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 IN OPPOSITION


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## QUESTION PRESENTED

In *Hill* v. *Colorado*, 530 U.S. 703 (2000), this Court upheld as constitutional a Colorado law prohibiting knowingly approaching within eight feet of a person in order to engage in "oral protest, education, or counseling" at the entrance to a healthcare facility. Respondent City of Carbondale, Illinois enacted a similar ordinance. Below, Petitioner Coalition Life acquiesced to the dismissal of its claims without seeking to develop any factual record, conceding that their challenge failed under *Hill*. The court thus dismissed their complaint. Since that dismissal, the Carbondale repealed the ordinance at issue, without ever having enforced it. The question presented is whether to grant certiorari in this case to review the correctness of the Court's decision in *Hill* v. *Colorado*.

## TABLE OF CONTENTS

**TABLE OF CONTENTS—Continued**

## TABLE OF AUTHORITIES

Page(s)

**CASES:**

**TABLE OF AUTHORITIES—Continued**

**TABLE OF AUTHORITIES—Continued**

**TABLE OF AUTHORITIES—Continued**

**TABLE OF AUTHORITIES—Continued**



**STATUTES:**

**TABLE OF AUTHORITIES—Continued**

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## BRIEF IN OPPOSITION

## INTRODUCTION

Petitioner filed a facial challenge to a now-repealed ordinance enacted by Respondent City of Carbondale, Illinois, prior to the ordinance being enforced against anyone. Rather than develop a factual record to support its facial challenge, Petitioner instead conceded in the district court and the court of appeals that its claims failed under existing law because the ordinance was lawful under *Hill* v. *Colorado*, 530 U.S. 703 (2000). This unusual litigation tactic was likely designed to take advantage of a perceived window of opportunity after *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022). Petitioner wants to fast-track a request that this Court overturn *Hill* just as it overturned *Roe* v. *Wade*.

This Court should deny that request. This case is a far cry from an ideal—or even passable—vehicle for revisiting *Hill*. Because the complaint was filed before Carbondale had enforced its ordinance, and because the case was dismissed prior to discovery, there is no factual record as to how Carbondale intended to enforce the ordinance. *See Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2398-99 (2024) (remanding First Amendment-based facial challenge to state laws because "underdeveloped" and "incomplete" record about the scope of the state laws and their enforcement precluded resolution of the facial challenge). And Carbondale's ordinance has since been rescinded, thereby eliminating any chance of enforcement against Petitioner (or anyone else). *See New York State Rifle & Pistol Ass'n.* v. *City of New York*, 590 U.S. 336, 338 (2020) (per curiam) (dismissing case as moot when, during the pendency of the litigation, the City of New York "amended the rule" to provide "the precise relief that petitioners requested in the prayer for relief"). The lack of a factual record and the mootness of the challenge are insurmountable barriers to this Court's review.

In any event, *Hill* was rightly decided. The decision was grounded in precedent and well-reasoned. Petitioner's arguments to the contrary misread the case itself and overlook decades of First Amendment precedent that support *Hill*. Nor does *Hill* conflict with this Court's more-recent precedent. Instead, overturning *Hill* would inject this Court into the political process and upset the reliance interests of those States and localities that have enacted legislation based on *Hill*'s guidance.

This Court should deny the petition.

## STATEMENT

### A. Factual Background

Carbondale is a hub of medical care in Southern Illinois and home to numerous full-service hospitals, medical centers, healthcare facilities and providers specializing in reproductive healthcare. D. Ct. Dkt. 1-2; D. Ct. Dkt. 1 at 5, Video of Carbondale, Ill. City Council Meeting Item 8.3 (Jan. 10, 2023), https://carbondaleil.new.swagit.com/videos/01112023-771. Patients and their families come to these facilities for a wide array of medical treatments, which can include surgical procedures, broken bones, cancer screenings and treatment, mental health services, infertility treatment, pregnancy and miscarriage care, and abortion care. *E.g.,* Video of Carbondale, Ill. City Council Meeting, *supra*, at 39:00-42:30.

Healthcare providers in Carbondale faced a significant problem: after *Dobbs* led to restrictions on abortion care in surrounding states and two new reproductive health care facilities opened in Carbondale, there was a marked increase in "acts of intimidation, threats, and interference from individuals protesting abortion access and services." D. Ct. Dkt. 1-1 at 2. In several instances, protests precipitated "calls for police service related to trespassing and disorderly conduct." D. Ct. Dkt. 1-2.

This uptick in intimidation and attempts to interfere with patients' care created a real public safety concern. In response, Carbondale proposed amending its disorderly conduct ordinance to "ensure the[] safety" of "individuals seeking healthcare

services," D. Ct. Dkt. 1-1 at 2,[1] by establishing a buffer zone in which patients would be protected from "harass[ment]" outside of medical facilities. Video of Carbondale, Ill. City Council Meeting, *supra*, at 49:09-49:10. The proposed amendment was modeled on two statutes previously found to be constitutional. *See Price* v. *City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), *cert denied*, 141 S. Ct. 185 (2020); *Hill* v. *Colorado*, 530 U.S. 703 (2000); Video of Carbondale, Ill. City Council Meeting, *supra*, at 00:52-01:01. Carbondale held a meeting where members of the public could comment on the proposed amendment.

