No. 12-1168

In The
Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003).

This case has grave importance for the free speech jurisprudence governing leafletting and other classic First Amendment activities, and is therefore of special interest to the ACLJ.

SUMMARY OF ARGUMENT

The lower court relied heavily upon this Court's majority opinion in *Hill v. Colorado*, 530 U.S. 703 (2000). The *Hill* decision, however, is profoundly flawed. *Hill* deeply unsettled the constitutional law of free speech. In several crucial respects, *Hill* rejected – without overruling – well-established norms of First Amendment jurisprudence. In particular, the *Hill* Court embraced (1) a presumption of an unwilling audience for speech, (2) the treatment of a content-based restriction as content-neutral, (3) strait-jacket

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[1]The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

limitations on leafletting on public sidewalks, and (4) prophylactic restrictions on speech. None of these holdings can be reconciled with prior precedent. Hence, *Hill* created an internal conflict in the constitutional law governing free speech activities.

This Court should repudiate *Hill*.

ARGUMENT

The majority opinion in this Court's divided ruling in *Hill v. Colorado*, 530 U.S. 703 (2000), made bad law and should be disavowed.

Hill upheld a state statute that created the crime of approaching-with-intent-to-speak-or-leaflet. *Id.* at 707. For the *Hill* majority to uphold such a blatant violation of the First Amendment right to free speech, the *Hill* Court had to trample over numerous well-settled free speech doctrines.

Hill's profound distortion of First Amendment law is at issue here, where the First Circuit in this case has relied repeatedly upon *Hill,* both in its decision below, *see McCullen v. Coakley*, 708 F.3d 1, 4, 7, 8 n.4, 10, 12, 13, 14 (1st Cir. 2013), and in its previous ruling on a prior appeal in the case, *McCullen v. Coakley*, 571 F.3d 167, 172-73, 180-83 (1st Cir. 2009).

The First Circuit said that *Hill* "shed new light on the legal landscape." 571 F.3d at 173. That is one way of putting it. Another would be to say that *Hill* "contradict[ed] more than a half century of well-established First Amendment principles." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting). For the reasons set forth below, among others, this Court should repudiate *Hill*.

THE DECISION IN *HILL v. COLORADO* IS IRRECONCILABLE WITH PREEXISTING CONSTITUTIONAL NORMS GOVERNING FREE SPEECH AND THUS HAS PROFOUNDLY DESTABILIZED THE LAW.

The simultaneous existence of two lines of contradictory precedent is profoundly destructive of the rule of law. Such internal inconsistency enables courts to decide arbitrarily which line of precedent to invoke; hence, parties cannot predictably gauge the law governing their activities.

When the uncertainty of dueling precedents arises in the context of free speech, the consequence is especially bad: the uncertainty of legal sanctions deters speech by all but the heroic, the foolhardy, and the judgment proof.

This Court's decision in *Hill* has had precisely this destabilizing effect on the rule of law. Because *Hill* is irreconcilable with numerous prior decisions of this Court, yet did not purport to overrule such decisions, the result is an unresolved contradiction, the simultaneous existence of diametrically opposed precedents from which each lower court can pick and choose as it sees fit. This is *not* the rule of law.

Petitioners have explained how the Massachusetts buffer statute at issue here is unconstitutional even under *Hill*. Amicus wishes to highlight the perniciousness of *Hill* itself, urging this Court to renounce *Hill* before it further corrodes the fabric of the law.

Hill is in many respects "antithetical to our entire First Amendment tradition," 530 U.S. at 768 (Kennedy, J., dissenting). *See also id*. at 762 (Scalia,

J., dissenting) ("an unabashed repudiation of our First Amendment doctrine"). While not providing an exhaustive list, amicus wishes to highlight some of the ways the *Hill* decision creates contradictory points in First Amendment jurisprudence.

