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 OF WEST VIRGINIA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

(*continued*)

Page(s)

TABLE OF AUTHORITIES

(*continued*)

Page(s)

TABLE OF AUTHORITIES

(*continued*)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES

(*continued*)

Page(s)

TABLE OF AUTHORITIES

(*continued*)

Page(s)

INTERESTS OF *AMICI CURIAE*[1] AND SUMMARY OF ARGUMENT

Article III's promise of judicial review protects the States' sovereignty over drafting *and construing* their own laws. The federal judiciary certainly possesses "some checking power of the States" through its authority to declare state and local laws unconstitutional. See David M. O'Brien, Constitutional Law and Politics 27 (8th ed., vol. 2 2011). Yet although necessary for the judicial branch to serve as an arbiter of federal constitutional law, that sobering power is balanced by careful respect for state legislative sovereignty. Federal courts are thus bound to follow state high-court interpretations of state law—and where that guidance is lacking, they must consider how the State would interpret a statute rather than substituting "any narrowing construction" federal courts deem appropriate. Pets.' App. 21a. The majority of the federal courts of appeals would agree that the Third Circuit's decision below crossed that line. The Court should grant review to provide national certainty and confirm that it did.

The States of West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah respectfully submit this brief as *amici curiae* in support of Petitioners. *Amici* States write to emphasize that this case raises important questions

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[1] Pursuant to Supreme Court Rule 37.4, counsel for *amicus curiae* the State of West Virginia timely notified the parties of *amici*'s intent to file this brief.

of federalism involving the balance of authority between States and the federal courts. The Third Circuit disregarded the City of Pittsburgh's interpretation of its own buffer-zone ordinance, and *sua sponte* adopted a narrower construction with weak grounding in the text that neither party advanced. The court below thus strayed from constitutional avoidance into effectively rewriting local law.

Amici emphasize *first* the importance of taking up this case because the Constitution's framework requires federal courts to avoid stepping into state policymaking through *sua sponte* inventive statutory interpretation. Respect for the States' construction of their own laws is evident in numerous doctrines guiding federal courts' review. Seven circuits apply those principles differently than the Third Circuit in the specific context here of construing local law in the face of a federal constitutional challenge.

Second, the consequences of these divergent views warrant review. The decision below deepens confusion among federal courts nationwide on the Questions Presented. Yet key issues of statutory construction and judicial restraint should not turn on a game of geographic luck. Effectively rewriting state and local laws to avoid compelling constitutional challenges hurts litigants because federal courts' *sua sponte* narrowing constructions are not binding on state courts. As a result, a decision motivated by a laudable desire to salvage a constitutionally suspect law may end up depriving parties of an effective

remedy by declaring *some* reading of the law valid, yet refusing to answer whether the same is true for the interpretation local officials *actually enforce*.

REASONS FOR GRANTING THE PETITION

I. PRINCIPLES OF STATE SOVEREIGNTY BAR FEDERAL COURTS FROM REWRITING STATE LAWS.

A. The Constitution Balances The Power Of Federal Courts With Respect For The States' Lawmaking Authority.

With its weak theory of central government, the ill-fated Articles of Confederation bred dysfunction from the beginning. Apart from granting Congress too little authority to protect national interests, the Articles also kept the federal judiciary's jurisdiction too closely in check. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 284 n.3 (1971); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 468-69 (1994). The power of federal courts we now take for granted to apply federal law and bind parties to their holdings was virtually non-existent in the pre-Constitution era. Pushaw, 69 Notre Dame L. Rev. at 448, 468-69. The federal government instead had to rely on state courts—which at that time often rebuffed national law in favor of their own interests. See The Federalist No. 81 (Signet ed. 2003) (A. Hamilton); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 Univ. of Chi. L. Rev. 887, 910 (2003). The States, too, lacked an effective

avenue to resolve disputes outside their borders. See *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 688-90 (1838) ("The tribunal was, of course, changed; for now an independent judicial department was established, which had no existence under the confederation.").

