringing of their children, it nevertheless held in *Danforth* that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth*, 428 U.S. at 73, 75. Consequently, the Court minimized parental involvement in minors' abortion decisions. *Id*. at 72–75; *see also Bellotti*, 443 U.S. 622; *Akron*, 462 U.S. 416; *Hodgson*, 497 U.S. 417. As Justice Kennedy partially dissented in *Hodgson*, "[t]he Court also concludes that [States] do[] not have a legitimate interest in facilitating the participation of both parents in the care and upbringing of their children." 497 U.S. at 489.

Hill added to the abortion distortion of constitutional rights as it upheld a "scheme of disfavored-speech zones on public streets and sidewalks," through an "opinion . . . antithetical to our entire First Amendment tradition." *Hill*, 530 U.S. at 768 (Kennedy, J., dissenting). "For the first time, the Court approve[d] a law which bar[red] 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." *Id*. at 765. In reaching this

outcome-driven holding, the Court held "[i]n a further glaring departure from precedent . . . that citizens have a right to avoid unpopular speech in a public forum," which the Court may weigh against First Amendment rights. *Id*. at 771; *see also id*. at 751 (Scalia, J., dissenting) ("[T]he 'right to be let alone' . . . is not an interest that may be legitimately weighed against the speakers' First Amendments rights . . . ."). This "right to be let alone" from pro-life speech in a public forum added to "the lengthening list of 'firsts' generated by this Court's relentlessly proabortion jurisprudence, . . . [because] in order to sustain a statute, the Court . . . relied upon a governmental interest not only unasserted by the State, but positively repudiated." *Id*. at 750 (Scalia, J., dissenting).

Notably, *Hill* and *Stenberg*, which the Court decided the same day, also authorized federal courts to selectively apply overbreadth doctrine to abortion cases. The Court weaponized overbreadth doctrine in *Stenberg* to strike down, not a law affecting free speech, but a state prohibition on horrific partial-birth abortions. *Stenberg*, 530 U.S. at 938–946. Yet, the Court rejected the sidewalk counselors' overbreadth argument in *Hill*, which led Justice Scalia to lament that "one can add to the casualties of our whatever-it-takes proabortion jurisprudence the First Amendment doctrine of narrow tailoring and overbreadth. R. I. P." *Hill*, 530 U.S. at 762, 764 (Scalia, J., dissenting). Thus, "vindicating a doctrinal innovation [*i.e.*, a purported abortion right] require[d] courts to engineer exceptions to longstanding background rules." *Dobbs*, 142 S. Ct. at

2276. This created an abortion distortion of the law, especially in First Amendment doctrine.

III. THE SECOND CIRCUIT'S DECISION, WHICH APPLIED *HILL V. COLORADO*'S ABORTION DISTORTION TO AN IMPORTANT FEDERAL QUESTION AND FIRST AMENDMENT DOCTRINE, IS IN TENSION WITH *DOBBS*.

Hill's pernicious legacy presents an important federal question since the case continues to inhibit sidewalk counselors' free speech rights to offer hope, compassion, and information about abortion alternatives to women on public sidewalks outside abortion facilities. Moreover, *Hill* was a product of *Roe*'s abortion distortion and is in tension with *Dobbs*, which overruled *Roe* and criticized how abortion cases have distorted other legal doctrines.

A. Infringement Upon Sidewalk Counselors' Free Speech Rights Raises an Important Federal Question, Especially Since Sidewalk Counselors Offer Women Peaceful Messages about Abortion Alternatives.

Hill's stifling of sidewalk counselors' peaceful speech raises an important First Amendment question. "'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'" *303 Creative LLC v. Elenis*, No. 21-476, slip op. at 7 (U.S. June 30, 2023) (citations omitted). "[T]he guiding First Amendment principle that the 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content' applies

with full force in a traditional public forum." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citation omitted). "When the government makes it more difficult to engage in [leafletting and one-on-one] communication, it imposes an especially significant First Amendment burden." *Id.* at 488–489. Yet the Westchester ordinance, under *Hill*'s authority, hinders Petitioner and other sidewalk counselors from offering women their peaceful messages about abortion alternatives.

Sidewalk counselors provide support and resources to women considering abortion. As one sidewalk counselor commented before the Westchester Board of Legislators in opposition to this ordinance, "the common thread of all the pro-life groups that I know of is that we are there to provide an honest perspective on the tragedy of abortion and to offer hope, strength, and love in its place." Regular Meeting of the Westchester County Board of Legislators at 30:36–30:49 (June 27, 2022), https://westchestercountyny.granicus.com/player/clip/1504?view_id=1&redirect=true&h=39bcc10bc26c46c63ab3da6c02851a00. These conversations are about the sensitive topic of abortion, and for sidewalk counselors to convey their compassionate messages, it is best to have a one-on-one conversation. As Justice Scalia wrote in his *Hill* dissent:

> [T]he Court must know that most of the "counseling" and "educating" likely to take place outside a health care facility cannot be done at a distance and at a high-decibel level. The availability of a powerful amplification system will be of little help to the woman who

> hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?"

