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.

REPLY 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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INTRODUCTION

The Supreme Court's recent decision in *Reed v. Town of Gilbert* clearly demonstrates the Ordinance at issue in this case is content based and subject to strict scrutiny, contrary to the District Court's ruling. The ordinance in *Reed* and the one here both apply different levels of treatment to speech serving different purposes, such as ideological and directional speech. The City's brief fails to rebut that case or the Ordinance's flaws under the narrow tailoring standard of *McCullen*.

ARGUMENT

I. THE ORDINANCE IS UNCONSTITUTIONALLY CONTENT-BASED UNDER *REED V. TOWN OF GILBERT*.

On June 18, 2015 (after the filing of Appellants' primary brief) the Supreme Court announced *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). *Reed* held that laws like the Pittsburgh Ordinance, make distinctions based on subject matter, function, or purpose are content-based and subject to strict scrutiny, contrary to the District Court's holding, J.A. 25a. The Ordinance here, where "demonstrating" speech is restricted but not such things as asking for directions, 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.

A. The Supreme Court's decision in *Reed*.

In *Reed*, the Supreme Court unanimously struck down an ordinance that placed different kinds of restrictions on outdoor signs according to the content of the signs. 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 2224-2225. *Reed*'s six-justice lead opinion 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.

The Town of Gilbert's restrictions were deemed content-based in *Reed* because they subjected signs to different levels of restriction based on what they said. Ideological signs, which included signs "communicating a message or ideas" and not fitting in another listed category, could be "up to 20 square feet in area and placed in all 'zoning districts' without time limits." *Id*. at 2224 (internal citations omitted). Political signs, too, which included "any 'temporary sign designed to influence the outcome of an election called by a public body,'" had significant leeway: they could be "up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property and 'rights-of-way,'" for "up to 60 days before a primary election and up to 15 days following a general election." *Id*. at 2224-2225 (internal citations omitted). But the

Town disfavored signs with "temporary directional" content, defined as any temporary sign intended to direct people to any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id*. at 2225. Those could be "no larger than six square feet," "no more than four signs [could] be placed on a single property at any time," and signs could be "displayed no more than 12 hours before the . . . event and no more than 1 hour afterward." *Id*.

In striking down this sign code, the Court ruled that the ordinance was impermissibly content-based on its face. First, the Court annunciated 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 third kind of content-based speech law occurs if 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.'" *Id*. All three categories render a law content-based and require the government to satisfy strict scrutiny. *Id*.

The Court noted that even if it deemed the government's *justifications* as being 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 the Court 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 spoken content, it must be subject to strict scrutiny regardless of these permutations.

The Supreme Court ruled that Gilbert's sign code was content-based because "[t]he restrictions in the Sign Code that apply to any given sign depend entirely on the communicative content of the sign." *Id*. at 2227. The sign code subjected temporary directional signs to differential treatment on the basis of "whether a sign conveys the message of directing the public to church or some other 'qualifying event.'" *Id.* But, if signs contain political or ideological speech, they are treated differently. *Id*. "[T]he Church's signs inviting people to attend its worship services

[were] treated differently from signs conveying other types of ideas." *Id*. The fact that the government had innocent justifications and tied the speech to a particular event did not save the law from strict scrutiny. *Id*. at 2231–32.

Reed therefore concluded that the Town's distinction between ideological, political, or directional signs was a content-based restriction. It applied strict scrutiny and struck down the sign code. *Id*. at 2231–33.

B. Pittsburgh's Ordinance is content-based under *Reed*.

Pittsburgh's Ordinance is necessarily content-based under *Reed*. 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 v. Coakley*, 134 S. Ct. 2518, 2526 (2014) ("No person shall knowingly enter or remain" in the 35-foot buffer zone outside of abortion facilities.) Instead, the Ordinance here bans speech for some purposes and topics, but not others. It bans only "congregating, patrolling, picketing, or demonstrating" in the zones. J.A. 4; *see also* J.A. 150a (The Ordinance "shall [be] construe[d] and enforce[d] . . . in a manner that does not permit any person to picket or demonstrate" within the zones.). Just as with the plaintiffs in *McCullen*, Appellants here wish to

individually walk with a person into a zone during for the purpose of engaging in one-on-one counseling, then depart the zone.[1]

But the City bans this 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. 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*."

