UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY KATHRYN BROWN,	)	
	)	**CIVIL ACTION NO. 06-0393**
Plaintiff,	)	
	)	**Judge Thomas M. Hardiman**
v.	)	
	)	
CITY OF PITTSBURGH, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Through this Motion for Preliminary Injunction, Plaintiff Mary Kathryn Brown (hereinafter "Ms. Brown") challenges Defendants' Ordinance No. 49 (hereinafter "Ordinance") as applied to her peaceful sidewalk counseling and leafleting on Pittsburgh sidewalks. Ms. Brown seeks to enjoin Defendants from enforcing the Ordinance as applied to her expression, which she has engaged in outside abortion facilities without incident for much of her life.

STATEMENT OF FACTS

Ms. Brown has worked as a Registered Nurse in Pittsburgh for twenty-two (22) years. (Brown Aff. ¶ 2.)[1] As an Emergency Department nurse, Ms. Brown saw many women who were seriously injured and dying from abortions in Pittsburgh abortion facilities. (*Id*. ¶¶ 3-4.) About fifteen (15) years ago, Ms. Brown's concern for unborn babies became so great that she vividly remembers awaking from a dream of the sound of babies crying for help. (*Id*. ¶ 5.) These experiences, along with her sincerely held religious beliefs, moved Ms. Brown to engage in peaceful sidewalk counseling and leafleting outside abortion facilities in downtown Pittsburgh and East Liberty. (*Id*. ¶ 6.) As a Christian and member of the Catholic Church, Ms. Brown believes that God called her to go to abortion facilities to offer distraught women the truth about abortion and try to save babies. (*Id*. ¶ 7.)

During the past fifteen (15) years, Ms. Brown has spent hundreds of hours outside abortion facilities – even in the summer heat and freezing temperatures – because of the realization that if she does not go, precious lives will be lost. (*Id*. ¶ 8.) Never blocking access or trespassing, Ms. Brown stands on the sidewalk to the side of the entrance to abortion facilities or walks along side women walking on the sidewalk in the direction of an abortion facility in order to hand them a leaflet and/or have a caring, personal conversation. (*Id*. ¶¶ 9-10.) Ms. Brown

[1] "Brown Aff." refers to the Affidavit of Mary Kathryn Brown in Support of Plaintiff's Motion for Preliminary Injunction filed herewith.

educates women about the physical dangers of abortion, discusses alternatives to abortion, and assists women or provides referrals for assistance with medical, physical, emotional, and spiritual needs. (*Id.* ¶ 11.)

Ms. Brown's ability to engage in peaceful sidewalk counseling and leafleting outside abortion facilities abruptly ended when Defendants enacted the Ordinance in December of 2005 and enforced it against her on or about January 28, 2006. (*Id.* ¶ 14.) The Ordinance completely bans Ms. Brown's speech because it prohibits her from getting close enough to individuals to engage in leafleting and sidewalk counseling on a personal level. (*Id.* ¶ 15.) The result of the Ordinance's fifteen (15) foot buffer zone, eight (8) foot bubble zone, and consent requirement is that Ms. Brown is foreclosed from counseling women and leafleting in opposition to abortion within one hundred (100) feet from any entrance door to abortion facilities. (*Id.* ¶ 41.)

The Ordinance forces Ms. Brown to stand across the street or in front of other businesses on the same side of the street as abortion facilities, where she loses her intended audience of women contemplating abortion. (*Id.* ¶ 16.) Because Pittsburgh abortion facilities are located along busy downtown streets, Ms. Brown cannot be heard at a normal conversational tone when standing at a distance of eight (8) feet from individuals or fifteen (15) feet from any abortion facility entrance due to background noise from buses and other vehicles, commercial activity, and pedestrians in the area. (*Id.* ¶ 26.) The Ordinance forces Ms. Brown to choose between yelling at people from a distance of eight (8) feet or speaking personally for the one or two seconds as people pass her while she stands still to comply with the "no approach" prohibition. (*Id.* ¶ 27.) Yet Ms. Brown does not yell out to individuals or resort to a sound device because she believes that these methods eliminate any interest of her intended audience in her message. (*Id.* ¶ 12.)

Because people rarely walk on the edge of a ten (10) to twelve (12) foot sidewalk, the eight (8) foot bubble zone in the one hundred (100) foot restricted area forces Ms. Brown into the street in order to walk along side and speak with people, which she cannot do for obvious safety reasons. (*Id.* ¶¶ 20-22.) Under the Ordinance, Ms. Brown cannot obtain consent to approach a woman contemplating abortion – even where she is a willing listener – because a boyfriend, family member, friend, or facility escort that is walking side by side with the woman customarily denies consent. (*Id.* ¶¶ 30-40.) Clearly, none of the "methods" permitted by the Ordinance allow Ms. Brown to communicate her message to women contemplating abortion. (*Id.* ¶ 29.)

