No. 14-428

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

REPLY IN SUPPORT OF 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

November 24, 2014

Parties to the Proceeding

Petitioners' list of parties was set forth at page ii of their Petition for Writ of Certiorari, and there are no amendments to that statement.

Table of Contents

Page

Table of Authorities

Page(s)

CASES

Petitioners presented this Court with three questions, each of which concerns a conflict between the First Circuit's decision below and decisions of this Court and other courts of appeals. The First Circuit answered all three questions incorrectly, and as a result (1) relieved Respondent, the City of Worcester, of any burden to justify the sweep of its laws criminalizing speech in traditional public fora; (2) approved the criminalization of panhandling in a traditional public forum wherever it might cause someone "discomfort" or "apprehensiveness"; and (3) ruled that laws criminalizing only certain solicitations could be reviewed under intermediate scrutiny because the subjective motivation behind the law was not "animus" or a desire to censor. The consequence of these errors was to deny Petitioners a preliminary injunction against the enforcement of laws that cannot survive under this Court's decision, one week later, in *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014). Petitioners and other homeless persons in Worcester thus approach another holiday season with serious restrictions on their ability to solicit charity from their fellow citizens.

In its opposition, Respondent does not dispute that the First Circuit's decision conflicts with *McCullen*, as well as decisions from other courts of appeals, on these three issues. With respect to the first question presented—whether a plaintiff must show substantial overbreadth before the government bears its burden of proving narrow tailoring—Respondent does not deny that *McCullen* explicitly tabled the overbreadth issue and turned instead on the government's failure to demonstrate narrow tailoring, nor does Respondent deny that other courts of appeals do not require a showing of overbreadth

before considering narrow tailoring. See Pet. 16-19. Respondent tries to distinguish these cases because they were decided on the merits, not on a motion for preliminary injunction. Opp. 15-18. But that argument is plainly incorrect: As the First Circuit noted below (App. 20a-21a) and this Court repeatedly has stated, the same party bears the burden of proof at both the preliminary injunction and merits stages. The conflict is therefore real, and the First Circuit's decision plainly wrong.

Respondent also does not deny the split in authority Petitioners identified in their second question presented: whether speech in a traditional public forum can be banned merely to avoid the possibility of causing "discomfort" or "apprehensiveness" to listeners. The opposition nowhere addresses the Sixth and Ninth Circuit cases Petitioners identified as establishing the split. Pet. 27-28. Instead, Respondent invokes a Seventh Circuit decision it claims is consistent with the decision below. Opp. 21-22. Even if that claim were correct, which it is not, the Seventh Circuit's decision would only make the split in circuit authority that much deeper, and the need for this Court's intervention that much greater.

Likewise, Respondent does not dispute that there is a circuit split with respect to the third question presented: the role of subjective motivation in determining content neutrality. See Pet. 31. Rather than addressing that split, or the conflict between the First Circuit's decision and *McCullen*, Respondent instead addresses the merits of the First Circuit's decision. Opp. 24-26. Respondent also fails

to address this Court's decision to consider this issue in *Reed* v. *Town of Gilbert*, No. 13-502.

All told, Respondent fails to provide any remotely plausible reason why the Court should not grant the petition to resolve the questions presented, GVR for reconsideration in light of *McCullen*, or, at a minimum, hold the petition pending *Reed*.

A. Respondent Does Not Explain Away The Conflict Created By The First Circuit's Ruling Placing The Burden Of Proof On Plaintiffs Challenging A Restriction Of Speech

Petitioners' first question presented concerns a conflict between the First Circuit's analytical approach and that employed by its sister Circuits, as well as this Court in *McCullen*. Pet. 16-19. The First Circuit held below that plaintiffs bringing a facial challenge to a law banning speech must show substantial overbreadth "before any burden of justification, be it strict or intermediate, passes to the government." App. 19a-20a. By contrast, this Court's decision in *McCullen*—and many other decisions from this Court and other courts of appeals—struck down laws for lack of narrow tailoring without putting any threshold burden on plaintiff to show overbreadth. 134 S. Ct. at 2540 & n.9; *Doe* v. *Prosecutor, Marion County, Ind.*, 705 F.3d 694, 701-02 & n.6 (7th Cir. 2013); *Doe* v. *City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012).

