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

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioners have presented a compelling reason to grant the Petition where the First Circuit properly analyzed the constitutionality of the Aggressive Panhandling and Pedestrian Safety Ordinances, in response to the facial challenge to content-neutral laws, pursuant to the overbreadth doctrine and in accordance with the burden of persuasion for a motion for a preliminary injunction, which fails to present an important, or unsettled, federal question.

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INTRODUCTION

The City of Worcester, Massachusetts, adopted two ordinances to address the safety risks of solicitation, or panhandling, in an aggressive manner and on public roadways. Petitioners filed suit challenging the constitutionality of the Ordinances and filed a motion for a preliminary injunction to halt their enforcement. The First Circuit Court of Appeals affirmed the District Court's denial of the Petitioners' motion to preliminarily enjoin enforcement of the Ordinances, for all but one provision.

Petitioners now seek review of the First Circuit's decision, in light of this Court's decision in McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014), invalidating the Massachusetts buffer zone law on the grounds that it was not narrowly tailored to serve significant government interests. Petitioners attempt to transform the First Circuit's proper analysis of the overbreadth doctrine in this facial challenge to content-neutral laws at the preliminary injunction stage to one that conflicts with McCullen and other circuit precedent. However, McCullen and the cases Petitioners cite were not in the same procedural posture as this case, and those cases did not analyze the overbreadth doctrine. Thus, the First Circuit decision here does not conflict with McCullen, nor the decisions of other circuits, and was a proper analysis of content neutrality and the overbreadth doctrine.

STATEMENT OF THE CASE

This case arises from a constitutional challenge to two City of Worcester, Massachusetts (Worcester), ordinances enacted by the City Council on January 29, 2013, entitled "An Ordinance Prohibiting Aggressive Begging, Soliciting and Panhandling in Public Places," Worcester Revised Ordinances of 2008, c. 9, § 16 (Aggressive Panhandling Ordinance), and "An Ordinance Relative to Pedestrian Safety," Worcester Revised Ordinances of 2008, c. 13, § 77(a) (Pedestrian Safety Ordinance) (collectively, Ordinances). Petitioners Robert Thayer and Sharon Brownson, who engage in panhandling, and Tracy Novick, who engages in campaigning for Worcester School Committee in traffic islands and medians, filed suit, alleging that the Ordinances on their face violate the First and Fourteenth Amendments to the United States Constitution.

Prior to the adoption of the Ordinances at issue, Worcester analyzed the issue of panhandling because of "concerns that have arisen … [including] fear/intimidation, public safety (e.g., individuals walking among moving vehicles), and the perception that there are not enough services for those in need." (App. 89a.) As City Manager Michael V. O'Brien indicated in a July 17, 2012, report to the Worcester City Council, while those panhandling were not necessarily homeless, there is a desire in Worcester to connect those panhandling with resources in the community, if they are in need of housing, medical services, or food. (App. 90a-91a.) Therefore, the City

Manager proposed a "multi-faceted, community-wide response that incorporates direct service providers, non-profit agencies, area businesses, policymakers, and public services in order to address any underlying community problems which may be related to panhandling." (App. 89a.) Part of this broad-based response was implementing an outreach program where workers would go out and make contact with those panhandling, in order assess their needs and connect the individuals with community-based resources, as well as work with the police and community. (App. 91a.)

As part of this response, City Manager O'Brien recognized that panhandling is constitutionally protected speech; however, he noted that a person's conduct could transgress into other criminal behavior, beyond the limits of constitutional protection, and the police were limited by the parameters of the existing laws and ordinances. (App. 89a, 93a-94a.) City Manager O'Brien cited data from the Worcester Police Department Crime Analysis Unit that Worcester police officers were dispatched to 181 incidents between January 2011 and 2012 that involved aggressive behavior by individuals who may have been involved in panhandling, which resulted in five arrests for trespassing, disorderly conduct, or outstanding warrants. (App. 94a.)

