NO. _____

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

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

QUESTIONS PRESENTED

1. Whether 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).

2. Whether an Article III court's use of the doctrine of constitutional avoidance to impose a narrowing construction on a content-based regulation of protected speech that is contrary to the law's plain text and the government's construction, enforcement, and defense conflicts with this Court's binding precedents in *United States v. Stevens*, 559 U.S. 460, 481 (2010), and *Reno v. ACLU*, 521 U.S. 844, 884 (1997).

3. 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*].

PARTIES

Petitioners are Colleen Reilly and Becky Biter.

Respondents are the City of Harrisburg, Harrisburg City Council, and Eric Papenfuse, in his official capacity as Mayor of Harrisburg. (Respondents are collectively referred to herein as "Harrisburg" or the "City.")

CORPORATE DISCLOSURE STATEMENT

Petitioners are individual residents of the Commonwealth of Pennsylvania. Neither Petitioner has a parent corporation nor a publicly held stock owner.

DIRECTLY RELATED PROCEEDINGS

COLLEEN REILLY; BECKY BITER; ROSALIE GROSS v. CITY OF HARRISBURG; HARRISBURG CITY COUNSEL; MAYOR ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg; Colleen Reilly; Becky Biter, Appellants, No. 18-2884 (3d Cir. Judgment Oct. 23, 2019)

COLLEEN REILLY; BECKY BITER; ROSALIE GROSS v. CITY OF HARRISBURG; HARRISBURG CITY COUNSEL; MAYOR ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg; Colleen Reilly; Becky Biter, Appellants, No. 16-3722 (3d Cir. Judgment May 25, 2017)

COLLEEN REILLY, BECKY BITER, and ROSALIE GROSS, Plaintiffs v. CITY OF HARRISBURG, HARRISBURG CITY COUNCIL, and ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg, Defendants, No. 1:16-CV-0510 (pending in M.D. Pa.; Order denying Petitioners' motion for preliminary injunction Aug. 23, 2018)

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The Third Circuit's opinion affirming the district court's denial of Petitioners' motion for preliminary injunction is unpublished and available at *Reilly v. City of Harrisburg*, No. 18-2884, 2019 WL 5424685 (3d Cir. Oct. 23, 2019) [hereinafter *Reilly II*], and is reproduced in the Appendix to this Petition at pp. 1a–21a.

The district court's opinion denying Petitioner's motion for preliminary injunction is published and available at *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451 (M.D. Pa. 2018), and is reproduced in the Appendix to this Petition at pp. 22a–68a.

JURISDICTION

The Third Circuit issued its decision on October 23, 2019 and denied rehearing on December 3, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

City of Harrisburg Ordinance No. 12-2012, codified at City of Harrisburg Code Chapter 3-371, Interference with Access to Healthcare Facilities, is reproduced in the Appendix to this Petition at pp. 116a–118a.

STATEMENT OF THE CASE

Petitioners are individual citizens of the Commonwealth of Pennsylvania who regularly engage in protected speech on the public sidewalks of the City of Harrisburg. (App. 4a, 23a, 128a–129a.) Petitioners' speech includes peaceful, one-on-one sidewalk counseling, prayer, and leafletting outside of two abortion facilities in Harrisburg, advocating for the rights of unborn children and offering aid and assistance to women who may be considering alternatives to abortion. (App. 4a, 23a, 128a–129a.)

In November 2012, the City of Harrisburg adopted Ordinance No. 12-2012 (the "Ordinance"), which was ultimately codified as Harrisburg Code Chapter 3-371. (App. 2a–3a, 23a–24a, 116a–118a.) The Ordinance provides, in pertinent part:

> No person or persons shall 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.

(App. 2a–3a, 23a–24a, 116a–118a.)

On March 24, 2016, Petitioners challenged the Ordinance by suing the City of Harrisburg in the United States District Court for the Middle District of Pennsylvania. (App. 24a.) Petitioners sought, inter alia, to enjoin enforcement of the Ordinance on the grounds that the "buffer zone" it created infringed their First Amendment rights by preventing their peaceful expression on the public sidewalks outside Harrisburg abortion facilities. (App. 2a, 24a–25a.) Petitioners also filed a motion for preliminary injunction to prevent the immediate and irreparable injury to their First Amendment rights. (App. [a2, a19].) The district court denied Petitioner's preliminary injunction motion, *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 456 (M.D. Pa. 2018), and Petitioners appealed to the United States Court of Appeals for the Third Circuit. (App. 4a–5a.) In that appeal, the Third Circuit reversed the district court's denial of preliminary injunctive relief because the district court had improperly applied the governing standard by shifting to Petitioners the City's burden to prove narrow tailoring of the Ordinance under the First Amendment. (App. 4a–5a (citing *Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017) [hereinafter *Reilly I*]).

On remand, the parties engaged in discovery and put on evidence during a two-day hearing on Petitioners' preliminary injunction motion. (App. 5a, 25a–26a.) The resulting evidentiary record shows Harrisburg construes, understands, and interprets the Ordinance to prohibit Petitioners' peaceful, one-on-one sidewalk counseling and leafletting on the public sidewalks inside the 20-foot buffer zone. (App.

12a n.7, 15a, 36a, 121a–123a, 129a–131a.) The City's Solicitor and corporate designee confirmed the Ordinance applies to conversations "of substance" within the buffer zone, such that "if **two** people were talking about anything of substance . . . they're congregating" and violating the Ordinance. (App. 15a, 36a, 129a–131a (emphasis added).) Conversely, he concluded, "[i]f two people were walking in the same direction and . . . they're talking . . . good morning, good afternoon, whatever, I don't know if those people would be considered congregating." (App. 36a, 37a, 129a–131a.) Even a sidewalk counselor' standing in the buffer zone next to a woman approaching the facility is prohibited by the Ordinance, as the City's designee was "sure" the Ordinance "prevents them from being in the buffer zone and doing what they want." (App. 126a.) Moreover, the City's police captain, also testifying as a corporate designee, confirmed that "merely quietly engaging in conversation with a patient entering or leaving" within the buffer zone "would be . . . could be considered a violation" of the Ordinance. (App. 120a.) Thus, the City construed and interpreted the Ordinance to prohibit—on the public sidewalk within the buffer zone—a Petitioner's walking or standing with a woman to counsel her on anything "of substance" (unlawful "congregating"), and leafletting to communicate alternatives to abortion (unlawful "demonstrating").

Furthermore, during oral argument in the Third Circuit preceding its decision in *Reilly I*, the City's counsel admitted that panhandling and leafletting for a business would not be covered by the Ordinance, but that leafletting in opposition to

abortion would be prohibited "demonstrating" under the Ordinance. (App. 121a–123a.) Then, on remand, the City's counsel defended the Ordinance as a sidewalk counseling ban in questioning Petitioner Biter, pressing to the district court that Biter's mere entry into the buffer zone to console a crying Planned Parenthood patron was a violation of the Ordinance. (App. 127a–128a.)

Consistent with its admitted construction, understanding, and interpretation, the City **actually enforced** the Ordinance against Petitioner Reilly's peaceful, one-on-one sidewalk counseling and leafletting when Harrisburg police ordered Reilly to leave the buffer zone while she was merely "handing out literature and talking to clients coming into the office": the police "advised [her] of the ordinance on protesting . . . and the buffer zone related to the ordinance," and "gave [her] a warning that she would be cited if she violates the ordinance in the future." (App. 124a, 128a–129a.)

The evidence developed on remand also showed there was no meaningful legislative record of the City's giving serious consideration to any less-restrictive alternative to the buffer zone speech prohibitions. The Ordinance's legislative record consisted only of a single, 18-minute discussion of the Ordinance at a city council meeting, resulting in 12 transcribed pages. (App. 20a n.12, 50a.) And although the City's witness at the **preliminary injunction hearing** testified that laws preexisting the Ordinance were not sufficient to address the City's supposed problems with abortion facility access at the time the Ordinance was enacted (App.

19a, 47a–50a, 54a), there is **no legislative record** demonstrating that the City's pre-enactment considerations included that less-restrictive alternatives—such as enforcing existing laws against trespass or disturbing the peace, or targeted injunctions against offenders—were tried and failed, or that any of these alternatives was closely examined and then ruled out for good reason. (App. 20a, n.12, 53a–55a, 59a.) To be sure, "[i]t is uncontested that [state and local trespass, disturbing the peace, noise, and loitering] statutes were available to law enforcement at the time the Ordinance was being considered. It does not appear that any prosecutions under these statutes were brought by the City or private citizens." (App. 53a–54a.)

On this evidentiary record, the district court denied Petitioners' motion for preliminary injunction. (App. 22a–26a.) On appeal, the Third Circuit affirmed the district court's denial of Petitioners' motion for preliminary injunction, in close reliance on its five-day-old decision *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019) [hereinafter *Bruni II*]. (App. 2a, 8a–11a.) The court held, *inter alia*, (1) that the Ordinance was not content based despite officials' having to review the content of expression within the buffer zone to determine whether conversation is "of substance" and leafletting is not about abortion (App. 14a–16a); (2) that the Ordinance was subject to a narrowing construction to exclude coverage of Petitioners' sidewalk counseling and leafletting, despite the City's construction, interpretation, defense, and actual enforcement of the Ordinance as covering

Petitioners' sidewalk counseling and leafletting (App. 11a–12A, n.7); and (3) that the City satisfied its narrow tailoring burden by saying after-the-fact, at the preliminary injunction hearing, that less-restrictive alternatives to the Ordinance's speech restrictions would not have worked, but without any meaningful legislative record at the time of enactment that less-restrictive alternatives were tried and failed or were closely considered and ruled out for good reason (App. 8a–21a, nn. 12, 13).

As shown herein, the answer to each of the Questions Presented (*supra* p. i) is "yes," and the Court should grant the Petition.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER A LAW RESTRICTING SPEECH IS CONTENT BASED.

This Court's Decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *McCullen v. Coakley*, 573 U.S. 464 (2014), expanded the category of content-based laws and overruled or replaced the holding in *Hill v. Colorado*, 530 U.S. 703 (2000), regarding whether a law is content based or content neutral. The Third Circuit's decision below conflicts with *Reed* by relying on the overruled or replaced portions of *Hill*'s content-neutrality analysis.

A. This Court's Decisions in *Reed v. Town of Gilbert* and *McCullen v. Coakley* Expanded the Category of Content-Based Laws and Overruled or Replaced the Holding in *Hill v. Colorado* Regarding Whether a Law Is Content Based or Content Neutral.

1. *Hill* held that laws may be content neutral even if they require government to review the content of the speech.

In *Hill*, the challengers alleged a restriction on speech in a traditional public forum was content based because government officials were required to examine the content of an individual's statements to determine whether the statute restricted such communications. 530 U.S. at 720 ("Because the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute, petitioners argue that the law is 'content based.'"). In determining whether the challenged restriction on speech was content based or content neutral, *Hill* noted that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose." *Id.* at 721. The Court then stated that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies." *Id.* Moreover, *Hill* said it was not constitutionally problematic when

"cursory examination" of the content of the speech being expressed "might be required to exclude casual conversation from the coverage of a regulation of picketing." *Id.* at 722. Thus, *Hill* stood for the proposition that a law which is content neutral on its face does not become content based simply by virtue of the government's needing to review the content of the speech to determine whether a speech restriction applies.

Hill also recognized another reason for recognizing a speech-restrictive law as content neutral even though it requires examination of the content of a message: where the government justifies the law because of "[t]he unwilling listener's interest in avoiding unwanted communication," not because of disagreement with the message conveyed. *Id.* at 716.

The content-neutrality analysis articulated in *Hill* was, thus, twofold: (1) a speech-restrictive law is not content based simply because the government officials tasked with enforcing it must look at the content of the message to determine whether the restriction applies, and (2) a speech-restrictive law is not content based when the government's purpose in adopting it was to protect against problematic listener reaction. *Id.* at 716, 722.

2. *Reed* adopted a more exacting standard than *Hill* and overruled or replaced *Hill* by holding that laws are facially content based if they cannot be justified without reference to the content of the regulated speech.

The first constitutional nail in the coffin of *Hill*'s content-neutrality analysis came in *McCullen*. There, this Court held that *Hill*'s first step in the content neutrality analysis was plainly incorrect. 573 U.S. at 479. In fact, the Court stated a speech-restrictive law "**would be content based if it required 'enforcement authorities' to 'examine the content of the message conveyed to determine whether' a violation has occurred**." *Id.* (emphasis added). Thus, *McCullen* explicitly rejected the first step of *Hill*'s content-neutrality analysis.

This Court's decision in *Reed* then eviscerated and overruled the remaining aspects of *Hill*'s content-neutrality analysis and expanded the category of speech-restrictive laws that qualify as content based. There, the Court rejected the entire framework from *Hill* and articulated a new standard for defining content-based laws with two branches. First, a law "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Indeed,

> [s]ome facial distinctions based on a message are obvious, defining

> regulated speech by a particular subject matter, **and others are more subtle, defining regulated speech by its function or purpose**. Both are distinctions drawn based on the message a speaker conveys . . . .

Id. (emphasis added). Including, as content-based speech restrictions, laws that define speech by function or purpose is a rejection of *Hill*'s contrary holding.

Second, *Reed* identified from this Court's precedents "**a separate and additional category of laws** that, though facially content neutral, **will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech** . . . ." *Id.* (emphasis added) (internal quotation marks omitted). This, too, was a rejection of *Hill*, recognizing that *Hill* was plainly incorrect in holding that a law can be content neutral even if enforcement authorities must review the content of the speech to determine the law's applicability.

Federal courts have recognized that this Court's decision in *Hill* is no longer valid post-*Reed*. As the Seventh Circuit concluded, "***Hill* is incompatible with current First Amendment doctrine as explained in *Reed* and *McCullen***." *Price v. City of Chicago*, 915 F.3d 1107, 1117 (7th Cir. 2019) (emphasis added). The *Price* court explained, "*Hill* started from the premise that the principle inquiry in determining content neutrality is whether the government has adopted a regulation

of speech because of disagreement with the message it conveys. After *Reed* that's no longer correct." *Id.* (internal quotation marks and citation omitted). Indeed, "**[i]n the wake of *McCullen* and *Reed*, it's not too strong to say that what *Hill* explicitly rejected is now prevailing law**." *Id.* at 1118 (emphasis added).

Circuit Judge Hardiman, in his concurrence in *Bruni II*, likewise concluded that *Reed* has overruled and replaced this Court's decision in *Hill*: "The continued vitality of [*Hill*'s] content neutrality analysis is questionable after *Reed*. In cases like *Hill* . . . the government's purpose was the threshold consideration." 941 F.3d at 93 (Hardiman, J., concurring) (internal quotation marks and citations omitted).

> *Reed* adopted [a different] test for content neutrality. It held that a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. By doing so, ***Reed* overturned the standard that the Court had previously used to resolve a particular class of cases—a class that includes cases like this one and *Hill***. In fact, *Reed* rebuked *Hill* several times: by noting that the errant Court of Appeals relied on it, and by favorably citing dissents

> in *Hill* authored by Justices Scalia and Kennedy.
>
> ***Reed* also seems to have expanded the types of laws that are facially content based.**

Id. (emphasis added) (internal quotation marks and citations omitted). Indeed, "laws once held content neutral because of purpose may well be facially content based after *Reed*." *Id.* at 94.

Finally, this Court, in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) [hereinafter *NIFLA*], confirmed *Reed*'s "stringent standard" as "reflect[ing] the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." 138 S. Ct. at 2371 (internal quotation marks omitted).

B. The Third Circuit's Decision Below Conflicts With *Reed* by Relying on the Overruled or Replaced Portions of *Hill*'s Content-Neutrality Analysis.

The Third Circuit's decision below is in direct conflict with *Reed*'s articulation of the content neutrality test. By its terms, the Ordinance is content based because it "regulates speech by its function or purpose." *Compare* (App. 117a (prohibiting only speech involving, *e.g.*, "picket[ing]" or "demonstrat[ing]"), *with Reed*, 135 S. Ct. at 2227

(holding that speech restrictions "defining speech by function or purpose" is a distinction "drawn based on the message the speech conveys"). Thus, under the Ordinance's plain terms, speech whose function or purpose is to "demonstrate" or "picket" is prohibited, while speech whose function or purpose is to communicate something else is not prohibited.

How is a government official tasked with enforcing the Ordinance to know whether a certain speaker is intending to "demonstrate" or "picket" something without reviewing the specific content of the speech? The simple answer is they cannot. To determine whether a certain speaker is demonstrating or picketing the government official must—by necessity—consider the content of the message being conveyed. And as *Reed* made clear, a law is content based if it "cannot be justified without reference to the content of the regulated speech." *Id.*

In the proceedings below, the City candidly admitted that speakers are in violation of the terms of the Ordinance if they are "talking about anything of substance." (App. 15a, 36a, 129a–131a.) Conversely, the City stated that "[i]f two people were walking in the same direction and . . . they're talking . . . good morning, good afternoon, whatever, I don't know if those people would be considered congregating by any definition." (App. 37a, 129a–131a.) Both the Third Circuit, and the district court before it, concluded that such admissions did not render the Ordinance content based. (App. 15a, 37–38a.) To support those conclusions the they relied on the obsolete *Hill* notion that requiring a cursory examination of the content of speech is not enough

to make an Ordinance content based. (App. 14a–15a (citing *Bruni II*, in turn relying on *Hill*)]; 37a.) Those conclusions are directly counter to *Reed*'s articulation of the content-neutrality standard. Logically, a police officer cannot tell whether a discussion is "of substance" or whether a leaflet is about abortion, without inspecting the content of the communication. If even **this** requirement does not render the Ordinance a content-based restriction, then that term has no meaning.

The Third Circuit's affirmance of the district court's narrowing construction (*infra* pt. II) 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. (App. 15a.) This avoidance left unchecked the district court's demonstrably incorrect interpretation of the Ordinance's "demonstrat[ing]" and "picket[ing]" bans to only apply to "people marching up and down the street with banners and bullhorns," or "protest[s] or assault[s]," while permitting "calm pamphleting by an individual" and "normal social interaction." (App. 37a.) Whether police officers could make such distinctions between extremes, however, is irrelevant because of the undisputed evidence that the Ordinance—as interpreted and actually enforced by the City covers even "**calm** pamphleting" and **quiet** conversation of substance, particularly about abortion. (App. 15a, 36a, 129a–131a.)

Put simply, the Ordinance's plain text and persistent interpretation by the City's officials

tasked with interpreting and enforcing it provide no explanation as to how one can know whether sidewalk speech in the buffer zone is covered without knowing exactly what is being said. Indeed, there is no way to tell the difference between "normal social interaction" (*e.g.*, talking politely and calmly) about insubstantial matters, such as the weather or football scores, which is permitted, and equally polite and calm discussion "of substance" (*e.g.*, abortion alternatives), which is prohibited, without examining the content of the speech. And, as *Reed* unequivocally teaches, "laws that cannot be justified without reference to the content of the regulated speech," "will be considered content-based regulations of speech." *Reed*, 135 S. Ct. at 2227 (internal quotation marks omitted). Thus, the Third Circuit's decision is plainly in conflict with *Reed* and begs this Court's review.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE PRECEDENTS OF EVERY OTHER CIRCUIT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER AN ARTICLE III COURT MAY IMPOSE A NARROWING CONSTRUCTION ON A LAW THAT IS CONTRARY TO THE PLAIN TEXT AND THE GOVERNMENT'S CONSTRUCTION, ENFORCEMENT, AND DEFENSE OF THE LAW.

This Court's precedents establish that Article III courts are not empowered to rewrite a law to

conform it to the requirements of the First Amendment. Likewise, the circuit courts have universally recognized that Article III courts are not empowered to rewrite a law to save it from constitutional invalidation under the First Amendment. Thus, the Third Circuit's decision below conflicts with this Court's precedents and the precedents of every other circuit.

A. This Court's Precedents Establish That Article III Courts Are Not Empowered to Rewrite a Law to Conform It to the Requirements of the First Amendment.

Time and again this Court has held that Article III courts are not empowered to rewrite a law restricting protected speech to narrow it into compliance with the First Amendment. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court stated plainly that "[t]his Court may impose a limiting construction on a statute only if it is readily susceptible to such a construction. **We will not rewrite a law to conform it to constitutional requirements**." 559 U.S. at 481 (emphasis added) (internal quotation marks and citations omitted). Indeed, the Court noted that rewriting a law to save it from constitutional condemnation "would constitute a serious invasion of the legislative domain and sharply diminish [the government's] incentive to draft a narrowly tailored law in the first place." *Id.* (internal quotation marks and citations omitted).

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court likewise held that Article III courts are severely limited in their ability construe a statute narrowly when doing so would constitute a legislative rewriting by judicial fiat. Like the Court would later confirm in *Stevens*, the *Reno* Court explicitly stated that "[t]his Court will not rewrite a law to conform it to constitutional requirements." 521 U.S. at 884–85 (internal quotation marks omitted). The Court explained further that Article III courts should decline "to draw one or more lines between categories of speech covered by an overly broad statute, when [the government] has sent inconsistent signals as to where the new line or lines should be drawn." *Id.* at 884 (internal quotation marks omitted). The Court so held because "doing so 'involves a far more serious invasion of the legislative domain.'" *Id.*

While *Reno* and *Stevens* are clear articulations of this plain rule, they are certainly not the only such pronouncements by this Court. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) ("'We will not rewrite a law to conform it to constitutional requirements.'"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 412 n.12 (1992) (White, J., concurring) (same); *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("The key to application of this principle is that a statute must be 'readily susceptible' to the limitation; **we will not rewrite a state law to conform it to constitutional requirements**." (emphasis added)); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (noting the Court's "obligation to avoid judicial legislation" and refusing

to "redraft the statute to limit its coverage"); *id.* ("We believe the Court of Appeals properly left to Congress the task of drafting a narrower statute."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 & n.15 (1975) (refusing to apply a limiting construction on a statute "because a rewriting of the ordinance would be necessary to reach that result"); *Osborne v. Ohio*, 495 U.S. 103, 121 (1990) (refusing to rewrite a speech-restrictive statute because "careless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth").

B. The Circuit Courts Have Universally Held That Article III Courts Are Not Empowered to Rewrite a Law to Save It From Constitutional Condemnation Under the First Amendment.

