United States Court of Appeals

FOR THE THIRD CIRCUIT

Case No. 15-1755

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)

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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 the recent Supreme Court decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). 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 the District Court for the District of New Hampshire is a challenge to a law which creates fixed buffer zones outside of reproductive health care facilities. The litigation is currently stayed. *See Reddy v. Foster*, No. 14-cv-299-JL (D. N.H. filed July 7, 2014).

JURISDICTIONAL STATEMENT

I. JURISDICTION OF THE DISTRICT COURT

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 dismissing all remaining claims on March 17, 2015, following the partial grant and partial denial of Defendants' Motion to Dismiss on March 6, 2015, from which this appeal is taken. 12 U.S.C. § 1292(a)(1); J.A. 4a–41a.

This appeal was timely filed. Fed. R. App. P. 4. The District Court entered its order partially granting Defendants' Motion to Dismiss on March 6, 2015, J.A. 4a–41a, and issued its Final Judgment on March 17, 2015, J.A. 3a. Plaintiffs filed their Notice of Appeal from those orders on March 26, 2015. J.A. 1a.

The District Court's March 6, 2015 Order granting Defendants' ("the City") Motion to Dismiss dealt with the following claims raised in Plaintiffs' complaint: Count I (Violation of the First Amendment Free Speech and Press Clauses); Count II (Violation of the Fourteenth Amendment Due Process Clause); and Count III (Violation of the Equal Protection Clause). In its March 6 order, the District Court granted the motion to dismiss in part and denied it part, dismissing Count II, all of the free speech and press claims under Count I except for the allegation of selective enforcement, and the City Council as a Defendant. It also denied Plaintiffs' motion for preliminary injunction. In that same March 6 order, the District Court denied the City's motion to dismiss Plaintiffs' selective enforcement claim, and Count III alleging Equal Protection violations, against the City and the

Mayor. On March 16, 2015, Plaintiff-Appellants filed a Motion to voluntarily dismiss the remaining selective enforcement and Equal Protection Clause claims, and to issue a Final Order. On March 17, the District Court granted the motion, dismissed the remaining claims, and issued final judgment. J.A. 3a.

Plaintiffs appeal from the March 6 order, made final on March 17, to the extent it granted the motion to dismiss their freedom of speech and press claims under Count I (except the selective enforcement allegation), and the Due Process claim under Count II. Plaintiffs do not appeal the denial of their motion for preliminary injunction, the dismissal of the City Council as a Defendant, nor the voluntary dismissal of their selective enforcement and Equal Protection claims.

The Court of Appeals has jurisdiction over this appeal because it has been taken in a timely fashion from a final judgment of the District Court.

INTRODUCTION

Pittsburgh has an Ordinance that allows the City ban advocacy speech on the public sidewalk in zones within a 15 foot radius of entrances to health facilities, broadly defined. Citing a desire to curb obstruction and violence, the City imposed zones outside abortion clinics where the Plaintiffs-Appellants wish to leaflet and converse, including a zone covering the width of the sidewalk all the way to the street. Last year in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Supreme Court declared that to ban speech in such zones the

government must, at minimum, show it prosecuted violence and obstruction in those areas but the problems persisted, making speech restrictions a narrowly tailored solution. Plaintiffs-Appellants filed the complaint in this case alleging that the City was incapable of meeting this evidentiary burden.

Despite no documentation of such problems and prosecution by the City, the District Court dismissed Appellants' claims, relying on this Court's 2009 decision in *Brown v. City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009). But *Brown* did not apply *McCullen*'s narrow tailoring requirement to make the City show that directly prosecuting violence and obstruction was unsuccessful. Instead, *Brown* relied on cases that *McCullen* explicitly distinguished or reversed. *McCullen* now controls this court's analysis of fixed zones, and must be applied here. The District Court's dismissal order was therefore legal error and should be reversed, as relief may be granted to Plaintiffs on this claim and on several related claims.

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. Plaintiff-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 on Liberty Avenue in downtown Pittsburgh. The Ordinance prohibits Appellants' expressive activities within a fifteen-foot radius (at least thirty-foot diameter) of the entrance to Planned Parenthood. The District Court dismissed Appellants' claims under Free Speech, Press, and Due Process Clauses of the First and Fourteenth Amendments to the United States Constitution. The issues presented are:

1. Did the District Court err when it dismissed Appellants' First Amendment Free Speech and Press claim following the Supreme Court decision in *McCullen v. Coakley*, which invalidated a similar Massachusetts law as not being narrowly tailored due to the government's failure to pursue its interests by directly prosecuting violence and obstruction instead of prohibiting speech?

Yes. Appellants have stated a claim under the First Amendment pursuant to the Supreme Court decision *McCullen v. Coakley*, and dismissal was therefore reversible error.

The issue was raised in Appellants' Verified Complaint at J.A. 51a, 62a, 64a–65a, and Appellants' Opposition to the City's Motion to Dismiss at DCT Doc. 15.[1] The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 25a–33a, 34a–36a.

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

2. Did the District Court err when it dismissed Appellants' claim that the Ordinance is unconstitutionally overbroad under the Free Speech Clause, due to authorizing the creation of speech restrictions outside facilities like eye doctor offices where no alleged problem has ever existed?

Yes. Appellants have stated an overbreadth claim, and dismissal was therefore reversible error.

This issue was raised in Appellants' Verified Complaint at J.A. 62a, and in Appellants' Opposition to the City's Motion to Dismiss at DCT Doc. 18. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 13a–14a, 34a–35a.

