No. 14-428

IN THE

Supreme Court of the United States

ROBERT THAYER ET AL.,

Petitioners,

v.

CITY OF WORCESTER,

Respondent.

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

MOTION OF *AMICUS CURIAE* HOMELESS EMPOWERMENT PROJECT FOR LEAVE TO FILE AND BRIEF IN SUPPORT OF PETITIONERS

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The Homeless Empowerment Project ("HEP") hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for writ of *certiorari* to the United States Court of Appeals for the First Circuit. HEP is filing this motion because the Respondent, City of Worcester, declined to consent to HEP's filing of its brief.* A copy of the proposed brief is attached.

As more fully explained on page 1 of the brief under "Interest of *Amicus Curiae*," HEP is the publisher of Spare Change News, a street newspaper created and distributed by homeless, formerly homeless, and low-income individuals. Spare Change News has a bi-monthly circulation of over 7,000 copies per issue. Thousands of homeless or formerly homeless people have written for and distributed Spare Change News.

HEP has a vital interest in this case because its right to distribute Spare Change News in public spaces is affected by ordinances that restrict panhandling and solicitation. Section 16, expressly prohibits solicitation within buffer zones in public fora, including streets, sidewalks, and entrances to parks and mass transit facilities. Because "solicitation" is broadly defined to reach the sale of newspapers, ordinances like Section 16 would greatly restrict HEP's ability to peacefully distribute Spare Change News in those locations where its speech is most valuable.

* HEP requested consent from the City of Worcester on November 4, 2014. The City declined to consent the same day.

Accordingly, HEP respectfully requests that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Homeless Empowerment Project ("HEP") is a non-profit corporation dedicated to empowering economically disadvantaged people. Its primary means of achieving its mission is through the publication of Spare Change News, a street newspaper created and distributed to the public-at-large by homeless, formerly homeless, and low-income individuals. Through Spare Change News, HEP provides economic opportunities to people who, because of circumstances such as mental or physical disabilities or the lack of a phone number or home address, have difficulty finding employment elsewhere. It also provides these people with an opportunity to participate in civic debate and the greater community. Since its founding in 1992, thousands of individuals have written for or distributed Spare Change News. It is a member of the International Network of Street Papers, which supports over 120 street paper projects.

Spare Change News is published every other week. Its current average circulation is over 7,000 copies per issue. Because its vendors are economically disadvantaged, they must sell the paper in areas accessible by public transportation. History has taught that vendors are most successful when they

[1] Pursuant to Supreme Court Rule 37.6, Homeless Empowerment Project affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than Homeless Empowerment Project and its counsel made such a monetary contribution.

distribute near mass transportation facilities and stops, shopping areas, and clusters of businesses.

HEP self-polices its vendors in order to ensure that the newspaper is solicited in a respectful and safe manner. Vendors enter a contract with HEP in which they agree (among other things) that they may not use drugs or alcohol while distributing Spare Change News. HEP also provides training and a written orientation guide that instructs vendors on appropriate solicitation practices. Vendors agree to submit to review of violations of these policies by HEP's Vendor Committee. Disciplinary action may include immediate suspension or termination.

HEP has a vital interest in this case because its ability to distribute the newspaper in public spaces is affected by local governments' attempts to discourage panhandling and solicitation. The ordinance at issue in this case, Section 16, expressly prohibits solicitation within buffer zones in public spaces, including streets, sidewalks, and entrances to parks and mass transit facilities. Because "solicitation" is broadly defined to reach the sale of newspapers, ordinances like Section 16 would greatly restrict HEP's ability to peacefully distribute Spare Change News in those locations where its speech is most valuable.

Moreover, the permissibility of restricting speech within buffer zones like those set forth in Section 16 is very difficult to determine, as the First Circuit's decision upholding Section 16 against a facial attack appears to conflict with this Court's recent decision in *McCullen v. Coakley*. That apparent disagreement, and the First Circuit's failure to address *McCullen* at all on the petition for rehearing, leaves speakers such as HEP unsure of how to proceed with

their speech-related activities while avoiding the risk of prosecution. This condition will inevitably chill speech.

