No. 18-1516

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF 40 DAYS FOR LIFE & SIDEWALK ADVOCATES FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are two non-profit Christian organizations that seek to end abortion through peaceful, public witness. This witness includes sidewalk counseling, vigils, education, dialogue with community members, public prayer, fasting, and offers of support to women facing unplanned pregnancies. Many of these actions and speech fall or would likely fall under the contours of Chicago's Ordinance. *Amici* are interested in ensuring that the free speech rights of sidewalk counselors, as well as vigil participants and sidewalk advocates, are not curtailed.

40 Days for Life is a community-based campaign that takes a determined, peaceful approach to ending abortion through prayer and fasting, community outreach, and peaceful vigil. 40 Days for Life began in Bryan-College Station, Texas in 2004. It has since expanded to over 6,400 total campaigns in over 850 cities in more than 60 countries. Each campaign features an all-day, every-day peaceful prayer vigil in public space outside of a single abortion facility.

Sidewalk Advocates for Life trains, equips, and supports local communities across the United States and the world in "sidewalk advocacy." Sidewalk Advocates for Life offers a peaceful, prayerful, and law-abiding sidewalk advocacy program that teaches

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for Petitioners granted blanket consent to the filing of *amicus* briefs and counsel for Respondents received timely notice and consented to the filing of this brief.

advocates how to reach a woman's heart and fill her needs so that she can confidently choose life. Through sidewalk advocacy, prayer, and community support, Sidewalk Advocates for Life offers life-affirming, low or no cost health care resources to individuals patronizing abortion clinics or abortion-referral centers. Since its founding in April 2014, Sidewalk Advocates for Life has grown to almost 200 locations worldwide and has assisted approximately 6,500 mothers by connecting them to local pregnancy resource centers, as well as helped thousands of other individuals meet their health care needs through life-affirming, community resources.

SUMMARY OF ARGUMENT

In *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a Colorado "bubble zone" law that restricted speech around abortion clinics. The Court recognized a significant governmental interest in protecting listeners from unwelcome speech and that such an interest is content neutral. This rationale has been disavowed by many Justices and this Court's subsequent decisions as inconsistent with the First Amendment. But because *Hill* has never been explicitly overruled, the Seventh Circuit below was bound to uphold a materially similar bubble zone law in Chicago. Without intervention by this Court to reconsider *Hill*, sidewalk counselors and sidewalk counseling organizations, such as Petitioners and *Amici*, will continue to be targeted for their pro-life speech—speech that is welcomed by many listeners—and have their free speech rights suppressed without recourse.

ARGUMENT

I. Chicago's Ordinance targets sidewalk counselors and sidewalk counseling organizations—such as Petitioners and *Amici*—because of their pro-life speech.

Similar to Petitioners, *Amici* are two non-profit organizations that engage in "sidewalk counseling."[2] In *Hill v. Colorado*, this Court defined "sidewalk counseling" broadly as "efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.'" 530 U.S. 703, 708 (2000); accord *McCullen v. Coakley*, 573 U.S. 464, 472 (2014) (explaining that "sidewalk counseling" involves "offering information about alternatives to abortion and help pursuing those options"); *Price v. City of Chi.*, No. 16-8268, 2017 U.S. Dist. LEXIS 519, at *4 (N.D. Ill. Jan. 4, 2017) (describing Petitioners' "sidewalk counseling" as "attempt[s] to engage women approaching the abortion clinics in a one-on-one conversation in a calm, intimate manner in order to offer information about the dangers involved in

[2] *Amicus* Sidewalk Advocates for Life prefers the term "sidewalk advocacy" to refer to "crisis intervention in front of the abortion center." *Vision & Mission*, Sidewalk Advocates for Life, https://sidewalkadvocates.org/about/vision-mission/ (last visited July 3, 2019); see also *id.* ("Sidewalk advocacy" involves "actively encouraging a woman to choose life, empowering her to leave the abortion center, and ministering to all present to bring about a conversion of heart from a culture of death to a culture of life, thereby ending abortion."). But for purposes of consistency, this brief will use the term "sidewalk counseling."

abortion and to offer alternatives to abortion and help in pursuing those alternatives."). Sidewalk counselors seek to peacefully, prayerfully, and lawfully share information about abortion alternatives and provide encouragement and support for women to choose life. This Court has recognized that sidewalk counselors converse "about an important subject." *McCullen*, 573 U.S. at 498.