3. Did the District Court err when it dismissed Appellants' claim that the Ordinance is content discriminatory and unconstitutional under the Free Speech Clause, when it requires government officials to determine whether the content of speech constitutes "demonstrating" before banning the speech?

Yes. Appellants have stated a claim under the First Amendment, and dismissal was therefore reversible error.

This issue was raised in Appellants' Verified Complaint at J.A. 63a, and in Appellants' Opposition to the City's Motion to Dismiss at DCT Doc. 18. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 14a–24a.

4. Did the District Court err when it dismissed Appellants' claims under the Fourteenth Amendment Due Process Clause, where the City has unlimited discretion to place new buffer zones outside of a wide range of health facilities?

Yes. Appellants have stated a claim under the Fourteenth Amendment Due Process Clause, and dismissal was therefore reversible error.

This issue was raised in Appellants' Verified Complaint at J.A. 65a–66a, and in Appellants' Opposition to the City's Motion to Dismiss at DCT Doc. 18. The issue was addressed by Judge Bissoon's District Court Opinion at J.A. 37a–38a.

STATEMENT OF THE CASE

The preceding issues arise from the Pittsburgh Code of Ordinances § 623.01 *et seq*., which creates fixed buffer zones outside of health care facilities in the City of Pittsburgh. Plaintiffs-Appellants Nikki Bruni, Kathleen Laslow, Cynthia Rinaldi, Patrick Malley, and Julie Consentino engage in peaceful expressive activities outside of the Planned Parenthood on Liberty Avenue in downtown Pittsburgh, and the Ordinance prohibits them from engaging in such activities within a fifteen-foot radius from the entrance to the facility.

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. 50a; 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. 61a–68a; DCT Doc. 1. 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.

The District Court heard arguments on the Defendants' Motion to Dismiss (and Plaintiffs-Appellants' Motion for Preliminary Injunction) on December 3, 2014. J.A. 4a; DCT. Doc. 20. In its March 6, 2015 Order, the 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. J.A. 33a, 36a, 39a; DCT Doc. 28. In particular, the Court held that Appellants did not state a First Amendment Free Speech claim following the recent Supreme Court decision in *McCullen v. Coakley*, 134 S. Ct. 2518, which struck down a similar speech restriction and applied specific criteria for determining if such a law is narrowly tailored. J.A. 25a–35a.

The Court left intact Appellants' selective enforcement claim under the First Amendment, as well as the Appellants' Equal Protection Clause claim. J.A. 34a,

41a. On March 16, 2015, Appellants filed a Motion for Voluntary Dismissal and for Final Judgment, requesting that Appellants' remaining claims be dismissed and that the Court issue a final order. DCT Doc. 29. On March 17, 2015, the District Court dismissed Appellants' remaining claims and ordered final judgment. J.A. 3a; DCT Doc. 31. In this appeal Appellants only raise their First Amendment and Due Process Clause claims dismissed by the District Court's March 6 order, which was made final by the order of March 16. Appellants do not appeal the denial of their preliminary injunction motion, the dismissal of the City Council as a Defendant, nor their voluntary dismissal of their selective enforcement and Equal Protection Clause claims. Appellants filed their Notice of Appeal on March 26, 2015. J.A. 1a; DCT Doc. 32.

STATEMENT OF FACTS

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. 76a–78a. After these "buffer zones" are demarcated, 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." J.A. 77a–78a. In the main location at issue here, the zone covers the width of the sidewalk all the way to the street. J.A. 100a, 147a. Health care facilities include any location offering "treatment services on an out-patient basis by physicians, dentists and other practitioners." J.A. 77a.

An order from a previous case, *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." J.A. 150a. Defendants have thusfar only applied the Ordinance to two abortion facilities located in the City of Pittsburgh, including Planned Parenthood on Liberty Avenue in downtown Pittsburgh. J.A. 79a. The Ordinance and the permanent injunction authorize the demarcation of speech restrictive zones at the entrances to numerous facilities that provide any health care services (not just abortion facilities), including dentists, eye doctors, chiropractors and the like. J.A. 50a–51a, 54a, 60a.

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. 76a. Thus, the alleged interests supporting the Ordinance are to prevent obstruction of sidewalks, violence, and criminal activity.

The Ordinance provides no specific instances of obstructive or violent conduct or criminal activity outside of heath care facilities. Nor does it provide specific instances of prosecution of such activities. Nor does it provide specific evidence that after such prosecution occurred, the obstructive, violent, or criminal activity continued anyway. *See* J.A. 76a. Likewise, the City's briefing before the District Court cited no such specific instances. Consequently, Appellants have asserted a sufficient allegation in the complaint that the Ordinance is not supported by evidence showing that speech-restrictive zones are needed as a narrowly tailored means to prevent violence, obstruction, and crimes, nor can the City show that enforcement of laws against those specific activities would not suffice to serve the City's interests instead of banning speech in these zones.

The Ordinance goes on to explicitly provide an exception for "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." J.A. 77a–78a. The *Brown* permanent injunction states that "assisting patients and other persons to enter or exist a hospital, medical office or clinic is permissible if it does not include any action, activity or signage in the form of picketing and demonstrating." J.A. 150a. Thus, the exemption for employees allows abortion clinic escorts to walk

and stand in the very same zones that the City claims it has an interest in clearing of obstruction, as long as their "assistance" does not constitute "picketing" and "demonstrating." The Ordinance is only enforced outside of Pittsburgh's two abortion facilities. J.A. 79a.