Section 16 is not the first attempt to limit solicitation in a way that directly impacts street newspapers. Other jurisdictions in Massachusetts have instituted similar restrictions. The decision below will embolden attempts to impose further restrictions on speech in public places so as to avoid the potential for "discomfort" in the public square. HEP's mission depends on maintaining the right to peaceably sell and distribute Spare Change News throughout its distribution area.

SUMMARY OF ARGUMENT

Section 16 makes it "unlawful for any person to beg, panhandle, or solicit any other person in an aggressive manner." R.O. ch. 9, § 16(d). It defines "soliciting" to include "the offer to immediately exchange and/or sell any goods or services."[2] *Id.* at § 16(c). It defines "aggressive manner" to include:

- "soliciting money from anyone who is waiting in line…for any [] purpose," *id.* at § 16(c)(7); and
- "soliciting any person within 20 feet of the entrance to, or parking area of, any…mass transportation facility, mass transportation stop…place of public assembly, or of any out-

[22] "Soliciting" also includes "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[.]" R.O. ch. 9 § 16(c).

door seating area of any…business," *id.* at § 16(c)(10).

On their face, these provisions impose significant content-specific prohibitions on the peaceful distribution of newspapers like Spare Change News (as well as a variety of other speech-related fundraising activities). And they do so in the public areas where the distribution of the newspaper is most likely to be successful: near mass transportation facilities and stops, shopping areas, and near clusters of business. Distributing Spare Change News within 20 feet of the entrances to or parking areas of these places, or to people waiting in a line, no matter how peacefully or politely, is prohibited under the ordinance.

The First Circuit's decision levies a heightened burden on plaintiffs seeking facial relief to make a "prima facie" showing of "substantial overbreadth" before *any* burden passes to the government to defend its speech restriction. This requirement, unique among the circuits, threatens to chill speech related to charitable fundraising and to encourage efforts of other municipalities to impose new restrictions on speech that might "discomfort" members of the public. Moreover, the decision cannot be reconciled with this Court's invalidation of a similar Massachusetts law restricting speech within buffer zones in *McCullen v. Coakley*.

First, the First Circuit held that not only must plaintiffs bringing facial challenges to restrictions on speech meet a prima facie burden, but it also ruled that in order to do so, they must present evidence quantifying "the relative likely frequencies of the ordinances' controversial versus obviously acceptable applications[.]" The holding conflicts with this Court's past practice and its precedents regarding

the importance of burdening the government with proving that its restrictions on speech are constitutional, and sets dangerous precedent that threatens to chill speech throughout the First Circuit. Poorly funded speakers, like HEP, faced with potentially unconstitutional statutes are much more likely to self-censor than to bear the risk and expense both of litigation and of proving the First Circuit's heightened burden on plaintiffs. Here, the error was outcome-determinative because Section 16 cannot pass constitutional muster under any substantive standard of review for compliance with the First Amendment. This Court's review is necessary to correct the error below and protect the marketplace of ideas in the First Circuit.

Second, the First Circuit's decision conflicts with *McCullen v. Coakley*, which was decided shortly after the decision below first issued, and which the First Circuit declined to address on the petitioners' request for rehearing. The decision below relies on listeners' feelings and discomfort to justify the City's restriction on speech in public fora. But *McCullen* teaches that listeners' reactions are not a content-neutral justification for such a speech restriction. Further, the First Circuit's ruling conflicts with *McCullen*'s rationale both in finding that the statute at issue there was content-neutral and that it was not narrowly tailored. Unlike the statute in *McCullen*, Section 16 explicitly references the content of the speech in justifying the restriction and is therefore not content-neutral. Even if it were content neutral, it cannot meet the requirement of narrow tailoring under the approach taken in *McCullen*, which struck a Massachusetts buffer zone restriction where the government could have achieved its purported interests through the use of generic criminal

statutes and local ordinances, rather than through speech-targeting restrictions. Here, the City may rely on *exactly* those same statutes and ordinances to address its interests without burdening the speech of numerous peaceful solicitors, including HEP. *Certiorari* should be granted in order to resolve the inevitable confusion created by the inconsistencies between the First Circuit's decision below and *McCullen*, so that speakers within the First Circuit have clarity in proceeding under buffer zone restrictions on speech.

ARGUMENT

I. THIS CASE RAISES IMPORTANT ISSUES REGARDING THE BURDENS OF PROOF IN ASSESSING THE CONSTITUTIONALITY OF WIDE-RANGING RESTRICTIONS ON SPEECH.

