No. 24-57

In the
Supreme Court of the United States

COALITION LIFE,

Petitioner,

v.

CITY OF CARBONDALE, ILLINOIS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

After this Court returned the debate on abortion to the people, *see Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), one would have hoped municipalities would take steps to ensure that ensuing debate would be "uninhibited, robust, and wide-open," *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Carbondale, for its part, took the opposite tack, responding to *Dobbs* by eviscerating the people's right "to converse with" their "fellow citizens about [that] important subject on the public streets and sidewalks." *McCullen v. Coakley*, 573 U.S. 464, 496 (2014). And since Carbondale purposefully modeled its ordinance on the law upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), that dubious precedent foreclosed any ability to develop a record and left the Seventh Circuit with no choice but to uphold it. But *Hill* was egregiously wrong from the start and remains so today. It is a "distortion of" "First Amendment doctrines," *Dobbs*, 597 U.S. at 286-87, that has skewed abortion debate for more than two decades. As numerous members of this Court and amici have recognized, *Hill*'s "abridged edition of the First Amendment" must be set aside. *McCullen*, 573 U.S. at 497 (Scalia, J., concurring in the judgment).

Having precluded any meaningful factual development and foreordained the outcome of lower-court litigation by mimicking the law upheld in *Hill*, Carbondale tried to moot this case and frustrate petitioner's efforts to vindicate the First Amendment by hastily repealing its speech-suppressing ordinance on the eve of this petition. That effort to prevent the one Court able to reconsider *Hill* from doing so is

understandable, as the city has precious little to offer in *Hill*'s defense. But the city's bait-and-switch is unavailing, as the relief petitioner has sought—retrospective damages and prospective injunctive relief—can still be granted. And while the city makes much of the fact that *Hill* precluded this case from making it past a motion to dismiss, that is both why *Hill* must go and why the city's suggestion that this Court await a case with a more developed record is so deeply cynical. The city precluded petitioner and the lower courts from developing a record by ensuring that there was no daylight between its ordinance and the law upheld in *Hill*. And the notion that some other group must expend even more resources developing a record before lower courts that cannot grant relief while *Hill* remains on the books, only to face the prospect of a certiorari-eve repeal that (in the city's view) will render all those efforts for naught, would make Sisyphus' to-do list enviable. The city's arguments thus succeed only in confirming that this Court should put an end to *Hill*, and do so now, rather than reward Carbondale's transparent efforts to frustrate this Court's review and render petitioner's resource-intensive efforts to vindicate the First Amendment and level the playing field for naught.

I. This Case Is Not Moot.

A case "becomes moot only when it is impossible for a court to grant any effectual relief." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 295 (2023). The party asserting mootness bears the "heavy burden" of establishing it. *Adarand Constructors, Inc. v. Slater*, 528 U. S. 216, 222 (2000) (per curiam). Carbondale has not met that burden, as

petitioner has sought two forms of relief that remain available notwithstanding the city's bait-and-switch.

1. Petitioner's complaint seeks nominal damages for Carbondale's infringement of its First Amendment rights. Dist.Dkt.1.at.p.13. Petitioner can still obtain that relief, as nominal damages remain available after a challenged policy has been changed. *See Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). Carbondale protests that "[n]ominal damages" are available only when the plaintiff suffered a "past, completed injury." BIO.13. But petitioner *did* suffer a "past, completed injury": Its members were forced to refrain from sidewalk counseling for the nearly two years that Carbondale prohibited that constitutionally protected conduct. Dist.Dkt.1.at.¶¶9-11, 21-24, 48.

Carbondale insists past harm cannot be proven in "a pre-enforcement challenge." BIO.13 That might be true when the government responds to a pre-enforcement challenge by repealing the policy before its effective date. But when, as here, a law takes effect and suppresses speech for nearly two years, there is no plausible argument that nominal damages are foreclosed. Nothing in *Uzuegbunam* is to the contrary. To be sure, the Court there declined to decide whether nominal damages were available to one plaintiff who had "decided not to speak about religion" for fear of that doing so might violate the school's policy. 141 S.Ct. at 797. But that was because of an unresolved factual issue—the school had not banned all religious speech, but rather concluded that Uzuegbunam's religious speech violated its general speech policy. It was thus unclear whether Bradford's self-censorship

of "religious speech" matched up with the school's policy. *Id.* at 802 n.*.