Based on this Court's unequivocal condemnation of the judicial rewriting of statutes to save them from constitutional demise, the circuit courts are universally in agreement that Article III courts lack such authority. *See, e.g.*, *Telecommunications Reg. Bd. of Puerto Rico v. CTIA-Wireless Ass'n*, 752 F.3d 60, 63 n.2 (1st Cir. 2014) ("'This Court will not rewrite a law to conform it to constitutional requirements.'" (quoting *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997)); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (same); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 136 (3d Cir. 2000) (same); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 258 (4th Cir. 2003) (same); *City of El*

Cenizo v. Texas, 890 F.3d 164, 182 (5th Cir. 2018) (**"[A] court has no authority to rewrite a law to conform it to constitutional requirements** . . . ." (emphasis added) (internal quotation marks omitted)); *Entm't Prod., Inc. v. Shelby Cnty.*, 588 F.3d 372, 386 (6th Cir. 2009) (same); *Bell v. Keating*, 697 F.3d 445, 456 (7th Cir. 2012) (same); *Wilson v. City of Bel-Nor*, 924 F.3d 995, 1004 (8th Cir. 2019) (same); *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) ("[W]e . . . do not 'insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance.' We may not 'rewrite a state law to conform it to constitutional requirements.'" (citations omitted)); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000) ("*[W]e will not rewrite a state law to conform it to constitutional requirements*. . . . To rewrite statutes in this manner would exceed the power and function of the court . . . ."); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990) (explaining the court's "twin obligations to (1) construe the statute narrowly, (2) without rewriting its terms"); *Al Bahlul v. United States*, 767 F.3d 1, 16 (D.C. Cir. 2014) ("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**." (emphasis added) (internal quotation marks and citation omitted)).

As these cases make clear, the circuit courts are universally in agreement that the doctrine of constitutional avoidance does not permit an Article III court to rewrite a statute infringing First Amendment rights to save it from constitutional invalidation.

C. The Third Circuit's Decision Below Conflicts With This Court's Precedents and the Precedents of Every Circuit.

The Third Circuit's ostensible narrowing interpretation of the Ordinance, to exclude one-on-one sidewalk counseling, conflicts with the above precedents and violates the doctrine of constitutional avoidance because it essentially rewrites the Ordinance. Given the Ordinance's plain language, Harrisburg's interpretation, actual enforcement, and defense of the Ordinance, and the realities of Petitioners' sidewalk counseling, the Ordinance is not readily susceptible to the narrowing construction imposed by the Third Circuit below, which constitutes a judicial rewriting of the Ordinance to conform it to constitutional requirements. The Third Circuit plainly lacked authority to usurp Harrisburg's legislative function.

The plain text of the Ordinance and the City's construction, interpretation, and actual enforcement and defense of the Ordinance are directly contrary to the Third Circuit's narrowing construction. Harrisburg actually enforced the Ordinance against Petitioner Reilly's peaceful sidewalk counseling and

leafletting in a traditional public forum.[1] (App. 124a, 128a–129a.) In fact, Harrisburg intended the Ordinance to prohibit sidewalk counseling in the buffer zone, admitted that it was intended to cover peaceful sidewalk counseling, and defended the Ordinance as a sidewalk counseling prohibition in the Third Circuit and the district court. (App. 12a n.7, 15a, 36a, 121a–123a, 127a–131a.) The City never argued that the Ordinance could be saved from unconstitutionality by construing it to allow one-on-one counseling, because such a narrowing construction (*i.e.*, judicial rewrite) obviously would have been directly contrary to its stated purpose and actual enforcement.

The Third Circuit, however, found none of these considerations relevant when adopting the district court's conjuring of a new and legislatively unknown version of the Ordinance. The Third Circuit acquiesced that the terms "'congregate,' 'patrol,' 'picket,' and 'demonstrate' do not cover peaceful one-on-one conversations or leafletting." (App. 11a–12a (citing *Bruni II*). But, the court offered no explanation as to why that conclusion was

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[1] Neither the Third Circuit nor the district court discussed Harrisburg's actual enforcement of the Ordinance against Petitioner Reilly's sidewalk counseling and leafletting. The Third Circuit's disregard of Harrisburg's actual enforcement is particularly significant because the court handcuffed its *Reilly II* conclusion—that Harrisburg's own interpretation of its Ordinance is not dispositive—to its *Bruni II* analysis (App. 12a n.7 (citing *Bruni II*, App. 89a n.14)), but in *Bruni II* the court noted that Pittsburgh's interpretation of its ordinance was only an assumption **because there had been no enforcement**. (App. 87a, n.12).

merited by the terms of the Ordinance or how it could ever be reconciled with the City's actual enforcement of it. In fact, the Third Circuit plainly recognized that "**the City asserts that the Ordinance covers Plaintiffs' sidewalk counseling**." (App. 12a n.7 (emphasis added)). If the legislative drafters of the Ordinance and the officials tasked with enforcing it candidly admit that the Ordinance applies to the speech that the Third Circuit simply excluded from the reach of the plain language, an improper judicial rewriting has unquestionably occurred.

Furthermore, the Third Circuit's conclusion that the Ordinance's plain terms do not encompass peaceful sidewalk counseling is itself directly contrary to this Court's precedents construing the terms picketing, demonstrating, congregating, and patrolling to include such peaceful speech. *See, e.g.*, *Madsen v. Women's Health Center*, 512 U.S. 753, 768 775 (1994) (teaching that a ban on "congregating," "picketing," "patrolling," and "demonstrating" applies to the peaceful sidewalk counseling and speech in a traditional public forum); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 367 (1997) (same).

Judge Hardiman's concurrence in the Third Circuit's *Bruni II* highlights the inadequacy of the narrowing construction in light of the realities of Petitioners' sidewalk counseling, which they do as a team:

> We hold that "[b]ecause the Ordinance, as properly interpreted, does not

> extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations," the City cannot examine the content of a conversation to decide whether a violation has occurred. It will instead examine, for example, decibel level, **the distance between persons, the number of persons**, the flow of traffic, and other things usually unrelated to the content or intent of speech.
>
> . . . .
>
> . . . Our decision today clarifies that the words **"congregate" and "patrol" address conduct—the assembly of people in one place or the action of pacing back and forth**.

Bruni II, 941 F.3d at 94–95 (Hardiman, J., concurring) (emphasis added). (App. 111a–113a.)

For Petitioners, however, their speech and "conduct" cannot be so easily separated. How many members of Petitioners' team may assemble on the 70 feet of public sidewalk in front of Planned Parenthood, in the buffer zone, in between their one-on-one conversations—and how close to one another—before they are "congregating?" How many sidewalk counselors may enter the buffer zone at once to engage in one-on-one conversations when more than one patron is present, before they are "congregating?" If a pair of sidewalk counselors engage a patron, or each other, in normal

conversation inside the buffer zone, are they "congregating" in violation of the Ordinance? If a sidewalk counselor traverses the sidewalk inside the buffer zone to engage in one-on-one conversations, multiple times in a day, is she "patrolling" in violation of the ordinance? What if she keeps moving within the buffer zone to avoid "congregating"—is she "patrolling" then? The foregoing are not merely hypothetical; they are inherent in the realities of Petitioners' sidewalk counseling as part of a team. Thus, the Third Circuit's rewriting of the Ordinance ostensibly solved one constitutional problem (one-on-one sidewalk counseling by a lone sidewalk counselor), but nowhere near all of the Ordinance's constitutional problems; indeed, the panel's interpretation created more questions than it answered. Such continuing problems demonstrate the plain flaws of judicial redrafting of laws restricting speech, particularly when such redrafting conflicts with the actual enforcement of the Ordinance by government authorities.

And given Harrisburg's strident defense of the Ordinance as a sidewalk counseling prohibition, Petitioners cannot depend on the City to give them room to speak. The Third Circuit all but invited the City to reinterpret the Ordinance even now to prohibit more than one sidewalk counselor at a time. (App. 21a n.14 ("We recognize that the City could have a legitimate concern . . . if there are **multiple one-on-one conversations** . . . The city may then have **occasion to revisit the terms of the Ordinance** . . . .") (emphasis added)).

To be sure, this Court in *United States v. Stevens* cautioned against putting faith in prosecutorial restraint by the government under an overbroad statute. *See* 559 U.S. at 480 ("[T]he First Amendment protects against the Government . . . . We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). "[P]articularly where as here [the government] offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed." *Erznoznik*, 422 U.S. at 217. In *Reed*, this Court articulated this mistrust in unequivocal terms:

> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, **as future government officials may one day wield such statutes to suppress disfavored speech**. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the abridgement of speech—rather than merely the motives of those who enacted them. The vice of content-based legislation is not that it is always used for invidious, thought-control purposes, **but that it lends itself to use for those purposes**.
>
> . . . .
>
> [W]e have repeatedly rejected the argument that discriminatory

> treatment is suspect under the First Amendment **only** when the legislature intends to suppress certain ideas.

135 S. Ct. at 2229 (emphasis added).

Thus, even under the panel's narrowing construction, Petitioners' legitimate expression will continue to be deterred because of the Ordinance's continuing overbreadth, and because of the new vagueness introduced by the decision below. Absent a narrowing construction that solves all constitutional problems—a construction both the Third Circuit and Judge Hardiman's concurrence in *Bruni II* admit the court has not given—constitutional avoidance is inappropriate in this case. Moreover, even if the Ordinance were susceptible to a narrowing construction, which—given the plain language and the City's interpretation, enforcement, and defense of the Ordinance—it is not, a complete judicial redrafting of an Ordinance is directly contrary to this Court's unequivocal precedents.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER THE GOVERNMENT MUST DEMONSTRATE WITH A MEANINGFUL RECORD THAT LESS RESTRICTIVE ALTERNATIVES WERE INSUFFICIENT.

This Court's precedent in *McCullen v. Coakley,* 573 U.S. 464 (2014), unequivocally holds that the government may not rely on its simple, unproven assertion that less-restrictive alternatives are insufficient. Indeed, the Third Circuit's *Bruni I* decision determined *McCullen* requires a meaningful record that less restrictive alternatives were tried and failed or were closely examined and ruled out for good reason. The Third Circuit's decision below conflicts with this Court's (and its own) precedent.

A. This Court's Precedent in *McCullen* Unequivocally Holds That the Government May Not Rely on Its Simple, Unproven Assertion That Less Restrictive Alternatives Are Insufficient.

In *McCullen,* this Court provided new clarification for determining whether the government has sufficiently narrowly tailored a law restricting protected speech. There, the Court made clear that the government's mere statements concerning other alternatives being inadequate do

not satisfy the demands of the First Amendment. 573 U.S. at 486. Additionally, the Court held that the First Amendment demands that the government seriously undertake to address a purported problem with mechanisms as nonintrusive to speech as possible. *Id.*

1. This Court held that it is not enough for the government "simply to say that other approaches have not worked."

As *McCullen* made clear, the First Amendment does not grant the government license "to regulate problems that do not exist." 573 U.S. at 481. Indeed, "[w]hen selecting among various options for combatting a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.* at 482.

> The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too

> readily "sacrific[ing] speech for efficiency."

Id. at 486 (modification in original).

Thus, to satisfy the burden of narrow tailoring, the government must demonstrate that it has not "too readily foregone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *Id.* at 490. To that end, this Court made clear that the government's mere *ipse dixit* is not enough to satisfy this burden. Indeed, "[g]iven the vital First Amendment interests at stake, **it is not enough for [the government] simply to say that other approaches have not worked**." *Id.* at 496.

2. *McCullen* mandates that the government demonstrate it seriously undertook to address the alleged problem with less intrusive tools or considered methods that other jurisdictions have found effective.

In addition to refusing to take the government at its word in the area of cherished First Amendment freedoms, *McCullen* also announced a new requirement for the government when adopting speech-restrictive legislation: the government must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it." 573 U.S. at 494. Additionally, prior to enacting

burdensome restrictions on speech in a traditional public forum, the government must "show[] that it considered different methods that other jurisdictions had found effective." *Id.* Indeed, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495. Simply put, "the prime objective of the First Amendment is not efficiency." *Id.*

B. The Third Circuit's *Bruni I* Decision Determined *McCullen* Requires a Meaningful Record That Less Restrictive Alternatives Were Tried and Failed or Were Closely Examined and Ruled out for Good Reason.

The Third Circuit reviewed Pittsburgh's similar buffer zone ordinance in *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016) [*Bruni I*]. There, the court noted that "[b]ecause of the significant burden on speech that the Ordinance allegedly imposes, the City has the same obligation to use less restrictive alternatives to its buffer zone as the Commonwealth of Massachusetts had with respect to the buffer zone at issue in *McCullen*." 824 F.3d at 369. To satisfy that burden post-*McCullen*, the Third Circuit stated that the government "**must, in some meaningful way** 'demonstrate that alternative measures that burden less speech would fail to achieve the government's interest.'" *Id.* (quoting *McCullen*, 573 U.S. at 494) (emphasis

added). To meet *McCullen*'s newly articulated narrow tailoring standard, the court held that the government "would have to show that **substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason**." *Id.* at 370 (emphasis added). Indeed, the government cannot forgo less restrictive alternatives "without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed." *Id.* at 371.

> *McCullen* required the sovereign to justify its regulation of political speech by describing the efforts it had made to address the government interests at stake by substantially less-restrictive methods or by showing that it seriously considered and reasonably rejected "different methods that other jurisdictions have found effective."

Id. This Court's *McCullen* decision, thus, "represents an important clarification of the rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis, and the decision is sufficient to call into question [previous precedent]." *Id.* at 372–73.

As the Third Circuit stated, "[t]he existence of those substantially less burdensome alternatives **obligates the City to try them or consider them**. Again, that is not our requirement. It is the Supreme Court's." *Id.* at 370 n.17 (emphasis added).

Anything less would be merely taking the government's word for it, which is constitutionally impermissible under *McCullen*.

C. The Third Circuit's Decision Below Conflicts With This Court's Precedent.

The Third Circuit's decision below ran roughshod over this Court's clear holding in *McCullen*. In the record below, Harrisburg's only evidence even suggesting—much less demonstrating—that it considered less restrictive alternatives was a "12-page transcript of the only council meeting where the Ordinance was substantively discussed." (App. 20a n.12.) The Third Circuit, however, concluded that a meaningful legislative 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." (App. 20a n.12.) But, if the only hearing at which the Ordinance was considered, discussed, debated, and approved **lacked even a pretextual discussion of potential alternatives**, how can the government satisfy *McCullen*'s requirement that it demonstrate it has not "too readily foregone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage"? 573 U.S. at 490.

Moreover, "[i]t is uncontested that [state and local trespass, disturbing the peace, noise, and loitering] statutes were available to law enforcement at the time the Ordinance was being considered. It

does not appear that any prosecutions under these statutes were brought by the City or private citizens." (App. 53a–54a.) Thus, it would not have been possible for the City to demonstrate that any such alternative had been tried and failed—the undisputed record shows the City never tried. The Third Circuit never engaged with this glaring reality. Indeed, if there was no record of failed attempts at enforcing existing laws, then it was necessarily impossible for the City to have "shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 494 (rejecting state's claim that existing laws were "difficult to enforce" because state identified "not a single prosecution brought under those laws within at least the last 17 years"). The Third Circuit's holding that the absence of any meaningful discussion of alternatives was not in itself fatal to the narrow tailoring analysis is wholly irreconcilable with *McCullen*.

The Third Circuit's only other mention of the City's consideration of less restrictive alternatives was "a councilperson's testi[mony] that existing criminal laws prohibiting trespassing, excessive noise, and disorderly conduct were insufficient to keep protests under control." (App. 19a.) That testimony, however, did not demonstrate that such alternatives had been tried and determined to have failed at the time of enactment of the Ordinance, or how such alternatives were closely examined and ruled out for good reason prior to enacting the Ordinance. In fact, the Third Circuit's crediting the City's after-the-fact testimony is the epitome of simply taking the government's word for it. Contra

this Court's admonition in *McCullen*, "[g]iven the vital First Amendment interests at stake, **it is not enough for [the government] simply to say that other approaches have not worked**." 573 U.S. at 496 (emphasis added). The Third Circuit, however, allowed the government simply to say that other options did not work. It cannot be gainsaid that such a conclusion is wholly inconsistent with and cannot be squared with the narrow tailoring burden this Court articulated in *McCullen*.

CONCLUSION

The Third Circuit's decision below improperly relied upon the overruled content-neutrality analysis of *Hill* and completely ignored this Court's new articulation of the content-based standard in *Reed* and *McCullen*. The Third Circuit's judicial rewrite of the Ordinance in direct contradiction to the City's construction, interpretation, and actual enforcement and defense of the Ordinance is also in direct conflict with this Court's precedents *Stevens* and *Reno*, as well as the precedents of every other circuit court. Finally, the Third Circuit improperly permitted the government'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 in direct conflict with this Court's precedent *McCullen*. For all these reasons, the Petition should be granted.

Dated this February 3, 2020.

Respectfully submitted,

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

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING DENIAL OF PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION AGAINST HARRISBURG BUFFER ZONE ORDINANCE, FILED OCTOBER 23, 2019 (*Reilly II*)

2019 WL 5424685
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

Colleen REILLY; Becky Biter; Rosalie Gross
v.
CITY OF HARRISBURG; Harrisburg City Counsel; Mayor Eric Papenfuse, in his official capacity as Mayor of Harrisburg
Colleen Reilly; Becky Biter, Appellants

No. 18-2884
|
Submitted Under Third Circuit L.A.R. 34.1(a) July 12, 2019
|
(Opinion filed: October 23, 2019)

Before: SHWARTZ, KRAUSE, and FUENTES, Circuit Judges

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

KRAUSE, Circuit Judge.

***1** Plaintiffs Colleen Reilly and Becky Biter appeal the District Court's denial of their motion for a preliminary injunction seeking to enjoin the enforcement of a Harrisburg ordinance that restricts certain types of expression within twenty feet of health care facilities on the ground that it violates the First Amendment. Consistent with our recent decision in *Bruni v. City of Pittsburgh (Bruni II)*, No. 18-1084, —— F.3d ——, 2019 WL 5281050, slip op. (3d Cir. 2019), we will affirm.

I. Background[1]

[1] Because we write primarily for the parties, we include only those facts and elements of the procedural history necessary to resolve this appeal and discuss the facts in greater detail in the context of our analysis below.

In November 2012, Harrisburg (the "City") adopted Ordinance No. 12-2012, codified as Harrisburg Code Chapter 3-371 (the "Ordinance"). It states, in relevant part:

> No person or persons shall

> 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 § 3-371.4 (2012); JA 164. The city council also 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; JA 163–64. Harrisburg adopted the Ordinance following a city council hearing during which the council heard testimony about problems that were occurring outside of the city's two reproductive health facilities, including:

> [T]respassing on private property, blocking the driveway entrance to [the] health care center, photographing or videotaping staff at close range, documenting license plate numbers of staff and patients ..., yelling harassing and offensive words ... including threat[s] ..., following the staff to continue harassment ..., pounding on the front window of the health center entrance to harass volunteers and

> those ... seeking care, [and] standing on private property to photograph employees through office windows.

JA 132.

Plaintiffs attest 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.[2] JA 65. They contend that their "sidewalk counseling and leafletting approach can only be communicated through close, caring, and personal conversations," and the buffer zones created by the Ordinance significantly hinder their ability to effectively communicate their message. JA 78.

[2] As in *Bruni II*, *see* slip op. at 11 n.6, —— F.3d at —— n.6, we will use the term "sidewalk counseling" in this opinion in accordance with the meaning given to it by Plaintiffs.

In March 2016, Plaintiffs filed a motion to preliminarily enjoin its enforcement on First Amendment grounds, which the District Court denied.[3] *See Reilly v. City of Harrisburg*, 205 F. Supp. 3d 620, 625, 638–39 (M.D. Pa. 2016). We reversed and remanded, holding that the District Court had improperly applied the preliminary injunction standard by shifting the burden of demonstrating narrow tailoring to Plaintiffs;

however, we did not address the merits of Plaintiffs' constitutional challenge. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176–80 (3d Cir. 2017) (*Reilly I*).

[3] Although not relevant here, Plaintiffs also alleged that the Ordinance violated their First Amendment rights to free exercise of religion and assembly as well as their Fourteenth Amendment rights to equal protection and due process. *See Reilly v. City of Harrisburg*, 205 F. Supp. 3d 620, 625 (M.D. Pa. 2016).

***2** On remand, the District Court held an evidentiary hearing on Plaintiffs' preliminary injunction motion. *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 456 (M.D. Pa. 2018). The Court received numerous pieces of documentary evidence and heard substantial testimony about the history of the Ordinance and Harrisburg's financial difficulties at the time of the Ordinance's adoption, among other topics. *See id.* Based on this new evidence and considering the standard for a preliminary injunction as clarified in *Reilly I*, the District Court again denied Plaintiffs' motion. *Id.* at 474. In doing so, the Court concluded that the Ordinance permitted sidewalk counseling. *Id.* at 459 n.3, 463–64. This appeal followed.

II. Discussion[4]

[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a), and we have jurisdiction under 28 U.S.C. § 1292(a)(1). "When reviewing a district court's [denial] of a preliminary injunction, we review the

> court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) (citation omitted). Because this is a First Amendment case, however, "we must conduct an independent examination of the factual record as a whole." *Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010) (internal quotation marks and citation omitted).

Plaintiffs seek to preliminarily enjoin enforcement of the Ordinance. To obtain a preliminary injunction, an "extraordinary remedy," *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526 (3d Cir. 2018) (citation omitted), the moving party must show "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured ... if relief is not granted," *Reilly I*, 858 F.3d at 176 (alteration in original) (citation omitted). If these two "threshold" factors are met, a court then considers the remaining two factors—"(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest"—and determines, on balance, whether to grant the requested preliminary relief. *Id.* (citation omitted).

At issue here is the first factor: whether Plaintiffs have a sufficient likelihood of succeeding on the merits of their constitutional challenge to the Ordinance.[5] In support of their contention that the Ordinance violates their First Amendment rights, Plaintiffs make four arguments: (1) "[t]he District Court erred when it *sua sponte* rewrote the

Ordinance to permit sidewalk counseling" to save it from constitutional infirmity, Appellants' Br. 23; (2) the Ordinance is unconstitutionally vague and overbroad; (3) the Ordinance is content based and subject to strict scrutiny; and (4) even if it is considered content neutral, the Ordinance is not narrowly tailored and thus does not survive intermediate scrutiny.[6] As many of Plaintiffs' arguments are foreclosed by our recent decision in *Bruni II*, we begin there and then address Plaintiffs' arguments in turn.

[5] As we explained in *Reilly I*, however, in First Amendment cases, "the [g]overnment bears the burden of proof on the ultimate question of [a statute's] constitutionality." 858 F.3d at 180 (alterations in original) (citation omitted).