In proposing the Ordinances in an October 30, 2012, transmittal to City Council, City Manager O'Brien indicated that Worcester had made efforts (as outlined in his previous report) to address the

panhandling situation in the city, which included outreach workers who spoke to those panhandling to discover their reasons for panhandling to determine what resources were needed and to connect them with social service agency assistance. (App. 99a-102a.) He noted that of the thirty-eight individuals panhandling that had been engaged by the outreach workers, less than half, sixteen individuals, reported to be homeless, twenty had a history of mental health issues and approximately seventy-five percent had substance abuse issues. (App. 100a-101a.) A majority of those individuals did express a desire to work with an outreach worker to obtain assistance. (App. 101a.) However, those panhandling still presented a public safety risk by their aggressive behavior and proximity to traffic. "[S]olicitation in the public right of way is an accident waiting to happen." (App. 103a.) Therefore, the City Manager proposed the two Ordinances – one to address aggressive panhandling, and the other to address the public safety of persons who were moving in and out of vehicular traffic. (App. 103a.)

On January 29, 2013, the Worcester City Council adopted both the Aggressive Panhandling Ordinance and the Pedestrian Safety Ordinance. (App. 104a-112a.) The Aggressive Panhandling Ordinance targets behaviors associated with coercive requests for money or things of value such as continuing to beg or solicit after receiving a negative response, interfering with the safe or free passage of a vehicle or pedestrian and using threatening gestures or language. The Aggressive Panhandling

Ordinance also identifies areas associated with aggressive soliciting such as within twenty feet of outdoor restaurant seating, an automated teller machine, or a mass transportation facility. Finally, the Aggressive Panhandling Ordinance defines the time where such solicitation would be most threatening - after dark.

The Aggressive Panhandling Ordinance contains a detailed preamble declaring the findings and policy behind the ordinance. (App. 104a-107a.) Worcester states in the preamble that it recognizes its "duty to protect the rights of all people to exercise their First Amendment rights safely." (App. 104a.) Further, Worcester "has a compelling governmental interest in imposing certain reasonable time, place and manner regulations whenever potential First Amendment activities such as begging, solicitation and panhandling occur on streets, highways, sidewalks, walkways, plazas, and other public venues within the City." Id. The Pedestrian Safety Ordinance prohibits walking or standing on a traffic island or roadway after having been given a warning by a police officer, except for the purpose of crossing the roadway at an intersection or crosswalk, entering or exiting a vehicle at a curb, or for some other lawful purpose. (App. 111a.)

On May 13, 2013, Petitioners filed suit in United States District Court, District of Massachusetts, challenging the Ordinances on constitutional grounds, and filed a motion for a preliminary injunction seeking to enjoin enforcement of the Ordinances. In denying Petitioners' motion

for a preliminary injunction, the District Court held that they had failed to show a likelihood of success on the merits of their claims that the Ordinances violated the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court further held that Petitioners had also failed to establish the additional requirements for granting a preliminary injunction. Specifically, the District Court found that they would not suffer irreparable harm and the public interest and safety interest in enacting the Ordinances was substantial and outweighed Petitioners' interest to solicit in the time, place and manner proscribed by the Ordinances. Thus, the District Court properly denied the motion for a preliminary injunction on the grounds that they failed to satisfy the necessary criteria to grant injunctive relief. Petitioners appealed the denial of the preliminary injunction to the United States Court of Appeals for the First Circuit.

The First Circuit analyzed the Petitioners' challenge as a facial challenge of content-neutral laws pursuant to the overbreadth doctrine. See Thayer et al. v. City of Worcester, 755 F.3d 60 (1st Cir. 2014). As the case was an appeal of a denial of a motion for a preliminary injunction, the First Circuit rejected the Petitioners' argument that the burden rested on the City of Worcester to show that the applicable standard of scrutiny is satisfied, holding that Petitioners failed to satisfy their burden to demonstrate a likelihood of success of prima facie substantial overbreadth. The First Circuit affirmed the District Court's denial of the motion for a

preliminary injunction with regard to both Ordinances, with the exception of the nighttime provision of the Aggressive Panhandling Ordinance, Worcester Revised Ordinances, c. 9, § 16(e)(11).[1] (App. 34a-35a.) Following the issuance of this Court's decision in McCullen, 134 S. Ct. 2518, Petitioners requested rehearing in the First Circuit, and were denied that request.

