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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The lynchpin of the City's opposition is that the Third Circuit's narrowing construction of the buffer-zone ordinance is "reasonable and readily apparent." That argument fails. Federal courts only construe state and local laws narrowly to save them from constitutional infirmities when local officials urge that construction. And at every stage of this litigation (until now), the City's officials expressly rejected the Third Circuit's interpretation. The City has always construed its own ordinance to squelch speech by pro-life sidewalk counselors; in fact, prohibiting pro-life sidewalk counseling is one of the reasons those officials enacted the ordinance. And in narrowly construing the ordinance's use of the word "congregate," the Third Circuit relied on a decision interpreting a congressional enactment for the District of Columbia based on the District's common-law definition of that term. The City interprets "congregate" a different way, as shown by another provision in the City's own code of ordinances.

With or without the City's lynchpin, the petition stands unrebutted. There is a 7-3 circuit split over the federal courts' authority to narrow state and local laws to save those laws from constitutional defects. Pet. 14–24. There is a conflict between the Third Circuit's First Amendment analysis and this Court's unanimous opinion in *McCullen* v. *Coakley*, 573 U.S. 464 (2014). Pet. 25–29. And there is a conflict between the Third Circuit's decision and three other circuits interpreting *McCullen*. Pet. 29–30.

The petition and ten amici briefs confirm that both the federalism and free-speech questions presented require review. Certiorari is warranted.

I. The City's arguments do not alleviate the circuit conflict over federal-court authority to narrow state and local laws.

As the petition explains and the Third Circuit acknowledged, this case involves a mature circuit conflict over whether federal courts have independent authority to narrow state and local laws to save those laws from constitutional infirmities. Pet. 15–24; Pet.App.21a–22a n.14 (discussing circuit split). Accord, *e.g.*, Br. of W. Va., et al. ("States Br.") 15–16 ("Disagreement on this issue is lopsided, with a two-to-one majority of circuit courts adhering to the proper limits on federal courts' review of state and local law. . . . [The decision below] elevated what might have been dismissed as an outlier position into a mature divide that warrants resolution."). The City's arguments do not change that reality.

1. The pro-life sidewalk counselors and supporters did not argue that "in no circumstances can a federal court issue a narrowing construction of a state statute." Opp. 14. They explained that federal courts "will accept a state-initiated narrowing construction that is 'reasonable and readily apparent.'" Pet. 22 (quoting *Boos* v. *Barry*, 485 U.S. 312, 330 (1988)). The problem is the City "proffered" no limiting construction here. Pet. 21 (cleaned up). City officials rejected the Third Circuit's interpretation; they wanted the broadest law possible to prevent women seeking abortions from "unwanted communication" from pro-life speakers. Pet. 6 (quoting JA402a). Courts in the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits would have respected federalism and honored those officials' wishes. Pet. 23. The First, Third, and Ninth Circuits take the opposite approach. Pet. 22–23.

2. The City cites *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), for the proposition that, in extrapolating the meaning of a state or local law, a federal court gives only *some* deference to the interpretation "by those charged with enforcing it." Opp. 13–14. The pro-life sidewalk counselors and supporters do not disagree. But the City ignores *Grayned*'s very next sentence, which expressly holds that "it is not within [the power of federal courts] to construe and narrow state laws." *Grayned*, 408 U.S. at 110 & n.14 (citing *United States* v. *37 Photographs*, 402 U.S. 363, 369 (1971)). Federal courts defer to state and local officials' construction of their own laws "even if another reading seems more textually valid." Pet. 18 (citing *Forsyth Cty.* v. *Nationalist Movement*, 505 U.S. 123, 131–32 & n.9 (1992), and *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154, 162 (1971)).

3. The Third Circuit rejected the City's interpretation of its own statute, holding that sidewalk counseling is not "congregating" because it involves only two people. Pet. 18–22. The City now says the court permissibly gave the ordinance a "reasonable and readily apparent" construction. Opp. 12–17. Not so. The Third Circuit's narrowing construction relied on *Boos*' statement that "congregating" involves three or more persons. Opp. 16 (citing *Boos*, 485 U.S. at 316–17). But this Court in *Boos* interpreted a statute enacted by *Congress* and reiterated that "federal courts have the power to adopt narrowing constructions of federal legislation." 485 U.S. at 330–31. Moreover, the Court relied on the District of Columbia common law's definition of "congregation" as "an assemblage of three or more people." *Id.* at 316–17 (citations omitted).

