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 United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver, (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
Counsel for Petitioners

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I. WHETHER *HILL V. COLORADO* SHOULD BE RECONSIDERED OR OVERRULED IS PROPERLY BEFORE THIS COURT AND CAN ONLY BE ANSWERED BY THIS COURT.

Petitioners properly preserved the issue of whether *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), replaced and overturned the content-neutrality analysis of *Hill v. Colorado*, 530 U.S. 703 (2000). Whether a precedent should be overruled is a question only this Court can answer, so Petitioners cannot be held to have waived an argument they did not present to a lower court with no authority to grant such relief. Overruling precedent from this Court is properly presented only to this Court and merits certiorari.

A. Petitioners Properly Preserved the Issue of Whether *Reed v. Town of Gilbert* Replaced the Content-Neutrality Analysis of *Hill v. Colorado*.

In their effort to insulate the lower court's order from scrutiny, Respondents argue that Petitioners waived their arguments on the lower court's reliance on *Hill v. Colorado*. (Br. Opp'n 10). Respondents cite no authority (nor could they) for the novel proposition that Petitioners who support their arguments with binding precedent, superseding or more apposite than the authorities

cited in the order on appeal, waive their arguments because they did not cite the authorities relied on by the lower court in error. To be sure, there is no authority for the proposition that avoiding waiver of an argument depends on citation of particular cases. Indeed, "**[a]n argument is not waived if it 'is inherent in the parties' positions throughout [the] case.**'" *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 301 (3d Cir. 2012) (emphasis added) (second modification in original); *see also Vento v. Director of Virgin Islands Bureau of Int. Rev.*, 715 F.3d 455, 469 (3d Cir. 2013) (same).

Petitioners' arguments need only be "inherent in [their] positions," *Nuven*, 692 F.3d at 301, or as this Court's rules and precedent require, "fairly included" in the Petition. Sup. Ct. R. 14.1(a) (providing "any question presented is deemed to comprise every subsidiary question fairly included therein"); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (noting arguments for certiorari deemed to comprise those claims "'fairly included' within the questions presented"). Petitioners went above and beyond this requirement both here and in the lower courts. Petitioners' arguments against the lower court's ostensibly *Hill*-informed conclusions were explicit, and rely on better authority. For example, in Petitioners' discussion of content neutrality in the Third Circuit (3d Cir. No. 18-2884, Opening Br. 40–49), they argued extensively that the Ordinance is not content neutral under more recent binding authorities such as *McCullen v. Coakley*, 573 U.S. 464 (2014), *Reed v. Town of*

Gilbert, 135 S. Ct. 2218 (2015), and *United States v. Marcavage*, 609 F.3d 264 (3d Cir. 2010), as well as other authorities more apposite than *Hill*.

Moreover, the district court cited *Hill* only twice, and fleetingly at that. (App. 37a, 44a.) The court first cited *Hill* in its discussion of content neutrality, for the point that police "can easily distinguish" speech prohibited by the Ordinance from permitted speech "without regard to the content of the speech." (App. 37a.) Petitioners, however, comprehensively demonstrated the error of the district court (3d Cir. No. 18-2884, Opening Br. 44–46), and cited the superseding opinion in *Reed*. *See Free Speech Coal., Inc. v. Attorney Gen.*, 825 F.3d 149, 160 n.7 (3d Cir. 2016) ("*Reed* represents a drastic change in First Amendment jurisprudence."); *Washington Post v. McManus*, 355 F. Supp. 3d 272, 296 (D. Md. 2019) ("*Reed* . . . was a watershed First Amendment case, refining the analysis of content-based regulations and cementing the primacy of the rule that such regulations receive strict scrutiny.").

