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 KENTUCKY, ARKANSAS, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The fact pattern here is a familiar one—to the amici States and to the Court. It is about a city's attempt to justify a buffer-zone law prohibiting speech on public sidewalks outside abortion clinics. And it is about a challenge to that law by sidewalk counselors. Members of Coalition Life want to counsel women outside the clinics through peaceful, quiet, and compassionate conversations. But they cannot do so within the buffer zones.

The amici States know that situation all too well. Cities or counties within some of their borders have passed similar laws. For example, Kentucky's largest city passed such a law in 2021. And its citizens' free-speech rights were curtailed for almost two years before the Sixth Circuit ordered entry of a preliminary injunction. *See Sisters for Life, Inc. v. Louisville-Jefferson County*, 56 F.4th 400, 409 (6th Cir. 2022). Granting review here would affect that law in the Bluegrass State and others like it.

So the amici States have a significant interest in the Court granting review to protect their citizens' free-speech rights. Buffer-zone laws like that here affect those rights when they are needed most. They cut off speech on a hotly contested moral and political issue. And they do so at the last place where the speech could be effective—outside an abortion clinic before a life-altering decision is made.

Likewise, the Court knows this situation all too well. Its decisions in *McCullen v. Coakley*, 573 U.S.

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[1] The amici States timely notified the parties' counsel of their intent to file this brief under Rule 37.2.

464 (2014), and *Hill v. Colorado*, 530 U.S. 703 (2000), considered buffer-zone laws. And no doubt, the Court is aware of the conflict between *Hill* and *McCullen*. Indeed, the Court has even noted how *Hill* "distorted" our free-speech law. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 (2022). And the Court has refused to resuscitate *Hill*, making it all but a dead letter in this Court's cases. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022).

Yet *Hill* continues to distort jurisprudence in the lower courts and undermine free-speech rights. Those courts are bound by the decision when directly on point. And even when not, they turn to *Hill* to uphold a buffer-zone law. In fact, that happened in *Sisters for Life* before the Sixth Circuit intervened. And yet that danger is not past in Kentucky. The district court there has yet to resolve the merits.

So the amici States have an interest in ensuring consistency of the rule of law in their circuits on this critical issue. They have an interest in the Court overruling *Hill* and in making sure that courts correctly apply *McCullen*. The amici States urge the Court to do just that: fix our free-speech jurisprudence as applied outside abortion clinics. Allow, where it matters most, the "uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen*, 573 U.S. at 476 (citation omitted). Only this Court can do so. And the time is long past due.

SUMMARY OF THE ARGUMENT

The petitions asking the Court to overrule *Hill* are not going to stop. Look at just the past year. This is the third case asking the Court to grant review to decide whether to overrule *Hill*. And it's the fourth in as many years. In two of those cases, the Court denied review. *See Bruni v. City of Pittsburgh*, 141 S. Ct. 578 (2021) (mem.); *Vitagliano v. County of Westchester*, 144 S. Ct. 486 (2023) (mem.). In one, the jury's still out. *See Turco v. City of Englewood*, No. 23-1189 (U.S. reply filed Aug. 1, 2024). So put *Turco* to the side. Why grant review here when the Court denied it in *Bruni* and *Vitagliano*?

The difference with *Bruni* is easy. That case had a potential vehicle problem not present here.[2] The difference with *Vitagliano* is harder—at least at first glance. There, the law was modeled on that in *Hill* and upheld in the lower courts only because of *Hill*. The same goes for here. And there, the government repealed its buffer-zone law in response to the petition for certiorari. The same goes for here. So assuming the repeal affected the Court's decision in *Vitagliano*, on the surface it might seem that the same result should follow here.

But that isn't right. If the Court countenances the repeal-the-law strategy again, then every government has a blueprint to follow if it wants. It can enact a law

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[2] There, the lower court had sua sponte construed the statute not to apply to sidewalk counselors. *Bruni v. City of Pittsburgh*, 941 F.3d 73, 86 (3d Cir. 2019). So the case involved "unclear, preliminary questions about the proper interpretation of state law." 141 S. Ct. at 578 (Thomas, J., statement respecting denial of cert.). That is not true here.

modeled on *Hill*, ensure a year, two, or more of effectiveness while a legal challenge works through the lower courts, and then repeal it when the case gets to this Court. And all the while *Hill* remains on the books.

