No. 19-983

IN THE
Supreme Court of the United States

COLLEEN REILLY and BECKY BITER,

Petitioners
v.

CITY OF HARRISBURG, HARRISBURG CITY COUNCIL, and ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg,

Respondents

On Petition for Writ of Certiorari to the Third Circuit Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

The questions on which Petitioners seek certiorari mischaracterize this Court's precedent and the record below. Petitioners' first question asks this Court to clarify whether the test for content neutrality articulated in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015) "replaces" the test for content neutrality set forth in *Hill v. Colorado*, 530 U.S. 703 (2000). But Petitioners did not properly raise and preserve this issue in the lower courts; moreover, the Third Circuit's narrow construction of the Ordinance–as not barring "sidewalk counseling"–rendered Petitioners' first issue moot. In any event, as its decision makes clear, the Third Circuit clearly did consider this Court's analysis in *Reed* in determining whether the ordinance was content based.

Petitioners' second and third questions assert that: a) the Third Circuit construed the Ordinance in a manner contrary to both the law's plain text and the government's construction; and b) the record below did not establish that Harrisburg had employed the least restrictive means to achieve legitimate interests. These questions rely on a misreading of the Ordinance's plain language or a limited reading of the factual record.

Accordingly, a more accurate statement of the questions presented is:

1. Did the Third Circuit err in applying this Court's test in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) when it determined that an Ordinance which does not regulate content but rather expressive conduct was not content based and therefore not subject to strict scrutiny?

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

3. Did the Third Circuit err in determining that the record sufficiently established that Respondents did not resort to a fixed buffer zone in the first instance but attempted or considered less burdensome alternatives which, because of Harrisburg's dire financial state and its inability to expend police resources to enforce existing laws, were unsuccessful in meeting the legitimate interests at issue?

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BRIEF FOR RESPONDENT IN OPPOSITION

The Petition fails to meet the standard criteria for certiorari. The Petition urges review of a non-precedential Third Circuit decision which properly applied this Court's precedent and does not conflict with the holdings of other circuit courts. Not one of the three issues Petitioners present provides a "compelling reason" for this Court to exercise its discretion and accept this appeal.

Petitioners urge this Court to clarify whether the test for content neutrality articulated in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015) "replaces" the test for content neutrality set forth in *Hill v. Colorado*, 530 U.S. 703 (2000). However, Petitioners failed to properly raise this issue in the courts below. Moreover, the Third Circuit did consider the standard set forth in *Reed*; hence, there is no issue for this Court to address.

Petitioners' remaining two issues are also not worthy of this Court's review. Petitioners urge this Court to determine whether the Third Circuit properly concluded that the Ordinance was susceptible to an interpretation that did not prohibit "sidewalk counseling," peaceful one-on-one conversations or leafletting. But Petitioners do not argue that the Court could not construe the Ordinance in accordance with its reasonably susceptible meaning. Rather, Petitioners criticize the Court's application of a narrowing construction of the Ordinance. This is simply a request for error correction which this Court routinely denies and should deny here. *See* Sup. Ct. R. 10.

Petitioners' third issue is a fact-bound challenge to the Court's conclusion that Harrisburg presented a meaningful record on the issue of less-restrictive alternatives. The Court properly analyzed the record in light of this Court's precedent. There is no conflict in the circuits and no need for this Court to wade into the record to determine whether the Court's decision based on the facts that were presented was correct. The Court's decision should not be disturbed.

The Petition for a Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

The City of Harrisburg Ordinance at issue here makes it illegal to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." Harrisburg, Pa., Code §3-371.4A. *Reilly v. City of Harrisburg*, 205 F. Supp.3d 620, 625 (M.D. Pa. 2016) (hereinafter "*Reilly I*").

Harrisburg adopted the Ordinance after members of the public presented testimony during a city council committee hearing attesting to problems occurring outside of the city's two reproductive health facilities. In passing the Ordinance, the city council ratified a preamble that set forth "[f]indings" and the "purpose" of the Ordinance, which it articulated as "ensur[ing] that patients have unimpeded access to medical services while protecting the First Amendment rights of demonstrators to communicate their message." Harrisburg, Pa., Code § 3-371.2; Pet. App. 3a.