A. The First Circuit Incorrectly Placed a Threshold Burden on Plaintiffs Challenging the Constitutionality of a Speech Restriction.

The First Circuit's decision in this case hinged on its determination that a plaintiff asserting a facial challenge to a speech restriction must first make "a prima facie showing" of "'substantial' overbreadth before any burden of justification…passes to the government." App. 19a-20a. In doing so, the First Circuit relieved the City of *any* burden of proving the constitutionality of Section 16. Moreover, it indicated that a plaintiff cannot satisfy this burden without presenting evidence quantifying the "relative likely frequencies of the ordinances' controversial versus obviously acceptable applications in the circumstances specified." *Id.* at 25a.

As the Petition notes, the First Circuit's decision is at odds with the approaches taken by other courts (this one included) considering facial challenges on narrow tailoring grounds. *See* Pet. 14-23. HEP will not repeat the Petition's able discussion of those cases, which highlights the confusion and inconsistency that abound in the lower courts as to the assignment of burdens and appropriate remedies in cases raising overbreadth and narrow-tailoring challenges. But HEP is compelled to emphasize the degree to which the First Circuit's decision departs from the fundamental principle that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *see also id.* at 818 ("When First Amendment compliance is the point to be proved, the risk of nonpersuasion—operative in all trials—must rest with the Government, not with the citizen.").

This rule is essential to ensuring free, transparent public discourse. If the burden instead lay with the citizen to prove that a statute is unconstitutional, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *New York v. Ferber*, 458 U.S. 747, 768 (1982), quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). "The First Amendment does not permit laws that force speakers to retain a[n]…attorney, conduct…research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 324 (2010).

The overbreadth doctrine itself arose to ensure that the government bears the responsibility of act-

ing narrowly when regulating speech. The overbreadth doctrine permits plaintiffs who could not themselves show an injury-in-fact (because their expressive activity or conduct could constitutionally be regulated) to nonetheless challenge a statute that unduly restricts the speech of others. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). "This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). In other words, not only do injured parties bear no burden in proving a statute unconstitutional, they are not even necessary parties to an action seeking to vindicate their rights. "In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick*, 413 U.S. at 612.

The First Circuit's decision departed from the established approach to safeguarding the freedom of speech by requiring a plaintiff asserting a facial challenge on First Amendment grounds to show the "relative likely frequencies of the ordinances' controversial versus obviously acceptable applications" before the government bears *any* burden of demonstrating the constitutionality of its speech restrictions. App. 25a. This requirement represents a substantial retreat from the principles outlined above, for several reasons.

First, the First Circuit's justification for its shifting of the burden to plaintiffs was that it was the plaintiffs who had elected to proceed with a facial challenge, and thus their injury need only be analyzed if the remedy of facial invalidation were available to them. App. 19a-21a. It then assumed that the remedy of facial invalidation is only available in overbreadth cases. But Petitioner persuasively argues that the remedy of facial invalidation is not limited to claims of overbreadth. *See* Pet. at 16-19. To the contrary, this Court has often (and recently) facially invalidated statutes because the government failed to satisfy its burden of demonstrating narrow tailoring, even where overbreadth was never addressed. *See e.g. McCullen v. Coakley*, 134 S.Ct. 2518, 2540 n.9 (2014) ("Because we find that the Act is not narrowly tailored, we need not…consider petitioners' overbreadth challenge); *Brown v. Ent. Merchants Ass'n*, 131 S.Ct. 2729, 2741 (2011); *see also* Pet. 16-17 (collecting cases). This inconsistency alone warrants review by this Court.

Second, to the extent that *only* overbreadth was at issue, the First Circuit's reasoning is not constitutionally sound. Although this Court has noted that an "overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003), it has *never* suggested that the right to *any relief* begins and ends there. In the First Amendment context, "the distinction between facial and as-applied challenges…goes to the breadth of the remedy employed by the Court, *not what must be pleaded* in a compliant." *Citizens United*, 588 U.S. at 331 (granting facial relief despite the fact that it was not presented with a facial challenge) (emphasis added); *see also Hicks*, 539 U.S. at

119 ("We have provided this expansive *remedy* out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech") (emphasis added). In other words, the court is always obligated to consider the constitutional challenge itself, in which the government must "bear[] the burden of proving the constitutionality of its actions." *Playboy*, 529 U.S. at 816; *see also Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485-86 (1989) (noting that it is not "generally desirable[] to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied" and "for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.").