REASONS FOR DENYING THE PETITION

The opinion of the First Circuit does not present an unsettled federal question, nor does it conflict with a decision of this Court, or a state court of last resort. Thus, Petitioners have not met their burden of demonstrating any compelling reasons for the Petition to be granted. See Sup. Ct. R. 10.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Id. This Court will grant a petition "only for compelling reasons" and may choose to grant certiorari if "a state court or a United States court of appeals has decided an important question of federal law that has not been,

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[1] The First Circuit left intact the duty panel's temporary injunction pending appeal of the provision of the Aggressive Panhandling Ordinance that defined "aggressive" as including "soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise." (App. 24a, n.7.) The appellate court found that there was an "absence of an evidentiary record on the substantiality of overbreadth on this point," but the implicit finding of the duty panel seemed sound, and Worcester could contest the matter on remand in argument over permanent relief. Id.

but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Petitioners do not present any compelling reason why they should be granted certiorari, nor do they state an important federal question that has not been settled by this Court.

I. The First Circuit Properly Applied The Overbreadth Doctrine To This Facial Challenge Of Content-Neutral Ordinances In The Context Of A Motion For A Preliminary Injunction.

Petitioners cite to the Court's recent decision in McCullen v. Coakley, 134 S. Ct. 2518 (2014), in support of their argument that, in this case, the First Circuit applied the incorrect test and burden for a facial challenge to a law that implicates the First Amendment. In doing so, Petitioners confuse the posture of this case, which involves an appeal of a denial of a preliminary injunction, with the facial challenge after a bench trial based on a stipulated record in McCullen, 134 S. Ct. at 2528. Similarly, the Seventh and Tenth Circuit cases, cited by Petitioners for support, were also not at the preliminary judgment stage.

Here, at the preliminary injunction stage, the First Circuit properly examined the same factors as the District Court reviewed:

> (1) whether the applicant has made strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether the issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Respect Maine PAC v. McKee, 622 F.3d 13, 15 (1st Cir. 2010); (App. 9a). The reviewing court did not proceed past the first prong in the analysis, holding that Petitioners had not made a showing that they were likely to succeed on the merits of their claims because they had failed to establish a prima facie case for substantial overbreadth. (App. 34a-35a.)

The appellate court first examined the issue of whether the Ordinances were based on the content of their speech to determine the standard of review, holding that there was "no serious question that the district court was correct in finding that the restrictions were not based on the content of the speech within the terms of First Amendment doctrine." (App. 11a.) Petitioners err at the outset by citing to the burden of proof for content-based restrictions, which does not apply here. (Petitioners' Brief at 14.) The appellate court properly held that the Ordinances are content-neutral, and that any impact on speech was without regard to the message being conveyed.

Begging or panhandling is conduct that is subject to regulation. Village of Schaumburg v. Citizens for a Better Env., 444 U.S. 620, 632 (1980) ("Soliciting financial support is undoubtedly subject to reasonable regulation[.]"). Further, a "city has a legitimate interest in promoting the safety and convenience of its citizens on public streets." Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000). However, the regulation must be narrowly tailored so that it "promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (citation omitted). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Id. at 791.

The First Circuit properly agreed with Worcester's position that the Ordinances do not make distinctions as to content of the message or distinguish one solicitation from another – they apply without regard to whether the solicitation is for a little league youth organization, an environmental cause, or for personal use. The Ordinances apply to speech only with regard "to the behavior, time or location of its delivery" to situations involving a threat to safety, prohibiting "aggressive, particularly obtrusive or alarming or risky solicitation … along with distracting activity on traveled roadways and traffic islands." (App. 11a.)

