No. 13-2355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT THAYER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WORCESTER,

Defendant-Appellee.

On Appeal from the Order Denying Preliminary Injunction by
the United States District Court for the District of Massachusetts

PETITION OF PLAINTIFFS-APPELLANTS ROBERT THAYER, SHARON BROWNSON, AND TRACY NOVICK FOR REHEARING OR REHEARING EN BANC

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STATEMENT OF COUNSEL UNDER RULE 35(b)(2)

Based on my professional judgment, I believe the panel decision rejecting plaintiffs' First Amendment challenge to Worcester Ordinances R.O. c. 9, § 16 and R.O. c. 13, § 77(a) stands in direct opposition to numerous decisions of the United States Supreme Court including but not limited to *McCullen v. Coakley*, No. 12–1168 Slip Op. (June 26, 2014) ("*McCullen*"). The questions raised by this petition are also matters of exceptional importance, with the panel decision in conflict with decisions by other federal courts of appeal and proper resolution of these issues (including the continued validity of the panel decision after *McCullen*) critical for similar cases pending in this circuit. *Cutting v. Portland*, C.A. No. 2:13-CV-359-GZS (D. Me.); *Copley v. City of Lowell*, C.A. No. 14-10270 (D. Mass.).

INTRODUCTION

The panel's decision in this case and the Supreme Court's decision in *McCullen* both involve claims that laws establishing buffer zones in Worcester fail the First Amendment's narrow tailoring requirement. But the legal reasoning of the two decisions could not be more in conflict, with case-dispositive implications.

In this case, the panel mostly affirmed a district court decision denying plaintiffs' preliminary injunction motion. It agreed that plaintiffs do not have a likelihood of success in challenging two laws enacted for the explicit purpose of reducing panhandling by the city's poor. One of the laws creates thousands of

buffer zones in which it now is criminal for the poor to ask for spare change, no matter how peacefully ("Section 16"); the other ("Section 77(a)") grants police total discretion to remove any speaker they choose from the city's roads and traffic islands. *McCullen*, decided one week after the panel's decision, struck down a law creating a buffer zone around a single Worcester abortion clinic (and one each in two other cities) because it was not narrowly tailored; in doing so, the Supreme Court unanimously reversed this Court.

The panel's decision was inconsistent with precedent and in conflict with decisions from other courts of appeal when it was issued, and now it also conflicts with *McCullen*. Allowing the decision to stand will leave the citizens of this Circuit, particularly the poor and homeless, with diminished free speech rights in comparison to those residing in other circuits. Indeed, other cities in this circuit already have been encouraged by Worcester's example to enact laws to drive the homeless from sight. The jurisprudential roadblocks the panel erected to bar facial challenges, even challenges to explicitly content-based and facially-overbroad laws, will only embolden these and other efforts to ban unpopular speech.

Rehearing is warranted for at least the following reasons. First, the panel held that it could not even consider plaintiffs' claim that the laws fail narrow tailoring because (it concluded) plaintiffs did not make a "threshold" showing of overbreadth. Under *McCullen*, that was error; even on a facial challenge, a court

should address narrow tailoring first and can strike down a law on that basis alone.

Second, the panel held that Section 16—which *on its face* applies only to certain solicitations and is purportedly justified by the "discomfort" such speech can cause—is content neutral. That too was error. *McCullen* confirms that laws are content-based if their application "depends . . . on what [people] say," not "simply on where they say it," and that laws are content-based if they are justified by "listeners' reactions" to speech. Under either test, Section 16 is content based.

Third, and in light of *McCullen*, plaintiffs have a reasonable probability of prevailing on their claim that Sections 16 and 77(a) are not narrowly tailored. Indeed, the panel agreed that there is "probably some overbreadth" in the laws; considering *McCullen*, that is an understatement.