At bottom, the city's conduct only adds to the many reasons favoring a grant. This case offers a perfect chance to finally overrule *Hill*. And it is critical that the Court be willing to grant review to do so. The Court's rule that lower courts must follow a suspect decision if directly on point presumes this Court's willingness to correct wayward precedent. Plus, governments and courts continue to rely on *Hill* to justify buffer-zone laws that infringe on free-speech rights throughout the nation.

ARGUMENT

The Court should grant review to overrule *Hill*. The city repealing its buffer-zone law only adds to the many reasons supporting doing so. But before jumping in, let's briefly set the scene of *Hill* versus *McCullen*.

The Court needs little reminder that in *Hill* it upheld a floating buffer-zone law. The law prohibited anyone within 100 feet of an abortion clinic from approaching within eight feet of another to engage in education or counseling without consent. *Hill*, 530 U.S. at 707–08. The Court held that law content neutral, relying in part on the purported government interest of protecting unwilling listeners in a public forum. *Id.* at 716–18, 721. And it held that the law was a valid time-place-or-manner restriction. *Id.* at 729–31. For that, its narrow-tailoring analysis endorsed the government's use of broad prophylactic measures. *Id.* at

729. And it required no showing that other measures substantially burdening less speech were insufficient.

McCullen held much the opposite. There, the Court considered a 35-foot fixed buffer zone outside of abortion clinics categorically excluding most individuals from entering and remaining. *McCullen*, 573 U.S. at 469. The Court held the law content neutral yet was clear that would not be true if it were concerned with listeners' reactions to speech. *Id.* at 481. Still, the Court determined that the law failed narrow tailoring for time-place-or-manner restrictions. In doing so, the Court explained that such a restriction cannot burden substantially more speech than necessary. *Id.* at 486. It did not matter that a broad prophylactic approach was easier to enforce. The government had to show that alternative measures burdening substantially less speech would not achieve its goals. *Id.* at 495. It had to show why violator-specific measures were insufficient.

No doubt, the two cases conflict. More on that shortly. For now, turn to the City's attempt to evade review before then considering the other reasons for granting review.

I. The city repealing its law favors review.

Consider the elephant in the room: the city repealed its buffer-zone law two days before Coalition Life filed its petition for certiorari. It did the exact same thing as the county in *Vitagliano*. There, the county successfully evaded this Court's review. Here, the opposite should follow.

1. To begin with, the city repealing its law does not moot the case. In its complaint, Coalition Life expressly sought nominal damages. And putting all else aside, that makes the case live. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). Coalition Life can at least recover nominal damages for the past injury of its sidewalk counselors being unable to speak inside the buffer zones when the law was in effect.

To be sure, the practical effect of granting review is different now that the city's law is off the books. On the one hand, a ruling for Coalition Life would seemingly just hold a repealed law unconstitutional. But on the other, it would vindicate Coalition Life and its sidewalk counselors' constitutional rights. It would decide an important (and live) issue. And it would stop other governments from mimicking what happened here and in *Vitagliano*. Consider just a few points about each.

2. Assume that the buffer-zone law was unconstitutional. That means the entire time the law was in effect and limiting Coalition Life and its sidewalk counselors' constitutional rights, it was infringing on those rights. Of course, the Court cannot undo that. The injury is irreparable. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citation omitted)).

But what the Court can do is vindicate those rights. It can still rule on the constitutionality of the law and allow redress at least by nominal damages. Indeed, that is the whole point of nominal damages: to recognize that a wrong has been done even if the loss is hard

to quantify. And making that ruling "vindicate[s] important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion). Doing so is crucial—both for a plaintiff and for others. At a minimum, it gives the plaintiff solace in the formal recognition that he was wronged. But just as important, it also gives others the benefit of deterring like constitutional violations in the future. *See id.* For an issue such as this one, that matters a great deal.

3. Speaking of which, it almost goes without saying how important the issue is. It is about our citizens' free-speech rights on a public sidewalk. Of course, that's a traditional public forum that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *McCullen*, 573 U.S. at 476 (citation omitted).