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. 57a. During sidewalk counseling, Appellants seek to have quiet conversation and offer assistance and information to abortion-minded women by providing them pamphlets describing local pregnancy resources, praying, and to peacefully express this message of caring and support to those entering and exiting the clinic. J.A. 58a. Appellants consider it essential to their message to engage in sidewalk counseling with women, meaning to engage in 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. J.A. 60a–61a. Appellants' sidewalk counseling approach can only be communicated through close, caring, and personal conversations, and cannot be conveyed through protests. J.A. 61a.

Appellant Nikki Bruni has been leading the Pittsburgh 40 Days for Life campaigns since 2010. J.A. 58a. 40 Days for Life occurs twice ever year, and,

during this time, individuals such as Appellants peacefully pray outside of abortion clinics from 7 A.M. to 7 P.M. continuously for forty days, alongside and in support of Appellants' sidewalk counseling. *Id*. Appellant Julie Cosentino participates in 40 Days for Life outside of Planned Parenthood, and generally engages in sidewalk counseling and other expressive activities. *Id*. Appellant Cynthia Rinaldi also engages in sidewalk counseling, prayer, and other peaceful expressive activities outside of the Liberty Avenue Planned Parenthood. J.A. 59a. As part of sidewalk counseling, Ms. Rinaldi will often escort women to nearby Catholic Charities, in order to connect them to resources such as adoption assistance, monetary assistance, food, education, and day care. *Id*. Appellant Kathleen Laslow engages in sidewalk counseling outside of Planned Parenthood. *Id*. In doing so, Ms. Laslow engages those entering and exiting the clinic, and will hand out pamphlets containing local pregnancy resources. *Id*. Appellant Patrick Malley also engages in sidewalk counseling, prayer, and other peaceful expressive activities at this location, and participates in the 40 Days for Life campaign. J.A. 60a.

Outside of the Planned Parenthood facility where Appellants regularly engage in expressive activities, a yellow semi-circle demarcates the buffer zone in which the Ordinance prohibits congregating, patrolling, picketing, or demonstrating. J.A. 57a. The Ordinance prohibits Appellants from effectively reaching their intended audience by prohibiting speech within a 15-foot radius of

the entrance to Planned Parenthood (a 30-foot diameter, and wider after adding the width of the doorway itself). J.A. 30a. The zone outside of Planned Parenthood on Liberty Avenue extends to the end of the sidewalk, forcing individuals into the street if they wish to speak while walking around the zone. J.A. 100a, 147a. The zones make it more difficult for Appellants to engage in sidewalk counseling, prayer, advocacy, and other expressive activities. J.A. 60a.

No speech activities on the public sidewalks and areas outside of Planned Parenthood in recent years have caused a problem preventing access to its entrances, and no speech activities at non-abortion facilities in Pittsburgh are even alleged to have caused problems necessitating the Ordinance. J.A. 57a.

SUMMARY OF THE ARGUMENT

In *McCullen v. Coakley*, which the Supreme Court issued last term, the court unanimously invalidated a Massachusetts law that created fixed buffer zones with a 35-foot radius outside of reproductive health care facilities. 134 S. Ct at 2541. The Court set forth precisely how the "narrow tailoring" test must be applied to fixed speech-restrictive zones outside abortion facilities:

> [f]or a content-netural time, place or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. But the government still "may not regulate expression in such a manner that a

> substantial portion of the burden on speech does not serve to advance its goals."

McCullen, 134 S. Ct at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989)). *McCullen* elaborates, specifically requiring the government to show it that it cannot directly prosecute the violence and obstruction of which it complains. The Court points out that a variety of laws alleviate such interests, including laws prohibiting obstruction of entrances, laws targeted at harassment, dispersal laws, targeted injunctions, and generic criminal statutes forbidding assault, breach of the peace, trespass, and the like. 134 S. Ct. at 2537–39.

The complaint alleges that the City cannot present sufficient evidence, or any evidence at all, to show that (1) obstruction or violence was an insoluble problem before the Ordinance; (2) the City consistently prosecuted such incidents, and (3) despite prosecution, the problems continued, so that creating buffer zones would qualify as a narrowly tailored remedy. Under *McCullen*, the Ordinance is unconstitutional unless the City can make such a showing. *Id*. at 2537–39. Consequently, the complaint states a claim for relief.

This Court previously upheld this Ordinance in *Brown v. Pittsburgh*, 586 F.3d 263. But *Brown* did not apply the narrow tailoring burden as set forth in *McCullen*. *Brown* instead relied on the now abrogated court of appeals ruling in *McCullen*, on the "floating" zone case (not "fixed" zone) of *Hill v. Colorado*, 530 U.S. 703 (2000), and on injunctions targeted at past bad actors, *Madsen v.*

Women's Health Center, Inc., 512 U.S. 753 (1994), and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which *McCullen* said do not justify a fixed zone on the public at large. *McCullen*, 134 S. Ct at 2538. The District Court's reliance on *Brown* to decline to apply *McCullen* was therefore erroneous. *See, e.g.*, *Lebanon Farms Disposal, Inc. v. Cnty. of Lebanon*, 538 F.3d 241, 249 n.16 (3d Cir. 2008) ("An intervening decision of the Supreme Court is a sufficient basis for us to overrule a prior panel's opinion without referring the case for an en banc decision.")

