No. 24-57

In the
Supreme Court of the United States

COALITION LIFE,
Petitioner,

v.

CITY OF CARBONDALE, ILLINOIS,
Respondent.

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

BRIEF OF *AMICI CURIAE* ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, WISCONSIN FAMILY ACTION, ILLINOIS FAMILY INSTITUTE, THE FAMILY FOUNDATION, CONCERNED WOMEN FOR AMERICA, PACIFIC JUSTICE INSTITUTE, AND NATIONAL LEGAL FOUNDATION

in Support of Petitioner

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INTERESTS OF *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with approximately 13 million members in more than 45,000 churches and congregations. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. The ERLC affirms that women and their preborn children are made in the image of God and must be protected from harm. Thus, the ERLC has an interest in ensuring that the government protects the lives and wellbeing of women and preborn children.

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues, in particular its long-sustained efforts to protect prenatal life and promote religious freedom.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have been given timely notice of the filing of this brief.

based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. Core values of IFI include the protection of prenatal life and upholding religious freedom and conscience rights for all individuals and organizations.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life, from conception to natural death, including the life and wellbeing of every woman in America.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under § 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of the First Amendment. Such includes civil litigation and criminal defense to vindicate the rights of free speech in public fora. As such, PJI has a strong interest in the development of the law in this area.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Illinois, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and individuals, especially with respect to contentious issues like abortion.

SUMMARY OF ARGUMENT

It is long past time that the aberration that is *Hill v. Colorado* be put to rest. But, as this case and others demonstrate, *Hill* is still alive and kicking. For those it affects, its kick is not feeble, but powerful and menacing.

Hill well deserves interment. The ordinance challenged here, based on that upheld in *Hill*, is a content-based regulation at odds with this Court's more recent precedents.

ARGUMENT

I. *Hill* Is Still Having Pernicious Effects

Your *Amici* will not rehearse the list of jurisdictions still enforcing a version of the buffer-zone ordinance upheld in *Hill*. The ordinance upheld here on the basis of *Hill* is just the latest to reach this Court, but there are many others.

Noting the example of just one federal Court of Appeals, the Third Circuit has in recent years ruled on copy-cat ordinances of Pittsburgh and Harrisburg, Pennsylvania. In the Pittsburgh case, the district court ruled that this Court in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), did not "expressly or implicitly" overrule *Hill* and, on the facts, found *Reed* "entirely distinguishable." *Bruni v. Pittsburgh*, 283 F. Supp. 3d 357, 367 (W.D. Pa. 2017). On appeal, the Third Circuit saved the ordinance, but only by applying the doctrine of constitutional avoidance to construe it *not* to outlaw content-related speech that it was obviously designed to reach. *See Bruni v. Pittsburgh,* 941 F.3d 73, 85-98 (3d Cir. 2019). The Third Circuit then applied the same restrictions to the Harrisburg ordinance to save it. *See Reilly v. Harrisburg,* 790 F. App'x 468, 478 (3d Cir. 2019).

As anyone who reads the newspapers or news websites knows, and as the actions of the county in this case show, the impact of *Dobbs v. Jackson Women's Health Organization*, 595 U.S. 215 (2022), having returned the regulation of abortion to state and local jurisdictions has been to ramp up legislation and attempted legislation around the country. Buffer-zone ordinances have been a favorite tool of

pro-abortion legislators to try to prevent pro-life individuals from discussing the advisability of elective abortions with those they most want to reach at a public place where they will most likely find them. Unless *Hill* is overruled, the use of these illicit ordinances will only increase.

II. Buffer-zone Ordinances Are Designed to Help Abortion Practitioners, Not Pro-Life Pregnancy Centers

While the challenged ordinance's scope would, on its face, encompass pro-life pregnancy centers as "healthcare facilit[ies]" (App.-9), your *Amici* are under no illusions about why such ordinances are passed and against whom they are targeted, and neither should this Court be. To your *Amici*'s knowledge, they have never been enforced against pro-abortion individuals congregating around pro-life pregnancy centers. Instead, pro-life pregnancy centers have been subjected to threats of suits for "deceptive" practices and forced to advertise the very abortion services they are chartered to help prevent. *See, e.g., NIFLA v. Bacerra*, 585 U.S. 755 (2018).

The content-specific intent of buffer-zone ordinances to advance abortion and to inhibit pro-life communications is amply illustrated in the case law and the news media. Such intent invalidates them. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993) (holding that ordinances passed to suppress free exercise are subject to strict scrutiny). But even were the buffer-zone ordinances designed to protect pro-life pregnancy centers and their clients, your *Amici* would object to them, as they are blatantly unconstitutional.

III. This Court Should Make *Reed*'s Implicit Overruling of *Hill* Explicit

This Court in *Hill* tested the buffer zone regulation on its face against the following standard articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989): "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719. The Ninth Circuit in *Reed*, relying on exactly this language in *Hill*, found a local ordinance "content-neutral" on its face because the legislators adopted it without showing any "disagreement with the message" of the regulated speech. 707 F.3d 1057, 1071-72 (9th Cir. 2013).

This Court reversed, ruling that the Ninth Circuit (and impliedly the *Hill* majority) had misused the *Ward* test in a facial challenge analysis. While discriminatory intent can invalidate a speech regulation in some circumstances, the *Reed* Court reiterated at length that the lack of such an intent cannot save an ordinance if it makes distinctions based on the message or its associated function or purpose:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws

> distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulation speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
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> . . . A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). . . . Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

576 U.S. at 163-66 (citations omitted). The *Reed* Court then elaborated by relying on the two *dissents* in *Hill*:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a

government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U.S., at 787, and n. 2. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "justified without reference to the content of the speech." *Id.*, at 791. But *Ward*'s framework "applies only if a statute is content neutral." *Hill*, 530 U.S., at 766 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*, at 765.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. ""The vice of content-based legislation

> . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill*, *supra*, at 743 (SCALIA, J., dissenting).

Id. at 166-67. Finally, the *Reed* Court required a heightened concern for suppression of speech by localities regulating its function or purpose:

> [I]t is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980).
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> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example a law banning the use of sound trucks for political speech—and only political speech —would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network*, *supra*, at 428.
> . . . .
>
> In any case, the fact that a distinction is speaker based does not, as the Court

> of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner* [*Broadcasting Sys. Inc. v. FCC*], 512 U.S. [622], at 658 [(1994)].

Id. at 169-70.

The *Reed* Court's correction of the expansive reading of *Hill* and *Ward* in facial challenges was foreshadowed in *McCullen v. Coakley,* 573 U.S. 464 (2014), a buffer-zone case decided after *Hill.* This Court took pains to explain that legislation "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 479 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). And it also emphasized in *McCullen* that regulation cannot be justified by concern about the reaction of those who hear the speech, which was a major concern of the *Hill* majority. *Id.* at 481. As just set out, this Court then in *Reed* went the next step and repudiated the Ninth Circuit's reliance in that case on *Hill*'s treatment of content-neutrality and embraced the reasoning of the *Hill* dissenters.

CONCLUSION

This Court demonstrated in *Reed* that *Hill* was a distortion of the First Amendment, a distortion that continues to have real-world consequences. The petition should be granted to overrule *Hill*.

Respectfully submitted,
this 19th day of August 2024,

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