The fact that the Ordinances may burden some speech more than others does not destroy their content neutrality. To be content-based, a restriction must show "a censorial intent to value some speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Brown v. Town of Cary, 706 F.3d 294, 301-02 (4th Cir. 2013). Although over the years, there was some debate amongst Worcester public officials regarding the suppression of panhandling, the reviewing court properly looked to the language of the adopted Ordinances, which did not reflect such an intent, and affected all forms of solicitation without reference to content. (App. 13a) (citing Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 699 (1st Cir. 1994)) (quoting Brock v. Pierce Cnty., 476 U.S. 253, 263 (1986)) ("[T]he overarching rule is that 'statements by individual legislators should not be given controlling effect'; rather, such statements are to be respected only to the extent that they 'are consistent with the statutory language.'"

As the First Circuit held, the intent of the Aggressive Panhandling Ordinance is clear from its preamble and the accompanying evidence. (App. 13a-14a.) It is reasonable to expect that a person can feel intimidated or coerced by repeated solicitation after a refusal has been given, while sitting in an outside eating area, standing in line for a service, or while at an ATM, situations that did not "smell of pretext." (App. 14a.) Likewise, the City

Manager's conclusion that allowing solicitation or demonstration on roadways or traffic islands was "an accident waiting to happen" was a legitimate concern, intended to be a distraction for drivers, and dangerous for participants and drivers alike. Id.

The First Circuit also properly rejected Petitioners' argument that the Aggressive Panhandling Ordinance's restriction on "immediate" donations of money or thing of value converted the Ordinance to one that was content-based. This Court has rejected that notion, as long as the regulation reflects a "legitimate, non-censorial government interest." (App. 15a.) See Int'l Soc'y for Krishna Conciousness, Inc. v. Lee, 505 U.S. 672, 704-5 (1992) (Kennedy, J., concurring); Hill v. Colorado, 530 U.S. 703, 724 (2000). "In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct." Lee, 505 U.S. at 705. (App. 16a.) Further, the fact that charitable solicitors (such as "tag day" fundraising by groups in intersections) is also prohibited under the Ordinances was found by the appellate court to show evenhanded regulation and a lack of subject matter discrimination. Id.

Similarly, the Pedestrian Safety Ordinance is a content-neutral restriction on travel in roadways and traffic islands, regardless of whether the person is soliciting or campaigning. (App. 17a.) The Petitioners, who equally complain that the Ordinance affects their panhandling in roadways

and traffic islands, as well as holding campaign signs in those locations, speak to the content neutrality of the Ordinance's restrictions.

As the Ordinances at issue here do not directly burden speech, they are reviewed pursuant to an intermediate scrutiny standard. Ward, 491 U.S. at 791. This is a less exacting level of scrutiny upholding time, place and manner restrictions, as long as they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Id. quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Here, the Aggressive Panhandling Ordinance is not an outright ban on solicitation, which could be violative of the First Amendment, see Speet v. Schuette, 726 F.3d 867, 880 (6th Cir. 2013); Benefit v. City of Cambridge, 424 Mass. 918, 924 (1997), but regulates solicitation with proper time, place and manner restrictions.

Petitioners persist in making the argument, rejected by the First Circuit, that the burden rests on Worcester to demonstrate that the applicable standard of scrutiny is satisfied. (App. 19a.) As the First Circuit explains, for a facial overbreadth challenge, "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, citing Virginia v. Hicks, 539 U.S. 113,

122 (2003)). That burden is influenced by the procedural posture of the preliminary injunction process. As Petitioners were required to show only a probability of success on the merits, but the First Circuit determined they were unable to do so with regard to overbreadth, the burden never passed to Worcester to demonstrate that the restriction was not substantially overbroad pursuant to a scrutiny test. Indeed, the First Circuit found that Petitioners failed to "seriously … address their burden of persuasion that the ordinances' overbreadth is substantial." (App. 21a.)

