No. 24-57

In the Supreme Court of the United States

COALITION LIFE,

Petitioner,

v.

CITY OF CARBONDALE, ILLINOIS,

Respondent.

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

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

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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 (2013)). 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. 14, 2024); *Pro-Life Model Legislation and Guides*, Ams. United for Life, https://aul.org/law-and-policy/ (last visited Aug. 14, 2024). 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-

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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.

The-Landscape-for-Life-After-Dobbs.pdf. AUL has fought against the abortion distortion since the Supreme Court decided *Roe*. Post-*Dobbs*, AUL 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 Seventh Circuit upheld a Carbondale, Illinois ordinance that is materially identical to the statute in *Hill*, and in fact, was based upon *Hill*'s statute. *Coal. Life v. City of Carbondale, Ill.*, No. 23-2367, slip op. at 2 (7th Cir. Mar. 8, 2024). However, *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 2242–43, 2275–76. 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 Writ of Cert. 17–29. *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, in light of *Dobbs*, *Hill* is no longer justified, and its continued existence actively infringes 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. at 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 (citations omitted).

In *Doe v. Bolton*, *Roe*'s companion case, the Court crafted a broad health exception that swallowed whole Roe's professed 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. Consequently, "[t]hat decision was viewed by many as essentially preventing States from restricting post-viability abortions," and permitting abortion throughout pregnancy. *Moyle v. United States*, No. 23-726, slip op. at 23 (U.S. June 27, 2024) (Alito, J., dissenting).

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 observed in dissent in *Roe* and *Doe*, "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.

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." Forsythe, *Abuse of Discretion*, *supra*, at 229–32 (listing cases). The Supreme Court led this effort, taking a scalpel to state law provisions that safeguarded the health and safety of women and their 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 a 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 invalidated a law providing minors a judicial procedure to bypass their parent's consent because the bypass procedure was not broad enough to conform with *Roe*'s purported abortion right. 443 U.S. 622 (1979). In *Colautti v. Franklin*, the Court struck down a 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.*, the Court invalidated provisions requiring: 1) all second and third trimester abortions be performed in hospitals; 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 receives 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 twelve 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 invalidated 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 the doctor's determination that an unborn 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 invalidated a requirement that abortion providers

notify both parents that their minor daughter is seeking an abortion. 497 U.S. 417 (1990).

The decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* only ramped up the abortion *ad hoc* nullification machine. 505 U.S. 833 (1992). The *Casey* Court identified abortion as a substantive due process right, reversed *Roe*'s trimester test, and contrived the undue burden standard. *Id.* at 846, 876–77 (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 strike down 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). In 2016, the Court struck down Texas' law 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 another law requiring abortion facilities to adhere to the minimum health standards for ambulatory surgical

centers. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Likewise, in 2020, the Court struck down Louisiana's admitting privileges law that brought abortion facilities up to the preexisting standards required for physicians at ambulatory surgical centers. *June Medical Services L. L. C. v. Russo,* 140 S. Ct. 2103 (2020).

Lower courts followed the Supreme Court's lead and struck down abortion laws. 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, in adhering to *Roe* for forty-nine years, the Supreme Court embroiled itself 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), and 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). But the *ad hoc* nullification machine "created a public health vacuum that [the

Judiciary could] not fill," Forsythe, *Abuse of Discretion*, *supra*, at 212, interfering with the democratic process, and striking down laws designed to protect the health, safety, and welfare of unborn children and women considering abortion.

II. *ROE*'S *AD HOC* NULLIFICATION MACHINE DISTORTED 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*, *supra*, at 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).

Not only did *Roe*'s right lead 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. 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). Under the abortion distortion, "no legal rule or doctrine [wa]s safe." *Dobbs*, 142 S. Ct. at 2275 (citations omitted).

In applying *Roe*, the Judiciary altered existing doctrines. *See id*. at 2275–76 (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 2167–68 (Alito, J., dissenting); *id.* at 2173–74 (Gorsuch, J., dissenting). Federal courts could enjoin abortion statutes *in toto*, rather than severing the unconstitutional provisions. *Roe*, 410 U.S. at 177–78 (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 2330–31 (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 977–78 (Kennedy, J., dissenting); *id.* at 996–97 (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 United States v. 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 2267–68 (citation omitted).

The abortion distortion affected constitutional rights, including parental rights under the Fourteenth Amendment and freedom of speech under the First Amendment. Even though the Supreme Court recognized that parents have constitutional rights over the care and upbringing of their children, the Court 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.

In 2000, the abortion distortion collided with the First Amendment in *Hill*. In an opinion "antithetical to our entire First Amendment tradition," the *Hill* Court upheld a "scheme of disfavored-speech zones on public streets and sidewalks." *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 . . . ."). *Hill*'s holding joined "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 938–46. 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, including First Amendment doctrine.

III. *Hill v. Colorado* Infringes Upon Sidewalk Counselors' Free Speech Rights and Requires Review Following *Dobbs*.

This case presents an important federal question since *Hill* 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. Even though the Supreme Court overruled *Roe*, and *Hill* was a product of *Roe*'s abortion distortion, *Hill* continues to warp debate over abortion.