Third, if there is a close question as to whether the statute is likely to be applied in an overly broad manner, the *plaintiff* should not bear the burden of demonstrating the likely application of a statute by the *government*. The government is much better positioned to present evidence on the statute's intended scope, the past applications of similar laws, and its attempts to limit the textual reach of a given restriction. And because First Amendment freedoms are involved, any doubt on this measure should redound in favor of free speech. *Citizens United*, 558 U.S. at 327, quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech.").

HEP is but one example of the kinds of parties who face serious curtailment of their right to expres-

sion under the First Circuit's newly imposed burden on plaintiffs mounting facial First Amendment challenges to statutes and ordinances restricting charitable solicitation. As a non-profit corporation that survives on grants and charitable contributions, HEP does not have the resources for extensive litigation aimed at confirming rights already guaranteed by the Constitution. "[R]ather than undertake the considerable burden (and sometimes risk) of vindicating [its] rights through case-by-case litigation," HEP and other organizations would far more likely "choose simply to abstain from protected speech, harming not only [itself] but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119. These risks are compounded when a party challenging a restriction is put to additional burdens of compiling data, deposing law enforcement authorities, or otherwise quantifying the "relative likely frequencies of the ordinances' controversial versus obviously acceptable applications[.]"[3] App. 25a. The First Circuit's placement of the burden on plaintiffs such as "Girl Scout cookie sellers," "Salvation Army bell-ringers," and "the homeless panhandler," *id.* at 16a, will simi-

[3] Another flaw in the First Circuit's decision weighing in favor of this Court's review is its repeated insistence that the plaintiffs bore the burden of showing a significant number of "*likely*" impermissible applications. App. 23a (twice); *id.* at 25a ("relative likely frequencies"); *id.* at 26a ("unlikely that there will be any occasion for the ordinance even to be applied"). To the extent the First Circuit's reference to "likely applications" refers to the expected scope of enforcement of the statute's plain terms, *United States v. Stevens* squarely forecloses that mode of analysis. *See* 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.")

larly lead many (if not all) of those parties to abandon or limit any attempt to engage in their preferred forms of expressive activity. Having undertaken an effort to restrain speech on matters of charitable solicitation, the government, not the people, bears the burden of ultimately justifying the statute or ordinance under the relevant constitutional test. The Constitution requires no less.

B. There Is No Reasonable Dispute that Section 16 Is Substantially Overbroad and Not Narrowly Tailored.

Regardless of the assignment of burdens, there can be no question that the language of Section 16 unconstitutionally restricts a large swath of protected speech. The First Circuit itself recognized that the buffer zone restriction is "probably too broad," App. 25a, and that "some of [Section 16's] prohibitions are at the far side of the reasonable reach of the City's objectives," *id.* at 24a-25a. *See also id.* at 26a ("probably some overbreadth,"); *id.* at 25a (some parts of Section 16 have a "fairly debatable character"); *id.* at 28a (plaintiffs "certainly point to some instances in which applying the ordinances may raise constitutional concerns"). This language underplays the full extent of Section 16, which would bar the following activities from large portions of Worcester's public streets, including the areas (such as mass transportation stations and stops) most important to meaningful expression:

- Soliciting passers-by in a large number of exclusion zones to purchase a pamphlet, leaflet, book, or newspaper (such as Spare Change News);

- Passively holding a sign requesting a donation (for one's self or for charity);
- Approaching those waiting in line for a benefit concert to ask if they would donate to a related cause;
- Soliciting the purchase of cookies, popcorn, candy bars, or baked goods to support a non-profit entity;
- Requesting donations for heating fuel assistance as winter approaches.