[6] Plaintiffs also argue that the remaining preliminary injunction factors of irreparable injury, public interest, and balance of harms support injunctive relief and that we should reassign this case to a different district court judge. For the reasons explained below, we conclude that Plaintiffs do not have a sufficient likelihood of prevailing on the merits of their claim—a threshold requirement—and thus do not address these remaining factors. We also decline to exercise our discretion to reassign this case to a different district court judge. *See United States v. Bergrin*, 682 F.3d 261, 282 (3d Cir. 2012) ("[R]eassignment is an extraordinary remedy that should seldom be employed." (citation omitted)). Although we agree that federal courts discussing the significant constitutional rights on both sides of this issue should address the parties with appropriate sensitivity and respect, including the respect due to the sincere religious beliefs and peaceful practices of

> sidewalk counselors as defined by Plaintiffs, we are not persuaded that the few isolated remarks on which Plaintiffs rely to seek recusal indicate bias or partiality on the part of the District Judge here. As a general matter, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and here, while the District Judge appeared at certain points to express skepticism about the peacefulness of sidewalk counseling, the record before her did reflect instances when persons who called themselves "sidewalk counselors" had engaged in loud and aggressive confrontations. That conduct, however, brings such persons outside of Plaintiffs' definition, and like the Supreme Court in *Schenck v. Pro-Choice Network of Western New York*, we reject the notion that "protestors" and "sidewalk counselors" as Plaintiffs use the term are one and the same. 519 U.S. 357, 363, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

A. Our Decision in *Bruni II*

***3** In *Bruni II*, individuals who identified as sidewalk counselors challenged an almost identical ordinance that created a fifteen-foot buffer zone outside the entrance of any hospital or healthcare facility in the city of Pittsburgh. *Bruni II,* slip op. at 5, 9, —— F.3d at ——, ——. As here, the ordinance stated that "[n]o person or persons shall knowingly congregate, patrol, picket or demonstrate" in the proscribed zone, *id.* at ——, at 9 (quoting Pittsburgh, Pa., Code § 623.04 (2005)), and, although the plaintiffs' sidewalk counseling consisted only of peaceful one-on-one conversations

and leafletting, the city of Pittsburgh interpreted the ordinance to prohibit the plaintiffs' actions, *Bruni II*, slip op. at 12, —— F.3d at ——.

Looking at the plain meaning of the ordinance's language, we concluded that the proscribed activities—congregating, patrolling, picketing, and demonstrating—did not encompass the sidewalk counseling in which the plaintiffs engaged. *Id.* at —— – ——, at 24–26. As such, we found the ordinance "readily susceptible" to a narrowing construction under the doctrine of constitutional avoidance. *Id.* at ——, at 21 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)); *id.* at —— – ——, at 24–26. In the absence of a state court's interpretation to the contrary, we therefore construed the ordinance narrowly not to prohibit sidewalk counseling within the zone. *Id.* at —— n.14, ——, at 22 n.14, 27.

With the ordinance so interpreted, we rejected the plaintiffs' argument that the ordinance was content based. *Id.* at ——, at 28. Because the ordinance did not prohibit sidewalk counseling—or any other peaceful one-on-one conversations on any topic or for any purpose—we concluded that it neither regulated speech based on subject matter, function, or purpose, nor required law enforcement to examine the content of the speech to determine if a violation had occurred. *Id.* at —— – ——, at 26–28. Indeed, we said, the Supreme Court "has repeatedly considered regulation of [the proscribed] activities to be based on the manner in which

expressive activity occurs, not its content, and held such regulation content neutral." *Id.* at ——, at 26 (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763–64, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *Snyder v. Phelps*, 562 U.S. 443, 456, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); *Hill v. Colorado*, 530 U.S. 703, 721, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383–85, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997); *United States v. Grace*, 461 U.S. 171, 181–82, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983)). Therefore, we concluded the ordinance was content neutral and subject to intermediate scrutiny. *Bruni II*, slip op. at 28, —— F.3d at ——.

Applying intermediate scrutiny, the ordinance, as properly interpreted to exclude sidewalk counseling, passed muster. Focusing on the "narrow tailoring" prong, we concluded that the ordinance did not "burden substantially more speech than" was "necessary to further the government's legitimate interests" in protecting access to pregnancy-related services, ensuring public safety, and eliminating neglect of law enforcement needs. *Id.* at ——, at 30 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014)). Specifically, we explained that where a restriction imposes a significant burden on speech, the government must show that it tried or "seriously considered[ ] substantially less restrictive alternatives," such as arrests or targeted injunctions. *Bruni II*, slip op. at 31, —— F.3d at ——. But where the burden on speech is not significant, "a less demanding inquiry

is called for." *Id.* Because the ordinance was limited in scope and size, we concluded that the burden on speech was not significant. *Id.* at ——— – ———, at 32–33. And because Pittsburgh had "attempt[ed] or consider[ed] some less burdensome alternatives," such as the use of an overtime police detail and enforcement of existing criminal laws, "and conclud[ed] they were unsuccessful in meeting the legitimate interests at issue," the city had satisfied its corresponding burden. *Id.* at ———, at 34 (citations omitted). We therefore held that the ordinance was narrowly tailored and survived intermediate scrutiny. *Id.* at ——— – ———, at 35–36.

***4** With this guidance, we now turn to Plaintiffs' arguments.

B. Plaintiffs' Arguments

First, the District Court did not err by interpreting the Ordinance narrowly to exclude sidewalk counseling. As we explained in *Bruni II*, the doctrine of constitutional avoidance counsels that "[i]n the absence of a limiting construction from a state authority, we must presume any narrowing construction or practice to which the law is fairly susceptible." *Id.* at ———, at 22 (alteration in original) (internal quotation marks omitted) (quoting *Brown v. City of Pittsburgh*, 586 F.3d 263, 274 (3d Cir. 2009)); *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 n.10 (3d Cir. 2001). Here, as in *Bruni II*, no state court has interpreted the Ordinance, and the Ordinance is "fairly susceptible" to a narrowing construction that

excludes sidewalk counseling from its reach because the plain meanings of the words "congregate," "patrol," "picket," and "demonstrate" do not cover peaceful one-on-one conversations or leafletting. *Bruni II*, slip. op. at 24–26, —— F.3d at ——— – ———. The District Court therefore did not "rewrit[e]" the Ordinance but simply "reinterpret[ed]" it consistent with the plain meaning of its terms.[7] *Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 539 (3d Cir. 2012) (quoting *United States v. Stevens*, 559 U.S. 460, 481, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)).

[7] Plaintiffs' arguments to the contrary are not persuasive. That the City asserts that the Ordinance covers Plaintiffs' sidewalk counseling is not dispositive. *See Bruni II*, slip op. at 22 n.14, —— F.3d at ——— n.14. And given that our precedent is clear that a federal court may interpret a state statute or municipal ordinance narrowly to avoid constitutional infirmity where it is readily susceptible to such an interpretation, *see id.* at ——— – ———, at 22–24; *Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 539 (3d Cir. 2012); *Brown*, 586 F.3d at 274; *Saxe*, 240 F.3d at 215–16, 215 n.10, it is of no consequence that some other circuits take a contrary approach, *Bruni II*, slip op. at 22 n.14, —— F.3d at ——— n.14.

Second, the Ordinance is neither unconstitutionally vague nor overbroad. A law is impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes ... arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732, 120 S.Ct. 2480 (citation omitted). Although

Plaintiffs are correct that the Ordinance does not provide definitions of the itemized activities that are prohibited within the zone, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). And, here, we do have guidance from the Supreme Court, which has found words like "demonstrate" not impermissibly vague, particularly when viewed in context, *see Schenck*, 519 U.S. at 383, 117 S.Ct. 855,[8] and, as is true of the Ordinance, when such words are qualified by a scienter requirement, *see Hill*, 530 U.S. at 732–33, 120 S.Ct. 2480. At bottom, Appellants' vagueness and overbreadth arguments rely on the assumption that the Ordinance can be interpreted to cover sidewalk counseling.[9] As we conclude that is not a reasonable reading of the Ordinance's plain language, *see Bruni II*, slip op. at 28, —— F.3d at ——, however, the Ordinance is neither unconstitutionally vague nor overbroad.

[8] Indeed, in *Schenck*, the Supreme Court "quickly refuted" an argument that the term "demonstrating" was vague. 519 U.S. at 383, 117 S.Ct. 855 ("When the injunction is read as a whole, we believe that people of ordinary intelligence (and certainly defendants, whose demonstrations led to this litigation in the first place) have been given a reasonable opportunity to know what is prohibited." (internal quotation marks and citations omitted)).

[9] Plaintiffs also argue that the Ordinance is vague "because it does not require Defendants to visibly mark

> the buffer zone boundaries on the sidewalk," Appellants' Br. 37, and there is some evidence in the record indicating that the lack of clear demarcation of the zone has created uncertainty about its bounds. While we agree with Plaintiffs that this raises vagueness concerns, such concerns are ameliorated in large part by the Ordinance's scienter requirement. *See Brown*, 586 F.3d at 291 n.34 (citing *Hill*, 530 U.S. at 732, 120 S.Ct. 2480). And, "[a]s always, enforcement requires the exercise of some degree of police judgment." *Hill*, 530 U.S. at 733, 120 S.Ct. 2480 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). To the extent there remain vagueness concerns, however, we are confident that if the District Court determines a remedy is necessary on remand, it could fashion one that does not require disposing of the Ordinance in its entirety. *See, e.g.*, *Brown v. City of Pittsburgh*, No. 06-393, 2010 WL 2207935, at *2 n.2 (W.D. Pa. May 27, 2010).

***5** *Third*, the Ordinance is not content based and thus not subject to strict scrutiny. 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." *Reed v. Town of Gilbert*, —— U.S. ——, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015) (alteration in original) (internal quotation marks and citations omitted). Plaintiffs argue that the Ordinance is content based under each of these tests. We disagree.

Plaintiffs first contend that the Ordinance is

content based because it regulates speech "whose function or purpose is to 'demonstrate' or 'picket' " but not "speech whose function or purpose is to communicate something else." Appellants' Br. 44. But, as we explained in *Bruni II*, "demonstrating" and "picketing," both of which have obvious visible manifestations, go to "the manner in which expressive activity occurs, not its content." *Bruni II*, slip op. at 26, —— F.3d at ——— (citing *Madsen*, 512 U.S. at 759, 763–64, 114 S.Ct. 2516; *Snyder*, 562 U.S. at 456, 131 S.Ct. 1207; *Hill*, 530 U.S. at 721, 120 S.Ct. 2480; *Schenck*, 519 U.S. at 383–85, 117 S.Ct. 855; and *Grace*, 461 U.S. at 181–82, 103 S.Ct. 1702).

Plaintiffs next argue that the Ordinance is content based because it bans "only discussions 'of substance' " and "leafletting about abortion alternatives" in the buffer zone, thus requiring law enforcement to examine the content of any speech to determine whether it is prohibited within the zone. Appellants' Br. 44. That being so, Plaintiffs contend, the Ordinance "cannot be justified without reference to the content of the regulated speech." *Id.* (citation omitted). But the District Court's narrow interpretation renders this argument moot: The Ordinance as properly interpreted does not prohibit sidewalk counseling—or any other peaceful one-on-one conversations about any subject or for any purpose—in the zone. Therefore, "there is no need for law enforcement 'to examine the content of the message ... to determine whether a violation has occurred.' " *Bruni II*, slip op. at 28, —— F.3d at ——— (omission in original) (quoting

McCullen, 573 U.S. at 479, 134 S.Ct. 2518).

Finally, Plaintiffs contend that the Ordinance is content based because it was "enacted ... to counteract listeners' reactions to speech," an impermissibly content-based purpose. Appellants' Br. 40 (capitalization omitted). Specifically, they point to three statements as evidence of a content-based motive for enacting the Ordinance: a comment at a city council hearing calling the legislation necessary to "protect the dignity" of patients[10]; the Ordinance's description of its "purpose" as assisting police in their "effort[s] to prevent violent confrontations"; and Defendants' statement in a brief that "Harrisburg determined that it needed a buffer zone as a preventative measure" in part because "[s]ometimes, a patient's loved one would react protectively, escalating the situation." Appellants' Br. 41 (alterations in original) (citations omitted).

[10] Plaintiffs erroneously imply that it was a Planned Parenthood employee who made this and other allegedly offending comments. But "a resident of the neighborhood" made these comments. JA 132.

None of these statements indicate that the City adopted the Ordinance for an impermissibly content-based reason. To begin with, the interests identified 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"—are content neutral.

JA 163–64; *see McCullen*, 573 U.S. at 480–81, 134 S.Ct. 2518. Indeed, the Supreme Court has said so repeatedly. *See Bruni II*, slip op. at 29, —— F.3d at ——— (citing cases). Plaintiffs' attempt to transform the content-neutral goal of "prevent[ing] violent confrontations"—and the related goal of de-escalating tense situations—into a content-based restriction akin to a heckler's veto is unavailing: "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[11] *McCullen*, 573 U.S. at 480, 134 S.Ct. 2518 (alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746); *see Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (distinguishing a "heckler's veto," which is an "impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience," from a "content-neutral time, place, or manner restriction"). And as for the allegedly offending stray comment, it is irrelevant because the individual resident who uttered it does not speak for the City. We therefore agree with the District Court that the Ordinance is content neutral.

[11] Moreover, contrary to Plaintiffs' argument, the Ordinance does not impermissibly regulate the "undesirable effects that arise from 'the direct impact of speech on its audience' or 'listeners' reactions to speech,' " because "[w]hether or not a single person reacts to abortion protesters' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and

> obstruct sidewalks." *McCullen*, 573 U.S. at 481, 134 S.Ct. 2518 (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)).

***6** *Fourth*, the Ordinance is narrowly tailored and therefore survives intermediate scrutiny. To be narrowly tailored, a regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518 (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746). As was true in *Bruni II*, the Ordinance, as properly interpreted, does not impose a significant burden on speech. The scope of prohibited expressive activities is identical to that in *Bruni II* and the fact that the buffer zone is five feet larger than the zone in *Bruni II* is not enough to render the burden on speech significant. *See Bruni II*, slip op. at 30, —— F.3d at ——— ("[W]e afford[ ] some deference to a municipality's judgment in adopting a content-neutral restriction on speech." (second alteration in original) (citation omitted)). Indeed, the buffer zone is significantly smaller than the thirty-five-foot zone in *McCullen* that was not narrowly tailored because, among other things, it "carve[d] out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinic's entrances and driveways." 573 U.S. at 487, 134 S.Ct. 2518.

Also, as in *Bruni II*, 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."[12] *Bruni II*, slip op. at 34, —— F.3d at ——. At the hearing on the preliminary injunction, a councilperson testified that existing criminal laws prohibiting trespassing, excessive noise, and disorderly conduct were insufficient to keep protests under control before the Ordinance's enactment. This was in large part due to the City's inability to expend police resources to enforce these laws because of the City's grave financial situation: As the former special counsel to the Harrisburg City Council explained, with over 300 million dollars in debt, the City was placed under receivership status and could afford neither to hire additional police officers nor to pay officers overtime to patrol the clinics.[13] *See Turco v. City of Englewood*, 935 F.3d 155, 167, 169 (3d Cir. 2019) (recognizing relevance of a city's "financial restraints" and police department's "finite resources" in the narrow tailoring analysis). 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. Thus, given that the burden the Ordinance imposes on speech is not significant and the City has demonstrated that it tried or considered some less-restrictive alternatives, we conclude that the Ordinance is narrowly tailored and survives intermediate scrutiny. That being so, Plaintiffs do not have a "reasonable probability of eventual success in the litigation," *Reilly I*, 858 F.3d at 176 (citation omitted), and the District Court therefore did not

err in denying their motion for a preliminary injunction.[14]

[12] Plaintiffs contend that Defendants have not carried their burden because "Defendants' entire 'meaningful record' of what they considered prior to enacting the Ordinance consists of the 12-page transcript of the only council meeting where the Ordinance was substantively discussed" and that record was "devoid of any serious consideration of less restrictive alternatives." Appellants' Br. 52. But we agree with the District Court that a local government is not required to "produce all available evidence and consider alternatives at a single, recorded hearing before taking action." *Reilly*, 336 F. Supp. 3d at 466. Even when a burden on speech is significant, all that our precedent requires is that "substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out," *Bruni v. City of Pittsburgh (Bruni I)*, 824 F.3d 353, 370 (3d Cir. 2016) (citation omitted), not that the only evidence a court can consider in determining whether the government has satisfied its burden must be derived from a committee council hearing that was recorded. More importantly, the burden here is not significant, so the City need only show that the restriction did not "burden[ ] *substantially* more speech than ... necessary to further the government's legitimate interests." *Bruni II*, slip op. at 35, —— F.3d at ——— (quoting *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518). Through declarations, documentary evidence, and in-court testimony, Defendants have done so.

[13] The City also decreased police benefits, causing officers to leave the force and fewer to join, at times leaving only four to eight police officers to patrol the City—a consequence the effects of which Harrisburg continues to feel to this day. Plaintiffs suggest that the City's

financial woes could not have been as bad as Defendants say—and as the District Court found—because Harrisburg's Chief of Police said during the same hearing at which the Ordinance was discussed that he would "step up enforcement of the City's noise and trash ordinances." Appellants' Br. 57. But the Police Chief's testimony merely reflects in context that councilmembers were not pleased that those ordinances were not adequately being enforced—no doubt due at least in part to scarce resources—and that the Police Chief would try to address their concerns going forward. His offer to "help ... out" the City's code enforcement division while its leader was having personal difficulties, JA 572, also does not demonstrate that there were resources available to station officers outside the City's reproductive health facilities on a continuous basis.

[14] We recognize that the City could have a legitimate concern about access to healthcare facilities if there are multiple one-on-one conversations that block access to the facilities. *See McCullen*, 573 U.S. at 486–87, 134 S.Ct. 2518. The City may then have occasion to revisit the terms of the Ordinance, having developed a record that would satisfy *McCullen* and *Bruni I*, as well as the content-neutrality requirement of *Reed*. *See Turco*, 935 F.3d at 162–63.

III. Conclusion

***7** For the foregoing reasons, we will affirm the decision of the District Court.

All Citations

--- Fed.Appx. ----, 2019 WL 5424685

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DENYING PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION AGAINST HARRISBURG BUFFER ZONE ORDINANCE, FILED AUGUST 23, 2018

336 F.Supp.3d 451
United States District Court, M.D. Pennsylvania.

Colleen REILLY, Becky Biter, and Rosalie Gross, Plaintiffs,
v.
CITY OF HARRISBURG, Harrisburg City Council, and Eric Papenfuse, in his official capacity as Mayor of Harrisburg, Defendants.

Civ. No. 1:16-CV-0510
|
Signed 08/23/2018

MEMORANDUM

SYLVIA H. RAMBO, United States District Judge

This First Amendment case comes before the court on remand from the Court ***455** of Appeals for the Third Circuit for reconsideration of Colleen Reilly and Becky Biter's ("Plaintiffs")[1] motion for a preliminary injunction. In its opinion, *Reilly v. City of Harrisburg*, 858 F.3d 173, 175 (3d Cir. 2017), *as amended* (June 26, 2017) ("*Reilly II*"), the Third Circuit clarified the proper standard for determining whether a plaintiff is entitled to preliminary injunctive relief. Plaintiffs seek to

enjoin the enforcement of an ordinance enacted by the City of Harrisburg (the "City") requiring demonstrators to remain a certain distance from the entrances, exits, and driveways of health care facilities. After reconsideration of Plaintiff's motion under the clarified standard articulated in *Reilly II*, this court will deny Plaintiff's motion for a preliminary injunction for the reasons stated herein.

[1] As noted by the Third Circuit, Rosalie Gross was a plaintiff in the original action before this court, *Reilly v. City of Harrisburg*, 205 F.Supp.3d 620, 636 (M.D. Pa. 2016) ("*Reilly I*"), *vacated and remanded*, 858 F.3d 173 (3d Cir. 2017), *as amended* (June 26, 2017). Ms. Gross has since voluntarily dismissed her claims without prejudice and did not join in Plaintiffs' appeal.

I. Factual and Procedural Background

As set forth in this court's prior opinion in *Reilly I*, the relevant factual background is as follows:

> Plaintiffs are individual citizens of Pennsylvania who regularly provide what they euphemistically refer to as "sidewalk counseling" outside of two health care facilities in Harrisburg, Pennsylvania that perform, among other procedures, abortions. Plaintiffs engage in leafletting, prayer, and individual conversations with women who are attempting to enter the health care facilities in an effort to dissuade them from obtaining abortions.
>
> On November 13, 2012, Defendant Harrisburg

> City Council adopted Ordinance No. 12–2012 entitled "Interference With Access To Health Care Facilities (the "Ordinance")," which became effective on November 23, 2012. [*See*] Harrisburg, Pa. Mun. Code § 3-371 (2015), http://ecode360.com/13739606. The Ordinance's stated purpose is "to promote the health and welfare of [Harrisburg] residents and visitors to [Harrisburg]'s health care facilities, as well as the health and welfare of those who may wish to voice their constitutionally protected speech outside of such health care facilities." Harrisburg, Pa. Mun. Code, § 3-371.2C. The Ordinance makes it illegal for individuals, other than police or emergency personnel performing official functions, or employees of health care facilities that are assisting patients to enter or exit the facilities, 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." *Id.* at § 3-371.4A.

Reilly I at 624-25 (footnote and citations to the record omitted).

Plaintiffs filed their complaint on March 24, 2016, alleging, *inter alia*, that the "buffer zones" created by the Ordinance made it impossible for them to counsel patients and distribute pamphlets in opposition to abortion at certain health care facilities within the City limits. (Doc. 1, ¶¶ 40-41, 50, 56.) Plaintiffs argue that the Ordinance violates their First Amendment rights to free speech, exercise of religion, and assembly, as well as their

Fourteenth Amendment rights to equal protection and due process. On March 25, 2016, Plaintiffs filed the instant motion seeking to preliminarily enjoin enforcement of the Ordinance due to the irreparable harm it causes to ***456** their First Amendment rights. (*See* Doc. 3.) Defendants filed a brief in opposition to Plaintiffs' motion for a preliminary injunction and soon thereafter filed a motion to dismiss for failure to state a claim upon which relief can be granted. (Docs. 15, 16.) After briefing on both motions, this court issued an order denying Defendants' motion to dismiss with respect to Plaintiffs' claims under the First Amendment, granting it with respect to all other claims, and denying Plaintiffs' motion for a preliminary injunction. (Doc. 45.) Plaintiffs subsequently appealed this court's order to the Third Circuit, which reversed this court's order to the extent that it denied Plaintiffs' motion for a preliminary injunction, and remanded the matter to this court for further consideration.

On remand, this court held an evidentiary hearing on Plaintiffs' motion for a preliminary injunction on October 31, 2017, and November 1, 2017. Prior to the hearing, Defendants submitted documentary evidence including declarations from City officials, Planned Parenthood employees, and Plaintiffs, including Rosalie Gross, maps of the areas around the clinic, evidence of the City's financial hardship, video taken around the Planned Parenthood clinic, audio from the committee hearing at which the Ordinance was discussed, and drafts and supporting documentation regarding the

Ordinance. Defendants submitted exhibits that included a declaration from Harrisburg police officers, the text of City ordinances, a draft version of the Ordinance, and memoranda and correspondence between City officials and Planned Parenthood employees. At the hearing, Defendants called Councilman Brad Koplinski ("Koplinski"), City Solicitor Neil Grover ("Grover"), City Engineer Wayne Martin ("Martin"), Officer Chad Sunday ("Sunday"), a City Financial Coordinator, Gerald Cross ("Cross"), and Planned Parenthood employees Andrew Guth ("Guth"), Lindsey Mauldin ("Mauldin"), and Sari Stevens ("Stevens"). Plaintiffs testified on their own behalf at the hearing, but did not present additional witnesses. The record is now closed, and the parties have submitted supplemental briefs in support of and in opposition to Plaintiffs' motion. Accordingly, the matter is now ripe for disposition.