Of course, the colonies' experience under Great Britain counseled against overcorrection by yielding too much sovereignty to the federal government. The solution thus involved "a partial union or consolidation" in which the States "surrendered only a part of [their] sovereign power to the national government." The Federalist No. 32, at 194 (A. Hamilton); *Atl. Coast Line R. Co.* v. *Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970). Each sovereign—the States and the federal government—would "wield" their powers with independence. *Murphy* v. *Nat'l Collegiate Ass'n*, 138 S. Ct. 1461, 1475 (2018). And one of the inherent powers States retained is "the plenary authority to make . . . their own laws." *Danforth* v. *Minnesota*, 552 U.S. 264, 280 (2008).

The importance of state lawmaking authority is as resonant in the intersection between the States and the judicial branch as it is between the States and Congress. The Framers corrected the Articles' failings by empowering the federal judicial branch to "declare the sense of the law" and the Constitution and to bind States to those declarations. The Federalist No. 78, at 467 (A. Hamilton). Yet they also cabined this power in important ways.

One example is limiting federal courts' jurisdiction to cases and controversies. See U.S. Const. art. III., § 2, cl. 1. The term "cases" was historically limited to formal legal questions that the courts answer "through exposition—the process of determining, construing, and applying legal rules." Pushaw, 69 Notre Dame L. Rev. at 474; see also 2 Max Farrand, The Records of the Federal Convention 430 (1911). Critically, resolving "cases" "did not make law," but provided "the best evidence of what the law was." Pushaw, 69 Notre Dame L. Rev. at 478. This prerequisite also ensured that federal courts would intervene in matters of state law only where a genuine controversy exists, rather than using the powerful tool of judicial review in a merely advisory context.

Indeed, the very idea of judicial review shields against the judicial branch "alienat[ing] . . . State power by implication." The Federalist No. 82, at 492 (A. Hamilton). On the one hand, limiting federal courts to "say[ing] what the law is" and "apply[ing] the rule to particular cases," *Murphy*, 138 S. Ct. at 1486 (Thomas, J. concurring) (citation omitted), ensures that courts do not step into policymaking. The Founders explicitly rejected proposals that would have allowed the judicial branch to draft legislation, for example: The Convention scrapped the "Council of Revision" proposal, which involved federal courts (in conjunction with the executive branch) reviewing and framing legislation, on the basis that lawmaking is not part of the judicial power. Pushaw, 69 Notre Dame L. Rev. at 490-91. Yet on the other hand, judicial review under the Constitution is strong—

federal courts can "declare an unconstitutional law void." 2 Farrand, at 78. Giving true power to the federal courts in this way safeguarded the supremacy of federal law while protecting state legislative sovereignty better than alternate approaches, such as letting Congress veto potentially unconstitutional state laws before they go into effect. See *Shelby Cty., Ala.* v. *Holder*, 570 U.S. 529, 542 (2013).

The effect of these compromises is that the States transferred to the federal judiciary the significant power to strike down unconstitutional state and local laws—or in other words, States could no longer legislate with abandon. But the States deliberately kept their legislative power. They thus ratified a Constitution that allows federal courts to police the boundaries of that authority, but not to second-guess or redraft policies that the States and their localities put into place.

B. Federalism Requires Respect For The States' Decisions When Construing Their Own Laws.

The constitutional balance between federal judicial power and state legislative sovereignty plays out in the care federal courts afford to States when construing state laws.