At this hearing, a number of individuals testified to witnessing "egregious and disturbing" behavior from protesters outside of Carbondale's reproductive healthcare facilities. *See, e.g.,* Video of Carbondale, Ill. City Council Meeting, *supra*, at 34:54-34:55. Some protesters were "block[ing] cars" so patients' ingress and egress was inhibited, while other protesters "misrepresent[ed] themselves" as clinic employees or medical personnel and lied to patients arriving for care, including directing those patients to "a fake check-in station" to obtain the patients' contact information. *E.g., id.* at 8:50-9:00, 36:05-36:25, 56:53-56:56.

After hearing public comments, the Carbondale City Council unanimously passed Ordinance 2023-03, which amended the Carbondale Revised Code to include a prohibition on "knowingly approach[ing] another person within 8 feet of such person, unless

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[1] The State of Illinois, through its Constitution, has delegated to the Carbondale City Council the power to "regulate for the protection of public health, safety, morals and welfare." D. Ct. Dkt. 1-1 at 2.

such person consents" if the purpose of the approach is to "pass[] a leaflet or handbill or, display[] a sign to, or engag[e] in oral protest, education, or counseling" within a "radius of 100 feet" of any entrance door to a "hospital, medical clinic or healthcare facility." D. Ct. Dkt. 1-1 at 5. Ordinance 2023-03 took effect on January 11, 2023. D. Ct. Dkt. 1-1 at 1, 4.

This summer, Carbondale repealed Ordinance 2023-03. *See* An Ordinance Repealing Ordinance No. 2023-03, Carbondale, Ill. Ordinance 2024-__ (July 13, 2024). The City Council noted that prior to the repeal, Ordinance 2023-03 had not been enforced against anyone, and that, going forward, the City Council had determined that other "City ordinances and State statutes" would "provide sufficient protection from acts of disorderly conduct." City Council of Carbondale, Ill., *Special City Council Meeting Agenda 7.13.2024* (posted July 11, 2024), https://www.explorecarbondale.com/AgendaCenter/ViewFile/Agenda/_07132024-2308. Carbondale affirms that it has no intention of reinstating Ordinance 2023-03 or of enacting a similar prohibition in the future. *See infra* p. 10.

### B. Proceedings Below

Petitioner is a Missouri corporation that uses anti-abortion "sidewalk counselors" to try and stop women from seeking abortion care. D. Ct. Dkt. 1.

Less than four months after Ordinance 2023-03 was adopted, Petitioner filed a pre-enforcement challenge asserting that the ordinance was "overbroad on its face" and "restricts far more speech than necessary to achieve any legitimate government purpose." D. Ct. Dkt. 1 at 7-8. The suit further alleged that "the City had no justification for the Ordinance at any location";

that "the City Attorney refused to answer a question" about "the scope of the prohibition" and suggested it would be resolved on a "case-by-case basis"; and that the face of the statute was unclear as to, for example, "what constitutes an unlawful 'approach' " and "what is consent." *Id.* at 5.

When Carbondale moved to dismiss, Petitioner did not contest dismissal or seek to develop a factual record on Carbondale's justification for enacting the ordinance, the ordinance's scope, or how the ordinance was being enforced. Instead, on the very same day that Carbondale moved for dismissal, Petitioner asked the District Court to "promptly" grant Carbondale's motion "so that Coalition Life may advance its arguments on appeal." D. Ct. Dkt. 15 at 2.

On appeal, Petitioner likewise requested that the Seventh Circuit not hold argument and just "send this case to the Supreme Court." Brief of Plaintiff-Appellant at 3, *Coal. Life* v. *City of Carbondale, Illinois*, No. 23-2367, 2024 WL 1008591 (7th Cir. Mar. 8, 2024). Petitioner expressly acknowledged its complaint was meritless unless this Court reversed *Hill*, which Petitioner thought would lead to "direction[s] to the District Court to enter a permanent injunction against [the ordinance's] enforcement." *Id.* at 10.

Petitioner chose not to pursue an as-applied challenge, did not allege that any individuals affiliated with Petitioner changed their conduct as a result of the ordinance, and declined to offer any factual allegations about enforcement of the ordinance against Petitioner's members (or anyone else). Petitioner's prayer for relief requested a

permanent injunction against enforcement of the ordinance and nominal damages. D. Ct. Dkt. 1 at 13.

Based on Petitioner's repeated concessions that it failed to state a claim absent a change in law—namely this Court overturning *Hill*—the District Court granted Carbondale's motion to dismiss. Pet. App. 4-5.

On appeal, Petitioner "again concede[d] that *Hill* controls and that [the court of appeals] cannot overrule a decision of the Supreme Court." Pet. App. 3. Relying on that concession, the Seventh Circuit affirmed the District Court's judgment in an unpublished per curiam decision. *Id.*

This petition followed.

## REASONS FOR DENYING THE PETITION

### I. PETITIONER'S CHALLENGE TO THE REPEALED ORDINANCE IS MOOT.

#### A. No case or controversy exists because Carbondale has repealed the ordinance that Petitioner challenged.

1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). That is, federal courts may exercise their authority only to the extent that the case is "of the sort traditionally amenable to, and resolved by the judicial process." *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1, 10 (2023) (Thomas, J., concurring) (internal citations omitted); *see also Allen* v. *Wright*, 468 U.S. 737, 752 (1984). "If a dispute is not a proper case or controversy, the

courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006).

A core Article III principle is mootness. "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotation marks omitted). Therefore, if an event transpires while an appeal is pending that deprives the parties of "a personal stake in the outcome of the lawsuit," the case becomes moot and must be dismissed. *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477-478 (1990) (internal quotation marks omitted); *see also Acheson Hotels,* 601 U.S. at 3-6. For an appellate court to proceed to the merits under such circumstances would be to issue an "advisory opinion[] on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam). And "[h]owever convenient" or tempting that might be, this Court lacks the power to declare "principles or rules of law which cannot affect the result" of the lawsuit before it. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

2. Applying these principles, this Court has consistently held that a case becomes moot when an intervening change in law provides a plaintiff with the relief it seeks.