Petitioners are two individuals who seek to engage in individual conversations with women who are attempting to enter the health care facilities. Petitioners

contend that they wish to engage within the zone in "sidewalk counseling," which they define as "peaceful . . . one-on-one conversations . . . , prayer[,]" and leafletting through which they attempt to dissuade patients from obtaining an abortion." Pet. App. 4a.

Petitioners sought to enjoin the City and various City officials from enforcing the Ordinance, which they claimed prohibited these activities. Petitioners asserted that the Ordinance violates the First Amendment.

The District Court's Decision

In March 2016, Petitioners moved for a preliminary injunction to enjoin enforcement of the Ordinance on First Amendment grounds. The District Court denied Petitioners' motion but the Third Circuit reversed, because it found that the District Court improperly applied the preliminary injunction standard by shifting the burden of demonstrating narrow tailoring to Plaintiffs, and remanded the matter to the District Court. *See Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017), as amended (June 26, 2017).

On remand, the District Court convened an evidentiary hearing, *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 456 (M.D. Pa. 2018), during which Respondents presented substantial evidence about the harm the Ordinance was intended to redress. This evidence included:

- An audio recording of the city council committee hearing which included testimony from a Planned Parenthood employee and a neighborhood resident describing the harm in the neighborhood surrounding the clinic. Pet. App. 50a.

- Testimony describing how anti-abortion protesters would brandish pepper spray at the counter-protesters and scream into the counter-protesters' faces. *Id.* at 51a.

- A statement by a Planned Parenthood representative describing how protesters would: "(1) follow patients from the sidewalk to the clinic door, screaming at them, insulting them, and calling them murderers; (2) take pictures of patients and employees and write down license plate numbers, to insinuate threats of future harm or harassment; (3) trespass ... to bang on windows or take photos inside the clinic; (4) wait around either side of the clinic driveway until a car attempted to enter the driveway, then slowly walk across to impede and deter cars from entering the clinic parking lot." *Id.* at 51a.

Respondents also presented substantial evidence about the alternatives considered by city council prior to the passage of the ordinance and how existing laws were insufficient to address the problems at these facilities, including:

- Testimony that the 20-foot buffer zone was considered "...the "middle ground where it was a safe enough space for people to feel comfortable ...to gain access to and from the clinic and also where individuals could speak at a reasonable voice... to get their points across." *Id.* at 52a.

- Testimony from police explaining the difficulties they experienced in in responding to complaints under the existing trespass statute, and noise and disorderly conduct ordinances, particularly in light of the short staffing of police in

Harrisburg and the lapse of time between the time police were called and when they could arrive at the clinic.

- Testimony from police describing how protesters would often have ceased the offending conduct by the time police arrived. *Id.* at 54a.

- Testimony from a former city council member regarding the dire nature of the City's financial affairs: "[w]e were... 300 million dollars in debt due to a botched incinerator project. And we were trying to find out ways to get out of that threatened bankruptcy... We were making some significant decisions as to how to eliminate that debt..." *Id.* at 56a.

- Testimony substantiating the City's inability to hire new police officers to increase patrol routes and explaining how the Department of Community and Economic Development ("DCED") issued several requirements related to the City's receivership status, including a prohibition on the hiring of additional officers and a moratorium on expenditures over $2,500 without prior DCED approval. *Id.* at 55a.

- Testimony describing how city council understood that increased police presence would be necessary to effectively enforce existing laws, but the City lacked the necessary financial resources to hire additional police to accomplish this goal. *See* Pet. App. 19a; 56a ("We had multiple scares in which the city was not going to be able to make payroll. Only emergency loans were able to take care of that. Police situation was not good. Our compliment on the streets was as low as four officers on the street at any particular time. You could say that there literally were street lights out...")(Q. [D]id the city have the financial resources to station a police officer at both Hillcrest

and at Planned Parenthood to enforce statutes such as the trespass ordinance? A. Absolutely not.").