1. Audience presumed unwilling

The *Hill* Court presumed as a matter of law that anyone approaching an abortion business is an "unwilling recipient" of any message a pro-life sidewalk counselor has to offer. 530 U.S. at 716-18, 723, 727, 734.[2] This is both inaccurate as a matter of fact (some would-be abortion patients do accept leaflets or conversation from sidewalk counselors, and some ultimately choose not to abort, *see*, *e.g.*, Brief for Petitioners at 9, 11, 15) and offensive to the many "thoughtful and law-abiding sidewalk counselors like petitioners," 530 U.S. at 727. More importantly, this proposition in *Hill* is flatly inconsistent with this Court's First Amendment case law. As long ago as *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court has held invalid restrictions on speech that deem such speech categorically unwelcome. As this Court noted in *Martin*, truly unwilling listeners can properly be protected by enforcing the "previously expressed

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[2]More specifically, the Court equated the situation of someone who has *declined* an offer to communicate, *id*. at 717 ("If, however, the offer is declined"), 718 ("after an offer to communicate has been declined"), with the situation of one who has *not yet responded*. (The statute required consent prior to the approach-with-intent-to-communicate, *id*. at 707 n.1, and thus such an approach is a crime "if the pedestrian does not consent," *id*. at 734.) *Hill* treated both as "unwilling listeners," *id*. at 718.

will" not to receive such messages, *id*. at 148. *Hill*, by contrast, inverted the rule: no one can speak unless they obtain *previously expressed consent*. 530 U.S. at 734 ("regulations . . . apply if the pedestrian does not consent"). *Compare Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (homeowner can take initiative to rebuff particular mailings, in advance, at will); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (offer of message may rightfully be declined; by contrast, initial offer, if done in an inoffensive way, is within traditional bounds of free speech).

2. Content-based restrictions deemed content-neutral

The *Hill* Court ruled that the statute challenged in that case was content-neutral. This conclusion was doubly flawed – and fundamentally so.

a. *Place as proxy for content*

First, the *Hill* statute applied only at any "health care facility," 530 U.S. at 701 n.1. "By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination." 530 U.S. at 767 (Kennedy, J., dissenting). Tying the restriction to locations in this way is inexplicable other than as a proxy for content restriction. One does not restrict residential picketing "at the residence of any physician," for example, without aiming at picketing over some medical controversy. One does not restrict protests "at any animal testing facility" without

targeting protests related to such facilities. *Cf. Carey v. Brown*, 447 U.S. 455, 457, 460-61 & nn.4-5 (1980) (statute linked to "place of employment involved in a labor dispute" treated as tied to topic of labor). That the restriction in *Hill* technically also applied to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," *Hill*, 530 U.S. at 723, is of little comfort where those other speakers have no particular reason to be at "health care facilities." A restriction on demonstrations outside businesses that dump effluents into waterways is hardly content-neutral just because it limits not just anti-pollution protesters but also pro-gun demonstrators.

b. Express verbal content regulation

Second, the statute challenged in *Hill* was expressly content-based – restricting only oral "'protest, education, or counseling,'" 530 U.S. at 707 n.1 (quoting statute), while leaving unrestricted the remaining universe of messages, such as "pure social" conversation, *id.* at 721 (or, for that matter, commercial sales pitches). The *Hill* majority declared this statute nevertheless content-neutral if the *justification* for the restriction was content-neutral, *id.* at 720. This directly contradicts the precedent of this Court. "[W]hile a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System v. FCC,* 512 U.S. 622, 642-43 (1994). That is,

for a statute to be content-neutral, it must be neutral *both* textually *and* in its purpose. *Accord Bartnicki v. Vopper*, 532 U.S. 514, 526 & n.9 (2001).

The *Hill* majority proffered three reasons in support of its conclusion that the statute challenged in that case was content-neutral, but all are transparently inadequate.

"First, [the statute] is not a 'regulation of speech.'" *Id*. at 719. Nonsense. The statute did not ban approaches as such. Only an approach *to communicate* was criminalized. *Id*. at 708 n.1 ("'No person shall knowingly approach 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 or sidewalk area'") (quoting statute; emphasis added). A regulation that only applies to speech is, necessarily, a regulation of speech. *E.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984) (analyzing restriction on placement of handbills as a "regulation on speech").

"Second, it was not adopted because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719. This was a highly dubious factual premise, as the law was plainly enacted to further the interests of the abortion lobby.

> One need read no further than the statute's preamble to remove any doubt about the question. The Colorado Legislature sought to restrict "a person's right to protest or counsel against certain medical procedures." The word "against" reveals the legislature's desire to restrict discourse on one

> side of the issue regarding "certain medical procedures." The testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion, a point the majority acknowledges.