The broad sweep of Section 16 is similar to the over-inclusive criminal prohibition on depictions of animal cruelty that the Court invalidated in *United States v. Stevens*, 559 U.S. 460 (2010). In *Stevens,* the government attempted to ban animal crush videos by banning "depiction[s] of animal cruelty." *Id.* at 474. However, the statute did not "require[] that the depicted conduct be cruel" to be prohibited. *Id.* Rather, the ban also applied to depictions of animals being intentionally "wounded" or "killed." *Id.* Because this language by its terms applied to numerous hunting periodicals, which far outnumbered the crush videos the government intended to address, *id.* at 476, the statute was "substantially overbroad, and therefore invalid under the First Amendment," *id.* at 482.

Section 16's purpose is to ban begging or soliciting "in an aggressive manner." R.O. ch. 9, § 16(d). However, the ordinance does not require that the conduct be aggressive (in the ordinary sense of that term) to be prohibited. Rather, the language of Section 16 bans completely peaceful solicitations if they occur within buffer zones located in public fora throughout the City. The First Circuit acknowl-

edged that the ban captures "messages expressed by panhandlers, Girl Scouts, the Salvation Army, [and] campaigning politicians[.]" App. 18a. It also applies to the distribution of newspapers or other expressive items offered "using the spoken, written, or printed word, bodily gestures, signs, or other means of communication" for "immediate[] exchange" or sale. R.O. ch. 9, § 16(c). As written, then, Section 16 is not limited to the type of persistent or threatening conduct accompanying speech that might fall within the "legitimate" sweep of regulation. To the contrary, Section 16 covers ordinary, peaceful interactions that might occur hundreds of times a day, particularly during the holiday season, throughout annual charitable fundraising drives, in the prelude to elections, or in the aftermath of natural disasters. Because a review of the plain language of Section 16 reaches a host of common and protected speech activities, its purported attempt to regulate "aggressive" panhandling is unquestionably overbroad and not narrowly tailored to achieve the City's legitimate aims.[4]

In sum, the First Circuit's approach below represents a novel and serious departure from the principles and procedures identified by this Court in prior

[4] Even if the First Circuit were correct in requiring a plaintiff to show that the relative number of *likely* "controversial" applications outweighs the permissible applications of the statute, that standard would be satisfied here. Over the course of an entire year, the City made five arrests based on "aggressive" panhandling. App. 3a. A single Spare Change News vendor (or Girl Scout, or Salvation Army bell ringer) standing within one buffer zone near the entrance to a mass transportation facility could make exponentially more peaceful solicitations in one hour.

First Amendment cases. Left unchecked, it imposes significant burdens on the ability of parties like HEP to challenge similar attempts to reduce panhandling, canvassing, charitable solicitations, and other allegedly "uncomfortable" First Amendment activity. The decision below increases the likelihood that these parties will refrain from engaging in that speech, contrary to the intent of this Court's many precedents firmly placing the burden of proof on the government. Review is warranted to address this new and harmful approach to facial challenges of speech restrictions.

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S DECISION IS IRRECONCILABLE WITH *McCULLEN*.

This Court's review of the decision below is separately justified because of its many conflicts with the Court's recent decision in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). Both cases arise from Massachusetts and concern the government's ability to restrict speech within buffer zones in traditional public fora, but their holdings cannot be reconciled. Petitioners requested rehearing in light of *McCullen*, but the First Circuit denied this request without explanation, much less an attempt to reconcile the two decisions. App. 66a. Without further clarification, charitable solicitors like HEP are left with conflicting authority as to the permissible scope of provisions like Section 16. This leaves the law in the First Circuit governing the restriction of charitable solicitation very much in doubt for the foreseeable future, and thus increases the likelihood of self-censorship for fear of running afoul ordinances like Section 16.

A. Under *McCullen*, Listeners' Discomfort Is Not a Legitimate Basis for Restricting Speech in Public Fora.

The court below held that Section 16 was a content-neutral restriction on speech. App. 18a. To reach its conclusion that plaintiffs had not demonstrated substantial overbreadth, it relied heavily on listeners' feelings and discomfort to justify the City's restrictions. It found relevant that solicitation can cause "serious apprehensiveness," App. 13a; can cause a person to "feel intimidated or coerced," *id.* at 14a; or to "feel trapped," *id.*; or "feel intimidated or unduly coerced," *id.* at 25a; or could cause "discomfort…and could definitely produce apprehensiveness," *id.* It did so despite finding that there is "no dispute" that the speech restrictions "occur in public forums." *Id.* at 10a.

