No. 23-74

In the Supreme Court of the United States

DEBRA A. VITAGLIANO,

Petitioner,

v.

COUNTY OF WESTCHESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Westchester County stakes its effort to avoid certiorari on a transparent attempt to manipulate this Court's jurisdiction. Last year, the County passed an abortion bubble-zone law modeled on the one upheld in *Hill* v. *Colorado*, 530 U.S. 703 (2000). When petitioner sued, the County vigorously defended its law, repeatedly telling federal courts the law served important government interests. After receiving this certiorari petition, however, the County repealed the law—now telling this Court the law is needless and claiming the case moot.

But the tactic is as inept as it is obvious. It is inept because it mistakes basic principles of mootness. Petitioner has live claims for compensatory and nominal damages stemming from the year in which her speech was undisputedly foreclosed by the threat of criminal penalties. That chill on speech supports claims for compensatory and nominal damages—and such claims cannot be mooted by repealing the challenged law. Moreover, even if petitioner had no damages claims, her claim for injunctive relief remains live, because the County's eleventh-hour course-reversal is a textbook example of voluntary cessation insufficient to moot a case.

The County's tactics are worse than inept; they are pernicious. The County knew from the start that its law was likely unconstitutional but passed it anyway—with its own attorney warning, "hopefully our legislation never gets to the Supreme Court," because "we know what the Supreme Court would rule." Now, after suppressing core protected speech for over a year, and telling multiple courts that its law

was crucial and constitutional under *Hill*, it seeks to evade review by telling this Court the opposite.

That is an abuse of the judicial process. It shows contempt for the Constitution. And denying certiorari here would only invite other governments to play similar games.

All of this comes from *Hill*. *Hill* distorts First Amendment jurisprudence. It gives local governments cover to suppress speech. And now it motivates them to manipulate the federal courts. The Court should reject the County's gamesmanship, grant certiorari, and overrule *Hill*.

ARGUMENT

I. This case is not moot.

The County's mootness argument is incorrect. A case isn't moot if "any effectual relief whatever" remains available. *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 295 (2023). Here, *all* the relief petitioner seeks—retrospective and prospective alike—remains fully available.

1. The repeal has no effect whatsoever on petitioner's claim for damages. *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660-1661 (2019); see also 13C Wright & Miller, Federal Practice & Proc. §3533.3 (3d ed.) ("[u]ntold numbers of cases illustrate th[is] rule"). Petitioner's complaint seeks both compensatory and nominal damages for the County's yearlong denial of her First Amendment rights. Pet.App.66a. Those damages will be "awarded by default" when petitioner prevails on the merits—nominal damages as a baseline, and compensatory damages if petitioner can "quantify [her] harm in

economic terms." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 798-802 (2021). Accordingly, there isn't just a "chance," but a certainty (if petitioner prevails), "of money changing hands"—so this "suit remains live." *Mission Product*, 139 S. Ct. at 1660.

The County's counterarguments are meritless. The County says damages are available only for "a past, completed injury," which can't be shown in "a pre-enforcement challenge." BIO.7. But petitioner *has* suffered a past, completed injury: she was prevented from sidewalk counseling—quintessential First Amendment activity—for over a year, because the County had criminalized it. "Self-censorship" is a "harm that can be realized even without an actual prosecution." *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). That is why lower courts (including the Circuit in which this case arose) have repeatedly recognized the availability of damages for plaintiffs whose speech was chilled by a challenged law—even when (as here) the suit was "pre-enforcement," and even when (as here) the challenged law was repealed.[1]

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[1] *McKenna* v. *Peekskill Housing Auth.*, 647 F.2d 332, 334-335 (2d Cir. 1981) (challenge to repealed rule not moot; damages available for plaintiffs whose "exercise" of "First Amendment rights" had been "chill[ed]"); accord, *e.g.*, *Moonin* v. *Tice*, 868 F.3d 853, 861 n.5, 864 (9th Cir. 2017) (challenge to retracted policy not moot; plaintiff had "claim for damages" because of "chilling effect" on speech); *Six Star Holdings, LLC* v. *City of Milwaukee*, 821 F.3d 795, 802-805 (7th Cir. 2016) (challenge to repealed ordinances not

