UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 18-1084

NIKKI BRUNI; JULIE COSENTINO; CYNTHIA RINALDI; KATHLEEN LASLOW; and PATRICK MALLEY,

Plaintiffs-Appellants

v.

THE CITY OF PITTSBURGH, *et al.*

Defendants-Appellees.

BRIEF OF APPELLANTS

On Appeal from the United States District Court for the
Western District of Pennsylvania
Civil Case No. 2:14-cv-01197-CB (Judge Cathy Bissoon)

Kristen K. Waggoner
Kevin H. Theriot
Elissa M. Graves
Kenneth J. Connelly
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30040
(770) 339-0074

Lawrence G. Paladin
PALADIN LAW OFFICES, PC
15 Duff Road, Suite 6C
Pittsburgh, PA 15235
(412) 244-0826

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Constitution & Statutes:

Ordinances:

STATEMENT OF RELATED CASES

This appeal presents the question whether the City of Pittsburgh may create fixed buffer zones outside of health care facilities consistent with *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and this Court's remand in *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016) (hereinafter "*Bruni I*"). Prior to *McCullen*, this Court had considered the constitutionality of the same Pittsburgh Ordinance in *Brown v. City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009).

Currently pending in this Court is a challenge to a law creating 8-foot fixed buffer zones outside of health care or transitional facilities. *See Turco v. City of Englewood*, No. 13-3716 (3d Cir. filed Dec. 14, 2017).

Currently pending in the District Court for the Middle District of Pennsylvania is a challenge to the City of Harrisburg's law creating 20-foot fixed buffer zones outside of health care facilities. *See Reilly v. City of Harrisburg*, No. 1:16-cv-00510-SHR (M.D. Pa. filed Mar. 24, 2016).

JURISDICTIONAL STATEMENT

I. JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

The District Court for the Western District of Pennsylvania had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action against local governmental entities and officials based on claims arising under the United States Constitution, particularly the First and Fourteenth Amendments. The

District Court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(4) because this is a civil action to secure equitable or other relief under an Act of Congress providing for the protection of civil rights under the Civil Rights Act, 42 U.S.C. § 1983.

II. JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This Court has jurisdiction over this appeal because the District Court issued its final order on November 16, 2017, from which this appeal is taken. 12 U.S.C. § 1291; J.A. 3a.

This appeal was timely filed. Fed. R. App. P. 4. The District Court entered its order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment on November 16, 2017. J.A. 3a, 4a. Plaintiffs then moved for and were granted an extension of time for filing a notice of appeal on December 1, 2017. J.A. 47a. Plaintiffs filed their timely Notice of Appeal from that order on January 11, 2018. J.A. 1a.

The District Court's Order denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Cross-Motion for Summary Judgment dealt with Count I (Violation of the First Amendment Free Speech and Press Clauses) raised in Plaintiffs' Verified Complaint. In its November 16, 2017 Order, the District Court

granted Defendants' motion for summary judgment on this claim, and denied Plaintiffs' motion for summary judgment on this claim.[1]

Plaintiffs appeal from the November 16, 2017 order denying Plaintiffs' motion for summary judgment and granting Defendants' cross-motion for summary judgment on Plaintiffs' Free Speech and Free Press claims.

INTRODUCTION

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The City of Pittsburgh created an Ordinance that allows the City to ban advocacy speech on the public sidewalk in zones within a 15-foot radius (which results in a 30-foot diameter) of entrances to health care facilities. It created such anti-speech zones outside of the entrance to only two health care facilities, both of which perform abortions.

This Court previously considered this Ordinance in *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016), which reversed the dismissal of Appellants'

[1] Appellants' Verified Complaint also alleged violations of the Due Process Clause of the Fourteenth Amendment, as well as a selective enforcement viewpoint discrimination claim under the First Amendment. The District Court dismissed Appellants' Due Process claims, and this Court affirmed such dismissal. *See* DCT Doc 28; *Bruni I,* 824 F.3d 353, 374–75 (3d Cir. 2016). Appellants voluntarily dismissed their selective enforcement claim at the District Court. DCT Docs. 29, 31.

challenge to the Ordinance and remanded to the District Court. That remand required the City to produce evidence "that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective,'" consistent with the Supreme Court decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). *See* 824 F.3d at 371 (citing *McCullen*, 134 S. Ct. at 2539). Despite this Court's clear instruction that the Ordinance be "subject to the same narrow tailoring analysis as the Supreme Court employed in [*McCullen*]," *id*. at 368 n.15, the District Court held that the burden on Appellants' speech is "minimal," and that the City therefore "has no obligation to demonstrate that it tried—or considered and rejected—any such [less restrictive] alternatives." J.A. 25a.

The City produced no evidence of enforcement of existing laws, no evidence that it pursued targeted injunctions, and no evidence that it considered any less restrictive alternatives prior to instituting the Ordinance's ban on speech. The Ordinance cannot withstand the demands of intermediate scrutiny under *McCullen* or this Court's previous decision in *Bruni*. Consequently, it is also unconstitutional under the higher bar of strict scrutiny, which is warranted because the Ordinance discriminates based on content, both facially and as applied. Rather than use existing laws or pursue less restrictive alternatives, the City's first choice was to close the public sidewalk. It cannot do so consistent with the First Amendment. The judgment of the District Court should therefore be reversed.

STATEMENT OF THE ISSUES

The Pittsburgh Code of Ordinances § 623.01 *et seq.* (hereinafter "the Ordinance") prohibits "congregating, patrolling, picketing, or demonstrating" within a fifteen-foot radius of an entrance to health care facilities. Plaintiffs-Appellants Nikki Bruni, Kathleen Laslow, Patrick Malley, Cynthia Rinaldi, and Julie Cosentino (hereinafter "Appellants") engage in peaceful expressive activities outside of the Planned Parenthood abortion facility located at 933 Liberty Avenue in downtown Pittsburgh—one of the two abortion facilities that are the only locations where the Ordinance is enforced. The Ordinance prohibits Appellants' expressive activities within a fifteen-foot radius (constituting a no speech zone at least thirty-feet in diameter) of the entrance to Planned Parenthood. The District Court denied Appellants' motion for summary judgment, and granted Defendants' cross-motion for summary judgment, resolving Appellants' First Amendment claims in favor of Defendants. The issues presented are:

1. Did the District Court err when it held that the Ordinance survives intermediate scrutiny as articulated in *McCullen v. Coakley*?

Yes. Appellants have demonstrated that the Ordinance substantially burdens their protected speech, and that the City was therefore obligated to demonstrate that the Ordinance was narrowly tailored by producing evidence that it pursued less restrictive alternatives prior to instituting the Ordinance's prophylactic ban on

speech. The City failed to produce sufficient evidence that it tried or considered, and reasonably rejected, less restrictive alternatives prior to the Ordinance, and therefore did not meet the burden articulated in *McCullen* and by this Court in *Bruni I*. The District Court's decision was therefore reversible error.

The issue was raised in Appellants' Verified Complaint at J.A. 62a–66a, Appellants' Motion for Summary Judgment at DCT Doc. 73[2], Appellants' Opposition to Defendants' Motion for Summary Judgment at DCT Doc. 78, and Appellants' Reply in Support of Plaintiffs' Motion for Summary Judgment at DCT Doc. 83. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 20a–27a.

2. Did the District Court err when it held that the Ordinance is not content discriminatory, even though it requires government officials to determine whether the content of speech constitutes "demonstrating" before banning the speech?

Yes. The Ordinance discriminates on the basis of content, and is therefore subject to strict scrutiny, which it cannot survive. The District Court's decision was therefore reversible error.