Defendants are prohibiting Ms. Brown's speech in a traditional public forum where speech protections are at its highest. As applied to Ms. Brown's peaceful speech, the Ordinance violates the First and Fourteenth Amendments to the United States Constitution; Article I, §§ 3, 7, 26 of the Pennsylvania Constitution; and the Pennsylvania Religious Freedom Protection Act, 71 PA. STAT. ANN. §§ 2401-2407. This Court should grant preliminary injunctive relief to prevent further irreparable harm to Ms. Brown's constitutional rights.

CHALLENGED ORDINANCE

Through her Motion for Preliminary Injunction, Ms. Brown challenges the Ordinance as applied to her speech. In relevant part, the Ordinance provides as follows:

§ 623.03 EIGHT-FOOT PERSONAL BUBBLE ZONE

> No person shall knowingly approach another person within eight feet (8') of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet (100') from any entrance door to a hospital and/or medical office/clinic.

§ 623.04 FIFTEEN-FOOT BUFFER ZONE

> No person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending fifteen feet (15') from any entrance to the hospital and or health care facility. This section shall not apply to police and public safety officers, fire

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

ARGUMENT

> This Court should issue injunctive relief because Ms. Brown demonstrates below:
>
> (1) a reasonable probability of success on the merits;[2] (2) irreparable harm would result if the relief sought is not granted; (3) relief would not result in greater harm to the non-moving party; and (4) relief is in the public interest.

Swartzwelder v. McNeilly, 297 F.3d 228, 234 (3d Cir. 2002).

I. MS. BROWN HAS A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

A. The Ordinance Violates the Right to Freedom of Speech and of the Press as Applied to Ms. Brown

Ms. Brown has a reasonable probability of success on the merits because the Ordinance violates the right to freedom of speech and of the press as applied to her. The Ordinance prevents Ms. Brown from engaging in personal, peaceful sidewalk counseling and leafleting in the public way and sidewalk area outside abortion facilities due to the restrictions that it imposes.

1. Expression is Entitled to Protection

Ms. Brown's desired expression of sidewalk counseling and leafleting lies safely within the protections of the First Amendment to the United States Constitution. "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995)). Indeed, the right to advocate, persuade, or

[2] The Third Circuit also uses the phrase "a likelihood of success on the merits" as the first part of the four-part standard for a preliminary injunction. *See, e.g., Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004). Ms. Brown has a "likelihood of success on the merits" for the same reasons that she has a "reasonable probability of success on the merits."

share a religious viewpoint implicates the very reason the First Amendment was adopted. *Thomas v. Collins*, 323 U.S. 516, 537 (1945). "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 at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997); *see also Com., Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340, 343-44 (Pa. 1999) ("Article I, § 7 of the Pennsylvania Constitution provides protection for freedom of expression that is broader than the federal constitutional guarantee"). Clearly, Ms. Brown's speech is entitled to constitutional protection.

2. The Public Way and Sidewalk Areas are Traditional Public Fora

As protected speech, the extent the expression can be validly regulated depends on the location of the speech. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The Ordinance bans speech in the "public way or sidewalk area," so Defendants are suppressing Ms. Brown's speech in a "traditional public forum," where the government's ability to restrict expression is at its lowest.

Traditional public fora are places such as streets, parks, and sidewalks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939)). "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id*. Therefore, this right "must not, in the guise of regulation, be abridged or denied." *Id*.

The public way and sidewalk areas outside abortion facilities where Ms. Brown previously engaged in expression, and where she seeks to engage in future expression, are traditional public fora. (Brown Aff. ¶ 10.) This means that the government may not enforce a

content-based regulation on speech unless it survives strict scrutiny: the regulation must be narrowly tailored to achieve a compelling governmental interest. *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990). "[T]he First and Fourteenth Amendments (do not) afford the same kind of freedom to those who would communicate ideas by *conduct* such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by *pure speech*." *Shuttlesworth*, 394 U.S. at 152 (quoting *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (emphasis added)). Here, Ms. Brown is entitled to great freedom because she seeks to communicate ideas by pure speech of conversation and leafleting. (Brown Aff. ¶¶ 10-11.) In applying the Ordinance to Ms. Brown, Defendants fail every prong of the exacting strict scrutiny test.

3. The Ordinance Fails Strict Scrutiny as Applied to Ms. Brown

a. The Ordinance is Content-Based as Applied to Ms. Brown

In applying the Ordinance to Ms. Brown, Defendants impermissibly discriminated against her based solely on the content of her speech. Defendants prohibited Ms. Brown from engaging in speech opposing abortion in the public way and sidewalk area, but permitted speech opposing pornography and other topics in the same location. (Exh. A, Verified Compl. ¶¶ 57-59, 77-78.)