1. Only States can "authoritatively . . . construe" their own laws. *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972) (citation omitted). As a result, federal courts reviewing state and local laws must be vigilant not to "unduly interfere with the legitimate activities of states." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

This caution is evident in the Rules of Decision Act, in which Congress recognized that controversies subject to federal courts' jurisdiction would often be governed by state law, Pushaw, 69 Notre Dame L. Rev. at 504—and mandated accordingly that state law apply unless the Constitution or federal law "otherwise require or provide." Judiciary Act of 1789, 28 U.S.C. § 1652. It also shows up in the tradition of certifying issues to a State's high court where federal courts have questions about the scope of state law. Certification is preferable to "speculat[ing]" about "the possible constructions of state law," and better builds "a cooperative judicial federalism." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78-79 (1997) (citation omitted); *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

And of course, the tenet that States alone can authoritatively construe their laws is on full display in the Court's abstention jurisprudence. Under *Pullman* abstention, federal courts abstain from hearing challenges to the constitutionality of state enactments before state courts have the opportunity to do so. See also *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 498 (1941). The *Younger* abstention doctrine further precludes federal courts from hearing constitutional challenges to state enactments that can be raised during ongoing state criminal, and some civil, proceedings. *Younger*, 401 U.S. 37. And the *Colorado River* doctrine counsels federal courts to stay or dismiss federal actions in the face of parallel state court proceedings. *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976).

These principles all show the wisdom of the specific doctrine in question here: federal courts' hesitance to force a limiting construction on state law that neither the State's courts nor its advocates support. The Court takes federalism seriously and has historically refrained from construing state statutes when resolving constitutional challenges that turn on the proper scope of non-federal laws. One seminal example is *Shipp* v. *Miller's Heirs*, where the Court held itself bound by the State's construction of local real property laws. 15 U.S. 316, 325 (1817). Similarly, *Murdock* v. *City of Memphis*, 87 U.S. 590, 632, 635 (1874), held that federal courts may not review state-court holdings on state law.

Today, this practice has evolved into a "special rule[]" of cautiously construing state laws. Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. Pa. J. Const. L. 1167, 1177 (2007). Starting from the premise that state sovereignty strips federal courts of "jurisdiction authoritatively to construe state legislation," *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971), the rule constrains the federal judiciary to the interpretation of a State's high court or (in appropriate circumstances) of "those charged with enforcing" the challenged law. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). Applying appropriate restraint may be a "delicate task" where a State's high court is silent on the law in question; yet because "it is not within [federal courts'] power to construe and narrow state laws," attention to

authoritative pronouncements by state and local officials is often a second-best option. *Id.* at 109-10; see also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 617 (1973) (giving weight to state official's construction). And as especially relevant here, the same principle applies to local ordinances, too. See *City of Houston, Tex.* v. *Hill*, 482 U.S. 451, 474 (1987) (Powell, J., concurring) (quoting *Gooding*, 405 U.S. at 520).

Accordingly, the Court cautions against *sua sponte* employing the constitutional avoidance canon to non-federal laws (as the Third Circuit did here), because the court might "rewrite a law to conform it to constitutional requirements." *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (cleaned up). The Court may in proper circumstances view state and local officials' "authoritative constructions" of their laws as "highly relevant." *Forsyth Cty.* v. *Nationalist Movement*, 505 U.S. 123, 131 & n.9 (1992); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989). Even so, the Court has limited itself in these contexts to a "construction that a state court or enforcement agency has proffered," *Vill. of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)—which helps avoid the danger of letting the laudable desire to save a state law from constitutional infirmity result in rewriting it altogether.

2. Against this backdrop, it is hardly surprising that the majority of the federal courts of appeals stand opposite the Third Circuit on this issue. Seven circuits in fact—the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh—approach the task of

resolving constitutional challenges that turn on the proper construction of state law from a straightforward federalist frame. Pets.' Br. 23.

Two examples highlight the point. First, in *Z.J. Gifts D-4, L.L.C.* v. *City of Littleton*, the Tenth Circuit addressed the constitutionality of a permitting process that required pre-approval for adult-oriented businesses before they could apply for business licenses. 311 F.3d 1220, 1223-24 (10th Cir. 2002), *rev'd on other grounds*, 541 U.S. 774 (2004). The Tenth Circuit declined to adopt a construction that would have allowed the businesses to submit applications while the pre-approval process was ongoing—even though the City of Littleton urged that reading—because the ordinance required "completed" applications and the federal court recognized it lacked power to ignore or amend this textual requirement. *Id.* at 1233-34 (quotation omitted).