Rehearing also is needed because, if the overbreadth issue is reached, the panel was wrong to "require[] quantification" of the "relative likely frequency" of the laws' constitutional and unconstitutional applications, a burden that will greatly undercut the ability of plaintiffs, especially those with limited resources, to bring facial challenges. While that might be consistent with the panel's stated view that facial challenges should be "discouraged" in favor of as-applied challenges, Slip Op. at 36, the Supreme Court has noted the grave risk to free speech rights from such an approach. *See Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

For the reasons given herein, this petition for rehearing should be granted to

address the clear conflicts between *McCullen* and the panel decision.

ARGUMENT

I. The Panel's Decision Conflicts With *McCullen* And Other Precedent

A. The Panel Erred By Not First Considering Narrow Tailoring

The government bears the burden of justifying a law that restricts speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 647 (1985). The panel, however, stated that when a First Amendment claim is brought as a facial challenge, plaintiffs must make a threshold showing of substantial overbreadth based on a "required quantification" of the "relative likely frequency" of the law's constitutional and unconstitutional applications. Slip Op. at 24-26. Barring such a threshold showing, the panel stated, no "burden of justification, be it strict or intermediate, passes to the government." *Id*. at 20-21. Holding that plaintiffs had not made their threshold showing in this case, the panel never considered whether Worcester had shown that its laws are narrowly tailored.

The panel's explication of burdens in First Amendment facial challenges to laws that are not narrowly tailored cannot be squared with *McCullen*. Plaintiffs in *McCullen* brought both a facial and an as-applied challenge, *McCullen* at 7, and the Supreme Court addressed the law's facial constitutionality. *Id*. at 7-8. In doing so, it did not consider whether plaintiffs had made a threshold showing of overbreadth. *Id.* at 18. Instead, holding that the law was not narrowly tailored, it stated "we

need not consider . . . petitioners' overbreadth challenge." *Id.* at 29-30 & n.9.

The approach in *McCullen*—narrow tailoring first, then overbreadth if necessary—conflicts with and precludes the panel's use of overbreadth as a gatekeeper inquiry before narrow tailoring. The *McCullen* approach is consistent with precedent and plainly correct. A law that is not narrowly tailored is unconstitutional *per se*. Thus, opinions addressing the facially invalidity of laws for lack of narrow tailoring need not and often do not analyze or even mention overbreadth. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000); *TBS, Inc. v. FCC*, 512 U.S. 622 (1994); *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1 (1st Cir. 2012). That includes the panhandling decisions noted by the panel (Slip Op. at 28 n.8); they are silent on overbreadth not because (as the panel speculated) they assumed a threshold showing, but because they were resolved on narrow tailoring, rendering overbreadth moot. In contrast, it seems that none of the cases cited by the panel for its threshold showing rule (Slip Op. at 20-22) involved a narrow tailoring argument.

Plaintiffs alleged that the Worcester laws are not narrowly tailored and emphasized the point in briefing. Brief for Plaintiffs-Appellants at 24-28, 32-37; JA009; JA109-13. Under *McCullen*, the panel should have addressed the narrow tailoring argument and, for the reasons plaintiffs gave previously and reiterate in Part I.C. herein, found that the laws likely are not narrowly tailored.

B. Section 16 Is Content Based

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 unlawful to ask one's fellow passengers for bus fare. It is not unlawful to hector people standing in line to sign a political petition, but it is unlawful to politely solicit that same audience for money for charity. Section 16, with its singular focus on certain solicitations, "draw[s] content-based distinctions on its face." *McCullen* at 12. Yet the panel held that the law is content neutral. Slip Op. at 19.

It was wrong to do so. As *McCullen* makes clear, 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* at 12 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). On the other hand, 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)). Because Section 16 requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," with liability turning "on what [speakers] say," not "simply where they say it," it is content-based.

