No. 19-1184

In The
Supreme Court of the United States

NIKKI BRUNI; JULIE COSENTINO;
CYNTHIA RINALDI; KATHLEEN LASLOW;
AND PATRICK MALLEY,

Petitioners,

v.

CITY OF PITTSBURGH; PITTSBURGH CITY COUNCIL;
MAYOR OF PITTSBURGH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

Petitioners seek certiorari on questions that misconstrue this Court's precedent and the record below. Accordingly, a more accurate statement of the questions presented is:

1. Did the Third Circuit err in narrowly interpreting the plain meaning of the Ordinance to find that the terms "congregate," "patrol," "picket," and "demonstrate" do not prohibit sidewalk counseling, peaceful one-on-one conversations or leafletting, and that the Ordinance therefore does not constitute a content-based regulation of speech?

2. Did the Third Circuit err in determining that the Ordinance was content neutral and narrowly tailored to serve a significant governmental interest?

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Petition fails to meet the standard criteria for certiorari. None of the four issues Petitioners raise provide a "compelling reason" for the Court to accept this appeal. The Third Circuit decision properly applied this Court's precedent, including *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to determine the City of Pittsburgh's "buffer zone" Ordinance was content neutral. To reach this determination, the Third Circuit conducted a fact-specific legal analysis of a complex record that has no bearing beyond the context of this case. Petitioners argue that the Third Circuit was prohibited from applying a narrowing construction, but do not argue that the Court could not construe the Ordinance according to its reasonable and readily susceptible meaning. The Petitioners' request, insofar as it amounts to nothing more than a request for error correction, should be denied. Despite Petitioners' assertions, this case does not present a circuit split or legal error; accordingly, there is no issue for this Court to resolve. The Third Circuit's decision should not be disturbed. The Petition for a Writ of Certiorari should be denied

COUNTERSTATEMENT OF THE CASE

The City of Pittsburgh Ordinance at issue here designates a fifteen-foot "buffer zone" extending from any entrance to a hospital or health care facility. Pittsburgh, Pa., Code titl. 6, §§ 623.04. Within the buffer

zone, it is illegal to "knowingly congregate, patrol, picket, or demonstrate. Pittsburgh, Pa., Code titl. 6, §§ 623.04. When adopting the Ordinance, City Council ratified a preamble setting forth its legislative purpose as: provid[ing] unobstructed access to health care facilities" and "medical services," "avoid[ing] violent confrontations," "provid[ing] a more efficient and wider deployment" of City services, and "ensuring that the First Amendment rights of demonstrators to communicate their message . . . [are] not impaired." *Id.* § 623.01.

Petitioners are five individuals who engage in "leafletting" and "sidewalk counseling" outside of a Planned Parenthood in downtown Pittsburgh. Petitions define "sidewalk counseling" as "peaceful . . . one-on-one conversations" meant to dissuade patients from obtaining an abortion". Pet. App. 5a. Petitioners asserted that the Ordinance violates the First Amendment.

The District Court's Decision

In September 2014, Petitioners filed suit asserting that the Ordinance violated the First Amendment and their right to due process and equal protection under the Fourteenth Amendment. Petitioners also sought a preliminary and permanent injunction to enjoin enforcement of the Ordinance on First Amendment grounds. After holding an evidentiary hearing on the preliminary injunction and hearing argument on the motion to dismiss, the District Court denied Petitioners' motion for preliminary injunction. *Bruni v.*

City of Pittsburgh, 91 F. Supp. 3d 658, 683 (W.D. Pa. 2015). In addition, the District Court granted the Respondents' Motion to Dismiss in part. *Id.*

Petitioners appealed the District Court's dismissal of the complaint. The Third Circuit vacated the District Court's ruling and remanded the case for discovery. *Bruni v. City of Pittsburgh (Bruni I)*, 824 F.3d 353, 357 (3d Cir. 2016). Following months of discovery, the parties filed cross-motions for summary judgment. On remand, the District Court held that the Ordinance was content neutral and distinguishable from the statute in *McCullen v. Coakley*, 573 U.S. 464 (2014). *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 361, 367-68 (W.D. Pa. 2017). It found the Pittsburgh Ordinance created a smaller buffer than in *McCullen* and imposed only a "minimal burden" on Petitioners' speech. *Id.* at 369-71. Therefore, the court held that the City had no obligation to demonstrate that it tried or considered the alternatives identified in *McCullen*, but even if the City had such an obligation, "it had been satisfied". *Id.* at 371-72. Accordingly, the District Court granted the City's motion for summary judgment.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Third Circuit.