In *McCullen*, this Court reiterated that public ways and sidewalks "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen*, 134 S.Ct. at 2529, quoting *United States v. Grace*, 461 U.S. 171, 180 (1983). "These places—which we have labeled 'traditional public fora'—'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.*, quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). "As a general rule, 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.*

Jacksonville, 422 U.S. 205, 209 (1975). "The government's ability to regulate speech in such locations is 'very limited.'" *Id.*, quoting *Grace*, 461 U.S. at 177.

These principles are complemented by the First Amendment's protection of every citizen's right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). In public, people do not have the right to avoid uncomfortable conversations. *McCullen*, 134 S.Ct. at 2532. "[A]n individual confronted with an uncomfortable message" cannot "turn the page, change the channel, or leave the Web site…on public streets and sidewalks….this aspect of traditional public fora is a virtue, not a vice." *Id.* at 2529. Section 16's buffer zones, like those analyzed in *McCullen*, are located in public fora. App. 10a. If speech in public buffer zones "cause[s] offense or ma[kes] listeners uncomfortable, such offense or discomfort would not give the [government] a content-neutral justification to restrict the speech." *McCullen*, 134 S.Ct. at 2532.

The First Circuit relied in part on *Hill v. Colorado*, which (among other things) recognized a "right to be let alone" even on public sidewalks. 530 U.S. 703, 716 (2000). Even if *Hill* supports this position, *McCullen* may well have overruled it *sub silentio* by ruling that listeners' discomfort is not a content neutral justification for speech restrictions, and then invalidating the statute for lack of narrow tailoring. *McCullen*, 134 S.Ct. at 2546 (Scalia, J. dissenting) ("The unavoidable implication of [*McCullen's*] holding is that protection against unwelcome speech cannot justify restrictions on use of public streets and sidewalks.").

In any event, *McCullen*'s holding comports with this Court's other precedents regarding validity of listeners' feelings or comfort as a legitimate basis for restricting speech. *See Playboy*, 529 U.S. at 817, quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509 (1969) (to restrict speech, the City "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); *Forsyth*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Were it otherwise, groups like HEP would face an onslaught of government restrictions. The issue of homelessness makes many people uncomfortable, and Spare Change News is a deliberate effort to overcome that discomfort by exposing the public to the creative works and professionalism of homeless and formerly homeless writers, editors, and vendors.

The simple truth is that speech unlikely to cause discomfort requires no protection; the First Amendment is necessary to ensure that even unpopular and uncomfortable messages are heard. *See McCullen*, 134 S.Ct. at 2541 (striking statute aimed at restricting speech directed at women entering abortion clinics); *Snyder v. Phelps*, 131 S.Ct. 1207, 1219, 1225 (2011) (holding that placards displaying messages such as "God Hates Dead Soldiers" outside of a serviceman's funeral is protected speech). "[I]f protecting people from unwelcome communications…is a compelling state interest, the First Amendment is a dead letter." *Hill*, 530 U.S. at 748-49 (Scalia, J. dissenting). This is particularly true in the context of the homeless and economically disadvantaged, the very sight of whom may cause discomfort in some people.

B. Under *McCullen*, Section 16 Is Not a Content-Neutral Restriction on Speech.

Section 16 is plainly content-based. Petitioners and HEP wish to speak to people within public buffer zones. Whether they may do so "depends…on what they say." *McCullen*, 134 S.Ct. at 2531, quoting *Holder v. Humanitarian Law Project*, 651 U.S. 1, 27 (2011); *see Forsyth*, 505 U.S. at 134 (statute content-based because application required "necessarily examin[ing] the content of the message that is conveyed"). The ordinance cannot be "justified without reference to the content of the regulated speech." *Id.* at 2529, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Speakers may stand in the buffer zones and speak on any topic without violating the ordinance (and may even *approach* those gathered in a line, near an ATM, or exiting a transit stop), unless that topic is solicitation. In contrast, the content-neutral *McCullen* statute was violated "merely by standing in a buffer zone, without displaying a sign or uttering a word." *Id.* at 2531.