Resisting, the County turns, surprisingly, to *Uzuegbunam*, BIO.7, which held that a request for nominal damages prevented mootness in a challenge to a university's speech policy, even after the university repealed its policy. 141 S. Ct. at 802. The County notes that the Court there did "not decide whether" the other plaintiff (Bradford) "c[ould] pursue nominal damages." *Id.* at 802 n.*. But the comparison is inapt. No court had ever determined that Bradford suffered a cognizable injury. Here, by contrast, the Second Circuit panel unanimously explained that petitioner was injured because she trained to engage in sidewalk counseling; had an "earnest desire to" do so; and would have done so "'but for' the enactment of the bubble zone," which "squarely proscribed" that activity and threatened her with fines and imprisonment if she engaged in it. Pet.App.6a, 11a-20a. That is a "completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 802. The "risk of future harm"—enforcement of the *Hill* law—"cause[d] a *separate* concrete harm"—petitioner stayed off the sidewalks. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2210-2211 (2021). She cannot now go back and offer alternatives to women whose abortions have already occurred.

Grasping, the County asserts in a footnote that "the petition is bereft of any allegation of actual injury." BIO.6 n.5. But the idea that a certiorari

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moot; plaintiff who "refrained from protected speech" could pursue damages); *Fitzgerald* v. *City of Portland*, No. 2:14-cv-0053, 2014 WL 5473026, at *3, *5-6 (D. Me. Oct. 27, 2014) (challenge to repealed buffer zone not moot; sidewalk counselors could seek nominal damages for "past" harm suffered "when they were prohibited from exercising their First Amendment rights").

petition would elaborate on a damages demand (especially before the County's self-serving repeal tried to make mootness an issue) is unusual indeed. Cf. *New York State Rifle & Pistol Ass'n* v. *City of New York* (*NYSRPA*), 140 S. Ct. 1525, 1526-1527 (2020) (per curiam) ("Petitioners did not seek damages *in their complaint*." (emphasis added)). In any event, like the complaint before it, the petition *does* articulate petitioner's injury—she was denied her First Amendment right to engage in sidewalk counseling and offer help to women, Pet.5-6; Pet.App.58a, ultimately for over a year. See *Irish Lesbian & Gay Org.* v. *Giuliani*, 143 F.3d 638, 649-650 (2d Cir. 1998) ("The denial of a particular opportunity to express one's views can give rise to a compensable injury."); *City of Watseka* v. *Illinois Pub. Action Council*, 796 F.2d 1547, 1558-1559 (7th Cir. 1986) (damages for two years of "lost First Amendment rights" from challenged law). And it recounts that she invested significant time training to engage in sidewalk counseling, which the County's law for a year stopped her from using. Pet.5-6; Pet.App.48a-51a. Cf. *Uzuegbunam*, 141 S. Ct. at 802 ("one dollar" for "wasted bus fare" compensable).

To find this case live, this Court need not "express [any] opinion" on whether these damages claims will succeed. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978). It need only acknowledge they are not so "insubstantial or so clearly foreclosed by prior decisions that this case may not proceed." *Ibid.* Petitioner's "claims for retrospective relief are indisputably live," so the repeal fails to moot this case. Tex. Right to Life Amicus Br.9-11.

2. Nor does the County's maneuvering moot petitioner's claims for injunctive and declaratory relief. Even where a plaintiff seeks only prospective relief, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). That rule applies here—the County's "repeal of [its *Hill* law] would not preclude it from reenacting precisely the same provision if" certiorari is denied. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

The County acknowledges voluntary cessation but mangles the test. In its view, voluntary cessation "applies only if it is reasonably likely that the behavior will recur." BIO.9. But its own case (which it doesn't quote) has it right: the rule applies unless "subsequent events" "ma[k]e it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (emphasis added); see also, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 457 n.1 (2017) (same). The County doesn't come close to "carr[ying]" this "heavy burden" here. *Trinity Lutheran*, 582 U.S. at 457 n.1.