The issue was raised in Appellants' Verified Complaint at J.A. 62a–66a, Appellants' Motion for Summary Judgment at DCT Doc. 73, Appellants' Opposition

[2] References in this brief to "DCT Doc." is to the district court's docket entries.

to Defendants' Motion for Summary Judgment at DCT Doc. 78, and Appellants' Reply in Support of Plaintiffs' Motion for Summary Judgment at DCT Doc. 83. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 17a–20a.

3. Did the District Court err when it granted summary judgment against Appellants' claim that the Ordinance is unconstitutionally overbroad under the Free Speech Clause, due to authorizing the creation of speech restrictions outside facilities such as hospitals or dental offices where no alleged problem has ever existed?

Yes. The Ordinance authorizes the creation of anti-speech zones outside of every health care facility within the City of Pittsburgh, and is therefore unconstitutionally overbroad. The District Court's decision on this issue was reversible error.

The issue was raised in Appellants' Verified Complaint at J.A. 63a, Appellants' Motion for Summary Judgment at DCT Doc. 73, Appellants' Opposition to Defendants' Motion for Summary Judgment at DCT Doc. 78, and Appellants' Reply in Support of Plaintiffs' Motion for Summary Judgment at DCT Doc. 83. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 28a–29a.

CONCISE STATEMENT OF THE CASE

Pittsburgh Code of Ordinances § 623.01 *et seq*. designates a fixed area with a radius of 15 feet around the entrances to health care facilities. J.A. 78a. In these

"buffer zones," one may not "knowingly congregate, patrol, picket or demonstrate in a zone extending 15 feet from any entrance to the hospital or health care facility." *Id*. at 79a. Health care facilities include any location offering "treatment services on an out-patient basis by physicians, dentists and other practitioners." *Id*. The order in *Brown v. City of Pittsburgh*, No. 2:06-cv-00393-NBF (W.D. Pa. Dec. 17, 2009), allows the City to enforce this Ordinance anywhere that the City has "clearly mark[ed] the boundaries of any 15 foot buffer zone in front of any hospital, medical office or clinic prior to the enforcement of the Ordinance." *See* J.A. 1324a Defendants have thus far only applied the Ordinance in two places: abortion facilities located at Planned Parenthood on Liberty Avenue in downtown Pittsburgh and at another abortion facility. J.A. 1323a.

In enacting the Ordinance, the stated "Intent of Council" indicated that the Ordinance's purpose was to protect the "right to obtain medical counseling and treatment in an unobstructed manner," to "avoid violent confrontations which would lead to criminal charges," to "enforce existing City Ordinances which regulate use of public sidewalks and other conduct," to avoid "a dedicated and indefinite appropriation of policing services" outside abortion facilities, to "reduce the risk of violence and provide unobstructed access to health care facilities by setting clear guidelines for activity in the immediate vicinity of the entrances to health care facilities," and to "ensure that patients have unimpeded access to medical services."

J.A. 78a. The Ordinance is supported by neither specific instances of obstructive or violent conduct or criminal activity outside of health care facilities nor specific instances of prosecution of such activities. J.A. 78a–80a.

Appellants regularly engage in peaceful prayer, leafleting, sidewalk counseling, pro-life advocacy, and other expressive activities outside of the Planned Parenthood abortion facility located at 933 Liberty Avenue in downtown Pittsburgh. J.A. 52a. During sidewalk counseling, Appellants seek to have quiet conversations with and offer assistance and information to abortion-minded women by peacefully providing them pamphlets describing local pregnancy resources, praying, and expressing a message of caring and support to those entering and exiting the clinic. *Id.* at 59a, 573a, 578a–579a, 585a–586a, 590a, 594a–595a. Appellants consider it essential to their message to engage in sidewalk counseling, meaning to initiate close, calm, personal conversations with those entering and exiting the abortion facility, rather than to merely express their opposition to abortion or to be seen as protesting. *Id*. at 61a–62a, 574a, 579a, 586a, 591a, 595a. Appellants' sidewalk counseling approach can only be communicated through close, caring, and personal conversations, and cannot be conveyed through protests. *Id*. 61a–62a. The Ordinance prohibits Appellants' activities within a 15-foot radius (at least a 30-foot diameter) from the entrance to Planned Parenthood. The buffer zone encompasses the public

sidewalk and extends into the street—both of which are traditional public fora. J.A. 58a, 575a, 597a, 954a.

On September 4, 2014, Appellants filed a Verified Complaint with the District Court for the Western District of Pennsylvania against the City of Pittsburgh, the Pittsburgh City Council, and Pittsburgh Mayor William Peduto (hereinafter "the City"). J.A. 51a; DCT Doc. 1. The Verified Complaint alleged that the Ordinance violates their rights under the Free Speech and Free Press Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. J.A. 62a, 66a–67a. On November 4, 2014, Defendants filed a Motion to Dismiss. DCT Docs. 15, 16. Appellants filed their opposition to Defendants' Motion to Dismiss on November 19, 2014. DCT Doc. 18. On March 6, 2015, the District Court held that Appellants did not state a claim under the First Amendment (except as to selective enforcement of the Ordinance) or the Due Process Clause of the Fourteenth Amendment, and denied Plaintiffs-Appellants' Motion for Preliminary Injunction. DCT Doc. 28.

Upon Plaintiffs-Appellants' appeal of the District Court's order, on June 1, 2016, a panel of this Circuit reversed the District Court's dismissal of Appellants' First Amendment claims and remanded the action for further proceedings and an opportunity for discovery. *Bruni I*, 824 F.3d at 369–373. The parties proceeded to conduct discovery and then filed cross-motions for summary judgment. DCT Docs.

68, 69. On November 16, 2017, the District Court denied Plaintiffs-Appellants' motion and granted Defendants' motion. DCT Docs. 84, 85; J.A. 3a, 4a. Appellants then moved for and were granted an extension of time for filing a notice of appeal. J.A. 47a. Plaintiffs-Appellants filed a timely notice of appeal on January 11, 2018. J.A. 1a. This appeal arises from the District Court's November 16, 2017 order and judgment denying Appellants' motion for summary judgment and granting Defendants' cross-motion for summary judgment.

SUMMARY OF THE ARGUMENT

The Ordinance bans Appellants' speech on at least a 30-feet section of the public sidewalk and street. Previously in this case, this Court ruled that the Supreme Court's decision in *McCullen v. Coakley*, 134 S. Ct. 2518—which invalidated a fixed buffer zone similar to that contained in the Ordinance—imposed a more specific evidentiary burden on the City to justify its ordinance than *Brown v. City of Pittsburgh,* 586 F.3d 263, had required: "*McCullen* 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 our conclusion in *Brown*." *Bruni I,* 824 F.3d at 372–73. "*McCullen* require[s] 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.'" 134 S. Ct. at 2539. Such proof can only be considered, however, after a fair opportunity for discovery and the production of evidence." *Bruni I*, 824 F.3d at 371–72. Following ample opportunity for discovery, the City has provided woefully insufficient evidence to meet this burden: it has no evidence of the enforcement of existing laws, no evidence of targeted injunctions, and no evidence that it considered less restrictive alternatives prior to the Ordinance. However, the District Court held that the burden on Appellants' speech was "minimal" and that the City therefore had "no obligation to demonstrate that it tried—or considered and rejected—any [less restrictive] alternatives," contrary to this Court's instruction in *Bruni I*. J.A. 25a.

