No. 23-74

In the
Supreme Court of the United States

DEBRA A. VITAGLIANO,
Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK,
Respondents.

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

BRIEF OF *AMICI CURIAE* WAGNER FAITH & FREEDOM CENTER AND RIGHT TO LIFE OF MICHIGAN IN SUPPORT OF PETITIONER

WILLIAM WAGNER
Counsel of Record
106 E. Main Street
Spring Arbor, MI 49283
(517) 643-1765
Prof.WWJD@gmail.com

Counsel for Amici Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether this Court should overrule the holding in *Hill v. Colorado*, 530 U.S. 703 (2000) that improperly enables government to prohibit and punish speech content with which it disagrees? In discussing whether this Court should revisit *Hill,* this amicus brief focuses on why the doctrine of *stare decisis* does not require adherence to the incorrect holding of that case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the *Wagner Faith & Freedom Center* and *Right to Life of Michigan Inc.* submit this brief.[1]

Housed on the campus of Spring Arbor University, the *Wagner Faith & Freedom Center* serves as a national academic voice for faith and freedom. Working daily to secure the future for freedom of thought, conscience, and religion, the Wagner Center equips the next generation with strategies promoting good governance and the Rule of Law. Contending for the faith, the Wagner Center strategically works to ensure the next generation may share the Gospel free of persecution and oppression. In public forums throughout the world the Center speaks on behalf of the persecuted and most vulnerable. The Wagner Center champions the cause of the defenseless and oppressed, standing for faith and freedom all around the world. Most importantly for this case, the Wagner Center works to preserve the freedom of Christian people to compassionately, peacefully, and

[1] Pursuant to Rule 37(a), *Amici curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

persuasively express viewpoints on various topics, and is a leading voice in this area.

Right to Life of Michigan, Inc., (RTL) is a non-profit and nonpartisan organization that believes every human being holds the inalienable right to life from conception until natural death. RTL advocates and strives to achieve its goals by educating the public on right to life issues, motivating the citizenry to action, encouraging community support, and participating in programs and legislation that foster respect and protect human life. RTL, with its hundreds of thousands of members, dedicates its work to protecting the sanctity of life by preparing pro-life educational material for sidewalk counseling, and by supporting public policy that respects all human life, including the lives of unborn children.

Amici Curiae have special knowledge helpful to this Court in this case, holding a significant interest in the protection of First Amendment freedoms. *Amici Curiae* file this brief to encourage this Honorable Court to guide the American judiciary, and other branches of government, to return to a sound constitutional basis for protecting First Amendment liberty in our nation.

SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution prohibits governmental infringement on the free exercise of religion and religious expression. U.S. Const. amend. I. The writers of the First Amendment did not say "make no law abridging

freedom of speech, unless you seek to prohibit and punish a religious person's pro-life viewpoint on the topic of abortion." Instead, the Framers of the First Amendment doubly protected such freedom of expression, requiring the application of strict scrutiny. *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2421, 2426 (2022)

In *Hill v. Colorado*, 530 U.S. 703 (2000), this Court drifted away from its constitutional jurisprudence recognizing First Amendment freedoms as a fundamental liberty interest requiring the most rigorous scrutiny. Even though the government's action prohibiting content-based speech in *Hill* substantially infringed on First Amendment protected liberty, *Hill* wrongly failed to require appropriate justification by the government for its conduct. This was so even though the law regulated expression in a content-based way, in some of the most historically revered public places traditionally protected for speech. The nature of *Hill's* erroneous First Amendment jurisprudence, its poor reasoning, the significance of post-*Hill* First Amendment cases, and lack of a legitimate reliance interest, all support granting the Petition to overturn *Hill.*

The doctrine of *stare decisis* must not be used to immortalize a decision that is contrary to a true and correct reading of the Constitution. Simply because the decision in *Hill* occurred, does not mean it must stand. Incorrect decisions require correction, not preservation. Just as this Court properly ceased to adhere to *Roe's* error for the sake of "predictability" or "consistency" it ought to likewise do so here. Being

consistently and predictably unconstitutionally wrong is no virtue.

Unless this Court affirmatively acts to restore fundamental right status to First Amendment expression here, *Hill*, as a practical matter, denudes any meaningful constitutional protection for expression or religious expression as a limit on the exercise of government power.