For sidewalk counselors and *Amici*, the manner in which sidewalk counseling occurs is very important. For instance, in *McCullen v. Coakley*—where this Court unanimously struck down Massachusetts' fixed 35-foot buffer zone law—the Court explained that the petitioners were "not protesters" and sought "not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them," something which they believed could be accomplished "only through personal, caring, consensual conversations." *Id.* at 489.

Likewise, the Seventh Circuit opinion below described Petitioners' sidewalk counseling efforts on the sidewalks and public ways outside Chicago abortion clinics as "peacefully approaching women entering the clinics to give them pro-life literature, discuss the risks of and alternatives to abortion, and offer support if the women were to carry their pregnancies to term." *Price v. City of Chi.*, 915 F.3d 1107, 1109–10 (7th Cir. 2019); see also *Price*, 2017 U.S. Dist. LEXIS 519, at *3 (Petitioners "counsel, pray, display signs, [and] distribute literature . . . on the public sidewalks and rights of way outside abortion clinics and elsewhere on the public ways in

the City of Chicago."). Petitioners explained that their conversations "must take place face to face and in close proximity to permit [them] to convey a gentle and caring manner, maintain eye contact and a normal tone of voice, and protect the privacy of those involved." *Price*, 915 F.3d at 1110. Their "communication is most effective when coming into close contact with women, which allows [them] to hand out literature and avoid shouting." *Price*, 2017 U.S. Dist. LEXIS 519, at *4; cf. *McCullen*, 573 at 488 ("In the context of petition campaigns, we have observed that 'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)).

For *Amicus* 40 Days for Life, sidewalk counselors and vigil participants are to avoid "shouting, confrontation with patients and employees, and the use of graphic abortion images." *FAQ*, 40 Days for Life, https://40daysforlife.com/faq/ (last visited July 3, 2019). They are encouraged to maintain "a positive, prayerful presence outside abortion facilities to show God's love and mercy to those who visit and work at the abortion centers." *Id.* All participants are required to sign a "Statement of Peace" establishing and reiterating peaceful, lawful, and prayerful participation. The application to lead a 40 Days for Life campaign requires leaders to pledge to, among other things: conduct themselves and their campaign in a "peaceful," "positive," and "law-abiding" manner with "respect, professionalism[,] and a compassionate, Christ-like attitude"; "obey the instructions of law enforcement officials, as well as all local, state, and

federal laws"; "avoid engaging in any physical altercations"; and "avoid speaking or acting in a way that is intended to harm, intimidate, frighten, antagonize or insult others." Leaders and participants are encouraged in training (and in follow-up interactions) to obey the law and law enforcement officials, and contact law enforcement to discuss their "rights and responsibilities" on the sidewalk. Participants are also instructed that they cannot: block public rights of way, threaten violence or unlawful activity, disrupt lawful business activity through disorderly or unlawful conduct, stalk, touch others, trespass on private property, and vandalize, deface, or remove the property of others.

Similarly, *Amicus* Sidewalk Advocates for Life "emphasizes the peaceful, prayerful, law-abiding methods of [its] ministry with love as its centerpiece." *Vision & Mission*, Sidewalk Advocates for Life, https://sidewalkadvocates.org/about/vision-mission/ (last visited July 3, 2019). After a "peaceful intervention on the sidewalk," sidewalk counselors are instructed to "offer to meet [the mother] at the local pregnancy center so she can receive ongoing crisis management and be surrounded with a community that will love and support her as she continues her pregnancy and prepares for the birth of her child." *FAQs*, Sidewalk Advocates for Life, https://sidewalkadvocates.org/faqs/ (last visited July 3, 2019). Even after the mother gives birth, many pregnancy centers and other local programs will continue to support the mother. *Id.*