A century ago, for instance, in *United States* v. *Alaska Steamship Company*, various carriers sought an injunction restraining the Interstate Commerce Commission from requiring certain conduct the carriers argued the Commission lacked the ability to

prescribe. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920). When the case reached this Court, Congress turned its attention to the matter and enacted new legislation precluding the Commission from requiring the actions at issue. *Id.* at 115. The Court held that "the necessary effect" of the new statute was "to make the cause a moot one." *Id.* Because the plaintiffs no longer "need[ed] an injunction" to do what they wished to do, the only "proper course" was to "remand the cause to the court below with directions to dismiss." *Id.* at 116.

This Court has reaffirmed this rule time and again. Recently, this Court dismissed a case as moot after a similar circumstance involving a change in the governing law. *See United States* v. *Microsoft*, 584 U.S. 236 (2018) (per curiam). In that case, the Department of Justice had issued a warrant to Microsoft seeking the disclosure of email data that was stored overseas. *Id.* at 237-238. Microsoft refused to comply and challenged the warrant's unauthorized extraterritorial application. *Id.* at 238-239. But after this Court granted certiorari, Congress amended the relevant statute to expressly require service providers to disclose data in their possession regardless of where the information was located. *Id.* at 239. This Court unanimously dismissed the case as moot because "no live dispute remain[ed] between the parties over the issue" since the Department of Justice was now statutorily entitled to obtain the information that it originally sought. *Id.* at 240.

A couple years later, this Court reached the same decision in *New York State Rifle & Pistol Association* v. *City of New York* where a gun rights association challenged a New York City regulation as

unconstitutional. 590 U.S. 336, 337-338 (2020). During the pendency of the litigation, the City of New York "amended the rule" to provide "the precise relief that petitioners requested." *Id.* at 338. This Court accordingly held that the claims for declaratory and injunctive relief were moot. *Id.* at 339.[2]

3. The same straightforward analysis applies in this case. Petitioner asked the court to declare Ordinance 2023-03 unconstitutional "on its face," permanently enjoin its enforcement, and award nominal damages. D. Ct. Dkt. 1 at 13. This relief would permit Petitioner's members to approach individuals entering health care facilities, regardless of consent and regardless of the purpose for approaching them.

That relief has already occurred. Carbondale repealed Ordinance 2023-03 before Petitioner sought certiorari. Carbondale affirms that it does not intend to reenact the provision, having concluded that other City ordinances and State statutes "provide sufficient protection from acts of disorderly conduct." City Council of Carbondale, Ill., *Special City Council Meeting Agenda 7.13.2024*, *supra*. As a result, there is not a medical-facility no-approach zone ordinance on the books in Carbondale and no case or controversy

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[2] We could go on. *See, e.g.*, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 234 (1990); *Bowen* v. *Kizer*, 485 U.S. 386, 387 (1988) (per curiam); *U.S. Dep't of Treasury* v. *Galioto*, 477 U.S. 556 (1986); *U.S. Dep't of Just.* v. *Provenzano*, 469 U.S. 14, 15-16 (1984) (per curiam); *United Bldg. & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 213-214 (1984); *Diffenderfer* v. *Cent. Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam); *Bd. of Pub. Util. Comm'rs* v. *Compania General de Tabacos de Filipinas*, 249 U.S. 425, 426-427 (1919); *Berry* v. *Davis*, 242 U.S. 468, 470 (1917).

between Petitioner and Carbondale. As in numerous other cases that have come before this Court, subsequent legislative action mooted this dispute. *See Alaska S.S. Co.*, 253 U.S. at 115; *Microsoft*, 584 U.S. at 240; *New York State Rifle & Pistol Ass'n.*, 590 U.S. at 338.

### B. Petitioner's efforts to avoid mootness lack merit.

Petitioner devotes one sentence to resisting the conclusion that the parties' dispute is moot and that its petition seeks an advisory opinion. This sentence reads, in full: "Not only does this appear to be a classic instance of voluntary cessation, but the complaint seeks nominal damages and all just and appropriate relief." Pet. 34 (citations omitted). Neither the voluntary cessation doctrine nor the passing request for nominal damages avoids mootness here.

1. Start with voluntary cessation. That doctrine is reserved for "exceptional situations," *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 170 (2016) (citation omitted), where "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive," *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

There is no such danger here. Carbondale repealed the challenged ordinance and now affirms that it does not intend to pass the same or a similar law in the future. Under this Court's precedent, the repeal mooted this case. *See, e.g.*, *New York State Rifle & Pistol Ass'n.*, 590 U.S. at 338.

Petitioner's speculative accusation (at 34) that Carbondale's repeal was an "effort to manipulate the Court's jurisdiction" is just that, speculation. It is also

irrelevant. Even if Petitioner were correct about Carbondale's motivations, there would be nothing "manipulative" about that. Developments in pending litigation commonly spur governments to amend their laws or regulations, and this Court routinely defers to such choices. *See, e.g.*, *Fusari* v. *Steinberg*, 419 U.S. 379, 385 & n.9 (1975) (remanding case without reaching merits even though "this Court's notation of jurisdiction" may have "encourage[d]" the state legislature to amend the law at issue); *Kremens* v. *Bartley*, 431 U.S. 119, 128-129 (1977) ("The fact that the Act was passed after the decision below [and after this Court noted probable jurisdiction] does not save the named appellees' claims from mootness."). Simply put, governmental defendants are entitled to reconsider their positions.