That is exactly what Coalition Life and its sidewalk counselors want to do. They want to discuss a public question—a morally and politically charged one—with their fellow citizens. Indeed, the counselors want to do so in the way they think most effective and at the last place their speech could be effective. And the likely consequence of their inability to do so is what they and "[m]illions of Americans believe . . . is akin to causing the death of an innocent child." *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). For Coalition Life and its sidewalk counselors, it doesn't get more important than that. And the same should go for the rest of us—no matter our respective views on abortion. Our commitment to free speech on such topics is a big part of

what makes our nation what it is. A law that cuts off such speech deserves this Court's consideration.

Besides, this case is not just about Coalition Life and its members' free-speech rights. No doubt, granting review here would affect the many similar cases and accompanying laws throughout our nation. That means this case affects all those whose free-speech rights are infringed by those laws. It is about the rights of Angela Minter, Ed Harpring, Mary Kenney, and their organizations in Kentucky. *See Sisters for Life*, 56 F.4th at 402. And it is about all those like them.

4. To be sure, all that was true in *Vitagliano* too. The difference here is that this is the second time a government has repealed a law in direct response to a petition for certiorari seeking to have the Court overrule *Hill*. And that's a big difference.

If the Court denies review again, then—no matter its intent—the Court cannot help but signal to other governments that they can evade review of a *Hill*-like law just by a repeal after a year or two. *Vitagliano* will no longer be a potential one-off of a government successfully doing so. There would be *Vitagliano* and then this case implicitly confirming that the tactic works. There would be a pattern of successfully evading this Court's review. Think of the possible consequences.

First, from then on, any time a challenge to a buffer-zone law gets to this Court, the government will likely repeal the law. To be sure, that means the law will no longer infringe on sidewalk counselors' rights. But the damage will already be done. For however long it takes a legal challenge to work its way through the lower courts, sidewalk counselors will be robbed of

their ability to speak in the way they think most effective on an issue of public import.

Second, more governments will be emboldened to enact copycat *Hill* laws unconstitutionally limiting speech. Why not when there is little danger of the Court overruling *Hill*? Of course, that means even more infringement on citizens' rights and likely even more loss of what "[m]illions of Americans believe" are "innocent child[ren]." *Stenberg*, 530 U.S. at 920.

And third, governments could try the same tactic when it comes to other laws that they do not want this Court to review. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 338 (2020) (per curiam). In other words, doubling down on letting a government evade review of a copycat *Hill* law by simply repealing it will encourage governments to try the same thing with other laws. And the result will be more attempted manipulation of the Court's docket and potentially more constitutional violations left unaddressed. That's good for no one.

In short, the city repealing its law weighs in favor of granting review, not against it.

II. *Hill* remaining on the books favors review.

1. Now turn to *Hill*. No doubt about it, *Hill* was wrong. The Court confirmed as much in *Dobbs*. Citing just *Hill*, it noted how its abortion cases "have distorted First Amendment doctrines." 597 U.S. at 287. Of course, if *Hill* was a distortion, it was also wrong. Some have tried to dismiss *Dobbs* on this point as dicta. But the statement was necessary to the Court's stare decisis holding. It supported that *Roe* and *Casey* had disrupted other areas of the law. *Dobbs*, 597 U.S.

at 286–87. So even though *Dobbs* did not overrule *Hill*, it authoritatively made clear that the decision was wrong.

Still, briefly consider some of *Hill*'s basic flaws. First, *Hill* wrongly held that the law at issue was content neutral. Recall, it prohibited anyone within 100 feet of an abortion clinic from approaching within eight feet of another to engage in education or counseling without consent. *Hill*, 530 U.S. at 707. Even though the law required an examination of "the content of a communication," the Court held that did not make it content-based. *Id.* at 721. That holding cannot square with *McCullen* and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). *See, e.g.*, *Bruni*, 141 S. Ct. at 578 (Thomas, J., statement respecting denial of cert.); *Price v. City of Chicago*, 915 F.3d 1107, 1117–18 (7th Cir. 2019) (joined by Barrett, J.). Nor can it find support in *City of Austin*.