Similarly, the Eighth Circuit addressed a statute requiring all picketing to occur at least fifty feet from the target facility's door. *United Food & Comm. Workers Int'l Union, AFL-CIO, CLC* v. *IPB, Inc.*, 857 F.2d 422, 424 (8th Cir. 1988). Although the State argued that the statute would be constitutional in emergency circumstances or instances of violence, the court declined to adopt this construction because it was powerless to graft a new limitation onto the statutory text. *Id.* at 431-32. It recognized that, absent guidance from the State's judiciary, a federal court could not narrow a state statute without "a clear line that a [state] court could draw" from the statute's

text. *Legend Night Club* v. *Miller*, 637 F.3d 291, 301 (4th Cir. 2011) (citation omitted).

In both cases, the courts refused to apply an atextual gloss to save state or local law that was not drawn from a state high court decision. These courts contemplated other sources of support that may have buttressed a State's narrowing construction—for example if the construction was supported by the statute's legislative history. *United Food*, 857 F.2d at 424. But none suggest that federal courts may *sua sponte* adopt a narrowing construction of state law that neither state judicial decision nor official interpretation supports. Their strict adherence to the rule against modifying state law through judicial interpretation stands in contrast to the Third Circuit's decision to do so here—at none of the parties' behest.

More generally, the seven courts on this side of the divide take novel state or local statutory language as they find it and do not "add to, delete from [or] define" it. *Eubanks* v. *Wilkinson*, 937 F.2d 1118, 1126 (6th Cir. 1991) (quotation and alterations omitted). They likewise decline to "impose their own narrowing construction onto [an] ordinance if the state courts have not already done so." *Hill* v. *City of Houston, Tex.*, 789 F.2d 1103, 1112 (5th Cir. 1986) (quotations and alterations omitted); see also *Eubanks*, 937 F.2d at 1126 (quoting *Hill*, 789 F.2d at 1112). Instead—and in line with the Court's jurisprudence—these courts recognize that where there is no state authority on point, federal courts are left with "twin obligations" to construe state statutes narrowly "without rewriting

[their] terms." *Dimmitt* v. *City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) (quotation omitted). They thus adopt narrowing constructions of a law only where there is "every reason to believe the [state] courts" would agree with them, which in proper circumstances can include where state officials propose the construction at issue. *United Food*, 857 F.2d at 434; see also *Wis. Right To Life, Inc.* v. *Barland*, 751 F.3d 804, 834 (7th Cir. 2014) (accepting a narrowing construction approved by "the state's . . . Attorney General" and "highest court").

Conversely, these circuits do not unilaterally modify state law by adding a narrowing construction that neither the State's courts nor its officials endorse. See *Beckerman* v. *City of Tupelo, Miss.*, 664 F.2d 502, 509 (5th Cir. 1981) (refusing to "impose our own narrowing construction" where "[n]o narrowing construction has been offered by the Tupelo city council or the Mississippi courts"). This cautious approach is rooted in the need to avoid "encroach[ing] upon the domain of a state legislature by rewriting a law to conform it to constitutional requirements." *Legend Night Club*, 637 F.3d at 301 (citation omitted). In short, courts on this side of the issue—the correct side—refuse to act as a "super state legislature." *Hill*, 789 F.2d at 1112; see also *United Food*, 857 F.2d at 431 (quoting *id.*).

II. SUPREME COURT REVIEW IS NEEDED TO RESTORE CERTAINTY ON THIS IMPORTANT QUESTION OF FEDERALISM.

The Court should take up this case because the Third Circuit's decision to narrowly construe Pittsburgh's ordinance upsets the balance between States' legislative authority and federal court review. It also deepened confusion in the federal appellate courts on this issue, and makes it more difficult for litigants who live in States covered by circuits on the wrong side of the divide to obtain certainty on critical matters of constitutional freedom.