Here, by contrast, there was no ambiguity about whether petitioner's members could engage in sidewalk counseling under Carbondale's ordinance. To do so would have been illegal. There is thus no risk that members chilled themselves by refraining from speech that was not actually prohibited. Lower courts have consistently recognized the availability of damages for plaintiffs who refrained from speech because it was prohibited—even when the law was never enforced against them and was later repealed. *E.g.*, *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 802-05 (7th Cir. 2016); *KH Outdoor, LLC v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007); *Moonin v. Tice*, 868 F.3d 853, 860 n.4 (9th Cir. 2017).[1]

2. Petitioner's prayer for injunctive relief also remains alive. With prospective relief, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). That rule applies with full force here, as Carbondale's "repeal … would not preclude it from reenacting precisely the same provision if" certiorari were denied, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), either "immediately or later at some more propitious moment," *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 243 (2024). To demonstrate otherwise, Carbondale must make "absolutely clear" that it could not "reasonably be expected" to reenact

[1] The cases the city invokes, by contrast, involve plaintiffs who failed to establish that a law prohibited their speech. BIO.14-15.

its ordinance. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Carbondale's bald assertion that it "does not intend to reenact" its ordinance, BIO.5, 10, does not satisfy that "heavy" burden. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 & n.5 (1953).

Carbondale invokes *New York State Rifle & Pistol Association, Inc. v. City of New York*, 590 U.S. 336, 341 798 (2020). But there it was not just the city that "changed its ordinance"; "the State of New York amended its firearm licensing statute" to preclude the city from reinstating its old regime. *Id.* at 337; *id.* at 341 (Alito, J., dissenting). Here, by contrast, no independent third-party action would block Carbondale from reinstating its ordinance. And the process by which it was repealed—a special four-minute weekend meeting—demonstrates both Carbondale's propensity for gamesmanship and the city's ability to alter its laws on a whim.[2] Moreover, the reality that this ordinance was enacted in protest against *Dobbs* hardly gives confidence that Carbondale will refrain from reenacting its ordinance out of respect for this Court—especially given the city's vehement defense of the ordinance even now. BIO.19-31; *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944) (finding "'actual controversy'" where "Respondent … consistently urged the validity of" voluntarily discontinued action). Carbondale's blatant effort "to manipulate the Court's jurisdiction to insulate a favorable decision from review," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89 (2000), thus

[2] The city's remaining cases do not involve the voluntary-cessation doctrine. *See* BIO.8-10 & n.2.

succeeds only in underscoring the need for this Court's intervention.

II. The Court Should Overrule *Hill v. Colorado*.

Hill was egregiously wrong the day it was decided and remains so today. Carbondale's effort to reconcile *Hill* with cases that came before it fails at every turn, and its claim that *Hill* has stood the test of time fares even worse.

1. *Hill* turned the First Amendment on its head by inventing a right of "unwilling listeners" to avoid speech they would rather not hear in "quintessential public forums." *Hill*, 530 U.S. at 714-17. Unable to defend that holding, Carbondale denies it, insisting that *Hill* "explicitly rejected … any suggestion that speech could be prescribed merely because it was offensive." BIO.21. But as the quotation ostensibly supporting that claim reveals, *Hill* rejected only the proposition that speech can be "deprive[d] … of constitutional protection" *entirely* because it "may be offensive to … recipients." 530 U.S. at 715. It then held that "[t]he unwilling listener's interest in avoiding unwanted communication" outweighs the speaker's "undisputed" right to speak in "'quintessential' public forums." *Id.* at 714-17.