The District Court considered this evidence in light of the Third Circuit's newly-clarified standard, and denied Plaintiffs' motion for preliminary injunctive relief. *Reilly v. City of Harrisburg*, 336 F.Supp.3d 451, 474 (M.D. Pa. 2018).

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 unanimously affirmed the District Court's denial of Petitioners' preliminary injunction request. Pet. App. 1a-21a. Applying the rationale from its recently-decided decision in *Bruni v. City of Pittsburgh*, No. 18-1084, 2019 WL 5281050 (3d Cir. Oct. 18, 2019) ("*Bruni II*"), the Court agreed that Harrisburg's Ordinance was content neutral and narrowly tailored to meet Harrisburg's legitimate interests. As a result, the Court found that the Ordinance passed muster under an intermediate scrutiny test.

First, the Court found the Ordinance "fairly susceptible" to a construction that excluded sidewalk counseling or other similar conduct from the Ordinance's prohibitions. The Court rejected Petitioners' contention that the District Court improperly engaged in a "rewrit[e]" of the Ordinance to reach this result; rather, the Court concluded that the District Court properly construed the terms "congregate," "patrol," "picket," and "demonstrate" in accordance with their plain meanings to

exclude peaceful one-on-one conversations or leafletting. Pet. App. 11a-12a (*citing Bruni II*, slip. op. at 24–26).

Second, the Court rejected Petitioners' claim that the Ordinance was unconstitutionally vague or overbroad, relying upon previous judicial opinions that found that the term "demonstrate" was not unconstitutionally vague when read in context. Pet. App. 13a (citing *Schenck v. Pro-Choice Network of W. New York,* 519 U.S. 357, 367 (1997)).

Third, because the Court held that "demonstrating" and "picketing" go to "the manner in which expressive activity occurs, not its content," it affirmed the District Court's finding that the Ordinance is not content based and not subject to strict scrutiny. *Id* at 15a.

Fourth, the Court held that the Ordinance, properly interpreted, did not prohibit sidewalk counseling—or any other peaceful one-on-one conversations about any subject or for any purpose—in the buffer zone. The Court therefore held that "there is no need for law enforcement 'to examine the content of the message . . . to determine whether a violation has occurred.'" *Id.* at 15a.

Fifth, the Court concluded that there was no evidence that the City adopted the Ordinance for an impermissibly content-based reason. Rather, the Court found that the interests specified in the Ordinance itself—providing "access to health care facilities," "prevent[ing] violent confrontations," and "protecting the First Amendment rights of demonstrators to communicate their message"—were content neutral. *Id.* at 16a.

Finally, the Court affirmed the District Court's finding that the Ordinance was narrowly tailored to the government's legitimate interests because Harrisburg did not "resort[] to a fixed buffer zone ... in the first instance" but "attempt[ed] or consider[ed] some less burdensome alternatives and conclud[ed] they were unsuccessful in meeting the legitimate interests at issue." *Id.* at 18a-19a. The Court cited specific evidence establishing both that existing criminal laws (prohibiting trespassing, excessive noise, and disorderly conduct) were insufficient to keep protests under control and how—because of its grave financial situation and scarce resources—the City was unable to expend police resources to enforce these laws. *Id.* at 19a.

Petitioners sought rehearing *en banc* but the Third Circuit denied Petitioners' request. *Id.* at 114a-115a.

REASONS FOR DENYING THE PETITION

Petitioners seek this Court's intervention on three grounds, none of which warrant it.

First, Petitioners ask this Court to clarify whether the test for determining whether a regulation is content based set forth in *Reed v. Town of Gilbert* replaced the test set forth in *Hill v. Colorado*. That question, however answered, is not worthy of this Court's review. The Courts below were not asked to address this question and therefore did not determine it. Moreover, the Third Circuit fully considered this Court's decision in *Reed*, which Petitioners now claim is the proper standard, in reaching its decision. Petitioners are simply dissatisfied with the Third Circuit's

application of this law. As such, their request is one for error correction that this Court should deny. Sup. Ct. R. 10; *see also Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is 'outside the mainstream of the Court's functions'") (*quoting* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)).