The Court of Appeals' Decision

The Third Circuit affirmed the District Court's grant of summary judgment in the Respondents' favor. *Bruni v. City of Pittsburgh (Bruni II)*, 941 F.3d 73 (3d

Cir. 2019); Pet. App. 1a-41a. The Third Circuit agreed that the City's Ordinance does not impose a significant burden on speech. First, the Court found the Ordinance "readily susceptible to a narrowing construction." Pet. App. 22a. Rejecting Petitioners' claim that the Ordinance prohibits sidewalk counseling or similar conduct, the Court found the Ordinance was content neutral and therefore subject to intermediate scrutiny. Pet. App. 24a-25a. Second, the Court found that the ordinance was narrowly tailored to serve a significant governmental interest. *Id.* at 26a-33a. Third, the Court rejected the Petitioners' contention that the Ordinance was unconstitutionally overbroad. *Id.* at 33a-35a.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT CONDUCTED A FACT- AND CONTEXT-SPECIFIC LEGAL ANALYSIS THAT HAS NO BEARING BEYOND THE CONTEXT OF THIS CASE.

The Third Circuit opinion below carefully applied this Court's doctrine regarding First Amendment challenges to buffer zones around health care facilities. In doing so, as Judge Hardiman explained in his concurring opinion, the Third Circuit followed *McCullen v. Coakley* as well as this Court's more recent decision of *Reed v. Town of Gilbert*. Given the Third Circuit's close application of Supreme Court precedent to a highly fact-sensitive matter involving a purely local ordinance, there is nothing about this case that warrants certiorari.

A. Based on the particular facts and context of the Pittsburgh Ordinance, the Third Circuit carefully applied the *McCullen* test.

Petitioners fail to state a compelling reason for this Court to review the narrow, fact-bound ruling below. Petitioners challenge the Third Circuit's application of this Court's decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), to these particular facts. They couch their disagreement with the Third Circuit's application of *McCullen*'s narrow tailoring test as a claim that the Third Circuit misstated *McCullen*'s holding and even created a split of authority among the federal circuit courts of appeals. A straightforward review of the Third Circuit's analysis refutes these arguments.

The Third Circuit carefully drew from *McCullen* when articulating the framework to review claims alleging violation of free speech. Slip opinion, at 17-19. What Petitioners claim is a legal error by the Third Circuit is, in reality, nothing more than their disagreement with how the Third Circuit applied clear precedent to the record in this case. In *McCullen*, this Court struck down a Massachusetts statute creating a thirty-five-foot buffer zone in front of abortion facilities, ruling that it substantially burdened the Petitioners' speech and was not narrowly tailored based on the record before it. 573 U.S. 464 (2014). Contrary to Petitioners' framing of *McCullen*, *see* Pet. at 28, the point this Court emphasized in *McCullen* was that Massachusetts failed to seriously consider less restrictive options that would "serv[e] its interests[] without

excluding individuals from areas historically open for speech and debate." *Id.* at 493-94.

The Third Circuit carefully considered and applied this central holding by analyzing the specifics of the Pittsburgh ordinance and the conditions on the ground in that city. The complex context that undergirds this case spans five pages in the Federal Reporter and covered decades of factual, legal, and procedural history of abortion protest in Pittsburgh. *Bruni II*, 941 F.3d at 78-82. It is because of this extensive context and history that the Third Circuit concluded that the Ordinance, as construed by the court, was narrowly tailored:

> [T]he record shows that the City resorted to a fixed buffer zone not in the first instance but after attempting or considering some less burdensome alternatives and concluding they were unsuccessful in meeting the legitimate interests at issue. These included an overtime police detail in front of Planned Parenthood until the cost became prohibitive once the City was declared a financially distressed municipality; incident-based responses by the police that proved unsuccessful in preventing or deterring aggressive incidents and congestion; and consideration of criminal laws that the police were finding inadequate to address the problem of protestors following patients and obstructing their way to the clinic.