Carbondale cannot ground that holding in any case before *Hill*. The city invokes *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), but that case involved speech *inside* hospitals, not on public sidewalks surrounding them. *Id.* at 775-76. It invokes *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), but that case not only involved an injunction against protestors who had repeatedly "impeded access" to an abortion clinic, but invalidated as overbroad the

provision that barred "*all* uninvited approaches of persons seeking [abortion services], regardless of how peaceful." *Id.* at 773-74. And *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), not only also involved an injunction against protesters who had blocked access to and physically assaulted women entering a clinic, but explicitly rejected any so-called "right of the people approaching and entering [abortion] facilities to be left alone." *Id.* at 383.

Carbondale's attempt to resuscitate *Hill*'s approach to content neutrality is equally unavailing. While it agrees that courts must assess whether a law "[*o*]*n its face* … accords preferential treatment" based "on the nature of the message being conveyed," *Carey v. Brown*, 447 U.S. 455, 460-61 (1980), it insists that *Hill* "did just that," BIO.24-25. But as Carbondale admits in its next breath, *Hill* really asked "'whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys.'" BIO.24-25 (quoting *Hill*, 530 U.S. at 719). That is not "enough to save a law which, on its face, discriminates based on content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994).

Finally, Carbondale's defense of *Hill*'s Omar-not-Versace tailoring falls flat. The city does not deny that *Hill* found Colorado's law "narrowly tailored" because it "does not entirely foreclose any means of communication." 530 U.S. at 726-27. Instead, Carbondale defends the proposition that "Colorado needed only to provide alternative channels for communication"—even if they look nothing like the channels it foreclosed. BIO.26. That does not begin to cut it for strict scrutiny. *Hill*, 530 U.S. at 749, 762

(Scalia, J., dissenting). Indeed, even *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), reiterated that laws must not "burden substantially more speech than is necessary." *Id.* at 799. And any claim that sidewalk counselors should be content with displaying signs from eight feet away reflects "'willful ignorance of the type and nature of communication' in which the petitioners [in *Hill*] (and here) seek to engage." Pet.22 (quoting *Hill*, 530 U.S. at 756 (Scalia, J., dissenting)).

2. Carbondale insists that *Hill* has "stood the test of time," BIO.27, but it fails to identify a *single* one of this Court's cases that has favorably invoked *Hill* in the past 24 years. That is because there is none. And this Court's more recent cases have undermined *Hill* from soup to nuts. *See, e.g., McCullen*, 573 U.S. 464; *Reed v. Town of Gilbert,* 576 U.S. 155 (2015); *Dobbs*, 597 U.S. at 287 & n.65.

Carbondale tries to reconcile *Hill* with *McCullen* by noting that *McCullen* "affirmed … the State's significant and content-neutral interests in public safety and ensuring safe access to medical services." BIO.28. But those are not the interests on which *Hill* relied. *Hill* relied instead on the state's made-up interest in protecting "[t]he unwilling listener[]" from "unwanted communication," even if it poses *no* risk to public safety or impediment to access. *Hill*, 530 U.S. at 714-17. *McCullen*, by contrast, expressly rejected the notion that a state may restrict speech in a public forum because it "caused offense or made listeners uncomfortable." 573 U.S. at 481. And it thoroughly dismantled any claim that buffer zones do not abridge the First Amendment rights of sidewalk counselors,

id. at 488-90—not to mention the rights of initially-unwilling-but-ultimately-open listeners, Pet.22.

Carbondale tries to square *Hill* with *Reed* by noting that the latter instructed courts to "evaluate *both* whether 'a law is content based on its face [and] when the purpose and justification for the law are content based.'" BIO.28 (quoting *Reed*, 576 U.S. at 166). But what *Reed* really said is that "strict scrutiny applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based." 576 U.S. at 166 (emphasis added). *Hill*, by contrast, said that strict scrutiny does *not* apply to a law that is content based on its face if it was not adopted "because of disagreement with the message." 530 U.S. at 719.