The Ordinance is also unconstitutionally overbroad. It permits the City to impose anti-speech zones not just outside abortion clinics but on the entrances of every health care facility in the City of Pittsburgh, even ones that have never experienced alleged problems. Additionally, the Ordinance is a content-based restriction that cannot satisfy strict scrutiny. *McCullen* asserted 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). Thus, the Ordinance is content-based on its face because it requires enforcement officials to determine whether particular speech is "demonstrating" or is some other form of speech like discussing sports. The Ordinance also violates Appellants' rights under the Due Process Clause of the Fourteenth Amendment by vesting unbridled discretion in City officials to create

new buffer zones outside other healthcare facilities in the City of Pittsburgh. There are no rules or criteria to guide the City in deciding when, how, or on what basis to draw any of the Ordinance's anti-speech zones.

STANDARD OF REVIEW

The District Court's grant of Defendants' Motion to Dismiss on ground of Federal Rule 12(b)(6) is subject to plenary review. *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006) (internal citations omitted). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." *Id.* Because this is "a § 1983 action, the plaintiffs are entitled to relief if their complaint sufficiently alleges deprivation of any right secured by the Constitution." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996) (internal citations omitted).

In considering a motion to dismiss under Rule 12(b0(6), the Court should "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d. Cir. 2009) (citing *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir 2008)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir. 2010). Appellants alleged that the City will fail to meet its evidentiary burden under narrow tailoring just as occurred in *McCullen*.

ARGUMENT

Appellants' complaint states causes of action under the First Amendment and Due Process Clause of the United States Constitution. Dismissal was therefore inappropriate, and the judgment of the District Court should be reversed.

I. THE ORDINANCE IS UNCONSTITUTIONAL UNDER THE RECENT SUPREME COURT DECISION *MCCULLEN V. COAKLEY* BECAUSE IT IS NOT NARROWLY TAILORED.

The Supreme Court's decision in *McCullen v. Coakley* requires the application of a narrow tailoring analysis that this speech-restrictive Ordinance cannot satisfy under the allegations of the complaint. *McCullen* unanimously struck down a Massachusetts law creating fixed buffer zones outside of reproductive health care facilities as an unconstitutional infringement of the First Amendment right to free speech.

Massachusetts alleged exactly the same interests the City does here—preventing violence, obstruction and crimes. Under narrow tailoring, *McCullen* explained at length that the government must show it could not address those problems by prosecuting them directly instead of creating zones banning speech

therein. 134 S. Ct. at 2538–39. When the government fails to make any such showing, *McCullen* deems a buffer zone law unconstitutional. *Id*. at 2539–41.

Pittsburgh's Ordinance creating 15-foot fixed buffer zones is unconstitutional as a result. In this case the zone stretches the entire width of the sidewalk on Liberty Avenue all the way to the street. J.A. 100a, 147a. The complaint alleges that the City cannot actually document the problems it claims justify this zone, nor that if it had prosecuted such problems directly it would have still needed to ban speech. The District Court was required to accept this allegation as facially plausible, since the same evidentiary failure led to the invalidation of fixed zones in *McCullen*. *See Sheridan*, 609 F.3d at 262 n. 27. Moreover, even if the District Court was permitted to look outside the complaint—and it was not—the City failed to document even one single prosecution under the laws *McCullen* says must be tried before banning speech. Consequently, Appellants amply stated a claim for relief under *McCullen* that the Ordinance is not narrowly tailored.

Instead of applying *McCullen*, however, the District Court simply declared that *Brown* already upheld the Ordinance in 2009. J.A. 25a–27a. This is error. *Brown* did not even claim to be putting the City to the narrow tailoring test laid down in *McCullen*. It is thus clearly not controlling here. *See, e.g., In re Krebs*, 527 F.3d 82, 84 (3d Cir. 2008) (noting that prior decisions may be "reevaluate[d]" when they "conflict[] with intervening Supreme Court precedent").

A. The Ordinance infringes on the protected speech of Appellants

The 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." *Schenk*, 519 U.S. at 377. *McCullen* noted that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression, no form of speech is entitled to greater constitutional protection." 134 S. Ct. at 2536 (internal citations and quotations omitted).

Traditional public fora such as sidewalks, which is where this Ordinance restricts speech, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communications 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 the Planned Parenthood on Liberty Avenue. Under the Ordinance, the City created a zone where they wish to speak that stretches the entire width of the sidewalk all the way to the street. J.A. 100a, 147a. In the zone Appellants are banned from "congregating, patrolling, picketing, or demonstrating," which the City has conceded encompasses Appellants' leafleting and sidewalk conversations. J.A. 148a–149a. The Ordinance therefore represents a substantial infringement of Appellants' protected free speech.

B. The Ordinance restricts substantially more speech than is necessary to further the City's proffered interests.

McCullen gave a new and specific application of the narrow tailoring test, which must be used for fixed "buffer zones" outside abortion facilities. In general, a content-neutral restriction[2] 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*, 491 U.S. at 791). A fixed buffer zone law such as the Ordinance here "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). *McCullen* elaborated on this standard in significant ways that this Court did not consider in *Brown*, and *McCullen* rejected the very few rationales that *Brown* offered on this issue.

[2] The Ordinance is not content-neutral, as discussed in Section III below.

1. The City of Pittsburgh has available to it other laws which are more targeted at solving the alleged issues of violence and obstruction.

The Supreme Court held in *McCullen* that if the government has the ability to enforce or enact 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.

Here, the City's alleged interests are the same as the ones cited by Massachusetts: reducing the risk of violence and crimes, and providing unobstructed access to health care facilities. J.A. 76a. While such interests are significant, *McCullen* insists 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 does 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.