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 "demonstrative" and "picketing" speech is prohibited, not other kinds of speech. The government cannot know if a conversation in the zone is banned unless it examines the content of the speech to know if it is directional or demonstrative—if the speakers are talking about sports or about whether abortions should occur

[1] Appellants do not seek to "congregate" in the zones, but to enter and speak individually in personal conversations, and offer a leaflet during that conversation. Nor do they wish to "patrol" the zones by intentionally and repeatedly passing back and forth for its own sake. In this respect they do not challenge the "congregating" or "patrolling" components of the Ordinance, to the extent those are understood as regulating behavior and not speech, and would not apply to one-on-one sidewalk counseling and leafleting as described in *McCullen* in any event.

inside that facility. 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.

The government's justifications were also improper because they referenced anti-abortion content. But even if the Court deems the government's motives content-neutral, the Ordinance is plainly content-based on its face. Unlike *McCullen* where *being* in the zone was banned, this Ordinance bans pickets and demonstration, but not other kinds of speech content.

In this way, the sign code struck down in *Reed* has significant parallels to the Ordinance's speech distinctions. It treated ideological speech better than directional speech. Pittsburgh treats demonstrative speech worse than asking for directions. Under *Reed,* this is necessarily a distinction between "communicative content" and is therefore content-based. 135 S. Ct. at 2226. As in *Reed*, "[t]he restrictions in the [Ordinance] that apply to any given [message] depend entirely on the communicative content." *Id.* at 2227. If one's speech is not demonstrating (or picketing, congregating, or patrolling), it is not restricted. Under the Ordinance,

one is free to stand in the buffer zone if they are communicating conversationally with a friend, or asking directions, but cannot do so if they are pro-life and attempting to calmly and personally share their views with women entering the abortion facility. This is an impermissible content-based restriction.

Reed strengthens and extends the argument in Appellants' opening brief that, under *McCullen*, the Ordinance is content-based. *See* Appellants' Br. at 40–42. *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). Law enforcement must rely entirely on the communicative content of speech in order to determine whether or not it constitutes demonstrating.

Here, the District Court relied on this Court's decision in *Brown v. City of Pittsburgh* in holding that the Ordinance is content-neutral. J.A. 16a–17a. But *Reed* controls. And the *Brown* analysis dealt only with the Ordinance's exemption, not the Ordinance's singling out of picketing and demonstrating speech versus speech for other purposes or functions. 586 F.3d 263, 274–75 (3d Cir. 2009). Distinctions based on communicative content, topic, subject matter, purpose, or function can no longer be deemed content-neutral. This case should be reversed and remanded in light of *Reed*.

C. *Reed* further 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 (2000), 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*. *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 (the Ninth Circuit) 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, Ariz.*, 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)).

Here the District Court rejected Appellants' argument that the Ordinance is content-based explicitly because, in the District Court's view, *McCullen* had not undermined *Hill* (or *Brown*) with sufficient specificity: "Nothing in *McCullen* indicates tension with the doctrine as set forth in *Hill*." J.A. 16a. Be that as it may, plenty of things in *Reed* indicate direct tension with *Hill*. *Reed* cites *Hill*'s dissents twice on the issue of the meaning of "content based," and cites *Hill*'s majority not 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. Whatever position this Court takes on *Hill* or *Brown* is ultimately somewhat academic, because without question *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.

Moreover, the Ordinance cannot satisfy strict scrutiny. As discussed in Appellants' opening brief, the Ordinance cannot even satisfy the *intermediate* scrutiny applicable under *McCullen*, wherein the Court said the government cannot restrict speech as such in its opposition to obstruction and violence, unless the government proves it actually tried but failed to prosecute those activities under more narrow laws like FACE, which specifically prohibit obstruction. Appellants' Br. at 18–38. On a motion to dismiss, which is the posture of this appeal, Appellants deserve the benefit of discovery on those facts. The District Court did not apply strict scrutiny, nor did it apply narrow tailoring as set forth in *McCullen*. It basically deemed this Court's holding in *Brown* controlling. Under *Reed* and *McCullen* the dismissal should be reversed and remanded.