This Court should, therefore, grant the Petition, revisit *Hill*, and correct the error.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO REVISIT *HILL* AND RESTORE FULL FUNDAMENTAL RIGHT STATUS TO THE UNALIENABLE LIBERTY PROTECTED BY THE FIRST AMENDMENT.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...." U.S. Const. amend. I. This Court holds liberty protected by the First Amendment applicable to the States via the Fourteenth Amendment. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Hill v. Colorado wrongly upheld government action prohibiting and punishing a person's speech for their pro-life viewpoint on the topic of abortion, peacefully shared on a sidewalk. 530 U.S. 703 (2000). Relying on *Hill*, and in reaction to the overruling of *Roe v. Wade*, 10 U.S. 113 (1973), Westchester County made it a crime to engage in First Amendment activity, banning some of the most protected kinds of expression in some of the most protected places for such expression. Specifically, authorities here made it a crime to engage others on sidewalks and other public fora in proximity to abortion facilities "for the purpose of ***engaging in oral protest, education, or counseling," "unless such other person consents." Laws of Westchester County sec 425.31(i).

This case provides the opportunity for the Court to overrule *Hill's* wrongly decided precedent that government authorities increasingly use to unconscionably (and unconstitutionally) burden a person's speech and conscience when it disagrees with the topic or viewpoint expressed.

A. Stare Decisis Does Not Control Where a Precedent is Incorrectly Decided and Unconstitutional.

When a court correctly decides a precedent, other courts ought to adhere to that precedent under the doctrine of *stare decisis.* See *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2261-62 (2022) (recognizing valuable ends served by the doctrine) This doctrine substantially contributes to good governance by providing the predictability and

consistency necessary for the citizenry to reliably function within the Rule of Law. *Id.* For example, the doctrine protects those acting in reliance on a past decision, fosters fair decision-making, and helps preserve integrity of the judicial process. *Id*.

Stare decisis must not apply though in cases like *Roe,* or *Hill* when the decision in question was not only knowingly incorrect but unconstitutional. The doctrine of *stare decisis* must not be used to immortalize a decision that is contrary to a true and correct reading of the Constitution. The doctrine "is not an inexorable command," and it "is at its weakest when [the Court] interpret[s] the Constitution." *Dobbs,* 142 S. Ct. at 2262 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) and *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

Simply because the decision in *Hill* occurred, does not mean it must stand. Incorrect decisions require correction, not preservation. *Dobbs,* 142 S. Ct. at 2262 (recognizing a high value on having matters concerning constitutional liberty "settled right"). Just as this Court properly ceased to adhere to *Roe's* error for the sake of "predictability" or "consistency" it ought to likewise do so here. Being consistently and predictably unconstitutionally wrong is no virtue. "No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). Correcting an erroneous constitutional ruling is an "appropriate circumstance" to "reconsider and, if necessary,

overrule constitutional decisions." *Dobbs,* 142 S. Ct. at 2262.

i. The Nature of Hill's Erroneous First Amendment Jurisprudence, its Poor Reasoning, the Significance of Post-Hill First Amendment Cases, and Lack of a Legitimate Reliance Interest, all Support Granting the Petition to Overturn Hill

Hill was egregiously wrong and deeply damaging on the day this Court decided it. See *Dobbs,* 142 S. Ct. at 2265 (discussing the nature of the Court's error as a factor in overturning a prior constitutional ruling).

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords.

The writers of the First Amendment did not say "make no law abridging freedom of speech, unless you seek to prohibit and punish a religious person's pro-life viewpoint on the topic of abortion." Instead, the Framers of the First Amendment doubly protected such freedom of expression, requiring the application of strict scrutiny. *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2421, 2426 (2022).

Content-based regulation of expression by government authorities properly faces strict scrutiny, the highest and most rigorous standard of review in constitutional analysis. *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broadcasting System v. FCC* 512 U.S. 622, 641 (1994); *Republican Party of Minnesota v. White* 536 U.S. 765 (2002).

Here the government prohibits a person's speech in the most historically protected of places -- on the public sidewalks, a quintessential public forum. *Hague v. C.I.O.,* 307 U.S. 496, 515 (1939). Thus, the government must not regulate a person's expression in a content-based way unless it can survive strict scrutiny. *Heffron v. International Society of Krishna Consciousness Inc.*, 452 U.S. 640, 648 (1981); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). When government prohibits a person's speech based on its content, it increases the threat that the government may, by force of law, exclude disfavored viewpoints from the marketplace of ideas. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

State prohibitions on expression "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner Broad Sys., Inc. v. FCC*, 512 U.S. at 641 (1994).