In contrast, Pennsylvania common law has never defined the term "congregate" to require a three-person minimum. Pennsylvania turns to dictionary definitions to ascertain "the common and approved meaning of a word." *Chamberlain* v. *Unemployment Comp. Bd. of Review*, 114 A.3d 385, 394 (Pa. 2015). Merriam Webster defines "congregate" as "to collect into a *group* or crowd," and then defines "group" as "two or more figures."[1] Accordingly, the most reasonable and readily apparent meaning of the word "congregate" (under Pennsylvania law) is a gathering of two or more individuals. See *Friends of Danny DeVito* v. *Wolf*, 227 A.3d 872, 890 (Pa. 2020) (noting that, under Pennsylvania Governor's authority to control ingress and egress to a disaster area, the Governor controls any location "where *two* or more people can *congregate*") (emphasis added).[2]

Most important, the City has specified that the term "congregate" includes as few as two persons in another portion of its laws. In Article 9 of the City's Code of Ordinances, Chapter 926.8 defines "Sexual Encounter or Meditation Center" as any business, agency, or person "who, for any form of consideration or gratuity, provides a place *where two (2)* or more persons, not all members of the same household, *may*

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[1] *Congregate*, MERRIAM-WEBSTER'S DICTIONARY, https://perma.cc/2E3F-XDCE (emphasis added); *Group*, MERRIAM-WEBSTER'S DICTIONARY, https://perma.cc/KHH3-FFGH.

[2] Cf. *People* v. *Lo Vecchio*, 56 N.Y.S.2d 354, 358 (N.Y. City Ct. 1945) ("The word 'congregate' implies the joint action of *two* or more persons.") (emphasis added); *Marine Indus. Ass'n of S. Fla.* v. *Fla. Dep't of Env't Prot.*, 672 So.2d 878, 882–83 (Fla. 4th Dist. Ct. App. 1996) ("congregate means *more than one* mammal together") (emphasis added).

congregate, assemble or associate for the purpose of engaging in specified sexual activities or exposing specified anatomical areas."[3] That is why City officials have always construed the term "congregate" in the buffer zone to prohibit quiet, peaceful, one-on-one sidewalk counseling: there are two persons congregating there. Construing the word "congregate" to require *three* or more individuals would not be a reasonable and readily apparent interpretation of any Pittsburgh ordinance.

Given all this, it is decidedly *not* reasonable to say that a law intended, written, and implemented to ban sidewalk counseling (which naturally involves at least two people) does not actually ban sidewalk counseling. That is why City officials have interpreted the ordinance as a pro-life sidewalk counseling ban since this litigation's inception. Pet.App.5a, 11a, 19a & n.12, 26a n.18, 46a, 82a, 142a–43a.

Accordingly, the Third Circuit's ruling runs headlong into this Court's description of the "vertical separation of power[s]" and insistence that "[a] federal court cannot avoid a constitutional question by imposing its own limiting interpretation on a local law." Br. of Ctr. for Const. Juris. ("CCJ Br.") 3, 5. And because of the circuit split—a split that the Third Circuit acknowledges—"sixteen States, as well as their cities and municipalities, have no guarantee that federal courts will take their laws at face value when evaluating constitutional challenges." States Br. 17. Certiorari is warranted to resolve the 7-3 circuit split over the first question presented.

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[3] Pittsburgh, Pa., Code of Ordinances ch. 926, art. 9, https://perma.cc/G2B6-PJRF (emphasis added).

II. The City ignores the circuit conflict over *McCullen*'s narrowing-tailoring standard, effectively conceding it.

The City accepts that the Third Circuit characterized the buffer-zone law's impact on sidewalk counselor's speech as "minimal" or "not . . . significant," so that the court could say the ordinance (as construed by the court) "was narrowly tailored." Opp. 3–4, 6 (cleaned up). That concession is problematic for the City, because the Third Circuit's analysis conflicts with *McCullen* and decisions of the First, Fourth, and Tenth Circuits in three ways. First, the Third Circuit improperly shifted the burden of proof to the sidewalk counselors and supporters to show a substantial—not de minimis—burden on their speech. Second, the court refused to recognize that less-speech-burdening measures would serve the City's interests. And third, the court ignored the City's admission that it never tried less-speech-burdening measures before creating buffer and bubble zones around abortion clinics. Pet. 28–30.

