No. 14-____

IN THE

Supreme Court of the United States

ROBERT THAYER ET AL.,
Petitioners,
v.
CITY OF WORCESTER,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MATTHEW R. SEGAL
SARAH R. WUNSCH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110

KEVIN P. MARTIN
Counsel of Record
YVONNE W. CHAN
TODD J. MARABELLA
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
kmartin@goodwinprocter.com
(617) 570-1000

Counsel for Petitioners

October 14, 2014

Questions Presented

In 2013, the city of Worcester, Massachusetts, adopted two ordinances curtailing speech in traditional public fora. The first law is content based on its face: Among other restrictions, it creates numerous 20-foot buffer zones in which it is a crime to ask for immediate donations or transactions in any manner whatsoever. The second law is facially content neutral: It curtails expression by prohibiting "standing or walking" in all of Worcester's roads, traffic islands, and medians except for the purpose of crossing a street or accessing a vehicle. On June 19, 2014, the First Circuit affirmed in most respects a district court's denial of Petitioners' motion to preliminarily enjoin enforcement of these ordinances. Exactly one week later, in *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014), this Court struck down a Massachusetts buffer zone law that prohibited knowingly "standing" within 35 feet of an abortion clinic. The questions presented are:

1. Whether a plaintiff bringing a facial challenge to a law banning speech must make a threshold showing of "substantial overbreadth" before the government must prove narrow tailoring?

2. Whether a government may ban speech in a traditional public forum on the basis that the speech might cause "discomfort" or "apprehensiveness"?

3. Whether a law that on its face singles out and bans certain content is subject to strict scrutiny only if the subjective motivation behind the law is disagreement with the speech or animus?

Parties to the Proceeding

Petitioners are Robert Thayer, Sharon Brownson, and Tracy Novick. All were plaintiffs-appellants below.

Respondent is the City of Worcester, Massachusetts. Respondent was the defendant-appellee below.

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Petition for a Writ of Certiorari

Petitioners Robert Thayer, Sharon Brownson, and Tracy Novick respectfully seek a writ of certiorari to the United States Court of Appeals for the First Circuit.

Opinion Below

The opinion of the court of appeals, App. 1a-35a, is reported at 755 F.3d 60 (2014). The opinion of the district court, App. 36a-65a, is reported at 979 F. Supp. 2d 143 (2013).

Jurisdiction

The court of appeals entered its judgment on June 19, 2014. An order denying a petition for rehearing *en banc* was entered on July 17, 2014. App. 66a-67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Relevant constitutional provisions and the ordinances involved are reprinted in full at App. 68a-82a.

INTRODUCTION

On June 26, 2014, this Court struck down, on its face, a Massachusetts law creating 35-foot buffer zones around reproductive health clinics, including one in Worcester. *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014). Reversing a decision by the First Circuit, the Court held that the Commonwealth failed to prove that its law was narrowly tailored. In reaching its decision, the Court observed the importance of traditional public fora, such as streets and sidewalks, for communicating "uncomfortable"

messages. *Id.* at 2529. The Court also explained that a law is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 2531 (quoting *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)). Having ruled for the petitioners on narrow tailoring, the Court noted that it need not resolve their "overbreadth" challenge. *Id.* at 2540 n.9.

Exactly one week before *McCullen* was announced, the First Circuit preliminarily approved two Worcester, Massachusetts ordinances banning speech on public streets and sidewalks, laws that were explicitly "aimed at reducing the incidence of panhandling" in the city. App. 18a. The laws prohibit any expressive conduct on Worcester's roadways, traffic islands, and medians, and prohibit the homeless and others from asking for money and engaging in other expressive conduct in numerous 20-foot buffer zones around public locations throughout the city, anywhere in the city "after dark," and under many other circumstances. App. 73a-76a. The First Circuit concluded that, apart from the laws' ban on all immediate solicitation after dark, Petitioners were unlikely to succeed on the merits of their challenge. One month later the First Circuit denied a petition for rehearing in light of *McCullen* without comment.

As a result of the decision below, police officers in Worcester are currently enforcing no-speech zones covering vast areas of the city in which it is criminal to stand holding a sign asking a passerby for charity. But, based on this Court's decision in *McCullen*, those same Worcester police officers are prohibited from enforcing a 35-foot buffer zone around a

reproductive health clinic. Such incongruous treatment of speech in Worcester's public spaces exists because the First Circuit departed from this Court's precedents and the decisions of its fellow courts of appeals in at least three respects.

First, in *McCullen*, this Court found it unnecessary to reach plaintiffs' overbreadth claim because it concluded that the challenged law was not narrowly tailored. In this case, by contrast, the First Circuit ruled that no "burden of justification, be it strict or intermediate, passes to the government" unless plaintiff first provides a "quantification" of the law's "substantial overbreadth," and, concluding that Petitioners had not made that showing, never put Worcester to its burden of proving narrow tailoring. The First Circuit's reasoning not only conflicts with *McCullen*, it has been explicitly rejected by at least one other court of appeals and has been implicitly rejected by many more.

Second, in considering whether Petitioners had demonstrated overbreadth, the court assumed that governments may ban speech in certain locations if the content might cause "discomfort" to those nearby, and hence counted in the Worcester laws' favor their many bans on even peaceful panhandling near members of the public. That reasoning too conflicts with *McCullen*. The First Circuit stands alone among the courts of appeals in allowing a government to exclude an entire category of speech from broad buffer zones, no matter how communicated, on the basis that the content might cause discomfort to listeners.