Petitioner's invocation (at 34) of *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000), cuts against their argument. That case, which this Court described as "not a run of the mill voluntary cessation case," *id.* at 288, involved a *plaintiff*—not the government—who ceased its allegedly illegal conduct to "insulate" from further review a lower court finding that the contested ordinance was unconstitutional. *Id.* The unfavorable lower court ruling left the City of Erie unable to "enforc[e]" the challenged ordinance against other establishments that violated its public nudity provisions. *Id.* This caused an "ongoing injury" to the City, despite the specific plaintiff's decision to stop violating the ordinance. *Id.* This Court allowed the case to proceed as a result. *Id.*

Here, in contrast, neither party has an "ongoing injury." Carbondale has no ongoing injury because the decisions below do not prevent it from enforcing its

ordinance, which has now been repealed in any event. Carbondale, Ill. Ordinance 2024-__ (July 13, 2024). Petitioner likewise has no "ongoing injury" because Ordinance 2023-03 is no longer on the books. *Id.* When neither party retains a "concrete stake in the outcome" of the litigation, as is the situation here, a case is moot. *Pap's A.M.*, 529 U.S. at 288.

2. Petitioner's request for nominal damages cannot avoid mootness either. "Nominal damages go only to redressability and are unavailable where a plaintiff has failed to establish a past, completed injury." *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 293 n.* (2021). Here, Petitioner brought a pre-enforcement challenge and alleged no facts showing a past, completed injury—for the obvious reason that the law had not yet been enforced against anyone.

In *Uzuegbunam*, this Court held that a request for nominal damages can satisfy Article III's redressability requirement when the nominal-damages claim is based on a "past, completed injury," i.e., a "completed violation of a legal right." *Id.* There, two students challenged a university policy heavily restricting the distribution of religious materials on campus. *Id.* at 283. One of those students—Uzuegbunam—had been repeatedly stopped by the university police and "threatened [] with disciplinary action," but the other—Bradford—"decided not to speak about religion [at all]." *Id.* at 283-284. Both students sued the university for nominal damages and injunctive relief. *Id.* at 284. During the course of the litigation, the university changed its religious speech policy to remedy the students' grievance and argued that the suit was moot as a result. *Id.*

The different facts underlying each student's challenge led this Court to dispose of their claims differently. Uzuegbunam's nominal-damages claim was not moot because he had suffered a "past, completed injury" when the university "enforced their speech policies against him" by prohibiting him from distributing religious materials on campus. *Id.* at 293 n.*. But for Bradford, whose nominal damages claim was based on self-censorship, this Court reached a different result. This Court did not "decide whether Bradford c[ould] pursue nominal damages," explaining that nominal damages were unavailable "where a plaintiff has failed to establish a past, completed injury." *Id.* Instead, this Court remanded for the district court to determine "whether the enforcement against *Uzuegbunam* also violated Bradford's constitutional rights." *Id.* (emphasis added).

Petitioner's complaint alleges no injury from Ordinance 2023-03's enforcement (because it was never enforced). And that is dispositive. For there to be even a possibility of nominal damages—and consequently a justiciable case or controversy—the allegedly unconstitutional policy must have been enforced against *somebody* and a fact finder must determine that the enforcement violated the plaintiff's rights. *See, e.g.*, *Davis* v. *Colerain Twp., Ohio*, 51 F.4th 164, 176 (6th Cir. 2022) (holding claims for nominal damages are mooted when disputed law is never enforced against the plaintiff and later repealed); *Chapin Furniture Outlet Inc.* v. *Town of*

*Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007) (same).[3] This is not the case here. In repealing the amendment, Carbondale expressly stated that it had never enforced the prohibition against anyone. Petitioner thus cannot point to a "past, completed injury" that would somehow keep this case alive despite the repeal of Ordinance 2023-03.

## II. THIS CASE IS A POOR VEHICLE TO REVIEW THE QUESTION PRESENTED.

This case is a poor vehicle to address the question presented because the record below is underdeveloped and because the Seventh Circuit appropriately relied on Petitioner's legal concessions and correctly applied settled law.

### A. The record below prevents meaningful appellate review.

Petitioner rushed a pre-enforcement facial challenge through the lower courts without developing a factual record. Consequently, this Court lacks the type of record necessary to conduct the review Petitioner seeks.

1. As this Court emphasized just last Term, "facial challenges are disfavored" in the absence of a well-

[3] Prior to *Uzuegbunam*, the courts of appeals were divided on this question. *See Utah Animal Rts. Coal.* v. *Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (holding that a lone claim for nominal damages survives when the case is otherwise mooted, even without an enforcement injury); *Jacobs* v. *Clark Cnty. Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008) (same); *Six Star Holdings, LLC* v. *City of Milwaukee*, 821 F.3d 795, 802 (7th Cir. 2016) (same). The Sixth Circuit is the only court to have considered the issue since *Uzuegbunam*, and it concluded that a nominal damages claim cannot survive the law's repeal without an enforcement injury.

developed factual record. *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2409 (2024); *see also, e.g.*, *June Med. Servs., L.L.C.* v. *Gee*, 139 S. Ct. 663 (2019) (Kavanaugh, J., dissenting from grant of application for stay) ("[T]he case comes to us in the context of a pre-enforcement facial challenge" so that the record is comprised "in essence [of] competing predictions" as to the law's application); *June Med. Servs. L.L.C.* v. *Russo*, 591 U.S. 299, 429 (2020) (Kavanaugh, J., dissenting) ("I respectfully dissent [] because, in my view, additional factfinding is necessary to properly evaluate Louisiana's law."); *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation."); *Sabri* v. *United States*, 541 U.S. 600, 609 (2004) ("Facial adjudication carries too much promise of premature interpretation of statutes on the basis of factually bare-bones records.") (internal citation omitted, cleaned up); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975) ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint.").