Factual and legal developments since *Hill* have eroded the holding's underpinnings, leaving it an outlier. *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et al.*, 138 S. Ct. 2448, 2482-83 (2018) (discussing such as a factor to consider when deciding whether to overrule a decision). In *Kennedy*, this Court recently confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. *Kennedy,* 142 S. Ct. at 2421, 2426 (2022) citing, *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876-1877 (2021); *Reed v. Town of Gilbert,* 576 U.S. 155, 171 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.* The expression covered by Westchester's censorship law comprises the kind of First Amendment liberty addressed in *Kennedy*.

Indeed, post-*Hill* First Amendment cases consistently protect expression of a religious person's

viewpoints and ideas, subjecting government to the strictest of scrutiny if it substantially interferes. See, e.g., *Masterpiece Cakeshop, LTD., v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1745-46 (2018) (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where Colorado's public accommodation law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); see also, *Reed v. Town of Gilbert*, *Ariz.*, 576 U.S. at 164 (2015). In *Shurtleff v. Boston*, No. 20-1800 (May 2, 2022) this Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). See also, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

Likewise, in *Fulton,* this Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted). Put another way, so long as the government can

> achieve its interests in a manner that does not burden religion, it must do so.

Fulton, 141 S. Ct. at 1881.[2]

In *Hill*, this Court drifted away from its constitutional jurisprudence recognizing First Amendment freedoms as a fundamental liberty interest. 530 U.S. 703 (2000). To accomplish this deed, *Hill's* clever jurisprudence masks its poor reasoning. See *Janus*, 138 S. Ct. at 2479 (discussing poor reasoning as a factor to consider in deciding whether to overrule a past decision). Even though the government's action prohibiting content-based speech in *Hill* substantially infringed on First Amendment protected liberty, *Hill* wrongly failed to require appropriate justification by the government for its conduct. This was so even though the law regulated expression in a content-based way in one of the most historically revered public places traditionally protected for speech.

For example, under *Hill* a religious person's pro-life viewpoint on the topic of abortion, shared peacefully on a public street or sidewalk, is excepted from the constitutional protection contra-expressed in the plain language of the First Amendment. *Hill* did so despite a dearth of any supporting jurisprudence deeply rooted in our Nation's history and traditions, or

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[2] While the government action in *Fulton* was not generally applicable, nothing in the Court's holding suggests the fundamental nature of the constitutional protection ought to diminish where it is.

implicit in the concept of ordered liberty. There is no real question that *Hill* used jurisprudential cleverness to cover its poor reasoning here. The context of *Hill* (and this case) requires speakers in public fora near abortion facilities to not engage in expression with others (i.e., in essence and reality, not share with others a prolife viewpoint on the topic of abortion). For the government to pretend that the censuring of this viewpoint on this topic of great public concern is merely the regulation of a place where speech occurs, deviously diminishes the fundamental nature of First Amendment liberty.

The pattern of governments using and abusing such jurisprudential diminishment of the First Amendment to accuse those with whom it disagrees, is familiar. For example, *Employment Division v. Smith* held that laws substantially interfering with the free exercise of religion were constitutional if written in a neutral and generally applicable way. 494 U.S. 872 (1990). This decision enables authorities to strategically write laws in a generally applicable way but then contextually apply the general prohibition in ways that result in accusations against people exercising religious conscience. For example, *Smith* would permit the prosecution of a pastor administrating the sacrament of holy communion with wine on Sunday, if a law generally prohibited the distribution of alcohol on the weekend. With similar cleverness, *Hill* allows the prosecution of a pastor expressing a pro-life viewpoint on the topic of abortion on a public sidewalk in proximity to an abortion facility.

Such jurisprudential deviousness covers deficient reasoning that re-writes the Constitution, rather than enforcing it as written. *Hill's* poorly reasoned conclusion cannot be reconciled with either pre- or post-*Hill* First Amendment jurisprudence.

The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus*, 138 S. Ct. at 2464 (2018)

At the heart of the matter here, a law prohibits and punishes citizens (and most often religious citizens) for expressing their pro-life viewpoint on the topic of abortion. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Finally, while sometimes "reliance provides a strong reason for adhering to established law" such must not be the case here. *Janus*, 138 S. Ct. at 2484 (discussing reliance as a factor to consider in deciding whether to overrule a past decision). Reliance on a wrongly decided unconstitutional ruling deserves no deference. *Brown v. Board of Education,* 347 U.S. 483 (1954) could not have been decided as it was if it considered the reliance of segregationists on *Plessy v.*

Ferguson, 163 U.S. 537 (1896). And in this case, it is not any reliance on the morally hazardous convenience of a "right" to kill your offspring that serves as the proper measure to silence expression of a pro-life viewpoint.