Third, although one of Worcester's laws—which on its face only bars asking for *immediate* donations and transactions—plainly "require[s] 'enforcement

authorities' to 'examine the content of the message that is conveyed,'" *McCullen*, 134 S. Ct. at 2531, the First Circuit concluded that the law is content neutral because the city council was not subjectively motivated by "animus" or "censorial intent." This ruling exacerbated a division among the courts of appeals on the question whether censorial or discriminatory intent is required for strict scrutiny to be applied to a facially content-based law, a circuit split that is also raised in *Reed* v. *Town of Gilbert*, No. 13-502 (certiorari granted July 1, 2014).

For the reasons given herein, the Court should grant this petition and reverse the decision below. At a minimum, the Court should vacate the decision below and remand for the First Circuit to reconsider its decision in light of *McCullen*, or the Court should hold this petition pending a decision in *Reed*.

STATEMENT OF THE CASE

A. Worcester's Campaign Against Panhandling

1. Worcester, like many cities, has a significant homeless population. The homeless receive some aid from government and charitable organizations, but to supplement such aid they—like the homeless everywhere—ask their fellow citizens for spare change. Such direct appeals by society's poorest for immediate cash donations, commonly referred to as panhandling, date back to biblical times (seeking and giving "alms") and indisputably constitute speech protected by the First Amendment. *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

Some view panhandling as a nuisance activity. The presence of panhandlers shines a spotlight on

poverty or lack of adequate mental health services in the community that can embarrass local government and civic leaders. Small businesses in downtown areas may assert that panhandlers drive away their customers. Massachusetts once banned begging or receiving alms in all public places, but that law was struck down on First Amendment grounds in *Benefit* v. *City of Cambridge*, 679 N.E.2d 184 (Mass. 1997).

2. In the years after *Benefit*, the City of Worcester ("Worcester" or the "City") sought to diminish the volume of panhandling by encouraging its residents to donate to charitable organizations instead of giving directly to the homeless. App. 2a. In January 2013, however, the City went a step further, enacting two criminal laws that were specifically "aimed at reducing the incidence of panhandling in our community." App. 99a.

The first law, R.O. c. 9, § 16 ("Section 16"), is styled as a ban on what the City calls "aggressive" panhandling. Section 16 makes it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner." R.O. c. 9, § 16 (App. 73a-80a). The law defines "beg[ging], panhandl[ing], and solicit[ing]" as:

> asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place. "Solicit" or "Soliciting" shall include using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer

> to immediately exchange and/or sell any goods or services.

R.O. c. 9, § 16(c) (App. 76a-77a). This definition is by turns broad and narrow: Broad, in that it covers all means of communication, including passively holding a sign, and narrow, in that it prohibits soliciting only an *immediate* donation or transaction, and so does not cover asking for a future transfer or something other than cash or an "object of value" that can be "transferred."

Section 16 contains an expansive definition of "aggressive manner." In part it forbids some truly aggressive conduct, such as begging "intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise to be intimidated into giving money or any other thing of value." App. 78a. This aggressive conduct is for the most part already covered by existing laws, as the City itself has recognized.[1] But the definition of "aggressive" also includes:

> (7) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose;
>
> * * *

[1] App. 94a (Memorandum from Worcester city manager to city council: "While peaceful begging is a protected activity, if the person's conduct transgresses those peaceful limits there are other State statutes that deal with such behavior. Among those are laws that prohibit trespass (i.e., private property/businesses), assault and battery, disorderly conduct (so long as that conduct is tumultuous), and G.L. c. 85, §17A, which prohibits causing a vehicle to stop or accosting the occupant of a motor vehicle stopped for a red light for the purpose of soliciting a contribution.").

> (10) soliciting any person within 20 feet of the entrance to, or parking area of, any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any cafe, restaurant or other business.
>
> (11) soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise.

R.O. c. 9, §16(c) (App. 78a-79a). A violation of Section 16 is punishable by a $50 fine, and arrest if the violator refuses an order to stop. App. 80a.

Section 16 thus criminalizes a broad swath of speech that is not "aggressive" within the ordinary meaning of that word. The law makes it a crime to request any immediate donation through any manner of communication whatsoever:

- anywhere in public "after dark," which as defined includes the majority of the day from mid-September through late March, including the great majority of the day during the Christmas and holiday season;
- at any time of day within a countless number of 20-foot buffer zones around (*inter alia*) bus stops, parking lots, and entrances to "places of public assembly." The ordinance does not define "places of public assembly," but that phrase has been construed by some courts to include parks,

> government buildings, stores, office buildings, restaurants, bars, and nightclubs;[2] and
>
> - from people standing in any kind of line, no matter the location or time of day or the speaker's distance from the line.

The sole justification Worcester gave for Section 16's restrictions appears in the law's preamble. The preamble states, in relevant part, that "[p]ersons approached by individuals asking for money . . . are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by or immediately followed or preceded with aggressive behavior." App. 74a. It also states that "[a]ggressive soliciting . . . of persons within 20 feet of" various locations "subjects people being solicited to improper and undue influence and/or fear and should not be allowed." App. 75a-76a. Section 16, as just noted, then defines all solicitation within 20 feet of such locations as automatically "aggressive."

3. The second Worcester law amended R.O. c. 13, § 77(a), "Crossing Ways or Roadways" ("Section 77(a)"). Unlike Section 16, the amendments to Section 77(a) were not accompanied by a preamble. Under the amended law:

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of

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[2] See, *e.g.*, *Sutera* v. *Go Jokir, Inc.*, 86 F.3d 298, 308 (2d Cir. 1996); *Schmitty's City Nightmare, LLC* v. *City of Fond du Lac*, 391 F. Supp. 2d 745, 749 (E.D. Wis. 2005); *Casanova Ent. Group, Inc.* v. *City of New Rochelle*, 375 F. Supp. 2d 321, 338 (S.D.N.Y. 2005).