II. Discussion

The First Amendment right to freedom of speech is fundamental, yet not without limit. Our Supreme Court has repeatedly held that such limits exist. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (acknowledging distinction between protected speech and "incitement to imminent lawless action"); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (distinguishing "obscenity" from protected speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (explaining that maliciously false and defamatory

speech is not entitled to protection); *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (plurality opinion) (holding that even cross burning can qualify as protected speech if it is not done with an "intent to intimidate"). Perhaps most poignantly illustrated in *Virginia v. Black*, the content of even vile and hateful speech is entitled to protection; however, the First Amendment does not require the government to allow such speech to be delivered in a violent and assaultive manner. This complex question, simply put, is whether an ordinance passed by a local government entirely restrains a particular message or merely places reasonable limitations on how that message may be delivered. Upon thorough examination, this court finds that the Ordinance constitutes the latter.

***457** Plaintiffs move for a preliminary injunction of the enforcement of the Ordinance, arguing that the Ordinance abrogates their First Amendment right to free speech in public fora because it is a content-based restriction that prohibits only anti-abortion speech and that it is not narrowly tailored to serve a legitimate governmental interest. Defendants had previously moved to dismiss Plaintiffs' complaint in its entirety for failure to state a claim under Rule 12(b)(6); however, this court previously denied Defendants' motion, and Defendants did not appeal that holding. Accordingly, we now resolve Plaintiffs motion for a preliminary injunction under the standard articulated by the Third Circuit in *Reilly II*.

The four factors that a court must consider in determining whether a petitioner is entitled to a preliminary injunction remain unchanged:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured ... if relief is not granted.... [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly II at 176 (quoting *Del. River Port Auth. v. Transam. Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974)). The Third Circuit, however, did clarify the allocation of the burdens borne by the respective parties:

> [A] movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway

> factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.
>
> ....
>
> In deciding whether to issue a preliminary injunction, plaintiffs normally have the burden of demonstrating a sufficient likelihood of prevailing on the merits. However, in First Amendment cases where "the government bears the burden of proof on the ultimate question of a statute's constitutionality, plaintiffs must be deemed likely to prevail for the purpose of considering a preliminary injunction unless the government has shown that plaintiffs' proposed less restrictive alternatives are less effective than the statute."

Reilly II at 179-80 (footnotes and alterations omitted) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004)). This court previously erred by placing the burden with Plaintiffs to prove all four prerequisites to a preliminary injunction. Under the standard set forth by the Third Circuit, the Plaintiffs, as the moving party, bear the initial burden of demonstrating that they are more likely than not to suffer irreparable harm without a preliminary injunction and have a likelihood of success on the merits. In considering whether Plaintiffs are likely to prevail, Defendants bear the burden to prove "the ultimate question of constitutionality" and

must demonstrate that the proposed less-restrictive alternatives are less effective than the Ordinance. To that end, this court shall consider whether Defendants have met their burden, while remaining mindful that preliminary injunctive relief remains an "extraordinary ***458** remedy." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526 (3d Cir. 2018). As a preliminary matter, however, this court will address whether the Ordinance is content neutral, subject to intermediate scrutiny, or content based subject to strict scrutiny.

A. Content Neutrality

As discussed in this court's prior decision, an ordinance is subject to strict scrutiny if it is a content-based restriction on speech. *Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). An ordinance restricting speech is content based and subject to strict scrutiny if it: (1) "define[s] speech by particular subject matter;" (2) "define[s] regulated speech by its function or purpose;" (3) cannot be justified "without reference to the content of the regulated speech;" or (4) was "adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* Under strict scrutiny, the challenged law is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests," and the content-based restriction must be "the least restrictive or least intrusive means of serving the government's interests." *Bruni v. City of*

Pittsburgh, 824 F.3d 353, 363 (3d Cir. 2016) (citing *Reed*, 135 S.Ct. at 2226).[2]

[2] To the extent Plaintiffs suggest that the Third Circuit's holding in *Bruni* is dispositive, the court rejects such a supposition. The District Court in *Bruni* both denied the plaintiffs' motion for preliminary injunction and granted the defendants' motion to dismiss. The plaintiffs appealed only the order dismissing their complaint. Accordingly, the *Bruni* Court examined plaintiffs' complaint under the highly deferential standard applied in the motion to dismiss context. *Bruni*, 824 F.3d at 371 (3d Cir. 2016) ("The City had no opportunity to properly produce such evidence at the motion-to-dismiss stage. Instead, we must accept as true at this stage of the case the Complaint's allegation that 'no specific instances of obstructive conduct outside of hospitals or health care facilities in the City of Pittsburgh ... provide support for the [ordinance].' "). Here, such evidence has been placed on the record and this court may consider it in disposing of Plaintiffs' motion for a preliminary injunction.

Conversely, "[a] regulation that serves purposes unrelated to the content of expression" is content neutral and subject to intermediate scrutiny, "even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citation omitted). Intermediate scrutiny requires that the challenged law be "narrowly tailored to serve a significant governmental interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Under intermediate scrutiny, the restriction on speech need not be the least

restrictive means available, but must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (citation omitted).

Defendants argue that this Court should decline to reexamine its prior holding in *Reilly I* on the issue of content neutrality because the Third Circuit did not reverse on that issue and the law of the case doctrine precludes review of our prior decision without extraordinary circumstances. (Doc. 101, pp. 9-11) (citing *Habecker v. Clark Equip.*, 942 F.2d 210, 218 (3d Cir. 1991).) We will briefly consider, however, whether any evidence elicited during the preliminary injunction hearing would alter our prior analysis and consider Plaintiffs' arguments to the extent they rely on such evidence. Plaintiffs argue on remand that the Ordinance is not content neutral based on several admissions made ***459** by Defendants: "1) Defendants admit that the City enacted the Ordinance because of their concern with the undesirable impact of pro-life speech on the sidewalk audience; 2) Defendants admit that only discussions 'of substance' are banned ... and 3) Defendants admit that only some substantive discussions are banned." (Doc. 88, p. 13.)

In support of their first argument, Plaintiffs cite to several cases holding that a law or regulation is not content neutral if it was enacted due to "undesirable effects that arise from the 'direct impact of speech on its audience' or 'listeners' reactions to speech.' " *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502

(2014) (citing *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)). Defendants, however, fail to distinguish between the "undesirable effects" referenced in *McCullen v. Coakley* and legitimate restrictions on certain acts that are indirectly associated with particular speech. In *Boos v. Barry*, the Supreme Court examined a Washington D.C. ordinance prohibiting signage offensive to foreign governments from being placed near embassies. The Court held that the regulation was content-based because it was enacted to protect the dignity of foreign officials rather than regulate harmful secondary effects caused by such signage. *Boos*, 485 U.S. at 320-321, 108 S.Ct. 1157. Justice O'Connor explained the distinction between a regulation based on content and a regulation dealing with "secondary effects" caused by a particular type of establishment:

> The regulation [limiting zoning of] theaters that specialize in adult films ... applied only to a particular category of speech, its justification had nothing to do with that speech. The content of the films being shown inside the theaters was irrelevant and was not the target of the regulation. Instead, the ordinance was aimed at the secondary effects of such theaters in the surrounding community, effects that are almost unique to theaters featuring sexually explicit films, *i.e.*, prevention of crime, maintenance of property values, and protection of residential neighborhoods. In short, the ordinance in [*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)] did not aim at the suppression of free expression.

> Respondents ... argu[e] that here too the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity. We think this misreads *Renton*. We spoke in that decision only of secondary effects of speech, referring to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.
>
> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*.

Id.

Here, the City did not seek to ban speech regarding abortion because it "offended the dignity" of those seeking to patronize the clinics. The City sought to limit the areas in which any and all protesters[3] could congregate around clinic entrances ***460** because such large groups tended to impede clinic visitors and to engage in aggressive and confrontational behavior. The Ordinance does not appear to even implicate the secondary effects doctrine, as it regulates particular acts (knowingly

congregating, patrolling, picketing or demonstrating) rather than a type of speech that tends to result in negative effects as did adult-themed theatres in *Renton*. Any type of speech would be equally prohibited if the proponents of that speech were performing any of the proscribed actions within the buffer zone. The regulatory targets, *i.e.* protestors outside clinics, happen to be associated with particular types of speech, *i.e.* anti-abortion speech. *McCullen v. Coakley*, 134 S.Ct. at 2531. ("[A] facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics. On the contrary, '[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.' The question in such a case is whether the law is 'justified without reference to the content of the regulated speech.' ") (citing *Ward*, 491 U.S. at 791, 109 S.Ct. 2746) (quoting *Renton*, 475 U.S. at 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). Here, the Ordinance is justified by the actions of the protesters rather than the content of their speech.

[3] A brief note on nomenclature: Plaintiffs consistently refer to themselves as "counsellors" throughout their filings. The distinction in this opinion is purposeful and relevant. As discussed at length, *infra*, the Ordinance does not, by its terms, prohibit many aspects of the "counselling" touted by Plaintiffs. The Ordinance's aim is to restrict aggressive acts of demonstration and protest around the clinic property. Thus, unless otherwise noted, the term "protesters" refers generally to those performing the acts prohibited by the Ordinance.

Plaintiffs additionally rely on *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. D.C.*, 972 F.2d 365 (D.C. Cir. 1992) for the proposition that unintentional incitement to violence is not a content-neutral reason for limiting the time, place, and manner Plaintiffs may demonstrate. The holding in *Invisible Empire*, however, was based on the Ku Klux Klan's request to peacefully march in a parade along with numerous other groups. The D.C. Circuit held that the audience's theoretical *hostile acts* in response to *passive speech* was insufficient to demonstrate a content neutral reason for the regulation. *Id.* at 374; *see also Startzell v. City of Philadelphia*, No. 05-cv-5287, 2007 WL 172400, *9 (E.D. Pa. Jan. 18, 2007), *aff'd sub nom. Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008) (distinguishing a "heckler's veto" from reasonable time, place, and manner restrictions). Conversely, here, the content of the speech is irrelevant; it is the time, place, and alleged encroachment into the personal space of clinic patrons that the City found objectionable, not the mere message.

Plaintiffs next cite a statement made by Neil Grover, Defendants' corporate designee and city solicitor, regarding the enforcement of the Ordinance with respect to congregating. Grover testified that "[i]f two people were talking about anything of substance, I think the answer is, they're congregating." (Hearing Transcript ("Tr."), p. 355.) Plaintiffs argue that this statement

indicates that the Ordinance would require police officers to determine the content of the speech before enforcing it. This argument is patently without merit. Assuming, *arguendo*, that Grover's method of interpretation is binding on the City for future enforcement, no inquiry into the content is required to determine if a conversation is substantive. Grover's comments were used to illustrate that the Ordinance did not prohibit two individuals ***461** from engaging in a passing greeting: "If two people were walking in the same direction ... and they're talking ... good morning, good afternoon, whatever, I don't know if those people would be considered congregating by any definition." (*Id.*) Plaintiffs' argument assumes that police officers are ignorant of social norms and average human behavior. If Plaintiffs' assumption were true, police would be incapable of distinguishing a woman walking down the street with a paramour from a woman being harassed or accosted by a stranger. A police officer is more than capable of distinguishing calm pamphleting by an individual from a group of people marching up and down the street with banners and bullhorns. An officer need not hear the precise content of what is being said, but can easily distinguish normal social interaction from protest or assault without regard to the content of the speech. *See Hill v. Colorado*, 530 U.S. 703, 721, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) ("[I]t is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling' rather than pure social or random

conversation."). Here, police may enforce the Ordinance by making objective determinations without inquiry into the content of the speech.

Finally, Plaintiffs argue that Counsel for Defendants admitted at argument before the Third Circuit that the enforcement of the Ordinance would depend on the content of the speech. Counsel responded to a line of questioning from Circuit Judge Jordan wherein Judge Jordan asked whether panhandling or leafletting for a business would be considered "demonstrating" under the Ordinance. Counsel posited that panhandling and leaflet distribution may not be covered, but distribution of anti-abortion pamphlets would be prohibited. Plaintiffs cite no Third Circuit precedent for their argument that a legal theory posited by counsel at an appellate argument is binding on the court. The cases from other circuits cited by Plaintiffs relate to attorneys conceding particular arguments or claims at oral arguments. *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1170 n.3 (9th Cir. 2001); *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002). The Third Circuit, however, has held that "[t]o be binding, admissions must be unequivocal. Similarly, they must be statements of fact that require evidentiary proof, not statements of legal theories." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 377 (3d Cir. 2007), *as amended* (Oct. 12, 2007) (citing *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972)). Furthermore, the Supreme Court has cautioned courts against placing great weight on comments made by counsel in the face of appellate questioning: "We are loathe to attach

conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge v. Irvis*, 407 U.S. 163, 170, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Accordingly, this court declines to view counsel's spontaneous remark during appellate argument as a conclusive admission that the Ordinance is content based.

Finding no merit to Plaintiffs' new arguments that the Ordinance is content based, the court reaffirms is prior holding that the Ordinance is content neutral and can be justified "without reference to the content of the regulated speech." *Reed*, 135 S.Ct. at 2227. Accordingly, the court will review the Ordinance under an intermediate scrutiny analysis.

B. Likelihood of Success on the Merits

To determine whether Plaintiffs are entitled to a preliminary injunction, ***462** the court must next examine whether Plaintiffs have a likelihood of success on the merits of their claim, applying an intermediate scrutiny analysis to the Ordinance. Under the intermediate scrutiny analysis, Plaintiffs would ordinarily need to show that the Ordinance is "not narrowly tailored to serve a significant governmental interest" and fails to "leave open ample alternative channels for communication of information." *McCullen*, 134 S.Ct. at 2534 (citing *Ward*, 491 U.S. at 791, 109 S.Ct. 2746). In a challenge based on the First Amendment, however, the City "bears the burden

of proof on the ultimate question of [the Ordinance's] constitutionality," and "[Plaintiffs] must be deemed likely to prevail [for the purpose of considering a preliminary injunction] unless the [City] has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than [the Ordinance]." *Reilly II* at 179-80 (footnotes omitted) (quoting *Ashcroft*, 542 U.S. at 666, 124 S.Ct. 2783). Thus, the City bears the initial burden to show that the ordinance is narrowly tailored. *Id.* at 180.[4]

[4] Plaintiffs do not appear to contest that the City has a significant governmental interest "in 'ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.' " *McCullen v. Coakley*, 134 S.Ct. at 2535 (quoting *Schenck v. Pro–Choice Network of Western N.Y.*, 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997)). Thus, the court finds that the City demonstrated a legitimate government interest identical to the legitimate interest recognized in *McCullen* and *Schenk*. Thus, the City has met its burden to prove that element of the intermediate scrutiny analysis.

i. Burden on Plaintiffs' right to free speech.

Irrefutably, the Ordinance places *some* burden on Plaintiffs' right to free speech, but to determine whether the ordinance is narrowly tailored to achieve the City's legitimate interests, the court must define the extent of the burden upon Plaintiffs' rights. Plaintiffs first argue that the Ordinance places a substantial burden on their

First Amendment right to free speech. Defendants counter that any burden faced by Plaintiffs is minimal and more than justified by the City's legitimate interests. Plaintiffs do not argue that they are unable to be seen and heard by clinic patients from outside the buffer zone. Instead, Plaintiffs suggest that the First Amendment includes a right to intimate conversation and to "be so close you can reach out and hug [clinic patients]." (Doc. 88, p. 31 of 100.) There is no such right to make physical contact with unconsenting strangers couched in the First Amendment, but, despite the substantial evidence that Plaintiffs and other protesters are more likely to offer patients virulent invective than a warm embrace, the Supreme Court in *McCullen* has held that individuals such as Plaintiffs are entitled to have their speech heard in an effective manner. *McCullen*, 134 S.Ct. at 2537 ("If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message."). Specifically, *McCullen* held that an anti-abortion protester has a protected First Amendment right to engage other members of the public in a conversational tone without resort to signs, shouting, or voice amplification. *McCullen*, 134 S.Ct. at 2527. Although decided prior to *McCullen*, the Third Circuit in *Brown v. City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009), presciently modified a similar Pittsburgh ordinance consistent with this concept.

In *Brown*, the city of Pittsburgh had enacted an

ordinance that consisted of a two-pronged "buffer" and "bubble" zone. ***463** The buffer zone prevented congregating, patrolling, picketing, or demonstrating within 15 feet of clinic entrances and exits, while the bubble zone extended 100 feet from the clinic entrance. Within the bubble zone, protesters were prohibited from coming within 8 feet of any individuals attempting to access the clinic. The *Brown* Court enjoined the enforcement of the bubble zone, but allowed the buffer zone to remain. This is consistent with the Supreme Court's mandate in *McCullen*; a counsellor could easily approach a potential patient outside the buffer zone to hand out a leaflet or converse with someone inside the buffer zone at a normal volume. A key difference between the Pittsburgh ordinance and the Massachusetts ordinance in *McCullen* is the specific type of behavior prohibited. The Massachusetts ordinance made it a crime simply to knowingly stand within the 35 foot buffer zone. *McCullen*, 134 S.Ct. at 2531 ("Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word."). The Ordinance, like the ordinance in *Brown*, prohibits only certain conduct. As written, the Ordinance does not bar a single individual from walking into the buffer zone and calmly handing a pamphlet to an individual. If receptive, a passerby may take the pamphlet. The importance of this distinction is obvious: where a group may bully and intimidate a single person, an individual simply offering a piece of paper, as Plaintiffs claim to desire, may offer a supportive presence. Of course, the calm pamphleting could quickly turn into

demonstrating or picketing if the individual offering the pamphlet begins to loudly advocate for his or her position, carries a sign, or accosts unwilling patients. This is perhaps the distinction that counsel for Defendants was alluding to at argument before the Third Circuit. *See supra*, at 460–61. Thus, Plaintiffs are not totally barred from the buffer zone, but their conduct therein, and consequently, their ability to engage in intimate conversation, is limited.

The Supreme Court in *McCullen* held that counsellors have a right not only to speak in public fora, but to have their speech heard in an effective manner. Plaintiffs rightly point out that in *McCullen* "petitioners [were] effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the [Boston] clinic" and that exclusion placed "serious burdens" on the petitioners' ability to engage in sidewalk counselling. *See McCullen*, 134 S.Ct. at 2527. Plaintiffs mischaracterize the Supreme Court's holding in *McCullen* to the extent they suggest that *McCullen* stands for the proposition that a 35 foot buffer zone is unconstitutional simply because of the area it covers. Instead, the Supreme Court engaged in a much more nuanced examination. For instance, the Court noted the paucity of evidence supporting the statewide need for such a buffer. The Massachusetts law applied to an entire Commonwealth without a particular examination of the needs of individual communities. *McCullen*, 134 S.Ct. at 2539 ("For a problem shown to arise only once a week in one city at one clinic, creating

35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution."). Moreover, the Massachusetts law was far broader in its prohibitions than the City's: it did not merely limit certain types of public demonstration, but instead prohibited simply standing on the sidewalk outside of a clinic. The Ordinance is much more limited in its purview: it prohibits only knowingly congregating, patrolling, picketing or demonstrating. A single individual handing out fliers does not appear to fit within the actions prohibited by the Ordinance. Individuals run afoul of the Ordinance only when they ***464** gather together in groups ("congregate") and hold up banners, pickets, or similar signage ("picket" or "patrol") or chant, shout, or use voice amplification to vociferously express their message ("demonstrate") within the buffer zone. They must also do so "knowingly." Thus, Plaintiffs' fear that they would be arrested for stepping a few inches over the line is misplaced. *See Hill*, 530 U.S. at 727, 120 S.Ct. 2480; *Brown*, 586 F.3d at 291 n.34; *Bruni*, 824 F.3d at 384 (Fuentes, concurring). Neither buffer zone requires protesters to move to the opposite side of the street as did the Massachusetts law. *McCullen*, 134 S.Ct. at 2527-2528. Planned Parenthood employees testified that they are able to hear Plaintiffs' speech at a conversational volume from outside of the buffer zones. (Tr. at 159-160; 186-187.) Plaintiffs both admit that they would be able to walk with potential patients up or down the sidewalk until they reached the buffer zone, hand out literature, and speak to individuals coming out of the front door of Planned Parenthood.

(Tr. 279-283; 297-298.) Put another way, the Ordinance does not specifically prohibit the type of expression that the *McCullen* Court found essential to the exercise of First Amendment rights. Concluding that the Ordinance limits certain acts within the buffer zone, the court now turns to the degree of limitation imposed by the physical boundaries of the buffer zone.

Although the physical size of the buffer zone is only one factor to be considered in determining the limits imposed by the Ordinance, it is the factor that has garnered the most attention from the parties in this case. Plaintiffs repeat throughout their briefs that the Ordinance creates an effective 70-foot barrier around the clinic because of the combination of the 20-foot buffer zones. Specifically, the buffer zones extend from either edge of the driveway and the outermost part of the clinic doorway.[5] Taken at face value, the "effectively 70-foot" barrier created by the Ordinance is even more burdensome than the 56-foot barrier in *McCullen*. As illustrated by Defendants, however, this is not the whole picture.

[5] Plaintiffs note that the buffer zone that was recently upheld by the Western District in *Bruni v. City of Pittsburgh*, 283 F.Supp.3d 357, 365 (W.D. Pa. 2017), did not include driveways. As illustrated in the photograph of the Pittsburgh Planned Parenthood clinic, attached as Exhibit G to Plaintiffs' brief, it does not appear that the Pittsburgh clinic had a driveway at all, but instead was located in an urban environment.

Defendants demonstrate that the buffer zones remove relatively little space that was previously available to Plaintiffs. The sidewalk comprising the northernmost expanse of the buffer zone includes approximately 15 feet of a neighbor's driveway, which Plaintiffs were previously prohibited from blocking. (Tr., p. 131-132, 136; Pls. Ex. 9, p. 4.) Thus, only five feet of sidewalk between the edge of the clinic driveway and the neighbor's driveway has been restricted. (*Id.* at 132.) Notably, Defendants presented evidence that the City had previously considered a somewhat larger buffer zone, but reduced the expanse to give Plaintiffs a four-foot wide area to protest directly in front of the clinic entrance, but out of the way of patients walking in and out of the clinic. (*Id.* at 49-51, 131-132; Doc. 59-7, p. 51; Defs. Ex. 20; Pls. Ex. 9, p. 4.) Approximately one-third of the southernmost portion of the buffer zone includes private property owned by Planned Parenthood from which Plaintiffs were already restricted. (Tr. at 143-144; Pls. Ex. 9, p.4.) Plaintiffs curiously complain that the four-foot area directly in front of the clinic is useless for counselling, yet seem to argue that the five-foot area between the Planned Parenthood driveway and the ***465** neighboring driveway is essential to their purpose. (Doc. 88, p. 39.) Thus, the sum total of the area restricted by the buffer zones is between 15 to 20 feet of sidewalk on one side of the street. This appears to be in contrast to the buffer zone in *McCullen*, which encompassed "a 56-foot-wide expanse of the *public sidewalk*" and "*more than 93 feet* of the sidewalk (including the width of the driveway) and extending across the

street and nearly *six feet onto the sidewalk on the opposite side.*" *McCullen*, 134 S.Ct. at 2527 (emphasis added).[6] These measurements demonstrate that the Ordinance creates a buffer zone less physically restrictive than the buffer zone in *McCullen*.