Despite sidewalk counselors' peaceful and lawful approach and interactions, as well as their desire to help and support women undergoing unplanned pregnancies, many cities and states, including Respondent City of Chicago, have sought to target and suppress their "disfavored" speech opposing abortion by creating "bubble zones" or "buffer zones" outside abortion clinics. See, e.g., *McCullen*, 573 U.S. at 504 (Scalia, J., concurring in the judgment) (Massachusetts' "speech-free zones . . . add[ed] nothing to safety and access" and "were obviously designed to achieve . . . the suppression of speech opposing abortion."). As this Court explained in *McCullen*, buffer zones "compromise [sidewalk counselors'] ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling,'" and have "made it substantially more difficult for [them] to distribute literature to arriving patients." *Id.* at 487–88 (majority opinion); see also *id.* at 489 (Petitioners' "conversations have been far less frequent and far less successful since the buffer zones were instituted."). For example, as one petitioner in *McCullen* explained, because of Massachusetts' buffer zone law, she was "often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishe[d] to convey." *Id.* at 487.

At issue here, Chicago's Ordinance creates a bubble zone around abortion clinics where the free speech of sidewalk counselors (and others) is proscribed. Specifically, the Ordinance 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.

Chicago, Ill., Code § 8-4-010(j)(1) (emphasis added). The Ordinance is clearly aimed at impeding, if not outright eliminating, the speech of sidewalk counselors (and others) who oppose abortion and seek to encourage women to choose life. See Brief of Defendants-Appellees at 24–26, *Price*, 915 F.3d 1107 (No. 17-2196) (relying on *Hill*'s recognition of a "governmental interest in protecting the interests of unwilling listeners").

II. Chicago's Ordinance deprives listeners of the opportunity to hear welcomed speech by sidewalk counselors and sidewalk counseling organizations.

Hill makes the audacious claim that "*all* persons entering or leaving health care facilities share the interests served by the statute." *Hill*, 530 U.S. at 731 (emphasis added). While all persons presumably share an interest in facility access, when read in context, the interest the Court is referring to is avoiding unwelcome speech. See *id.* at 730 (responding to the argument that "the statute is too broad because it protects too many people in too many

places, rather than just the patients at the facilities where *confrontational speech* had occurred" (emphasis added)). It is inaccurate to assume that *all* persons approaching or leaving abortion facilities do not want to hear the information offered by sidewalk counselors and sidewalk counseling organizations, including Petitioners and *Amici*. This is evident by both this Courts' recognition of the importance in the abortion context of informed decision making and the potential dire consequences of an uninformed decision, as well as the fact that many women not only listen to the information conveyed by sidewalk counselors, but also act on that information by visiting pregnancy resource centers and/or choosing life for their child.

This Court has consistently recognized the importance of being well informed when making "so grave a choice" to elect an abortion. See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld an informed consent law because it "reduc[ed] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. 833, 882 (1992). Likewise, in *Gonzalez v. Carhart*, the Court recognized that some women "come to regret [their] choice to abort" and will "struggle with grief more anguished," "sorrow more profound," "[s]evere depression," and "loss of esteem" when they learn, only after the abortion, what they once did not know. 550 U.S. at 159. As such, this Court has not only recognized that sidewalk counselors converse "about an important subject," *McCullen*, 573 U.S. at 496, but also that women may suffer if they do

not know information which sidewalk counselors seek to share.

Amici's own experiences belie the assumption that sidewalk counselors' speech is unwelcome by all women. For example, *Amicus* 40 Days for Life reports that over the course of nearly 6,500 campaigns in 855 cities across the world, at least 16,004 lives have been saved from abortion and 190 abortion workers have quit their jobs directly as a result of the witness and counseling of 40 Days for Life. *Results*, 40 Days for Life, https://40daysforlife.com/results/ (last visited July 3, 2019). *Amicus* Sidewalk Advocates for Life reports that, in association with their "peaceful outreach on the sidewalk": 1,762 pregnant women have left the abortion facility to "'think about it[]' armed with life-saving literature and a referral to the local pregnancy resource center," 632 women have "'turned away' from the abortion facility for a free pregnancy test and/or sonogram at the pregnancy resource center," 6,421 pregnant women have chosen life for their child, and 63 abortion workers have chosen to leave the abortion industry. *Statistics*, Sidewalk Advocates for Life, https://sidewalkadvocates.org/stats/ (last visited July 3, 2019). *Amici*'s reports of women welcoming their speech are consistent with other sidewalk counselors' experiences. *See*, e.g., *McCullen*, 573 U.S. at 473 (Petitioners' testimony that "they have collectively persuaded hundreds of women to forgo abortions" was "unrefuted."); *Price*, 2017 U.S. Dist. LEXIS 519, at *4 (Petitioners' "communication is most effective when coming into close contact with women."). Regardless of these results, bubble zone laws, such as Chicago's

Ordinance, not only impinge upon the free speech rights of sidewalk counselors (and others) to approach and converse with people on public ways, but they also deprive women of the opportunity to hear and act upon information offered by sidewalk counselors and sidewalk counseling organizations—information welcomed by many women.