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). "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Supreme Court has instructed:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its

> content. . . . Necessarily, then, . . . 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. . . . [s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

Defendants' application of the Ordinance to Ms. Brown's speech in the public way and sidewalk area was triggered entirely by content. Officer Alexander excluded Ms. Brown's pro-life, religious speech from the restricted area, yet permitted speech opposing pornography in the same location. (Exh. A, Verified Compl. ¶¶ 57, 59.) Such conduct demonstrates that Defendants impermissibly denied use of the public way and sidewalk area to Ms. Brown because she wished to "express less favored or more controversial views." While the Supreme Court held in *Hill v. Colorado* that a statute restricting ***all*** speech outside abortion facilities was obviously content neutral, here, the application of the Ordinance is dependent upon content. 530 U.S. 703, 708 (2000). Such content-based application of the Ordinance is subject to strict scrutiny.[3]

b. No Compelling Governmental Interest Exists as Applied to Ms. Brown

Defendants have not proffered a reasonable – let alone compelling – governmental interest to ban Ms. Brown from gently speaking with women and leafleting outside abortion facilities. Defendants' stated intent for the Ordinance is to "reduce the risk of violence and provide unobstructed access" to abortion facilities. (Exh. A, Verified Compl., Exh. 1 at 1-2.) Yet Ms. Brown has engaged in peaceful sidewalk counseling and leafleting outside Pittsburgh abortion facilities without incident for over fifteen (15) years. (*Id*. ¶ 1.) She has never been violent, trespassed, or blocked ingress or egress to an abortion facility while engaging in expression there. (*Id*. ¶ 26.) Also, Ms. Brown has never been arrested, charged, or convicted of

[3] While *Hill* solely resolved a facial challenge, the Supreme Court predicted the possibility of "[s]pecial problems that may arise" through application of the statute. 530 U.S. at 730. As discussed herein, the application of Defendants' Ordinance to Ms. Brown's speech at Pittsburgh abortion facilities has given rise to such "special problems."

any criminal offense related to her conduct of sidewalk counseling and other expressive activities outside abortion facilities. (*Id*. ¶ 27.) Defendants are punishing Ms. Brown for misconduct that she has never committed.

To survive strict scrutiny, a content-based regulation must be narrowly tailored to achieve a compelling governmental interest. *Gregoire*, 907 F.2d at 1370. Defendants' stated intent for the Ordinance does not constitute a compelling governmental interest to justify banning Ms. Brown's peaceful, non-obstructive speech in traditional public fora. Ms. Brown does not desire or intend to physically touch or harass those individuals she seeks to counsel, block or impede ingress or egress to any abortion facility, or encroach upon the private property of any abortion facility. (Exh. A, Verified Compl. ¶¶ 51-52.) Censorship of Ms. Brown's speech does nothing to further Defendants' alleged interests. The Ordinance fails strict scrutiny as applied to Ms. Brown because Defendants do not have a compelling governmental interest to prohibit her speech.

Moreover, the Ordinance does not even further *Defendants'* alleged interests. Defendants have failed to specify whether the Ordinance applies only to abortion speech or to all speech. If the Ordinance broadly restricts all speech within a radius of one hundred (100) feet from any entrance door to an abortion facility, the Ordinance bans a vast amount of speech that has nothing to do with abortion and does not even take place along the perimeters of abortion facilities. For example, the restricted areas near abortion facilities encompass local businesses and other establishments, including a restaurant and lounge, a child care facility, a pizza shop, and a sexually oriented business (hereinafter "SOB"). (*Id.* ¶¶ 30, 33, 35-37.) Clearly, Defendants do not have a compelling governmental interest to prohibit Ms. Brown from handing out literature opposing the SOB, or an individual from handing out lunch coupons outside the pizza shop, or a parent from educating a child by saying the "ABCs" on the sidewalk outside day

care. The blatant overbreadth of the Ordinance demonstrates that it is far from "narrowly tailored," as discussed below.

c. The Ordinance is Not Narrowly Tailored to a Compelling Governmental Interest as Applied to Ms. Brown

Defendants prohibit Ms. Brown's peaceful sidewalk counseling and leafleting to allegedly "reduce the risk of violence and provide unobstructed access" to abortion facilities. (Exh. A, Verified Compl., Exh. 1 at 1-2.) Yet Ms. Brown's speech outside abortion facilities has *never* been violent or obstructive. (*Id*. ¶¶ 26-27.) Ms. Brown leaflets and approaches women for a personal, caring conversation to explain the physical dangers of abortion, discuss alternatives to abortion, and assist women or provide referrals for assistance with medical, physical, emotional, and spiritual needs. (*Id*. ¶¶ 21-24.)