Before the District Court, the City made the unsupported argument that laws existing prior to the Ordinance were inadequate to serve its interests. DCT Doc. 13 at 6–7. But the Complaint alleges, and the District Court was required to accept on a motion to dismiss, that the City lacked sufficient evidence to support this

argument. J.A. 60a. Under *McCullen*, "[g]iven the vital First Amendment interests at stake, *it is not enough for [the City] simply to say that other approaches have not worked*." *See* 134 S. Ct. at 2540 (emphasis added). 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. The complaint alleges exactly the opposite, and therefore states a First Amendment claim under *McCullen*. The Ordinance's legislative findings reference disruptive activity only in general, with no specific proof of these elements as *McCullen* required of Massachusetts in that case.

The City failed to introduce evidence to meet its burden even when given the opportunity. Appellants filed a motion for preliminary injunction, the denial of which is not at issue here. But the District Court did hold an evidentiary hearing on that motion. If there had been complaints of violent or obstructive incidents, then arrests or prosecutions, and further complaints thereafter, the City would have public records of those incidents. Yet during that evidentiary hearing, the City failed to introduce a single public record showing a complaint, a citation, an arrest, or a prosecution. The same failure to introduce "a single prosecution" doomed the law in *McCullen*. 134 S. Ct at 2539. At most the City cited the self-serving testimony of abortion clinic staff who claim that unspecified incidents happened at

unknown times in the past, without knowledge of whether the government tried to prosecute them. Such "evidence" simply highlights the absence of any public complaint, any arrest, or any prosecution by the City. This reinforces the fact that the complaint's allegations facially plausible under the motion to dismiss. The District Court wrongly denied Appellants their right under the Federal Rules of Civil Procedure to pursue this case through discovery and show at summary judgment or trial that the City cannot meet its burden of proof under *McCullen*'s narrow tailoring standard.

McCullen further explained the stringency of this standard. It insisted 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 here at issue. Where a government such as the City is concerned about obstruction of the public ways and sidewalks, it can rely on laws which specifically restrict obstruction. *Id*. at 2539. Moreover, if the City is concerned about "harassment," and not protected speech, 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 2537 (internal 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 discussed below, and can be prosecuted under those existing laws.

The City also has the ability to "enact legislation similar to the federal Freedom of Access to Clinic Entrances Act" (FACE), "which subjects both criminal and civil penalties anyone who 'by force of 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*.

Narrow tailoring is further undermined by the availability of "targeted injunctions as alternatives to broad, prophylactic measures" such as the Ordinance. *Id*. at 2538. These injunctions "'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*, 512 U.S. at 762) (emphasis in original). "[G]iven the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary." *Id*. (internal citations omitted). "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.*

The City may also protect its interests with "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Id*. at 2538. In the District Court, the City did not even try to cite an official record of any actual assaults, trespass, or other conduct, much less prosecution of those incidents, and the subsequent failure of that prosecution to curtail the problem. Trespass is a criminal offense under the laws of Pennsylvania, *see* 18 Pa. Cons. Stat. § 3503, as is assault, *see* 18 Pa. Cons. Stat. § 2701. These are exactly the sorts of laws that *McCullen* said were available to Massachusetts instead of speech restrictions. 134 S. Ct. at 2537–39.

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 McCullen*, 134 S. Ct at 2539. If any of the violent or obstructive activities 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. To satisfy the narrow tailoring inquiry, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interest, not

simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540. The complaint alleges the City cannot meet this burden, and Appellants are entitled to substantiate their case through discovery just as the plaintiff did in *McCullen*.

Because this case was dismissed prematurely, the City has not been required to show "that it seriously undertook to address the problem with less intrusive tools readily available to it." *See id*. at 2539. The City "undeniably" has "significant interests in maintaining public safety" on streets and sidewalks, "as well as in preserving access to adjacent healthcare facilities." *See id*. 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 purposed." *See id*. The City "may not do that consistent with the First Amendment." *See id.* Consequently the District Court's dismissal of Appellants' claim was in error and should be reversed.

2. The Ordinance is not materially distinguishable from the law struck down in McCullen.

The District Court committed reversible error when it held that "[d]ue to the factual dissimilarities between *McCullen* and the instant case with respect to the degree of burden imposed on the petitioners' and Appellants' speech, respectively, the Supreme Court's invalidation of [the Massachusetts law] does not compel the invalidation of Pittsburgh's less burdensome Ordinance." J.A. 31a. The District

Court improperly held that "the burden on speech was significantly greater" under the Massachusetts law because there the zones "had a radius of at least 35 feet . . . and were implemented statewide," thereby rendering the Ordinance distinguishable from *McCullen*. J.A. 27a.

McCullen's narrow tailoring test does not focus on the size of the anti-speech buffer zones created by the Massachusetts law. Instead, the Court found that the crucial question in deciding the constitutionality of such a law was whether banning speech in fixed zones was necessary to further the government's interest, and whether the government used any of the alternate means at its disposal to address its alleged problems but those means proved ineffective. *McCullen*, 134 S. Ct. at 2535.

The zones here are 30 feet or more in diameter. Despite that being smaller than the zones in *McCullen*, they still ban Appellants' speech in those zones, the zones extend past the sidewalk to the street. J.A. 100a, 147a. This makes it substantially more difficult for Appellants to engage in the protected speech they desire. Banning speech on a public sidewalk within 30-foot diameter around a facility by definition is a substantial burden on speech. The complaint properly alleges that the burden on Appellants' speech is substantial. J.A. 60a–61a, 64a.

