No. 18-1516

IN THE

Supreme Court of the United States

VERONICA PRICE, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

An ordinance of the City of Chicago provides that, within fifty feet of the entrance to any healthcare facility, no one may "knowingly approac[h]" another person, without that person's consent, "for the purpose of" handing that person a leaflet, displaying a sign, or "engaging in oral protest, education, or counseling." The ordinance is modeled on a statute upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), although that statute applied to a substantially larger area than the ordinance does.

The question is whether the ordinance violates the First Amendment.

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STATEMENT

Factual Background

An ordinance of the City of Chicago includes, among other types of conduct that constitute "disorderly conduct," a provision that applies to the area outside healthcare facilities. Specifically, the Ordinance prohibits "knowingly approach[ing] * * * within eight feet" a person who does not 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" while "within a radius of 50 feet from any entrance door to a hospital, medical clinic, or healthcare facility." Municipal Code of Chicago, Ill. § 8-4-010(j)(1).

Petitioners are several individuals and organizations with members who gather at healthcare facilities in Chicago in order to "dissuade [women] from choosing an abortion." Complaint, ¶¶ 5-8, 10. They assert that they seek to "engage women approaching the abortion clinics in a one-on-one conversation in a calm, intimate manner in order to offer information about the dangers involved in abortion and to offer alternatives." Complaint, ¶ 20. Petitioners brought this action under 42 U.S.C. § 1983 against the City and various City officials. Petitioners asserted that the Ordinance violates the First Amendment both on its face and as applied.[1]

The District Court Proceedings

The United States District Court for the Northern District of Illinois dismissed the complaint

[1] Petitioners also asserted claims under the Equal Protection and Due Process Clauses, as well as state law claims. See Pet. App. 5. They do not pursue those claims in this Court. See Pet. i.

insofar as it challenged the Ordinance on its face.[2] The court noted that the Ordinance was modeled on a Colorado statute upheld by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000). Pet. App. 29. The "only material difference between the two laws is the size of the area within which the eight-foot 'bubble zone' applies": the Colorado statute applied within a 100-foot radius, while the Ordinance applies within a much smaller 50-foot radius (Pet. App. 29-30, 40), meaning that the Ordinance covers approximately one-fourth of the area specified by the Colorado law.

The district court considered, and rejected, petitioners' argument that this Court's decisions in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), fatally undermined *Hill*. See Pet. App. 42-50. The court explained that *McCullen* involved a different kind of restriction: one that prohibited unauthorized persons from standing within 35 feet of an entrance to a reproductive healthcare facility, in contrast to the statute in *Hill* (and the Ordinance), "which do[es] not ban people from standing near clinics." Pet. App. 42. In addition, "the *Hill* Court focused on patients' privacy interests in avoiding unwanted, intrusive communication in situations in which avoiding such communication is not practical" (Pet. App. 46), an

[2] The district court initially denied the motion to dismiss the counts alleging that the Ordinance was unconstitutional as applied, but the parties settled those claims, and the district court dismissed those claims pursuant to the parties' settlement agreement. See Pet. App. 5, 53-59.

interest that *McCullen* did not disapprove. See Pet. App. 45-46.

Reed considered a municipal regulation that imposed different restrictions on signs depending on the type of information they conveyed; the Court held that the regulation was a content-based restriction on speech that did not satisfy strict scrutiny and was therefore unconstitutional. See 135 S. Ct. at 2227, 2231-32. Petitioners asserted that under *Reed*, the Ordinance is content-based as well. But the district court explained that "[i]n *Hill*, in contrast [to *Reed*], it was not the message of the speech that was important — instead it was the manner of speech" because "unlike the Sign Code, the Colorado law had nothing to say about what one can talk, counsel, educate, protest, or leaflet about." Pet. App. 50. See also *id*. at 50-51 n.7 (distinguishing *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), which invalidated a law forbidding panhandling, on the ground that "[t]he Ordinance, in contrast, permits individuals to speak about any subject, but limits the manner in which they convey information * * *.").

Because the district court concluded that the Ordinance is not content-based, the court reviewed the Ordinance under intermediate scrutiny: the question was whether the Ordinance is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. Pet. App. 51. The intermediate scrutiny analysis, the district court said, was controlled by *Hill*, which upheld a measure that imposed a greater restriction on speech than the

Ordinance does. Pet. App. 51. The district court rejected petitioners' argument that the City was required to adduce evidence to support the Ordinance. The court noted that *Hill* "provided the model for the Ordinance" and explained that "'[w]here the courts have already upheld a similar ordinance because of the governmental interests at stake, a future litigant should not be able to challenge similar governmental interests without showing some distinction at the pleading stage.'" Pet. App. 52 (citation omitted). Because petitioners had not alleged facts that would justify treating the Ordinance differently from the more far-reaching statute upheld in *Hill*, the district court ruled that the Ordinance satisfied intermediate scrutiny. The court accordingly dismissed petitioners' facial challenge. Pet. App. 53, 60.