The overbreadth doctrine is not a new test for First Amendment challenges. See Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). It has been applied by the Court in a variety of First Amendment challenges and continues to evolve. See, e.g., Hicks, 539 U.S. at 118-19; Hill, 530 U.S. at 731-2. "The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges." Hicks, 539 U.S. at 118. If it is shown that a law "punishes a 'substantial' amount of protected free speech" in comparison to the regulation's "plainly legitimate sweep," all enforcement of the regulation can be invalidated, unless there is a limiting construction that sufficiently narrows the regulation to remove the threat to the protected speech. Id. at 118-19. A regulation is substantially overbroad only if "it is susceptible to a substantial number of applications that are not necessary to further government's legitimate interest." (App. 21a.) See United States v. Stevens, 559 U.S. 460, 473 (2010). This Court has

already decided that it is the person or entity claiming the overbreadth who bears the burden of showing, based on the text of the law and fact, that substantial overbreadth exists. Hicks, 539 U.S. at 121; N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988).

Petitioners have continuously challenged the Worcester Ordinances on their overbreadth. (App. 7a.) Indeed, the doctrine of overbreadth can be an effective way to invalidate a content-neutral law in a facial challenge. See Hicks, 539 U.S. at 118-19. However, Petitioners cannot now complain that the First Circuit accepted their challenge, analyzing the overbreadth argument first, not reaching further analysis pursuant to intermediate scrutiny, because of Petitioners' failure to make the prima facie showing of overbreadth. (App. 23a.)

Petitioners cite to McCullen, which noted that the Court would not reach the overbreadth challenge, as the Court struck down the buffer zone law on the grounds that the law was not narrowly tailored. (Petitioners' Brief at 16.) McCullen, 134 S. Ct. at 2540 n.9. McCullen was in a different procedural posture than this case, and was on appeal after a bench trial based on a stipulated record, an appeal to the First Circuit, remand to the district court, another bench trial and another appeal to the First Circuit. Id. at 2528. Thus, the burden in the Court's narrow tailoring analysis was properly placed on the government to demonstrate that alternative measures that burden less speech would fail to achieve the government's interests. See McCullen,

134 S. Ct. at 2540. In this case, the First Circuit properly required a prima facie showing of a probability of success on the merits for the preliminary injunction, and that the challenger of the regulations for overbreadth, the Petitioners, show that the Ordinances are susceptible to a substantial number of applications that are not necessary to further Worcester's legitimate interests. See Stevens, 559 U.S. at 473.

Petitioners further argue that the First Circuit erred in requiring Petitioners, not Worcester, to show overbreadth before analyzing the narrow tailoring requirement, arguing that the First Circuit "stands alone in relieving the government of *any* burden of proof unless plaintiff first shows substantial overbreadth." (Petitioners' Brief at 19.) (Emphasis in original.) However, Petitioners err by citing only to examples of cases in a different procedural posture. (Petitioners' Brief at 18-19.)

In Doe v. City of Albuquerque, 667 F.3d 1111, 1115-16 (10th Cir. 2012), a registered sex offender asserted a facial challenge under the First and Fourteen Amendments to a city ban on sex offenders from entering public libraries. The city appealed the district court's denial of its motion to dismiss and the grant of the plaintiff's summary judgment motion. Id. at 1115. There was no indication that Doe asserted an overbreadth argument, nor did the Tenth Circuit Court of Appeals explicitly address the application of an overbreadth analysis at the outset, as Petitioners intimate. (App. 18.) Rather, the court analyzed the case pursuant to the Ward test for evaluating time,

place and manner restrictions, holding that the city failed to make a showing to demonstrate that the ban was narrowly tailored and left open alternative channels of communication to defeat summary judgment. Doe, 667 F.3d at 1117. Thus, the case is not instructive here where the burden is different due to the procedural posture of the case at the preliminary injunction stage, and where the plaintiff in the Doe case did not raise the same overbreadth argument.