II. THE CITY FAILED TO REBUT THE NEED FOR THIS COURT TO APPLY *MCCULLEN*, OR TO SHOW THE ORDINANCE SATISFIES ITS NARROW TAILORING TEST.

The City attempts to argue that *McCullen* does not mandate the invalidation of the Ordinance. However, the City fails to focus on the central inquiry of *McCullen*: whether the Ordinance is narrowly tailored to serve a significant government interest, which is determined by whether the Ordinance restricts substantially more speech than is necessary to further its legitimate interests. 134 S. Ct at 2535 (citing *Ward*, 491 U.S. at 799). The City instead argues that the insignificant factual distinctions between *McCullen* and the Ordinance here at issue

mean that the Ordinance survives constitutional scrutiny, and that Pittsburgh need not show that it has attempted other approaches before enacting a prophylactic speech restriction.

This is not a faithful application of *McCullen*. *McCullen* is not constrained to the minute details of its statute, nor does it claim to be. It sets forth a test for narrow tailoring that each court must apply to any content neutral speech restriction. *McCullen* sets forth principles that courts cannot relegate to abstractions merely because one statute varies from another. Otherwise no Supreme Court case would serve as precedent in any practical sense, since a legislature could make minute changes to a law and avoid the precedent entirely.

A. McCullen's factual distinctions are not significant.

The City attempts to argue that *McCullen* does not mandate invalidation of the Ordinance because of factual differences between the buffer zones in *McCullen* and the Ordinance. But because the law in *McCullen* and the Ordinance in Pittsburgh have ample commonalities, the City must demonstrate under narrow tailoring that it could not prevent violence and obstruction without banning speech. *McCullen* explicitly references the Pittsburgh Ordinance as a "law[] similar to the Act here." 134 S. Ct. at 2537 n.6 (citing Amicus Brief for the State of New York, et al., at 14 n.7, which specifically cites § 623.04; *see* 2013 WL 6228464 (Nov. 22, 2013)). In this respect *McCullen* explained it was concerned with whether any

other state enacted "a law that creates fixed buffer zones around abortion clinics," not about whether such zones have a 30-foot diameter, a 70 foot diameter, or something in between. *Id.* at 2537. In fact, the central difference between the *McCullen* and Pittsburgh zones is not the size, but the fact that the law in *McCullen* banned entering or remaining in zones, while the Ordinance here bans demonstrative speech while allowing directional or other speech. This is a content-based distinction that makes the Ordinance constitutionally *worse* than the law in *McCullen*. *See supra* Section I.

The commonalities between the laws in *McCullen* and Pittsburgh are many, and they show why the Ordinance fails regardless of the difference in detail between them. Both are "fixed buffer zones around abortion clinics." *Id.* Both are laws banning speech in zones around entrances to abortion facilities. Both were passed pursuant to completely identical government interests: to prevent violence and to prevent obstruction of doors and the sidewalk. Both, as alleged in the Complaint, were enacted without the government first showing it tried to ban and prosecute those problems directly, before banning speech, but that the problems persisted despite prosecution. *McCullen*'s narrow tailoring test is keyed to these common traits. For example, "[a]ny such obstruction" complained of by the government "can readily be addressed through existing local ordinances" directly banning obstruction. *Id*. at 2538. This is true regardless of a zone's size.

It is possible that making a zone smaller could affect whether problems, *which remain after diligent prosecution*, can still only be eliminated on the margins by a very small zone. But under *McCullen*, that showing would require actual evidence of prosecution, actual evidence of problems persisting despite prosecution, and actual evidence of the need for that specific zone size to eliminate those remaining problems. It would not, as the City contends, immunize the City from needing to make any of these showings, ostensibly because since the zone is small enough that narrow tailoring does not apply. If the City says it seeks to prevent violence and obstruction, and it chooses to address those problems by a fixed buffer zone banning speech instead of violence and obstruction, the City must demonstrate all the elements of the narrow tailoring test set forth in *McCullen*.