The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1-27. The court recognized that the Ordinance "is materially identical to–indeed, is narrower than–the law upheld in *Hill*." Pet. App. 27. And the court acknowledged that it was bound by *Hill*. Pet. App. 2. But the court asserted that "*Hill*'s content-neutral holding is hard to reconcile with both *McCullen* and *Reed* * * * and its narrow-tailoring holding is in tension with *McCullen*." Pet. App. 2.

Specifically, the court of appeals stated that *Reed* and *McCullen* used a definition of content-neutrality that was different from the definition used in *Hill*:

Hill's analysis emphasized the question whether the government disagreed with the message conveyed by the regulated speech, while, the court of appeals said, the more recent cases focused on the text of the challenged measure. Pet. App. 21-23. In addition, the court declared, the later decisions established that *Hill* was wrong to hold that it is sometimes permissible to consider the content of an individual's speech in order "to determine if a violation of the law had occurred." Pet. App. 22; see Pet. App. 22-24. And the court of appeals believed that the government's interest in protecting individuals from the "'emotional harm suffered when an unwelcome individual delivers a message . . . at close range'" (Pet. App. 24) (quoting *Hill*, 530 U.S. at 718 n.25) was no longer "an acceptable justification." Pet. App. 24 (emphasis omitted).

On the question whether the Ordinance is sufficiently narrowly tailored, the court of appeals understood *McCullen* to disapprove of "broad prophylactic regulations in speech-sensitive zones" while *Hill* approved the "'bright-line prophylactic' aspect" of Colorado's statute. Pet. App. 25 (quoting *Hill*, 530 U.S. at 729). The court of appeals concluded that "*McCullen* and *Reed* have deeply shaken *Hill*'s foundation." Pet. App. 25. But because this Court has not overruled *Hill*, the court affirmed the district court's dismissal of petitioner's claim. Pet. App. 26.

REASONS FOR DENYING THE PETITION

Chicago's Ordinance is constitutional under established First Amendment principles, even apart from the *stare decisis* effect of *Hill v. Colorado*. The Ordinance is a narrowly drawn regulation of the manner and place of speech – not of its content – that serves important government interests and goes no further than necessary in restricting expression. Neither *McCullen* nor *Reed* draws this conclusion into question. *McCullen*'s explicit conclusion that the statute at issue in that case was not content-based reinforces, *a fortiori*, the non-content-based nature of the Ordinance. And *McCullen*'s holding about narrow tailoring concerned a significantly different kind of regulation, and different government interests, from what is involved here. Similarly, no plausible interpretation of *Reed* justifies the court of appeals' conclusion that the Ordinance is content-based.

Petitioners acknowledge, as they must, that the Court cannot invalidate the Ordinance without overruling *Hill*. *Hill* was not an isolated or ill-considered decision; it was the product of a careful evolution in this Court's cases concerning expressive activity like petitioners'. Moreover, *Hill* is rooted in, and justified by, First Amendment principles that underlie many other decisions. Petitioners' simplistic arguments, if they were accepted, would threaten to undermine settled law concerning, among other subjects, the regulation of solicitation in public places; harassment laws, including those that petitioners themselves urge as alternatives to the Ordinance; the Court's "fighting words" doctrine; the

regulation of picketing and demonstrations targeted at particular locations, such as courthouses, residences, and funerals; regulations that limit expressive activities in sensitive public areas, such as those around schools, libraries, and hospitals; and measures that protect individuals from unwanted expression.

Petitioners do not remotely explain why, in these circumstances, the Court should reconsider *Hill*. Petitioners do not identify any lower court, other than the panel in this case, that has found *Hill* to be incompatible with more recent decisions. The district judge in this case – who has since been appointed to the Seventh Circuit – did not believe there was any such incompatibility. The petition for a writ of certiorari should be denied.

1. The Ordinance is a Narrowly Drawn, Non-Content-Based Regulation of the Place and Manner of Expression.

a. The Ordinance is a limited regulation of the place and manner of expression. It has no effect at all outside of the 50-foot area. Within that area, individuals may stand anywhere they like and express themselves any number of ways: by speaking to passersby, chanting, holding a sign, or offering literature. The only limit on their behavior within that area is that they may not approach closer than eight feet – a distance from which strangers commonly hail each other on the street – a person who does not consent to being approached. The

Ordinance applies only to the act of "approach[ing]": if petitioners are distributing leaflets, for example, they do not have to move out of the way of someone walking toward them. And because the Ordinance requires scienter, an unintentional approach is not a violation.