The Ordinance burdens speech because it "makes it more difficult to engage in … communication." *Bruni I*, 824 F.3d 353, 367 (citing *McCullen*, 134 S. Ct. at 2536). The City was therefore obligated to produce evidence "that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective,'" consistent with this Court's decision in *Bruni*. *See id*. at 371 (citing *McCullen*, 134 S. Ct. at 2539). The City produced insufficient evidence, and is unable to meet its burden. The Ordinance accordingly fails the narrow tailoring requirement.

Moreover, the Ordinance's prohibition on demonstrating while allowing casual conversation is a content-based restriction, both on its face and as applied,

and therefore is subject to strict scrutiny pursuant to *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Because the Ordinance cannot survive even the intermediate scrutiny applicable to content-neutral regulations such as that in *McCullen*, it must necessarily fail under strict scrutiny. The Ordinance further violates the Free Press Clause of the First Amendment, and is unconstitutionally overbroad. The judgment of the District Court should therefore be reversed.

STANDARD OF REVIEW

The District Court's grant of Defendants' Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 is subject to plenary review. *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 286 (3d Cir. 1995). Because this case involves First Amendment claims, this Court has "'a constitutional duty to conduct an independent examination of the record as a whole,' and [] cannot defer to the District Court's factual findings unless they concern witnesses' credibility." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156–57 (3d Cir. 2002) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995)).

"To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). In considering a motion for summary

judgment pursuant to Rule 56, the Court "must review the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id*. (internal citations omitted).

ARGUMENT

The Ordinance is unconstitutional even under a content-neutral analysis applying intermediate scrutiny. It substantially burdens the protected speech of Appellants on the public sidewalk and street outside of the Planned Parenthood in downtown Pittsburgh, and the City has not met its burden of demonstrating that it pursued less restrictive alternatives prior to instituting the Ordinance's prophylactic ban on speech.

Moreover, the Ordinance bans speech based on content in a traditional public forum and cannot survive the strict scrutiny required for such restrictions. Summary judgment for the City was inappropriate, and the judgment of the District Court should therefore be reversed, with instructions to enter summary judgment for Appellants.

I. THE ORDINANCE FAILS INTERMEDIATE SCRUTINY UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

As this Court has explained, because the Ordinance "foreclos[es] speech about an important subject in a quintessential public forum 'without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes,'" it "imposes a similar burden as that in *McCullen*" and "is subject to the

same narrow tailoring analysis as the Supreme Court employed in that opinion." *Bruni I*, 824 F.3d at 368 n.15. This Court remanded this case to the District Court to give the City the opportunity to produce evidence demonstrating "that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective,'" consistent with the *McCullen* standard. *Id.* at 371 (citing *McCullen* 134 S. Ct. at 2539). This Court noted that the City was obliged to use less restrictive alternatives pursuant to *McCullen*, and "that obligation requires that the government 'demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests.'" *Id*. at 371 (citing *McCullen*, 134 S. Ct. at 2540). Indeed, the "municipality may not forego a range of alternatives—which would burden substantially less expression than a blanket prohibition on Plaintiffs' speech in a historically-public forum—without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed." *Id*.

Despite this Court's holding that the Ordinance imposes a burden similar to that in *McCullen*, thus requiring a showing that less restrictive alternatives were inadequate, the District Court committed fundamental legal error in its application of intermediate scrutiny.

A. The District Court erred in holding that the Ordinance does not sufficiently burden speech to trigger the City's responsibility to consider less restrictive alternatives.

The Ordinance burdens the protected speech and expressive activities of Appellants by banning speech within the buffer zone outside of Planned Parenthood in downtown Pittsburgh. However, the District Court held that the burden on Appellants' speech was "minimal," and that the City therefore had "no obligation to demonstrate that it tried—or considered and rejected—any [less restrictive] alternatives." J.A. 25a. The District Court did not apply the correct test, as any burden on speech that makes communication more difficult triggers the City's obligation to demonstrate that it tried or considered such alternatives. *See Bruni I*, 824 F.3d at 367.

i. The Ordinance burdens Appellants' speech.

The evidence in the District Court clearly demonstrates the Ordinance makes it more difficult for Appellants to engage in one-on-one speech and leafletting. This burden is not "minimal," but in fact substantial. *Bruni I*, 824 F.3d at 367 (citing *McCullen*, 134 S. Ct. at 2536).

Appellants' activities of leafleting and education on the sidewalk are unequivocally protected by the First Amendment. "Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is most protected on sidewalks; a

prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997). Traditional public fora such as streets and sidewalks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (internal citations omitted). Such traditional public fora "are open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998).

Appellants engage in expressive activities on public sidewalks in downtown Pittsburgh, including peaceful leafleting and sidewalk counseling conversations with people entering Planned Parenthood on Liberty Avenue. But in the 30-foot zone created by the Ordinance, Appellants are banned from "congregating, patrolling, picketing, or demonstrating," which the City enforces to suppress Appellants' leafleting and sidewalk conversations. J.A. 79a.

During summary judgment proceedings, Appellants testified that the Ordinance burdens their speech in many ways. *See* J.A. 574a–576a, 579a–580a, 586a–588a, 591a–592a, 595a–597a. Importantly, by completely prohibiting Appellants' speech within a 15-foot radius of every abortion facility in the City, the Ordinance limits the Appellants' ability to have close, personal conversations with

their intended audience of people entering abortion facilities. J.A. 57a, 574a, 579a, 586a, 591a, 596a. Appellants testified that they are often unable to distinguish between patients and passersby before individuals enter the buffer zone, making it difficult to know who intends to enter Planned Parenthood. J.A. 263a, 291a, 575a, 580a, 587a, 591a, 596a–597a.[3] Additionally, because the Planned Parenthood escorts have exclusive access to the buffer zone, they are able to surround patients, speak over sidewalk counselors, act to prevent speech directed towards dissuading those women to enter the facility, and limit the ability of such patients to receive the literature that Appellants offer. *Id*. at 59a, 195a.

Appellants further testified that they are unable to engage in conversations at a normal conversational level and distance with people entering and exiting the facility due to the buffer zone, making their interactions with their intended audience far less frequent, successful, and effective. J.A. 574a, 579a, 586a, 591a, 596a. The buffer zone exacerbates the difficulty of engaging in close, one-on-one conversations outside the Planned Parenthood facility due to "loud" street noise

[3] Appellant Rinaldi testified that "I don't know they're going in until they get to the door" of Planned Parenthood. J.A. 291a. Appellant Cosentino testified in particular that "[w]hen someone is approaching Planned Parenthood, you don't know until the second they open the door that they're going to be going into Planned Parenthood," and because of "the restrictiveness of the buffer zone and the lack of ability to freely engage with someone in the buffer zone or even near it" she often stands across the street, attempting to engage all passersby. J.A. 262a–263a.

along Liberty Avenue. J.A. 579a, 587a, 317a.[4] The buffer zone forces Appellants to raise their voice or even shout to be heard by people 15 feet or more away. *Id*. at 114a–115a, 135a–136a. Despite being able to walk through the zone, the buffer zone prohibits Appellants from engaging with their intended audience if they are standing on the opposite side of the buffer zone, because they are forced to walk at least thirty feet to reach that individual. *Id*. at 11a–112a, 194a–195a, 596a–597a.[5] If the individual has already entered the buffer zone, Appellants are unable to effectively communicate with that individual, as the buffer zone forbids Appellants from engaging in sidewalk counseling while standing within or walking through the buffer zone. *Id*. at 184a–185a, 188a, 201a.

Courts have found that similar and even smaller buffer zones impose a burden on speech. In *Schenck*, the Supreme Court found that a 15-foot floating zone was unconstitutional because it prevented the Petitioners there "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." 519 U.S.