The panel, however, reasoned that even if a law "restricts only some

expressive messages and not others," it still "may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive," Slip Op. at 12-13, rather than "animus," *id*. at 18. But that is not so. Censorial intent might trigger strict scrutiny of a *facially-neutral* law (such as the noise ordinance in *Ward*), but strict scrutiny also applies *whenever* a government picks and chooses what topics may be discussed in a particular public forum, no matter the benevolence of its motive. *McCullen* at 12; *Carey v. Brown*, 447 U.S. 455, 465 (1980); *Burson v. Freeman*, 504 U.S. 191, 197 (1992). A law that says "no debating abortion in the park" cannot escape strict scrutiny if the city acts from a benevolent desire to spare the sensitivities of nearby picnickers, rather than animus toward those who would debate abortion. *Playboy*, 529 U.S. at 814 (applying strict scrutiny even though "[n]o one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent"). So too with Section 16's prohibitions on certain categories of solicitations.[1]

If there were any doubt, *McCullen* also clarifies 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* at 13

[1] The panel's view that there is "scant support in the case law" for treating solicitations for donations and other immediate transactions as a category of content, Slip Op. at 15-16, ignored *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) and *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 552, 556 (4th Cir. 2013).

(quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). 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*., in contrast to "problems [that] arise irrespective of any listener's reactions," such as public safety, which can be content-neutral justifications. *Id*. at 13.

Worcester plainly seeks to "'justif[y]" Section 16's prohibition of only some solicitations "[by] reference to the content of the regulated speech,'" *McCullen* at 12 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)), specifically an assumption that solicitations for cash donations or transactions—in contrast to other messages, such as solicitations for signatures on a political petition—are more likely to "discomfort" listeners. That this is Section 16's basis cannot be denied, because Worcester made the "fear and apprehension" supposedly caused by even peaceful solicitations for spare change a centerpiece of its argument to this Court. Def. Br. at 14-15. Indeed, the panel adopted this rationale, reasoning 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," *id*. at 26, "discomfort" that Section 16 implicitly assumes would not also be caused by a sign advocating anarchy or a silently brooding person with no sign at all. Under *McCullen*, the "discomfort" supposedly caused by certain messages does "not give

[Worcester] a content-neutral justification to restrict the speech." *McCullen* at 13.[2]

C. The Worcester Laws Are Not Narrowly Tailored

Considering plaintiffs' claim that the laws are not narrowly tailored (which the panel has not done yet, due to the error addressed in Section I.A, *supra*), it is clear that neither Section 16 nor Section 77(a) is narrowly tailored; indeed, the panel has agreed that there "probably is some overbreadth" in the laws, Slip Op. at 26-29, and Worcester never has tried to defend Section 16 under strict scrutiny.

At the outset, shielding persons in a public forum from speech that causes them "discomfort" is *not* a legitimate government interest supporting Section 16. The Massachusetts SJC correctly summarized the law in striking down a statewide panhandling ban: "[a] listener's annoyance or offense at a particular type of communicative activity does not provide a basis for a law burdening that activity." *Benefit v. City of Cambridge*, 679 N.E.2d 184, 190 (Mass. 1997). Or, as the Ninth Circuit has expressed, "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." *Berger*, 569 F.3d at 1054; *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Boos*, 485 U.S. at 322. If the Worcester laws are to survive, it must be on the basis

[2] That Section 16 applies only to certain solicitors and not to all speakers (or non-speakers) who might cause "discomfort to someone stuck at a bus stop" is an additional indication of content specificity. *City of Ladue v. Gilleo*, 512 U.S. 43,

of a legitimate interest such as public safety, not "discomfort."

The public safety interest behind Section 77(a) also is overstated. While cities have an interest in traffic safety, roads (and traffic islands and medians in the road) also are traditional public fora. Slip Op. at 10. They would hardly merit that label if a city could invoke generic "traffic safety" concerns to give police authority to ban *all* expression from *all* such locations, as Worcester has done with Section 77(a). The First Amendment requires tailoring of laws to risks—even traffic risks—that are "real, not merely conjectural." *TBS*, 512 U.S. at 664.[3]

If Worcester has legitimate interests behind its two laws, it still must establish narrow tailoring by "demonstrat[ing] that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen* at 28. Once more, *McCullen* is instructive. In its decision, the Court first observed that the law had reduced

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51-52 (1994); *First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 792-93 (1978).