The Ordinance applies no matter what the speaker's subject, message, or point of view. It would apply to anti-war protesters who wish to accost veterans, face-to-face, while they are entering a hospital, to "educate" them about the nature of the conflict in which they were wounded; to animal-rights advocates who objected to methods used at a research hospital; to community activists who believed that a hospital catered to wealthy individuals at the expense of poorer people living nearby; and to alternative medicine proponents who wanted to "counsel" unconsenting patients, face-to-face, to reject conventional medical treatments. Crucially, it applies to people whose views are diametrically opposed to petitioners': An approach by someone who wanted to offer encouragement to a person obtaining an abortion would violate the Ordinance if that person simply wanted to be left alone and did not consent.

b. Face-to-face speech – which is the only thing the Ordinance affects – is a manner of expression. It is one of several possible ways in which people might want to convey a message in a public setting. It is comparable to amplified speech, for example, and to picketing, holding up a sign, marching en masse, door-to-door solicitation, and symbolic speech in streets and parks: sleeping overnight in a park to

dramatize the plight of homeless people (see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)) or lying down in the street to protest violence.

In each of these instances, speakers characteristically assert, as petitioners do, that their favored manner of expression will be the most effective way for them to convey their message. But each of these methods of expression can be regulated to address the different public interests that are affected – that the expression is too noisy, too disruptive, too intrusive, or in some other way infringes on an important public interest.

The Ordinance also applies only in a narrowly defined place in which the interests it protects are most significantly affected. The traditional public forum – "streets, sidewalks, and parks" (*United States v. Grace*, 461 U.S. 171, 177 (1983)) – is, for First Amendment purposes, not an undifferentiated whole. The government is permitted to recognize the special sensitivity of certain areas. The government is not required to allow a march on a busy street during rush hour, or demonstrations in areas of a public park committed to other uses. It can limit the use of amplifiers near residential areas, schools in session, or hospitals. See, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 781, 796-97 (1989) (citing *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (opinion of Reed, J.)); *id.* at 96-97 (Frankfurter, J., concurring); *id.* at 97 (Jackson, J., concurring); *Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972); *March v. Mills*, 867 F.3d 46 (1st Cir. 2017), cert. denied, 138 S. Ct. 1545 (2018)).

The Ordinance fits within these principles. It applies only to an area near the entrance of a healthcare facility – a place where patients and their loved ones, entering or leaving the facility, are likely to be in a particularly vulnerable emotional state. Cf. *Snyder v. Phelps*, 562 U.S. 443, 473 (2011) (Alito, J., dissenting). And just as a noise ordinance may constitutionally restrict a mode of expression when it is particularly intrusive, such as in a residential area or near a school, Chicago's Ordinance affects only a mode of expression that is especially intrusive in the narrowly defined context it governs – face-to-face speech directed at individuals who do not want to be approached in that way while they are about to enter a healthcare facility. As the Court explained in *Hill*, the concern is with "the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her." 530 U.S. at 724.

c. Petitioners assert that the Ordinance is content-based. Their principal argument is that the Ordinance prohibits approaching a person for the purpose of "'engaging in oral protest, education, or counseling'" but not "to solicit donations for a charity, sell Cubs tickets, campaign for a candidate, or panhandle." Pet. 1; see Pet. 25 ("raise funds for charity, sell Cubs tickets, make small talk about the weather, or panhandle").

Petitioners repeatedly invoke the criticism of *Hill* by Members of this Court and academic commentators who have asserted that *Hill* allows content-based regulation. See, *e.g.*, Pet. 2-3, 14-17. But the critics' argument has not been that laws like the Ordinance discriminate in favor of people who want to sell baseball tickets. Their principal argument has been that measures like the Ordinance are motivated by hostility to the views of those who oppose abortion. See pp. 28-29 & n.5, *infra*. That argument, which we will address below, is meritless. Petitioners, revealingly, do not assert it. The artificiality of the argument they do make is an indication of its weakness.

Petitioners' argument ignores what the Court said in *Hill* about the language that the Ordinance shares with the Colorado statute: "[T]he statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." 530 U.S. at 723. As the Court explained: "With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling' rather than pure social or random conversation." *Id*. at 721.