The City argues that the "extreme" size of the buffer zones in *McCullen* makes it so factually different that it compels the opposite result here. While the zones in *McCullen* were 35 feet radius (70 feet diameter), rather than the 15 feet radius (30 feet diameter, plus the width of the doors) mandated by the Ordinance here, *McCullen* did not ever suggest that a smaller zone would not have to satisfy narrow tailoring. The focus of the inquiry in *McCullen* was appropriately whether the zones were narrowly tailored to serve a significant government interest. And the contours of that test also did not depend on size, at least initially, but on the

general notion of banning speech in a misguided attempt to prevent violence and obstruction. That was unjustified in *McCullen*, and the Complaint contends there is no evidence that it is justified here. That is an amply pled claim to defeat a motion to dismiss.

Despite the zones here being smaller than in *McCullen*, the burden on Plaintiffs' speech is significant: it completely bans speech within a 30-foot diameter surrounding abortion facility doors (which are themselves two doors wide). The City correctly points out that the *McCullen* zones closed off a large area to speech. *See* Appellee Br. at 35–38. But the same is true here. As is apparent from the City's own source, the buffer zone outside of Planned Parenthood encompasses the entire sidewalk and further extends into the street and the crosswalk. *See* Appellee Br. at 1; *see also* J.A. 146a. If Plaintiffs are engaging in their conversational activities as they go down the sidewalk, they would have to walk into traffic to avoid the zone. This is not a minimal burden. It is a ban on speech in a 30-foot diameter area around any point of the entryway. This is an area comprising over 350 square feet. *Id. McCullen* itself calls Pittsburgh's Ordinance a "law[] similar to the Act here." *McCullen*, 134 S. Ct. at 2537 n.6. There is no basis for sustaining the City's position that if a zone is under a certain size, *McCullen* need not be applied at all. Nor would it be possible to articulate exactly what that certain size is, since the Supreme Court never suggested that its ruling depended on

the size of the zone. Instead, the Court applied the test due to the fact that there was a zone restricting speech, "similar" to the specific Ordinance in this case. The Complaint properly alleges that the burden on the speech of Appellants is substantial. Therefore, dismissal was inappropriate.

Just as was true in *McCullen*, it is immaterial that Appellants are permitted to engage in various forms of protest *outside* of the buffer zone. The City attempts to argue that, because Plaintiffs can engage in their activities in an area outside of the zone and have successfully dissuaded some women from choosing to undergo an abortion, the Appellants are not meaningfully restricted. *See* Appellee Br. at 41–42 ("[t]here is no ban on Plaintiffs' peaceful speech extending for dozens of feet along the sidewalk" outside the zone). The City argues that "[t]he record demonstrates that [Appellants] have taken advantage of these ample alternatives," by which they refer to the fact that Appellants sidewalk counsel outside the zone. Appellee Br. at 42 (citing J.A. 31). This "misses the point." *See McCullen*, 134 S. Ct. at 2536. It is "no answer to say that [Appellants] can still be seen and heard by women within the buffer zones" while Appellants are standing outside those zones, because Appellants are seeking to converse with women, not to call out to them from several feet away. *Id.* at 2537. The focus of narrow tailoring is not on activities outside of the Ordinance's restrictions, but on the fact that the Ordinance

is an absolute ban on speech within traditional public fora, and any restriction on speech whatsoever is subject to the narrow tailoring analysis.

B. The availability of other laws capable of addressing the City's interests demonstrates that the Ordinance is not narrowly tailored.

The City argues that it should not have to satisfy narrow tailoring at all because this "distracts from the question whether the actual Ordinance substantially burdens the plaintiffs' speech. . . ." *See* Appellee Br. at 39–40. The City seems to conflate Free Exercise jurisprudence with Free Speech jurisprudence by arguing that Appellants' are required to establish that their speech is substantially burdened. This is not the standard. Appellants do not need to establish that their speech is substantially burdened; rather, the City must demonstrate that the Ordinance does not burden substantially more speech than is necessary to further its alleged interests. *See McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799).

