No. 24-57

IN THE

Supreme Court of the United States

COALITION LIFE,

Petitioner,

v.

CITY OF CARBONDALE, ILLINOIS,

Respondent.

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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Question Presented

In *Hill v. Colorado*, 530 U.S. 703 (2000), this Court upheld a Colorado law that prevented sidewalk counselors from sharing a message on a profound moral issue with their fellow citizens in the public way outside an abortion facility. Even then, multiple members of the Court denounced *Hill* as "patently incompatible with the guarantees of the First Amendment," contrary to "more than a half century of well-established First Amendment principles," and explicable only by the Court's abortion jurisprudence. *Id.* at 741-65 (Scalia, J., dissenting); *Id.* at 765-68 (Kennedy, J., dissenting). Since then, this Court's intervening First Amendment precedents have "all by interred" *Hill*, leaving it "an aberration." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 92, 104 (2022) (Thomas, J., dissenting). And most recently, this Court cited *Hill* as an example of how such cases had "distorted First Amendment doctrines." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022).

Dobbs should have made clear beyond cavil that *Hill* could no longer skew public debate on a divisive issue now returned to the people. Inexplicably, however, the City of Carbondale treated *Dobbs* as an invitation to enact a brand-new ordinance modeled on, and virtually identical to, the law upheld in *Hill*. The lower courts had no choice but to uphold that carbon-copy measure. This Court has a better option.

The question presented is:

Whether this Court should overrule *Hill v. Colorado*.

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Interest of the Amici Curiae[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize protections for individual rights and constitutional restraints on government power.

This case particularly interests Liberty Justice Center because the freedom of speech is a core value vital to a free society. To that end, the Liberty Justice Center has long advocated the application of *Reed*'s test apply to content-based restrictions on speech. *See, e.g., Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), *petition for cert. denied* No. 19-792 (Apr. 27, 2020); Brief of Liberty Justice Center as *Amicus Curiae* in Support of Respondents *City of Austin v. Reagan National Advertising of Austin, LLC,* No. 20-1029; Brief of Liberty Justice Center as *Amicus Curiae* in Support of Petitioners in *Living Essentials, LLC v. Washington,* No. 19-988; Brief of Liberty Justice Center and Manhattan Institute as *Amici Curiae* Supporting Petitioners in *Mazo v. New Jersey Secretary of State,* No. 22-1033; Brief of Liberty Justice Center as *Amici Curiae* in Support of Petitioner in *Vitagliano v. County of Westchester*, No. 23-74.

Summary of Argument

Because content-based restrictions on speech are especially likely to be improper attempts by the government to interfere in the marketplace of ideas,

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for all parties received notice of Amicus's intent to file this brief.

this Court has long subjected such restrictions to the highest scrutiny. In recent years, this Court has clarified its test for identifying restrictions on speech that are content based. A restriction on speech is facially content based if its text discriminates based on "topic or subject matter"—regardless of government's motive in enacting the law. *City of Austin v. Reagan Nat'l Adver. Of Austin, LLC*, 142 S. Ct. 1464, 1472 (2002) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). A restriction on speech is also content based if the government enacted it with an "impermissible purpose or justification." *Id.* at 1475.

Before *Reed* and *City of Austin*, the Court applied a different, conflicting analysis for determining content neutrality in *Hill v. Colorado*, 530 U.S. 703, 707 (2000). In that case, the Court upheld a Colorado statute substantially similar to the law at issue in this case, which prohibited, within 100 feet of an abortion facility, knowingly approaching within eight feet of someone entering such a facility "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling." Although the law forbade certain topics of speech—oral protest, education, and counseling—*Hill* upheld the restriction as content neutral. *Hill* reasoned that because it was not adopted because of disagreement with the message, the government did not have an impermissible purpose.

Reed and *City of Austin* are inescapably incompatible with *Hill*. Under *Reed* and *City of*

Austin, the government's benign motive cannot render a facially discriminatory law content-neutral—but a malign motive can condemn a statute that appears to be facially content-neutral. Under *Hill*, however, an innocent motive *can* save a facially discriminatory law.