[4] Appellant Rinaldi noted that it is sometimes hard to hear a conversation from more than a mere three feet away on Liberty Avenue outside the facility. J.A. 317a. Appellant Laslow testified that she "must raise [her] voice considerably in order to be heard across the distance created by the buffer zone" and that she "cannot have normal conversations with those in the buffer zone" due to the high volume of noise. J.A. 579a; *see also id*. at 587a, 596a.

[5] Appellant Laslow testified that "there's not freedom to approach someone from the other side [of the buffer zone] when they're coming – they're in the buffer zone approaching the door." J.A. 193a.

357, 377 (1997); *see also Hill v. Colorado*, 530 U.S. 703, 726 (2000) ("the distance certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention."). Recently, the District of New Jersey struck down a buffer zone law creating 8-foot buffer zones outside of health care facilities as unconstitutional under the First Amendment. *See Turco v. City of Englewood*, No. 2:15-cv-03008, 2017 WL 5479509 (D. N.J. Nov. 14, 2017). The Ordinance's 15-foot radius and 30-foot diameter anti-speech zones likewise burden Appellants' speech.

In finding that the Ordinance does not sufficiently burden speech, the District Court twice cited testimony from Appellant Bruni at the hearing on Appellants' Motion for Preliminary Injunction admitting that she did not have evidence at that time that the buffer zone impeded her from talking to willing listeners. J.A. 12a, 23a. However, this hearing occurred in December 2014 and was preliminary in nature. Since Appellant Bruni's testimony, more facts have developed and Appellants have provided ample testimony and evidence demonstrating that the Ordinance burdens their protected speech.

ii. The burden imposed by the Ordinance is not materially distinguishable from the buffer zone law struck down in *McCullen*.

This Court has already criticized the District Court's earlier determination at the motion to dismiss stage that this case is subjected to a different level of scrutiny

than *McCullen* because of the factual differences between the buffer zones at issue. *Bruni I*, 824 F.3d at 368; *but see* J.A. 22a–23a (District Court opinion). Indeed, this Court rejected the idea that the smaller size of the buffer zone should affect the level of scrutiny that the Ordinance receives. As this Court noted, the buffer zones at issue in *McCullen* "were larger, applied state-wide, and limited any entry into the prohibited areas." *Bruni I*, 824 F.3d at 369 & n. 15. But this Court specifically held that "th[ose] differences do not change the applicable analysis under intermediate scrutiny… or subject it to a lesser level of review." *Id.*

In *McCullen*, the Supreme Court relied on free speech considerations that apply equally in this case. These include the historical importance of advocacy in traditional public fora and its particular significance to the message of sidewalk counselors such as Appellants. 134 S. Ct. at 2536 & n.5. Sidewalk counselors "are not protestors," and their message of support and alternatives to abortion must be conveyed through quiet, compassionate conversations in order to be effective. *Id*. at 2536. As in *McCullen*, the speech restrictions of the Ordinance make it more difficult for Appellants to engage in peaceful expressive activities. Standing 15 to 30 feet away from someone due to the buffer zone is not a conversational distance, especially not in the noisy downtown area of a major city. It is "no answer to say that petitioners can still be 'seen and heard' by women within the buffer zones . . . . If all that the women can see and hear are vociferous opponents of abortion, then the

buffer zones have effectively stifled petitioners' message." *Id*. at 2537. Appellants do not desire to shout, for such expression would be starkly at odds with the message Appellants desire to communicate.

In finding that the burden on Appellants' speech was insufficient, the District Court held that "there is undisputed evidence in this case that Appellants are able to communicate their anti-abortion message using their preferred form of expression." J.A. 22a. However, the same evidence was present in *McCullen*: Eleanor McCullen testified that, even though she was able to persuade 80 women not to get an abortion with the buffer zone in place, she had "far fewer" successful interventions than before. 134 S. Ct. at 2535. The District Court discounts this similarity by saying the *McCullen* plaintiffs had a before-and-after comparison indicating a "sharp decline"; but any differences in effectiveness noted in *McCullen* were only "estimates," similar to what we have in this case. Moreover, Appellants believe that they would be more successful in saving the lives of unborn children if the buffer zone did not exist. All Appellants testified that the buffer zone causes their interactions with individuals entering the facility to be far less frequent, successful, and effective. J.A. 574a, 579a, 586a, 591a, 596a. The buffer zone makes it more difficult for sidewalk counselors to provide literature to people inside the buffer zone. J.A. 62a. People inside the buffer zone have observed sidewalk counselors trying to provide them literature and reached out their hands to receive such literature, expecting the

sidewalk counselors to come to them, which the sidewalk counselors cannot do. J.A. 108a. If the buffer zone did not exist, sidewalk counselors would not have to raise their voices while engaged in sidewalk counseling and would be able to speak with people more conversationally without a distance separating them. J.A. 191a–192a, 316a–317a. Appellant Bruni testified that, while she and other sidewalk counselors have been successful in saving the lives of some unborn children, more would be saved if the speech of sidewalk counselors was not restricted by the buffer zone. J.A. 576a.

Moreover, the District Court wrongly determined that Appellants' inability to identify individuals who are actually visiting Planned Parenthood does not burden speech at all. J.A. 23–24 & n.3. *McCullen* specifically noted that this is a burden on speech. 134 S. Ct. at 2536 ("The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients . . . because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands.").

As further support of its minimal burden finding, the District Court also cites the fact that Appellants are not forced to cross the street to talk to women because they can walk through the zone. J.A. 23a. But a buffer zone at one of the three clinics in *McCullen* did not extend into the street ("one foot short of the curb"), 134 S. Ct. at 2527, and the Court did not find that to be significant to its finding that all the

zones were unconstitutional. Moreover, Appellants testified that, despite being allowed to walk through the buffer zone, they are forced to walk across the zone to reach a woman entering the facility, but cannot speak with them until they are back outside the zone. J.A. 575a–576a, 587a, 596a–597a. Under those circumstances, it is very difficult to reach that individual prior to them entering the buffer zone or the facility, and Appellants are then unable to engage in sidewalk counseling. *Id*. Appellants further testified that, because the buffer zone extends into the street, a woman either being dropped off by car at the front of the facility or using the crosswalk would immediately be within the zone, and Appellants would therefore be unable to engage in sidewalk counseling with that woman. J.A. 588a, 597a.

That the Ordinance acts as a ban on certain types of speech in traditional public fora is the crucial fact requiring a narrow tailoring analysis. Appellants are unable to effectively communicate with their intended audience as a result of the zone outside of Planned Parenthood. Because the burden on Appellants' speech is sufficient to trigger First Amendment scrutiny, the burden shifts to the City to justify the Ordinance by demonstrating that less restrictive alternatives were attempted or considered and reasonably rejected.

B. The District Court erred in holding that the Ordinance is narrowly tailored.

A fixed buffer zone law such as the Ordinance "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id*.

at 2535 (quoting *Ward*, 491 U.S. at 798–99). These restrictions on speech may only be upheld if they "are narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *McCullen*, 134 S. Ct. at 2529 (citing *Ward v. Rock Against Racism* 491 U.S. 781, 791 (1989)). This Court made clear that an alternative is not valid simply because it is "easier" or better for "efficiency," and that "[i]n light of the 'vital First Amendment interests at stake, it [was] not simply enough to say that other approaches have not worked.'" *Id*. (citing *McCullen*, 134 S. Ct. at 2540) (alteration in original). The City cannot regulate speech as its first option, yet this is exactly what it has chosen to do. *See Thompson*, 535 U.S. at 373.