That is because facial challenges require courts to "explore the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets." *Moody*, 144 S. Ct. at 2398. This analysis requires "actual fact[s] that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988). Accordingly, facial challenges cannot survive in the face of "underdeveloped" records that do not bear on the full range of a statute's application. *Moody*, 144 S. Ct. at 2399; *Members of City Council of*

*City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (facial challenge based on overbreadth was inappropriate because "nothing in the record [indicated] that the ordinance will have any different impact on any third parties' interests in free speech than it has on [petitioners]").

2. The lack of a factual record is particularly problematic in First Amendment cases where resolution of the constitutional issue depends upon a judicial determination as to whether a particular limitation, in particular circumstances, inhibits too much constitutionally protected speech.

For this reason, this Court does not ordinarily decide First Amendment challenges in the absence of a well-developed factual record. *See Moody*, 144 S. Ct. at 2398-2399, 2403 (remanding because the records were "underdeveloped" and "incomplete"); *City of Austin* v. *Reagan Nat'l Advert. of Austin*, 596 U.S. 61, 76-77 (2022) (remanding for narrow tailoring analysis); *Zubik* v. *Burwell*, 578 U.S. 403, 410 (2016) (remanding for factual and legal development on issue clarified in supplemental briefing); *Witters* v. *Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 486 n.3 (1986) (declining to consider argument on the basis that it is inappropriate "as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings").

Precedent regarding buffer zones illustrates why: it is impossible to perform a narrow tailoring analysis without a sufficient record. "In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible," *Schenck* v. *Pro-Choice Network of*

*Western N.Y.*, 519 U.S. 357, 377 (1997), when that same prohibition would be impermissible in other factual contexts, *see McCullen* v. *Coakley*, 573 U.S. 464, 487-490 (2014).

Thus, in all four of this Court's buffer zone cases—*Madsen*, *Schenck*, *Hill*, and *McCullen,* discussed *infra* at pp. 22-23, 27-29—this Court looked to the record for examples of abusive conduct or harassment to better scrutinize whether the restrictions were narrowly tailored. *See Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 770 (1994) (record reflecting three-day evidentiary hearing providing details on protests); *Schenck*, 519 U.S. at 362 (record detailing numerous blockades outside clinics supported buffer zone); *Hill*, 530 U.S. at 709 & n.6 (record reflecting "confrontational" "demonstrations in front of abortion clinics [that] impeded access to those clinics"); *McCullen*, 573 U.S. at 470 (record containing evidence of confrontation, attempts to block entrances, and prior attempts to enforce the statute).

3. Yet Petitioner asks this Court to break with both of these conventions. There is no record in this case. Petitioner waived oral argument and *agreed* to the dismissal of its claims on the same day Carbondale filed its motion to dismiss, without making any arguments or attempting to seek discovery to prove its claims had merit. D. Ct. Dkt. 14-16. Because the claim was dismissed at such an early stage, there was no discovery, evidentiary hearings, or factual findings on the issues relevant to the ultimate means-end inquiry.

Petitioner's request is even more unusual when considered in the context of other buffer zone cases. Unlike *Hill*, this Court has no summary judgment record to review and no affidavits or indications of

legislative deliberations underlying the Ordinance 2023-03. *See Hill*, 530 U.S. at 709-710. There were no evidentiary hearings, trials, or factual findings made by the District Court. *Contra Schenck*, 519 U.S. at 365-67 (review after lower court held "27 days of hearings"); *McCullen*, 573 U.S. at 475 (review after "bench trial based on a stipulated record"). In light of this precedent, it would be anomalous to grant certiorari in this case without the necessary record.

Petitioner is wrong to applaud the sparse factual record in this case. Pet. 33. The lack of a record presents a serious barrier to review.[4]

### B. The Seventh Circuit correctly invoked Petitioner's concessions that its claims were meritless under existing law in affirming the District Court's ruling.

There is no compelling reason to review the Seventh Circuit's judgment. Petitioner identifies no analytical error in the decision below, much less any departure "from the accepted and usual course of judicial proceedings [so] as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

To the contrary, Petitioner readily conceded its claims were barred by precedent. *See* Brief of Plaintiff-Appellant at 3, *Coal. Life*, 2024 WL 1008591, *supra*. Indeed, Petitioner admitted defeat in its

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[4] Other cases involving buffer zones have more developed records than this case. *See, e.g.*, *Turco* v. *City of Englewood, N.J.*, 621 F. Supp. 3d 537 (D. N.J. 2022), *aff'd*, No. 22-2647, 2024 WL 361315 (3d Cir. Jan. 31, 2024) (decision based on record and credibility determinations following a multi-day bench trial); *Faustin* v. *Polis et al.*, No 23-cv-01376-SKC-NRN (D. Colo.) (in challenge to the very statute at issue in *Hill*, fact discovery has closed and expert discovery closes in late November 2024).

opening brief to the Seventh Circuit, waived oral argument, and requested a "send[-off] to the Supreme Court" so it could ask this Court to overrule *Hill*. *Id.* at *1. Accepting Petitioner's concession—and in light of this Court's and the Seventh Circuit's precedent upholding similar laws—the Seventh Circuit affirmed the District Court's dismissal in an unpublished decision and without oral argument. Pet. App. 1-3.