This Court should grant certiorari in this case and overturn *Hill* and the lower court's decision following it because they are inconsistent with this Court's First Amendment jurisprudence.

Argument

I. This Court has long held that content-based restrictions on speech are heavily disfavored.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Such "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, [and] are particularly susceptible to being used by the government to distort public debate." *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring). They are therefore "presumptively invalid." *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted).

a. *Ward v. Rock Against Racism* has been misapplied.

For decades, courts have relied on *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), to determine whether government restrictions on speech were content-based and therefore subject to strict scrutiny, but many courts have misapplied *Ward*'s analysis. In *Ward*, the Court held that governments may impose reasonable restrictions on the time, place, or manner of protected speech, provided that such restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Id.* at 791. Thus, the Court upheld New York City regulations requiring concert performers in Central Park to use both sound-amplification equipment and a sound technician provided by the city because they were content-neutral time-and-place restrictions and were narrowly tailored to the city's substantial interest in protecting citizens from unwelcome noise. *Id.* at 784, 803.

According to *Ward*, the principal inquiry for determining whether a restriction is content-neutral is "whether the government has adopted [it] because of disagreement with the message it conveys." *Id*. (cleaned up). In that analysis, the government's purpose is the controlling consideration: regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech, even if it has incidental effects on some speakers or messages but not others. *Id*.

Thus, many lower courts interpreted *Ward* to mean that regulations that appeared to be facially content-based were nonetheless content-neutral if the government had a nondiscriminatory motive. *See, e.g., Reed v. Town of Gilbert*, 707 F.3d 1057, 1071 (9th Cir. 2013); *Pahls v. Thomas*, 718 F.3d 1210, 1236 (10th Cir. 2013); *McGuire v. Reilly*, 386 F.3d 45, 63 (1st Cir. 2004); *Brown v. Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013).

b. *Reed* and *City of Austin* reflect the Court's current standards for determining whether a speech restriction is content based.

This Court has refuted the lower courts' misinterpretation of *Ward* in two decisions that establish the proper analysis for content-based speech restrictions, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2002).

In *Reed*, this Court addressed a sign ordinance that treated ideological signs more favorably than political signs, which were treated more favorably than temporary directional signs. 576 U.S. 155, 159–61 (2015). The Court held that the sign ordinance was a content-based regulation of speech and could not survive strict scrutiny. *Id.* at 159.

Reed held that government regulation of speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Reed*, 576 U.S. at 163. Under *Reed,* content-based laws receive strict scrutiny regardless of the government's "benign motive, content-neutral

justification, or lack of animus toward the ideas." *Id.* at 165 (cleaned up).

City of Austin affirmed that restrictions are content based if they "discriminate based on topic, subject matter, or viewpoint." *City of Austin*, 142 S. Ct. at 1473. Such provisions "single out any topic or subject matter for differential treatment." *Id.* at 1472.

After *Reed* and *City of Austin*, a law restricting speech may be content based in two ways. First, a restriction on speech is facially content based if its text discriminates based on particular content—namely, "topic or subject matter." *City of Austin*, 142 S. Ct. at 1472. But if the regulation considers content simply to make neutral determinations—such as permissible time, place, and manner restrictions—then the law may be content-neutral on its face. *Id.* at 1475.

Second, if the government has an "impermissible purpose or justification" for a restriction on speech, then it is content based. *Id.* at 1475. Essentially, "regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* at 1474. Both facially content-based restrictions and restrictions with a content-based purpose require strict scrutiny.

II. *Reed* is incompatible with *Hill*, which bound the lower court in this case, and therefore the Court should overturn *Hill*.

Reed and *City of Austin* are not compatible with the analysis applied in *Hill*—the case binding the lower court here.