This Court already made clear that "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*." *Bruni I*, 824 F.3d at 369. The District Court held that "even assuming, *arguendo*, that the City had such an obligation, the Court finds that it has met its burden," and the Ordinance survives constitutional scrutiny. J.A. 25a. But the City produced almost no evidence that it had enforced existing laws, pursued targeted injunctions, or utilized or considered less restrictive laws prior to instituting the Ordinance. As such, the City cannot meet its burden, the Ordinance fails narrow tailoring, and the District Court's decision to the contrary constitutes reversible legal error.

i. The City produced insufficient evidence that it enforced existing laws prior to instituting the Ordinance.

The Supreme Court held in *McCullen* that if the government has the ability to enforce laws which further its proffered interests without substantially burdening speech unrelated to those interests, prophylactic speech measures such as the Ordinance are not narrowly tailored. *See* 134 S. Ct. at 2537. During summary judgment proceedings, the City produced no evidence of a history of enforcing existing laws prior to the Ordinance. The City produced evidence of only one arrest and one citation related to conduct outside of Planned Parenthood, and that was *after* the Ordinance was enacted.

Here, the City's alleged interests are the same as the ones cited by Massachusetts in *McCullen*: reducing the risk of violence and crimes, and providing unobstructed access to health care facilities. While such interests are significant, *McCullen* demands that if a government desires to serve the interests of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," as the City claims here, the government is required to "look to less intrusive means of addressing its concerns" without first seeking to curtail protected speech. 134 S. Ct. at 2538. "Given the vital First Amendment interests at stake, it is not enough for [the City] simply to say that other approaches have not worked." *Id*. at 2540.

The City has alleged previously in this litigation that laws existing prior to the Ordinance were inadequate to serve its interests, but it has failed to produce evidence supporting that assertion. The City's burden required it to show (1) incidents of violence or obstruction; (2) actual arrest and prosecution of such incidents; and (3) the continuance of violence or obstruction despite the prosecution of offenders, to such a degree that banning speech in fixed zones was needed to deal with these problems. *See Bruni I*, 824 F.3d at 369–370.

a. The City produced no evidence of a history of violence or obstruction prior to instituting the Ordinance.

The City produced no evidence of violent or obstructive conduct prior to the Ordinance. The testimony of the City's designated representative, Pittsburgh Police Sergeant William Hohos, revealed that most protest speech outside of the Planned Parenthood in downtown Pittsburgh occurred prior to the year 2000. J.A. 322a–323a. The Ordinance was implemented in December 2005. Moreover, Sergeant Hohos testified that the groups outside of Planned Parenthood "are extremely smaller now," compared to the 1990s and prior to Planned Parenthood's move to its current location in 2002. J.A. 323a. He further testified that there has not been any increase in violent behavior between 2002—when Planned Parenthood relocated to the 933 Liberty Avenue Location—and December 2005, when the Ordinance was implemented. J.A. 324a. Indeed, "[t]here's always been very little that actually occurred there [at the 933 Liberty Ave location], to my knowledge, in that time

period" of approximately 2002 to the implementation of the Ordinance in 2005. J.A. 325a.

The City produced logs of calls to police and police reports, none of which demonstrated a pattern of obstruction and violence outside of abortion facilities occurring prior to the Ordinance. *See* J.A. 834a–887a. The City's evidence certainly does not show a pattern of violation of existing laws prior to the Ordinance: the City produced evidence of only one arrest between 2002 and 2016 involving pro-life conduct (as well as one citation, though it is unclear if it involved pro-life conduct), and this occurred after the Ordinance was in force. J.A. 884a–887a; *see infra* at I.B.i.b. The City produced no evidence of a conviction or prosecution arising from this arrest, nor any evidence of *any* convictions, citations, arrests, or attempted prosecutions prior to the Ordinance. Moreover, the Ordinance's legislative findings reference disruptive activity only in general, J.A. 78a, with no specific proof of these elements as *McCullen* required of Massachusetts in that case. The legislative testimony revealed no evidence that existing laws had been enforced, only a general allegation that enforcement was insufficient. *Id*.

Regarding the specific Appellants, the City's representative indicated that it is "not currently aware of any incidents where the individual Plaintiffs in this lawsuit were violent outside abortion facilities, hospitals, or medical offices/clinics." J.A.

451a. The City therefore has no basis to enforce the Ordinance against Appellants' peaceful expressive activities.

b. The City produced no evidence of relevant prosecutions, arrests, or citations prior to the Ordinance.

McCullen teaches that governments have a variety of laws available to resolve problems like this which are less restrictive on speech, and should be pursued prior to prophylactic speech measures such as the Ordinance. Where a government is concerned about obstruction of the public ways and sidewalks, it can rely on laws which specifically restrict obstruction. 134 S. Ct. at 2539. Moreover, if the City is concerned about "harassment," it has the ability to restrict harassment. For example, *McCullen* pointed to a New York City Ordinance which "not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.* at 2538 (citations omitted). Furthermore, the City's "interest in preventing congestion in front of abortion clinics" can be served by "more targeted means" than a fixed buffer zone, such as ordinances which require crowd dispersal. *Id*. at 2538. Much of the conduct complained of by the City and its witnesses is already made illegal by local and federal law, and can be prosecuted under those existing laws.

The City has the ability to protect its interests with "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *McCullen*,

134 S. Ct. at 2538. However, the City has failed to produce evidence showing a complaint, a citation, an arrest, or a prosecution of the conduct of which the City complains. The City produced police reports and logs of phone calls to the police, *see* J.A. 834a–887a, but did not show any evidence of attempted prosecution, convictions, or enforcement. Moreover, the police reports and calls largely complained of conduct that was already illegal under existing law, such as harassment (18 Pa. Cons. Stat. § 2709), trespassing (18 Pa. Cons. Stat. § 3503), assault (18 Pa. Cons. Stat. § 2701), disorderly conduct (18 Pa. Cons. Stat. § 5503), and obstruction of public passage (18 Pa. Cons. Stat. § 5507). There is almost no evidence of a history of enforcement of those existing laws, either with citations, arrests, indictments, or prosecutions.[6] The only evidence of the enforcement of existing laws occurred *after* the Ordinance was instituted, and there is absolutely no evidence that such laws were enforced prior to the Ordinance. The City produced no

[6] In the District Court, the City did not produce any evidence of citations, arrests, prosecutions, or convictions under the following statutes: simple assault, 18 Pa. Cons. Stat. § 2701; aggravated assault, 18 Pa. Cons. Stat. § 2702; recklessly endangering another person, 18 Pa. Cons. Stat. § 2705; terroristic threats, 18 Pa. Cons. Stat. § 2706; harassment,18 Pa. Cons. Stat. § 2709; using weapons of mass destruction, 18 Pa. Cons. Stat. § 2716; arson, 18 Pa. Cons. Stat. § 3301; causing or risking catastrophe, 18 Pa. Cons. Stat. § 3302; criminal mischief, 18 Pa. Cons. Stat. § 3304; institutional vandalism, 18 Pa. Cons. Stat. § 3307; burglary, 18 Pa. Cons. Stat. § 3502; criminal trespass, 18 Pa. Cons. Stat. § 3503; riot, 18 Pa. Cons. Stat. § 5501; failure of disorderly persons to disperse upon official order, 18 Pa. Cons. Stat. § 5502; obstructing highways and other public passages, 18 Pa. Cons. Stat. §5507; disrupting meetings and processions, 18 Pa. Cons. Stat. § 5508.

evidence of citations, arrests, prosecutions, or convictions related to pro-life conduct outside Planned Parenthood between December 2002 and the enactment of the Ordinance in December 2005. J.A. 326a–327a. The City produced evidence of only one arrest between December 19, 2005 and September 30, 2016 related to pro-life conduct outside the Planned Parenthood facility—an arrest in 2007 under 18 Pa. Cons. Stat. § 5503 (disorderly conduct). J.A. 884a–887a. The City produced no evidence that this arrest lead to prosecution or conviction. The City produced evidence of only one citation under 18 Pa. Cons. Stat. § 5503 during the same time period related to conduct outside Planned Parenthood, though it is unclear if that incident involved a pro-life individual. J.A. 553a. The City has therefore utterly failed to meet its evidentiary burden.