Petitioners' requests for review of the Court's construction of the Ordinance and application of the doctrine of constitutional avoidance fare no better. There is no tension between this Court's precedent and the Third Circuit's finding that the Ordinance did not draw lines between categories of speech, but rather that "congregate," "patrol," "picket," and "demonstrate" address the manner or expression of speech and do not prohibit peaceful one-on-one conversations or leafletting.

Similarly, the Third Circuit carefully applied this Court's precedent when it reviewed the evidentiary record and concluded that there was sufficient and meaningful evidence that the Ordinance reflected the least restrictive means to address the government's expressed legitimate concerns. Petitioners are not able to cite legal error in the Third Circuit's reasoning; instead, they urge this Court to wade into issues of fact which are inappropriate for review, particularly where the Third Circuit specifically noted that through "declarations, documentary evidence, and in-court testimony," Respondents carried their burden of proof. Pet. App. 20a. Because this case presents a poor vehicle to consider any of the three Questions Presented, and because the Third Circuit's decision comports with this Court's precedent, the Petition should be denied.

1. The Third Circuit Properly Determined that the Ordinance was a Narrowly Drawn Content Neutral Regulation Leaving No Question for this Court to Decide.

a. This Case is a Poor Vehicle for Consideration of the Questions Presented.

Petitioners ask this Court to grant certiorari to determine "[w]hether this Court's holding in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), that laws restricting speech on the basis of its function or purpose are facially content-based, overruled and replaced this Court's previous test for content neutrality set forth in *Hill v. Colorado*, 530 U.S. 703 (2000)." Pet. i.

This case is a poor vehicle for consideration of this issue.

First, Petitioners did not properly preserve the issue for review. Petitioners did not challenge the viability of *Hill* after *Reed* in their opening brief in the Third Circuit. Thus, Petitioners clearly waived any argument that *Reed* overruled *Hill* or that the two decisions are incompatible. *See United States v. Bestfoods*, 524 U.S. 51, 72–73 (1998) (declining to entertain an issue on which the courts below did not focus); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)("[W]e are a court of review, not of first view."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) (waiver of argument below precludes consideration by this Court). Rather than addressing it here, this Court should wait for a case where the issue was timely raised and preserved by the party seeking review.

Second, the Question Presented is at odds with the record. Petitioners claim that the Third Circuit "relied" on *Hill* and "ignored" this Court's content-based standard in *Reed* and *McCullen*. Pet. 35. But this is inaccurate. The Third Circuit did

not ignore *Reed* and *McCullen*; rather, it specifically considered both and applied them correctly in considering the Ordinance. *See* Pet. App. 14a (citing *Reed*) ("A law is content based if it (1) regulates speech based on "subject matter," "function," or "purpose"; (2) "cannot be justified without reference to the content of the regulated speech"; or (3) was "adopted by the government because of disagreement with the message [the speech] conveys") and Pet. App. 20a (citing *Bruni* and *McCullen* to support the conclusion that "through declarations, documentary evidence, and in-court testimony, Defendants have shown that the restriction did not 'burden[ ] substantially more speech than ... necessary to further the government's legitimate interests.'").

Petitioners' request for review of this issue should plainly be denied.

Third, this case is a poor vehicle because the issue became moot once the Court concluded that "demonstrate" and "picket" as they appear in the Ordinance do not discriminate against types of speech. Pet. App. 15a. Once the Court agreed that the proscribed activities—congregating, patrolling, picketing, and demonstrating—did not encompass the sidewalk counseling, and that there was "no need for law enforcement 'to examine the content of the message ... to determine whether a violation has occurred," it easily recognized that the Ordinance was content neutral. Petitioners concede that the Court's construction of the Ordinance in this manner renders this first issue moot. Pet. 15 ("court's narrowing construction ... avoided engaging (as moot) the district court's conclusion that police officers could objectively

determine Ordinance violations without considering the content of sidewalk speech within the buffer zone.").