Id. at 91-92. The court also noted the relatively small size of the buffer zone and the particular location and layout of the clinics which permit anti-abortion groups

to congregate "within sight and earshot of the clinic." *Id.* at 90.

There is no basis for certiorari when a case presents such a fact-sensitive analysis. The different outcome here as opposed to in *McCullen* is because of the material differences between the records in the two cases. There is no circuit split; there is no legal error; there is only an application of a clear rule to a particular and complex set of facts. That Petitioners disagree with the Third Circuit's application of *McCullen* here is no basis for granting certiorari.

B. As Judge Hardiman's concurring opinion concluded, the ordinance is content-neutral under *Reed*.

Judge Hardiman's concurrence further demonstrates why certiorari should be denied in this case. In his separate opinion, he parsed *Reed*'s requirements regarding content neutrality and concluded that the opinion below is unexceptional, because it "does what *Reed* requires." *Bruni II*, 941 F.3d at 94 (Hardiman, J., concurring). Consistent with *Reed*, Judge Hardiman explained that the lower court opinion does not allow the City to "examine the content of a conversation to decide whether a violation has occurred." *Id.* That is the essence of content neutrality under this Court's precedent, and this Court has no need to review this straightforward ruling.

Petitioners claim that the Third Circuit erred in this regard and that the Ordinance is content-based

because it prohibits one-on-one conversations about abortion within the buffer zone. As Judge Hardiman explained in detail in his concurrence, this understanding is based on an erroneous interpretation of *Reed* and is entirely inconsistent with the Third Circuit's interpretation of the text and purpose of the Ordinance. Rather, as interpreted by the Third Circuit, the City of Pittsburgh must apply the Ordinance in a "constrain[ed]" manner that does not depend on the "tone" of the speaker and must enforce it in an "even-handed" manner against clinic protesters as well as clinic employees and agents. *Id.* at 95 (Hardiman, J., concurring).

The basic principles here are not in dispute, as this Court has clearly explained the essence of content neutrality. In *Reed*, the Court articulated that a statute may be content-based if it makes "facial distinctions based on a message," if it "regulate[s] speech by its function or purpose," or if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1980)) (alteration in original). A content-based statute is subject to strict scrutiny. *Id.* at 164. A law that does not meet this test is content neutral. Governments are given "wider leeway to regulate features of speech unrelated to its content" and can restrict speech in traditional public fora using content-neutral means that are justified under intermediate scrutiny. *McCullen*, 573 U.S. at 477.

Applying this clearly demarcated doctrine about content neutrality, as Judge Hardiman's concurring opinion demonstrates, the Third Circuit properly determined that the Ordinance was a content-neutral time, place, manner restriction. First, the Ordinance is plainly not content-based on its face. The Ordinance does not distinguish between types of speech for differential treatment. *Cf. Reed*, 576 U.S. at 164 (Ordinance regulated "Temporary Directional Signs" differently than "Political Signs" and "Ideological Signs"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (Ordinance prohibited all peaceful picketing except that "on the subject of a school's labor-management dispute"). Judge Hardiman summed this up perfectly when he noted that, pursuant to the Third Circuit's ruling, the City of Pittsburgh must "examine, for example, decibel level, the distance between persons, the number of persons, the flow of traffic, and *other things usually unrelated to the content or intent of speech*." *Bruni II*, 941 F.3d at 94 (Hardiman, J., concurring) (emphasis added).

Second, contrary to Petitioners' misguided interpretation, the Third Circuit's interpretation of the Ordinance does not regulate speech based on its purpose or function. Rather, it prohibits congregating, patrolling, picketing, or demonstrating outside of health care facilities for any purpose, including as Judge Hardiman explains, "clinic employees and agents who . . . help[] persons enter or exit a clinic." *Id.* at 95. The Third Circuit's holding is consistent with *McCullen*, which emphasized that a statute is content-neutral

when it regulates not what Petitioners are saying, "but simply . . . where they say it." *McCullen*, 573 U.S. at 479. Moreover, even if the Third Circuit's interpretation of the Ordinance captures more anti-abortion speech than abortion-rights speech, "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* at 480.