Petitioners argued below that Section 16 is content-based because it makes explicit reference to the content of the restricted speech. App. 15a. Relying on *Hill*, the First Circuit ruled that a statute that makes express distinctions based on content may nonetheless be content-neutral "so long as [the distinction] reflects a legitimate, non-censorial government interest." App. 15a. This holding is inconsistent with *McCullen.*

The First Circuit went on to incorrectly conclude that Section 16 is content-neutral in part because it found that Section 16's restriction is not on speech, but rather on "behavior [] associated with certain sorts of messages." App. 14a. But Section 16 explic-

itly restricts "solicitation" and "the solicitation of charitable contributions is protected speech[.]" *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988). The distribution of newspapers is also constitutionally protected speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 768 (1988). Speech in the form of solicitation does not become conduct simply because of where or how it occurs. "The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips…or peacefully approaching in order to speak. All of these acts can be regulated, to be sure; but not, on the basis of content, without satisfying the requirements of our strict-scrutiny First Amendment jurisprudence." *Hill*, 530 U.S. at 745 (Scalia, J. dissenting). And while the ordinance separately targets particular types of conduct that may be permissible *regardless* of the content of any accompanying speech, Sections 16(c)(7) and (10) outlaw the delivery of a message in certain public locations independent of any threatening behavior or other non-speech conduct.

C. Under *McCullen*, the City Cannot Meet Its Burden of Proof Under Any Standard of Scrutiny

Regardless of the applicable level of scrutiny, the City cannot meet its burden of proving that Section 16 is constitutional. Under intermediate scrutiny, a statute is constitutional only if it is "narrowly tailored to serve a significant government interest." *McCullen*, 134 S.Ct. at 2534. Because *McCullen* teaches that listeners' discomfort does not justify restrictions on speech, *id.* at 2532, listeners' discomfort is not the baseline against which the ordinance must be tailored.

Rather, the ordinance itself instructs that the governmental interest it addresses is restricting solicitation "in an aggressive manner." R.O. ch. 9 § 16(d). *See also* App. 36a (district court found that Section 16 was "aimed at controlling aggressive panhandling"). As explained above, despite its interest in addressing "aggressive" solicitation, Section 16 restricts speech that is not aggressive, including peaceful solicitations within public buffer zones. The ordinance is therefore not narrowly tailored to address a legitimate government interest.

McCullen held that the statute there did not pass intermediate scrutiny because the government "has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *McCullen*, 134 S.Ct. at 2537. So too here. The City's legitimate interest in public safety can be better served by measures less intrusive than direct prohibition of all solicitations in buffer zones located in public fora. The penal laws can be used, and are already in use, to address public safety directly.

For instance, Section 16's ban on solicitations "in an aggressive manner" includes bans on the following behavior, defined by the ordinance as "aggressive manner":

- "intentionally touching or causing physical contact…without…consent," R.O. ch. 9, § 16(c)(3);
- "intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means," *id.* at § 16(c)(4);

- "using violent or threatening language and/or gestures toward a person being solicited," *id.* at § 16(c)(5);

This activity "can readily be addressed through existing local ordinances" as well as through "available generic criminal statutes forbidding assault [and] breach of the peace," without restricting speech. *McCullen*, 134 S.Ct. at 2538. And so it has been. *See*, Mass. Gen. Laws ch. 265 § 13A (prohibiting assault and battery); *id.* at § 43A (prohibiting harassment); R.O. ch. 9, § 1 (prohibiting disorderly behavior). In fact, the City's R.O. ch. 12, § 25(b), which prohibits "standing[ing] or plac[ing] any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon," was *explicitly cited* by this Court in *McCullen* as an example of the "less intrusive means" available to address the government's concerns. *McCullen*, 134 S.Ct. at 2538.

In this case, *McCullen* provides a roadmap of the correct way to analyze a buffer zone restriction on speech in a public forum. The City may rely on *exactly* the same statutes and ordinances to address its interests—without burdening speech—that this Court indicated were available to the state in *McCullen*. But the precedent below gives license to Worcester to maintain Section 16 and to other cities within the First Circuit to enact similar buffer zone restrictions. *Certiorari* should be granted in order to resolve the confusion created by the inconsistencies between the First Circuit's decision below and *McCullen*, so that speakers know how to proceed and governments know what restrictions are permissible.

CONCLUSION

Petitioner's petition for writ of *certiorari* should be granted.

Respectfully submitted,

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