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. The government must not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. A complete ban is not narrowly tailored unless "each activity within the prescription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. Here, the Ordinance is not narrowly tailored as applied to Ms. Brown because it bans her speech even though it is not part of the alleged concern that Defendants seek to remedy. Defendants' prohibition of Ms. Brown's peaceful, non-obstructive speech does nothing to advance their stated intent to "reduce the risk of violence and provide unobstructed access" to abortion facilities. (Exh. A, Verified Compl., Exh. 1 at 1-2.) Clearly, Defendants fail their constitutional duty of "precision of regulation." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The Supreme Court found the same flaw in a statute at issue in *United States v. Grace*, 461 U.S. 171 (1983). The *Grace* Court struck down a ban on the display of any "flag, banner, or device" on the Supreme Court grounds and surrounding public sidewalks because it did not

substantially serve the purposes asserted by the government. *Id*. at 183-84. The purpose of the Act was to "provide for the protection of the building and grounds and the persons and property therein, as well as the maintenance of proper order and decorum." *Id*. at 182. The *Grace* Court noted that there was no suggestion that "appellees' activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id*. The Court concluded that the statute had an "insufficient nexus with any of the public interests that may be thought to undergird [the statute]." *Id*. at 181.

Similarly, in this case, the Ordinance has an "insufficient nexus with any of the public interests" asserted by Defendants. *Id*. Quite frankly, there is *no* nexus. Defendants' alleged concerns about obstruction or violence should be addressed by state and local laws that specifically prohibit such conduct regardless of the location – not by imposing a blanket ban on speech outside abortion facilities.

Following *Grace*, the Supreme Court struck down overbroad restrictions on speech in public fora outside abortion facilities. *See Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753 (1994); *Schenck*, 519 U.S. at 357. In *Madsen*, the Supreme Court struck down a provision against "uninvited approaches" in an injunction[4] entered by a Florida state court against pro-life speakers concerning a particular abortion facility. 512 U.S. at 757-58. According to the *Madsen* Court, "[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. at 774. "Absent evidence that the protesters' speech is independently proscribable (*i.e*.,

[4] The standard for evaluating a content-neutral injunction is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

"fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." *Id*. (citation omitted). The Court concluded, "[t]he 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id*.

The constitutional defect that the *Madsen* Court found in the prohibition against "uninvited approaches" is repeated in Defendants' Ordinance that prohibits Ms. Brown from approaching others without obtaining their consent. The consent requirement is especially egregious in this case where Ms. Brown cannot obtain consent to approach a woman contemplating abortion – even where she is a willing listener – because a boyfriend, family member, friend, or facility escort that is walking side by side with the woman customarily denies consent. (Brown Aff. ¶¶ 30-40.) Like the *Madsen* Court recognized, Defendants cannot justify their "prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. at 774. Though *Madsen's* prohibition on approaching others extended to three hundred (300) feet from the abortion facility, rather than one hundred (100) feet as in this case, both restrictions "cannot stand" because they prohibit speech that is not "independently proscribable" or "so infused with violence as to be indistinguishable from a threat of physical harm." *Id*.

While the *Madsen* Court upheld a thirty-six (36) foot buffer zone, the Court considered the fact that "the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic." *Id*. at 759, 770. The Court gave deference to "the state court's familiarity with the facts and the background of the dispute." *Id*. Standing in stark contrast to the conduct in *Madsen* is Ms. Brown's record of

fifteen (15) years of peaceful, non-obstructive speech. (Exh. A, Verified Compl. ¶¶ 1, 26-27.) Clearly, a buffer zone is not justified as applied to Ms. Brown's speech.

In *Schenck*, the Supreme Court struck down floating buffer zones around individuals and vehicles outside abortion facilities because they "burden[ed] more speech than necessary to serve the relevant governmental interests." 519 U.S. at 379. In the Court's view, the "floating buffer zones prevent defendants – except for two sidewalk counselors, while they are tolerated by the targeted individual – from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id*. at 377. Here, Defendants' Ordinance does not even contain an exception for a small number of sidewalk counselors, or even one sidewalk counselor, to enter the restricted area and engage in speech. Clearly, Defendants' Ordinance impermissibly burdens more speech than necessary by prohibiting Ms. Brown from communicating at a normal conversational distance and leafleting outside abortion facilities. (Brown Aff. ¶¶ 15, 26-27.)

While the *Schenck* Court upheld "fixed buffer zones around the doorways, driveways, and driveway entrances" of the abortion facilities, the injunction followed the issuance of a TRO that was much more limited. 519 U.S. at 380. The TRO proved ineffective because "protests returned to their prior intensity" of large-scale blockades, disruption of clinic operations, and even aggressive physical contact with women entering the abortion facilities. *Id*. at 362-63, 365. The *Schenck* Court concluded that the condition on the pro-life speakers' freedom to espouse their message "within the buffer zone is the result of their own previous harassment and intimidation of patients." *Id*. at 385. Thus, the *Schenck* Court's approval of the fixed buffer zone does not make Defendants' buffer zone constitutional as applied to Ms. Brown who has never harassed or intimidated patients. Ms. Brown's speech supports Defendants' intent of furthering medical services because she assists women or otherwise makes referrals for

assistance with medical, physical, emotional, and spiritual needs. (Exh. A, Verified Compl. ¶ 22.) Moreover, the record is deplete of evidence of violence or obstruction as it relates to Ms. Brown that was present in *Madsen*, 512 U.S. at 758-59, *Schenck*, 519 U.S. at 362-63, and *Hill*, 530 U.S. at 709-10.