530 U.S. at 768-69 (Kennedy, J., dissenting) (citation omitted). *See also Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. Ct. App. 1995) ("testimony was presented concerning the conduct of some anti-abortion protesters at various medical clinics"). But more importantly, the government's disagreement with the message is not a required element: "while a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases," *Turner*, 512 U.S. at 642. Obviously, a law that bans discussion of civil rights on a city plaza, for example, would not be content-neutral just because the city officials profess – in all honesty – that they support civil rights but want to avoid crowds on the plaza.

"Third, the state's interests in protecting access and privacy, and providing police with clear guidelines, are unrelated to the content of the demonstrators' speech." *Hill*, 530 U.S. at 719-20. But this proves too much, as the same could be said of any government regulation that proffers "access," "privacy," or "clarity" as interests. The "mere assertion of a content-neutral purpose" does not "save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-43.

In short, *Hill* is utterly inconsistent with this Court's established tests for content-neutrality.

3. Leafletting hobbled

While the *Hill* statute did not *absolutely* ban leafletting outside abortion facilities, it did drastically hobble such leafletting. Under the *Hill* statute, leafletters could not approach close enough merely to *offer within reach* a flyer, without first obtaining the passerby's consent. 530 U.S. at 707 & n.1, 727-28. At best, leafletters could stand still "near the path of oncoming pedestrians and proffering" the material like a parking garage ticket dispensing machine. *Id*. at 727. By contrast, the precedents of this Court, aside from *Hill,* uphold vigorous First Amendment protection for leafletting. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *United States v. Grace*, 461 U.S. 171 (1983); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Notably, this constitutional protection for leafletting holds true even when the ban is not geographically absolute. As *Grace* illustrates, it is unconstitutional to ban leafletting on the sidewalks of just one particular building. *See also Schneider*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Nor can the controversial nature of the topic of the handbills justify such a restriction. "Indeed, . . . handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347.

Nor need the ban be unconditional; requiring prior permission to offer the material, as in *Lovell* and

Schneider, is likewise invalid. To be sure, the *Hill* statute required that the necessary "permission" to offer a leaflet must be obtained, not from the government, but from private pedestrians. But this makes the permission requirement worse, not better. The government must at least follow non-arbitrary, non-discretionary standards when licensing speech. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Private individuals face no such constraints, and thus can be wholly arbitrary, even viewpoint-based, in withholding consent. This is perfectly acceptable when a private individual is controlling the flow of information *into the home*, *Rowan*, or deciding whether to *accept* a handbill from a leafletter. But giving private parties licensing power over the mere *offer* of information *on a public way* is an entirely different matter. To suppress the right to speak, picket, or leaflet in a public place absent license from unconstrained private parties, under penalty of criminal enforcement, is even worse than an unconstitutional after-the-fact heckler's veto. Indeed, if it is unconstitutional merely to charge a higher permit fee based upon potential adverse audience reaction, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992), then it is necessarily unconstitutional to ban the speech altogether absent actual approval from the audience.

Under this Court's precedents, then,

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to

> the communication of ideas by handbills and literature as well as by the spoken word.

Jamison, 318 U.S. at 416.

Hill's miserly allowance of minimal freedom to leaflet is entirely inconsistent with the jealous constitutional protection recognized in these other cases.

4. Prophylactic restrictions on speech approved

Hill expressly approved a statute taking "a prophylactic approach" to speech regulation, 530 U.S. at 729, i.e., sweeping up substantial amounts of "harmless" *(id.)* speech as part of an effort to address proscribable misconduct. It is difficult to imagine a proposition more antithetical to this Court's free speech case law. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Accord Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same); *Edenfield v. Fane*, 507 U.S. 761, 777 (1983) (quoting *Button* and noting that even commercial speech may not be subjected to broad prophylactic restrictions); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612, 616 (2003) (noting condemnation of prophylactic restrictions on charitable solicitation). *But cf. Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 382 (1997) (approving prophylactic *injunctive* restrictions on *particular defendants*).

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The *Hill* decision, by announcing several novel constitutional rules in profound tension with this Court's existing free speech jurisprudence, has deeply destabilized the law. This Court should disavow *Hill*.

CONCLUSION

This Court should reverse the judgment of the First Circuit and, in particular, repudiate *Hill v. Colorado*.

Respectfully submitted,

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September 13, 2013