As did the *McCullen* district court, the Third Circuit wrongly downplayed "the burden[ ] that buffer-zone ordinances [a]re imposing on the First Amendment rights of sidewalk counselors." Br. of Eleanor McCullen 17. This misstep "conflicts with the First, Fourth, and Tenth Circuits' approaches[, which] applied *McCullen* where challengers have shown *some* burden on their speech. But none have required challengers to show a *significant* burden. Indeed, each of those courts have applied the narrow-tailoring inquiry without discussing a requisite burden level." Br. of U.S. Senators & Representatives 7; accord Br. of Am. Ctr. for Law & Justice 12. Certiorari is warranted on the second question presented, too.

III. The City never denies that its reading of the buffer-zone ordinance is content and viewpoint based.

The petition explains that the City's reading of the ordinance is content and viewpoint based, violating *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015). Pet. 25–27. The City never denies that. Instead, the City says that the Third Circuit's *limiting construction* is content neutral. *E.g.*, Opp. 7–8 (Judge Hardiman's concurrence explains why the buffer zone is content neutral based on "the Third Circuit's interpretation of the [Ordinance's] text and purpose"); *ibid.* ("as interpreted by the Third Circuit," the ordinance is content neutral); *id.* at 10 (same); *id.* at 9 ("Third Circuit's interpretation of the Ordinance does not regulate speech based on its purpose or function").

But the pro-life sidewalk counselors and supporters raise no First Amendment challenge to the Third Circuit's narrowing construction because it is fictional, non-binding, and irrelevant. Even the City recognizes that "[t]he Third Circuit *affirmed* the District Court's grant of summary judgment in the Respondents' favor." Opp. 3 (emphasis added). So federal courts issued no declaratory judgment, injunction, or other order enforceable against the City. All the sidewalk counselors hold now is a scrap of paper with a purported limiting construction that binds no one. Pet. 17–20.

The City never explains why this advisory opinion matters. Federal courts "lack jurisdiction authoritatively to construe state legislation." *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972). The City knows this, and so do Pennsylvania courts. *E.g.*, *Wertz* v. *Chap-*

man Twp., 741 A.2d 1272, 1278 (Pa. 1999) (holding "federal decisions predicting" Pennsylvania law "unpersuasive" and declaring itself the "final arbiter of state law"). Once this litigation ends, the City may construe the ordinance, as it always has, to bar sidewalk counseling in the buffer zone. Pet. 8–10. And "state courts are free to ignore the limiting interpretation imposed by the federal court." CCJ Br. 5.

As the States' amici brief makes clear, the Third Circuit's attempt to "avoid a constitutional question" did "not save[ ] the law so much as declare[ ] that a *different* law passes constitutional muster." States Br. 17. "All parties to this action recognized that the Pittsburgh ordinance covers Petitioners' conduct, including sidewalk counseling, yet they are left with a declaration that the First Amendment allows an ordinance prohibiting different conduct—an ordinance Pittsburgh did not enact." *Id.* at 17–18.

Because the Third Circuit's construction is nonbinding, the City's content-and-viewpoint based construction of its own ordinance controls. Pet. 17–20. "The City allows peaceful one-on-one conversations in the zone about the weather, directions, sports, or any discussion it deems—in its discretion—purely social or random." Pet. 25 (citing JA334, 692a–93a, and Pet.App.45a). "But Pittsburgh bans peaceful one-on-one conversations in the zone it views as 'advocacy or demonstration,' including speech about whether an unborn baby is alive or a human being." *Id.* (citing Appellees Br. 11, 13, 18–19, and 37). Such content- and viewpoint-based regulation is unconstitutional. Pet. 25–27. And this shows that lower courts are confused about how to reconcile *Reed* and *Hill* v. *Colorado*, 530 U.S. 703 (2000). 40 Days for Life, et al., Br. 16–18.

IV. The City unintentionally underscores the ordinance's substantial overbreadth.

Rather than address the sidewalk counselors and supporters' overbreadth claim, the City (again) touts the Third Circuit's purported limiting construction. *E.g.*, Opp. 11 ("the Third Circuit's narrowing construction" refutes Petitioners' overbreadth claim*); id.* at 11–12 ("Given the validity of the narrowing construction . . . Petitioners have failed to show that the Ordinance is overbroad."). But that narrowing construction is nonbinding, as just explained. See also Pet. 15–22.