The County doesn't even assert it won't reenact the law. It makes only the cagey statement that "we have been informed that there is no intention of doing so." BIO.9; see also Supp.App.2sa (*Hill* provision "is not necessary *at this time*" (emphasis added)). And while the County relies on *NYSRPA*, BIO.11 & n.8, there, a state law forbade New York City from reenacting the challenged measure. 140 S. Ct. at 1526; see also *id.* at

1527 (Alito, J., dissenting). Nothing similar constrains the County.

Moreover, the County concedes voluntary cessation would apply if the repeal were "a litigation tactic." BIO.12. Yet few terms are more apt for what happened here. The County enacted its *Hill* provision fully aware it would prompt litigation and advised by counsel that "we know what the Supreme Court would rule if this ever got there," "so hopefully our legislation never gets to the Supreme Court." Pet.2-3, 7. When petitioner sued, the County told lower courts the law was "narrowly tailored," "serves significant governmental interests," and was "necessarily" constitutional under *Hill*, County C.A. Br.12, 17, 19—all while using the law's threat of fines and imprisonment to silence sidewalk counselors like petitioner and deprive women of offers of information and help. Then, only after the case arrived at this Court, the County repealed the provision, trying a "gambit to duck [this Court's] review" after having imposed a year's worth of speech suppression and underinformed abortion decisions. EPPC Amicus Br.17. Such an effort "to manipulate the Court's jurisdiction to insulate a favorable decision from review" "counsels against a finding of mootness." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288-289 (2000).

Brazenly, the County claims its coordination with "reproductive-rights" organizations like Planned Parenthood and Choice Matters reduces the risk of reversion. BIO.9. But the opposite is true. Representatives from Planned Parenthood and Choice Matters spoke at the press conference introducing the County's effort to pass a *Hill* law, praising the County

for "set[ting] an example."[2] They then were lead witnesses supporting enactment, with a Planned Parenthood spokesperson urging the County to pass the eight-foot "buffer zone[]" because it would be "critically important to our patients."[3] After the County did so and petitioner challenged the law, the organizations hastened to its defense, appearing as *amici* at the Second Circuit to inform that court that the *Hill* restriction is "critical to protecting" abortion-clinic patients.[4] Indeed, they believed so strongly in defending the *Hill* law that they sought Second Circuit argument time, aiming to further underscore "the necessity of the challenged law for women seeking reproductive health services."[5] None of this is surprising given that Planned Parenthood told this Court in *Hill* itself that bubble-zone laws are "necessary," "essential," and "indispensable."[6]

Yet two months after their last filing in this case, these organizations were suddenly (and strenuously) supporting repeal of the County's *Hill* provision. As the County notes, BIO.9 & n.7, they sent letters to the County Board of Legislators, taking the position—directly contrary to what they had just told the Second Circuit—that the *Hill* law was "unenforceable,"

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[2] Press Conference Introducing Clinic Access Law at 9:08-12:07, 14:17-15:34 (May 9, 2022), https://bit.ly/3SrE96q.

[3] Joint Meeting of Committees on Health and Legislation at 36:25-36:30 (May 12, 2022), https://bit.ly/3tXrxdb.

[4] Choice Matters, Inc. C.A. Amicus Br. 7-12, 17 (cleaned up).

[5] Request for Leave to Participate in Oral Argument 1, No. 23-30 (2d Cir. May 3, 2023).

[6] NARAL Amicus Br at 3, 15, 21, *Hill*, *supra* (No. 98-1856).

unclear, and not "beneficial."[7] And a Planned Parenthood spokesperson again took the lead at a committee meeting, this time to urge repeal to the compliant legislators, who within weeks did as they were told.[8]

These organizations' procurement of both the law's passage and its repeal only confirms the game afoot—to "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [they] left off" when the coast is clear. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013). Only one thing had changed between appeal and repeal: the Second Circuit sent this case along to the only Court that could provide relief. So, having wrung as much speech suppression out of their *Hill* law as they safely could, the County and its abortion-advocate allies set it aside—at least for now. But they remain "free to return to [their] old ways" as soon as certiorari is denied. *City of Mesquite*, 455 U.S. at 289 n.10. Thus, the County has failed to carry its heavy burden of demonstrating it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *ibid.*, and petitioner's requests for injunctive and declaratory relief remain live.