III. This Court has disavowed *Hill*'s recognition of a content-neutral governmental interest in protecting listeners from unwelcome speech.

The Chicago Ordinance is materially the same as the Colorado bubble zone law upheld by the Court in *Hill*. There, the Court recognized that Colorado had a significant state interest in protecting patients from unwelcome speech (as well as preserving clinic access) and found that Colorado's law was content neutral and narrowly tailored to that end. *Hill*, 530 U.S. at 726–30; see *id.* at 714–18 (discussing "the interests of unwilling listeners").

Without explicitly overruling *Hill*, several Justices and subsequent Court decisions have disavowed *Hill*'s recognition of a governmental interest in protecting listeners from unwelcome speech and that such an interest is content neutral under the First Amendment. Beginning with the dissents in *Hill*, Justice Scalia, joined by Justice Thomas, stated that the Court's decision was "in stark contradiction of [] constitutional principles" and "patently incompatible with the guarantees of the First Amendment." *Id.* at 741–42 (Scalia, J, dissenting). Likewise, Justice Kennedy's dissent

called the decision "an unprecedented departure" from First Amendment jurisprudence. *Id.* at 772 (Kennedy, J., dissenting).

Subsequent decisions by this Court have emphasized that speech "at a public place on a matter of public concern . . . is entitled to 'special protection' under the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (upholding free speech rights to protest a veteran's funeral). This includes sidewalk counselors who "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*, 573 U.S. at 496. As Justice Scalia explained: "Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks." *McCullen*, 573 U.S. at 505 (Scalia, J., concurring in the judgment). Thus, "[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." *Snyder*, 562 U.S. at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); see also *id.* ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt.").

Regarding content neutrality, the Court explained in *McCullen* that a law "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.'" 573 U.S. at 481 (alteration in original) (citing *Boos v. Barry*, 485 U.S.

312, 321 (1988)). "[O]ffense or discomfort" do not support "a content-neutral justification to restrict speech." *Id.* In his *McCullen* concurrence, Justice Scalia explained that "[t]he unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks." *Id.* at 505 (Scalia, J., concurring in the judgment). As Judge Sykes explained below: "The bubble-zone law upheld in *Hill* was aimed in substantial part at guarding against the undesirable effects of the regulated speech on listeners. After *McCullen* that's not a content-neutral justification." *Price*, 915 F.3d at 1118. Further, after *McCullen* (and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)), "it's not too strong to say that what *Hill* explicitly rejected is now prevailing law." *Id.*

IV. Only intervention by this Court can protect the free speech rights of sidewalk counselors and sidewalk counseling organizations.

In *McCullen*, Justice Scalia, joined by Justices Kennedy and Thomas, concurring in the judgment, suggested that "the Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*." 573 U.S. at 505 (Scalia, J., concurring in the judgment); see also *id.* ("I necessarily conclude that *Hill should* be overruled." (emphasis added)). But as the Seventh Circuit held below, while the Court has "deeply unsettled *Hill*, it has not overruled the decision," and thus it remains binding precedent—something only this Court can change. *Price*, 915 F.3d at 1119; see also *id.* at 1109 ("*Hill*'s content-neutrality holding is hard to reconcile with both *McCullen* and [*Reed*], and

its narrow-tailoring holding is in tension with *McCullen*. Still, neither *McCullen* nor *Reed* overruled *Hill*, so it remains binding on us."). As such, this Court should grant certiorari to reconsider *Hill* and reject *Hill*'s recognition of a significant governmental interest in protecting listeners from unwelcome speech. Without intervention by this Court, there will remain an irreconcilable conflict between *Hill* and this Court's First Amendment jurisprudence, and the free speech rights of sidewalk counselors and sidewalk counseling organizations will continue to be suppressed without any recourse.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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