A. *Hill* Stifles Sidewalk Counselors' Free Speech Rights to Offer Peaceful Messages About Abortion Alternatives.

While *Hill v. Colorado* remains binding law, lower courts must apply the precedent to hinder sidewalk counselors from offering women their peaceful messages about abortion alternatives. This has a damaging impact upon public discourse over abortion

in public fora. "[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 488–89. *Hill* has stifled pro-life sidewalk counselors' free speech rights.

Sidewalk counselors provide compassionate support and resources to women considering abortion. Coalition Life describes their volunteers as "empowering women to make a positive choice for life . . . [and] provid[ing] loving and effective advocates for life . . . [as] a last line of defense for every mother and child in crisis." *Volunteer*, Coal. Life, https://coalitionlife.com/volunteers/ (last visited Aug. 15, 2024). Sidewalk counselors' messages and resources ensure women have authentic choice if they would like to continue a pregnancy.

Abortion is a sensitive topic. For sidewalk counselors to convey their messages in a sympathetic manner, 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, *Hill* authorized governments to silence sidewalk counselors' otherwise protected speech on public sidewalks in front of abortion facilities.

Not all women approaching abortion facilities will ultimately have an abortion. As Justice Kennedy noted in *Hill*, "[*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. Even after considering abortion, many women decide to continue a pregnancy after

conversing with sidewalk counselors. For example, Coalition Life documents "4,111 [t]urnarounds outside [a]bortion [f]acilities" after these women received sidewalk counseling. *The Coalition Life Mission*, Coal. Life https://coalitionlife.com/ (last visited Aug. 15, 2024); *see also 2023 Impact Report*, Sidewalk Advocates for Life 1, 4 (Feb. 2024), https://sidewalkadvocates.org/wp-content/uploads/2024/02/SAFL-Impact-Report-2023-Digital.pdf (detailing, over a nine-year period, that women outside abortion clinics chose to continue 21,796 pregnancies). Furthermore, 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 receive counseling before their 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). However, sidewalk counselors ensure women know their options, which include government assistance programs, charitable parenting and financial support, adoption, and private community-developed resources.

Sidewalk counselors' messages are critical because some women seeking abortions are not 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. *Hill* has stifled this speech, raising an important First Amendment question.

B. *Hill* Skews the Abortion Debate Against Pro-Life Speech Even After *Dobbs* Returned the Abortion Issue to the Democratic Process.

By overruling *Roe* and *Casey*, *Dobbs* halted the *ad hoc* nullification machine and reset the jurisprudential baseline for the abortion issue. Instead of using *Casey*'s undue burden standard, the *Dobbs* 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." *Dobbs*, 142 S. Ct. at 2283–84

(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.

Dobbs likewise returned the abortion issue to the democratic process. *Dobbs*, 142 S. Ct. at 2243. "'The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.'" *Id*. (citing *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)).

Democracy has been at work after *Dobbs*. Congress has considered abortion-related legislation. *See*, *e.g.*, Born-Alive Abortion Survivors Protection Act, H.R. 26, 118th Cong. (2023). Federal administrative agencies have made abortion-related rules, and federal courts have assessed their legality.

See, *e.g.*, *Moyle*, No. 23-726. State legislatures have passed legislation to enable or prohibit the practice, and state courts have opined on abortion laws. *See*, *e.g.*, *Planned Parenthood Ariz., Inc. v. Mayes*, 545 P.3d 892 (Ariz. 2024); Ariz. Rev. Stat. § 13-3603 (repealed 2024). State ballot initiatives have empowered voters to directly decide the issue. *See*, *e.g.*, Ohio Const. art. I, § 22.

Yet disenfranchisement remains for sidewalk counselors seeking to exercise their freedom of speech on public sidewalks outside abortion facilities. *Hill* emerged from *Roe*'s abortion distortion, which inhibited 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. Accordingly, 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 741–42 (Scalia, J., dissenting). Even though the underlying justification for *Hill*—*i.e.*, *Roe*—is gone, *Hill*'s legacy of "disfavored-speech zones" remains, distorting First Amendment jurisprudence and public discourse. *See* Pet. for Writ of Cert. at 30–31 & n.2 (listing *Hill* copycat laws).

The *Dobbs* decision 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 2275–76 (citations omitted). Significantly, the Court issued an invitation for a future case to reexamine *Hill*, referencing *Hill*'s distortion of First Amendment jurisprudence. *Id*. at 2276 n.65 (citing *Hill*, 530 U.S. at 741–42 (Scalia, J., dissenting); *id*. at 765 (Kennedy, J., dissenting)). That case is now before this Court, and squarely presents the issue of whether *Hill* should be overruled as a discredited relic of *Roe*'s abortion distortion.

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 skew the

abortion debate against pro-life sidewalk counselors' free speech. The Court should grant *certiorari* and reconsider *Hill*.

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