Hill upheld a state statute—substantially identical to the law at issue in this case—prohibiting anyone within 100 feet of an abortion facility's entrance to knowingly approach within eight feet of another person, without that person's consent, to pass a leaflet or handbill, to display a sign to, or engage in oral protest education, or to counsel with such other person. 530 U.S. 703, 707 (2000). Carbondale City implemented a near carbon copy of the law in *Hill*.

In *Hill*, the Court found the statute to be content neutral, noting that it applied equally to all protesters and that the State's interests in privacy were unrelated to the content of speech. *Id.* at 719–20. In reaching that conclusion, the *Hill* Court purported to apply the *Ward* test by determining "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 719 (quoting *Ward*, 491 U.S. at 791).

But *Reed* rejected that interpretation of *Ward*. The lower court in *Reed* found the sign code at issue to be content neutral, noting that "in *Hill*, the Supreme Court explained why a statute, which only restricted certain types of speech-related conduct, is properly considered content neutral." *Reed*, 707 F.3d at 1071. The lower court in *Reed* applied the same test used by *Hill*—the *Ward* test—concluding that the law was content neutral because it "was not adopted 'because of any disagreement with the message it convey[ed].'" *Id.* at 1072 (quoting *Hill*, 530 U.S. at 719).

This Court was unpersuaded by the Ninth Circuit's analysis, declaring that it "misunderst[ood]" *Ward* "as suggesting that a government's purpose is relevant even when a law is content based on its face," which was "incorrect." *Reed*, 576 U.S. at 166. Indeed,

"*Ward* had nothing to say about facially content-based restrictions" because "its framework applies only to a content-neutral statute." *Id.* at 166, 156.

Reed further emphasized that the government's purpose does not matter when faced with content-based laws: "Innocent motives do not eliminate the dangers of censorship presented by a facially content-based statute." *Id.* The text of the First Amendment "expressly targets the *operation* of laws—*i.e.*, the 'abridgment of speech'—rather than merely the *motives* of those who enacted them." *Id.* (emphasis added). The Court even quoted the dissent in *Hill*, declaring that "'the vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Id.* (quoting *Hill*, 530 U.S. at 743 (Scalia, J., dissenting)).

Reed also rejected the lower court's reasoning that the sign code was content neutral because it did not mention any idea or viewpoint, or single one out for differential treatment. *Id.* at 168. This Court found that the appellate court's "analysis conflate[d] two distinct but related limitations that the First Amendment places on government regulation of speech," namely, viewpoint and content-based restrictions. *Id.* at 168. The Court explained that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.*

The same confusion between viewpoint and content-based restrictions exists in *Hill*. The law does not allow certain types of speech, namely, "oral protest, education, or counseling" when within the bubble zone. Pet. App-9; *Hill*, 530 U.S. at 707. Here,

the law treats speech on certain subjects—protest, education, or counseling—differently from other speech. As in *Hill*, a "speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent." *Hill*, 530 U.S. at 743 (Scalia, J., dissenting). This runs afoul of *Reed*'s declaration that "the First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Reed*, 576 U.S. at 169 (cleaned up).

Hill's fatal flaw was to assume that facially discriminatory restrictions on speech were content neutral by focusing exclusively on the government's intent and purpose. *Hill's* analysis finding the restrictions on speech to be content-neutral—and thus the appellate court's application of *Hill* to Carbondale's nearly identical law in this case—cannot be squared with this Court's test for determining whether a restriction on speech is content based set forth in *Reed* and *City of Austin*. *Hill*—and consequently the lower court's decision in this case—therefore must be overturned.

Conclusion

This Court held in *Reed*, and reaffirmed in *City of Austin*, that a speech restriction is facially content based and subject to strict scrutiny if its text discriminates on the topic discussed, or the idea or message expressed. *City of Austin* 142 S. Ct. at 1472 (citing *Reed*, 576 U.S. at 163). By focusing on the government's intent and purpose, *Hill*—and the

decision below in this case—conflicts with *Reed* and *City of Austin*. *Hill*, therefore, must be overturned.

For these reasons, the Court should grant certiorari.

Respectfully submitted,

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