II. The County's manipulation efforts confirm that this is the case to overrule *Hill*.

The County never contests that *Hill*'s continuing vitality is a question of exceptional importance warranting this Court's review. Pet.11-15. If anything,

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[7] Planned Parenthood Letter (July 10, 2023), https://bit.ly/3QmQ9Uj.

[8] Joint Meeting of Committees on Health and Legislation (July 10, 2023) at 3:15-6:54, https://bit.ly/46S5nHZ.

the County's maneuvers confirm that those who would prefer to silence sidewalk counselors are eager to insulate *Hill*. The County even acknowledges the similar laws in effect across the country, BIO.12-13, agreeing with petitioner that the *Hill* problem "isn't going away." Pet.11 & n.7. And any effort to discount the exceptional importance of this case would be hard to square with the eighteen *amicus* briefs filed in support of certiorari, from a vast range of *amici*.

Instead, the County simply implores the Court not to review *its Hill* law given its post-petition efforts to game the Court's jurisdiction. BIO.13-14. But the County's "keep-away tactics" "should make this Court more eager to select this petition as the vehicle for reconsidering *Hill*," not less. Tex. Right to Life Amicus Br. 11-12. Denying certiorari here would tell governments across the country that they are free to infringe their citizens' constitutional rights by willfully relying on discredited precedent for as long as possible and telling diametrically opposed stories to different federal courts. Confirming this conduct will not be countenanced is added reason to grant review. See Tr. of Oral Arg., *Acheson Hotels, LLC* v. *Laufer*, No. 22-429 at 12:22-13:3.

The County's concessions also underscore why *Hill* should be overruled. The County now admits that "the remainder of" its clinic-access law "satisfactorily protects" its interests, so the *Hill* provision was "not necessary." Supp.App.2sa. But this simply confirms that *Hill* laws are not narrowly tailored because the government has other "options that could serve its interests just as well, without substantially burdening" petitioner's speech. *McCullen* v. *Coakley*, 573 U.S. 464, 490, 495 (2014); see Pet.33-35; States

Amicus Br.14-17 & n.3. Likewise, the County now acknowledges *Hill* laws are "difficult to enforce." Supp.App.2sa. Yet their supposed "clear guidance" for "enforcement authorities" was a "virtue[]" this Court cited in upholding them. *Hill*, 530 U.S. at 729, 733. Planned Parenthood, too, has flip-flopped, now purporting to agree with both of the County's critiques. *Supra* n.7. So if even the County and Planned Parenthood have come to realize that *Hill* laws are gratuitous and *Hill*'s reasoning was wrong, this Court should not hesitate to agree and finally overrule *Hill*.

The County's hodgepodge of other vehicle arguments likewise fail. This case was dismissed on the pleadings (BIO.14) because *Hill* clearly controlled; that is a plus for a case seeking to overrule it. See *Janus* v. *State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018). The County's threat to require this Court to appoint an *amicus* to defend its abandoned position (BIO.12) is of little concern; no doubt many competent law firms would gladly step into the breach. See, *e.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (20 of the Nation's largest law firms submitting *amicus* briefs for respondent). And the County's vague recital that this Court may always "independently review" standing (BIO.13 n.9) likewise poses no obstacle; the Second Circuit easily found standing, see Pet.App.12a, 14a-15a (allegations "more than suffice[]"; district court's standing holding "misconstrued the complaint"), and this Court (if needed) would, too.

Finally, the County contends the Court should reject this petition and instead consider potential future petitions in *Faustin* v. *Polis*, No. 23-cv-1376 (D.

Colo.), or *Coalition for Life St. Louis* v. *City of Carbondale*, No. 23-2367 (7th Cir.). But *Faustin* is still at the district court and involves challenges by a long-time sidewalk counselor to the now decades-old Colorado law upheld in *Hill*; defendants there have thus deployed jurisdictional and equitable defenses not present here. And while *Coalition for Life* is awaiting decision by the Seventh Circuit, Carbondale's scant briefing there gives the Court no hint of what sort of vehicle that case may present. In any event, a denial in this case will offer any government with a *Hill* law a roadmap for evading review, either before or after a grant of certiorari. This case is live and cleanly presents the exceptionally important issue of overruling *Hill*. Prolonging *Hill*'s demise would only invite more speech suppression and unseemly gamesmanship.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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