To be sure, *Planned Parenthood v. Casey* brazenly cited as its main "reliance" concern "the certain cost of overruling *Roe* for the people who have ordered their thinking and living around that case." 505 U.S. 833, 856 (1992). What sort of human beings order their thinking and life around the ability to kill children before they are born? The very concept is appalling, and *Dobbs's* rightly refused to apply *stare decisis.* This Court should likewise not apply the doctrine here.

From a "reliance" perspective, it is the amount of expression and conscience silenced, and the number of unborn lives sacrificed on the altar of judicial supremacy, that this Court should weigh when deciding whether *Hill* requires reversal. For both citizens of conscience and the pre-born rely on this Court to reject *Hill's* unconstitutional diminishment of fundamental First Amendment freedoms.

ii. Hill's Erroneous Abortion Speech Jurisprudence Exceeds the Scope of its Article III Judicial Power, Disregards the Supremacy Clause, and Usurps the People's Authority Contrary to Article V's Explicit Amending Process

Applying *stare decisis* is an unconstitutional act where application of the doctrine results in this Court

following a precedent contrary to the true meaning of the Constitution. In *Roe*, the Fourteenth Amendment served as the applicable constitutional Rule of Law. The *Roe* Court, venturing far beyond the scope of its Article III powers, improperly expanded the Fourteenth Amendment from something designed to protect the inherent value of human life, to instead add a liberty interest in the right to abortion. In doing so, a politically unaccountable Court created *ex nihilo* an entitlement to kill an unborn child. In *Dobbs*, this Court partially restored legitimacy to American judicial institutions by overturning the long-standing egregious error in *Roe*.

In *Hill*, the First Amendment served as the applicable constitutional Rule of Law. As in *Roe*, this Court in *Hill* again ventured far beyond the scope of its Article III powers, this time improperly amending the First Amendment to uphold content-based speech regulation directed against opponents of abortion and their viewpoint on the topic. Because the law enabled government authorities to silence pro-life viewpoints on the topic of abortion, Justice Scalia accurately noted it "therefore enjoy[ed] the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice." *Hill*, 530 U.S. at 742 (Scalia, J. dissenting)

The words and structure of the American Constitution contemplate a judicial branch with no

power to make or enforce laws.[3] No enumerated judicial power exists for the judiciary to amend the Constitution or evolve the meaning of its provisions.

It is undisputed that

> The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.' The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'

National Fed'n of Indep Bus v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404-05 (1819)); U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 194-95 (1824).

Article III of the Constitution assumes a jurisprudence obligating the judiciary to honestly apply constitutional provisions according to their true meaning. Historical evidence demonstrated that *Roe* inappropriately read into the Fourteenth Amendment

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[3] Article III provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party." U.S. Const, art. III, §§ 1 and 2.

something not there. This Court in *Dobbs,* therefore, upheld the Constitution rather than *Roe's* distortion of it. Likewise, as to this Court's error in *Hill*, it is the Constitution that must govern us, not judicial amendments of it.

In this regard, Article VI, section 2 mandates that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. const. art.6 sec. 2. Not included in the list of "the supreme Law of the Land" are the decisions of this Court. Since *Marbury v. Madison* declared "[i]t is emphatically the province and duty of the judicial department to say what the law is," a co-existing constitutional duty demands judges decide cases in conformity with the Constitution. 5 U.S. 137, 177-78, 180 (1802) (making clear that our Constitution also serves as "a rule for the government of courts"). This Court is obliged, therefore, to accept the Constitution as the "paramount law" when a precedent or other law conflicts with what the Constitution says. *Id*. Because *Hill's* holding contradicts the true meaning of the First Amendment, the Supremacy Clause requires this Court to cease following its precedent and instead give effect to the constitutional provision.