That latter point is worth drawing out. In *City of Austin*, the Court expressly disclaimed resuscitating *Hill*'s content-neutrality holding—for good reason. *City of Austin*, 596 U.S. at 76. There, the Court held that a sign code distinguishing between on- and off-premises signs was not content-based. *Id.* Even though the distinction required reading the sign to know whether it was allowed, that did not make it based on content. The distinction was "agnostic as to content," requiring "an examination of speech only in service of drawing neutral, location-based lines." *Id.* at 69. In other words, the substance of the message was irrelevant. *Id.* at 71.

The same was not true of the law in *Hill*. To be sure, the Court there held that the law was not content-based even though it required hearing the oral communication to discern whether it was for the purpose of counseling or education. *Hill*, 530 U.S. at 721. But that is nothing like "the neutral, location-based lines" in *City of Austin*. 596 U.S. at 69. Whether a sign is located on or off premise is not about content. Whether a statement provides counseling or education very much is. Put differently, the law in *Hill* was anything but "agnostic as to content." *Id.* It cared precisely about the content of the speech: whether the content provided counseling or education. The bottom line is *Hill* can find no support in *City of Austin*.

Second, *Hill* erred by relying on the purported government interest of protecting unwilling listeners in a public forum to support its holding that the law was content neutral. 530 U.S. at 716–18. The Court in *McCullen* expressly noted that a statute would not be content neutral if it were concerned with listeners' reactions to speech or making them feel uncomfortable. 573 U.S. at 481. And that must be right. The content of the speech is what would cause offense, not the mere speech itself.

Third, *Hill*'s narrow-tailoring analysis for a time-place-or-manner restriction also directly conflicts with *McCullen*. The latter rejected the government's use of broad prophylactic measures that were easier to enforce than violator-specific measures; the former endorses them. *Compare McCullen*, 573 U.S. at 486, 492, *with Hill*, 530 U.S. at 729. And *Hill* did not require any showing that other measures substantially burdening less speech were insufficient—the central holding of *McCullen*. *See McCullen*, 573 U.S. at 490–95.

2. In short, *Hill* was wrong—and badly so. And overruling it is necessary. Consider three reasons for that. First, even though it conflicts with *McCullen*, *Reed*, and other cases, *Hill* remains binding on the lower courts when directly on point. The Court has made clear that if one of its precedents "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls," and leave to this Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). Indeed, it matters not if this Court has long stopped relying on a case. Lower courts remain "bound by even [its] crumbling precedents." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2269 (2024). That's why the Seventh Circuit below upheld the law—just like it did in *Price*. 915 F.3d at 1119. And it's why the Second Circuit in *Vitagliano* did the same. *Vitagliano v. County of Westchester*, 71 F.4th 130, 141 (2d Cir. 2023).

Make no mistake, the rule in *Agostini* is a good one. This Court is the final arbiter of federal law. And so it is not for the lower courts to ignore its cases unless overruled. But a necessary component of that rule is that this Court be willing to grant review to overrule a case that later ones have called into question. Otherwise, the suspect case remains on the books and binding on the lower courts. They have no choice but to follow likely bad precedent—even if the consequences include the loss of First Amendment freedoms. In other words, the rule in *Agostini* makes sense only if this Court is willing to ultimately grant review to resolve a "glaring tension" in its precedents. *Bruni*,

141 S. Ct. at 578 (Thomas, J., statement respecting denial of cert.). If not, then it is individuals and their rights that lose out.

A prime example of the Court rightly doing just that is *Loper Bright*. There, the Court granted review only to decide "whether *Chevron* should be overruled or clarified." *Loper Bright*, 144 S. Ct. at 2257. The Court itself had not relied on *Chevron* since 2016, and many later cases had called it into question. *Id.* at 2269. Yet *Chevron* was still working mischief in the lower courts. So the Court recognized the need to step in. *Hill* is no different. The Court has not followed or relied on *Hill* since the day it was decided, and later cases have repeatedly called it into question. Yet lower courts remain bound by that long since "crumbl[ed] precedent[ ]" still on the books. *Id.*