The availability of other laws is integral to the narrow tailoring analysis of *McCullen*. *McCullen* sets forth this test, saying narrow tailoring should be applied to "a law that creates fixed buffer zones around abortion clinics," and specifically references Pittsburgh's Ordinance among the few "laws similar to the Act here." 134 S. Ct at 2537 & n.6. *McCullen* insists that the City must account for the

availability of an ample number of other laws to combat violence and obstruction short of banning speech.

The City seems to argue something like the issue of standing, as if Appellants cannot challenge a direct ban on their speech on the public sidewalk unless the ban is as large as in *McCullen*. Neither *McCullen* nor any other case sets forth such a standard. On the contrary, any ban on speech in "traditional public fora" like the public city sidewalk at issue here, must be subject to the appropriate scrutiny standard, which, in this case, is at least the standard set forth in *McCullen*. *See Frisby v. Schultz*, 487 U.S. 474, 480–82 (1988). There are no direct bans of protected speech on public sidewalks that need not be subject to either content-based strict scrutiny or content-neutral narrow tailoring. In *McCullen*, the Supreme Court annunciated the test to apply to content-neutral fixed buffer zones, and how to apply it. The City cannot avoid meeting at least that test in this case.

In this respect, the City also misapplies the *Ward* standard, arguing that the inquiry must first focus on "whether the actual Ordinance substantially burdens the plaintiffs' speech" before turning to the issue of whether other laws would be less restrictive. Appellees' Br. at 39–40 ("In *McCullen*, the Supreme Court" found that the buffer zone law substantially burdened speech "and therefore turned to the question of whether other laws might exist with lesser effects on speech.").

This is a gross mischaracterization. As set forth in *McCullen*, in *any* speech regulation which is content-neutral, the *Ward* narrow tailoring test applies. Such a law must be "narrowly tailored to serve a significant government interest," meaning that it does not "burden substantially more speech than is necessary to further the government's. . . interests." *McCullen*, 134 S. Ct. at 2534–2535 (citing *Ward*, 491 U.S. at 796, 799). There are no "freebies" in a direct governmental regulation of fully protected speech, even if done in a content-neutral manner. Such laws are at least subject to narrow tailoring (and, as discussed above, strict scrutiny when content-based, as is true here under *Reed*).

In analyzing whether the fixed buffer zone in *McCullen* met the *Ward* test, the Court looked to the availability (and the corresponding lack of enforcement) of other laws which could have been successful at serving the Commonwealth's interests in preventing violence and obstruction (the exact same interests the City seeks to serve here). *See McCullen*, 134 S. Ct. at 2537–40. In concluding that there were other laws available to the Commonwealth, the Court then held that the law burdened "substantially" more speech than was necessary, because it was not necessary to regulate speech when other avenues could remedy the issues the Commonwealth sought to alleviate in passing the buffer zone law.

Thus, the "substantiality" of a speech ban does not serve to prevent some speech bans from needing to face constitutional scrutiny at all if they fall below

some unspecified threshold smaller than the ban in *McCullen*. Far from being a "red herring," Appellee Br. at 39, it is a black letter necessity to look at the availability of other laws in determining whether a fixed buffer zone law is narrowly tailored, consistent with *Ward* and *McCullen*.

The availability of other laws which combat the City's alleged interests in preventing violence and obstruction fatally undermine the Ordinance. *McCullen* makes it absolutely clear that if the City desires to serve interests of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," it must first "look to less intrusive means of addressing its concerns" before enacting a ban on speech. 134 S. Ct. at 2538. The Court identifies several other laws and targeted injunctions available to directly prevent obstruction and violence. *Id*. at 2537–39. Moreover, the City must demonstrate that those options would actually fail to achieve the goals. The mere complaint that the City "tried other laws already on the books" is woefully inadequate. *Id.* at 2539. The respondents in *McCullen* failed this test because "they identif[ied] not a single prosecution brought under those laws within" a relevant span of years, nor did they cite a recent targeted injunction." *Id.* The City cannot avoid its duty to prove that "it seriously undertook to address the problem with less intrusive tools." *Id.*

To satisfy the narrow tailoring inquiry required by *McCullen*, "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." *Id.* at 2540. The City has not met this burden, and indeed contends that it need not (perhaps because it knows it cannot).