The district court cited *Hill* again after supposing Petitioners have nothing to fear from the invisible boundaries of Respondents' buffer zone because the Ordinance punishes only "knowing" violations, apparently analogizing the similar provision from *Hill*. (App. 44a.) But Petitioners demonstrated, with unrebutted testimony, that police used the invisible Harrisburg boundary to intimidate and force Petitioner Reilly well beyond the actual buffer zone, to a made-up boundary far

from possible interaction with her intended audience. (3d Cir. No. 18-2884, Opening Br. 13, 37.) It was not necessary for Petitioners to explicitly name *Hill* at every turn, request a lower court to overrule *Hill* (which it has not authority to do, *infra* Part I.B), or to even name *Hill* to demonstrate these obviously distinguishable facts and inapplicable law. Respondents' waiver argument is without merit.

B. Whether a Precedent Should Be Overruled Is a Question Only This Court Can Answer, and Merits Certiorari.

Respondents contend that Petitioners have waived argument for an explicit overruling of *Hill* because they did not ask the lower courts to overrule *Hill*. (Br. Opp'n 10.) This is fallacious, *supra* Part I.A, and advocates for a system allowing "anarchy to prevail within the federal judicial system." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Petitioners cannot be faulted for declining to explicitly ask a lower court to do that which it is not empowered to do. As this Court has unequivocally held, "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Id.* Indeed, whether this Court's precedents should be explicitly overturned is a matter only this Court may decide. *See, e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("**Needless to say, only this Court may overrule one of its precedents**." (emphasis added)); *see also United States v. Cheek*, 415 F.3d 349, 352–53 (4th Cir. 2007) ("Even were we

to agree with Cheek's prognostication that it is only a matter of time before the Supreme Court overrules [its precedent], we are not free to overrule or ignore the Supreme Court's precedents.").

Thus, it would have been an act in utter futility for Petitioners to seek what Respondents claim they must have sought below in the Third Circuit, as even the court below has recognized it would have been required to reject such an argument: "Only the Supreme Court has the power to overrule one of its precedents, even where the viability of that precedent has been called into question by subsequent Supreme Court decisions." *United States v. Henderson*, 841 F.3d 623, 626 n.3 (3d Cir. 2016). Respondents' contentions concerning waiver are incorrect.

II. THE THIRD CIRCUIT'S REWRITING OF THE ORDINANCE IS INCONSISTENT WITH THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE AND CONFLICTS WITH EVERY OTHER CIRCUIT ON THE ISSUE.

A. Respondents' Contention That the Third Circuit's Impermissible Judicial Rewrite of the Ordinance Mooted the Issues Presented Here Is Incorrect.

Respondents contend that this matter became moot once the lower court redrafted the Ordinance to avoid constitutional scrutiny. (Br. Opp'n 11.) This

contention is incorrect for two reasons: (1) whether the lower court has authority to rewrite the Ordinance is one of the seminal questions on this appeal and thus cannot itself render the matter moot, and (2) a case is not moot when this Court can grant effective relief by invalidating the lower court's judicial redrafting of the Ordinance.

First, a case cannot become moot when the error of the precise act Respondents claim mooted the case is a primary question before this Court. "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Even assuming the lower court's impermissible judicial rewrite of the Ordinance could potentially moot a claim, the case is not moot when that action itself is the question presented on appeal. *See Chafin*, 568 U.S. at 173 ("[Petitioner] is asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done."). Where, as here, mootness would depend on one of the principal lower court errors that Petitioners seek to have reversed, "'[j]urisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it.'" *Id.* (quoting *Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891)).

Second, "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin*, 568 U.S.

at 172 (quoting *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)) *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (same); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (same). Effectual relief is unquestionably available from this Court, and Petitioners have sought a reversal of the lower court's decision to rewrite the Ordinance to avoid constitutional scrutiny. (*See* Pet. Cert. at i.) In fact, Petitioners have plainly presented to this Court that the Third Circuit's decision below is in direct conflict with *Reed* and that this Court should grant review to invalidate the Third Circuit's improper reliance on questionable precedent.