Defendants' Ordinance ignores the fundamental principle that Ms. Brown does not lose her First Amendment rights at the edge of the public way and sidewalk areas outside abortion facilities. *See, e.g., Grace*, 461 U.S. at 184 ("[v]isitors to this Court do not lose their First Amendment rights at the edge of the sidewalks any more than 'students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" (Marshall, J., concurring in part and dissenting in part) (citation omitted)). "When a citizen is 'in a place where [he] has every right to be,' he cannot be denied the opportunity to express his views simply because the government has not chosen to designate the area as a forum for public discussion." *Id*. Defendants' failure to craft a "narrowly tailored" ordinance should not be tolerated by this Court. Ms. Brown has a right to engage in peaceable expression in the public way and sidewalk area outside abortion facilities.

While Defendants may believe that a "speech-free zone" outside abortion facilities is desirable, the government "may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The government may only "prevent or punish" speech due to a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Id*. Here, Ms. Brown's pro-life, religious expression did not result in a "clear and present danger" of any of these possibilities occurring. Ms. Brown simply seeks to engage in peaceful sidewalk counseling and leafleting outside

abortion facilities. (Exh. A, Verified Compl. ¶¶ 53-55.) Therefore, Defendants' Ordinance is not narrowly tailored to serve a compelling governmental interest as applied to Ms. Brown.

4. The Ordinance Fails as a Time, Place, and Manner Restriction as Applied to Ms. Brown

Defendants' Ordinance not only fails the strict scrutiny test, but also fails as a valid time, place, and manner restriction as applied to Ms. Brown's speech. A restriction on speech in a traditional public forum is constitutional only if it is (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) allows for ample alternative channels for the expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

a. The Ordinance is Not Content Neutral as Applied to Ms. Brown

As discussed above in the context of strict scrutiny, the Ordinance is not content neutral as applied to Ms. Brown's speech. *See* § I(A)(3)(a), *supra*. Defendants prohibited Ms. Brown from engaging in speech opposing abortion in the public way and sidewalk area, but permitted speech opposing pornography and other topics in the same location. (Exh. A, Verified Compl. ¶¶ 57-59, 77-78.) Defendants' selective exclusion of speech opposing abortion is an unconstitutional content-based restriction as applied to Ms. Brown. *See, e.g.*, *Ward*, 491 U.S. at 791.

b. The Ordinance is Not Narrowly Tailored to a Significant Governmental Interest as Applied to Ms. Brown

Defendants have not asserted a compelling, significant, or even reasonable governmental interest to ban Ms. Brown from gently speaking with women and leafleting outside abortion facilities. *See* § I(A)(3)(b), *supra*. Defendants' prohibition of Ms. Brown's peaceful, non-obstructive speech does nothing to advance their stated intent to "reduce the risk of violence and provide unobstructed access" to abortion facilities. (Exh. A, Verified Compl., Exh. 1 at 1-2.) In *Halfpap v. City of West Palm Beach*, the court enjoined the enforcement of a twenty (20) foot

buffer zone because it "burden[ed] substantially more speech than is necessary to serve the interests identified by the City." (Exh. B, No. 05-80900, at 41 (S.D. Fla. Apr. 11, 2006)). The *Halfpap* court explained, "Without any history of disruption of the ability of patients to enter the clinics, there is no factual justification for the claim that the twenty foot buffer zone is narrowly tailored to promote safe access." *Id*. at 43. Similarly, here, the absence of narrow tailoring is highlighted by the fact that there is no evidence in the record to support Defendants' alleged concerns of violence or obstruction of access so as to prohibit Ms. Brown's speech. Clearly, the Ordinance is not narrowly tailored to a significant governmental interest as applied to Ms. Brown. *See* § I(A)(3)(c), *supra*.

c. The Ordinance Does Not Allow for Ample Alternative Channels for the Expression as Applied to Ms. Brown

Defendants foreclose to Ms. Brown ***all*** channels for peaceful sidewalk counseling and leafleting in opposition to abortion within one hundred (100) feet from any entrance door to abortion facilities. (Brown Aff. ¶ 41.) The Ordinance prohibits Ms. Brown from getting close enough to individuals to engage in leafleting and sidewalk counseling on a personal level, including those who line up on the public sidewalk waiting to be admitted to the Allegheny Reproductive Health Center in East Liberty. (Brown Aff. ¶ 15; Exh. A, Verified Compl. ¶ 44.)