Respondent tries to argue this split away by noting that this case involves the denial of a preliminary injunction, while the cases cited in the petition followed a decision on the merits. According

to Respondent, because a plaintiff has the burden of proving a likelihood of success on the merits in order to obtain a preliminary injunction, it necessarily follows that plaintiffs seeking to preliminarily enjoin a law restricting speech must prove that the law is unconstitutional. Opp. 15-18.

That basis for distinguishing the decision below from *McCullen* and the other cases cited in the petition is meritless. Indeed, not even the First Circuit justified its decision on that ground (see App. 20a-21a), and for good reason: "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales* v. *O Centro Espirita Beneficente União de Vegetal*, 546 U.S. 418, 429 (2006). Thus, where "the Government bears the burden of proof on the ultimate question of [the law's] constitutionality" under the First Amendment, plaintiffs "must be deemed likely to prevail unless the Government has shown that [plaintiffs'] proposed less restrictive alternatives are less effective than [the challenged law]." *Ashcroft* v. *Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004); see also *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1443, 1452 (2014) (recognizing, on appeal from a decision denying a preliminary injunction and granting the Government's motion to dismiss, that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions" (citation omitted)). If the government ultimately must show narrow tailoring, as Respondent's sequencing argument appears to concede, then narrow tailoring is in play at the preliminary injunction stage too, and the decision below conflicts with this Court's teachings and the decisions of other courts of appeals.

Moreover, even considered on its own terms, Respondent's position that plaintiffs must show overbreadth at the preliminary injunction stage, even if the government must show narrow tailoring at trial, makes no sense. The two standards are not interchangeable. A First Amendment "overbreadth" challenge asserts that because an otherwise-constitutional law lends itself to a substantial number of unconstitutional applications, the entire law must fail. *City of Houston* v. *Hill*, 482 U.S. 451, 459 (1987). A claim that a law restricting speech is not narrowly tailored, by contrast, attacks the degree of fit between the law's ends and its chosen means as being insufficiently close. Pet. 14-15; see *McCullen*, 134 S. Ct. at 2532, 2534. For a content-based law the government must show that it selected the least restrictive option; even with a content-neutral law, however, the government must show that it first tried employing more narrowly tailored laws and enforcing applicable generic laws, and that these paths were dead ends. Pet. 14-15; *McCullen*, 134 S. Ct. at 2540. A law can fail this narrow-tailoring review even if its application would be constitutional more often than not, and a law may be overbroad in application even if it was narrowly tailored at the outset. Thus, even if Respondent were correct that the burden can shift between phases of the case, there is no sound reason why it should shift from overbreadth to narrow tailoring.

B. Respondent Concedes The Split Of Authority On The Question Of Whether Governments Can Ban Speech In Public To Avoid "Discomfort" Or "Apprehensiveness"

As this Court observed in *McCullen*, the First Amendment is particularly solicitous of the right of speakers in traditional public fora to be close enough to their audience to speak in a normal conversational voice and to proffer written materials: "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *McCullen*, 134 S. Ct. at 2536. The Sixth and Ninth Circuits both have held that speech—including "one-on-one communication," *id.*—cannot be banned in traditional public fora even if the message communicated might cause the audience discomfort or apprehension. Pet. 27-28. The First Circuit held precisely the opposite below. App. 25a.

Nowhere in its opposition does Respondent dispute this split in circuit authority. Rather, Respondent cites a Seventh Circuit decision, *Gresham* v. *Peterson*, 225 F.3d 899 (7th Cir. 2000), that it claims is consistent with the decision below. Opp. 21-22. Even if that were the case, it would just mean that the split Petitioners have identified is even deeper. That would be even more reason for the Court to grant the petition, not less.