The District Court also seemed to confuse the elements of narrow tailoring with Appellants' standing. Whether a law bans speech in traditional public fora is a

threshold question, and the 30-foot diameter zone here easily restricts Appellants' speech in a substantial way. On Liberty Avenue the zone actually reaches all the way out to the street, encompassing the whole width of the sidewalk. J.A. 100a, 147a. On such facts, *McCullen* requires narrow tailoring.

McCullen requires the City must show that this zone does not "burden substantially more speech than is necessary to further the government's legitimate interests." 134 S. Ct at 2535. The first question under this test, therefore, is whether banning speech is needed *at all* instead of prosecuting violence and obstruction directly, based on a past history of prosecutions that nevertheless failed to curb the problem. The District Court essentially chose not to consider that question, deeming instead that because the zones here are different in size than the zones in *McCullen*, the narrow tailoring test is different. But *McCullen*'s test must still be applied, and its outcome cannot be known apart from the City meeting its evidentiary burden to show a prosecution history that rendered a speech ban necessary as a last resort. The complaint alleges the City cannot meet this burden, and under Rule 12 the District Court should have denied the motion to dismiss.

In *McCullen*, the Court relied on free speech considerations that apply equally in this case. These include the historical importance of advocacy in traditional public fora, which date back to the founding of the United States, and their particular importance 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. Appellants desire to engage in the same speech as the petitioners in *McCullen*, but are restricted by the Ordinance's prohibition on speech. J.A. 51a.

Like *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. Appellants do not desire to shout, for such expression would be starkly at odds with the message Appellants desire to communicate. Just as the petitioners in *McCullen*, Appellants here "believe that they can accomplish [their] objective[s] only through personal, caring, consensual communications." *See* 134 S. Ct. at 2536. Therefore, 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. The speech in which Appellants desire to engage is non-violent, peaceful, and non-obstructive. The City must show how the Ordinance satisfies *McCullen's* narrow tailoring analysis, even if the zone's size varies slightly.

As in *McCullen,* the Ordinance makes it so that Appellants "often cannot distinguish patients from passersby" outside of the Pittsburgh Planned Parenthood "in time to initiate a conversation before they enter the buffer zone." *See* 134 S. Ct at 2535. "[E]ven when [Appellants] manage to begin a discussion outside of the zone, [they] must stop abruptly at its painted border, which [they] believe causes [them] to appear untrustworthy or suspicious." *See id.* at 2535 (internal citations and quotation marks omitted).

The District Court emphasized that the Appellants were permitted to engage in various forms of protest, and engaged in "more speech." J.A. 29a. However, "[t]hat misses the point." *See McCullen,* 134 S.Ct at 2536. The fact that the Ordinance acts as a complete ban on speech in traditional public fora is the crucial fact that requires a narrow tailoring analysis, not any alleged fact that the Appellants are able to engage in "more [free] speech" because they are able to speak to more people in order to determine who is a patient of the facility. *See* J.A. 29a. Appellants are unable to effectively communicate with their intended audience as a result of the zone outside of Planned Parenthood. J.A. 61a. Appellants do not seek to merely express an opposition to abortion, but rather consider it essential to their message to engage in close, calm, personal conversations with women entering and exiting the Planned Parenthood facility.

J.A.60a J.A. 100a, 147a.61a. The Ordinance effectively stifles the message that Appellants desire to send, in violation of their right to free speech.

The Ordinance regulates substantially more speech than is necessary because banning speech is apparently not necessary at all, as was the case for the Massachusetts law invalidated in *McCullen*. The District Court's dismissal of Appellants' claim should therefore be reversed.

C. *McCullen* controls this Court's decision, while *Brown* omitted the analysis that *McCullen* requires.

The District Court dismissed Plaintiffs' claim by reliance on *Brown* and on the cases cited there, *Hill*, *Madsen*, and *Schenk*. This not only errs in overlooking *McCullen*'s distinguishing of such cases, but it misreads *Brown*, which never actually applied narrow tailoring in the way *McCullen* requires.

McCullen governs this case in ways that *Hill* does not. *Hill* considered "floating bubble" zones, which are not drawn out from a facility door but float around patients and require individuals to gain permission before approaching within eight feet of such patients if they are near a facility entrance. 530 U.S. at 707. The Ordinance being challenged here is a fixed zone, as was the ordinance in *McCullen*. *McCullen* therefore controls how to apply narrow tailoring to the zone here. *Brown*'s reliance on *Hill* mostly pertains to its discussion of floating bubble zones in Pittsburgh, not to the fixed zone that is the focus of this case. *Hill*'s rationale further shows that it does not encompass fixed buffer zones, since it

upheld floating buffers in part because they still allow individuals to stand right next to the entrance to the facility, 530 U.S. at 726–27, 729–30, whereas fixed zones by definition push speakers a certain distance away from the entrance. Here, not only are Appellants pushed back from from the entrance, but the zone envelops the entire width of the Liberty Avenue sidewalk into the street. J.A. 100a, 147a.

The District Court overstated *Brown*'s applicability in light of *McCullen* by failing to observe that *Brown* explicitly relied on the *McCullen* decision of the First Circuit, which held that the Massachusetts "statute was 'content-neutral, narrowly tailored, and l[eft] open ample alternative channels of communication.'" *Brown*, 586 F.3d at 276 (citing *McCullen v. Coakley*, 571 F.3d 167, 184 (1st Cir. 2009)). This case has now been abrogated by the *McCullen* Supreme Court decision. *See McCullen*, 134 S. Ct at 2541.