Petitioners seek review of an impermissible judicial rewriting of the Ordinance (Pet. Cert. 21–27), as opposed to a proper statutory amendment enacted by a legislative body. But, even where a legislative body amends an ordinance, this Court has held that such a change does not moot a case that challenges the validity of the Ordinance as applied to the Petitioners (even if it was the earlier version). *See, e.g.*, *Decker v. Nw. Envt'l Def. Ctr.*, 568 U.S. 597, 609–610 (2013). In *Decker*, this Court noted that where the party "requests injunctive relief for both past and ongoing violations," a case is not moot. *Id.* at 610. Directly contrary to Respondents' contentions here, this Court held that while a revision to or reinterpretation of a challenged law might have an effect on the merits of a claim, it does not remove the justiciability of it. "The District Court, it is true, might rule that [Petitioners'] arguments lack merit, or that the relief

[they] seek[] is not warranted on the facts of these cases. **That possibility, however, does not make the cases moot**." *Id.* (emphasis added). Mootness and the merits of a claim are different questions, and Respondent confuses them here. As this Court has held, "prospects of success are . . . not pertinent to the mootness inquiry." *Chafin*, 568 U.S. at 174.

Finally, the lower court's judicial rewrite of the Ordinance does not moot Petitioners' claims in that—even under the impermissible rewrite of the Ordinance—Petitioners still contend that it violates the First Amendment. As this Court noted in *R.A.V. v. City of St. Paul*, a claim is not moot when the narrowing construction applied to the challenged law is still invalid under the First Amendment. 505 U.S. at 381 n.3 (noting where narrowing construction does not eliminate alleged constitutional defect and such a claim was pressed in courts below, it is fairly included in the petition and warrants review). Here, Petitioners have plainly alleged that—even under a judicial rewriting of the Ordinance—the lower court failed to impose the appropriate burden on Respondents to satisfy the requisite strict scrutiny. (Pet. Cert. at i, 33–35 (pressing that the lower court did not properly apply this Court's *McCullen* standard for narrow tailoring and thus did not eliminate the Ordinance's continuing constitutional infirmity)). The questions presented here are not moot, and warrant certiorari.

B. Petitioners Have Demonstrated the Third Circuit's Decision Conflicts With Every Other Circuit on the Question of Whether a Court May Rewrite an Ordinance to Save It From First Amendment Condemnation.

Respondents also make the astounding contention that Petitioners have not alleged that the Third Circuit's decision below conflicts with the decisions of any other circuit. (Br. Opp'n 15.) But Petitioners have unequivocally argued and demonstrated that the Third Circuit's decision below **conflicts with the universal decisions of every other circuit court to address the issue**. (*See* Pet. Cert. 19–21.) Indeed, as Petitioners pointed out, the Third Circuit's impermissible use of the constitutional avoidance canon to redraft the Ordinance to avoid constitutional scrutiny has been rejected by every circuit, some of them in unequivocal language regarding the same proposition. (Pet. Cert. 19–20.) As the D.C. Circuit eloquently stated in *Al Bahlul v. United States*,

> If judicial inquiry reveals that the Congress was mistaken, it is not our task to rewrite the statute to conform with the actual state of the law but rather to strike it down insofar as the Congress's mistake renders the statute

> unconstitutional. **The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures**.

767 F.3d 1, 16 (D.C. Cir. 2014) (emphasis added) (citation and internal quotation marks omitted)).

Respondents' contention that Petitioners have failed to allege a circuit split is incorrect. The Third Circuit's decision below not only represents a departure from this Court's precedent (*see* Pet. Cert. 17–19), but it is in direct conflict with universal precedent from every other circuit. Certiorari is warranted.

III. PETITIONERS PROPERLY SEEK REVIEW OF THE APPROPRIATE BURDEN ON THE GOVERNMENT IN STRICT SCRUTINY REVIEW, NOT A PURE FACTUAL DETERMINATION.