A. The Decision Below Flouts The Prohibition On Rewriting Or Amending State Laws.

The Third Circuit disregarded the limited approach discussed above—grounded in the Court's precedents and adopted by many of its fellow circuits—to avoid what should have been a fatal constitutional challenge. In defending the ordinance, the City was adamant that it construed the ordinance to apply to sidewalk counseling. Pets.' App. 23a-24a nn.15-16. And the Supreme Court of Pennsylvania had never interpreted the ordinance otherwise. Nevertheless, the court below dismissed this uncontested interpretation, finding it just short of "irrelevant," and at best "not dispositive." Pets.' App. 21a n.14.

Unmoored from the parties' arguments and without guidance from any state court, the Third Circuit proceeded to "presume" that "any narrowing

construction" that was not wholly unreasonable must be part of the ordinance. Pets.' App. 21a-22a (citation omitted). It then determined it was not entirely unreasonable to exclude sidewalk counseling from all four of the activities the ordinance prohibits within the 15-foot buffer zone: congregating, patrolling, picketing, and demonstrating. Pets.' App. 22a-23a (citing Pittsburgh, Pa., Municipal Code §§ 623.01-.07). And although this reading may not be facially frivolous, the court's narrowing construction is certainly not drawn from any "clear line" in the ordinance itself. *Legend Night Club*, 637 F.3d at 301 (citation omitted). This is thus not a case where the court found the parties' positions untenable when measured against the ordinance's text and purpose.

Indeed, the Third Circuit looked outside the ordinance's text—and Pennsylvania law itself, for that matter—when crafting its interpretation of "congregating." The court reasoned that the term did not necessarily apply to one-on-one sidewalk counseling because only "groups of three or more" can be said to congregate. Pets.' App. 24a. Support for this view, however, came from District of Columbia common law that defines "congregating" as forming a group of three or more. *Boos* v. *Barry*, 485 U.S. 312, 316-17 (1988) (cited at Pets.' App. 24a). *This* ordinance contains no similar definition.

The Third Circuit did not base its consideration of the other three types of prohibited conduct in Pennsylvania law, either. The court asserted, for instance, that "demonstrating" "surely does not"

include "speaking to someone at a normal conversational volume and distance." Pets.' App. 24a. The broad definition of the term, however—"participat[ing] in a public display of opinion," *Demonstrate*, The American Heritage Dictionary of the English Language 484 (4th ed. 2006)—does not lend much support to this assumption. And evidence from the meeting where the ordinance was deliberated confirms that its purpose was to stifle conduct much like Petitioners'. See Pets.' App. 8a, 48a, 72a, 81a, 142a-43a, 165a-66a. Unlike other courts that deliberately refrain from "defin[ing]" statutory terms when developing a narrowing construction, *Eubanks*, 937 F.2d at 1126, here the Court went out of its way to land on something the ordinance *could* mean. The fact that its narrowing construction found no basis in Pennsylvania law and was flatly contradicted by state officials' practice appeared to give the court little pause.

B. The Consequences Of The Decision Below Call For Review.

The Third Circuit's approach is not only wrong, but has damaging ripple effects that justify the Court's attention.

First, the decision below deepens division in the lower courts. 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. But by unilaterally narrowing the ordinance in the name of constitutional avoidance, the Third Circuit became the third federal appellate court

to endorse the opposite view. It thus elevated what might have been dismissed as an outlier position into a mature divide that warrants resolution.

Here, Pittsburgh's enforcement officers had taken the position that all four of the acts the ordinance prohibits could apply to sidewalk counseling, and during litigation the parties were in agreement that, at minimum, "demonstrating" likely applied. See Pets.' App. 23a-24a nn.15-16. Eight other circuits would not have worked so hard to find a potential reading of the ordinance that could allow the court to bypass Petitioners' constitutional claims. Some, in fact, would have relied on the City's refusal to offer a narrowing construction as an effective concession. See *Beckerman*, 664 F.2d at 509.