As in *McCullen*, the City here has not identified "a single prosecution under those laws" already in force, and has presented no evidence that injunctive relief has been pursued at any point in the recent past. *See* 134 S. Ct. at 2539. If any of the problems the City complains of were actually happening outside of health care facilities in the City of Pittsburgh, the City has the ability to prosecute them. But it has not done so and fails to satisfy the narrow tailoring inquiry.

c. The City offered no evidence that there was a continuation of violence and obstruction after the enforcement of existing laws.

Because the City has produced no evidence of enforcing existing laws prior to instituting the Ordinance, it necessarily cannot demonstrate that violence and obstruction continued after such enforcement. The City did not produce any evidence of continued violence or obstruction following the enforcement of existing laws, and the Ordinance cannot therefore survive narrow tailoring.

ii. The City did not pursue any less restrictive alternative methods of limiting illegal conduct prior to instituting the prophylactic Ordinance.

In addition to enforcing existing laws, the City could have pursued less restrictive additional alternatives to curb any conduct of concern. The District Court incorrectly concluded that the City was not obligated to attempt such less restrictive alternatives prior to instituting the Ordinance, but that even if it was so obligated, it had met that burden. *See* J.A. 25a–27a.

The District Court found that less restrictive alternatives had been tried and failed based solely on the City's inability to continue a police detail outside of Planned Parenthood because of expense. *See* J.A. 26a. However, *McCullen* makes clear that a prophylactic speech restriction is not valid simply because it is more "efficien[t]" and that "[i]n light of the 'vital First Amendment interests at stake, it is

not simply enough to say that other approaches have not worked.'" *Id*. (citing *McCullen*, 134 S. Ct. at 2540).

The City produced no evidence of pursuing "targeted injunctions as alternatives to broad, prophylactic measures" such as the Ordinance. *McCullen*, 134 S. Ct. at 2538. These injunctions would "'regulate[] the activities, and perhaps the speech, of a group' but only 'because of the group's past actions in the context of a specific dispute between real parties.'" *Id*. (citing *Madsen v. Women's Health Ctr., Inc.*, et al., 512 U.S. 753, 762 (1994)). "In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem." *Id*. By contrast, the Ordinance "categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech." *See id*. And the securing of such targeted injunctions would not have required any additional expense for a continuing police detail.

Moreover, the City has the ability to "enact legislation similar to the federal Freedom of Access to Clinic Entrances Act" (FACE), "which subjects to both criminal and civil penalties [against] anyone who 'by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health services.'" *McCullen*, 134 S. Ct. at

2537 (citing 18 U.S.C. § 248(a)(1)). "Some dozen other States" have enacted such legislation. *Id.*

While it is true that the City need not demonstrate that "it has tried or considered every less burdensome alternative to its Ordinance," *see* J.A. 27a (citing *Bruni I,* 824 F.3d at 371), it was obligated to show "that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective.'" *Bruni I,* 824 F.3d at 371 (citing *McCullen* 134 S. Ct. at 2539). The City did not produce sufficient evidence to meet this burden. The District Court's finding that it did constitutes reversible error.

II. THE ORDINANCE IS CONTENT DISCRIMINATORY.

The Supreme Court's recent decision in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015), held that laws like the Pittsburgh Ordinance, which make distinctions based on subject matter, function, or purpose are content-based and subject to strict scrutiny. Under the Ordinance, "demonstrating" speech is restricted but not such things as asking for directions or casual conversation. This bears a striking parallel with the rule struck down in *Reed*, which was held to be content-based for distinguishing between ideological and directional speech.

The District Court held that the Ordinance is content-neutral under *Hill v. Colorado*, and that *Reed* did not change the applicable analysis. J.A. 17a–20a. But

Reed clarified the appropriate analysis in light of *Hill*, and the District Court's failure to apply the clarified standard articulated in *Reed* constitutes reversible error.

A. The Supreme Court's decision in *Reed v. Town of Gilbert*.

In *Reed*, the Supreme Court unanimously struck down an ordinance that placed different kinds of restrictions on outdoor signs according to what the signs said. 135 S. Ct. at 2224. Signs directing people to certain events ("directional" signs) were restricted in their size and duration more than "political" and "ideological" signs. *Id*. at 2224–25. *Reed* held that subjecting a directional sign to more restrictions than ideological and political signs was a content-based restriction, subject to (and incapable of surviving) strict scrutiny.

In striking down the sign code, the Supreme Court clarified the standard for determining if a law is content-based. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 2227. This test considers "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. Furthermore, distinctions based on content can be of three kinds. The first is "defining regulated speech by particular subject matter." *Id*. The second, "more subtle" approach is "defining regulated speech by its function or purpose." *Id*. Those two categories deal with the law on its face. "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." *Id*. at 2228 (citations omitted). This Court has noted that "*Reed* explicitly proscribes such an inquiry into the purpose of a facially content-based statute." *Free Speech Coal., Inc. v. Att'y Gen. of the United States*, 825 F.3d 149, 161 (3d Cir. 2016).

Only if a court has determined that a law is facially content-neutral may it then inquire into the government's motivations in passing the law, such as where the government's justification cannot exist except with "reference to the content of the regulated speech," or where the law was "adopted by the government 'because of disagreement with the message [the speech] conveys,'" the third category of content-based restrictions examined in *Reed*. 135 S. Ct. at 2227 (citations omitted).

The Court noted that even if it deemed the government's justifications content-neutral, one cannot "skip[] the crucial first step" of asking whether the law distinguishes among kinds of speech based on its subject matter or its purpose. *Id*. at 2228. Laws that make such a distinction will be deemed content-based even if the government had "innocent motives." *Id*. at 2229. The Court also rejected the lower court's apparent view that if a law is not "viewpoint" based, it should also not be deemed content-based. *Id*. at 2230. And *Reed* clarified that a law need not be "speaker based" to be content-based, nor is a content-based law saved from strict scrutiny just because it hinges on the nexus between the speech and a particular

event. *Id*. If a law distinguishes between speech content, it must be subject to strict scrutiny regardless of these permutations.

B. The Ordinance is content-based under *Reed*.

The Ordinance is necessarily content-based under *Reed*. The District Court attempted to distinguish *Reed* by holding that "[t]he Ordinance does not advantage one message over another based upon content." J.A. 19a. However, the Ordinance clearly permits some types of messages, while banning others. This is impermissible content discrimination.

The Ordinance bans only congregating, patrolling, picketing, or demonstrating in the zones. J.A. 79a. Just as with the petitioners in *McCullen*, Appellants here wish to individually walk with a person into a zone for the purpose of engaging in one-on-one counseling, then depart the zone. But unlike the content-neutral law in *McCullen*, the Ordinance here does not ban all speech in its restrictive zones, nor does it ban Appellants from merely being present in the zones whether or not they speak. *See McCullen*, 134 S. Ct. at 2526 ("No person shall knowingly enter or remain" in the 35-foot buffer zone outside of abortion facilities.)