Carbondale posits that *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), "rejected" the notion that "the Colorado statute discriminated based on 'function or purpose." BIO.28. But the majority actually alluded to *Hill* only to refute the dissent's accusation that it was "'resuscitating'" it. 596 U.S. at 76. And while the majority rejected the notion that a "classification that considers function or purpose is *always* content based," it reiterated that laws that use "function or purpose" as a "proxy" for an "obvious subject-matter distinction" are content based." *Id.* at 74. That is precisely what Colorado's (and Carbondale's) law did.

Finally, Carbondale notes that *Dobbs* declined to "'cast doubt on precedents that do not concern abortion.'" BIO.29 (quoting *Dobbs*, 597 U.S. at 290). Indeed. But *Hill does* "concern abortion," and in fact can only be explained as a product of the "*ad hoc*

nullification machine" that typified this Court's pre-*Dobbs* precedent. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting). And if singling out *Hill* to illustrate how "[t]he Court's abortion cases … have distorted First Amendment doctrines," 597 U.S. at 287 & n.65, does not cast doubt on it, it is difficult to imagine what would.

3. As for the remaining *stare decisis* criteria, the city has nothing to say about *Hill*'s (un)workability. Pet.28. It just claims that overruling *Hill* "would upset States and localities who have legislated in reliance on" it. BIO.30. It is hard to see how anyone can rely on a decision that members of this Court have repeatedly said is on thin ice. But if the only reliance interest Carbondale can muster is an interest in continuing to suppress speech and skew a debate that has just been returned to the states, then the time for *Hill*'s overruling has come.

III. This Case Is An Excellent Vehicle To Resolve An Exceptionally Important Question.

The question presented is undeniably important, as numerous members of this Court have recognized, *see, e.g., City of Austin*, 596 U.S. at 102-04 (Thomas, J., dissenting), and an armada of amici has attested. Indeed, even Carbondale acknowledges that *Hill*-style ordinances remain a recurring issue. BIO.29-30. In fact, the Detroit City Council enacted one shortly after this petition was filed. Offenses at Healthcare Facilities, Detroit, MI, City Code (Oct. 1, 2024) (to be codified at ch. 31, art. XIV). And the tendency of cities to repeal them as they near the one Court that can revisit *Hill* only underscores the cynicism of Carbondale's suggestion that this Court should wait

for a vehicle with a more extensive (i.e., more expensive) record. The answer is not to force citizens who want only what the First Amendment guarantees them to expend even more resources developing a record that is useless to lower courts in hopes that a city forgets to repeal its ordinance when the case nears this Court. The answer is to grant review here and give *Hill* the burial it deserves.

Carbondale's insistence on factual development is not just cynical; it misses the point. The question presented is whether *Hill* should be overruled. *See* Pet.i. Until that question is answered in the affirmative, factual development is beside the point. And this is an ideal vehicle to answer that question. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), on pleadings record). As the city agreed below, *Hill* forecloses this challenge notwithstanding the troubling allegations detailed in the complaint. *E.g.*, Dist.Dkt.1.at.¶¶14-49. And any factual disputes that matter if *Hill* is overruled can be resolved on remand, which makes eminently more sense than developing extensive records that are useless to lower courts bound by *Hill*. Indeed, the only cases in which fact development would make sense right now are ones with laws that are arguably distinguishable from the law in *Hill*—which will almost inevitably be worse vehicles for deciding whether to overrule it.

In short, there is no reason to wait any longer to eradicate the "distortion of" "First Amendment doctrines" that *Hill* created. *Dobbs*, 597 U.S. at 286-87. As Carbondale acknowledges, the whole point of

Dobbs was to return "'debate about the sensitive questions surrounding abortion to the people.'" BIO.30 (quoting Pet.16). Yet every day that *Hill*'s "abridged edition of the First Amendment" remains on the books is one more day that it is curtailing "speech against abortion." *McCullen*, 573 U.S. at 497 (Scalia, J., concurring in the judgment). The Court should grant certiorari and finally correct that grave mistake.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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