Yet the Third Circuit did not refuse "either to amend the ordinance or proffer a limiting instruction" where the City "insisted" the ordinance was "valid[] as literally read." *Hill*, 789 F.2d at 1111-12. It followed the First and Ninth Circuits down a different path instead: setting aside the City's reading because it made the "law more vulnerable to constitutional challenge," *Cutting* v. *City of Portland*, 802 F.3d 79, 84-85 & n.8 (1st Cir. 2015), and "saving" the City's reading of its own ordinance from an otherwise powerful First Amendment challenge, *Hoye* v. *City of Oakland*, 653 F.3d 835, 848 (9th Cir. 2011). Indeed, the Third Circuit viewed the absence of guidance from Pennsylvania courts on this issue as creating a vacuum that *required* it to seek out "any narrowing

construction" that was not wholly unreasonable. Pets.' App. 21a.

The upshot is that now 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. Because foundational principles of federalism should not depend on geography, the Court should intercede.

Second, this growing confusion involves an important national issue. The line between giving state law the benefit of the doubt and effectively rewriting it is not academic; if federal courts get the balance wrong, judicial review can become "a serious invasion of the legislative domain." *Stevens*, 559 U.S. at 481.

The Third Circuit may have thought that it was "saving" the City from itself, but this approach smacks of paternalism, not the respect due to co-sovereign States and their political subdivisions. To be sure, there are federalism concerns with being too quick to invalidate state or local law on constitutional grounds, and federal courts should not ignore fair limiting constructions. But if courts change the meaning of state or local law to avoid a constitutional question, the court has not saved the law so much as declared that a *different* law passes constitutional muster. And that is the case here: 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.

This is why the Third Circuit erred in "substituting its own notions" for the City's—and why the Court should step in. *Bd. of Educ. of Rogers, Ark.* v. *McCluskey*, 458 U.S. 966, 971 (1982) (per curiam). There are a host of limiting constructions in cases like this that may not seem wholly unreasonable. Enforce the ordinance in these circumstances, against those entities, in that manner, and so on. But all of these narrowing constructions reflect policy judgments. Where a statute does not plainly lead to one outcome and a federal court has no indication that the State's high court would endorse its choice—including appropriate consideration of what enforcing officials do (or in this case, *do not*) think it means—the court should not be quick to choose from the array. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1472 (1997) (explaining this Court has clearly established that it will not "exercise substantial policymaking discretion on behalf of the states").

Third, and finally, allowing the decision below to stand leaves Petitioners and parties like them with no meaningful remedy for federal constitutional claims.

The sticking point in the Third Circuit's approach is that federal courts' constructions of state and local laws are not binding on state courts. This means that federal courts leave litigants with the worst of both

worlds when they adopt a limiting construction of a state statute with no evidence the State's high court would agree. The parties may hope state officials will limit enforcement to the context the federal court considered, but there is no guarantee. Rather, they are escorted from the courthouse without an answer to the question that brought them there in the first place: whether enforcement of the law against Petitioners and those like them is *also* consistent with the Constitution.

The risk of an advisory opinion that could render the entirety of federal litigation for naught is even greater in cases where the federal court "attempts a narrowing interpretation that deviates widely from the statute's apparent meaning." *Wis. Right To Life, Inc.*, 751 F.3d at 833-34 (quotation omitted). Petitioners fought over five years to protect their First Amendment rights. Yet they received an answer that gives them no protection if Pennsylvania and its courts deem sidewalk counseling within the ordinance's reach. The ephemeral nature of this relief confirms why federal courts are ill-advised to "write nonbinding limits into a silent state statute." *Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

Further, lack of an effective remedy is particularly egregious because the constitutional defect in the City of Pittsburgh's ordinance is plain:

As incorporated against the States, the First Amendment prohibits restricting expression based on its message, ideas, subject matter, or content. *Reed* v.

Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015). Content-based restrictions "are presumptively unconstitutional" and can stand only "if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* As written, Pittsburgh's buffer-zone ordinance criminalizes knowingly congregating, patrolling, picketing, or demonstrating within a 15-foot buffer zone extending from any entrance to a hospital or health care facility.[2] Pittsburgh, Pa., Municipal Code §§ 623.01-07. Yet it turns out that whether a speaker violates the buffer-zone ordinance is dependent on what that speaker says.