[6] Although this court granted Plaintiffs' request to file a sur-reply to Defendants' post-hearing reply brief (Docs. 101, 107, 108), Plaintiffs do not contradict the City's calculation that the Massachusetts buffer zone covered an area of 3848.45 square feet total, 2481.63 square feet of public property, but the Ordinance restricts only 824.16 square feet total and 469.66 square feet of public property. (Doc 101, p. 45.)

To reiterate, the evidence presented by both parties demonstrates that the Ordinance effectively restricts Plaintiffs and other protesters from performing certain acts of "counselling" on 15-20 feet of sidewalk that was previously available to them. In essence, this constitutes a minor physical restriction on a profound right. It is unclear from prior precedent whether any appreciable physical restriction on Free Speech is "substantial" under the analysis clarified by *McCullen*. Accordingly, although the limitation is slight in many respects, the court concludes that it is substantial enough to shift the burden to the City to show that it tried less-restrictive alternatives that failed or seriously considered other available alternatives.

ii. Consideration of less-restrictive alternatives

Because Plaintiffs have met their burden to show that the buffer zones place a substantial limit on their free speech rights, the City now bears the burden to show that it considered less-restrictive alternatives or that less-restrictive alternatives were tried and failed. *Reilly II* at 180. At the evidentiary hearing, Defendants presented evidence of the difficulty enforcing other laws that would have prevented the acts complained of by the City, the City's financial difficulty increasing its police force, and the documentary evidence considered by the City council. The City also introduced audio of the hearing and related testimony from Planned Parenthood employees. The City argued that this evidence, taken together, demonstrates that alternative methods had failed and that the City considered numerous alternatives, but was constrained by its dire financial limitations from moving forward with other methods of enforcement. Plaintiffs argue that the City failed to affirmatively consider alternative, less-restrictive, methods of achieving its legitimate governmental interest. In support of this argument, Plaintiffs refer to the brevity of the hearing at which the Ordinance was enacted and the surfeit of alternative laws that would achieve the same goal of preventing protesters from interfering with clinic patients.

Plaintiffs argue that the Defendants bear the burden of producing a "meaningful record" that the City "closely examined and ruled out for good reason" less-restrictive alternatives to the Ordinance. (Doc. 88, p. 56 (citing *Bruni*, 824 F.3d at

369-370 (3d Cir. 2016)).) Plaintiffs interpret this requirement to mean that, in the course of a council hearing, the City legislators must introduce evidence to support the problem they seek to rectify and address exhaustively the potential options for solving the ***466** problem. Although the discussion held by councilmembers must be considered in determining if Defendants can show they seriously considered less-restrictive alternatives, a council hearing is not a trial where relevant exhibits must be placed into evidence. *See Bruni*, 824 F.3d at 370 n.14 (discussing the need to examine the "legislative record" before the lawmaking body). Such an onerous burden on a city's legislature would likely stymie any action on local ordinances. It would be reasonable to assume, and likely unreasonable not to assume, that an elected body is generally aware of the needs and faculties of the municipal entity it represents and need not be reeducated before voting on each piece of legislation before it. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508–12, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (opinion of White, J., joined by Stewart, Marshall & Powell, JJ.) ("[the Court] hesitate[s] to disagree with the accumulated, common-sense judgments of local lawmakers"); *Bruni*, 824 F.3d at 377 (Fuentes, concurring) ("A local ordinance enacted by a local lawmaking body is naturally distinct from a state government that "enacts a blanket prohibition to address a localized problem." ")

Moreover, Plaintiffs argue that the City was required to systematically analyze the available

alternatives during the single hearing put on the record. The City clearly received input from its citizens and had available police reports of calls made by Planned Parenthood and testimony that protesters were impeding access to the clinic and threatening and intimidating patients. *Bruni* and *McCullen* did not specifically require that the local government produce all available evidence and consider alternatives at a single, recorded hearing before taking action. Instead, they require only that "substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out." *Bruni*, 824 F.3d at 370 (citing *McCullen*, 134 S.Ct. at 2540). Considering the evidence submitted by the City, the court concludes that Defendants have met their burden of showing that the City's less-restrictive alternatives were ineffectual and that the City gave due consideration to available options before enacting the Ordinance.

The City has introduced evidence of the specific consideration given to the Ordinance before its passage. The audio recording of the hearing at which the Ordinance was discussed includes approximately 18 minutes of discussion regarding the Ordinance, which amounts to 12 pages of transcripted text. (Defs. Ex. 26.) The hearing itself includes testimony by a Planned Parenthood employee, Guth, and a neighborhood resident, Yost, both describing the harm caused in the neighborhood surrounding the clinic. Specifically, Guth read into the record a statement by Heather Shumaker, Director of Public Affairs for Planned

Parenthood, which described that protesters: (1) would follow patients from the sidewalk to the clinic door, screaming at them, insulting them, and calling them murderers; (2) would take pictures of patients and employees and write down license plate numbers, to insinuate threats of future harm or harassment; (3) would trespass onto clinic property to bang on windows or take photos inside the clinic; (4) would wait around either side of the clinic driveway until a car attempted to enter the driveway, then slowly walk across it in an attempt to impede and deter cars from entering the clinic parking lot. (*See* Pls. Ex. 20.) Yost testified that the protesters generally disturbed neighborhood residents with loud yelling and blocking the sidewalk on a regular basis. Yost further testified that she had participated in "counter-protests" around the clinic. At ***467** these counter-protests, Yost stated that anti-abortion protesters would brandish pepper spray at the counter-protesters and scream into the counter-protesters' faces.[7] No testimony in opposition to the Ordinance was offered at the hearing. Although the discussion at the hearing was brief, testimony presented by Defendants demonstrate that the hearing testimony was the tip of the iceberg of consideration given to the Ordinance.

[7] Notably, counter-protests as described by Yost would clearly be prohibited by the terms of the Ordinance.

A draft version of the Ordinance was originally supplied by Planned Parenthood to Councilman

Koplinski to address problems seen at the clinic parallel to problems addressed at other clinics throughout the country. (Doc. 59-4, pp. 7-9.) After the draft was given to Koplinski, it was submitted to the City's Law Bureau for review. (*Id.*) As a matter of course, the Bureau would review the constitutionality of any ordinance before it was presented to the full council for review. (*Id.*) Although we give no deference to the determination of the constitutionality by the Bureau, it is relevant for purposes of determining whether the City gave due consideration to alternatives that the City's Law Bureau reviewed the statute. After review by the Law Bureau, the proposed ordinance was read at a "reading meeting" of the City council. (Doc. 59-5, pp. 46-47.) This meeting was considered a mere formality at which the text of the draft was read aloud at a public meeting. (*Id.*) After the reading meeting, the bill was submitted to a committee of the council for consideration. (*Id.* at 47.) Between the initial reading and the committee consideration, the draft was modified in two substantive respects. First, driveways were included in the areas covered by the buffer zones. (Tr., p. 49.) Second, the Planned Parenthood draft included a buffer zone of 24 feet as opposed to 20 feet. (*Id.*) The committee considered 15-foot buffer zones and larger zones up to 30 feet. (Doc. 59-5, p. 49.) The 20-foot buffer was considered to be the "middle ground where it was a safe enough space for people to feel comfortable to be able to gain access to and from the clinic and also where individuals could speak at a reasonable voice ... to be able to get their points across." (*Id.*) Thus, the

City has presented evidence that the distance was not arbitrarily chosen, but was specifically considered the most appropriate distance to adequately protect the employees and patients of the local clinics.

iii. Less-restrictive alternatives were tried and failed
Plaintiffs have failed to show a feasible, less-restrictive alternative was available to the City. *See Reilly II* at 179-80; *see also Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 978 (8th Cir. 2014) (concluding that the district court abused its discretion in granting a preliminary injunction against enforcement of an ordinance prohibiting distribution of leaflets along roadways) ("In contrast to *McCullen*, the record here does not show an obvious, less burdensome alternative that the city [ ] should have selected."). Plaintiffs suggest three distinct less-restrictive alternative methods of achieving their goals: (1) existing state, federal, and local laws; (2) targeted injunctions against specific violators; and (3) crafting a less-restrictive ordinance.

Plaintiffs cite five relevant laws and ordinances that they suggest would be less-restrictive alternatives to the Ordinance: (1) 18 Pa. Code 3503(b) (Defiant Trespass); ***468** (2) Harrisburg Ordinance 3-341 (disturbing the peace); (3) Harrisburg Ordinance 3-343 (noise disturbances); (4) Harrisburg Ordinance 3-339 (malicious loitering); and (5) the federal Freedom of Access to

Clinic Entrances Act ("FACE"), 18 U.S.C. 248. Because *Bruni* and *McCullen* require evidence that "substantially less-restrictive alternatives were tried and failed, *or* that the alternatives were closely examined and ruled out," the court may examine whether these existing statutes were effective and need not limit its inquiry to whether the City council affirmatively acknowledged their failure at a hearing. *Bruni*, 824 F.3d at 370 (citing *McCullen*, 134 S.Ct. at 2540) (emphasis added). It is uncontested that these statutes were available to law enforcement at the time the Ordinance was being considered. It does not appear that any prosecutions under these statutes were brought by the City or private citizens; however, the City has produced records of police being called to Planned Parenthood for the harms that the City sought to correct by enacting the Ordinance. (Defs. Ex. 33.) Koplinski addressed each of the statutes cited by Plaintiffs during the hearing. Koplinski testified that his experience was that police would not be able to timely respond to complaints of the trespass statute, noise ordinance, and disorderly conduct ordinance. (Tr., p. 34-38.) Essentially, between when police were called and when they arrived, the protesters would have retreated from the offending conduct. (*Id.*) Also at the committee hearing, when questioned about the enforcement of noise ordinances generally, the Chief of Police stated that such laws are difficult to enforce unless the officer happens to be at the location at the time of the offense. (Defs. Ex. 26, Hearing Audio at 52:30-53:03.) Plaintiffs argue that the City council, at the hearing, instructed the Chief to enforce the

noise ordinance more often, yet failed to do the same with the laws and ordinances noted above at Planned Parenthood. Contrary to Plaintiffs assertions, police may enforce certain ordinances stringently throughout the City more easily than enforcing particular laws at a particular location. The former would require an officer to look for certain offenses that may have been considered "minor" or exercise his or her discretion to issue citations more frequently for certain offenses; the latter would require an officer to deviate from his or her typical patrol route or remain stationary at a certain location instead of patrolling the City. Thus, a councilperson's instruction to "enforce noise ordinances" more often does not imply that such a simple mandate would effectively remedy the problems at the clinic.

In order to effectively enforce these existing laws, the council reasoned that increased police presence would be necessary, but knew that it was without the financial resources to do so. The council was specifically informed of the City's inability to hire new police officers to increase patrol routes. The Pennsylvania Department of Community and Economic Development ("DCED") issued several requirements for the City's receivership status in November 2011. (Defs. Ex. 6; Tr. 230.) Relevantly, no additional officers could be hired or expenditures of over $2,500 could be made without prior DCED approval. (*Id.*) This notice from DCED was addressed directly to the Council President. (*Id.*) The City has produced an abundance of evidence demonstrating the City's poor financial standing.

(*See* Defs. Exs. 2, 3, 5, 6.)[8] Koplinski further testified as to the ***469** pervasive nature of the City's financial situation:

> We were, as a city, we had gotten into some significant financial difficulty; 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. This was not, of course, only a local story, it was a statewide and national story as well. I did interviews on CNN and other outlets. It was well-known that the city was having extreme financial difficulties in 2011 and 2012. We were making some significant decisions as to how to eliminate that debt. But we were under a receiver, state-appointed, and had very strict financial controls over the city.
>
> ....
>
> 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. I mean, maybe not to the point of keeping the lights on at City Hall, but pretty darn close.

(Tr., p. 26.)

> Q. Now did 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.

(Tr., p. 34.)

[8] Plaintiffs filed a notice of objections to several exhibits and portions of transcripts introduced by Defendants at the preliminary injunction hearing. (Doc. 106.) Specifically, Plaintiffs objected to Exhibits 2, 3, 5, and 6 as irrelevant under Federal Rule of Evidence 401, or more prejudicial than probative under Rule 403. As explained herein, Exhibits 2, 3, 5, and 6 are relevant to show the City's prior knowledge of its financial situation for purposes of determining whether the City adequately considered less-restrictive alternatives to the Ordinance. Accordingly, Plaintiffs' objections are overruled with respect to Exhibits 2, 3, 5, and 6, and Plaintiffs' remaining objections are sustained.

Because of these financial limitations, the City argues that it is unable to afford additional police officers to patrol the area around Planned Parenthood on a regular basis. *Cf. McCullen*, 134 S.Ct. at 2540 ("[T]he police maintain a significant presence outside Massachusetts abortion clinics."). Plaintiffs do not appear to contest the City's financial status, but argue only that the City did not specifically make a formal determination that it could not afford police staffing at Planned Parenthood. The City has produced substantial evidence that it has experienced difficulty increasing its police force due to its inability to adequately fund its police operations. *Cf. Turco v. City of Englewood*, No. 15-cv-3008, 2017 WL 5479509, *5 (D.N.J. Nov. 14, 2017) ("[Englewood] fails to provide any reliable documentation or

support for its assertion that ... the City did not have the resources to have a continuous [police] presence at the site."). Plaintiffs fail to contradict this assertion, but suggest that the City is required to perform an analysis to determine that it cannot afford new police officers. Such a requirement is completely without support either in logic or the law. A cash-strapped City that is aware of its need for frugality need not spend money it cannot afford to confirm what it already knows. *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, 319 F.Supp.3d 773, 788 (E.D. Pa. 2018) ("To meet its burden of showing that a law 'directly advances' a substantial interest, the City must establish that *the harms it recites are real and that its restriction will in fact alleviate them to a material degree.*") (emphasis added) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)) (citing ***470** *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)). Thus, with respect to the state laws and local ordinances, the City council was aware of their ineffectiveness and the City's financial inability to adequately enforce them.

Koplinski also testified that he had previously been counsel on a special task force within the Department of Justice that specifically litigated FACE claims. (Tr., pp. 61-62.) He noted the difficulty in bringing civil suits under FACE contrasted with the effectiveness of summary criminal offenses, and explained that the City would likely face difficulty funding protracted civil

litigation in federal court. (Id. at 61-62; *see also* Doc. 59-5, pp. 130-131.) Beyond the City's consideration of the difficulties in enforcing FACE, it does not appear that the City has authority to bring a civil action under that statute. FACE gives a right to sue to any "person" aggrieved by certain prohibited acts and a person "lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. 248(c)(1)(A). FACE also empowers the United States Attorney General and State Attorneys General as *parens patriae* to bring similar enforcement actions. 18 U.S.C. 248(c)(1)(A). Thus, it appears that, even if the City had desired to increase enforcement under FACE, it was without authority to do so.

It does not appear from the record that any consideration was given to seeking injunctions against individual protesters. Defendants only argument why they failed to do so is that it would be financially unfeasible to do so. The City offers no evidence of the cost to seek such injunctions or any reasons why they are beyond the typical expenses of the City's Legal Bureau. Thus, the court finds that Defendants did not consider personal injunctions against protesters. Regarding a less-restrictive buffer zone ordinance, the City did specifically consider a buffer zone of 15 feet, but after consultation with the City solicitor and clinic personnel, rejected that distance as failing to adequately cover the specific areas around the clinic. (Doc. 59-5. p. 49.)

There also appears to be evidence that the City stopped enforcing the buffer zones in the wake of *McCullen*, although it is unclear who or if any individual informed police that *McCullen* rendered the buffer zone inoperable. (*See* Pls. Exs. 44, 47.) On August 22, 2015, Planned Parenthood employees experienced a large scale protest that included an estimated 100 anti-abortion protesters as well as approximately 15 counter-protesters. (Pls. Ex. 44.) The employees believed, and were apparently informed by police, that the buffer zones were unenforceable. (*Id.*) After this large protest, Neil Grover, the City solicitor, issued a directive to the police bureau stating that the buffer zone was still enforceable. (Pls. Ex. 47.) There is no record of further large scale protests after that date. Plaintiffs argue that it is unreasonable to infer that the *McCullen* decision, which was issued on June 26, 2014, could have been causally related to the protest 14 months later. Although by no means definitive, it is conceivable that the two are directly linked. The *McCullen* decision did not wholesale invalidate all buffer zones around clinics, nor did it invalidate buffer zones of a particular size or scope. In fact, no decision has yet invalidated the Ordinance. It is not unreasonable to conclude that *McCullen* was misconstrued by officers who stopped enforcing the Ordinance over time. This process may have been gradual as there is no evidence of any formal directive or instruction to that effect. It may have similarly taken months for protesters to discover that the Ordinance was *de facto* unenforceable, and more months yet to organize a protest of ***471** 100 individuals. That said, there is

no evidence that *McCullen* directly led to Harrisburg police ceasing to enforce the Ordinance. There is, however, evidence that the Ordinance was not being enforced in August 2015 when the large-scale protest and counter-protest occurred. Thus, there is support for an inference that the Ordinance did have some ameliorative effect on the problems that it sought to resolve. (*See* Pls. Exs. 44, 50, ¶¶ 19-20.)

The record is clear that the City had undertaken some examination of alternatives to the Ordinance. The crucial question is whether it gave *enough* consideration to such alternatives. The council was aware that hiring additional police to patrol the clinic was financially unworkable and that enforcement of existing ordinances was an ill-fitting solution without constant or at least consistent police presence at the clinic. The City actually did consider both more and less physically restrictive buffer zones, and chose the distance that, in its judgment, was the fulcrum between protecting its citizens and protecting free speech rights. The City did not consider individual injunctions against offenders; although if police are unable to cite individuals for violations of certain laws, it is unclear what the legal basis for such an injunction would be. The City also did not formally petition the Commonwealth Attorney General or the United States Attorney General to enforce FACE at the clinics. Taking this evidence together, the court relies on the Third Circuit's instruction in *Bruni* that the City need not "demonstrate that it has used the least-restrictive alternative, nor ...

that the City demonstrate it has tried or considered *every* less burdensome alternative to its Ordinance." *Bruni*, 824 F.3d at 370 (citing *Ward*, 491 U.S. at 800, 109 S.Ct. 2746) (emphasis in original) ("intermediate scrutiny affords some deference to a municipality's judgment in adopting a content-neutral restriction on speech."). Thus, the court concludes that the City has carried its burden to demonstrate that less-restrictive alternatives were tried and failed or that alternatives were closely examined and ruled out.

Although Plaintiffs have demonstrated that the Ordinance substantially burdens their First Amendment rights, Defendants have met their burden to show that the Ordinance was narrowly tailored to achieve a legitimate governmental interest because the City considered less-restrictive alternatives, ruled them out as less effective, and demonstrated that other less-restrictive methods had been tried and failed. Accordingly, the court holds that Plaintiffs have failed to show that they have a likelihood of success on the merits. Nonetheless, the court will now consider the remaining factors in the preliminary injunction analysis.

C. Irreparable Harm

The analysis for determining whether Plaintiffs would suffer irreparable harm is comparatively straightforward. "It is hornbook law that the 'irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will

experience harm that cannot adequately be compensated after the fact by monetary damages ... this is not an easy burden.' " *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 701 (E.D. Pa. 2018) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)). However, the loss of First Amendment freedoms, for even a *de minimis* period of time, unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) (citing *N. Y. Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)). Thus, if the Ordinance constitutes harm to Plaintiffs' First ***472** Amendment rights, such harm is almost unquestionably irreparable. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (citing *Elrod*, 427 U.S. at 373, 96 S.Ct. 2673); *see also* 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."), *quoted in Buck v. Stankovic*, 485 F.Supp.2d 576, 586 (M.D. Pa. 2007). As explained at length above, the court holds that the Ordinance is a reasonable and constitutionally appropriate time, place, and manner limitation on protesters. Plaintiffs are not limited from voicing their beliefs, except that they may not protest, demonstrate, patrol, or congregate within the buffer zone. They may still do so outside the buffer zone, near the clinic, or individually enter the buffer zone as long as they are not protesting, demonstrating, patrolling, or

congregating. Accordingly, the court finds that Plaintiffs will not suffer a deprivation of their constitutional rights and, thus, will not suffer irreparable harm if the Ordinance is not preliminarily enjoined.

D. Public Interest and Harm to Others

Having concluded that Plaintiffs have failed to satisfy both of the gateway factors necessary for a grant of preliminary injunctive relief, the court need not strictly analyze the remaining factors; however, the court shall briefly address the remaining factors. The remaining factors to be weighed in determining if a plaintiff is entitled to preliminary injunctive relief are (1) the possibility of harm to other interested persons from the grant or denial of the injunction, and (2) the public interest. *Reilly II* at 176 (citing *Transam. Trailer Transport, Inc.*, 501 F.2d at 919-20.).

Under the present factual scenario, the final two factors are circumjacent. The harm to "others" is essentially the harm to the public at large asserted by the City. The City argues that the public good is furthered by preventing the exact harm that led to the enactment of the Ordinance. Noise and obstruction of the public sidewalk would be abated, and violent or aggressive protesters would be less likely to intimidate or harass patients or prevent patients from entering the clinic. This would also be the harm to others if the injunction were not granted. It goes without saying, however, that a deprivation of a constitutional right is contrary to

the public interest and the harm to others (*e.g.* neighborhood residents, Planned Parenthood employees, and clinic patients), although substantial, does not outweigh such a denial. *See K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) ("[T]he enforcement of an unconstitutional law vindicates no public interest."). Because this court holds that the City has demonstrated that the Ordinance is narrowly tailored to satisfy constitutional scrutiny, Plaintiffs can point to no legitimate public interest or harm to others that would support their motion for a preliminary injunction.

Having held that Defendants have carried their burden to demonstrate the constitutionality of the Ordinance, and Plaintiffs have failed to demonstrate irreparable harm, the court need not proceed with the full balancing of the *Transamerican Trailer* factors. *See Reilly II* at 179-80 (holding that the "likelihood of success on the merits" and "irreparable harm" factors are gateway factors in the preliminary injunction analysis). However, if this court were to undertake such a balancing test, it is clear that the final two factors, harm to others and public interest, would also weigh in favor of denying injunctive relief. ***473** Accordingly, all four factors, on balance, would favor Defendants.