> any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the [sic] remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

R.O. c. 13, § 77(a) (App. 81a). The law allows police to ask speakers to move along whether or not they are causing a traffic hazard or impeding traffic. Thus, on its face, Section 77(a) gives police total discretion to bar all expressive activity in all of Worcester's roadways and traffic islands (some of which are quite expansive, see App. 180a).

As this Court observed 75 years ago, "streets are natural and proper places for the dissemination of information and opinion . . . ." *Schneider* v. *New Jersey (Town of Irvington)*, 308 U.S. 147, 163 (1939). For decades, expressive activity on or near Worcester's roadways has included two forms of speech in addition to panhandling. First, politicians and their supporters have long engaged in campaigning from the city's traffic islands. See App. 182a. Additionally, the City has sanctioned so-called "tag days," events in which the City issues permits to non-profit groups and organizations such as high schools, churches, and sports teams to solicit donations from motorists. During these events, participants signaled to stopped motorists and

entered the roadway in order to collect donations or signatures.

Although both political campaigning and tag day activities have occurred within Worcester for years, the City has no evidence that such conduct ever caused an accident or injury. *Cf.* App. 165a-167a. There also is no indication that, prior to Worcester turning its sights on panhandlers, it ever sought to eliminate tag days or political speech on traffic islands over safety concerns. To the contrary, when the city government first introduced Section 77(a), there was a backlash against its possible application to tag days. The city council asked the city solicitor if the law could be limited only to panhandlers, and he responded that such a law likely would be unconstitutional. App. 114a-115a. During subsequent debates some politicians also complained that they and their supporters would no longer be able to campaign on traffic islands. The city solicitor, in reply, assured them that police had discretion under the law to allow politicians to remain. App. 141a-144a. In fact, that is what has happened, even as the homeless have been told to move along. App. 185a.

B. Proceedings Below

1. Petitioners, two homeless persons who panhandle by peaceably holding signs asking for help and a Worcester school committee member who holds political campaign signs on traffic islands, filed a complaint and motion for preliminary injunction under 42 U.S.C. § 1983 challenging the Worcester ordinances under the First and Fourteenth Amendments. Petitioners alleged that the laws violated their own constitutional rights and that the ordinances are unconstitutionally overbroad. The

thrust of Petitioners' First Amendment claim was that the laws are not narrowly tailored to either a compelling or significant government interest, thus unnecessarily banning a substantial volume of speech that poses no risk to public safety.

2. On October 24, 2013, the District Court denied Petitioners' preliminary injunction motion, holding that the ordinances were likely constitutional. The District Court ruled that both laws were content neutral, App. 52a, and that both laws were narrowly tailored. App. 57a-58a. With respect to Section 16, the District Court reasoned that the law was likely to survive challenge because "Worcester has determined that vocal requests for money create a threatening environment, or *at least a nuisance* for some citizens," and "[t]he City has chosen to restrict soliciting only in those circumstances where it is considered especially *unwanted or bothersome*." App. 58a (emphases added). With respect to Section 77(a), the District Court credited the City's assertion, unsupported by any findings or data, that engaging in expressive conduct in roadways and traffic islands is necessarily unsafe and therefore can be entirely banned. App. 57a-58a.

3. On appeal, the First Circuit affirmed except with respect to Section 16's prohibition of all solicitation "after dark." App. 24a n.7.

The First Circuit began by holding that the ordinances were content neutral. App. 18a. The court rejected Petitioners' argument that Section 16 is content based because it applies only to solicitations for immediate donations or transactions, reasoning that "[e]ven assuming that the ban on immediate donations is a content distinction, . . . that distinction alone does not render the ordinance

content-based so long as it reflects a legitimate, non-censorial government interest." App. 15a. Concluding that the law was motivated by safety concerns rather than "animus" against soliciting, the court declined to apply strict scrutiny. App. 17a-18a.

Next, the First Circuit stated that, by challenging the laws on their face, Petitioners took on "the initial burden to make at least a prima facie showing of . . . 'substantial' overbreadth before any burden of justification, be it strict or intermediate, passes to the government." App. 19a-20a. The court concluded that Petitioners "failed to make the prima facie showing necessary to trigger the government's burden of proving that the ordinances survive intermediate scrutiny." App. 23a. The court therefore *never* proceeded to determine whether Worcester is likely to carry its burden of demonstrating narrow tailoring. Consequently, the opinion below never analyzes, *e.g.*, whether any government interests Worcester identified could be advanced by narrower laws or generic criminal statutes, what laws have been adopted by other jurisdictions to address such interests, whether Worcester had tried and failed options less burdensome of speech, and so forth.

In ruling that the Petitioners had not demonstrated substantial overbreadth, the court faulted Petitioners for not providing information on "the relative likely frequencies of the ordinances' controversial versus obviously acceptable applications in the circumstances specified." App. 25a. In enumerating Section 16's "obviously acceptable applications" the First Circuit reasoned that Worcester may ban even a single polite request

for money if it might cause "apprehensiveness" or even mere "discomfort" to the audience, observing:

- "[A] sign request [within twenty feet] would reasonably give rise to discomfort to someone stuck at a bus stop, and could definitely produce apprehensiveness in someone obviously possessing fresh cash." App. 25a.
- "[P]eople can feel intimidated or unduly coerced when they do not want to give to the solicitor standing close to a line they must wait in for a bus or a movie." App. 25a.
- "As to the moving solicitor, the 20 foot restriction at the bus stop is probably too broad, but the contrary is probably true in the case of a stationary sign-holder staring at a lone individual waiting for a bus." App. 25a.