Second, a suspect case remaining on the books, even when not directly on point, can lead courts astray. *Turco* is a good example of that. *See, e.g.*, *Turco v. City of Englewood*, No. 22-2647, 2024 WL 361315, at *2–4 (3d Cir. Jan. 31, 2024). But there are plenty more. For example, take Kentucky's experience in *Sisters for Life.*

That case involved a Louisville law creating a 10-foot buffer zone on public sidewalks in front of healthcare facilities. *Sisters for Life*, 56 F.4th at 402. Like Coalition Life's members here, the plaintiffs there were sidewalk counselors seeking to have "quiet, compassionate, non-threatening one-on-one" conversations with women entering an abortion clinic. *Id.* They had no intention of blocking access or harming anyone. But when the sidewalk counselors challenged

the law, the district court denied a preliminary injunction based on *Hill*—even though *McCullen* controlled. *Sisters for Life, Inc. v. Louisville-Jefferson Cnty. Metro Gov't*, Nos. 3:21-cv-367-RGJ, 691-RGJ, 2022 WL 586785, at *6–9, *14 (W.D. Ky. Feb. 25, 2022).

Nearly two years after Louisville enacted the law, the Sixth Circuit, with Chief Judge Sutton writing, ordered the district court to enter a preliminary injunction. It concluded that the law likely failed narrow tailoring just like that in *McCullen*. *Sisters for Life*, 56 F.4th at 404–07. But the Sixth Circuit could not undo the nearly two-year-long loss of the sidewalk counselors' rights. The counselors were robbed of their ability to speak in the way they thought most effective on a key matter of public concern. And they cannot get that loss back. *See Roman Cath. Diocese*, 592 U.S. at 19.

Plus, the counselors' ability to minister successfully to women dropped significantly. For example, one group of counselors had previously helped change the minds of three to six women per month who were dropped off in front of the clinic to get an abortion. Minter Dep. at 54–55, *Sisters for Life*, No. 3:21-cv-367-RGJ, 2022 WL 586785. But while the buffer zone was enforced, that number dropped to *zero*. *Id.* at 55. On top of all that, who knows what will happen now that the case is back in district court for a merits decision. Perhaps after hearing more proof, the Kentucky district court doubles down on narrow tailoring and again upholds the buffer-zone law. Then the law could again infringe on the sidewalk counselors' rights.

Third, there are plenty more situations in which individuals are losing their free-speech rights based

on buffer-zone laws relying on *Hill*. Coalition Life's petition goes through them in detail. *See* Pet. 30–31. But consider again two examples just to see how closely the laws are modeled on that in *Hill*.

In Montana, a law prohibits "approaching within 8 feet of a person" to "protest, counsel, or educate about a health issue" if the person "does not consent" and "is within 36 feet of" a healthcare facility. Mont. Code § 45-8-110(1). That is just like the law in *Hill* except with a smaller radius.

And in Charleston, West Virginia, there is a similar law. It prohibits anyone from approaching within eight feet of another without consent to engage in "oral protest, education, or counseling" within 100 feet of a healthcare facility. Charleston, W. Va. Code § 78-235(c). No doubt, the law is based on *Hill*: the "ordinance was carefully written drawing from language that has previously been upheld in courts." Shauna Johnson, *Charleston council considers language regarding access to health care facilities*, MetroNews (May 29, 2019), https://perma.cc/YY7T-226B.

All in all, *Hill* continues to strip individuals of their free-speech rights throughout the nation. It has done so for almost 25 years. And it will continue to do so until the Court steps in and expressly overrules it. This case is that chance.

* * *

This case warrants review. The city's attempt to evade such review by repealing its law only adds to the many reasons why the Court should step in. The case offers a golden opportunity to finally overrule *Hill*.

That could not be more needed. *Hill* was wrong. It infringes on First Amendment freedoms and leads courts astray when directly on point and when not. And only this Court can fix that. Plus, the case presents an issue that could not be more important. It is about free speech on a public sidewalk on a matter of intense public concern—speech about abortion outside of a place performing abortions. If such speech is silenced, gone is any chance for truth to ultimately prevail in the "uninhibited marketplace of ideas," *McCullen*, 573 U.S. at 476 (citation omitted), right where it matters most.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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