C. The City's evidence of alleged past violence and obstruction outside of abortion facilities is woefully inadequate.

The Complaint contends that the City cannot point to a sufficient record of violence or obstruction actually occurring recently so as to necessitate the Ordinance. This appeal concerns the motion to dismiss and not the preliminary injunction proceeding that occurred before the District Court. But as occurred in *McCullen*, the City here appears to be incapable of pointing to actual proof of such incidents. Since in *McCullen* such a failure resulted in summary judgment for the plaintiffs before the U.S. Supreme Court, it was improper for the District Court to dismiss the case because Appellants did not even have a plausible chance of succeeding on the same claim here.

The City alleges that, prior to the Ordinance's enactment, "police officers were frequently called to the downtown Planned Parenthood clinic due to confrontations between demonstrators and clinic patients and their companies," and as grounds for this assertion, points to testimony of an official of Planned Parenthood. *See* Appellee Br. at 9–10, 13–14. This is inadequate on several levels. First, it is improper as a basis for upholding a motion to dismiss, since the testimony was not part of the Complaint. Such evidence cannot be used to sustain

dismissal of a complaint unless the District Court converts the motion to a summary judgment posture and provides proper notification. *See West Run Student Housing Associates, LLC v. Huntington Nat. Bank*, 712 F.3d 165, 173 (3d Cir. 2013). In this case, the District Court did not merely deny a preliminary injunction motion, it dismissed Appellants' *McCullen* claim entirely, without giving Appellants an opportunity to show at summary judgment that the City's evidence fails *McCullen*'s narrow tailoring standard. That dismissal was improper if the theory is that *Brown* precludes applying narrow tailoring, since *McCullen* is superseding precedent, and this Court is not free to refrain from applying *McCullen*'s narrow tailoring test to the Ordinance here. And the dismissal was improper if it was issued on the theory that the City satisfied *McCullen*'s narrow tailoring test based on two Planned Parenthood witnesses, since such testimony is outside the Complaint and the motion was not converted to summary judgment.

Second, the testimony itself shows the City failed to meet *McCullen*'s narrow tailoring test. Even if there really were calls to the police complaining about sidewalk counselors, the City would still be required to show a record of not only such calls, but more importantly, subsequent arrests, prosecutions, injunctions, or serious attempts to do the same. The City points to none of this. Instead, it merely relies on generic, self-serving, unverified, and double- or triple-hearsay testimony by two officials of Planned Parenthood, the organization that

benefits from restricting the speech of those who try to persuade women not to go to Planned Parenthood. *Id.*

All of the unspecified obstructive or violent activities the Planned Parenthood witnesses vaguely say occurred are already illegal, or could be, and thus could be prosecuted directly. But the City did not point to public records (or even uncorroborated, self-serving testimony) of any *arrests* or *prosecutions*. Perhaps if some calls exist, public records show the callers were unreliable, or there was no actual illegal behavior that occurred. Perhaps arrests and prosecutions should have occurred *but did not*, which proves under *McCullen* that the City never "*seriously* undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 134 S. Ct. at 2539 (emphasis added). By simply pointing to the generic testimony of two Planned Parenthood officials, the City makes the following language from *McCullen* directly applicable, so that the Court "cannot accept" the City's position: "They identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth 'tried injunctions,' the last injunctions they cite date to the 1990s." *Id*. These flaws in the City's attempt to avoid narrow tailoring demonstrate why *McCullen* insists that courts *actually apply* narrow tailoring, and why dismissal was improper.

"A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id*. at 2540. The City is trying to sustain dismissal of a complaint on the same grounds under which Massachusetts lost its entire case, simply "say[ing] that other approaches have not worked." *Id*. The City cannot on one hand say that there were problems of violence and obstruction outside of the abortion facility, and then on the other refuse to arrest, indict, or prosecute for those same problems.

CONCLUSION

For all of these reasons, the Ordinance violates the First Amendment. Dismissal of Appellants' claims was improper under both *McCullen*'s narrow tailoring standard and *Reed*'s content-based definition. Appellants respectfully request that this Court reverse the District Court's decision and remand for further proceedings.

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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 5706 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I herby certify that on July 27, 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 Reply Brief via United Parcel Service on July 27, 2015.

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