E. Credibility of Plaintiffs as Witnesses

Defendants argue that the court should apply the doctrine of *falsus in uno, falsus in omnibus* to

disregard Plaintiffs' testimony at the hearing. (Doc. 101 at 49) (citing *Lambert v. Blackwell*, 387 F.3d 210, 256 (3d Cir. 2004)). To do so, this court must conclude that Plaintiffs "deliberately testified falsely as to a material fact." *Dressler v. Busch*, 143 F.3d 778, 781 (3d Cir. 1998). Specifically, Defendants point to Plaintiffs' testimony that they saw a drop in the number of people they interacted with at Planned Parenthood in contrast to their testimony that they did not begin counselling at Planned Parenthood until late 2015, approximately three years after the buffer zone was enacted. (*Compare* Tr., pp. 262-263 ("I started going to Planned Parenthood in, I believe it was late 2015.") *with* Doc. 1, ¶ 61 ("Plaintiffs have regularly engaged in free speech on the public sidewalks and walkways outside of the Planned Parenthood and Hillcrest clinics for years and prior to adoption of the Ordinance did not observe any [confrontational] conduct.").) Defendants also note that Plaintiffs verified a complaint that stated "Plaintiffs seek to have quiet and personal one-on-one conversations with, and to offer assistance and information to, women" and "Plaintiffs do not desire to engage in loud confrontations or any kind of harassment," yet were aware that former-plaintiff Gross was engaging in aggressive behavior contrary to the peaceful "counselling" allegedly sought by Plaintiffs. (*Compare* Doc. 1, ¶¶ 62, 64 *with* Tr., p. 273 ("You would agree with me that Rosie Gross was generally not up at that clinic to seek quiet and personal one-on-one conversations with, and to offer assistance and information to, women considering abortions? Do you agree with that?

[Plaintiff Biter:] Yes.") *and* Defs. Ex. 24 (Video of Rosalie Gross at Planned Parenthood).) Also despite offering assurances that they seek only peaceful counselling, Plaintiffs' brief suggests that they may intend to follow unconsenting women up to the clinic door. (*See* Doc. 88, p. 36 ("[P]assersby usually enter the buffer zone, and Plaintiffs are cut off from any further interaction ... the buffer zone [is] a big impediment ... If the buffer zone were not there, Plaintiffs would continue to walk with and converse with willing patients over the 70 feet of public sidewalk leading to Planned Parenthood's door.") (record citations omitted).) Although Plaintiffs describe these women as "willing" it is unclear why a "willing" listener would be unable to simply stop outside the buffer zone to speak with Plaintiffs as opposed to being followed to the clinic doorstep. These contradictions cast doubt on the veracity of Plaintiffs' testimony, but have little bearing on the disposition of the case. The purpose of the Ordinance was not to bar Plaintiffs from peaceful counselling or distributing literature, nor does it. The scope of the Ordinance is limited both in the actions it proscribes and the physical boundaries it covers. As explained at length, above, Plaintiffs' ability to peacefully offer counselling, as they testified to desire, is not wholesale prohibited by the Ordinance. To the extent Plaintiffs testimony can be reconciled, it is possible that they engaged with fewer patients overall after Hillcrest closed. Because Plaintiffs stated that they did not counsel at Planned Parenthood prior to the Ordinance's enactment, they have little basis to argue that the Ordinance directly led to their

alleged decrease in engagement. Thus, even taking Plaintiffs' testimony as true, the court's analysis would remain the same.

III. Conclusion

The Court again emphasizes the paramount importance of First Amendment ***474** rights in the continued functioning of our democracy. However, the Supreme Court has, time and time again, recognized that limits to these rights exist. Here, the City has placed reasonable and constitutional limits on the free speech rights of protesters at certain locations within its municipal limits. The Court holds that the Ordinance is content neutral and, thus, subject to an intermediate scrutiny analysis. In determining whether to grant Plaintiffs request for a preliminary injunction, the court applied the factors as set forth by the Third Circuit in *Reilly II*. In doing so, the court concluded that: (1) Plaintiffs failed to demonstrate a reasonable likelihood of success on the merits because Defendants met their burden of demonstrating that the Ordinance was narrowly tailored to achieve a legitimate governmental interest; (2) Plaintiffs failed to demonstrate irreparable harm; and (3) even if Plaintiffs had done so, the final two factors in the preliminary injunction analysis weighed against granting injunctive relief. Accordingly, Plaintiffs' motion for preliminary injunctive relief is denied. An appropriate order will follow.

All Citations

336 F.Supp.3d 451

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BRUNI v. CITY OF PITTSBURGH* AFFIRMING SUMMARY JUDGMENT AGAINST CHALLENGE TO PITTSBURGH BUFFER ZONE ORDINANCE, FILED OCTOBER 18, 2019 (*Bruni II*)

941 F.3d 73
United States Court of Appeals, Third Circuit.

Nikki BRUNI; Julie Cosentino; Cynthia Rinaldi; Kathleen Laslow; Patrick Malley, Appellants
v.
CITY OF PITTSBURGH; Pittsburgh City Council; Mayor Pittsburgh

No. 18-1084
|
Argued: February 6, 2019
|
(Opinion Filed: October 18, 2019)

Before: HARDIMAN, KRAUSE, and GREENBERG, Circuit Judges

OPINION OF THE COURT

KRAUSE, Circuit Judge.

This case requires us to determine the constitutionality of a Pittsburgh ordinance that creates a fifteen-foot "buffer zone" outside the entrance of any hospital or healthcare facility.

Pittsburgh, Pa., Code § 623.04 (2005) [hereinafter "the Ordinance" or "Pitts. Code"]. In relevant part, the Ordinance states that "[n]o person or persons shall knowingly congregate, patrol, ***78** picket or demonstrate" in the prescribed zone. *Id.* Outside of a Planned Parenthood in downtown Pittsburgh, Plaintiffs engage in leafletting and "peaceful ... one-on-one conversations" conducted "at a normal conversational level and distance" intended to dissuade listeners from obtaining an abortion. Appellants' Br. 9, 17–18. As the City has asserted that the Ordinance applies to this speech, known as "sidewalk counseling," Plaintiffs argue that the Ordinance is facially unconstitutional under the First Amendment and the District Court erred in granting summary judgment in the City's favor. Because we conclude that the Ordinance does not cover sidewalk counseling and thus does not impose a significant burden on speech, we will affirm.

I. Background

A. Factual Background[1]

[1] The background summarized here is drawn from the record and our prior opinion in this case, *Bruni v. City of Pittsburgh* (*Bruni I*), 824 F.3d 353, 357–59 (3d Cir. 2016). Because we are reviewing a district court's grant of summary judgment, we consider the facts in the light most favorable to the non-movants and draw all reasonable inferences in their favor. *See Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 266–67 (3d Cir. 2005).

1. History of the Ordinance

In the mid- and late 1990s, Planned Parenthood was the site of numerous clashes between opponents and advocates of abortion rights as well as individuals seeking the facility's services.[2] In addition to seeing "hundreds" of people at the facility on a Saturday—"pro and anti"—the clinic was plagued by bomb threats, vandalism, and blockades of its entrance. JA 322a. To address these incidents, the Bureau of Police deployed an overtime detail of "up to ten officers and a sergeant" to maintain order and security, often using crowd-control barriers to separate demonstrators from each other and from patients trying to enter the clinic. JA 1024a.

[2] The same was true of Allegheny Reproductive Health Center, another clinic that provides abortions, which, in addition to seeing hundreds of protestors, was fire bombed, intentionally flooded, and had its windows shot out.

In 2002, Planned Parenthood moved to its current location at 933 Liberty Avenue. Although the incidents lessened in severity, contemporaneous police logs and testimony from Sergeant William Hohos indicate that "the pushing," "the shoving," and "the blocking of the doors" continued, and the overtime detail, reduced in size, continued to provide a police presence. JA 323a, JA 834a, JA 837a. After Pittsburgh was declared a financially distressed municipality in late 2003, however, fiscal constraints and the need for redeployment of limited police resources required the detail to be

discontinued, and police were called to address the continuing incidents at the site on an as-needed basis. In the wake of the detail's discontinuation, the clinic reported an "obvious escalation in the efforts of the protestors," JA 357a, including an increase in "aggressive pushing, shoving and ... harassing behavior that included shoving literature into people's pockets, hitting them with signs and blocking their entrance into the building," JA 352a.

In November 2005, the City Council held hearings on proposed legislation that eventually resulted in the Ordinance. Among those who testified were sidewalk counselors, clinic escorts, patients, and other concerned members of the community. Several witnesses insisted the Ordinance was unnecessary either because they had never observed violent incidents or were unaware of "significant violence" outside the clinic. JA 348a. But other witnesses ***79** reported being personally harassed and prevented from entering the clinic, being yelled at through the glass doors of the clinic, and seeing patients being surrounded on the sidewalk. A Planned Parenthood counselor described patients entering the clinic in a "psychological state [of] situational crisis," threatening their health. JA 355a. And "without [police] supervision," the President and CEO of Planned Parenthood of Western Pennsylvania said, "there ha[d] been an increase in unlawful behavior that ... put[ ] ... patients, their families, pedestrians and ... protestors at risk." JA 352a.

The City Council also heard from Commander

Donaldson of the Pittsburgh Police Department. He reported that police had been summoned to Planned Parenthood twenty-two times in the past six months alone to "mediate confrontations" and respond to incidents ranging from signs "obstructing the front of the building" to protestors "follow[ing] ... people to the doorway." JA 404a. They had not made any arrests, however. According to Commander Donaldson, the City had on its books "laws ... that would address obstructing traffic or passageways or ... the [clinic's] doorway," but those laws would not address the precise problem that was occurring, namely attempts to block people from entering the facility before they reached its front door.[3] JA 398a.

[3] The City's designated representative, who had been a member of the overtime detail before it was disbanded, likewise attested that the criminal laws were not adequate to deal with protestors and demonstrators outside the clinic because the obstructive conduct "[wasn't] rising to those levels. It was all the underlying stuff in between." JA 1057a.

The debate on the Ordinance was extensive. Many witnesses, both for and against the legislation, expounded on the competing interests at stake and expressed a desire to protect both free speech and access to healthcare, including abortions.

2. The Ordinance

Shortly after these hearings, the City Council

adopted the Ordinance, and the mayor signed it into law. *See Bruni v. City of Pittsburgh* (*Bruni I*), 824 F.3d 353, 357 (3d Cir. 2016). Codified as Chapter 623 of the Pittsburgh Code of Ordinances, the Ordinance states, in relevant part:

> No person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending 15 feet from any entrance to the hospital and or health care facility. This section shall not apply to police and public safety officers ... in the course of their official business, or to authorized security personnel employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic.[4]

Pitts. Code § 623.04. The Council also ratified a preamble that set forth the City's goals in adopting the Ordinance, including "provid[ing] unobstructed access to health care facilities" and "medical services," "avoid[ing] violent confrontations," "provid[ing] a more efficient and wider deployment" of City services, and "ensuring that the First Amendment rights of demonstrators to communicate their message ... [are] not impaired." *Id.* § 623.01.

[4] Although the Chapter does not define "health care facility," a "[m]edical [o]ffice/[c]linic" is defined as "an

establishment providing therapeutic, preventative, corrective, healing and health-building treatment services on an out-patient basis by physicians, dentists and other practitioners." Pitts. Code § 623.02. Penalties for violating the Ordinance range from a $50 fine for a first offense to a thirty-day maximum (and three-day minimum) jail sentence for a fourth violation within five years. *Id.* § 623.05.

***80** As originally passed, the Ordinance also included an "[e]ight-foot personal bubble zone," extending one hundred feet around clinics, in which people could not be approached without their consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* § 623.03. Following a facial challenge to the Ordinance, we concluded that the Ordinance was content neutral and each zone was constitutionally permissible but the combination of the two zones was not. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 273, 276–81 (3d Cir. 2009). On remand, the City chose to abandon the floating bubble zone and retain only the fixed buffer zone that prohibited "congregat[ing], patrol[ling], picket[ing] or demonstrat[ing]." Pitts. Code § 623.04. That choice was effectuated by the District Court, which permanently enjoined the bubble zone and required the City to demarcate any fixed buffer zone prior to enforcement.[5]

[5] The injunction also required that the buffer zone be construed to prohibit "any person" from "picket[ing] or demonstrat[ing]" within the zone, including those

allowed to enter the zone pursuant to their official duties. *See Brown*, 586 F.3d at 275.

3. Application of the Ordinance and Plaintiffs' Activities

Today, the City has demarcated buffer zones at two locations, both of which provide reproductive health services including abortions. *Bruni I*, 824 F.3d at 358. Plaintiffs Nikki Bruni, Cynthia Rinaldi, Kathleen Laslow, Julie Cosentino, and Patrick Malley engage in the bulk of their anti-abortion activities outside the buffer zone at Planned Parenthood. *See id.* at 359. In contrast to the conduct that gave rise to the Ordinance, Plaintiffs do not physically block patients' ingress or egress or engage in violent tactics. Instead, they engage in what they call "sidewalk counseling," meaning "calm" and "quiet conversations" in which they "offer assistance and information to" women they believe are considering having an abortion "by providing them pamphlets describing local pregnancy resources, praying, and ... peacefully express[ing] [a] message of caring support."[6] JA 59a; *see* Appellants' Br. 9. That message, Plaintiffs explain, "can only be communicated through close, caring, and personal conversations, and cannot be conveyed through protests." JA 62a. Nonetheless, the City takes the position that Plaintiffs' sidewalk counseling falls within the prohibition on "demonstrating"—if not "congregating," "patrolling," and "picketing" too, *see* JA 334a–37a—so while they can engage in sidewalk

counseling outside the zone, they cannot once within its bounds. *See Bruni I*, 824 F.3d at 359.

[6] We will use the term "sidewalk counseling" in this opinion with the meaning given to it by Plaintiffs. By contrast, the title "sidewalk counselor" has sometimes been claimed by those who engage in " 'in your face' yelling ... pushing, shoving, and grabbing" consistent with aggressive demonstration. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 363, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). As Plaintiffs here have explained, however, such conduct does not constitute sidewalk counseling as they use the term and is "counter-productive to [their] message of kindness, love, hope, gentleness, and help." JA 574a.

Plaintiffs describe various ways that the buffer zone has hindered their ability to effectively communicate their message. The street noise makes it difficult for people to hear them, forcing them to raise their voices in a way inconsistent with sidewalk counseling. And at the distance at which they are forced to stand, they are unable to differentiate between passersby and individuals who intend to enter the facility, causing them to miss opportunities ***81** to engage with their desired audience through either speech or leafleting.

In addition to "sidewalk counseling," Plaintiff Nikki Bruni is the local leader of a group participating in the "Forty Days for Life" movement, a global anti-abortion campaign.[7] Twice a year, campaign participants, including Plaintiffs, pray outside of abortion clinics from 7 AM to 7 PM continuously for forty days. They do so in shifts, and many

participants wear or carry signs. As the leader of the group, Bruni organizes local churches to ensure people are always outside of the clinic so "there's always groups on the sidewalk present during the 40 Days all day every day." JA 141a. Although the exact number of participants is disputed, the record reflects a daily presence of somewhere between ten and forty people.

[7] The movement describes its mission as "to bring together the body of Christ in a spirit of unity during a focused 40 day campaign of prayer, fasting, and peaceful activism, with the purpose of repentance, to seek God's favor to turn hearts and minds from a culture of death to a culture of life, thus bringing an end to abortion." *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 363 (W.D. Pa. 2017).

B. Procedural Background

About five years after we upheld the buffer-zone component of the Ordinance in *Brown* as a content-neutral time, place, and manner regulation, the Supreme Court decided *McCullen v. Coakley*, striking down as insufficiently narrowly tailored a Massachusetts law that created a thirty-five-foot buffer zone in front of health facilities where abortions were performed. 573 U.S. 464, 493–97, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014). The Court found the law "extreme," *id.* at 497, 134 S.Ct. 2518, and "truly exceptional," *id.* at 490, 134 S.Ct. 2518: although congestion occurred at one clinic in one city once a week, the law applied statewide to all reproductive health

facilities and, with few exceptions, prohibited any person from even "standing" in the zone, *id.* at 480, 493, 134 S.Ct. 2518. To justify this "significant ... burden" on speech, *id.* at 489, 134 S.Ct. 2518, the Court held, the government must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," such as arrests, prosecutions, or targeted injunctions, or "that it considered different methods that other jurisdictions ... found effective," *id.* at 494, 134 S.Ct. 2518.

In light of *McCullen*, Plaintiffs filed a complaint, challenging the Ordinance, pursuant to 42 U.S.C. § 1983, under the First and Fourteenth Amendments. *Bruni I*, 824 F.3d at 359. The District Court granted the City's motion to dismiss Plaintiffs' First Amendment claims, and Plaintiffs appealed.[8] *Id.* at 360.

[8] Plaintiffs also filed a motion for a preliminary injunction to prevent the City from enforcing the Ordinance against them, which the District Court denied and Plaintiffs did not appeal. *Bruni I*, 824 F.3d at 359–60. In addition to dismissing Plaintiffs' First Amendment claims, the District Court granted the City's motion to dismiss Plaintiffs' Fourteenth Amendment Due Process Clause challenge, a decision we affirmed in *Bruni I* and that therefore is not on appeal here. *See id.* at 360, 374–75. Earlier in this litigation, Plaintiffs voluntarily dismissed their as-applied challenges to the Ordinance, their claim under the Equal Protection Clause, and their claim of selective enforcement against the mayor. *Id.* at 359 n.5.

We vacated the District Court's dismissal. *Id.* at 357, 373–74. Taking as true the complaint's allegations that the Ordinance had been enforced against Plaintiffs and had significantly hindered their speech, *id.* at 369, we concluded that the Ordinance "impose[d] a similar burden as that in *McCullen*," *id.* at 368 n.15, so that the City had the same obligation as in *McCullen* to ***82** demonstrate "either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *id.* at 370. We thus remanded for factfinding on these issues, as well as a determination about "the proper scope of the Ordinance." *Id.* at 357, 374. Notwithstanding our earlier holding as to content neutrality in *Brown*, 586 F.3d at 273, 275, 277, we also directed the District Court to consider whether the Ordinance should still be considered content neutral in light of *Reed v. Town of Gilbert*, —— U.S. ——, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015), the Supreme Court's most recent pronouncement on the dividing line between content-neutral and content-based restrictions. *Bruni I*, 824 F.3d at 365 n.14.

On remand, the District Court accepted the City's contention that the Ordinance covered Plaintiffs' sidewalk counseling as a form of demonstrating and held that the Ordinance was content neutral, even under *Reed*. *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 361, 367–68 (W.D. Pa. 2017). It also distinguished the Ordinance from the statute in *McCullen* as creating a smaller buffer zone and allowing Plaintiffs to reach their audience through

sidewalk counseling despite the buffer zone and therefore concluded that the Ordinance imposed "only a minimal burden on Plaintiffs' speech." *Id.* at 369–71. Accordingly, it held that the City "ha[d] no obligation to demonstrate that it tried—or considered and rejected"—the alternatives identified in *McCullen*, such as arrests or targeted injunctions, and even if the City did have such an obligation, it had been satisfied. *Id.* at 371–72. The Court therefore granted the City's motion for summary judgment. *Id.* at 373. This appeal followed.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review a district court's grant or denial of summary judgment de novo, *see EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 448 (3d Cir. 2015), and may affirm on any basis supported by the record, *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009). Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the context of a First Amendment claim, we "examine independently the facts in the record and 'draw our own inferences' from them." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002) (quoting *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir. 1998)). Like the District Court, however, we review the facts in the light most favorable to the

nonmoving party. *See Hugh*, 418 F.3d at 267.

III. Discussion

On appeal, Plaintiffs argue that the Ordinance violates the Free Speech and Free Press Clauses[9] of the First Amendment for three reasons: first, the Ordinance is content based and therefore subject to strict scrutiny; second, even if it is content neutral, the Ordinance is not narrowly tailored and thus does not survive intermediate scrutiny; and third, the Ordinance is ***83** overbroad. After providing an overview of the general framework that guides our analysis, we address each of these arguments.

[9] For the reasons articulated in *Bruni I*, we treat Plaintiffs' free speech and free press claims together. *See* 824 F.3d at 373 ("Plaintiffs' free press claim is ... properly considered a subset of their broader free speech claim, given that the Freedom of the Press Clause and the Free Speech Clause both protect leafleting from government interference.").

A. General Framework

Plaintiffs allege that the Ordinance is unconstitutional on its face. *See Bruni I*, 824 F.3d at 362. A facial challenge "seeks to vindicate not only [a plaintiff's] own rights," as in an as-applied challenge, but also "those of others who may ... be adversely impacted by the statute in question." *Id.* (quoting *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 623 (3d Cir. 2013)). Although facial

challenges in the First Amendment context are more forgiving than those in other contexts, *see United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), "all agree that a facial challenge [under the First Amendment] must fail where the statute has a plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (citation omitted).

As we explained in *Bruni I*, however, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the ... disposition in every case involving a constitutional challenge." 824 F.3d at 363 (quoting *Citizens United v. FEC*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)). Courts therefore look to "[t]he relevant constitutional test" to resolve the inquiry, *id.* (citation omitted), bearing in mind that a party seeking to invalidate a law in its entirety bears a heavy burden, *see Wash. State Grange*, 552 U.S. at 450–51, 128 S.Ct. 1184; *Brown*, 586 F.3d at 269.

Here, the relevant test is that governing free speech claims. The government's ability to restrict speech in a traditional public forum, such as a sidewalk, is "very limited." *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518 (citation omitted). That is because traditional public fora "are areas that have historically been open to the public for speech activities." *Id.* at 476, 134 S.Ct. 2518. In such fora, the government may not restrict speech based on

its "communicative content," *Bruni I*, 824 F.3d at 364 (quoting *Reed*, 135 S. Ct. at 2226)—that is, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *id.* at 363 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002)).

By contrast, the government has greater leeway to regulate "features of speech unrelated to its content." *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518. Thus, "[e]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

The level of scrutiny a court applies to a restriction on speech depends on whether it is content based or content neutral. If the restriction is content based, it is subject to strict scrutiny and is therefore "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see McCullen*, 573 U.S. at 478, 134 S.Ct. 2518. If a restriction is content neutral, "we apply intermediate scrutiny and ask whether it is 'narrowly ***84** tailored to

serve a significant governmental interest.' " *Bruni I*, 824 F.3d at 363–64 (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994)). The threshold question, therefore, is whether the restriction here is content based or content neutral.[10]

[10] Although the parties begin their briefing with an application of intermediate scrutiny, we follow the Supreme Court's lead in *McCullen* by addressing first whether the Ordinance is content based because the answer to that question determines the correct level of scrutiny to apply. *See* 573 U.S. at 478–79, 134 S.Ct. 2518.

B. Content Neutrality

Plaintiffs contend that the Ordinance is content based and thus subject to strict scrutiny because it regulates speech "based on subject matter, function, or purpose," rendering it content based under *Reed*.[11] Appellants' Br. 34. For the reasons that follow, we disagree.