Preservation and mootness are threshold issues this Court would have to resolve, to avoid rendering an advisory opinion, before reaching the Question Presented. This Court should not grant review here, when it can easily decide the question without these vehicle problems in another case.

b. The Decision below Correctly Applied This Court's Precedent.

The Ordinance explicitly bars content-discrimination: "The provisions of this section shall apply to all persons equally regardless of the intent of their conduct or the content of their speech." Code §3-371.4(B); *Reilly v. City of Harrisburg,* 858 F.3d 173, 175 (3d Cir. 2017). Section B prevents consideration of content even if content could in the abstract factor into whether a person is "demonstrating" or "congregating." Thus, even if Petitioners preserved this issue and the issue was not moot, there is no reason for this Court to grant certiorari because the Court's decision is consistent with the Ordinance language and fully comports with this Court's precedent.

In reviewing the terms of the Ordinance and concluding that it prohibited certain manners of speech (such as "demonstrations," "protests" and "picketing" within the buffer zone), rather than content, the Third Circuit applied the standard set forth in *Reed, McCullen* and *Hill* to conclude that these prohibitions were content neutral.[1] Pet. 15a (citing *Bruni II*'s citation of *Reed,* 135 S.Ct. at 2232 (stating that

[1] Even if *Reed* cast doubt on *Hill,* "[i]f a precedent of this Court has direct application..., yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case

"entirely forbidding the posting of signs" is content neutral) and *McCullen*, 573 U.S. at 491–92 (holding that Massachusetts buffer zone law was viewpoint-neutral and rejecting argument that statute was a content-based restriction on speech).

In so concluding, the Third Circuit drew heavily from its decision in *Bruni II*, which the Court had decided a mere five days before. *Bruni II* involved a Pittsburgh ordinance with language virtually identical to that of the ordinance in this case, except that the Pittsburgh ordinance created a 15-foot, rather than a 20-foot, buffer zone. Plaintiffs in *Bruni II*, like Petitioners here, identified themselves as "sidewalk counselors" who wished to engage in peaceful one-on-one conversations and who challenged the ordinance on First Amendment grounds. In *Bruni II*, the Third Circuit concluded that the plain meaning of the ordinance was "readily susceptible" to a narrowing construction that did not prohibit sidewalk counseling within the zone and accordingly rejected plaintiffs' argument that the ordinance was content based. Rather, it found that the ordinance did not prohibit sidewalk counseling—or any other peaceful one-on-one conversations on any topic or for any purpose—and, thus, "did not regulate speech based on subject matter, function or purpose." Pet. App. 85a. The Court also found that the plain language of the ordinance did not require law enforcement to examine the content of speech to determine if a violation occurred.

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which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *See Bosse v. Okla.*, 137 S.Ct. 1, 2 (2016) (per curiam) (unanimous) ("[T]he court was wrong to... conclude that *Payne* implicitly overruled *Booth*... Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

Judge Thomas Hardiman, in his concurring opinion in *Bruni II,* specifically addressed Petitioners' concern about whether the Court's decision comported with *Reed*. As he plainly stated: "Today our Court does what *Reed* requires." Pet. 111a. While he recognized that *Reed* may place certain demands on courts to: "construe the Ordinance narrowly" and "away from precedents that focused on a law's purpose rather than its facial effect," and, indeed, recognized that *Reed*, "may have expanded the types of laws that are facially content based..." *Id.* at 112a, he also recognized that where law enforcement is required to examine "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," as opposed to the content of speech to determine whether a violation occurred, the ordinance is content neutral. As a result, he agreed that the Pittsburgh Ordinance "as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations"—and, as such, is content neutral.[2]

Judge Hardiman's concurrence in *Bruni II* completely undercuts Petitioners' argument that Harrisburg's ordinance is content based under this Court's decision in *Reed*. For this reason as well, the Petition should be denied.