Lastly, Petitioners themselves have recognized that there is no indication that the Ordinance was passed with the intent to stifle speech based on the City's disagreement with Petitioners' message. "As Plaintiffs acknowledge, the interests that the City seeks to protect – unimpeded access to pregnancy-related services, ensuring public safety, and eliminating 'neglect' of law enforcement needs – are legitimate." *Bruni II*, 941 F.3d at 88. These are fundamentally content-neutral concerns under both *McCullen*, 573 U.S. at 480, and *Reed*, 576 U.S. at 173.

Judge Hardiman joined the Third Circuit's opinion because he concluded that it correctly applied *Reed* and *McCullen* to find that the Ordinance regulates features of speech without regard for its content. As he summed up the lower court's holding, "Our decision today clarifies that the words 'congregate' and 'patrol' address conduct – the assembly of people in one place or the action of pacing back and forth. So interpreted, the *Brown* injunction's narrow exception does not discriminate between types of speech." *Bruni II*, 941 F.3d at 95 (Hardiman, J., concurring). Therefore, because the lower court fully adhered to the mandates of *Reed* and

McCullen regarding content neutrality, Petitioners' claims of content- and viewpoint-based discrimination are meritless and do not warrant this Court's review.

C. The Ordinance, construed in light of the particular facts and context of this case, is not overbroad.

Petitioners' claim that the Ordinance is overbroad insofar as they claim it prohibits all pro-life advocacy is meritless, as the Third Circuit's narrowing construction makes crystal clear. The First Amendment overbreadth doctrine only applies if a statute "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). The Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*." *Id.* (emphasis in original). Given the small size of the buffer zone in question, and the restriction of only certain conduct within the zone, the statute cannot in any way be considered overbroad.

The burden of proving overbreadth also requires not just a demonstration "from the text of [the law]" but also "from actual fact." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003). Given the validity of the narrowing construction to allow an individual to leaflet and engage in one-on-one conversation within the buffer zone, and the lack of evidence in the record that Petitioners have been prevented from communicating their message, let alone that any of them were cited under the Ordinance, Petitioners have failed to show that the

Ordinance is overbroad. Therefore, certiorari is not warranted.

II. CONSISTENT WITH WELL-ESTABLISHED PRECEDENT FROM THIS COURT AND EVERY CIRCUIT IN THE COUNTRY, THE THIRD CIRCUIT GAVE THE PITTSBURGH ORDINANCE A "REASONABLE AND READILY APPARENT" CONSTRUCTION.

In construing the Pittsburgh Ordinance, the Third Circuit did what every circuit court has done in a similar situation – given it a "reasonable and readily apparent" construction pursuant to clear Supreme Court authorization. Contrary to Petitioners' argument to this Court, there is no circuit split on this issue. Rather, because of the unequivocal guidance from this Court, there is national unity on the interpretive process circuit courts should employ in construing and applying laws such as the Ordinance. Certiorari is not warranted in a case such as this one, where the Third Circuit followed this universal interpretive process.

A. This Court has consistently stated that federal courts can give "reasonable and readily apparent" constructions to state statutes.

The Third Circuit here followed this Court's repeated command to adopt a "reasonable and readily apparent" construction of a state law challenged under the First Amendment. This Court has been clear that

federal courts are to uphold laws challenged under the First Amendment if there is a "readily susceptible" narrowing construction that is consistent with the Constitution. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 770 n.11 (1988) (noting that it "will presume any narrowing construction or practice to which the law is 'fairly susceptible.'"). Specifically talking about construing state laws, this Court instructed that "federal courts are without power to adopt a narrowing construction of a state statute *unless such a construction is reasonable and readily apparent*." *Boos v. Barry*, 485 U.S. 312, 330 (1988) (emphasis added). The Third Circuit did just that in its ruling below.

Contrary to this long line of precedent instructing federal courts how to handle these situations, Petitioners claim that "[f]ederal courts have no authority to limit state or local laws to save them," especially in the face of an official state construction of a state law. *See* Pet. 15. This is a plainly incorrect reading of this Court's precedent. A federal court must always "determine what a state statute means before it can judge its facial constitutionality." *Broadrick v. Oklahoma*, 413 U.S. 601, 617 n.16 (1973). Moreover, it is bedrock First Amendment doctrine that federal courts must "extrapolate [the] allowable meaning" of a state law based on the words of the law itself, lower court interpretations of similar statutes, and only "to some degree, [] the interpretation of the statute given by those charged with

enforcing it." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Petitioners are simply wrong when they assert that in no circumstances can a federal court issue a narrowing construction of a state statute or that federal courts must always defer to state authorities regarding the interpretation of a statute.