Brown is not sufficient grounds to refuse to apply the narrow tailoring as it is set forth in *McCullen* because *Brown* hardly applied narrow tailoring at all. As discussed in detail above, *McCullen* requires the government to document rather than merely assert the alleged problems of violence and obstruction, prove that it had tried other laws to prosecute those problems, and demonstrate that despite prosecutions the problems continued. 134 S. Ct. at 2537–39. In contrast, *Brown* was not interested in such a record. Like *McCullen*, *Brown* mentioned no documentation of arrests or prosecutions that had both existed and yet still had

failed serve the City's interests. *McCullen*. 134 S. Ct at 2539 (dooming the law for lacking evidence of "a single prosecution"). Instead, just as Massachusetts tried and failed to rely on conclusory assertions in legislative history, 134 S. Ct. at 2540 ("that is not enough to satisfy the First Amendment"), *Brown* mentioned only uncorroborated and contradicting evidence in the legislative history of this Ordinance concerning whether violence did or did not occur, 586 F.3d at 267. *Brown* deemed "the truth" of those incidents not relevant (and did not discuss prosecution thereof) except to identify what the City's asserted interests are. *Id.* at 267 n.2. But under *McCullen*, "the truth" of whether incidents and prosecution history exists is imperative. "Given the vital First Amendment interests at stake, it is not enough for [the City] simply *to say* that other approaches have not worked." 134 S. Ct at 2540 (emphasis added). The City must show narrow tailoring based on a history of prosecuting other laws, but *Brown* did not require it to do so.

Brown's narrow tailoring analysis instead consists of an assertion that the Ordinance is narrowly tailored due to the Supreme Court's decisions in *Madsen* and *Schenck*, which had found injunction-originated buffer zones "sufficiently tailored under a test more exacting than the one applicable here." *Brown*, 586 F.3d at 276. *McCullen* contradicts this rationale. It specifically instructs that injunction-originated zones such as in *Madsen* and *Schenck* do not justify zones that restrict the public at large. On the contrary, injunction-originated zones are an option that

governments should pursue *instead of* a publicly restrictive zone, because they target people with a history of bad action, while allowing law-abiding speakers to use the same traditional public fora. 134 S. Ct at 2538 (noting the "First Amendment virtues of targeted injunctions as alternatives to broad prophylactic measures," because "injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem" rather than "unnecessarily sweeping in innocent individuals and their speech.").

Therefore *Brown* does not justify this Court or the District Court in declining to apply the narrow tailoring rule set forth in the more recent and more controlling decision of *McCullen. Brown* predates *McCullen*, it failed to apply narrow tailoring as set forth in *McCullen*, it relied on *McCullen*'s reversed lower court precedent, and it assumed what *McCullen* has declared incorrect: that injunctions targeted at bad actors justify fixed zones imposed on the public at large. *See id*.

This Court is bound to follow *McCullen's* ruling on how to apply narrow tailoring to the Ordinance here. That obligation does not change based on pre-*McCullen* precedent in this circuit. *Brown* did not apply narrow tailoring under *McCullen,* and the ideas it offered *McCullen* ultimately rejected. Whether the new and certain standard of *McCullen* means that *Brown* is insufficient for this case, or is seen as superseding *Brown* more directly, is somewhat of an academic question. Either way the Supreme Court requires this Court and the District Court to apply

McCullen's narrow tailoring analysis to this Ordinance, which *Brown* did not apply. Since the District Court deferred to an analysis *Brown* had not undertaken instead of applying *McCullen*'s narrow tailoring test, it committed reversible error. The complaint plausibly alleges that the City cannot meet its evidentiary burden under *McCullen*, so dismissal of Appellants' claim should be reversed.

D. The Ordinance does not leave open ample alternative channels for communication.

The Ordinance leaves no corresponding alternative channel for communication of Appellants' message. The only location where Appellants are able to engage in their expressive activities is the sidewalk outside of the abortion clinic, an area traditionally left open for debate, leafleting, and other expressive activities. Prohibiting quiet conversations at the heart of the location where Appellants seek to speak effectively leaves them no alternative location. J.A. 64a.

For all of the preceding reasons, the Ordinance is not narrowly tailored, in violation of the unanimous decision *McCullen*, and violates the First Amendment. This Court should therefore reverse the District Court's dismissal of Appellants' First Amendment Free Speech claim.

E. Appellants likewise alleged a claim under the Free Press Clause.

For parallel reasons, Appellants alleged a cause of action under the Freedom of the Press Clause of the First Amendment. The freedom of the press protects the leafleting activities of Appellants. The First Amendment right of 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). The freedom of the press 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. 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.'" *Id*. (citation omitted).

Appellants alleged that the Ordinance violates their right to freedom of the press because the Ordinance prohibits them from leafleting on public sidewalks. J.A. 51a, 59a. The District Court dismissed Appellants' Free Press claim without discussion. J.A. 34a. 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). Appellants regularly leaflet outside of the Planned Parenthood on Liberty Avenue, and wish to do so within the confines of the buffer zone. J.A. 58a–61a. Therefore, 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). Accordingly, the dismissal of Appellants' claim under the Free Press Clause was reversible error.