[3] Actions can speak louder than words, and Worcester's show that any traffic risks here are more "conjectural" than "real." For years, the city allowed children to raise funds in stopped traffic, and politicians to hold signs on traffic islands, *without incident*, JA226-27; it enacted Section 77(a) only when a desire to reduce panhandling arose, JA124; and *even then* it inquired if the law could apply only to panhandlers, electing to ban everyone only after counsel noted the litigation value of content neutrality. JA167, 212. Tellingly, and despite the panel's view that the risks of political campaigning on traffic islands are "hard to gainsay," Slip Op. at 14-15, police have not actually enforced the law against political campaigners, including supporters of the very politicians who pushed Section 77(a). Appellants' 11/8/13 Mot. for Inj. Ex. D, ¶¶ 3-5 & Exs. 1-3; *id*. Ex. E ¶¶ 4-6 & Exs. 1-2.

petitioners' opportunities to effectively speak with their intended audience. *Id*. at 20. It then noted that no other States have adopted fixed buffer zones around abortion clinics, *id.* at 23, before citing numerous laws (including "generic criminal statutes") that would more directly address the government's asserted interests without substantially burdening speech *Id*. at 25. In doing so, the Court emphasized that Massachusetts "has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id*. at 27.

Applying the *McCullen* approach here, Worcester is unlikely to demonstrate that its laws are narrowly tailored to a public safety interest. First, the laws have had a real impact on the ability of the poor to solicit, and many have given up even trying to do so. JA236; JA311. Which should come as no surprise: the laws were drafted as part of a plan to "reduce the incidence of panhandling" and were crafted to cover those locations where panhandlers can hope to reach members of their intended audience effectively, be they on foot or in cars. While the panel downplayed the size of the 20-foot buffer zones, Slip Op. at 26, that distance will preclude ordinary conversation in an urban setting, is wider than most sidewalks, requires donors to go out of their way to provide money, can render handwritten signs unreadable, and will preclude the passing of any written material. These impacts are entirely identical to those discussed in *McCullen* at pages 19-22.

Second, Worcester has identified no other anti-solicitation laws as

burdensome of protected speech as its own that have survived judicial review. This Court already has enjoined Section 16's unprecedented ban on all soliciting from 30 minutes before sunset under 30 minutes after sunrise (Slip Op. at 25 n.7). Some other laws—but not Section 16—exclude sign-holding, and the Seventh Circuit relied upon a sign-holding exception in upholding a solicitation ban (although even that law may not be narrowly tailored under *McCullen*). *Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000); *cf. Cohen v. California*, 403 U.S. 15, 21 (1971) (onlookers must "avert[] their eyes" from unwanted speech). Laws addressing speech on roads often carve out traffic islands; when they do not, other circuits have found lack of narrow tailoring. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 941, 945 (9th Cir. 2011); *Satawa v. Macomb County Road Comm'n*, 689 F.3d 506, 519 (6th Cir. 2012); *Warren v. Fairfax County*, 196 F.3d 186, 196-97 (4th Cir. 1999).

Third, police have many other laws available to address aggressive panhandling and traffic safety issues without also burdening peaceful, safe speech. It is illegal to "signal[] a moving vehicle on any public way or cause[] the stopping of a vehicle thereon" for purposes of soliciting, Mass. Gen. Laws ch. 85, § 17A; to obstruct traffic, Worcester Rev. Ordinances ch. 12 § 25; to commit harassment or assault, Mass. Gen. Laws ch. 265 §§ 13A(a), 43A(a); to trespass, Mass. Gen. Laws ch. 266 § 120; and to engage in "threatening, or violent or tumultuous behavior"

that creates a "public nuisance" or "a hazardous or physically offensive condition" if the "conduct has the purpose of causing public inconvenience, annoyance or alarm." Rev. Ordinances ch. 9 § 1 (2008). Indeed, *McCullen* cited Worcester's obstruction of traffic law as one alternative to the abortion-clinic buffer zone. *McCullen* at 25. Yet, as in *McCullen*, Worcester has not shown that it tried employing such laws before enacting the sweeping prohibitions in Sections 16 and 77(a), which go so far as to criminally sanction "the meek repeat solicitor [who] may justify no concern at all," Slip Op. at 26, and someone who solicits briefly within 20 feet of a bus stop before "moving along," *id.*