The ordinance permits peaceful, one-on-one conversations on a host of topics, treating those discussions as purely social. Because Petitioners' peaceful, one-on-one conversations about pregnancy resources and abortion alternatives are wrapped in more politically charged garb, however, they are tagged as advocacy. Indeed, the City Council's hearings on the ordinance revolved around abortion, and the ordinance creates buffer zones outside abortion clinics, but no other health care facilities. See Pets.' App. 8a, 48a, 72a, 81a, 142a, 165a-66a.

It thus beggars belief that the ordinance was not aimed at specific speakers because of the content of their message instead of the manner in which they

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[2] The ordinance also contains an 8-foot bubble-zone restriction, but the City abandoned that portion of the ordinance after an earlier Third Circuit decision. *Brown* v. *City of Pittsburgh*, 586 F.3d 263, 283 (3d Cir. 2009); Pets.' App. 196a–97a.

present it. After all, even the court below recognized the constitutional weakness; otherwise there would have been no need to contort the ordinance to avoid applying it to sidewalk counseling. See Pets.' App. 20a (explaining that applying the ordinance to sidewalk counseling would "prohibit one-on-one conversations about abortion but not about other subjects within the zone"); see also *Reed*, 135 S. Ct. at 2222 (constitutional concern where legality of expression "depend[s] entirely on the . . . communicative content").

The ordinance's constitutionality accordingly must satisfy strict scrutiny, which it cannot do. Assuming a compelling state interest, there is no narrow tailoring. The City's stated concerns include preventing "disputes between those seeking [abortions] and those who would counsel against their actions," obstructing access to clinics, and inefficient "deployment of [police] services." Pets.' App. 44a. But the ordinance does not target the type of speech "that might create problems." *Bd. of Airport Comm'rs of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Petitioners' method of demonstrating is quiet and does not create disputes, impede access to clinics' doors, nor require police interventions. Pets.' App. 10a. Petitioners thus "are not [the type of] protestors" who cause the strife the City fears. *McCullen* v. *Coakley*, 573 U.S. 464, 489 (2014).

The ordinance does, however, place serious burdens on Petitioners' speech. The Court has already recognized—in a sidewalk counseling case, no less—that "one-on-one communication" is "the most

effective, fundamental, and perhaps economical avenue of [] discourse." *McCullen*, 573 U.S. at 488 (citation omitted). By criminalizing this type of advocacy within the buffer zone, the City has effectively "stifled petitioners' message," *id.* at 490, without adequate constitutional justification.[3] Petitioners thus should have prevailed on their constitutional claim, making more troubling the lower court's decision to sidestep the issue.

* * *

The Third Circuit's novel rendering of the Pittsburgh ordinance transformed what should have been a clear victory for the First Amendment into a hollow win that holds only so long as the City of Pittsburgh agrees to enforce the ordinance no broader than the court's inventive construction. "Our federalism" works best when "the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S.

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[3] Although the majority of this brief focuses on the federalism concerns inherent in Question 1, the *amici* States urge the Court to take up Question 2 as well, which focuses on the First Amendment's requirements in the context of this and many similar buffer-zone ordinances nationwide. Indeed, there would be serious constitutional concern even if the Third Circuit's narrowing construction were appropriate because the decision below allows the ordinance to bar peaceful forms of advocacy beyond sidewalk counseling—like displaying signs, wearing buttons, or prayer—based on the pro-life content of that expression. Cf. *Jews for Jesus*, 482 U.S. at 575 (finding Los Angeles Airport's ban on all expressive activity, including non-verbal expression, swept too broad).

at 44. The lower court's *sua sponte* decision to rewrite the ordinance leaves Petitioners out cold and magnifies confusion over foundational questions of state-federal relations. The Court should intervene.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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