II. 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) (internal 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 Ordinance authorizes the creation of buffer zones outside of innumerable health care facilities in 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. 77a. The Ordinance therefore authorizes the creation of buffer zones outside of every hospital and healthcare facility, very broadly defined to include dental offices, eye doctors, out-patient medical laboratories, urgent care facilities, family practitioners, and countless other offices. J.A. 54a, 77a–78a. Neither the legislative findings nor the City's briefing ever claims there is some kind of problem regarding speech at such locations to justify restricting protected speech.

The permanent injunction in *Brown v. City of Pittsburgh*, 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.*" J.A. 150a (emphasis added). Accordingly, the City may place buffer zones outside of any hospital, medical office, or clinic. Such unchecked discretion to place and enforce anti-speech buffer zones is substantially overbroad, in violation of the First Amendment.[3]

The Ordinance and the *Brown* permanent injunction give the City unbridled discretion to place buffer zones outside of any medical facilities at any time, without any showing that there have been issues of violence and obstruction. The

[3] The breadth of the Ordinance further demonstrates that it is not narrowly tailored under *McCullen*, further in violation of the First Amendment.

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 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, as modified by the permanent injunction in *Brown*, is overbroad. The District Court's dismissal of Appellants' claim should therefore be reversed.

III. THE ORDINANCE IS FACIALLY CONTENT-BASED.

The Ordinance improperly discriminates on the basis of content. While this Court's decision in *Brown* held that the Ordinance was content neutral, the unanimous decision in *McCullen* altered the applicable content-neutrality test.

McCullen specifically explained 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). Notably, this test for content-based speech was rejected in *Hill*, 530 U.S. at 720–24, but the more recent and unanimous definition in *McCullen* controls. The *McCullen* court ruled that the law at issue was content neutral

because it did not simply 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*.

Here, the Ordinance on its face does the opposite. It does not ban Appellants from walking through the zone as such. Instead the Ordinance only bans "congregating, patrolling, picketing, or demonstrating" in the zones. J.A. 77a–78a. Consequently 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 speech to determine if it counts as "demonstrating" or "picketing." If their speech is generally about the Steelers, the weather, or directions, it would not be banned. If their speech urges someone not to enter the abortion facility for ideological reasons, it would be banned. Speech that is not "demonstrating" is not banned, speech that is "demonstrating" is. No one can know which is which unless they examine the content. 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."

134 S. Ct. at 2531. *Brown*'s decision to the contrary is not consistent with *McCullen*'s newly articulated and applied rule.

Because the Ordinance is content-based, Appellants have stated a viable claim that it is unconstitutional. As a general rule, regulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). The Supreme Court has held that a "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791. And as discussed above, the Ordinance cannot even meet the narrow tailoring test applicable to content-neutral laws. The District Court's dismissal of this claim was therefore erroneous.

IV. THE ORDINANCE VIOLATES THE DUE PROCESS CLAUSE DUE TO UNBRIDLED DISCRETION.

The Ordinance vests unbridled discretion in the City to create buffer zones outside of any hospital or health care facility in the City of Pittsburgh, in violation of the Fourteenth Amendment. The unbridled discretion doctrine "requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established

practice. . . . This Court will not write nonbinding limits into a silent state statute." *City of Lakewood v. Plain Deal Publ'g Co.*, 486 U.S. 750, 770 (1988)."[A]llowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment." *Cox v. State of La.*, 379 U.S. 536, 558 (1965). "[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

Here the Ordinance gives the City unbridled discretion to decide whether and where to draw and enforce a buffer zone outside of any health facility in Pittsburgh, and the City has used that discretion to focus on Appellants' speech against abortion. Nothing restricts or governs the City's decision of whether, or when, to draw a zone around one, some or all eye doctors, dentist, or other professionals' offices or office buildings. Nothing stops the City from using its limitless authority to draw a zone that undermines important constitutional protections afforded to citizens.

The parameters of the injunction in *Brown* reinforces the existence of this problem. It tells the City it must draw a zone before enforcing it, but does not in any way curtail the City's unbridled discretion in deciding where to draw them.

Therefore the Ordinance and injunction give the City unfettered discretion to decide where to demarcate those zones. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal citations omitted).

The Ordinance violates Appellants' right to due process. Defendants' infringement of Appellants'' fundamental rights is not "narrowly tailored" to serve a rational – let alone compelling – governmental interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Dismissal was improper because Appellants "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir. 2010).

The District Court dismissed Appellants' unbridled discretion claim because Appellants' "allegations are better suited for challenge under the First Amendment, which provides an 'explicit textual source of constitutional protection' for impermissible abridgements of freedom of speech and the press," and that the First Amendment is therefore "the more appropriate authority" for Appellants' claims for relief. J.A. 38a.

Dismissal of Appellants' unfettered discretion claim was in error. While there is some overlap between a First Amendment claim and an unfettered discretion claim under the Fourteenth Amendment Due Process Clause, this does not mean that the claims are duplicative. The City assumed unfettered discretion to itself and is using that discretion to enforce zones outside abortion facilities but not elsewhere. This is a substantive due process violation that exacerbates the First Amendment violations described above. Nor does Rule 12 justify dismissing a claim under the theory that another claim is similar. Dismissal of Appellants' unbridled discretion claim was therefore reversible error.

CONCLUSION

For all of these reasons, Appellants respectfully request that this Court reverse the District Court's decision involuntarily dismissing Appellants' claims under the First and Fourteenth Amendments to the United States Constitution, and remand for further proceedings.

Dated: May 26, 2015

Respectfully submitted,

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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. J.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 10,491 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

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CERTIFICATE OF SERVICE

I herby certify that on May 26, 2015, 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 May 26, 2015.

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