Perhaps most importantly, any "fit" between Sections 16 and 77(a) and Worcester's asserted interests is wholly unsupported by the evidentiary record. "[T]he vast majority" of aggressive panhandling occurs at "private properties, such as convenience stores, gas stations, etc.," JA135-36, yet Section 16 does not address trespassing. In fact, it is unclear if Section 16 would apply to *any* of the "181 incidents" of aggressive panhandling noted by the panel, Slip Op. at 2—most notably, there is no indication that *any* of those incidents occurred in Section 16's thousands of buffer zones. Moreover, the preamble to Section 16 focuses on those who "approach" listeners, JA142, yet rather than bar unconsented approaching, as in *Hill v. Colorado*, 530 U.S. 703, 733-35 (2000), the city banned solicitation even by those standing or sitting (again, it is unclear if *Hill* actually survives *McCullen*).

The lack of demonstrated fit between Section 16 and those incidents represents the antithesis of narrow tailoring, which requires a law to "alleviate [the identified] harms in a direct and material way." *TBS*, 512 U.S. at 664.

As for Section 77(a), it prohibits taking even a single step into the road while traffic is stopped to retrieve a proffered donation, and holding political signs even on spacious traffic islands. Yet there is no evidence that either type of conduct ever resulted in an accident during the decades it was occurring. JA226-27. Although the panel accepted *speculation* that these activities are "an accident waiting to happen," Slip Op. at 14-15, there is no *evidence* that these activities pose a "real, not merely conjectural," risk. *TBS*, 512 U.S. at 664. And Section 77(a) is not even tailored to that type of conduct: it lets police order any speaker off of any road or median in the city, whatever the context. Courts reviewing similar laws have rejected city-wide bans and required a showing of particularized public safety risks.[4] The approach taken by those courts is consistent with *McCullen*, which chided that responding to problems that arise at only certain locations at certain times with blanket bans "is hardly a narrowly tailored solution." *McCullen* at 26.[5]

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[4] *Comite de Jornaleros*, 657 F.3d at 945; *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).

[5] The panel reassured that police will use their discretion under Section 77(a) to enforce the law only against "hazardous action in the streets," Slip Op. at 34, but the need for legislative narrow tailoring and "confine[ment]," *id.*, of police discretion cannot be replaced with "trust the police." *See City of Houston v. Hill*,

II. "Quantification" Of "Relative Likely Frequency" Is Not Required

If plaintiffs' overbreadth argument need even be reached, the threshold burden introduced by the panel, under which plaintiffs are "required" to provide a "quantification" of the "relatively likely frequency" of a law's constitutional and unconstitutional applications, Slip Op. at 24, is without basis in precedent or law. It would place a nearly insurmountable barrier in the way of First Amendment facial challenges—especially once post-enactment compliance renders data for the "quantification" impossible to collect—and incent governments not to compile such quantifications during the legislative process. While that may advance the panel's belief that facial challenges should be "discouraged," Slip Op. at 36, it is inconsistent with the Supreme Court's recognition that facial challenges play a crucial in protecting free speech. *Supra* at 2.

If "quantification" is not required, then for all the reasons the Worcester laws are not narrowly tailored, *supra* at 9-14, plaintiffs also should be held to have satisfied any prima facie burden of establishing substantial overbreadth.

CONCLUSION

For the forgoing reasons, plaintiffs request that rehearing be granted and the decision of the District Court reversed in its entirety.

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482 U.S. 451, 466-67 (1987); *Papachristou v. Jacksonville*, 405 U.S. 156, 168 (1972). And the "hazardous action" standard is not in Section 77(a), distinguishing *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(b)-(c), 30(a)(3), and 31(b), I hereby certify that on July 3, 2014, a true and correct copy of the foregoing was served on the following counsel of record in this appeal via CM/ECF:

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