That distinction – between "social or random conversation" and targeted face-to-face advocacy – cannot plausibly be regarded as content-based for First Amendment purposes. In the words of *Reed*, the decision on which petitioners most heavily rely, that

distinction is not based on "the topic discussed or the idea or message expressed." 135 S. Ct. at 2227; see *id.* at 2231 (same); *id.* at 2227 ("distinctions drawn based on the message a speaker conveys").

The Ordinance does not refer to *any* topics, ideas, or messages. It applies to a person making an unconsented approach no matter what topics, ideas, or messages that person might have in mind. Under *Reed*, therefore, the Ordinance is not content-based. In fact, as we explain below, if the distinction identified by *Hill* were treated as content-based, many unquestioned decisions of this Court would have to be reconsidered. See pp. 21-24, *infra*.

The distinction identified in *Hill* matters because, as anyone who has walked on a busy city street knows, there is a difference between being "approach[ed]" by, for example, someone asking directions – and who could just as easily have asked any other passer-by – and being singled out by a stranger who wants to have an intense conversation on a subject of his choosing. The latter can be intrusive or even threatening, not because of the subject of the conversation but because of the nature of the unconsented approach. The Ordinance regulates that kind of "approach" – not in general, of course, but only in a narrow area, designed to deal with the special circumstances of a patient entering a hospital.

Petitioners suggest (Pet. 25-26) that a law is content-based whenever enforcement authorities must examine what an individual said in order to

determine whether the individual acted unlawfully. That cannot possibly be right.[3] The lawfulness of an act routinely depends on the intent with which an individual did it, and intent is routinely determined by examining that individual's statements. Petitioners also contend (Pet. 4, 22) that the Ordinance violates the well-established principle, for which petitioners quote *Snyder*, 562 U.S. at 458, that "'speech cannot be restricted simply because it is upsetting or arouses contempt.'" But as *Snyder* itself illustrates, and as the Court has repeatedly said in the cases that petitioners cite, that principle applies when the government restricts speech because it determines that the *ideas* being expressed are offensive – not when it is the mode of expression that is objectionable. See, *e.g.*, *Texas v. Johnson*, 491 U.S.

[3] In support of this contention, petitioners quote a passage from the Court's opinion in *McCullen* to the effect that a law is content-based if authorities must "examine the content of the message that is conveyed to determine whether a violation has occurred." 134 S. Ct. at 2531. But the Court was referring to instances in which the conveying of speech with a certain content is the offense, not when the statements are used to establish the intent, or – in the words of the Ordinance – the "purpose" behind a physical act like an unconsented approach. See *ibid*. (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)) ("[I]n order to determine whether a particular statement [is prohibited,] enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.'").

397, 414 (1989); *Street v. New York*, 394 U.S. 576, 592 (1969).

For example, even when expression is involved, the government may prohibit loud noises because they are upsetting, and the government may ban visual blight because it is offensive. And it may, in the special circumstances addressed by the Ordinance – which says nothing about ideas – ban an excessively close physical approach because it is intrusive, even when expression is involved.

Contrary to petitioners, the fact that an individual might withhold consent because of her perception of what a speaker will say also does not make the Ordinance content-based. Any content-based judgment in that situation is not made by the government. A measure designed to protect individuals from unwanted intrusive expression will often allow the individual to indicate whether it is indeed unwanted: that does not make those measures content-based, as this Court's decisions establish. See, *e.g.*, *Rowan v. Post Office Department*, 397 U.S. 728, 737 (1970); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (allowing door-to-door solicitation to be banned when a "householder * * * has appropriately indicated that he is unwilling to be disturbed"). See also *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 n.12 (1981) (argument that a "regulation is not content-neutral in that it prefers listener-initiated exchanges to those originating with the speaker * * * is interesting but has little force").

Nor does it matter, as petitioners suggest, whether the unwanted expression takes place in the public forum. A noise ordinance – including one that applies in the public forum – does not become content-based if its enforcement is contingent upon nearby residents' complaining, even though the content of the amplified expression might affect whether they complain.

d. Petitioners assert that *McCullen* requires the conclusion that the Ordinance is not narrowly tailored. But *McCullen* involved a different kind of regulation – one that put an area entirely off-limits to speakers – and the statute in *McCullen* was justified primarily by the need to prevent physical obstruction. The Ordinance, by contrast, is concerned with the close-approach physical intrusiveness that *Hill* described. See pp. 9-11, *supra*; 530 U.S. at 724.

The Ordinance contains at least five features that precisely tailor it to protecting that interest without unnecessarily restricting expression. The Ordinance has no application at all except within fifty feet of an entrance to a healthcare facility; it applies only to an individual who "approaches another person"; it contains a scienter requirement, limiting its application to a "knowin[g]" approach; it applies only to an approach closer than eight feet, a normal conversational distance; and it applies only to an approach made without consent. Petitioners never explain why these aspects of the Ordinance do not constitute narrow tailoring; in fact, their argument about narrow tailoring never addresses these features of the Ordinance at all.