The City bans sidewalk counseling activity because it considers it "demonstrating" under the Ordinance, since the Appellants would be seeking to convey their message in favor of life and against abortion. J.A. 79a. This is a content-based distinction because the City does not ban non-demonstrating kinds of speech

in the zones. If someone is in the zones asking for directions, the City does not ban that speech. If someone is in the zones waiting to cross the street and talking about the Pittsburgh Steelers, it does not ban that speech. Conversations can occur in the zones on a wide range of subjects unless the speaker is "demonstrating." Testimony by the City's designated representative confirmed that the Ordinance is enforced this way: he testified that "[t]wo people walking through the buffer zone talking about the weather. That would not -- that would not be a violation." J.A. 334a.

Therefore, the Ordinance is a content-based restriction. It is content-based under the Supreme Court's first definition, on the face of the law, because only "demonstrating" and "picketing" speech is prohibited, not other kinds of speech. The government cannot know if a conversation in the zone is "demonstrating" unless it examines the content of the speech. A person could have a t-shirt with a message in the zone, unless they were deemed as "picketers," in which case they would be violating the Ordinance. The Ordinance is also content-based under the second, facial, definition of that doctrine. Prohibitions on "picketing" and "demonstrating" regulate the "function or purpose" of speech, the government must examine speech to determine if it has been spoken in order to picket or demonstrate before it determines if the speech is prohibited. *Reed* deems such an inquiry content-based.

Moreover, *McCullen* made clear that a law is content-based if "it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to

determine whether' a violation has occurred." 134 S. Ct. at 2531 (internal citations omitted).[7] Here, law enforcement must rely entirely on the communicative content of speech in order to determine whether it constitutes demonstrating. The District Court held that "members of law enforcement can identify congregating, patrolling, picketing and demonstrating without knowing or needing to ascertain the content of the speech," and that the Ordinance was therefore content-neutral. J.A. 20a (citing *Hill*, 530 U.S. at 721). The law at issue in *Hill* was held to be content-neutral, because the restriction did not depend on the content of the speech, but merely the location where the speech was occurring. *Hill*, 530 U.S. at 792. However, the Ordinance—which does not ban merely standing in the zones—is applied only when one's speech or conduct constitutes "congregating, patrolling, picketing, or demonstrating." If citizens walk through these zones so as not to constitute "patrolling," or if any one person stands in the zone and therefore (being alone) is not "congregating," those people may speak some words in the zones. But law enforcement officials cannot know whether those words are prohibited unless they screen the content of the

[7] The *McCullen* Court ruled that the law at issue was content-neutral because it did not specifically ban speech in its zones, it banned "merely [] standing in a buffer zone, without displaying a sign or uttering a word." 134 S. Ct. at 2531. Consequently, the Supreme Court could conclude that the law there regulated not "what [plaintiffs] say," but "where they say it." *Id*. The Ordinance here does the opposite, for it allows walking through the zones, but its penalties explicitly turn on the content of the speech occurring within the zone—namely, whether such speech is considered "picketing or demonstrating."

speech to determine if it counts as "demonstrating" or "picketing." Therefore, under *McCullen*, the Ordinance on its face require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred," and therefore is content-based. 134 S. Ct. at 2531.

Moreover, unlike the buffer zone at issue in *Hill v. Colorado*, 530 U.S. 703, the Ordinance is only enforced outside of abortion facilities, and is therefore content-based as applied. *Hill* concerned a facial challenge to a law that restricted speech outside of all health care facilities, *see id.* at 707, and therefore was found to be content-neutral because it applied to all people who "'knowingly approach' within eight feet of another for the purpose of leafletting or displaying signs" outside of health care facilities, not just abortion facilities, *id*. at 720. The Court noted that "the comprehensiveness of the statute," due to the fact that it applies to all health care facilities, "is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Id*. at 731. However, the Ordinance has only been applied to two abortion facilities, despite being facially applicable to all health care facilities. J.A. 1323a. Because the Ordinance has only been applied outside abortion facilities, and no other health care facilities, it has been applied in a content discriminatory manner, and therefore is content-based for this independent reason.

Moreover, the government's justifications target anti-abortion content, and the Ordinance is therefore content discriminatory. In the testimony regarding the

Ordinance before the Pittsburgh City Council, the discussion centered entirely on abortion and the speech outside of abortion facilities in Pittsburgh. *See* J.A. 523a–530a, 533a–535a. It is thus clear that the Ordinance was aimed at speech concerning abortion. *See Sorrell v. IMS Health*, 131 S. Ct 2653, 2663 (2011) (holding that a law regulating the speech of those involved in pharmaceutical advertising was specifically "designed to target those speakers and their messages for disfavored treatment" and therefore "apparent that [the law] imposed burdens that are based on the content of speech.").

C. *Reed* undermines the content-based restriction analysis of *Hill v. Colorado*.

The Court's decision in *Reed* significantly undermined *Hill v. Colorado,* 530 U.S. 703, which held that no-approach zones outside of abortion facilities were content-neutral and survived First Amendment scrutiny. *Hill* was one of the primary decisions relied upon by this Court when it upheld the Ordinance in *Brown*, and in the present case, the District Court relied on both *Brown* and *Hill* in determining that the Ordinance is content-neutral. *Reed* calls *Hill* into significant question by citing the case twice—both times from dissents, squarely on the issue of what it means for a law to be content-based.

In *Reed*, the lower court relied heavily on *Hill* in upholding Gilbert's sign code. It had held that the sign code was content-neutral under *Hill* by deeming the Town's motives content-neutral, in accordance with *Hill*'s determination that the

regulation of speech outside health facilities was not for an improper motive. *Reed v. Town of Gilbert*, 707 F.3d 1057, 1060 (9th Cir. 2013). The Supreme Court in *Reed* rebutted this rationale explicitly, noting that "*Ward*'s framework" of analyzing government motive "'applies only if a statute is content neutral,'" so that the motivation analysis "rules thus operate 'to protect speech,' not 'to restrict it.'" 135 S. Ct. at 2229 (citing *Hill*, 530 U.S. at 765–66 (Kennedy, J., dissenting), and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The *Reed* Court then went on to cite *Hill*'s dissent again to emphasize that facially content-based laws should not be deemed content-neutral based on apparently innocent government purposes. 135 S. Ct. at 2229 (citing *Hill*, 530 U.S. at 743 (Scalia, J., dissenting)).

The District Court rejected Appellants' argument that the Ordinance is content-based because, in the District Court's view, *Reed* did not alter the content-neutrality standard in *Hill* (or *Brown*). *See* J.A. 18a. However, *Reed* indicates direct tension with *Hill*. *Reed* cites *Hill*'s dissents twice on the issue of the meaning of "content based," and does not cite *Hill's* majority at all. More fundamentally, *Reed* defines content-based in a way irreconcilable with *Hill*, with *Brown*, or with this Ordinance. *Hill* says a law is not content-based just because the government needs "to examine the content of a communication to determine the speaker's purpose," if its motives are not suspect and the dangers are not too great. 530 U.S. at 721–24. But *Reed* makes it clear that any law distinguishing speech "by particular subject

matter" *or* "by its function or purpose" is facially content-based, period. 135 S. Ct. at 2227. *Reed* controls whether this Ordinance is content-based, and *Reed* is the test this Court must apply. Under that test, the Ordinance distinguishes between speech for the purpose of demonstrating and picketing on the one hand, and speech for other purposes. It is content-based.