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[2] As Judge Hardiman made clear, "while quiet conversations—even if they are not in a tone of "kindness, love, hope, gentleness, and help;" may not be targeted and while law enforcement "must allow not only conversations that help and love, but also those that serve any other "function or purpose" within the bounds of protected speech, so long as: (i) the City's enforcement of the Ordinance is evenhanded, (ii) did not allow clinic employees or agents to engage in speech "that others could not," and (iii) the words "congregate" and "patrol" address conduct (namely, the assembly of people in one place or the action of pacing back and forth), without discriminating between types of speech, the Ordinance is not content based. Pet. App. 112a.

2. The Court's Application of the Doctrine of Constitutional Avoidance is Closely tied to the Particular Language of the Ordinance and does not Merit this Court's Review.

Petitioners' next claim—that the Third Circuit improperly construed the Ordinance by "rewriting" it to save it from constitutional infirmity, Pet. App. 117– also is unworthy of this Court's review. Petitioners do not allege that the Court's decision conflicts with decisions of other circuits. Moreover, Petitioners do not contend that the courts below were not permitted to construe the ordinance narrowly or were not permitted to use the canon of constitutional avoidance to do so. It is obvious that Petitioners are simply unhappy with the application of this canon in this case.

The Court properly applied the canon of constitutional avoidance[3] once Petitioners asserted that the ordinance created a content-based restriction on speech. *See INS v. St. Cyr,* 533 U.S. 289, 300 (2001) (courts are obligated "to construe [a] statute to avoid [constitutional] problems if it is "'fairly possible'" to do so); *Warger v. Shauers,* 135 S.Ct. 2298, 2307 (2015)(canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a provision"). The Third Circuit avoided the constitutional concerns Petitioners raised by interpreting the

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[3] The canon of constitutional avoidance is consistent with this Court's reluctance to "decide any constitutional question in advance of the necessity for its decision;" it directs that when a statute is susceptible of two constructions, one that gives rise to constitutional questions and another that avoids such questions, the court should adopt the construction that avoids the constitutional questions. "[I]t is a cardinal principle" of statutory interpretation that when an interpretation of a statute raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," and adopt that interpretation instead. *Zadvydas v. Davis,* 533 U.S. 678, 689 (2001)(*quoting Crowell v. Benson,* 285 U.S. 22, 62 (1932)); *see also Jennings v. Rodriguez,* 138 S. Ct. 830, 842 (2018) (same); *Jones v. United States,* 526 U.S. 227, 239 (1999) (explaining that this principle is "beyond debate") (quotation marks omitted).

terms "picket," "protest" and "demonstrate" according to their common meanings. Specifically, the Court recognized that the terms have obvious visible manifestations which go to "the manner in which expressive activity occurs, not its content." Pet. App. 15a. The Court's reading is the only plausible one in light of the Ordinance's plain text. There is no need to grant review to consider Petitioners' reading of an Ordinance that is inconsistent with its plain terms. And, while Petitioners suggest that this language could be improperly construed by law enforcement, Pet. at 14, the question presented should not be resolved based on hypothesized conduct but should be properly resolved by the language of the Ordinance itself.

Petitioners cite no cases to demonstrate that the Third Circuit construed the Ordinance in a manner that is at odds with its plain meaning. Rather, Petitioners heavily rely on two decisions from this Court to support their contention that use of the canon of constitutional avoidance was improper here. Both cases are inapposite. In *Reno v. ACLU,* 21 U.S.844, 884 (1997), this Court concluded that the "open-ended character of the CDA [Communications Decency Act]" provided no guidance for limiting its coverage and, thus, the statute was not "readily susceptible" to a narrowing construction. That holding is inapplicable here, where the Ordinance's plain language is susceptible to a content-neutral interpretation that does not discriminate between categories of speech.