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc*., 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). Because of this, "[i]f an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001). Impairment of speech consists of "interference with the content of the message through severance of the speech from a location critical to that content." *Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004). Therefore,

"[t]he question must be whether the regulation prevents the speakers from expressing their views, where that expression depends in whole or part on the chosen location." *Id.*

Here, the application of the Ordinance to Ms. Brown's speech demonstrates its failure to leave open ample alternative channels of communication – as well as its absurdity. Defendants turn the public way and sidewalk area into an obstacle course for free speech. The Ordinance forces Ms. Brown to stand across the street or in front of other businesses on the same side of the street as abortion facilities, where she loses her intended audience of women contemplating abortion. (Brown Aff. ¶ 16.) The eight (8) foot bubble zone forces Ms. Brown into the street in order to walk along side and speak with people, which she cannot do for obvious safety reasons. (*Id*. ¶ 21.) Because the fifteen (15) foot buffer zone extends beyond the sidewalk and into the street at abortion facilities in East Liberty and downtown Pittsburgh, the Ordinance forces Ms. Brown to leave the sidewalk when women approach from the opposite direction, enter the street, and rush around the perimeter of the buffer zone to the opposite side of the sidewalk – just to speak with them before they enter the buffer zone. (*Id*. ¶¶ 23-25.) The Ordinance prevents Ms. Brown from peacefully speaking to women contemplating abortion and, instead, requires her to focus on staying outside the fifteen (15) foot buffer zone and the eight (8) foot bubble zone around a moving individual and dodge other individuals and physical objects such as trees, trash bins, and electric utility boxes in order to avoid citation or arrest. (*Id*. ¶ 28.) As the *Halfpap* court recently recognized, Defendants' Ordinance eliminates Ms. Brown's encounters with individuals and thus does "not leave open ample alternative means of communication." (Exh. B, *Halfpap*, No. 05-80900, at 41.) None of the "methods" permitted by the Ordinance allow Ms. Brown to communicate her message to women contemplating abortion. (Brown Aff. ¶ 29.)

While the Ordinance does not prevent Ms. Brown from speaking outside the restricted areas, "[a]lternative channels of communication" does not mean that an individual may exercise

their constitutional rights somewhere else. *Grayned v. City of Rockford*, 408 U.S. 104, 199 n.40 (1972) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). The First Amendment's broad protections of free speech should not be reduced to calling Ms. Brown's ability to yell at people from a distance of eight (8) feet or speak personally for one or two seconds as people pass by an ample alternative channel for expression. (Brown Aff. ¶¶ 20-21, 27.)

While in *Hill v. Colorado* the Supreme Court upheld a statute that contained a "no approach" provision, the statute did not also contain a buffer zone. 530 U.S. at 729. The Court concluded that the statute left "ample room to communicate a message through speech":

> If the clinics in Colorado resemble those in *Schenck*, demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

Id. at 729-30. Here, Defendants' Ordinance forecloses all channels for Ms. Brown's peaceful sidewalk counseling and leafleting outside abortion facilities. In contrast to *Hill*, the Ordinance's fifteen (15) foot buffer zone prohibits Ms. Brown from standing at the entrance of abortion facilities, without blocking ingress or egress, to peacefully speak to women and leaflet.

From outside the restricted areas, Ms. Brown does not know whether an individual or couple will enter an abortion facility, rather than enter a neighboring business or simply pass by. (Brown Aff. ¶ 18.) Ms. Brown has misjudged on numerous occasions whether an individual or couple intended to enter an abortion facility and thus lost the opportunity to engage in speech with them because they had entered the restricted area. (*Id*. ¶¶ 17, 19.) Because Pittsburgh abortion facilities are located along downtown streets with background noise from buses and other vehicles, commercial activity, and pedestrians, Ms. Brown cannot be heard at a normal conversational tone when standing at a distance of eight (8) feet from individuals or fifteen (15) feet from any abortion facility entrance. (*Id*. ¶ 26.) So even if Defendants' Ordinance contained the "Bubble Zone," but not the "Buffer Zone" as in *Hill*, Ms. Brown would not have ample

alternative channels to engage in counseling on a personal level without resorting to counter-productive methods such as yelling out to individuals or resorting to a sound device. (Exh. A, Verified Compl. ¶ 25.) Therefore, as applied to Ms. Brown's speech, the Ordinance does not constitute a valid time, place and manner regulation.

5. The Ordinance is a Prior Restraint as Applied to Ms. Brown

Defendants' Ordinance bars Ms. Brown's speech in advance of expression and requires her to obtain consent before approaching individuals. (*Id*., Exh. 1 at 2.) Such restrictions are prior restraints that are presumptively unconstitutional as applied to Ms. Brown's speech. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). A prior restraint gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). A prior restraint is unconstitutional where it places "unbridled discretion in the hands of a government official or agency and may result in censorship." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990).