In any event, as the district court explained, once this Court has determined that a regulatory measure is narrowly tailored to a particular situation, other units of government are entitled to rely on that determination, at least until the parties challenging a measure make a factual showing to undermine it. See Pet. App. 52 (quoting *Graff v. City of Chicago*, 9 F.3d 1309, 1323 (7th Cir. 1993) (en banc)). Otherwise this Court's decisions would provide no guidance on that issue. Petitioners offer no factual evidence at all suggesting that Chicago's Ordinance, in particular, is too sweeping.

Petitioners instead make a general attack on *Hill*'s conclusion that the Colorado statute, and measures like it, are narrowly tailored. Pet. 22-24. As we explain below, petitioners treat *Hill* as if it came out of nowhere; they ignore the fact that *Hill* was the product of a progression of cases in which the Court gained familiarity with the issues presented by protests near healthcare facilities and, in fact, invalidated some measures because they were not narrowly tailored. See pp. 18-21, *infra*. By the time *Hill* came before the Court, the Court understood very well what was needed to deal with those issues.

But petitioners' and the court of appeals' principal attack on *Hill* seems not to be that the Court in *Hill* somehow misapprehended the facts; instead, it is that *Hill* should not have allowed the adoption of a "bright-line" rule to address the problems growing out of activity near healthcare facilities and should instead have insisted on regulations that were more flexible. Pet. 24; Pet. App.

25. This is, if anything, exactly backward. While excessively broad prophylactic rules are suspect, see *NAACP v. Button*, 371 U.S. 415, 438 (1963) – and the Court concluded that the *McCullen* statute was excessively broad – "[p]recision of regulation must be the touchstone" in dealing with First Amendment rights. *Button*, 371 U.S. at 438. The bright-line clarity of the Ordinance is a virtue, not a vice.

2. *Hill v. Colorado* Is Justified By Established First Amendment Principles And Should Not Be Overruled.

a. Hill was the product of a careful evolution in this Court's doctrine.

Petitioners portray *Hill* as an inexplicable First Amendment outlier. It was nothing of the kind. *Hill* was the last of a series of decisions in which the Court addressed the issues raised by individuals who protested near facilities that provided abortions, and it reflected the Court's extensive and well-informed consideration of those issues.

In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the Court considered a state court injunction that imposed a variety of restrictions on individuals who had engaged in disruptive conduct near an abortion clinic. Among other things, the injunction forbade those individuals from "approaching any person seeking services of the clinic 'unless such person indicates a desire to

communicate' in an area within 300 feet of the clinic." *Id*. at 773. The Court's opinion recited the evidence showing that the actions that had been enjoined "took their toll on the clinic's patients." *Id*. at 758. The Court then rejected the claim that the injunction was content-based because it applied only to anti-abortion protesters. *Id*. at 762-64. But the Court invalidated the restriction on approaching a patient within 300 feet of the clinic on the ground that it swept too broadly. *Id*. at 773-74.

Three years later, in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), the Court addressed another injunction restricting conduct near abortion clinics. The Court again reviewed the facts that led a federal district court to grant the injunction. *Id*. at 361-66. The injunction imposed, among other things, a requirement that protesters stay fifteen feet away from people entering or leaving the clinics. The Court invalidated that provision of the injunction, explaining that it prevented the defendants "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics." *Id*. at 377.

By the time *Hill* came before the Court, the Court had experience with the issues raised by expressive activity near abortion clinics and with the various regulatory devices that might be used. It had addressed the question whether those regulatory measures were content-based and whether they swept too broadly. On the basis of that experience, the Court concluded that the statute in *Hill* lacked the defects that caused it to invalidate the

comparable provisions of the injunctions. The Colorado statute applied only within 100 feet of a healthcare facility – the Ordinance, of course, applies to a much smaller area. The Colorado statute, because it prohibited only "knowingly approaching," did not require protesters to keep their distance from people entering a facility. It did not prevent them from offering leaflets to their target audience. And it did not prevent "communicating a message from a normal conversational distance." Notably, Chief Justice Rehnquist, who wrote for the Court in *Madsen* and *Schenck*, joined the majority opinion in *Hill*.

This progression by itself is enough to answer petitioners' contention that the Ordinance – which is substantially more limited than the Colorado statute – is not narrowly tailored. This Court itself ensured that it was narrowly tailored, because it had pared away what it considered the excessive restrictions imposed by the injunctions in the prior cases.