United States v. Stevens, 559 U.S. 460 (2010), which Petitioners also invoke, is likewise inapplicable. In *Stevens,* this Court reviewed 18 U.S.C. §48, which criminalized the commercial creation, sale, or possession of certain depictions of

animal cruelty, to determine whether its prohibitions were consistent with the First Amendment. Concluding that the statute "create[d] a criminal prohibition of alarming breadth," because, among other things, the phrase "depictions of animal cruelty" was not well defined, this Court declined to read the statute as the Government requested. This Court concluded that it could not rely on the canon of constitutional avoidance to construe the statute in a manner at odds with its "natural meaning." *Id.* at 480. Here, by contrast, the Ordinance is fairly susceptible to the meaning ascribed by the Third Circuit; the terms "congregate," "patrol," "picket," and "demonstrate," when construed in accordance with their plain meanings, address conduct or expression of speech. As such, because the Third Circuit did not "rewrit[e]" the Ordinance but simply "reinterpret[ed]" it consistent with the language used, there is no tension between *Reno*, *Stevens* and the decision below.

Petitioners' reliance on comments from witnesses for Respondents to suggest that a content-neutral Ordinance may be transformed into a content based Ordinance is misplaced. The testimony upon which Petitioners rely consists of answers to hypothetical questions bracketed by the phrase "I don't know." Pet. App. 37a (A: "If two people were ...walking parallel to the building..., and they're talking about...—you know, "good morning," "good afternoon," whatever, I don't know if those people would be considered congregating by any definition. If two people were talking about anything of substance, I think the answer is, they're congregating.") Putting aside that the testimony referred to a hypothetical involving people passing through the

zone, not persons going to or from the clinic, which Petitioners have never claimed to be prohibited, the witness's testimony was equivocal at best.

Furthermore, hypotheticals also cannot substitute for evidence. This Court "must be careful not to... speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *McCullen*, 573 U.S. at 485 ("[T]he record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics..."). Petitioners presented no evidence to establish that persons passing through the zone have been cited or that police consider content when issuing citations. Petitioners also did not demonstrate that Harrisburg engaged in a pattern of doing so that is "so permanent and well settled as to constitute a custom or usage with the force of law." *Monell v. DSS*, 436 U.S. 658, 691 (1978).

Because the Court properly employed the doctrine of constitutional avoidance and followed this Court's precedent in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) and *Schenck, supra,* in interpreting the Ordinance to not prohibit peaceful one-on-one conversations or leafletting, there is no reason for this Court to grant certiorari. The Petition should be denied.

3. The Court's Holding that Respondents Demonstrated that they Explored Substantially Less-Restrictive Alternatives is Closely tied to the Particular Facts of this Case and does not Merit Review.

Petitioners' third question is equally unsubstantial and unworthy of certiorari. Indeed, this case presents a poor vehicle for this Court to decide this issue as it would require this Court to wade into complicated questions of fact. The law is well-settled

that certiorari is not appropriate where petitions allege mere "erroneous factual findings" or "the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Gressman et al., Supreme Court Practice* at 351 ("[E]rror correction . . . is outside the mainstream of the Court's functions [and] . . . not among the 'compelling reasons' . . . that govern the grant of certiorari."). This is particularly true here, where the Third Circuit cited "declarations, documentary evidence, and in-court testimony" to support its conclusion that Respondents established that the restriction did not "burden[ ] substantially more speech than ... necessary to further the government's legitimate interests." Pet. 20a. For this reason as well, this is a poor vehicle for certiorari.

While Petitioners claim that the Third Circuit improperly accepted Harrisburg's "mere assertion" that "other alternatives were inadequate to achieve its purported purpose without actually producing a meaningful legislative record demonstrating less restrictive alternatives were tried and failed, or seriously considered and ruled out for good reason," Pet. App. 35, Petitioners' challenge is an attack on a fact-bound ruling that clearly does not warrant this Court's review. As with Petitioners' other issues, Petitioners do not assert a conflict among the circuits with regard to this issue.