Rather than vigorously advance its position and develop a useful record below, Petitioner strategically gave its case away. It cannot now turn around and ask this Court to reverse a court of appeals decision that was correctly rendered, in large part, because of Petitioner's own concession.

## III. THIS COURT SHOULD NOT RECONSIDER *HILL* v. *COLORADO*.

An argument that this Court erred, "even a good argument to that effect," is an insufficient reason to reconsider precedent. *Kimble* v. *Marvel Entm't*, 576 U.S. 446, 455 (2015). Instead, a decision must be "*egregiously* wrong" in order to provoke further review. *Dobbs*, 597 U.S. at 268 (emphasis added). To determine if a decision is egregiously wrong, this Court considers (1) "the quality of the decision's reasoning," including "its consistency with related decisions"; (2) "legal developments since the decision"; and (3) "reliance on the decision." *Ramos* v. *Louisiana*, 590 U.S. 83, 106 (2020). Each of these factors counsels against reconsideration of *Hill*.

### A. *Hill* was correctly decided and is consistent with this Court's precedent.

To portray *Hill* as a First Amendment outlier, Petitioner twists the case beyond recognition. *See* Pet.

17-23. *Hill* did not greenlight bans on offensive speech, *contra* Pet. 17-18, and the decision aligns with this Court's precedents regarding content-neutral regulations, *contra* Pet. 19-21, as well as the narrow-tailoring analysis articulated in other First Amendment cases, *contra* Pet. 21-23.

1. Petitioner describes *Hill* as distorting the First Amendment by endorsing a prohibition on offensive speech. Pet. 17-18. Both halves of that assertion are wrong. The majority addressed head-on—and explicitly rejected—any suggestion that speech could be prescribed merely because it was offensive. *Hill*, 530 U.S. at 715 ("The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection.").

Instead, *Hill* is one of several of this Court's cases upholding regulations of speech and expressive conduct in and around healthcare facilities. *See, e.g.*, *NLRB* v. *Baptist Hosp., Inc*., 442 U.S. 773, 782 (1979) (upholding hospital rule prohibiting union solicitation in areas accessible to the public based on evidence of disruptions in care). These cases recognized that States may protect patients' interest in receiving medical care without disruption or harassment by solicitation or protest. *See Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment) (describing hospitals as places where "patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family * * * need a restful, uncluttered, relaxing, and helpful atmosphere").

Indeed, by the time this Court heard *Hill*, this Court had twice before considered the right to speak near abortion clinics and, both times, upheld restrictions on speech as consistent with the First Amendment. *See Madsen*, 512 U.S. 753; *Schenck*, 519 U.S. 357. And since *Hill*, this Court has continued to recognize the States' interest in "protecting a woman's freedom to seek pregnancy-related services." *McCullen*, 573 U.S. at 487 (quoting *Schenck*, 519 U.S. at 376).

*Madsen* concerned a state-court order enjoining anti-abortion protesters and sidewalk counselors, *inter alia*, from "congregating, picketing, patrolling, demonstrating or entering" the public right of way within 36 feet of the clinic's property line; from projecting "images observable to or within earshot of the patients inside the" clinic; and from physically approaching any person without their consent within a 300-foot radius of the clinic. 512 U.S. at 759-761. The plaintiffs challenged the injunction as a violation of their First Amendment rights.

Chief Justice Rehnquist, writing for the majority, first determined that the injunction was content-neutral because the state court had "imposed restrictions * * * incidental to [the protesters'] antiabortion message." *Id.* at 763. Then, the Court upheld the 36-foot buffer zone because it provided "unfettered ingress to and egress from the clinic, and ensur[ed] that petitioners do not block traffic," while allowing petitioners to remain "seen and heard" from clinic lots. *Id.* at 769-770. However, the Court struck the "images observable" provision of the injunction, explaining that it burdened more speech than necessary to achieve the State's purpose of limiting threats to patients and families. *Id.* at 773. Likewise,

although the 300-foot buffer zone was intended to prevent petitioners from stalking clinic staff and patients, the Court determined the provision burdened more speech than necessary absent evidence that the protesters' speech was "independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm." *Id.* at 774.

Shortly thereafter in *Schenck*, this Court considered a similar order enjoining protesters from demonstrating within a 15-foot "floating" buffer zone around people and vehicles accessing an abortion clinic, as well as within a 15-foot fixed buffer zone around the clinic entrances and its parking lot. 519 U.S. at 367. Again writing for the majority, Chief Justice Rehnquist upheld the fixed buffer zone as "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Id.* at 380. However, the Court struck down the floating zone because it prevented petitioners from "communicating a message from a normal conversational distance," and "pushed" petitioners into streets, making it "hazardous" to safely comply with the injunction. *Id.* at 377-379.

Three years later, this Court heard *Hill*. *Hill* considered a Colorado statute making it unlawful for any person within 100 feet of a health care facility to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person." *Hill*, 530 U.S. at 707 (citing Colo. Rev. Stat. § 18–9–122(3) (1999)). The plaintiffs there were a

group of sidewalk counselors who asserted the statute was facially unconstitutional. *Id.* at 708-711. In light of the record in the case, and relying on *Madsen* and *Schenck*, *Hill* validated Colorado's interests in protecting public safety around healthcare facilities, as well as ensuring patient privacy and safety. *Id.* at 715, 728-729 (traditional police powers justified a "special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests") (citing *Madsen*, 512 U.S. 753 and *NLRB* v. *Baptist Hosp.*, 442 U.S. 773). In light of the State's interest in "controlling the activity around certain public and private places," including medical facilities, the Court upheld the statute as a proper "time, place, and manner" restriction. *Id.* at 728-729. The buffer zone advanced Colorado's interests while still allowing petitioners to speak, maintain a "normal conversational distance," and distribute literature. *Id.* at 726-729.