Following this Court's decision in *McCullen*, Petitioners sought rehearing and rehearing *en banc*. Rehearing was denied on July 17, 2014, without comment. App. 66a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With *McCullen* and Creates or Deepens Three Circuit Splits

A. Only The First Circuit Requires Plaintiffs To Demonstrate Overbreadth Before Requiring The Government To Prove That A Law Burdening Speech Is Narrowly Tailored

The First Circuit ruled that, in a facial challenge, the government bears no burden of proving narrow tailoring unless plaintiff first demonstrates substantial overbreadth. That ruling conflicts with this Court's decision in *McCullen* and with the decisions of other federal courts of appeals.

1. This Court long has required governments to bear the burden of demonstrating that a law restricting speech is narrowly tailored to either a compelling (if the law is content based) or significant (if the law is content neutral) government interest. See, *e.g.*, *McCullen*, 134 S. Ct. at 2540; *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647 (1985).

This assignment of the burden of proof is neither accidental nor trivial. "[T]he Constitution demands that content-based restrictions on speech be presumed invalid *and that the government bear the burden of showing their constitutionality*," *United States* v. *Alvarez*, 132 S. Ct. 2537, 2544 (2012) (emphasis added) (internal quotation marks and citation omitted). The government bears a "heavy burden" of demonstrating a content-based law's constitutionality. *Id*. at 2549. Nor does this Court hesitate to strike down even content-neutral laws

when the government does not carry its burden of proof.[3] "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency." *McCullen*, 134 S. Ct. at 2534 (internal quotation marks and citation omitted). The government "'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *Id.* at 2535 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)). To survive intermediate scrutiny, therefore, "*the government must demonstrate* that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 2540 (emphasis added).

In this case, however, the First Circuit rejected any "assumption" that "the burden rests on the City from the start to demonstrate that the applicable standard of scrutiny is satisfied." App. 19a. The court stated that when a plaintiff challenges on its face a law burdening speech, "the claimant has the initial burden to make at least a prima facie showing" of "'substantial' overbreadth *before any burden of justification*, be it strict or intermediate, passes to the government." App. 19a-20a (emphasis added). The court further stated that to make this showing, plaintiff is "required" to provide a "quantification" of the "relative likely frequencies" of

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[3] *E.g.*, *McCullen*, 134 S. Ct. at 2534; *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001); *Schenck* v. *Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen* v. *Women's Health Ctr.*, 512 U.S. 753 (1994); *City of Ladue* v. *Gilleo*, 512 U.S. 43 (1994); *United States* v. *Nat'l. Treasury Employees Union*, 513 U.S. 454 (1995).

the law's constitutional and unconstitutional applications. App. 23a-26a.

2. One week later, this Court in *McCullen* did exactly what the First Circuit said was impermissible: It invalidated a buffer zone law on its face without first requiring the plaintiffs to demonstrate overbreadth (whether through a "quantification" or otherwise). The plaintiffs in *McCullen*, like Petitioners here, challenged a buffer zone law both on its face and as applied to their own conduct. This Court, in finding the law invalid on its face, put the government to its burden of justification without ever considering whether plaintiffs had first demonstrated overbreadth or shown the "relative likely frequencies" of the law's constitutional and unconstitutional applications. Indeed, the Court explicitly noted that it had no need to reach the overbreadth issue: "Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. *Nor need we consider petitioners' overbreadth challenge.*" *McCullen*, 134 S. Ct. at 2540 n.9 (emphasis added).

McCullen is consistent with this Court's prior decisions, which have addressed the facial invalidity of laws for lack of narrow tailoring without analyzing or even mentioning overbreadth. See, *e.g.*, *Brown* v. *Ent. Merchants Ass'n*, 131 S. Ct. 2729 (2011); *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000); *TBS, Inc.* v. *FCC*, 512 U.S. 622 (1994). *Hill* v. *Colorado*, 530 U.S. 703 (2000), also is instructive. In that pre-enforcement action, plaintiffs challenged a buffer zone law only on its face. *Id.* at 710. The majority opinion first considered plaintiffs' argument that the law failed narrow tailoring and rejected it.

Id. at 725-30. Only then did the majority consider plaintiffs' overbreadth argument and reject that too. *Id.* at 730-33. Addressing narrow tailoring first would have been gratuitous if, as the First Circuit believes, the *Hill* plaintiffs' failure to demonstrate overbreadth rendered narrow tailoring a non-starter.

This Court's decisions on which the First Circuit relied for its approach, App. 19a-20a, do nothing of the sort. In none of them did the Court decline to consider a narrow-tailoring challenge to the face of a law on the basis that plaintiff failed to meet some initial burden of demonstrating overbreadth. In *United States* v. *Stevens*, 559 U.S. 460, 473 (2010), plaintiff *succeeded* on his overbreadth challenge and therefore the Court had no need to consider his narrow tailoring argument; the Court certainly did not decline to consider it. See also *City of Houston* v. *Hill*, 482 U.S. 451, 458-67 (1987) (striking down law proscribing "assaulting or interfering with policemen" on basis of overbreadth). None of the other decisions the First Circuit cited even discuss the narrow-tailoring requirement. See *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 457-58 (2008) (rejecting facial challenge to state law establishing primary election system that conceivably could be applied constitutionally); *Virginia* v. *Hicks*, 539 U.S. 113, 117 (2003) (considering overbreadth and vagueness challenges to trespassing law with no discussion of narrow tailoring requirement); *N.Y. State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 11 (1988) (considering challenge to public accommodations law with no discussion of narrow tailoring requirement).