Yet Respondent is not right about *Gresham* either. To be sure, the Indianapolis anti-solicitation ordinance at issue in *Gresham*, like Worcester's Section 16, applied only in certain locations and circumstances (a narrower set than in Worcester),

which the Seventh Circuit described as "situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone." *Gresham*, 225 F.3d at 906. As Petitioners previously noted, however, the Indianapolis ordinance did not bar holding a sign requesting a donation; it applied only to vocal solicitations. Pet. 21-22; *Gresham*, 225 F.3d at 907. Unlike the poor in Worcester, the poor in Indianapolis still can ask for charity near bus stops, and near ATMs, and near outdoor cafes, so long as they use non-vocal means, like holding signs. Thus, in contrast to the First Circuit, the Seventh Circuit did not bless an ordinance completely shielding persons in numerous public places from requests for charity on the theory that the message—*no matter how communicated*—can cause "discomfort" or "apprehensiveness."[1] To the contrary, the Seventh Circuit emphasized the exception for non-vocal solicitations in ruling that the law left open adequate alternative channels of communication. *Gresham*, 225 F.3d at 906-07.

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[1] The same sign-holding exception exists in the Springfield, Illinois ordinance recently analyzed by the Seventh Circuit in *Norton* v. *City of Springfield, Ill.*, 768 F.3d 713, 717 (7th Cir. 2014). Respondent also relies on *Young* v. *N.Y. City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990), but that case is inapplicable because it involved a prohibition on begging in the New York City subway system, which the Second Circuit concluded was "not a traditional or designated public forum." *Id.* at 162; compare *Loper* v. *N.Y. City Police Dep't*, 999 F.2d 699, 702-03 (2d Cir. 1993) (reiterating that *Young* did not apply to restrictions on speech in traditional public fora, and striking down ban on panhandling in such locations).

Respondent has provided no reason why the Court should not grant the petition to resolve a plain conflict among the courts of appeals: between the Sixth and Ninth Circuits,[2] which have struck down attempts by governments to bar communicating uncomfortable messages in public, and the First and—arguably—Seventh Circuits, which have blessed such laws. The First Circuit's position poses a grave risk to a core purpose of the First Amendment: providing space in the public square for speakers to convince an unwilling or even hostile audience. *McCullen*, 134 S. Ct. at 2529. Indeed, if mere "discomfort" or "apprehensiveness" were enough to ban speech, it is impossible to see how the Court could have decided *McCullen* as it did. This Court's intervention is necessary to correct the First Circuit's error, which threatens free speech not only in this case, but potentially in many other cases.

C. Respondent Does Not Deny The Circuit Split Concerning The Test For Content Neutrality

Respondent never denies the existence of the third circuit split identified by Petitioners: whether a law that makes content-based distinctions on its face need only survive intermediate scrutiny if the subjective basis for adoption of the law is not "censorial motive" or "animus." Pet. 31. Nor could it. Indeed, this Court already has granted certiorari in

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[2] Recently, the Third Circuit has similarly indicated its belief that a government "may not abridge one's First Amendment freedoms merely to avoid annoyances." *Gov't of Virgin Islands* v. *Vanterpool*, 767 F.3d 157, 167 (3d Cir. 2014).

Reed v. *Town of Gilbert* to resolve essentially the same question.

Rather than argue the cert-worthiness of the issue, Respondent simply repeats its merits arguments concerning content neutrality made to the court of appeals. Opp. 9-13, 19-21, 24-26. Suffice to say, Petitioners disagree, and maintain that proper application of this Court's precedent requires the conclusion that Worcester's Section 16—which applies only to certain categories of solicitations, and necessarily requires police to "examine the content of the message that is conveyed to determine whether a violation has occurred"—is inherently and unquestionably content-based. Pet. 29 (quoting *McCullen*, 134 S. Ct. at 2531)). Respondent has provided no reason why the Court should not grant the petition to resolve the clear split in lower court authority; GVR, for the First Circuit to reconsider the content-neutrality question in light of *McCullen*; or hold this case pending *Reed*.

Conclusion

For the foregoing reasons and those in Petitioners' opening brief, the petition for a writ of certiorari should be granted.

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

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