Content-based restrictions such as the Ordinance are subject to strict scrutiny. *See Reed*, 135 S. Ct. at 2227. Because the Ordinance cannot even achieve the intermediate scrutiny of *McCullen*, it necessarily fails strict scrutiny.

III. THE ORDINANCE VIOLATES THE FREE PRESS CLAUSE

The First Amendment right to freedom of press "has broad scope" and "embraces the right to distribute literature . . . ." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (internal citations omitted). It is "among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). The liberty of the press "necessarily embraces pamphlets and leaflets." *Id*. at 452. The Supreme Court has struck down restrictions on leafleting as unconstitutional under the guarantee to the freedom of the press. *See Talley v. California*, 362 U.S. 60, 65–66 (1960) (striking down as a violation of the First Amendment a requirement that leaflets contain certain information before distribution). An "ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating

is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Lovell*, 303 U.S. at 452 (citation omitted).

The District Court did not separately consider Plaintiffs-Appellants' Free Press claim, but instead rejected this claim as part of the Free Speech analysis. *See* J.A. 27a. The Ordinance violates Appellants' right to freedom of the press because it prohibits them from leafleting on sections of public streets and sidewalks. Appellants regularly leaflet outside of the Planned Parenthood on Liberty Avenue, and wish to do so within the confines of the buffer zone. Leafleting in advancement of Appellants' pro-life beliefs would constitute "demonstrating" under the Ordinance (and may also constitute "picketing" or "patrolling"), and therefore leafleting is forbidden within the buffer zone. *Schenck* has made clear that an 8-foot restriction prevents individuals from "handing leaflets to people entering or leaving the [abortion] clinics." 519 U.S. at 377. It is therefore clear that a 15-foot zone prohibits Appellants from distributing leaflets. Accordingly, this Court can "safely maintain that the leaflets at issue in this case implicate the freedom of the press." *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (involving a challenge to a restriction on anonymous political leaflets).

As this Court noted when remanding this case to the District Court, "[i]n light of the burden the Ordinance places on speech, the City's inability to show at

the motion to dismiss stage that substantially less burdensome alternatives would fail to achieve its interests dooms its broad prohibition on all of Plaintiffs' expressive activities, including the prohibition on leafleting" in Appellants' Free Press claim. *Bruni I*, 824 F.3d at 373. Because the City cannot demonstrate at the summary judgment stage and following discovery that such alternatives would fail to achieve its interests, and the Supreme Court has already indicated that even 8-foot buffer zones are problematic for leafletting, the Ordinance is unconstitutional under the Free Press Clause.

IV. THE ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD

The Ordinance is unconstitutionally overbroad because it authorizes the creation of zones at non-abortion locations where the City does not even claim there has been a justification for banning speech. A law is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citations omitted). The overbreadth doctrine prohibits laws that "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (internal citations omitted). Accordingly, a law is void for overbreadth where it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps

within its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Alabama v. Thornhill*, 310 U.S. 88, 97 (1940).

The District Court held that the Ordinance is not overbroad because the City has not instituted buffer zones outside of other facilities. *See* J.A. 28a–29a. However, the Ordinance, as modified by the permanent injunction, gives the City the ability to enforce the Ordinance outside of myriad health care facilities throughout the City of Pittsburgh. Health care facilities include any "establishment providing therapeutic, preventative, corrective, healing and health-building treatment services on an out-patient basis by physicians, dentists and other practitioners." J.A. 79a. The Ordinance therefore authorizes the creation of buffer zones outside of every hospital and health care facility, very broadly defined to include dental offices, eye doctors, out-patient medical laboratories, urgent care facilities, family practitioners, and countless other offices. *Id*. at 57a, 79a. Neither the legislative findings nor the City's evidence produced in discovery ever claims there is some kind of problem regarding speech at such locations to justify restricting protected speech.

The permanent injunction in *Brown*, No. 2:06-cv-00393-NBF (W.D. Pa. Dec. 17, 2009), allows the City to enforce the Ordinance anywhere the City has "clearly mark[ed] the boundaries of any 15 foot buffer zone in front of *any hospital, medical office or clinic prior to the enforcement of the Ordinance.*" *See* J.A. 1324a. Such

unchecked discretion to place and enforce anti-speech buffer zones is substantially overbroad, in violation of the First Amendment.[8]

A recent decision of the District Court of New Jersey concerned a buffer zone ordinance that similarly applied outside of health care and transitional facilities. The court there reasoned that "Defendant did not create a targeted statute to address the specific issue of congestion or militant and aggressive protestors outside of the Clinic. Instead, Defendant created a sweeping regulation that burdens the free speech of individuals, not just in front of the Clinic, but at health care and transitional facilities citywide. To meet the narrowly-tailored requirement, Defendant must create an Ordinance that targets the exact wrong it seeks to remedy." *Turco v. City of Englewood*, No. 2:15-cv-03008, 2017 WL 5479509, at *4 (D. N.J. November 14, 2017). The same is true here.

The Ordinance gives the City unbridled discretion to place buffer zones outside of any medical facility at any time, without any showing that there have been issues of violence and obstruction. The City admitted before the District Court that the Ordinance's fact findings only discuss the need for buffer zones outside abortion facilities. Thus, the City has not even claimed that some need exists to restrict speech at other locations. This is the very definition of overbreadth, and there is indeed "a

[8] The breadth of the Ordinance further demonstrates that it is not narrowly tailored under *McCullen*.

realistic danger that the [law] itself will significantly compromise recognized First Amendment protections." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir. 1992) (quoting *Members of Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). The Ordinance is therefore unconstitutionally overbroad.

CONCLUSION

The City "undeniably" has "significant interests in maintaining public safety" on streets and sidewalks, "as well as in preserving access to adjacent healthcare facilities." *McCullen*, 134 S. Ct. at 2541. "But here, the [City] has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum for its time-honored purposes." *See id*. The City "may not do that consistent with the First Amendment." *See id*. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson*, 535 U.S. at 373.

The Ordinance burdens the speech of Appellants, and the City was therefore obligated to consider less restrictive alternatives to the prophylactic ban on speech contained in the Ordinance. The City presented insufficient evidence in the District Court of enforcing existing laws, issuing targeted injunctions, or considering less

restrictive limitations. The Ordinance therefore cannot survive intermediate, much less strict, scrutiny required by the First Amendment.

The Ordinance violates the Free Speech and Free Press Clauses of the First Amendment. For all of these reasons, Appellants respectfully request that this Court reverse the District Court's decision, and render judgment in favor of Appellants.

Dated: April 13, 2018

Respectfully submitted,

/s/ Elissa M. Graves

Kristen K. Waggoner
Kevin H. Theriot
Elissa M. Graves
Kenneth J. Connelly
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30040
(770) 339-0074

Lawrence Paladin
PALADIN LAW OFFICES, PC
15 Duff Road, Suite 6C
Pittsburgh, PA 15235
(412) 244-0826

Attorneys for Plaintiffs-Appellants

CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING, AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Sophos Endpoint Security and Control software.

I hereby certify that that this brief complies with the requirements of Fed. R. A. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. J.A. P. 32(a)(7)(B) because it contains 11,594 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

Respectfully submitted,

/s/ Elissa M. Graves

Elissa M. Graves

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Opposing counsel are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. Pursuant to Third Circuit Rule 31.1, the below counsel for Appellees were served one paper copy of the Joint Appendix via United Parcel Service on April 13, 2018.

Matthew S. McHale
Matthew.mchale@pittsburghpa.gov

Respectfully submitted,

/s/ Elissa M. Graves
Elissa M. Graves