3. The First Circuit's requirement that overbreadth be shown before narrow tailoring is

considered also conflicts with decisions from other courts of appeals. The First Circuit itself acknowledged that other courts have invalidated anti-panhandling laws on their face for lack of narrow tailoring without any discussion of overbreadth, but rationalized these decisions by speculating that the courts had "implicitly" found overbreadth before moving on to narrow tailoring. App. 27a & n.8.

That is not so. Other courts of appeals explicitly have rejected the First Circuit's understanding of the interplay between claims that a law is not narrowly tailored and "facial overbreadth" claims. In *Doe* v. *City of Albuquerque*, 667 F.3d 1111, 1117, 1131 (10th Cir. 2012), for example, the defendant city "argued that because [plaintiff] was challenging the ban on its face, [he] had to show that the law could not be constitutionally applied under any circumstance," and therefore the city, believing "that there was no burden upon [it] to prove anything," "did not submit any evidence" to satisfy its own burden of demonstrating narrow tailoring. The Tenth Circuit correctly ruled that even on a "facial" challenge the city had a burden of demonstrating narrow tailoring, explaining that:

> where a statute fails the relevant constitutional test (such as strict scrutiny, the *Ward* test [for content-neutral laws], or reasonableness review), it can no longer be constitutionally applied to anyone—and thus there is "no set of circumstances" in which the statute would be valid. The relevant constitutional test, however, remains the proper inquiry.

Id. at 1127. Because the city did not submit evidence to carry its own burden of proving narrow tailoring, the Tenth Circuit ruled for plaintiff and struck down the challenged law on its face. *Id.* at 1134-35.

The Seventh Circuit employed similar logic in *Doe* v. *Prosecutor, Marion County, Ind.*, 705 F.3d 694, 701-02 & n.6 (7th Cir. 2013), explaining that, even though a more narrowly-tailored sexual-predator law "could apply to certain persons that present an acute risk" consistent with the First Amendment, nonetheless "we facially invalidate the Indiana law because it is not narrowly tailored to serve the state's interest *and any plaintiff could show as much*" (emphasis added). At no point in *Doe* did the Seventh Circuit consider whether plaintiff had carried some initial burden of demonstrating substantial overbreadth.

That said, decisions from the courts of appeals vary when it comes to the relief provided when a government fails to prove narrow tailoring. Some decisions strike down such laws on their face. See, *e.g.*, *Comite de Jornaleros de Redondo Beach* v. *City of Redondo Beach*, 657 F.3d 936, 950-51 (9th Cir. 2011); *Justice For All* v. *Faulkner*, 410 F.3d 760, 772-73 (5th Cir. 2005); *Burk* v. *Augusta-Richmond County*, 365 F.3d 1247, 1250 (11th Cir. 2004); *Kirkeby* v. *Furness*, 92 F.3d 655, 658 (8th Cir. 1996). Other decisions have awarded only "as-applied" relief. *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 98 (2d Cir. 2003); *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 556-58 (6th Cir. 2001). But within this spectrum of approaches, the First Circuit stands alone in relieving the government of *any* burden of proof unless plaintiff first shows substantial overbreadth.

4. If permitted to stand, the decision below will have profound practical consequences for First Amendment rights in the First Circuit. Most worryingly, unconstitutional laws will remain in force simply because of the practical difficulties of proving the "relatively likely frequencies" of their application. Such proof is always elusive because cataloguing all instances of protected speech is difficult. Once a law curtailing speech goes into effect, that difficulty is likely to become an impossibility. At that point, the law's chilling effect can eliminate the banned speech, thus nullifying efforts to collect meaningfully accurate data. Yet the decision below will ensure that these laws do go into effect, hamstringing efforts to meet the First Circuit's "relative likely frequencies" test. Meanwhile, governments wishing to shield laws from facial challenges will be motivated to avoid collecting relevant information during the legislative process, knowing that the absence of such evidence will be held not against it, but against plaintiffs.

The First Circuit asserted that this harsh outcome is warranted because facial challenges should be "discouraged" in deference to as-applied challenges. App. 34a. Although this Court has sometimes has made similar statements, see, *e.g.*, *Wash. State Grange*, 552 U.S. at 450; *Sabri* v. *United States*, 541 U.S. 600, 608-09 (2004), the Court also has noted the important role facial challenges play in protecting First Amendment free speech rights. See *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). The Court appears never to have stated that facial relief is to be discouraged even where a government has enacted a law burdening speech that is not narrowly tailored. Instead, the very opposite is true. In *Citizens United*

v. *Fed. Election Comm'n*, 558 U.S. 310, 331, 333 (2010), for example, the Court struck down on its face an aspect of a campaign finance law that was not narrowly tailored, explaining that the "chilling effect" of the unconstitutional law supported awarding facial, rather than merely as-applied, relief.

Discouraging facial challenges to laws that are not narrowly tailored makes little sense because whether a law is narrowly tailored does not turn on the specifics of plaintiff's conduct. In *McCullen*, for example, the Court's explanation why the Massachusetts law failed narrow tailoring review (Part IV.B of the Court's opinion) nowhere addressed plaintiffs' own conduct, and for good reason: that conduct had nothing to do with the fact that other states had not adopted such obtrusive buffer zone laws, or the availability of other, narrower laws to address the Commonwealth's concerns, or the Commonwealth's failure to employ other tools available to it before enacting its buffer zone law. All of those issues were addressed on the law's face.