Likewise, Petitioners cite to a Seventh Circuit Court of Appeals case, Doe v. Prosecutor, Marion County, Indiana, 705 F.3d 694 (7th Cir. 2012), for the proposition that an overbreadth analysis was implicitly rejected by an analysis of narrow tailoring. (Petitioners' Brief at 19.) The plaintiff filed a class action lawsuit against the county prosecutor alleging that a law that prohibited most registered sex offenders from using social networking websites, instant messaging and chat programs violated his First Amendment rights. Id. at 696. The parties had agreed that the plaintiff's motion for a preliminary injunction should be treated as a motion for permanent injunction and should be decided after a jury-waived trial. Id. The plaintiff appealed from the order post-trial entering judgment for the defendant upholding the law. Id. at 697. Again, the procedural posture, an appeal from a final judgment, results in a different burden than for the movant for a preliminary injunction. Further, the court did not specify that the plaintiff mounted an overbreadth challenge that was rejected by the court for an

analysis of narrow tailoring. Id. Thus, the case does not support Petitioners' argument.

The fact that the Court declined to consider the overbreadth challenge in McCullen, and that the Tenth and Seventh Circuits did not analyze overbreadth arguments presented by the plaintiffs, does not make the First Circuit's analysis of overbreadth in this case incorrect. The First Circuit analyzed the Petitioners' arguments for the the Aggressive Panhandling Ordinance, that bans on soliciting within twenty feet of a bus stop with a hand-held sign, less than twenty feet from those waiting in line, and a polite request for reconsideration after a negative response were overbroad. (App. 24a.) Although the court notes that the examples could be "at the far side of the reasonable reach of the City's objectives," people could still feel intimidated or coerced by solicitation when they are relatively captive in a line, someone who yells or shouts could pose a different threat, and twenty feet is not very far to likely give rise to "apprehensiveness in someone obviously possessing fresh cash" from an ATM. (App. 25a.) The First Circuit explains that even the restrictions that are perhaps the easiest for Petitioners to challenge are debatable, and they "make no attempt to show the relative likely frequencies of the ordinances' controversial versus obviously acceptable applications in the circumstances specified." Id.

The First Circuit also found that there was no showing of overbreadth with regard to the Pedestrian Safety Ordinance, which restricts pedestrian traffic in

roadways in areas not designated for that purpose and on traffic islands. The First Circuit found that the two pictures submitted by Petitioners as evidence of people in roadway areas at issue were not indicative of actual, "real world" conditions because no vehicles are shown. (App. 26a-27a.) However, Petitioners' second photo did show how distracting people holding political signs on a traffic island can be, "and how dangerous, if they were displaying their signs during busy hours with many drivers who could be distracted." (App. 27a.)

The First Circuit then addressed Petitioners' argument that cases in other circuits have found bans on roadside solicitations to be overly broad, indicating that none of the cited cases "expressly addressed the challenger's prima facie burden to demonstrate substantial overbreadth." (App. 27a, n.8.) Nevertheless, the bans were broader than the Pedestrian Safety Ordinance. Id. The First Circuit held that again, the Petitioners made no showing of "substantial overbreadth in either positive or comparative terms" to satisfy their prima facie burden that "the scope of any unjustifiable applications is or will be 'substantial' in relation to the ordinances' plainly legitimate sweep." (App. 27a-28a.)

II. The First Circuit Did Not Err In Finding The Ordinances To Be Content-Neutral.

Petitioners next argue that the First Circuit inappropriately banned speech in this case because of

"discomfort" and "apprehensiveness." (Petitioner's Brief at 23.) However, Petitioners misstate the context of this discussion by the First Circuit, which occurred in the court's analysis of overbreadth. (App. 25a.) The appellate court held that Petitioners failed to satisfy their prima facie burden at the preliminary injunction stage to show that the Ordinances are susceptible to a substantial number of applications that are not necessary to further government's legitimate interest. See Stevens, 559 U.S. at 473. The court indicated that the record showed Worcester's legitimate purpose in trying to address the public safety hazards of panhandling and solicitation, "not muzzle the poor." (App. 18a.) The Aggressive Panhandling Ordinance addresses that legitimate purpose in targeting behaviors associated with aggressive requests for things or objects of value, in areas and at times where people are most likely to feel threatened and vulnerable. (App. 104a-106a.) The Ordinances do not restrict the message that is conveyed, but the time, place and manner in which it is conveyed. As stated, Petitioners failed to show "the relative likely frequencies of the ordinances' controversial versus obviously acceptable applications in the circumstances specified." (App. 25a.) Therefore, Petitioners failed to satisfy their prima facie burden to show that speech was improperly restricted in ways that were not necessary to further Worcester's interest in public safety.