530 U.S. at 757. Yet, because of *Hill*, governments have the power to effectively silence sidewalk counselors' protected speech on public sidewalks in front of abortion facilities.

It cannot be presumed that all women approaching an abortion facility will ultimately have an abortion. As Justice Kennedy noted, "[*Hill*'s] prophylactic theory seems to be based on a supposition that most citizens approaching a health care facility are unwilling to listen to a fellow citizen's message . . . [this] premise[] ha[s] no support in law or in fact." *Id*. at 778 (Kennedy, J., dissenting). Whether a woman is still considering abortion or if she has decided on one, she is still free to change her mind after receiving information about abortion alternatives. For example, studies show that "[w]hen parents are given comprehensive, multidisciplinary, individualized, and informed counsel[ing], including clinical expectations, in the

setting of a lethal fetal condition, they often choose the option of perinatal hospice care [over abortion]." *See, e.g.*, Michelle D'Almeida et al., *Perinatal Hospice: Family-Centered Care of the Fetus with a Lethal Condition,* 11 J. Am. Physicians & Surgeons 52, 55 (2006).

Peer-reviewed research shows that "[a] majority of women who had abortions (60%) reported they would have carried to term if they had received more support from others or had felt more financial security." David C. Reardon et al., *The Effects of Abortion Decision Rightness and Decision Type on Women's Satisfaction and Mental Health*, Cureus, May 11, 2023, at 1, 9. Unfortunately, "[i]t is likely that many individuals who consider abortion, and self-abortion in particular, turn to the Internet to find information." Jenna Jerman et al., *What Are People Looking for When They Google "Self-Abortion"?*, 97 Contraception 510, 510 (2018). As a result, many women are unaware of the realities of abortion, including their unborn child's development, the physical and mental risks of the procedure, and what alternatives and resources are available to them. One study found that 66.8% of the surveyed American women did not receiving counseling before the abortion, 79.2% were never counseled about alternatives, and 84.0% felt they received inadequate counseling before the abortion. Vincent M. Rue et. al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, 10 Med. Sci. Monitor SR5, SR9 (2004).

Sidewalk counselors' messages about abortion alternatives are especially important because not all

women seeking abortion are doing so volitionally. A recent peer-reviewed study showed that 43% of post-abortive women described their abortion as "accepted but inconsistent with their values and preferences," while 24% indicated their abortion was "unwanted or coerced." Reardon, *The Effects of Abortion Decision Rightness*, *supra*, at 1. Similarly, another study found that 61% of women reported experiencing "high levels of pressure" to abort from "male partners, family members, other persons, financial concerns, and other circumstances." David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women's Emotional Responses and Mental Health*, Cureus, Jan. 31, 2023, at 1, 1. This study found that:

> These pressures [to abort] . . . are strongly associated with more negative emotions about [a woman's] abortion; more disruptions of their daily life, work, or relationships; more frequent . . . intrusive thoughts about their abortions; more frequent feelings of loss, grief, or sadness about their abortion; . . . [and] a perceived decline in their overall mental health that they attribute to their abortions . . . .

Id. at 9.

Sidewalk counselors help address these issues by providing women with hope, counseling, and necessary information about abortion alternatives. However, *Hill* has stifled this important speech, raising an important First Amendment question.

B. *Hill*'s Abortion Distortion Conflicts with *Dobbs*.

Dobbs halted the abortion *ad hoc* nullification machine by overruling *Roe* and *Casey* and returning the abortion issue to the democratic process. *Dobbs*, 142 S. Ct. at 2242–2243. In *Dobbs*, the Supreme Court directed that "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity,'" and "rational-basis review is the appropriate standard for [abortion] challenges." *Id*. at 2283–2284 (citation omitted). Accordingly, in the year following *Dobbs*, federal courts dismissed at least thirty abortion cases due to mootness, since the pro-abortion plaintiffs could no longer contend pro-life laws infringed upon *Roe*'s purported right or posed an undue burden to women and girls seeking abortion. Aden, *supra*, at 31. At the same time, federal courts lifted injunctions against pro-life state laws, including Texas' and Louisiana's admitting privileges laws that the Supreme Court previously held unconstitutional in *Whole Woman's Health* and *June Medical Services*, respectively. *Whole Woman's Health v. Hellerstedt*, No. 1:14-cv-284-LY (W.D. Tex. Feb. 16, 2023), *vacating injunction in* 136 S. Ct. 2292; *June Med. Servs. LLC v. Phillips*, No. 3:14-cv-525-JWD-RLB (M.D. La. Nov. 14, 2022), *vacating injunction in* 140 S. Ct. 2103. Notably, after returning the abortion issue to the democratic process, twenty-three states now have laws protecting women and unborn children from the harms of elective abortion at twelve weeks' gestation or earlier in a pregnancy. Aden, *supra*, at 2–3.