Similarly, consideration of Petitioners' conduct in this case is unnecessary to reach the conclusion that Worcester's ordinances are not narrowly tailored. Petitioners are aware of no laws as burdensome as Worcester's to the free speech rights of the homeless and local politicians that have survived judicial review. Other courts, properly placing the burden on the government to demonstrate that laws akin to Sections 16 and 77(a) are narrowly tailored, have struck those laws down for lack of narrow tailoring, or upheld them because they contain exceptions and limitations (*e.g.*, exceptions for non-vocal signholding or standing off of the roadway on a median

strip/traffic island) not present in Worcester's laws.[4] There also are numerous laws already on the books that are more narrowly tailored to truly aggressive conduct and traffic safety concerns than Worcester's sweeping ordinances, App. 68a-73a, 80a, yet Worcester never argued that it tried without success to employ such laws to remedy any legitimate public safety issues.

Ultimately, the First Circuit agreed that "there is probably some overbreadth" in Worcester's laws, agreed that "some of" the laws' "prohibitions are at the far side of the reasonable reach of the City's objectives," and acknowledged that some speech banned by the laws "may justify no concern at all." App. 24a-25a. Yet, because the court believed that Petitioners had failed to carry an initial burden of demonstrating substantial overbreadth, Worcester's

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[4] For cases pertinent to Section 16, see *Norton* v. *City of Springfield*, __ F.3d __, 2014 WL 4756402, at *1-2 (7th Cir. Sept. 25, 2014); *Gresham* v. *Peterson*, 225 F.3d 899, 906-907 (7th Cir. 2000); *Henry* v. *City of Cincinnati*, 2005 WL 1198814, *1-3 (S.D. Ohio Apr. 28, 2005); *State* v. *Boehler*, 262 P.3d 637, 643-44 (Ariz. Ct. App. 2011); *State* v. *Dean*, 866 N.E.2d 1134, 1140-41 (Ohio Ct. App. 2007). For cases pertinent to Section 77(a), see *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 948-51; *ACORN* v. *St. Louis County*, 930 F.2d 591, 596-97 (8th Cir. 1991); *Traditionalist Am. Knights of Ku Klux Klan* v. *City of Desloge*, 914 F. Supp. 2d 1041, 1051 (E.D. Mo. 2012); *Wilkinson* v. *Utah*, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012); *Sun-Sentinel Co.* v. *City of Hollywood*, 274 F. Supp. 2d 1323, 1332 (S.D. Fla. 2003); *News & Sun-Sentinel Co.* v. *Cox*, 702 F. Supp. 891, 901-02 (S.D. Fla. 1988); *ACORN* v. *City of New Orleans*, 606 F. Supp. 16, 21-22 (E.D. La. 1984). Petitioners are not asserting that the more narrowly-tailored laws at issue in some of these cases are themselves constitutional, only that, as in *McCullen*, the existence of these less burdensome options demonstrates the Worcester laws' lack of narrow tailoring.

own failures of proof and failure to try more narrowly-tailored alternatives were of no consequence. Such an outcome is anathema to this Court's First Amendment jurisprudence and should be reversed.

B. The Decision Below Conflicts With *McCullen*, And The Decisions Of Several Courts Of Appeals, By Holding That Governments Can Ban Speech Causing "Discomfort" Or "Apprehensiveness"

While *McCullen* held that a buffer zone could not be established around reproductive health clinics to shield those entering from speech they might find distressing or threatening, the First Circuit held that the "discomfort" and "apprehensiveness" of persons engaged in everyday activities such as waiting for a bus or entering a "place of public assembly" can justify numerous buffer zones throughout a city. The First Circuit's reliance on the public's assumed "discomfort" with panhandlers cannot be reconciled with *McCullen*, and reversal is warranted on this basis alone.

1. As set forth *supra* at 7-8, Section 16 criminalizes a substantial volume of solicitation that is by no means "aggressive." Petitioners therefore argued below that Section 16's application to a homeless person politely holding a sign requesting spare change while sitting near a bus stop and a Salvation Army volunteer ringing a bell near a train station are indications of the law's lack of narrow tailoring (and, if necessary, overbreadth). See *Loper* v. *N.Y. City Police Dep't*, 999 F.2d 699, 705-06 (2d Cir. 1993) (rejecting total ban on panhandling advanced to address concerns with "intimidation, coercion, harassment and assaultive conduct," and

observing that "[a] verbal request for money for sustenance or a gesture conveying that request carries no harms of the type enumerated by the City Police, if done in a peaceful manner"); *Boehler*, 262 P.3d at 643-44 (striking down law that "would prohibit both a cheery shout by a Salvation Army volunteer asking for holiday change and a quiet offer of a box of Girl Scout cookies by a shy pre-teen").

The First Circuit, however, treated these applications as evidence of the law's virtue, reasoning that a government may ban speech if it is capable of causing "discomfort," "apprehensiveness," or "intimidat[ion]" to people nearby. See *supra* at 12-13. Importantly, the First Circuit's reasoning necessarily hinged on the mere act of requesting an immediate donation within the no-solicitation zones, not any additional conduct that is "aggressive." That is because Section 16 *separately* prohibits "begging or soliciting in a manner . . . intended or likely to cause a reasonable person to fear imminent bodily harm, danger or damage to or loss of property or otherwise to be intimidated into giving money or any other thing of value." App. 75a. It also separately prohibits "begging or soliciting in a group of two or more persons in an intimidating fashion," "using profane, threatening, or abusive language," "closely following" a person after a negative response to a solicitation, "touching another person . . . without that person's consent" while soliciting, and "using violent or threatening gestures which are likely to provoke an immediate violent reaction" from the person solicited. App. 74a-75a.