Petitioners cite to McCullen regarding "uncomfortable" speech on public sidewalks that listeners may have to tolerate. (Petitioner's Brief at 25.) However, the Court held that concerns that the

law restricted abortion-related speech did not destroy the content neutrality of the Massachusetts law. McCullen, 134 S. Ct. at 2532. The law was content-neutral because the problems of compromised public safety, impeded access to clinics and obstructed sidewalks were addressed by the law without regard to any listener's reactions. Id. Likewise, here, it is not the content of the message that is restricted by the Ordinances, nor is the impact on the listener an element of the Ordinances. The manner in which the message is conveyed is restricted in ways to further Worcester's interest in public safety. The First Circuit properly decided that the Ordinances are content-neutral.

Similar methods of conveying speech threatening public safety have been banned in other circuits. The Seventh Circuit Court of Appeals upheld an Indianapolis ordinance, holding:

> Rather than ban all panhandling, however, the city chose to restrict it only in those circumstances where it is considered especially unwanted or bothersome – at night, around banks and sidewalk cafes, and so forth. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone. By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city

> has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.

Gresham, 225 F.3d at 906. Similarly, in Young v. New York City Transit Auth., 903 F.2d 146, 158 (2nd Cir. 1990), in upholding the New York City subway panhandling regulation, the Second Circuit Court of Appeals held that there are substantial government interests in protecting subway travelers from begging, which "often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger … [and] raises concerns about public safety … creating the potential for a serious accident in the fast-moving and crowded subway environment."

Petitioners cite to another Second Circuit case, Loper v. N.Y. City Police Dep't, 999 F.2d 699, 705-06 (2nd Cir. 1993), in support of their proposition that a ban on panhandling to address concerns with "intimidation, coercion, harassment and assaultive conduct" is improper. (Petitioners' Brief at 23.) However, Petitioners misstate the ordinance at issue in that case, which was a broad ban on loitering that the plaintiffs argued affected their panhandling on New York City streets and in city parks. Loper, 999 F.2d at 701. The Second Circuit affirmed the grant of summary judgment finding the broad ban unconstitutional. Id. at 706.

The Second Circuit's holding in Loper is consistent with the decisions of other courts of appeals, invalidating broad bans on solicitation and

upholding panhandling or solicitation laws with time, place and manner restrictions, similar to the Worcester Ordinances. See Gresham, 225 F.3d at 901 (upholding aggressive panhandling ordinance in Indianapolis, Indiana, with time, place and manner restrictions); Smith v. City of Fort Lauderdale, Florida, 177 F.3d 954, 955 (11th Cir. 1999) (upholding a city regulation prohibiting begging on a five-mile strip of beach and sidewalks); Young, 903 F.2d at 157 (upholding a regulation prohibiting begging and panhandling in the New York City subway system); cf. Speet, 726 F.3d at 870-1 (holding that a Michigan statute that outlawed begging per se in a public place was facially invalid); Clatterbuck v. City of Charlottesville, 708 F.3d 549, 551-2 (4th Cir. 2013) (reversing dismissal of a case that challenged the constitutionality of a city ordinance broadly prohibiting begging in an area of the downtown); Benefit, 424 Mass. at 924 (holding Mass. Gen. Laws c. 272, § 66 to be unconstitutional because it instituted a broad ban on begging that "by its terms makes distinctions based on the content of the message conveyed"). In comparison, the First Circuit properly determined that the Worcester Ordinances are content-neutral, as they are not a broad ban on panhandling or solicitation.