More important, though, this progression shows that *Hill* is precisely the kind of case that should not be overruled. *Hill* did not come out of nowhere. It was not the product of a snap judgment, superficial reasoning, or a preconception about the issues. Chief Justice Rehnquist, for example, had dissented in *Roe v. Wade*, 410 U.S. 113, 171 (1973), but he was satisfied that the Colorado statute did not present the difficulties that his previous opinions identified in the injunctions.

Rather, *Hill* was the work of a Court that was deeply familiar with both the practical and the analytical issues that the case presented. The *Hill* Court could draw on the lessons of its own experience. It had seen a variety of regulatory measures and had had an opportunity to consider the extent to which each of them preserved First Amendment values. The decision that the Court made in those circumstances should not be dismissed without a much stronger showing than anything petitioners have offered.

b. Overruling *Hill* Would Destabilize Important Bodies Of First Amendment Doctrine.

Because *Hill* is based on established First Amendment principles, it cannot be surgically removed from the body of First Amendment doctrine, as petitioners seem to think. Overruling *Hill* would draw into question a number of settled decisions of this Court and various regulatory approaches the validity of which has been generally assumed, including by the Court.

i. One of the central claims made by petitioners and the court of appeals is that under *Reed*, measures like the Colorado statute upheld in *Hill* must now be regarded as content-based. As we have shown, the distinction that *Hill* drew – between "social or random conversation" and targeted face-to-face advocacy – is not content-based even under the language of *Reed* itself, because it is not based on "the

topic discussed or the idea or message expressed" (135 S. Ct. at 2227, 2231). But beyond that, the Court has often upheld, without even raising a question about content-neutrality, measures that draw distinctions more closely related to the content of expression than the distinction recognized in *Hill*.

For example, the Court has repeatedly upheld regulations that imposed restrictions on "solicitation" by religious and advocacy groups that were not imposed on other forms of expression – even though determining whether someone is engaged in "solicitation" as opposed to another kind of expression requires at least as much of an investigation of content as *Hill* does. See, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675-76 (1992) ("solicitation and receipt of funds" if "conducted * * * in a continuous or repetitive manner" is forbidden within airports); *United States v. Kokinda*, 497 U.S. 720, 724 (1990) (plurality opinion) ("[s]oliciting alms and contributions" prohibited on Postal Service property); *Heffron*, 452 U.S. at 643-44 ("fund solicitation operations" on a fairground must be conducted from a booth although "communicati[on of] the organization's views [to] fair patrons" need not be).

In these cases, the Court did not even consider it worth discussing whether the regulation was content-based and therefore subject to strict scrutiny. On petitioners' view that *Hill* did not survive *Reed*, then these cases – and the undoubtedly numerous regulations built upon them – will be open to serious question.

In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court upheld a state statute prohibiting "picket[ing] or parad[ing] in or near a building housing a [state] court" if the picketing is done "with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty" (*id*. at 560) (internal quotation marks and citation omitted). There is a substantively identical federal statute. See 18 U.S.C. § 1507. Like the Ordinance, these statutes apply in the public forum, but to only a limited area within the public forum – near a courthouse, or near a healthcare facility.

Unlike the Ordinance, though, these statutes will routinely require an examination of the specific views expressed by a speaker in order to determine if the law was violated. Moreover, as the Court explained in *Cox*, the basis for these statutes is the impact of the prohibited speech on people who were exposed to it: "the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." 379 U.S. at 565. In this way, 18 U.S.C. § 1507 and the statute upheld in *Cox* reflect a judgment by the government that speech with a certain content – speech designed to influence judicial proceedings – will have a harmful impact on listeners. The Ordinance reflects no such judgment about the content of any speech. If *Hill* is overruled as petitioners request, it is difficult to see how *Cox* and 18 U.S.C. § 1507 can survive.

Finally, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipal ordinance that it construed as forbidding "picketing focused on, and taking place in front of, a particular residence." *Id*. at 482. That ordinance, too, applied in the public forum. See *id*. at 480-81. Determining whether picketing is focused on a particular residence, like determining whether speech constitutes "solicitation" and whether a picketer has an intent to influence judicial proceedings, requires a more substantial inquiry into content than *Hill* envisions. But the Court has not questioned *Frisby*. Indeed, despite the *Hill* majority's reliance on *Frisby*, the two dissenters in *Hill* who had joined the majority in *Frisby* did not doubt the content neutrality of the ordinance in *Frisby,* distinguishing it on other grounds.

ii. In a wide range of contexts, the Court has recognized that face-to-face expression presents distinctive issues and justifies distinctive forms of regulation.[4] Petitioners utterly fail to acknowledge this. Overruling *Hill* would potentially affect all of these varied principles.