[11] Plaintiffs make additional arguments in passing, but they are not persuasive. First, Plaintiffs contend that the City's purpose in adopting the Ordinance was to "target anti-abortion content" because the City Council's discussion about the Ordinance "centered entirely on abortion and the speech outside of abortion facilities in Pittsburgh." Appellants' Br. 40–41. But the Supreme Court explicitly rejected this argument in *McCullen*. *See* 573 U.S. at 481–82, 134 S.Ct. 2518 ("States adopt laws to address the problems that confront them. The First Amendment does not require

> States to regulate for problems that do not exist." (quoting *Burson v. Freeman*, 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion))). Second, Plaintiffs argue that the Ordinance is content based as applied because it is enforced only outside of reproductive health facilities and therefore affects only abortion-related speech. Plaintiffs did not make this argument at summary judgment below, and it is therefore forfeited. *See Keenan v. City of Philadelphia*, 983 F.2d 459, 471 (3d Cir. 1992). In any event, "a facially neutral law does not become content based simply because it may disproportionally affect speech on certain topics." *McCullen*, 573 U.S. at 480, 134 S.Ct. 2518. *Reed*, decided one year after *McCullen*, does not speak to these aspects of *McCullen*'s analysis.

In *Reed*, the Supreme Court considered the constitutionality of an ordinance that regulated the manner of display of outdoor signs depending on their subject matter. 135 S. Ct. at 2224–25. For example, the ordinance allowed "Political Signs" to be bigger in size and remain posted longer than those it defined as "Temporary Directional Signs." *Id.* at 2224–25, 2227. The Court held that the regulation was content based because the restrictions applied differently "depend[ing] entirely on the communicative content of the sign[s]." *Id.* at 2227. As relevant here, the Court noted that whereas "[s]ome facial distinctions ... are obvious," such as "defining regulated speech by particular subject matter," others are more "subtle," such as "defining regulated speech by its function or purpose." *Id.*

The thrust of Plaintiffs' argument is that the

Ordinance is content based because the City interprets the word "demonstrating" to apply to sidewalk counseling but not to peaceful one-on-one communication about other subjects, like sports teams, and, as a result, law enforcement must examine the content of any speech to determine if it is prohibited. However, despite the assumptions of both parties,[12] nothing in the plain language of ***85** the Ordinance supports a construction that prohibits peaceful one-on-one conversations *on any topic* or conducted *for any purpose* at a normal conversational volume or distance. In short, the Ordinance as written does not prohibit the sidewalk counseling in which Plaintiffs seek to engage within the zone.

[12] Although Plaintiffs contend that the City "enforces" the Ordinance "to suppress [their] leafletting and sidewalk conversations" within the buffer zone, Appellants' Br. 17, the record does not reflect any prosecution, arrest, or even citation. Instead, it reflects that, except for isolated instances in which police were called to Planned Parenthood but took no action, Plaintiffs avoided the buffer zone based on an assumption, shared by the City, about the scope of the Ordinance. The realistic threat of the City's enforcement is sufficient for purposes of Plaintiffs' standing. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). As we explain below, however, it does not preclude us under the doctrine of constitutional avoidance from adopting a narrowing construction of the Ordinance.

No doubt, if the Ordinance by its terms did prohibit one-on-one conversations about abortion but not about other subjects within the zone, it would be

highly problematic, *see Reed*, 135 S. Ct. at 2230, particularly where, as here, the speech alleged to be prohibited occurs on a public sidewalk and constitutes one-on-one "normal conversation and leafletting," *McCullen*, 573 U.S. at 488, 134 S.Ct. 2518—"core political speech entitled to the maximum protection afforded by the First Amendment," *Bruni I*, 824 F.3d at 357. But under the doctrine of constitutional avoidance, "[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."[13] *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.").

[13] As we said in *Brown*, "[t]his principle of interpretation is consistent with Pennsylvania law." 586 F.3d at 274 n.13 (citing *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812, 827 (1974); and *Dole v. City of Philadelphia*, 337 Pa. 375, 11 A.2d 163, 168–69 (1940)). And this is a particularly compelling case in which to apply the doctrine given the constitutional concerns inherent in restricting this kind of speech. As the Court explained in *McCullen*, " 'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.' " 573 U.S. at 488, 134 S.Ct. 2518 (quoting *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)). Indeed, "[l]eafletting and commenting on matters of public concern are classic forms of speech

> that lie at the heart of the First Amendment." *Id.* at 489, 134 S.Ct. 2518 (quoting *Schenck*, 519 U.S. at 377, 117 S.Ct. 855).

Of course, we may not "rewrite a ... law to conform it to constitutional requirements," *United States v. Stevens*, 559 U.S. 460, 481, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (citation omitted), but, as we have recognized on many occasions, "[i]n the absence of a limiting construction from a state authority, we must 'presume any narrowing construction or practice to which the law is fairly susceptible.' "[14] ***86** *Brown*, 586 F.3d at 274 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)); *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 n.10 (3d Cir. 2001) (explaining that where a state court has not authoritatively construed the terms of a stated policy, "we are ... required to give it a reasonable narrowing construction if necessary to save it from unconstitutionality"); *see also Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.").

[14] That is not to say that the City's interpretation of the Ordinance is irrelevant—it is a consideration in a court's determination of whether to adopt a limiting construction. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *see also Ward*, 491 U.S. at 795–96,

> 109 S.Ct. 2746. But the City's interpretation has not been adopted by any Pennsylvania court, and where no state court has weighed in and the Ordinance is readily susceptible to a "reinterpretation" consistent with the Ordinance's text, the City's position is not dispositive. *Free Speech Coal., Inc. v. Attorney Gen. of the U.S.*, 677 F.3d 519, 539 (3d Cir. 2012); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215–16, 215 n.10 (3d Cir. 2001); *see also U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (stating, outside of the constitutional avoidance context, that litigants cannot "extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles" by agreeing on the proper construction of the law); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) ("[W]e are not required to ... adopt an interpretation precluded by the plain language of the ordinance." (citation omitted)). While other Courts of Appeals take a contrary approach, *see United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988); *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986), our precedent is clear, *see Free Speech Coal., Inc.*, 677 F.3d at 539; *Brown*, 586 F.3d at 274; *Saxe*, 240 F.3d at 215–16, 215 n.10.

Here, the Ordinance is readily susceptible to a narrowing construction. The text of the Ordinance says nothing about leafletting or peaceful one-on-one conversations, let alone on a particular topic or for a particular purpose. And, to put a fine point on it, the floating bubble zone, which was enjoined years ago, did prohibit "passing a leaflet," "educating," or "counseling." Pitts. Code § 623.03. Those are *not* the activities that remain prohibited in the zone, and "when the legislature uses certain

language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, at 194 (6th rev. ed. 2000)).

The Ordinance prohibits four—and only four—activities within the zone: "congregat[ing]," "patrol[ling]," "picket[ing]," and "demonstrat[ing]." Pitts. Code § 623.04. And none of those terms, as commonly understood, encompasses the sidewalk counseling in which Plaintiffs engage.[15]

[15] In its briefing and at oral argument, the City justified its interpretation by noting that in *Schenck*, the injunction at issue referred to "sidewalk counseling" as a "form of demonstrating," and the Supreme Court did not reject that characterization. *See* Appellees' Br. 48 (citation omitted). But the Court made clear that the term as used by some protestors in that case was misleading given their aggressive actions, *see Schenck*, 519 U.S. at 363, 381–82, 117 S.Ct. 855, and, as discussed, *see supra* note 6, such conduct falls far outside Plaintiffs' definition of sidewalk counseling.

To "congregate" means "to collect into a group or crowd." *Congregate*, Merriam-Webster's Collegiate Dictionary 262 (11th ed. 2005) [hereinafter Merriam-Webster's]; *see also Congregate*, The American Heritage Dictionary of the English Language 388 (4th ed. 2006) [hereinafter American Heritage] (defining "congregate" as "bring or come together in a group, crowd, or assembly"). To

"patrol" is "to carry out a patrol," defined in turn as "the action of traversing a district or beat or of going the rounds along a chain of guards for observation or the maintenance of security," *Patrol*, Merriam-Webster's 909, and "[t]he act of moving about an area especially by an authorized and trained person ... for purposes of observation, inspection, or security," *Patrol*, American Heritage 1290. To "picket" is to "serve as a picket," defined as "a person posted for a demonstration or protest." *Picket*, Merriam-Webster's 937; *see also Picket*, American Heritage 1327 (defining "picket" as "to post as a picket" where ***87** "picket" is defined as "[a] person or group of persons present outside a building to protest"). And to "demonstrate" is defined as "to make a demonstration," which is defined in turn as "an outward expression or display" and "a public display of group feelings toward a person or cause." *Demonstrate*, Merriam-Webster's 332; *see also Demonstrate*, American Heritage 484 (defining "demonstrate" as "[t]o participate in a public display of opinion").

Plaintiffs' sidewalk counseling does not meet any of these definitions. While the Supreme Court has noted that a grouping of three or more people may constitute "congregat[ing]," *see Boos v. Barry*, 485 U.S. 312, 316–17, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), approaching someone *individually* to engage in a *one-on-one* conversation no more constitutes "congregat[ing]" than walking alongside another person constitutes "patrol[ling]." And while signs and raised voices may constitute "picket[ing]" or "demonstrat[ing]," speaking to someone at a

normal conversational volume and distance surely does not. Simply calling peaceful one-on-one conversations "demonstrating" or "picketing" does not make it so when the plain meaning of those terms does not encompass that speech.[16]

[16] Perhaps because of this disconnect between the Ordinance's text and the specific expressive activities to which the parties have assumed the Ordinance applies, the City's own witness struggled during his deposition to explain which specific prohibition was even applicable to Plaintiffs' sidewalk counseling. For example, when asked "[w]hat part of the Ordinance" would prohibit a sidewalk counselor from crossing into the buffer zone while talking to a patient, the City's designated witness replied, "[c]all it congregating, patrolling, picketing, or demonstrating, or any name you wish to give it." JA 337a.

Moreover, the activities that the Ordinance does prohibit render it content neutral under binding Supreme Court precedent. No doubt due to the easily identifiable nature and visibility of "congregat[ing], patrol[ling], picket[ing] or demonstrat[ing]," Pitts. Code § 623.04, the Court has repeatedly considered regulation of those activities to be based on the manner in which expressive activity occurs, not its content, and held such regulation content neutral. *See Madsen*, 512 U.S. at 759, 763–64, 114 S.Ct. 2516 (addressing the precise language at issue here, "congregating, picketing, patrolling, [and] demonstrating," and concluding that the injunction prohibiting those activities was content neutral); *see also Snyder v. Phelps*, 562 U.S. 443, 456, 131 S.Ct. 1207, 179

L.Ed.2d 172 (2011); *Hill*, 530 U.S. at 721, 120 S.Ct. 2480; *Schenck*, 519 U.S. at 383–85, 117 S.Ct. 855; *United States v. Grace*, 461 U.S. 171, 181–82, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).[17] Nor does *Reed* alter that conclusion. *See Reed*, 135 S. Ct. at 2228–29.

[17] We have continued to rely on *Hill* since *McCullen* and *Reed* were handed down, *see, e.g.*, *Turco v. City of Englewood*, 935 F.3d 155, 165 (3d Cir. 2019) (declining to strike down eight-foot buffer zone as a matter of law because "such a conclusion would be directly at odds with the Supreme Court's decision in *Hill v. Colorado*" (citation omitted)), as have some of our sister circuits, *e.g.*, *March v. Mills*, 867 F.3d 46, 64 (1st Cir. 2017); *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found.*, 846 F.3d 391, 403–04 (D.C. Cir. 2017). We note, however, that other Courts of Appeals have observed that, even if "neither *McCullen* nor *Reed* overruled *Hill*, so it remains binding on us," the content neutrality holding of *Hill* may be "hard to reconcile with both *McCullen* and *Reed*," *Price v. City of Chicago*, 915 F.3d 1107, 1109 (7th Cir. 2019) (Sykes, J.), *petition for cert. filed*, No. 18-1516 (U.S. June 6, 2019).

In short, the doctrine of constitutional avoidance counsels that we impose a limiting construction where, as here, a statute ***88** has not been construed by a state court and is not only susceptible to a narrowing construction but also demands that construction on its face. *See Am. Booksellers*, 484 U.S. at 397, 108 S.Ct. 636; *Brown*, 586 F.3d at 274; *Saxe*, 240 F.3d at 215 n.10. Because the Ordinance, as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one

conversations—there is no need for law enforcement "to examine the content of the message ... to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479, 134 S.Ct. 2518 (citation omitted). The Ordinance so read is thus content neutral and subject to intermediate scrutiny.

C. Application of Intermediate Scrutiny

Because we conclude the Ordinance does not implicate Plaintiffs' speech, we could end our analysis here if this were an as-applied challenge. But because Plaintiffs have brought a facial challenge, we briefly consider whether the Ordinance as applied to the remaining expressive activity of congregating, patrolling, picketing, or demonstrating within fifteen feet of the clinic entrance is "narrowly tailored to serve a significant governmental interest."[18] *Id.* at 477, 134 S.Ct. 2518 (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746). We easily conclude that it is.

[18] To satisfy intermediate scrutiny, the government bears the burden of demonstrating that a restriction on speech is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518 (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746). Plaintiffs do not dispute the "ample alternatives" prong and, with its narrowing construction, "the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain." *Frisby*, 487 U.S. at 483, 108 S.Ct. 2495. We therefore focus our inquiry, as

do the parties, on the issue of narrow tailoring.

As Plaintiffs acknowledge, the interests that the City seeks to protect—unimpeded access to pregnancy-related services, ensuring public safety, and eliminating "neglect" of law enforcement needs—are legitimate.[19] *Bruni I*, 824 F.3d at 368 (quoting Pitts. Code § 623.01); *see McCullen*, 573 U.S. at 487, 496–97, 134 S.Ct. 2518 (describing these interests as "undeniably significant" interests that are "clearly serve[d]" by buffer zones); *see also Turco v. City of Englewood*, 935 F.3d 155, 166 (3d Cir. 2019) (recognizing the government's significant interest in "protecting the health and safety of its citizens, which 'may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests' ") (citation omitted). Instead, Plaintiffs argue that the Ordinance is not narrowly tailored to those interests.

[19] To the extent Plaintiffs argue that the City's stated interests were not substantiated on remand, the record—including reports of violent incidents, obstruction of patients' ingress and egress, and aggressive confrontations—establishes otherwise. *See supra* Section I.A.1. Plaintiffs' additional argument that there has been no obstructive conduct preventing access to the clinic's entrance in recent years and, therefore, that the Ordinance is no longer necessary is also belied by the record. For starters, there is evidence in the record to the contrary. For example, a clinic escort declared in 2014 that she was "aware of incidents at [Planned Parenthood] in which escorts

> were pushed by a protester and where protesters placed their hands on patients and thrust their leaflets inside patients' coat pockets or handbags." JA 709a–10a. More importantly, the fact that an otherwise constitutional restriction on speech is successful in serving the interests for which it was intended is hardly a reason to strike it down.

To be narrowly tailored, a regulation must not "burden substantially more ***89** speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518 (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746). At the same time, it " 'need not be the least restrictive or least intrusive means of' serving the government's interest," *id.* (quoting *Ward*, 491 U.S. at 798, 109 S.Ct. 2746), and we "afford[ ] some deference to a municipality's judgment in adopting a content-neutral restriction on speech," *Bruni I*, 824 F.3d at 370.

In arguing that the restriction on speech here is not narrowly tailored, Plaintiffs do not distinguish between the Ordinance as read to include sidewalk counseling and the Ordinance as read to exclude it. Rather, quoting *Bruni I*, they contend we "already made clear that 'the City has the same obligation to use less restrictive alternatives to its buffer zone as ... Massachusetts had with respect to the buffer zone at issue in *McCullen*.' " Appellants' Br. 25 (quoting *Bruni I*, 824 F.3d at 369). So, say Plaintiffs, just as in *McCullen*, the City had to demonstrate on remand that "substantially less-restrictive alternatives," including arrests,

prosecutions, and injunctions, "were tried and failed, or ... were closely examined and ruled out for good reason." *Bruni I*, 824 F.3d at 370. Because the City here concededly failed to make a showing of that magnitude, Plaintiffs contend the Ordinance necessarily fails intermediate scrutiny.

Plaintiffs mistake the import of *Bruni I* in two respects. First, in reviewing the District Court's dismissal of Plaintiffs' complaint, we did not conclusively determine that the City "ha[d] the same obligation to use less restrictive alternatives" as in *McCullen*. *Bruni I*, 824 F.3d at 369. As appropriate at the pleading stage, we "accept[ed] all [of Plaintiffs'] factual allegations as true," *id.* at 360 (citation omitted), and held that "[b]ecause of the significant burden on speech that the Ordinance *allegedly* imposes, the City ha[d] the same obligation to use," *id.* at 369 (emphasis added), or show that it "seriously considered, substantially less restrictive alternatives," *id.* at 357, as in *McCullen*. On that basis, we remanded for a determination of the proper scope of the Ordinance, the actual burden on Plaintiffs' speech, and a means–ends analysis "by the standard that *McCullen* now requires." *Id.* at 375.

Second, to the extent Plaintiffs' argument is that *McCullen* imposes on a municipality "the same obligation" as on Massachusetts—even in the absence of a "significant burden on speech," *id.* at 369—they are mistaken. As we recognized in *Bruni I*, where the burden on speech is de minimis, a regulation may "be viewed as narrowly tailored,

even at the pleading stage," *id.* at 372 n.20, and *McCullen* and *Bruni I* both observed that where there is only "a slight burden on speech, any challengers would struggle to show that 'alternative measures [would] burden *substantially* less speech,' " *id.* (alteration in original) (quoting *McCullen*, 573 U.S. at 495, 134 S.Ct. 2518). In short, while *McCullen* and *Bruni I* made clear that a "rigorous and fact-intensive" inquiry will be required where a restriction imposes a significant burden on speech, *Bruni I*, 824 F.3d at 372, they also made clear (and logic dictates) that a less demanding inquiry is called for where the burden on speech is not significant—whether due to a restriction's scope, the size of the speech-free zone, or some combination of the two.[20]

[20] In *Bruni I*, we explained that when dealing with core speech, such as sidewalk counseling, whether a restriction is less burdensome in "degree"—meaning size in the context we used it—is not necessarily dispositive of whether the burden on speech is significant. 824 F.3d at 368. A court must also consider the burden as "a matter of ... kind," referring to the type of speech a restriction prohibits. *Id.* Elsewhere in the opinion, however, we also recognized that there may be cases where the "degree" of burden is so minimal that it, alone, will determine whether the burden on speech should be considered significant, thus potentially negating any need for the government to show that substantially less-restrictive alternatives were tried and failed or seriously considered and reasonably rejected. *See id.* at 372 n.20 (quoting *McCullen*, 573 U.S. at 495, 134 S.Ct. 2518). As "degree" could refer to the size of the zone or significance of the burden, depending on the context, and both subjects are mentioned in today's opinion, we will use the terms

"scope" and "size," rather than "kind" and "degree," for the sake of clarity.

***90** In this case, now that we have before us both a developed record and a narrow construction of the Ordinance, it is apparent that the burden it imposes is different from *McCullen* both in scope and size and is instead akin to that imposed by the thirty-six-foot and fifteen-foot buffer zones that the Supreme Court upheld in *Madsen v. Women's Health Center, Inc.*, 512 U.S. at 757, 776, 114 S.Ct. 2516, and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. at 364, 380, 117 S.Ct. 855, respectively.

As to scope, although the restrictions in those cases were more targeted in that they were created by way of injunction, not legislation, *see Schenck*, 519 U.S. at 361, 117 S.Ct. 855; *Madsen*, 512 U.S. at 757, 114 S.Ct. 2516, the Ordinance is narrower in scope because it limits only congregating, patrolling, picketing, and demonstrating within a fifteen-foot buffer zone, and does not sweep in the "one-on-one communication," including "normal conversation and leafletting," that *McCullen* emphasized "have historically been more closely associated with the transmission of ideas," 573 U.S. at 488, 134 S.Ct. 2518. Thus, so long as she is not "congregating" with others in the buffer zone, an individual plaintiff is not barred by the Ordinance from engaging in sidewalk counseling inside its borders. *Cf. Schenck*, 519 U.S. at 367, 369–70, 383–84, 117 S.Ct. 855 (describing and upholding

the district court's decision to allow only two sidewalk counselors inside the fifteen-foot buffer zone); *Madsen*, 512 U.S. at 759, 114 S.Ct. 2516 (prohibiting not only "congregating, picketing, patrolling, [and] demonstrating" within the zone but also "entering").

And as to size, the relatively small buffer zone imposed by the Ordinance, like those in *Madsen* and *Schenck*, does not prevent groups like Forty Days for Life from congregating within sight and earshot of the clinic. Nor does it prevent protestors, demonstrators, or picketers from being seen and heard, or any of these persons from speaking outside the zone with willing listeners who are entering or exiting. *See Schenck*, 519 U.S. at 384–85, 117 S.Ct. 855; *Madsen*, 512 U.S. at 770, 114 S.Ct. 2516. And size, while not necessarily in and of itself dispositive, *see Bruni I*, 824 F.3d at 368, is still a "substantial distinction" that must factor into a court's analysis of the relative burden on speech, *Turco*, 935 F.3d at 163.

Also as in *Madsen* and *Schenck*, the record shows that the City resorted to a fixed buffer zone not in the first instance but after attempting or considering some less burdensome alternatives and concluding they were unsuccessful in meeting the legitimate interests at issue. *See Schenck*, 519 U.S. at 380–82, 117 S.Ct. 855; *Madsen*, 512 U.S. at 769–70, 114 S.Ct. 2516. These included an overtime police detail in front of Planned Parenthood until the cost became prohibitive once the City was declared a financially distressed municipality;[21]

incident-based responses by the police ***91** that proved unsuccessful in preventing or deterring aggressive incidents and congestion; and consideration of criminal laws that the police were finding inadequate to address the problem of protestors following patients and obstructing their way to the clinic.

[21] In *McCullen*, Massachusetts did not assert such economic hardships. While the Court noted that "the prime objective of the First Amendment is not efficiency," *McCullen*, 573 U.S. at 495, 134 S.Ct. 2518, it did not have occasion to consider circumstances where "the limitations of 'manpower' and the need to be able to deploy officers in response to emergencies" made it "not feasible to permanently provide a significantly increased police presence at the clinic," *Turco*, 935 F.3d at 167. As we recently recognized, however, the facts "that the police department ha[s] finite resources," *id.* (citation omitted), and a city has "financial restraints," *id.* at 167–68, are relevant to the narrow tailoring analysis.