The Aggressive Panhandling Ordinances goes a step further to more narrowly define prohibited conduct, making it unlawful for any person to "beg, panhandle or solicit any other person in an aggressive manner." R.O. c. 9, § 16(d). (Emphasis added.) "Aggressive manner" is a time, place and manner restriction satisfied by behavior, not speech,

such as approaching or following someone in a manner that is likely to cause those solicited to feel fear, or defenselessness: continuing to solicit after a negative response; intentionally touching without consent; intentionally blocking a person or vehicle; using violent or threatening language; soliciting from a person waiting in line for tickets or entry to a building; soliciting in a group of two or more to intimidate; soliciting in areas such as an automatic teller machine, mass transportation facility, public restroom or outdoor restaurant seating where people are likely to feel particularly vulnerable to requests for money; and soliciting in public after dark. R.O. c. 9, 16(c). Therefore, Worcester's Ordinances are not a broad ban on solicitation but, rather, soliciting in a manner that is overly aggressive and harassing and in a way, place or time that has a tendency to threaten the safety of the public.

III. The First Circuit's Analysis Of Content Neutrality With Regard To A Showing Of Censorial Intent Followed Supreme Court And Circuit Precedent.

The First Circuit's citation to a test of content neutrality applied by this Court in the Hill case and by the Fourth Circuit in the Clatterbuck case was not improper, nor did it illustrate a split among the circuits. The First Circuit explained that the mere association of certain behavior with certain subjects did not amount to a content basis. (App. 12a.) In Hill, this Court found a buffer zone law designed to protect those who enter a health care facility from

harassment, nuisance, persistent importuning, following, and the implied threat of physical touching to be content-neutral even though it contained the words "oral protest, education or counseling," and "distinguished speech activities likely to have those consequences from speech activities that are most unlikely to have those consequences." Hill, 530 U.S. at 724. "[N]ot every content distinction merits strict scrutiny; instead, a distinction is only content-based if it distinguishes content with a censorial intent to value some forms of speech over others …." (App. 12a, citing Clatterbuck, 708 F.3d at 556.)

These cases, cited by the First Circuit in support of content neutrality in this case, do not conflict with McCullen, which, as stated, also found a buffer zone law to be content-neutral. Petitioners point to the statement in McCullen that "[t]he Act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." McCullen, 134 S. Ct. at 2531, quoting FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984). However, the Court held in McCullen that the buffer zone law did not require such an interpretation by law enforcement – a violation of the Act did not depend on what a person said, but where they said it. Id.

Similarly, in this case, a violation of the Aggressive Panhandling Ordinance, or the Pedestrian Safety Ordinance, does not involve an interpretation by law enforcement as to what a person says, and a violation does not depend on what a person says, but

how and where they say it. A person cannot persist in holding signs or walking or standing in a traffic island after having been given a warning by a police officer, or they would be in violation of the Pedestrian Safety Ordinance. It does not matter what the sign says, whether it be to elect a candidate for School Committee or to solicit money donations; what matters is where the person is standing holding that sign, and whether it is in an area restricted by the Ordinance. The Aggressive Panhandling Ordinance does not impose a ban on panhandling in general, but, rather, soliciting in a manner that is overly aggressive and harassing because it is taking place in a way, place or time that has a tendency to make the person solicited feel especially susceptible and fearful. It matters not what the person says, but in what manner and where they say it. See McCullen, 134 S. Ct. at 2531. Thus, the First Circuit properly evaluated the Ordinances and applied the tests of this Court and other precedent to determine that the Ordinances do not suppress certain kinds of messages, but regulate their delivery, and are, therefore, content-neutral. (App. 13a.)

CONCLUSION

For the reasons detailed above, Petitioners fail to raise any important issue of federal law that has not been settled by this Court, and the Respondent asks this Court to decline to grant Petitioners' writ.

Respectfully submitted,

The Respondent,
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