2. If the First Circuit's belief that governments may ban speech causing discomfort and apprehension to persons in public spaces were

correct, *McCullen* would have had to come out differently. There is no doubt that pro-life speech within 35 feet of an abortion clinic has the potential to cause "discomfort" or "apprehensiveness" in the intended audience. Yet this Court explained that public fora are particularly important under the First Amendment *precisely because* the speech that occurs there may be "uncomfortable" for listeners:

> With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, this aspect of traditional public fora is a virtue, not a vice.

McCullen, 134 S. Ct. at 2529 (internal quotation marks and citations omitted). This principle is crystalized in the general rule that "in such a forum the government may not 'selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others.'" *Id.* (quoting *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975)).

The First Circuit's reasoning also finds no support in this Court's pre-*McCullen* precedent. This Court has explained that "citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms

protected by the First Amendment." *Boos* v. *Barry*, 485 U.S. 312, 322 (1988) (quotations omitted). Even in schools, where free expression is sometimes more restrained than it can be in the public streets, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-10 (1969). With respect to written messages, which Section 16 also outlaws, this Court has stated that if persons in a traditional public forum do not wish to see the message, then it is their obligation to "avert[] their eyes." *Cohen* v. *California*, 403 U.S. 15, 21 (1971).

What is more, *McCullen* specifically rejected the First Circuit's belief that "the Constitution does not accord 'special protection' to close conversations," such as those Section 16 precludes. *McCullen*, 134 S. Ct. at 2536. The Court noted that, "[w]hile the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others." *Id.* Thus, "[w]hen the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* Even the majority opinion in *Hill* v. *Colorado* was careful to note that the eight-foot "no approach" buffer zones upheld in that case would, unlike larger buffer zones struck down in earlier cases, allow normal conversation, signs to be read, and stationary individuals to hand out written material. *Hill*, 530 U.S. at 726-27. Section 16's no-speech zones allow none of that.

3. The First Circuit's reasoning also conflicts with that of other courts of appeals, which have recognized that the First Amendment exists precisely to protect speech, even close conversations, that the audience finds "especially unwanted" or "discomfort[ing]." Petitioners have been unable to find a decision of another court of appeals upholding a ban on any communication of a message in a traditional public forum on the grounds that the message could cause mere discomfort or apprehension.

For example, in *Berger*, the Ninth Circuit struck down a law that created a 30-foot buffer zone around people waiting in line in a public park, rejecting an argument that speech could be restricted in order to protect individuals from "harassment." *Berger* v. *City of Seattle*, 569 F.3d 1029, 1053 (9th Cir. 2009). The court explained that "we cannot countenance the view that individuals who choose to enter [public parks], for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable, or annoying," *id.* at 1054, and described the implications of the city's argument as "startling," *id*. at 1055.

Similarly, in *Bays* v. *City of Fairborn*, organizers of a city's "sweet corn festival" asked religious preachers to stop approaching visitors, stating "[i]f we start getting approached by people who say, hey these two guys are approaching me and bothering me and talking about stuff I don't want to hear, then you're going to have a problem." 668 F.3d 814, 818 (6th Cir. 2012). The Sixth Circuit held that this violated the speakers' First Amendment rights, explaining:

> The Fairborn officials claimed that one-on-one conversations may be acceptable, so long as the plaintiffs did not bother anyone or talk about things festival goers did not want to hear (such as a religious message). The Supreme Court has made clear that an individual's speech is protected even if it does "not meet standards of acceptability" from the potential audience's view.

Id. at 824 (quoting *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971)); *cf. Benefit*, 679 N.E.2d at 190 (in panhandling case, explaining that "[a] listener's annoyance or offense at a particular type of communicative activity does not provide a basis for a law burdening that activity").

4. Once again, the First Circuit's error was likely outcome dispositive. The First Circuit's conclusion that Petitioners had not demonstrated substantial overbreadth plainly turned on the court's belief that merely annoying or discomfiting speech may be banned in traditional public fora consistent with First Amendment principles. Because that belief was mistaken, the decision below cannot stand even if the First Circuit is correct concerning its threshold overbreadth test.

C. The First Circuit Deepened A Circuit Split On Whether Content-Based Laws Are Subject To Strict Scrutiny Only When Motivated by Animus Or Censorial Intent

Section 16 makes a variety of conduct unlawful, but only if accompanied by specific speech: a request for an immediate donation or other transaction. Thus, it is not unlawful to stand near a bus stop with

a sign advertising a yard sale, but it is a crime to tell others at the stop that you need money for food while holding out a collection cup. It is not unlawful for someone to repeatedly ask people standing in line to sign a political petition, but the same person risks arrest if he asks the same audience to financially support his cause by purchasing literature.

Yet the First Circuit held that the law is content neutral, looking not at whether the law objectively draws distinctions based on content, but at the City's subjective reasons for drawing those distinctions. *Supra* at 11-12. According to that court, "[e]ven a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive," App. 13a, rather than "animus," App 18a. That holding cannot be reconciled with *McCullen*. At the very least, it implicates the question on which this Court has granted certiorari in *Reed* v. *Town of Gilbert*.