As courts have recognized, "the constitutionality of buffer zones turns on the factual circumstances giving rise to the law in each individual case – the same type of buffer zone may be upheld on one record where it might be struck down by another." *Bruni*, 824 F.3d 353, 357. Petitioners' challenge is predicated largely on the fact that

the City relied on a "12-page transcript of the only council meeting where the Ordinance was substantively discussed." Pet. App. 20a n.12. Petitioners claim—without any case law to support this conclusion—that this showing was insufficient. The Third Circuit, however, disagreed. It properly concluded that a more robust record was unnecessary because the government "is not required to produce all available evidence and consider alternatives at a single, recorded hearing before taking action." *Id.*

However, even if this Court were inclined to wade into these issues, the record is clear that the City presented a sufficient record to establish that it had considered, and dismissed, less restrictive alternatives. This case is unlike *McCullen*, where this Court struck down an Ordinance because there was no evidence that Massachusetts had tried other available options, including prosecution of violators, within the previous seventeen years, and had "too readily foregone" options that could have served its interests without substantially burdening the kind of speech in which the sidewalk counselors wanted to engage. The record is clear that Harrisburg did not "resort[] to a fixed buffer zone . . . in the first instance" but "attempt[ed] or consider[ed] some less burdensome alternatives and conclud[ed] they were unsuccessful in meeting the legitimate interests at issue." Pet. App. 18a.

Here, Respondents established how they adequately considered alternatives and how those alternatives failed to deter intimidation, harassment, obstruction, and trespass. Specifically, Respondents presented evidence that the buffer zone distance was narrowly, and not arbitrarily, chosen. Pet. App. 19a ("The record also

demonstrates that Harrisburg considered differently sized zones and, based on the competing interests at stake, settled on twenty feet as the optimal size, rejecting Planned Parenthood's request for a twenty-four-foot zone"); *Reilly III*, 336 F.Supp.3d at 467, 470-71 ("Thus, Harrisburg explained how it had previously considered and rejected a 15-foot zone as inadequate, and 24-foot and 30-foot zones as excessive.). Moreover, the Ordinance, as adopted, contains a scienter requirement, which limits its application. This requirement makes it illegal to ""*knowingly* congregate, patrol, picket or demonstrate..." Petitioners offer no legitimate reason why these aspects of the Ordinance do not constitute narrow tailoring.

Respondents also presented extensive evidence about the effect Harrisburg's unique financial crisis and its dwindling police department had on its ability to enforce laws at the clinics or post full-time officers at those locations. Before Harrisburg adopted the 2012 Ordinance, the Commonwealth placed Harrisburg in receivership, with the City at constant risk of failing to make payroll. Pet. App. 19a. Officers left because of uncertainty and benefit cuts. Harrisburg went from 219 full-time officers in 2009 to just 165 in 2016. Harrisburg's police force was reduced to just four officers on the street at points to protect 49,100 people. As the former special counsel to the Harrisburg City Council explained, "Harrisburg's financial crisis was "about as bad as it could be for a municipality..." Harrisburg defaulted on a $365 million debt, and faced a unique revenue problem because, as the state capital, Harrisburg cannot tax 52% of property within its borders. *See* Joint Appendix at JA345, JA345-JA346; JA370; JA344-JA345; JA349, JA445; JA189-JA190.

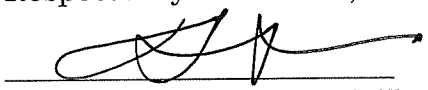
At the same time, Harrisburg experienced "a spike in violent crime," partly due to its shrinking police force. As the testimony also established, Harrisburg's hands were tied once the Commonwealth of Pennsylvania ordered Harrisburg to cut overtime and focus on preventative policing. Respondents also established that existing criminal laws prohibiting trespassing, excessive noise, and disorderly conduct were insufficient to keep protests under control before the Ordinance's enactment, due in large part to the City's inability to expend police resources to enforce these laws because of the City's grave financial situation.

Unlike in *McCullen v. Coakley*, 573 U.S. 464 (2014), Respondents here offered far more than a "simple, unproven assertion that less-restrictive alternatives are insufficient." The record is replete with examples of measures that were considered, tried and which failed as well as the financial and other reasons that justified the specific Ordinance language chosen. The Ordinance is a narrowly drawn regulation of the manner and place of speech, not its content, that serves important governmental interests and goes no further than necessary in restricting expression. Petitioners' claim that the record is not sufficiently robust is meritless. This issue does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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