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[4] See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 S. Ct. Rev. 1, 42 (footnotes omitted): "Narrowly targeted, face-to-face expression has often received less constitutional protection than words and expressive conduct in other contexts. * * * [I]ndividually-targeted, face-to-face speech is especially likely to have the purpose of being, and to be experienced as, invasive, threatening, or coercive."

In *Lee* – which upheld a ban on solicitation at airports – the Court emphasized that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." 505 U.S. at 684. The Court mentioned the particular risk to "the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation." *Ibid*. People who are entering a healthcare facility are especially likely to be among those described by the Court. And while the Court in *Lee* was addressing face-to-face solicitation, Chief Justice Rehnquist, the author of the Court's opinion in *Lee*, quoted the same language in his opinion for the Court in *Madsen*, dealing with face-to-face contact outside an abortion clinic. See 512 U.S. at 773-74.

The "fighting words" doctrine, which the Court has consistently understood as defining a low-value category of speech since its decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is similarly designed to deal with "personally abusive epithets," but only when the epithets are "'directed to the person of the hearer.'" *Cohen v. California*, 403 U.S. 15, 20 (1971) (citation omitted). The Court has made it clear that the same words that might constitute unprotected fighting words when spoken face-to-face – and therefore be subject to an outright prohibition – will be fully protected if spoken publicly. In *Cohen*, for example, the Court held that displaying an epithet publicly in connection with a political issue was fully protected speech even though the same epithet is "not uncommonly employed" in a

way that might constitute unprotected fighting words. *Ibid*. While it is customary to describe "fighting words" as an unprotected category of speech, it is more accurate to say that fully protected speech can, in some circumstances, become unprotected – precisely because of its effect on the person to whom it is directed – when those same words are uttered face-to-face. That is true even when the face-to-face contact occurs in the public forum: the facts of *Chaplinsky* took place on a public sidewalk. It is difficult to see how this established doctrine can survive petitioners' approach.

In yet another context, the Court highlighted the distinctive issues presented by face-to-face speech when it issued two contrasting decisions on the same day. In *In re Primus*, 436 U.S. 412 (1978), the Court held that a state could not reprimand a lawyer who offered his services to a potential client by mail. Then in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court held that a state bar association could punish a lawyer who contacted a potential client in person.

iii. Finally, the Court has, contrary to petitioners, often recognized the importance of protecting individuals from unwanted expression. This is true even when, as in *Frisby*, the expression itself took place in the public forum. The Court has emphasized that individuals have a particular interest in being protected from unwanted expression when they are at home. See, *e.g.*, *Rowan*, 397 U.S. at 737. But there are circumstances outside the home in which

individuals' interest in not being subjected to intrusive modes of expression is equally strong.

For example, in *Snyder*, the Court noted that nearly all states, and the federal government, have enacted measures restricting the location of demonstrations near funerals. See 562 U.S. at 456-57; Respect for America's Fallen Heroes Act, Pub. L. 109-228, codified at 38 U.S.C. § 2913 and 18 U.S.C. § 1387. These statutes have been upheld on the ground that "'mourners attending a funeral . . . share a privacy interest analogous to those which the Supreme Court has recognized for individuals in their homes'" (*Phelps-Roper v. Ricketts*, 867 F.3d 883, 893 (8th Cir.), cert. denied, 138 S. Ct. 477 (2017)) (quoting *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc)). See also *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). Decisions upholding these statutes have recognized the resemblance, in this respect, between individuals attending a funeral and patients entering a healthcare facility, and they have explicitly relied on *Hill*. See, *e.g.*, *Phelps-Roper v. Ricketts*, 867 F.3d at 893. Overruling *Hill* on the ground that the government may not protect individuals outside the home from unwanted speech would draw into question all of these statutes.

Petitioners suggest (Pet. 13) that laws forbidding harassment would serve the purposes of the Ordinance. The Court in *McCullen* suggested that a New York City harassment ordinance might be a way of preventing abusive behavior near an abortion clinic. See 134 S. Ct. at 2538 (citing N.Y.C. Admin.

Code § 8-803(a)(3) (2014)). But harassment laws, when applied outside a healthcare facility, have all the same features that, according to petitioners, call for *Hill* to be overruled. They protect an individual from unwelcome expressive conduct outside the home. The conduct takes place in a public forum. And the alleged harasser's verbal expression will routinely be relevant to determining whether the conduct constitutes harassment.