Again, no real question exists over whether *Hill* re-wrote the Constitution rather than enforcing it. John Hart Ely's famous observation regarding *Roe* also applies to here: "It is bad because it is bad constitutional law, or rather because it

is *not* constitutional law and gives almost no sense of an obligation to try to be."[4]

Moreover, *Hill's* distortion of the First Amendment affirmatively amended the Constitution. In doing so, the *Hill* Court unconstitutionally bypassed Article V's constitutionally required political processes that specifically require involvement of politically accountable state legislatures. U.S. Const., art. V. The Constitution delegates and reserves power to amend the meaning of a constitutional provision only to those politically accountable to the people. *Id.*

To be sure, proponents of evolving judicial preferences claim that by amending the Constitution from the bench, unelected judges can jurisprudentially bestow new meanings and even new rights and understandings for the people. Disturbingly, (as *Hill* illustrates) a democratically unaccountable judiciary capable of giving rights is equally empowered to take them away. In this jurisprudential wonderland, judges wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to shape as they see fit. This is the antithesis of constitutional governance. First *Roe,* and then *Hill*, supplanted our politically accountable system of constitutional governance with an unelected judiciary's own protean preferences. In doing so, this Court's abortion speech jurisprudence disregards the Supremacy Clause, exceeds the scope of its Article III Judicial Power, and usurps the people's authority

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[4] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 947 (1973).

contrary to Article V's explicit amending process.[5] While *Roe* wrongly wrote new "rights" into the Constitution that the Ratifiers never intended, *Hill* compounded the egregious error. Acting outside this Court's constitutional authority, *Hill* exercised will instead of judgement, so as to silence pro-life viewpoints on the topic of abortion. As *Dobbs* provided the vehicle to overturn *Roe*, this case provides the opportunity for the Court to overrule *Hill's* wrongly decided precedent.

Hill, like *Roe* before it, dangerously undermines constitutional representative governance under the Rule of Law, thereby threatening the institutional legitimacy of the federal judiciary. This Court should cease relying on *Hill*, therefore, to represent the Constitution's true meaning, which is what must govern this Court. This Court should grant the Petition and revisit *Hill*.

Stare decisis does not constrain this Court when a precedent violates the Constitution. By ignoring the true meaning of a constitutional provision, and changing it to mean something else, *Hill* disregarded the Supremacy Clause, exceeded the scope of its

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[5] In his farewell address, George Washington stated the core principle that: "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." https://founders.archives.gov/documents/Washington/05-20-02-0440-0002 (last visited 8/17/23). He was not wrong.

Article III Judicial Power, and usurped the people's authority, contrary to Article V's explicit amending process. In doing so, *Hill* undermined republican governance and the Rule of Law. This Court should, therefore, grant the Petition and reject *Hill's* unconstitutional precedent.

B. *Hill* Contributes to a Self-Inflicted Hyper-Politicization of the Judiciary that Undermines the Court's Institutional Legitimacy.

The people entrust the nation's judiciary to independently resolve disputes arising under the Constitution and laws of the United States. This trust exists only to the extent the people continue to perceive the exercise of judicial power as legitimate. The judiciary's duty to apply the Rule of Law, as understood and expressed by the people's representatives, preserves this legitimacy. To facilitate this calling, the Constitution inoculates the judiciary against political interference from the Congress and President by giving lifetime tenure to Federal Judges. U.S. Const., art. III. Federal Judges hold lifetime appointments so that they may apply existing law to resolve disputes without fear of political consequences.

And it is critical that they do so apolitically. With constitutionally instituted independence comes responsibility. Every Justice taking the oath of office swears to uphold the Constitution as it was written. The principle of independence only preserves institutional legitimacy of the judiciary if the judiciary

exercises judgment based on what a constitutional provision says, not based on what the judiciary wills it to say.

The judiciary's duty to adhere to the Constitution requires it to resist the temptation to use its independence, as it did in *Roe and Hill*, to impose its will over that of the people. The Constitution guarantees politically accountable representative governance. Unconstitutional usurpation of that authority by the judiciary undermines the judiciary's institutional legitimacy.

Roe might have been the most significant case in the Supreme Court's history—in our nation's history. It was at least as significant as *Marbury* or *Dred Scott*, and almost certainly more so because many millions of lives hung in the balance. Yet for all its gravitas, it was a simple case. Not easy, of course, but simple. To restore institutional legitimacy, this Court in *Dobbs* just applied the Constitution as written. *Dobbs,* in overturning *Roe*, helped to diminish the self-inflicted hyper-politicization of the judiciary caused by the judicial overreach in the *Roe* case. Overturning *Hill* furthers this restoration process, repairing and reestablishing the American judiciary's institutional legitimacy.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to grant the Petition, revisit *Hill*, and reverse the decision of the Second Circuit.

Respectfully submitted,

WILLIAM WAGNER
Counsel of Record
106 E. Main Street
Spring Arbor, MI 49283
(517) 643-1765
Prof.WWJD@gmail.com

Counsel for Amici Curiae