In considering whether an unconstitutional prior restraint was present in *Hill*, the Supreme Court highlighted that under the statute, "[a]bsolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited." 530 U.S. at 734. But such is not the case here. The Ordinance forecloses Ms. Brown's communication channels of sidewalk counseling and leafleting in opposition to abortion. (Exh. A, Verified Compl. ¶¶ 55-57.) The Ordinance improperly denies Ms. Brown the use of the public way and sidewalk in advance of her expression. As a prior restraint, the Ordinance is unconstitutional because it places unbridled discretion in the hands of Pittsburgh officials to censor Ms. Brown's speech. *See, e.g., FW/PBS, Inc.*, 493 U.S. at 225-26.

Moreover, the Ordinance's requirement that Ms. Brown obtain consent to approach others to engage in expression outside abortion facilities is a prior restraint. In *Hill*, the Court

stated that "[p]rivate citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider." *Hill*, 530 U.S. at 734. While the *Hill* Court did not invalidate the statute's consent requirement, the Court noted that the statute "does not authorize the pedestrian to affect any other activity . . . relating to any other person." *Id*. at 735.

Here, however, the Ordinance – as applied to Ms. Brown – improperly authorizes pedestrians to "unilaterally silence a speaker even as to willing listeners." *Id*. at 735 n.43. Under the Ordinance, Ms. Brown cannot obtain consent to approach a woman contemplating abortion – even where she is a willing listener – because a boyfriend, family member, friend, or facility escort that is walking side by side with the woman customarily denies consent. (Brown Aff. ¶¶ 30-38.) Therefore, the Ordinance is an unconstitutional prior restraint as applied to Ms. Brown.

B. The Ordinance Violates the Right to Substantive and Procedural Due Process as Applied to Ms. Brown

Ms. Brown has a reasonable probability of success on the merits because the Ordinance violates the right to substantive and procedural due process as applied to her.

1. The Ordinance is Vague as Applied to Ms. Brown

Defendants' Ordinance broadly prohibits leafleting, displaying a sign, engaging in oral protest, education, counseling, picketing, and demonstrating in the public way and sidewalk areas to allegedly "reduce the risk of violence and provide unobstructed access" to abortion facilities. (Exh. A, Verified Compl., Exh. 1 at 1-2.) Because the restricted areas are located along much-traveled city sidewalks and encompass numerous other local businesses and establishments (*Id*. at ¶¶ 28-38), the Ordinance's terms prohibit much speech that is unrelated to the "intent of council" or even the issue of abortion. Yet, in application, Defendants enforced the Ordinance contrary to its written terms by prohibiting Ms. Brown's speech opposing abortion, but not speech opposing pornography and other topics. (*Id*. ¶¶ 57, 59.)

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. The vagueness doctrine is premised on due process principles requiring fair notice (*i.e.*, pre-violation warning). *Id.* A law or policy is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine applies with special force in the First Amendment context. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Vague laws offend basic constitutional principles because they act to chill the exercise of First Amendment rights. *Grayned*, 408 U.S. at 109. "[U]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (citation omitted).

In this case, Defendants violate Ms. Brown's right of due process because the Ordinance is vague and fails to adequately advise, notify, or inform persons subject to prosecution under the Ordinance, including what subject matter Defendants prohibit. On its face, the Ordinance prohibits all speech – even speech that has nothing to do with Defendants' stated intent for the Ordinance – yet, as applied, Defendants solely prohibited Ms. Brown's speech opposing abortion. In violation of due process, the Ordinance leaves Ms. Brown to "guess at its meaning" and Pittsburgh officials to "differ as to its application." *Connally*, 269 U.S. at 391.

In addition, and just as important, the Ordinance is vague because it fails to provide fair notice and warning to individuals as to what words or conduct constitute "consent" and whether the consent requirement applies only to those intending to enter abortion facilities or whether it applies to all individuals within the restricted area. Under the Ordinance, does the "consent" requirement mean that one must receive verbal affirmation such as, "You may approach." Or, is

the "consent" requirement met if the speaker makes eye contact with an individual, and she appears to be listening or slows down to talk? (Brown Aff. ¶ 39.) Defendants' failure to define "consent" violates the due process requirement that officials give fair notice of what conduct is prohibited. *Grayned*, 408 U.S. at 108. In addition, most of the individuals within the restricted "one hundred (100) feet from any entrance door" to an abortion facility are going to neighboring businesses, not to an abortion facility, or are going to no business at all and are simply passing through. Under the Ordinance, does the "no approach" prohibition apply to all individuals? Or, does it just apply to those who intend to enter an abortion facility? From a distance of one hundred (100) feet up to the entrance door, how is one to know whether an individual intends to go into an abortion facility or whether they are just walking by? If the Ordinance stops all speech, it is overbroad and not related to any governmental interest. Clearly, the Ordinance offends basic principles of due process because it chills the exercise of Ms. Brown's First Amendment rights.

2. The Ordinance Grants Unbridled Discretion as Applied to Ms. Brown

Defendants' vague Ordinance vests Pittsburgh officials with unbridled discretion to restrict Ms. Brown's speech in the public way and sidewalk area outside abortion facilities. Just weeks after the Ordinance came into effect, Defendants arbitrarily enforced the Ordinance against Ms. Brown so as to prohibit speech opposing abortion, but not as to speech opposing pornography. (Exh. A, Verified Compl. ¶ 59.)