1. The First Circuit's view that a law can escape strict scrutiny even if it "draw[s] content-based distinctions on its face" conflicts with *McCullen*. This Court in that case explained that a law is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2518 (quoting *League of Women Voters*, 468 U.S. at 383). In contrast, the Court stated, a content-neutral law is one in which liability "'depends' not 'on what [speakers] say,' but simply on where they say it." *Id.* (quoting *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). That test contains no subjective requirement and is directly at odds with the First

Circuit's approach below. See also *TBS*, 512 U.S. at 622; *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

Even if censorial motive were necessary, the First Circuit's understanding of what constitutes such a motive also does not survive *McCullen*. This Court explained that a law is content based "if it [is] concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *McCullen*, 134 S. Ct. at 2546 (quoting *Boos*, 485 U.S. at 321). Thus, "offense or discomfort" at hearing certain messages "outside Massachusetts abortion clinics . . . would not give the [government] a content-neutral justification to restrict the speech." *Id.* at 2532. Content-neutral laws are concerned with "problems [that] arise irrespective of any listener's reactions," such as congestion on a sidewalk. *Id.*

Section 16 is not premised on content-neutral concerns about congestion on sidewalks, traffic safety, or noise levels, and the city (to its credit) never has claimed that it is. Section 16 is premised entirely on the effect of particular speech on the audience: an assumption that appeals for spare change—in contrast to messages that are not banned under the identical circumstances—are more likely to cause listeners to be discomfited. App. 204a-205a. The First Circuit plainly adopted this argument: It reasoned that merely looking at a sign requesting charity from "twenty feet [away] would reasonably give rise to discomfort to someone stuck at a bus stop." App. 25a. Under *McCullen*, this basis for upholding the law—the "discomfort" listeners feel in response to the category of banned speech—confirms the law's content specificity.

2. To the extent that *McCullen* leaves room for debate, the courts of appeals are split on the question whether a showing of "animus" or a "censorial motive" is necessary before strict scrutiny is applied to a law that is content based on its face.[5] This Court may resolve that split in *Reed* v. *Town of Gilbert*, where petitioner presents the following question: "Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based signed code content neutral and justify the code's differential treatment of Petitioners' religious signs?" A decision reversing the Ninth Circuit in *Reed* could dictate the outcome of this case with respect to Section 16, and therefore, if the Court does not grant certiorari on the first two questions presented by this petition (or vacate and remand the decision below in light of *McCullen*), Petitioners submit that holding this petition pending the decision in *Reed* would be appropriate.

II. This Case Is An Appropriate Vehicle To Address The Questions Presented

The cleanest step for this Court to take in response to this petition is to grant it, vacate the decision below, and remand for the First Circuit to

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[5] Compare *Surita* v. *Hyde*, 665 F.3d 860, 871 (7th Cir. 2011); *Whitton* v. *City of Gladstone*, 54 F.3d 1400, 1407 (8th Cir. 1995); *Berger*, 569 F.3d at 1050; *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1259 & n.8 (11th Cir. 2005) with *Clatterbuck* v. *City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013); *Asgeirsson* v. *Abbott*, 696 F.3d 454, 460-61 (5th Cir. 2012); see also *United States* v. *Caronia*, 703 F.3d 149, 164-65 (2d Cir. 2012); *Stilp* v. *Contino*, 613 F.3d 405, 412-13 (3d Cir. 2010); *Pagan* v. *Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007); *Eagon Through Eagon* v. *City of Elk City, Okl.*, 72 F.3d 1480, 1487-88 (10th Cir. 1996).

consider the inconsistencies between its decision and this Court's decision one week later in *McCullen*. If the Court does not follow that approach, then this case would be an appropriate vehicle for the Court to grant certiorari in order to resolve the questions presented.

As an initial matter, this case provides the Court an opportunity to address three important legal issues in one vehicle. Each of the questions presented is a pure legal issue that does not require any further factual development. On each of these questions, the First Circuit's decision is inconsistent with this Court's precedent and represents a minority position among the courts of appeals.

Moreover, correcting any of the First Circuit's three errors will justify reversing the decision below. As previously noted, the First Circuit is an outlier in holding that laws imposing an extensive ban on any manner of peaceful and passive solicitation in traditional public fora, and granting police unbridled power to preclude expressive conduct in roadways, medians, and traffic islands, are probably constitutional. If the Court properly puts Worcester to its burden of proving narrow tailoring, then it should rule that Worcester's laws are not narrowly tailored. *Supra* at 12-13, 14-23. Likewise, if strict scrutiny is applied to Section 16, a decision in favor of Petitioners should follow, for Worcester never has argued that the law can survive strict scrutiny. Nor, to the extent overbreadth must be considered, has Worcester argued (nor could it) that Section 16's applications to solicitations that pose a legitimate public safety concern outnumber its applications to speech that poses no public safety risks, but is merely "discomforting" to the audience.

Finally, this Court's review is warranted because the First Circuit's decision is seriously harming free expression and will continue to do so. Homeless people in the First Circuit, including Petitioners Thayer and Brownson, depend every day upon the charity of strangers for purchasing necessities. Likewise, elections will come and go while politicians like Petitioner Novick are chilled by application of Section 77(a). Their speech, and that of their fellow citizens, already has been chilled far too long. The procedural and substantive roadblocks the First Circuit erected to facial challenges to laws burdening speech—even content-based laws that would fail narrow-tailoring review—threaten, if not corrected, to diminish the free speech rights of countless others in future cases. Because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), this Court's intervention now will prevent the unnecessary loss of irretrievable freedoms.

Conclusion

For the foregoing reasons, the Court should (1) grant certiorari to hear this case or (2) grant certiorari, vacate and remand for reconsideration in light of *McCullen*. However, if the Court does not take either of those steps, then Petitioners respectfully request that this case be held pending a decision in *Reed* v. *Town of Gilbert*.

Respectfully submitted,

MATTHEW R. SEGAL
SARAH R. WUNSCH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110

KEVIN P. MARTIN
Counsel of Record
YVONNE W. CHAN
TODD J. MARABELLA
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
kmartin@goodwinprocter.com
(617) 570-1000

Counsel for Petitioners

October 14, 2014