3. The Ordinance Is Not Motivated By Hostility To Abortion Opponents' Expression.

Petitioners repeatedly emphasize criticisms of *Hill* made by the dissenting opinions in that case. *E.g.*, Pet. 2-3, 13-15. Those criticisms, however, were explicitly animated by a claim that petitioners do not advance, at least not overtly: the claim that the Colorado statute, and other regulations like it, are motivated by hostility to the views expressed by opponents of abortion. See, *e.g.*, *Hill*, 530 U.S. at 741-42, 744 (Scalia, J., dissenting); *id*. at 768 (Kennedy, J., dissenting). The same is true of much of the academic criticism that petitioners invoke.[5]

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[5] See, *e.g*., Jamie B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights*, 51 Am. U. L. Rev. 179, 215 (2001) ("The conclusion that the statute was designed to and would function to stifle anti-abortion protest is inescapable"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepperdine L. Rev. 723, 737-38 (2001) ("[T]he motivation for this facially neutral law had to do with its effect in shielding patients

Because this claim plays a central role in criticism of *Hill* – and because that criticism plays such a prominent role in the petition – it is important to recognize how utterly without merit this claim is. It is, for one thing, foreclosed by the Court's decision in *McCullen*. The *McCullen* Court squarely rejected the argument that the Massachusetts statute was a content-based restriction on anti-abortion speech. See 134 S. Ct. at 2530-32. And that statute applied only to the area outside facilities where abortions are performed. *Id*. at 2526. It follows *a fortiori* that the Ordinance – which applies to all healthcare facilities – is not directed at anti-abortion expression.

Moreover, the Court explained that it had established the non-content-based nature of the Massachusetts law in order to leave open other regulatory options that would apply to the area near a facility that provided abortions – including the anti-harassment measures that, as we explained above, share many of the characteristics of the Ordinance. See *id*. at 2530, 2538. In all of these ways, *McCullen*, directly contrary to petitioners' assertions,

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(abortion patients) known to be the recipients of a particular kind of speech (anti-abortion speech).") An amicus curiae brief filed in *McCullen* that was devoted to recounting academic criticism of *Hill* characterized the academic criticism in the same way. See Brief of Eugene Volokh, et al., as amici curiae in support of petitioners, *McCullen v. Coakley*, No. 12-1168 (October Term, 2013), at 8 (commentators objected to *Hill* because the Colorado statute "clearly targeted anti-abortion speech").

reinforces the constitutionality of the Ordinance.

As the Court has recognized, in *McCullen* and elsewhere (see, *e.g.*, *Madsen*, 512 U.S. at 763; *Clark*, 468 U.S. at 294-95), a regulation of a method of expression does not become content-based just because it affects a group with a particular viewpoint. There is a direct analogy to the state and federal laws that, as the Court has noted, regulate protests near funerals. See *Snyder*, 562 U.S. at 456-57; pp. 26-27, *supra*. Even if those laws were a response to the actions of the group involved in *Snyder*, that would not make them content-based, so long as they were prompted by concern about the tactics that the group used, not its views. Significantly, petitioners seem to think otherwise: that the laws of the federal government and nearly every state regulating protests near funerals are per se constitutionally suspect. See Pet. 33-34 (asserting that *Phelps-Roper v. Ricketts* erroneously failed to treat as content-based a law that "bann[ed] a single category of speech – protests in the vicinity of funeral services"). Petitioners' position on this issue is a further indication of how much established First Amendment doctrine would be discarded if petitioners were to prevail.

Petitioners' complaint, in fact, does not even contain a claim that the Ordinance was enacted out of hostility to their speech.[6] And nothing about the

[6] One clause in the complaint states, in passing, that the Ordinance "was enacted and is applied so as to restrict pro-life

Ordinance suggests that it was. The Ordinance does not limit petitioners' speech anywhere except within eight feet of a patient who is near a healthcare facility and does not want to be approached by petitioners. As we have said, anyone on any side of any issue is subject to the same restriction. There is no reason whatever to doubt that the basis for the Ordinance is a concern with protecting patients from intrusive conduct and not anything having to do with the ideas that petitioners, or anyone else, is expressing.

Petitioners portray *Hill* as a decision that was widely condemned, is legally unsound, and is at odds with First Amendment principles. In fact, it is fully legally justified. It is so well-rooted in First Amendment principles that it cannot be overruled without jeopardizing wide-ranging and important aspects of First Amendment doctrine. And, for the most part, the condemnation is based on a false premise that even petitioners are unwilling to avow.

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speech" (Complaint, ¶ 120), but the Complaint contains no "factual matter" supporting the assertion that the enactment of the Ordinance was improperly motivated. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). Nor does the petition pursue this assertion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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