A. Petitioners Seek a Determination of the Appropriate Burden the Government Must Shoulder in Strict Scrutiny Review.

Respondents contend that Petitioners seek merely a review of factual determinations made below. (Br. Opp'n 18–19.) But this misstates the Questions Presented and the substance of what

Petitioners seek from this Court. Petitioners have presented a question of exceptional importance to First Amendment jurisprudence:

> Whether this Court's holding in *McCullen v. Coakley*, 573 U.S. 464, 494 (2014), that the government must demonstrate it seriously undertook to address alleged problems with protected speech by less restrictive tools readily available to it, requires that the government show, with a meaningful record, that other less restrictive alternatives were tried and failed or that such alternatives were closely examined and ruled out for good reason, as stated in *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016) [hereinafter *Bruni I*].

(Pet. Cert. at i.) As is plainly evident, Petitioners are seeking a determination of what strict scrutiny requires in this context, not primarily a determination of whether the facts below were sufficient to satisfy a standard that was never applied and that Petitioners are seeking this Court to clarify.

B. The Appropriate Burden to be Applied in Strict Scrutiny Review is a Question of Exceptional Importance that Merits Certiorari.

This Court's precedents plainly demonstrate that certiorari is the appropriate mechanism to address the exceptionally important question of what level of scrutiny is applicable to regulations of speech, and whether the lower court applied the correct standard. *See, e.g.*, *Nat'l Inst. Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018) (noting certiorari granted to determine whether the Ninth Circuit applied the appropriate level of scrutiny to California's regulation of speech); *McCullen v. Coakley*, 573 U.S. 464, 485 (2014) (granting certiorari to consider whether strict scrutiny was appropriate level of scrutiny); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (granting certiorari to determine whether lower court applied appropriate level of scrutiny); *see also Emp't Div. v. Smith*, 494 U.S. 872, 884–85 (1990) (discussing long history of this Court's cases where certiorari granted to determine appropriate level of scrutiny for a challenged law).

Moreover, this Court has often granted certiorari to determine the appropriate burdens that must be carried under the appropriate level of scrutiny. *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (granting certiorari to determine what must be demonstrated to satisfy narrow tailoring requirements of strict scrutiny);

McCullen, 573 U.S. at 486, 490–91 (discussing appropriate burden that must be satisfied under strict scrutiny). This is true even where—as here—the lower court applied a narrowing construction to the Ordinance. *See, e.g.*, *R.A.V.*, 505 U.S. at 391 (determining whether the challenged law was narrowly tailored, even after a narrowing construction by the lower court); *id.* ("[W]e conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional."); *id.* at 395–96 (noting that—even as narrowly construed—the ordinance was not narrowly tailored because there were adequate content neutral alternatives that would have sufficed to achieve the government's alleged interest).

Here, the same is true. Even as improperly rewritten by the Third Circuit, the Ordinance was still not subjected to the appropriate level of scrutiny. As Petitioners have demonstrated, the lower court did not mandate that Respondent **show** (rather than merely assert) that less restrictive alternatives would not work. (*See* Pet. Cert. 28–35.)[1] Its failure to do so warrants this Court's review. The Petition should be granted.

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[1] For example, Respondent contends that its financial mismanagement and budget woes were sufficient to warrant a lesser burden of scrutiny under the First Amendment. (Br. Opp'n., at 21.) But, "the denial of a fundamental right . . . cannot be justified by reference to cost or convenience." *Nadeau v. Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977). The lower court failed to require Respondent to demonstrate its narrow tailoring burden under *McCullen* by merely allowing financial considerations to trump First Amendment rights.

CONCLUSION

For the foregoing reasons, and for all those articulated in Petitioners' Petition for Writ of Certiorari, the Petition should be granted.

Dated this June 9, 2020.

Respectfully submitted,

s/ Roger K. Gannam
Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
Counsel for Petitioners