As illustrated by the discussion above, *Hill* did nothing "in one fell swoop." Pet. 18. Rather than depart from precedent or invent new law, Pet. 18, 27, *Hill* built upon the foundation of *Madsen* and *Schenck*.

2. Nor did *Hill* apply a content-neutrality test "unmoored" from this Court's precedent. Pet. 19. Petitioner faults *Hill* for foregoing a facial analysis when determining if the statute at issue was content-neutral, but *Hill* did just that, albeit without using those magic words.

As a starting point, *Hill* incorporated the content-neutrality test articulated in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), which asks "whether the

government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719 (citing *Ward*, 491 U.S. at 791). The Court searched for any "disagreement with [a] message" by analyzing the face of the statute. *Id.*

In doing so, *Hill* compared the Colorado statute to an Illinois residential picketing law examined in *Carey* v. *Brown*, 447 U.S. 455, 462 (1980). *Carey* explained that facially content-or-viewpoint discriminatory statutes received strict scrutiny. *Hill*, 530 U.S. at 723. The *Hill* majority carefully distinguished Colorado's statute from Illinois's, holding that Colorado "place[d] no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id.* The Colorado statute was not content-based because it "applie[d] equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Id.*[5] Nor was the Colorado statute viewpoint discriminatory because it applied as equally to petitioners as to speakers who "approach[] a patient and 'chants in praise of the Supreme Court and its abortion decisions,' or hands out a simple leaflet saying, 'We are for abortion rights.' " *Id.* at 724-725.

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[5] Petitioner also fails to grapple with *Hill*'s express consideration of Petitioner's argument that the statute was content-based because it applied to those engaging in "protest, education, or counseling." 530 U.S. at 720. The *Hill* petitioners there, like Petitioner here, made no attempt to define the "subject matter" or "topic" singled out by the statute. To the contrary, Petitioner's founder, Brian Westbrook, spoke at the Carbondale town hall and explained to the crowd that the ordinance "applies to all groups and all issues." Video of Carbondale, Ill. City Council Meeting, *supra*, at 03:09-04:02.

*Hill* plainly performed a facial analysis and found the statute to be content-neutral. *Hill* is thus consistent with this Court's other decisions regarding the tailoring analysis.

3. Finally, Petitioner wrongly faults *Hill* as "reduc[ing] intermediate scrutiny to little more than rational-basis review," claiming the decision "demot[ed] the right to speak in public forums to a mere 'interest' " by finding it sufficient that "demonstrators could still hold signs and try to speak to women from eight feet away." Pet. 21.

This objection is to the core legal rule applied to content-neutral time, place, and manner regulations. *Ward*, 491 U.S. at 791 (requiring content-neutral time, place, and manner regulations to "leave open ample alternative channels for communication of the information") (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Under this Court's precedent, Colorado needed only to provide alternative channels for communication so as not to burden more speech than necessary. The Court found that it did, as petitioners could maintain a "normal" conversational distance and their signs remained visible. *Hill*, 530 U.S. at 726-727. This was all the Constitution required. *See also Ward*, 491 U.S. at 798-799 n.6 ("While time, place, or manner regulations must also be 'narrowly tailored' in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place.").

Because *Ward* explained that the narrow tailoring analysis for time, place, and manner restrictions

requires less than in the strict scrutiny context, Petitioner is incorrect to cite the case (at 23) and suggest more was required. Likewise, Petitioner's citations to *NAACP* v. *Button*, 371 U.S. 415 (1963) and *Riley* v. *National Federation of the Blind of North Carolina, Inc*., 487 U.S. 781 (1988) are inapposite as *Button* applied standards pursuant to a vagueness challenge, and the cited portion of the *Riley* opinion applied heightened scrutiny.

### B. Legal developments since *Hill* was decided do not suggest that it should be overruled.

Contrary to Petitioner's claims, *Hill* has stood the test of time. Petitioner cites four cases in support of this argument—*McCullen* v. *Coakley*, 573 U.S. 464 (2014); *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015); *City of Austin* v. *Reagan Nat'l Advert. of Austin*, 596 U.S. 61 (2022); and *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022)—but *Hill* is consistent with the other First Amendment cases cited by Petitioner (*McCullen*, *Reed*, and *City of Austin*), and the majority in *Dobbs* explicitly cautioned readers against extending its reasoning outside of the abortion context.

*McCullen* considered a "35-foot fixed buffer zone from which individuals [were] categorically excluded." 573 U.S. at 471. Rejecting petitioners' arguments that the statute was content-based and deserved strict scrutiny, *McCullen* found the statute content-neutral and applied the time, place, and manner test articulated in *Ward*. *Id.* at 479-486. After determining that the buffer zones served the "legitima[te]" governmental interests in regulating spaces surrounding medical facilities, as "previously

recognized" in *Schenck* and *Madsen*, the Court struck down the statute for lack of narrow tailoring. *Id.* at 486-487.