Alternatively, the City emphasizes that the sidewalk counselors and supporters must show the ordinance's overbreadth "from actual fact." Opp. 11 (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003)). But examining the facts here underscores the ordinance's overbreadth. The law bars knowingly congregating, patrolling, picketing, or demonstrating within a 15-foot buffer zone outside the City's two abortion clinics. Pet. 6–7. The City Council passed the ordinance to protect listeners "from unwanted communication." JA402a. It intended the law to bar sidewalk counseling outside abortion clinics and succeeded: sidewalk counselors avoided the zone for fear of fines and imprisonment for over a decade. Pet. 8. But the City allowed others to speak one-on-one in the zone, deeming their expression "purely social or random conversations." Pet.App.45a. Even under the Third Circuit's narrowing construction, the ordinance prohibits all forms of conventional advocacy—including praying, holding signs, sporting buttons, or wearing symbolic clothing—on the public sidewalk and street. Pet. 32.

The City's buffer-zone law thus excludes all manner of "constitutionally protected speech" in a traditional public forum, including "leafletting and demonstrating." *Hicks*, 539 U.S. at 122. Few, if any, applications of the ordinance are "legitimate." *Id.* at 124. The law's terms are "specifically addressed to [restrict] speech or . . . conduct necessarily associated with speech (such as picketing or demonstrating)." *Ibid.* And the ordinance's "purpose . . . has [everything] to do with the First Amendment." *Id.* at 123. The ordinance is exactly the sort of speech-squelching law that *Hicks* considered substantially overbroad.[4]

As the Members of Congress amici brief observes, "under the City's own interpretation, the ordinance puts *anyone* in Pittsburgh at the mercy of the police to determine what speech violates the law." Br. of U.S. Senators & Representatives 15. So even though the City's ban uniquely and detrimentally impacts sidewalk counselors, Br. of the Pro-Life Union of Greater Philadelphia 7–11, it also negatively affects "those protesting the president or the Iraq war." Br. of U.S. Senators & Representatives 15. This Court should not tolerate a buffer-zone law that prophylactically bars all manner of protected speech in a traditional public forum.

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[4] The City claims that Petitioners conceded there is no indication the ordinance was enacted to stifle speech. Opp. 10. But the City only cites Petitioners' acknowledgment that the City might also have other, non-speech-squelching interests. *Ibid.* Petitioners have always maintained that the City desired to stifle pro-life speech. *E.g.*, App. Br. at 40–41 ("[T]he Ordinance was aimed at speech concerning abortion.").

V. The questions presented are of national importance and this case is a clean vehicle.

Buffer zones place immense burdens on sidewalk counselors' speech because counselors need proximity to communicate their caring messages with a peaceful demeanor and to provide written information. Life Legal Defense Found. Br. 5–6; Br. of the Pro-Life Union of Greater Philadelphia 7–11. Yet this Court "has applied the intermediate standard of scrutiny to abortion-clinic buffer zones, with mixed results." *Price* v. *City of Chicago*, 915 F.3d 1107, 1112 (7th Cir. 2019). While it may be unnecessary to overrule any of those precedents, it is certainly long overdue for the Court to clarify them and again place pro-life speech on an equal footing with other speech.

The City downplays this case's significance, characterizing it as "a highly fact-sensitive matter involving a purely local ordinance," Opp. 4, one in which the pro-life sidewalk counselors and supporters seek mere "error correction," *id.* at 1. But that characterization is not accurate. The facts are undisputed, as the Third Circuit's ruling on summary judgment makes plain. JA6a–14a. And the petition raises pure legal questions about federalism and free speech that are of national importance. Because those questions are constitutional in nature, they have "bearing beyond the context of this case." Contra Opp. 1. The Third Circuit's ruling "magnifies confusion over foundational questions of state-federal relations," States Br. 23, and "leaves Petitioners and parties like them with no meaningful remedy for federal constitutional claims," *id.* at 18.

"There is no basis in the original understanding of the free speech guaranty . . . for an 'abortion' exception, or indeed any similar subject matter exception." CCJ Br. 9. Preventing "'individuals from saying what they think on important matters[,] . . . undermines' our democracy and the search for truth." Br. of U.S. Senators & Representatives 12–13 (quoting *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018)). "This is especially true on public streets and sidewalks where a listener 'encounters speech he might otherwise tune out.'" *Id.* at 13 (quoting *McCullen*, 573 U.S. at 476). "Allowing the decision below to stand will flout that high purpose and stifle the free speech rights of citizens across the country." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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