The *Dobbs* Court also confronted the abortion distortion, recognizing that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions." 142 S. Ct. at 2275. The Court highlighted the abortion distortion's effect upon:

> the strict standard for facial constitutional challenges . . . third-party standing doctrine . . . standard *res judicata* principles . . . the ordinary rules on the severability of unconstitutional provisions . . . the rule that statutes should be read where possible to avoid unconstitutionality . . . [and] First Amendment doctrines.

Id. at 2275–2276 (citations omitted). Significantly, the Court referenced *Hill*'s disfigurement of First Amendment jurisprudence, citing both Justice Scalia and Justice Kennedy's *Hill* dissents. *Id*. at 2276 n.65 (citing *Hill*, 530 U.S. at 741–742 (Scalia, J., dissenting); *id*. at 765 (Kennedy, J., dissenting)).

Courts have grappled with *Roe*'s long-standing abortion distortion in the few abortion cases remaining in federal courts. The Eleventh Circuit determined:

> Because we take the Supreme Court at its word, we must treat parties in cases concerning abortion the same as parties in any other context. And to the extent that this Court has distorted legal standards because of abortion, we can no longer engage in those

> abortion distortions in the light of a Supreme Court decision instructing us to cease doing so.

SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1328 (11th Cir. 2022) (citations omitted). Likewise, the District of Arizona recognized that "[t]his Court is bound by the Supreme Court's directives, and so to avoid engaging on remand in the same distortions *Dobbs* identified, the Court must carefully examine whether Plaintiffs may challenge the [abortion provisions] facially and pre-enforcement, rather than as applied in an enforcement action." *Isaacson v. Mayes*, No. 2:21-cv-1417-DLR, slip op. at 4 (D. Ariz. Jan. 19, 2023), *appeal docketed*, No. 23-15234 (9th Cir. Feb. 22, 2023).

Yet, *Hill* has lingered in First Amendment jurisprudence even post-*Dobbs*. Here, the District Court dismissed Petitioner's claim after determining *Hill* is precedential. *Vitagliano v. Cnty. of Westchester*, No. 7:22-cv-9370-PMH, slip op. at 7 (S.D.N.Y. Jan. 3, 2023). The Second Circuit likewise held, "[w]e nevertheless affirm the judgment on the merits because the district court correctly concluded that *Hill* is dispositive of Vitagliano's First Amendment claim." *Vitagliano*, No. 23-30, slip op. at 4. The issue of whether *Hill*'s abortion distortion is precedential is also at issue in other cases currently being litigated. *Turco v. City of Englewood*, No. 22-2647 (3d Cir. argued May 19, 2023); *Coal. for Life St. Louis v. City of Carbondale, Ill.*, No. 23-2367 (7th Cir. appeal docketed July 12, 2023).

Hill remains problematic, especially following *Dobbs*. First, *Roe* and *Casey* caused the abortion

distortion, which resulted in *Hill*'s warping of First Amendment jurisprudence. *Dobbs*, 142 S. Ct. at 2275–2276 & n.65. Although *Dobbs* overturned *Roe* and *Casey* and discredited the abortion distortion, *Hill* has lingered in First Amendment jurisprudence, repressing sidewalk counselors' abilities to speak with women considering abortion. Second, *Dobbs* recognized that abortion jurisprudence has "conflated two very different meanings of the term[privacy]: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference." *Id*. at 2267 (citation omitted). In this tradition, the *Hill* Court misrepresented privacy law, contriving that the "right to be let alone" meant listeners have a right to be insulated from pro-life speech in public forum, which the Court may balance against the First Amendment rights of speakers. *Hill*, 530 U.S. at 715–718. This alteration of privacy doctrines is in tension with *Dobbs*' rebuke of doing such to contrive abortion protections. *See Dobbs*, 142 S. Ct. at 2267–2268. Third, *Roe* skewed the abortion debate for nearly half a century, removing the issue from the democratic process, and protecting a purported fundamental right for a woman to end her unborn child's life. In *Hill*, "[h]aving deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court . . . continue[d] and expand[ed] its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong." *Hill*, 530 U.S. at 741–742 (Scalia, J., dissenting). Even though *Dobbs* returned the abortion issue to the democratic process, *Hill*'s legacy of "disfavored-speech zones" remains distorting First

Amendment jurisprudence and public discourse. In sum, *Hill*'s abortion distortion conflicts with *Dobbs*.

CONCLUSION

"[T]he *ad hoc* nullification machine claim[ed] its latest, greatest, and most surprising victim: The First Amendment." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting). Even though the Supreme Court overruled *Roe*, its corollary distortion of First Amendment jurisprudence in *Hill* has continued to infringe upon sidewalk counselors' fundamental rights. The Court should grant *certiorari* and reconsider *Hill*.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
CAROLYN MCDONNELL
DANIELLE PIMENTEL
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW,
Suite 500
Washington, DC 20036
Steven.Aden@aul.org
Tel: (202) 741-4917

Counsel for Amicus Curiae

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