*McCullen* did not "repudiate[]" *Hill*. Pet. 24. Far from it, *McCullen* affirmed several key elements of *Hill*—including the State's significant and content-neutral interests in public safety and ensuring safe access to medical services. *McCullen*, 573 U.S. at 480, 487. Nor did *McCullen* "erode[]" *Hill*'s definition of content neutrality. Pet. 7. *Hill* incorporated *Ward*'s standard for facially neutral time, place, and manner regulations. *Hill*, 530 U.S. at 719 (citing *Ward*, 491 U.S. at 791). *McCullen* did the same. *McCullen*, 573 U.S. at 477 (citing *Ward*, 491 U.S. at 791).

*Hill* is also consistent with *Reed*. *Reed* reiterated that the "crucial first step" of any free speech case is a facial analysis. *Reed*, 576 U.S. at 163, 165. As discussed, *Hill* performed this analysis when it determined that the Colorado statute was neither content nor viewpoint discriminatory. *See Hill*, 530 U.S. at 724-725; *see also supra* p. 28. *Hill*'s subsequent evaluation of Colorado's motives is also consistent with *Reed*'s instruction that courts should evaluate *both* whether "a law is content based on its face [and] when the purpose and justification for the law are content based." *Reed*, 576 U.S. at 166. *Hill* did both. *See Hill*, 530 U.S. at 721-725. Moreover, *Reed* went on to affirm the *Ward* test for content-neutral statutes—the same standard that *Hill* applied. *Compare Reed*, 576 U.S. at 166-167, *with Hill*, 530 U.S. at 719-720.

Petitioner's alternative argument, Pet. 25-26, that the Colorado statute discriminated based on "function or purpose," was rejected by this Court in *City of Austin*. *See City of Austin*, 596 U.S. at 74 (rejecting

that argument as "stretch[ing] *Reed*'s 'function or purpose' language too far"). And while Petitioner makes much of the fact that *Hill* allowed a "cursory examination" of content to determine if the statute applied, Pet. 20, *City of Austin* explicitly affirmed this approach. *City of Austin*, 596 U.S. at 72 ("This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral."). *City of Austin* thus affirmed multiple aspects of *Hill* that Petitioner takes issue with.

Petitioner also leans heavily on *Dobbs* v. *Jackson Women's Health Organization*—or, more specifically, a single footnote of that decision—to argue that *Dobbs* "removed all doubt" of *Hill*'s continuing viability. Pet. 10 (citing *Dobbs*, 597 U.S. at 286 n.65). But *Dobbs* did not address the First Amendment or States' right to regulate public safety. Moreover, the decision expressly cautioned against extension of its reasoning to other constitutional protections. *Dobbs*, 597 U.S. at 290 ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). *Dobbs* cannot do the work Petitioner asks of it.

In sum, Petitioner is flatly incorrect that *McCullen*, *Reed*, *City of Austin*, or *Dobbs* disavowed *Hill*. This Court has oft and recently declined to overrule *Hill*. *See, e.g.*, *Reilly* v. *City of Harrisburg*, 2023 WL 6810442, *cert. denied*, 144 S. Ct. 1002 (2024); *Vitagliano* v. *County of Westchester*, 2023 WL

4824890, *cert. denied*, 144 S. Ct. 486 (2023); *Reilly* v. *City of Harrisburg*, 2020 WL 598608, *cert. denied*, 141 S. Ct. 185 (2020); *Price* v. *City of Chicago*, 2019 WL 2404320, *cert. denied*, 141 S. Ct. 185 (2020); *Bruni* v. *City of Pittsburgh*, No. 19-1184, 2009 WL 10736044, *cert denied*, 141 S. Ct. 578 (2021); *McGuire* v. *Reilly*, 2005 WL 79243, *cert. denied*, 544 U.S. 974 (2005). Petitioner offers no reason to depart from that practice now.

### C. Petitioner's theory would upset States and localities who have legislated in reliance on *Hill*.

As Petitioner aptly put it, the "whole point of *Dobbs* was to return debate about the sensitive questions surrounding abortion to the people." Pet. 16. Local ordinances, like the Carbondale ordinance, are one example of returning these issues to the people. *Madsen*, 512 U.S. at 764-765 (explaining local ordinances not only represent a "legislative choice regarding the promotion of particular societal interests," but the public's choice as well); *see also Dobbs*, 597 U.S. at 256 ("Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.").

It is no matter that local regulations differ across the country, *contra* Pet. 15, because "the people of the various States may evaluate [] interests differently." *Dobbs*, 597 U.S. at 256. Thus, any "proliferat[ion]" of laws, Pet. 16, "is a virtue, not a vice," *McCullen*, 573 U.S. at 476.

Finally, Petitioner is "not without electoral or political power." *Dobbs*, 597 U.S. at 289. Petitioner is free to convince Carbondale's residents and City

Council of its position. Indeed, Petitioner's political efforts may have been the impetus for Ordinance 2023-03's repeal. Because "[t]he Framers recognized that the most effective democracy occurs at local levels of government," *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (1985) (Powell, J., dissenting) (citations omitted), this Court should reject Petitioner's attempt to interfere with the political process and instead abide by *Dobbs*'s instruction to "return the power [] to the people and their elected representatives," *Dobbs*, 597 U.S. at 259.

**D. A grant of certiorari would be premature.**

Petitioner identifies no court of appeals decision in conflict with the Seventh Circuit's decision below. Indeed, Petitioner cites no decision of the federal courts of appeal holding that *Dobbs* undermined *Hill*'s reasoning. To counsel's knowledge, no such case exists. *Dobbs* was issued only two years ago, and its relationship to *Hill* has received almost no attention in the lower courts. The lack of a conflict among the courts of appeals further counsels against granting certiorari.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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