True, as Plaintiffs point out, this record does not reflect that the City tried or seriously considered arrests, prosecutions, or targeted injunctions, which Plaintiffs would have us treat as dispositive. But where the burden imposed by a restriction on speech is not significant, the government need demonstrate neither that "it has tried or considered *every* less burdensome alternative," *Bruni I*, 824 F.3d at 370, nor that it tried or considered every less burdensome alternative discussed in *McCullen*. Instead, as we reiterated in *Turco*, this is an "intensely factual ... inquiry," 935 F.3d at 170, that

must account for "the 'broad principle of deference to legislative judgments' and that a legislative body 'need not meticulously vet every less burdensome alternative,' " *id.* at 171 (quoting *Bruni I*, 824 F.3d at 370 n.18). And, as we recognized there in remanding for further fact-finding, a municipality can demonstrate that it "attempted ... [or] considered alternative means of bringing order to the sidewalk" even if it "ha[s] not 'prosecute[d] any protestors for activities taking place on the sidewalk' and 'did not seek injunctive relief against individuals whose conduct was the impetus for the Ordinance.' " *Id.* at 167 (second alteration in original) (quoting *Turco v. City of Englewood*, No. 2:15-cv-03008, 2017 WL 5479509, at *5 (D.N.J. Nov. 14, 2017)). The ultimate question remains whether a restriction on speech "burden[s] *substantially* more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518 (emphasis added) (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746).

Consistent with *Madsen* and *Schenck*, the Ordinance, as we have construed it, does not do so.[22] The Ordinance therefore is "narrowly tailored to serve a significant governmental interest," *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518 (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746), and it satisfies intermediate scrutiny.

[22] We recognize that the City may have a legitimate concern about access to healthcare facilities if it transpires that multiple one-on-one conversations

> impair access to the facilities, *see McCullen*, 573 U.S. at 486–87, 134 S.Ct. 2518, and that the City may then have occasion to revisit the terms of the Ordinance having developed a record that would satisfy *McCullen* and *Bruni I*, as well as the content-neutrality requirement of *Reed*. *See Turco*, 935 F.3d at 162–63. That, however, is not the Ordinance before us today.

D. Overbreadth

Finally, Plaintiffs argue that the Ordinance is unconstitutionally overbroad because it authorizes the City to create buffer zones at any health facility in the City, regardless of whether the City has identified a problem at the location in the past. A law may be overbroad under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." ***92** *Bruni I*, 824 F.3d at 374 (quoting *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577). The overbreadth doctrine is "strong medicine," *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir. 1992) (citation omitted), should therefore be "used sparingly," *id.*, and will "not be[ ] invoked when a limiting construction has been or could be placed on the challenged" law, *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Plaintiffs' overbreadth challenge is not well-founded. As a general matter, "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no

constitutional significance," *Hill*, 530 U.S. at 730–31, 120 S.Ct. 2480, and its applicability more generally is one of the reasons that we consider it to be a content-neutral restriction on speech, *see id.* at 731, 120 S.Ct. 2480. For that reason, "[w]hen a buffer zone broadly applies to health care facilities" to include "buffer zones at non-abortion related locations," we may then "conclude 'the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.' " *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 730–31, 120 S.Ct. 2480).

Nor is the Ordinance overbroad because it affords the City discretion to select particular health facilities at which it will demarcate a buffer zone. Since the demarcation requirement was put in place approximately ten years ago, the City has exercised that discretion as to only two facilities, both of which suffered from violence and obstruction in the past. Yet we may not, as Plaintiffs suggest, simply assume that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S.Ct. 2908. Instead, we revert again to the "principle ... well-established in First Amendment jurisprudence"—"our duty to 'accord a measure of deference to the judgment' of [the] city council,' " *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 727, 120 S.Ct. 2480), considering "[the] statute's application to real-world conduct, not fanciful hypotheticals," *id.* at 172 (quoting *Stevens*, 559 U.S.

at 485, 130 S.Ct. 1577). Applying that principle here, we conclude the Ordinance is not substantially overbroad.

In sum, Plaintiffs have not carried their "burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (alteration in original) (citation omitted). We therefore affirm the District Court's grant of summary judgment to the City on this claim.

IV. Conclusion

For the foregoing reasons, we will affirm the District Court's order granting summary judgment.

HARDIMAN, Circuit Judge, concurring.

I join the Court's opinion because it rightly construes the Pittsburgh Ordinance to allow conversation on a public sidewalk. I write separately to highlight the impact of *Reed v. Town of Gilbert*, —— U.S. ——, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015). In my view, *Reed* weakened precedents cited in the Court's content neutrality analysis and will constrain Pittsburgh's enforcement of the Ordinance going forward.

I

It is true that the Supreme Court has held that restricting "congregating, picketing, patrolling, [and] demonstrating" around abortion clinics is facially content neutral. ***93** *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 759, 757–65, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *see* Op. 87–88. The Court has even extended this content neutrality to "wildly expansive definitions" of "demonstrate" and "picket." *Hill v. Colorado*, 530 U.S. 703, 744, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (Scalia, J., dissenting); *see id.* at 721–22, 120 S.Ct. 2480 (majority opinion) ("defining 'demonstrate' as 'to make a public display of sentiment for or against a person or cause' and 'picket' as an effort 'to persuade or otherwise influence' " (quoting Webster's Third New International Dictionary 600, 1710 (1993))); *see also Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 374 n.6, 381–82, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (upholding injunction against "demonstrating," even though it would target some "stationary, nonobstructive demonstrations").

The continued vitality of this content neutrality analysis is questionable after *Reed*. Before *Reed*, the Court vacillated between two tests for content neutrality. *See generally* Genevieve Lakier, *Reed v Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233; Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996). In cases like *Hill*, *Schenck*, and *Madsen*, the

"government's purpose [w]as the threshold consideration." *Madsen*, 512 U.S. at 763, 114 S.Ct. 2516; *see Hill*, 530 U.S. at 719, 120 S.Ct. 2480; *Schenck*, 519 U.S. at 371–74 & n.6, 117 S.Ct. 855 (relying solely on *Madsen* to hold injunction content neutral). But in other cases, the Court's first consideration was whether a law "draw[s] content-based distinctions on its face." *McCullen v. Coakley*, 573 U.S. 464, 479, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014). Any law that did so was necessarily content based, no matter the government's purpose. *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–17, 122 n.*, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

Reed adopted the latter test for content neutrality. It held that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)); *see id.* at 2237–39 (Kagan, J., concurring in the judgment). By doing so, *Reed* "overturn[ed] the standard that [the Court] had previously used to resolve a particular class of cases"—a class that includes cases like this one and *Hill*. Brian A. Garner et al., The Law of Judicial Precedent 31 (2016) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 691–93 (3d Cir. 1991), *aff'd in part*,

rev'd in part, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). In fact, *Reed* rebuked *Hill* several times: by noting that the errant Court of Appeals relied on it, 135 S. Ct. at 2226; and by favorably citing dissents in *Hill* authored by Justices Scalia and Kennedy, *id.* at 2229.

Reed also seems to have expanded the types of laws that are facially content based. Facial distinctions, the Court explained, may not only be "obvious, defining regulated speech by particular subject matter." *Id.* at 2227. They may also be "subtle, defining regulated speech by its function or purpose." *Id.* Two cases discussed in *Reed* exemplify this subtle content discrimination.

The first, *Sorrell v. IMS Health Inc.*, involved a law that restricted the sale, disclosure, and use of information about drug prescriptions. *See* ***94** 564 U.S. 552, 563–64, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *Reed*, 135 S. Ct. at 2227. The Court held content based a provision that allowed the sale of that information for " 'educational communications,' " but not for "marketing." *Sorrell*, 564 U.S. at 564, 131 S.Ct. 2653 (quoting Vt. Stat. Ann., tit. 18, § 4631(e)(4) (Supp. 2010)). "[E]ducation[ ]" and "marketing" are examples of speech's "function or purpose" under *Reed*. 135 S. Ct. at 2227. They explain *how* or *why* a speaker speaks, not *what* is said. *Id.*

The second case that underscores the protection afforded to speech's function or purpose is *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405

(1963). *See Reed*, 135 S. Ct. at 2229. In that case, Virginia "attempt[ed] to use a statute prohibiting 'improper solicitation' by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People." *Id.* (quoting *Button*, 371 U.S. at 438, 83 S.Ct. 328). The *Button* Court rejected that attempt, holding that "advocacy" and " 'the opportunity to persuade to action' " are First Amendment rights. 371 U.S. at 437–38, 83 S.Ct. 328 (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945)). Describing the Virginia law over 50 years later, the *Reed* Court called it "facially content-based." 135 S. Ct. at 2229.

So *Reed* demands that we construe the Ordinance narrowly. And it steers us away from precedents that focused on a law's purpose rather than its facial effect. For laws once held content neutral because of purpose may well be facially content based after *Reed*. *Compare, e.g.*, *Hill*, 530 U.S. at 720–21, 120 S.Ct. 2480 (holding content neutral a ban on "picketing," "demonstrating," "protest, education, or counseling" even though it may require the government "to review the content of the statements made"), *with McCullen*, 573 U.S. at 479, 134 S.Ct. 2518 ("The [buffer zone law] would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed ....' " (quoting *FCC v. League of Women Voters of Ca.*, 468 U.S. 364, 383, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984))), *and Reed*, 135 S. Ct. at 2227–29 (highlighting facially content based laws that target solicitation and educational

communications). Even some purposes previously held content neutral may now be content based. *Compare, e.g.*, *Hill*, 530 U.S. at 716, 120 S.Ct. 2480 (citing "[t]he unwilling listener's interest in avoiding unwanted communication"), *and Turco v. City of Englewood*, 935 F.3d 155, 162, 166-67 (3d Cir. 2019) (citing that interest to support narrow tailoring of concededly content neutral law), *with McCullen*, 573 U.S. at 481, 134 S.Ct. 2518 ("To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' " (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988))), *and Reed*, 135 S. Ct. at 2227 (protecting speech's "function or purpose").

II

Today our Court does what *Reed* requires. We hold that "[b]ecause the Ordinance, as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations," the City cannot examine the content of a conversation to decide whether a violation has occurred. Op. 87–88. It will instead examine, for example, decibel level, the distance between persons, the number of persons, the flow of traffic, and other things usually unrelated to the content or intent of speech. *See, e.g.*, *Reed*, 135 S. Ct. at 2228 (confirming that banning sound amplification is content neutral); *id.* at 2232 (stating that "entirely forbidding the ***95** posting of

signs" is content neutral); *McCullen*, 573 U.S. at 491–92, 134 S.Ct. 2518 (collecting laws that, by penalizing conduct like obstruction or assault, may pass intermediate scrutiny).

The Court's decision constrains the City's enforcement discretion. Pittsburgh cannot target quiet conversations even if they are not in a tone of "kindness, love, hope, gentleness, and help." Op. 80 n.6 (quoting JA 574a); *see, e.g.*, *id.* at 86–87. It 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. *Reed*, 135 S. Ct. at 2227; *see, e.g.*, *id.* at 2228–29 (discussing *Sorrell*, 564 U.S. at 563–64, 131 S.Ct. 2653 ("educati[ng]" and "marketing"), and *Button*, 371 U.S. at 438–40, 83 S.Ct. 328 ("solicit[ing]," "advoca[ting]," and "urg[ing]")).

And the City's enforcement of the Ordinance must be evenhanded. Consider clinic employees and agents who, under the injunction issued in *Brown v. City of Pittsburgh*, can "congregate" or "patrol" when helping persons enter or exit a clinic. *See* 586 F.3d 263, 273–75 (3d Cir. 2009); *Brown v. City of Pittsburgh*, 2010 WL 2207935, at *2 n.2 (W.D. Pa. May 27, 2010); JA 1324a (permanent injunction order). Before today, the City's broad and amorphous interpretation of the Ordinance risked allowing those employees to engage in speech that others could not. That sort of disparate treatment would now be content or viewpoint based. *See Reed*, 135 S. Ct. at 2230 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct.

2510, 132 L.Ed.2d 700 (1995), and *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)). Our decision today clarifies that the words "congregate" and "patrol" address conduct—the assembly of people in one place or the action of pacing back and forth. *See* Op. 86–87. So interpreted, the *Brown* injunction's narrow exception does not discriminate between types of speech.

With these understandings, I join the Court's opinion.

All Citations

941 F.3d 73

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING, FILED DECEMBER 3, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2884

COLLEEN REILLY; BECKY BITER;
ROSALIE GROSS

v.

CITY OF HARRISBURG; HARRISBURG CITY COUNSEL; MAYOR ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg

Colleen Reilly; Becky Biter,
Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 1-16-cv-00510)
District Judge: Sylvia Rambo

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FUENTES,[1] *Circuit Judges*.

[1] Judge Fuentes's vote is limited to Panel rehearing only.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: December 3, 2019
Lmr/cc: All Counsel of Record

CITY OF HARRISBURG CODE CHAPTER 3-371. INTERFERENCE WITH ACCESS TO HEALTHCARE FACILITIES, CODIFYING CITY OF HARRISBURG ORDINANCE NO. 12-2012, FILED MARCH 24, 2016

Chapter 3-3 71. Interference With Access to Health Care Facilities

[HISTORY: Adopted by the City Council of the City of Harrisburg 11-13-2012 by Ord. No. 12-2012. Amendments noted where applicable.]

§ 3-371.1. Title.

This chapter may be cited as "Interference With Access to Health Care Facilities."

§ 3-371.2. Findings and purpose.

A. The Council of the City of Harrisburg recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is important for residents and visitors to the City. City Council further recognizes that the exercise of a person's right to protest or counsel against certain medical procedures is a First Amendment activity that must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner.

B. The City Council is aware of several instances in which police departments across the commonwealth, including the City of

Harrisburg Bureau of Police, have been called upon to mediate disputes between those seeking medical counseling and treatment and those who would counsel against their actions in an effort to prevent violent confrontations which would lead to criminal charges.

C. In order to promote the health and welfare of City residents and visitors to the City's health care facilities, as well as the health and welfare of those who may wish to voice their constitutionally protected speech outside of such health care facilities, the City finds that the limited buffer zones outside of health care facilities established by this chapter will ensure that patients have unimpeded access to medical services while protecting the First Amendment rights of demonstrators to communicate their message.

§ 3-371.3. Definition.

"Health care facility" means any hospital, medical office, physical or psychological therapy facility or clinic licensed by the Commonwealth of Pennsylvania Department of Health.

§ 3-3 71.4. Restriction.

A. No person or persons shall 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. This section shall not apply to police and public safety officers, fire and rescue

personnel, or other emergency workers in the course of their official business or to authorized security personnel, employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic.

B. The provisions of this section shall apply to all persons equally regardless of the intent of their conduct or the content of their speech.

§ 3-371.99. Penalty.

Any person, firm, or corporation who or which pleads guilty or nolo contendere or is convicted of violating this chapter shall be guilty of a summary offense and punished by a fine of at least $50 for the first offense; a fine of at least $150 for a second offense within five years; and a fine of $300 for a third offense within five years. For fourth and subsequent offenses within five years the fine shall not be less than $300 and/or imprisonment for not more than 30 days.

EXCERPTS FROM DEPOSITION TESTIMONY OF CITY OF HARRISBURG POLICE CAPTAIN DERIC MOODY, FILED OCTOBER 28, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

CASE NO. 1:16-cv-00510-SHR
DISTRICT JUDGE
SYLVIA H. RAMBO

COLLEEN REILLY; BECKY BITER; AND ROSALIE GROSS,
PLAINTIFFS

V

CITY OF HARRISBURG; HARRISBURG CITY COUNCIL; AND ERIC PAPENFUSE, IN HIS OFFICIAL CAPACITY AS MAYOR OF HARRISBURG,
DEFENDANTS

DEPOSITION OF: DERIC E. MOODY

. . . .

DATE: AUGUST 14, 2017, 9:18 A.M.

. . . .

Q All right. Please state your full name and

title for the record.

A My full name is Deric, D-e-r-i-c, Emile, E-m-i-l-e, Moody, M-o-o-d-y, and I am the Captain at the Harrisburg Bureau of Police.

. . . .

Q I'm just going to go through those topics to make sure we're on the same page. You have been designated by the city to discuss under topic No. 1 on page 2 the city's application and enforcement of the ordinance in this case. Is that a correct understanding?

A Yes, I believe so.

. . . .

Q Is it your understanding that if an individual were within that 20-feet buffer zone at one of the two clinics and was merely quietly engaging in conversation with a patient entering or leaving that clinic, would that violate the ordinance?

A Within the 20 feet? I would say it would if the statute says or if the ordinance says 20 feet. If they're within that 20 feet, then yeah, that would be—that could be considered a violation.

(Circuit Court Joint Appendix Pages JA128–29.)

EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON MARCH 21, 2017, FILED OCTOBER 28, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No.: 16-3722

COLLEEN REILLY and BECKY BITER,
Plaintiffs/Appellants,

vs.

CITY OF HARRISBURG, ET AL.,
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THE HONORABLE SYLVIA H. RAMBO, DISTRICT JUDGE

CIVIL CASE NO.: 1:16-CV-00510

ARGUED MARCH 21, 2017

The following pages constitute the proceedings held in the above-captioned matter before the Honorable Circuit Judges Ambro, Roth and Jordan . . . .

On behalf of Plaintiffs/Appellants:

. . . .

HORATIO G. MIHET, ESQUIRE (Argued)

. . . .

On behalf of Defendants/Appellees:

JOSHUA M. AUTRY, ESQUIRE (Argued)

. . . .

. . . .

JUDGE JORDAN: Right. So, a person could panhandle, could ask for money. How about just a person soliciting business? Suppose that it were an accountant or heaven forbid a lawyer with leaflets, saying come use my services, would that be covered by the ordinance within 15 feet?

MR. AUTRY: It could potentially be demonstrating, depending on how they're doing it.

JUDGE JORDAN: How could that possibly be demonstrating? Just handing somebody a leaflet that says I'd like you to consider my business. Under what possible definition is that demonstration?

MR. AUTRY: Under that scenario, that would not be demonstrating.

. . . .

JUDGE JORDAN: But the same person

couldn't—

. . . .

—do that right? Couldn't hand out a leaflet that said don't go in there because this is an abortion clinic, that's covered.

MR. AUTRY: I believe that would be covered, Your Honor.

(Circuit Court Joint Appendix Pages JA154–55,160.)

EXCERPTS FROM
HARRISBURG POLICE DISPATCH
INCIDENT REPORT DATED JULY 2, 2014,
FILED OCTOBER 28, 2017

. . . .

DISPATCH INCIDENT: 20140700292 HBG

. . . .

COMMENTS
PROTESTOR IN FRONT OF THE PLANNED PARENTHOOD OFFICE HANDING OUT LITERATURE AND TALKING TO CLIENTS COMING INTO THE OFFICE.

COLLEEN REILLY . . . WAS ADVISED OF THE ORDINANCE ON PROTESTING IN FRONT OF THESE CLINICS AND THE BUFFER ZONE RELATED TO THE ORDINANCE.

STAFF INSIDE THE OFFICE ADVISED THAT SHE WAS NEW PROTESTOR SO WE JUST GAVE AN ADVISEMENT AND A WARNING THAT SHE WOULD BE CITED IF SHE VIOLATES THE ORDINANCE IN THE FUTURE.

MS. REILLY DID LEAVE THE AREA WHILE WE WERE STILL ON SCENE.

(Circuit Court Joint Appendix Page JA165.)

EXCERPTS FROM TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA ON OCTOBER 31 AND NOVEMBER 1, 2017, FILED NOVEMBER 21, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA
HARRISBURG DIVISION

CASE NO. 1:16-CV-00510

COLLEEN REILLY, ET AL

v.

CITY OF HARRISBURG, ET AL

TRANSCRIPT OF PROCEEDINGS
PRELIMINARY INJUNCTION
DAY I OF II

Held before the HONORABLE SYLVIA H. RAMBO
October 31, 2017 . . . .

APPEARANCES:

ROGER K. GANNAM, ESQUIRE
HORATIO G. MIHET, ESQUIRE
. . . .
For the Plaintiffs

. . . .

FRANK J. LAVERY, JR., ESQUIRE
JOSHUA M. AUTRY, ESQUIRE
. . . .
For the Defendants

. . . .

BY MR. GANNAM:
Q. Good afternoon, Mr. Grover.

A. Good afternoon, counsel.

. . . .

Q. . . . . [I]f a pro-life sidewalk counselor wants to stand next to a woman in the public sidewalk, a woman who's approaching that clinic, doesn't this buffer zone prevent that contact, that standing next to each other as long as it's within the area designated by the buffer zone?

A. Sure, sure. It prevents them from being in the buffer zone and doing what they want. But you don't make rules for the people that are quiet and peaceful. . . .

. . . .

. . . .

DAY II OF II

. . . .
November 1, 2017 . . . .

. . . .

BY MR. LAVERY:
Q. What did you do there?

[PETITIONER BITER:]
A. She started to weep. And I was trying to console her from the street. And I couldn't hear what she was saying because she was crying, so I got closer.

Q. Okay. And is anybody stopping you from doing that?

A. No.

Q. And you got closer to her, correct?

A. Correct. I asked if I could hug her, and she said, yes.

Q. You actually went up and hugged her, correct?

A. I did. And we prayed.

. . . .

Q. Okay. And it's your sworn testimony that's the only time you ever violated that buffer zone, correct?

A. Yes.

. . . .

Q. You said you don't break the law, but you did there; correct?

A. That was the only time I did that.

. . . .

BY MR. GANNAM:
Q. Good afternoon, Ms. Reilly. When did you first start getting involved in pro-life advocacy or ministry?

A. In 1989.

. . . .

Q. And where in Harrisburg have you engaged in pro-life advocacy?

A. There at Hillcrest. I did sidewalk counseling at Hillcrest and later on at Planned Parenthood.

. . . .

Q. When you say sidewalk counseling, what does that mean to you?

A. I offer alternatives to women going in, literature, and talk to them if they'll stop and talk

to me.

Q. And in the method—as you see sidewalk counseling, is it important that you be able to get up close to a woman whom you're talking to?

A. Yes, definitely.

. . . .

Q. And the first time you went to Planned Parenthood, I believe you said it was July of 2014; is that correct?

A. Right.

Q. And can you explain what happened when you got there?

A. I was there for a short time, and then two police cars drove up. And one of them went into Planned Parenthood, and then she came out, and she said to me, you're new here, aren't you? I said, yes. She said, well, an ordinance has been passed, and you have to stay 25 to 30 feet from the door and the driveway.

. . . .

MR. GANNAM: Your Honor, our final evidence we want to present is to read two questions from the city's 30(b)(6) deposition that was offered through City Solicitor Neil Grover. . . .

. . . .

. . . . And may I use my colleague, Mr. Mihet, to read the question and answer into the record?

. . . .

THE COURT: You may proceed.

. . . .

MR. GANNAM: Question, And just for the record, you have been designated by counsel for the city to testify pursuant to this notice regarding . . . the numbered topics, Number 1, the City's interpretation, application, and enforcement of the ordinance . . . . Is that understanding correct, that you've been designated to testify regarding those matters?

MR. MIHET: Answer, It is . . . .

MR. GANNAM: . . . . Question, But generally speaking, if two persons are having a conversation walking side-by-side, moving in the same direction, and not stopping, would that be considered congregating?

MR. MIHET: Answer, If two people were walking in the same direction and, let's say, they're walking parallel to the building entrance on Second Street, and they're talking about, you know, that they're—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.

(Circuit Court Joint Appendix Pages JA279, JA358, JA369, JA420, JA485–87, JA524–26JA541–43.)