B. There is no circuit split, as every circuit court has also allowed for "reasonable and readily apparent" constructions of state statutes and local ordinances.

Because this Court has clearly articulated these principles, the circuit courts of appeals have all adopted them. Petitioners assert that only the First, Third, and Ninth Circuits allow lower courts to adopt narrowing constructions of state statutes, while the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits never allow such limitations. Simply put, Petitioners mischaracterize the circuit opinions, and there is no circuit split here.

Five of the decisions Petitioners claim demonstrate a split in fact show that these circuits faithfully apply this Court's command that federal courts can narrowly construe state statutes when such constructions are "reasonable and readily apparent." In this set of cases, the circuit courts found that such narrowing is allowed but that the statutes at issue were not "readily susceptible" to such narrow constructions. *See Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268,

270 (4th Cir. 1998) (statute was not "readily susceptible" to the construction applied by the lower court); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1126 (6th Cir. 1991) (the district court "chose[] language used by the United States Supreme Court . . . [r]ather than construing anything in the statute"); *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 431, 432 (8th Cir. 1988) (because defendants' proposed construction was not "reasonable and readily apparent" in the "plain meaning" of the statute, the court could not "rewrite" it.); *Z.J. Gifts D-4 v. City of Littleton*, 311 F.3d 1220, 1234 (10th Cir. 2002) ("Littleton's ordinance is not 'readily susceptible' to the interpretation offered by the City"); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) ("to remove a portion of the permit exemption . . . in the guise of narrowly construing the Clearwater ordinance, would amount to [] interference").

Meanwhile, the two other circuits Petitioners point to, the Fifth and Seventh Circuits, have in fact held that federal courts can impose reasonable narrowing constructions on state statutes. *Netherland v. Eubanks*, 302 F. App'x 244, 246 (5th Cir. 2008) ("federal courts should presume any narrowing construction or practice to which the law is fairly susceptible" (internal quotations omitted)); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 833-34 (7th Cir. 2014) (federal court's narrow construction of a state statute was "reasonable, readily apparent, and likely to be approved by the state courts").

Thus, the Petitioners are wrong to assert that the Third Circuit "erroneously applies its own version of 'constitutional avoidance,'" and they are wrong to claim that there is an "entrenched circuit conflict" regarding federal courts' ability to narrowly construe state statutes in certain circumstances. Pet. 24. All the circuits are in agreement that, pursuant to this Court's command in *Boos v. Barry*, where a construction is "reasonable and readily apparent," a federal court may narrow a state statute in order to avoid a constitutional question.

C. The Third Circuit's interpretation of the Pittsburgh Ordinance is "reasonable and readily apparent."

Here, the Third Circuit properly applied this Court's rules regarding narrowing constructions. The language of the Pittsburgh Ordinance states that persons may not "congregate, patrol, picket or demonstrate in a zone extending fifteen (15) feet" from medical facility entrances. Section 623.04.

The Third Circuit parsed each of the terms in this provision. It relied on this Court's conclusion that "congregating" involves three or more persons. *Boos*, 485 U.S. at 316-17. It then held that merely having a conversation with someone while walking would not constitute patrolling. *Bruni II*, 941 F.3d at 87. The Third Circuit further held that "[s]imply calling peaceful one-on-one conversations 'demonstrating' or 'picketing' does not make it so when the plain meaning of those

terms does not encompass that speech." *Id.* The court also relied on the utterly uncontroversial canon of meaningful variation, where a court assumes that different language in different parts of a statute shows different meanings were intended by the legislating body. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The court noted that a plain reading of Section 623.04 of the ordinance does not prohibit peaceful one-on-one conversations of the sort the Petitioners claim constitutes their sidewalk counseling, because one-on-one conversation was only prohibited in a different section of the ordinance which was enjoined long ago by the District Court, pursuant to a remand by the Third Circuit in *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009) (enjoining Section 623.03 which prohibited "approach[ing] another person within eight (8) feet . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling").

The Third Circuit's construction of the ordinance is thus a "reasonable and readily apparent" reading. This Court and all the other circuits agree that federal courts can provide this sort of narrow reading under these circumstances.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for certiorari.

Respectfully submitted,

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