The Supreme Court has emphasized that the government cannot "restrict speech in whatever way it likes." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). "[T]he Constitution requires that the [government] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). These neutral criteria

should be "narrow, objective, and definite standards to guide the [governmental] authority," so that such regulations do not result in an "unconstitutional censorship or prior restraint." *Shuttlesworth*, 394 U.S. at 151. "The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations omitted). "Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758.

In this case, Defendants' Ordinance does not contain "narrow, objective, and definite standards" to guide Pittsburgh officials in enforcing the Ordinance. This allows Pittsburgh officials to exercise their judgment and form an opinion as to what the Ordinance prohibits – as demonstrated by Officer Alexander's decision to selectively exclude Ms. Brown's abortion speech. (Exh. A, Verified Compl. ¶¶ 57, 59.) Without this Court's aid, this is just the start of arbitrary enforcement by Defendants. Under the Ordinance, for example, a Pittsburgh official must decide whether to apply the Ordinance to a woman discussing abortion with a friend as they leave a restaurant within the restricted area – even if the abortion facility is not open. (*Id*. ¶¶ 30, 35.) Or whether the Ordinance should be applied to employees of neighboring businesses as they hand out advertisements in the public way and sidewalk area? (*Id*. ¶¶ 30, 33, 35.) Or whether to apply it to protestors opposing the SOB in the restricted area? (*Id*. ¶ 30.) On the face of the Ordinance, the answers to these questions are "yes." But in the context of the stated intent for the Ordinance, the answers to these questions are "no." These questions are not mere conjecture – such situations will likely occur on a frequent basis. Yet the Ordinance leaves these

quandaries to the unbridled discretion of Pittsburgh officials. The Ordinance thus violates the right to due process as applied to Ms. Brown's speech.

C. The Ordinance Violates the Right to Equal Protection as Applied to Ms. Brown

Ms. Brown has a reasonable probability of success on the merits because the Ordinance violates the right to equal protection as applied to her. While prohibiting Ms. Brown's religious, pro-life speech, Defendants permit individuals to engage in speech on other topics in the restricted areas. Defendants also permit individuals to engage in speech favorable to abortion by compelling women to enter the abortion facilities and continue with the abortions. (*Id*. ¶ 102.)

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *Artway v. Att'y Gen. of State of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985)). Equal protection analysis requires strict scrutiny of a legislative classification when the "classification impermissibly interferes with the exercise of a fundamental right." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). At issue here is Ms. Brown's fundamental right to engage in free speech, so strict scrutiny is the proper test. *See Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994). To withstand strict scrutiny, "[i]t is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve that goal." *Turner*, 512 U.S. at 680.

Ms. Brown is similarly situated with other speakers who are allowed to engage in speech in the public way and sidewalk area outside abortion facilities. While excluding Ms. Brown's speech opposing abortion, Defendants permit speech favorable to abortion and speech on other topics in the restricted areas. (Exh. A, Verified Compl. ¶¶ 101-102.) Defendants are treating Ms. Brown differently than similarly situated persons based on the content of her speech without

offering a compelling, or even rational, interest to justify this unequal treatment. For these reasons, the Ordinance violates the right to equal protection as applied to Ms. Brown.

D. The Ordinance Violates the Rights to Free Exercise of Religion and Religious Freedom as Applied to Ms. Brown

Ms. Brown has a reasonable probability of success on the merits because the Ordinance violates the rights to free exercise of religion and religious freedom as applied to her. Through their Ordinance, Defendants prohibit Ms. Brown from exercising her sincerely held religious belief – of more than fifteen (15) years – to engage in peaceful sidewalk counseling and leafleting concerning abortion outside abortion facilities. The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The preliminary inquiry is thus whether a law interferes with the religious obligations of a religious adherent.

"Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 165. The Free Exercise Clause provides heightened protection where:

> [I]f the law is not neutral (*i.e.*, if it discriminates against religiously motivated conduct) or is not generally applicable (*i.e.*, if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.

Id. (citation omitted). Thus, the key Free Exercise question in this case is whether the application of the Ordinance to Ms. Brown was "neutral" and of "general applicability." If not, the law must be justified by a compelling, narrowly-tailored governmental interest. As discussed above in other constitutional contexts, Defendants cannot meet this stringent test.

The Supreme Court made clear in *Lukumi* that it looks beyond whether a law is facially neutral; the Free Exercise Clause also prohibits discriminatory application of a law. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534.

1. Ms. Brown Exercises Her Religion by Sidewalk Counseling and Leafleting

As to the preliminary inquiry, the application of the Ordinance to Ms. Brown clearly restricts core aspects of her free exercise of sincerely-held religious beliefs. As a Christian and member of the Catholic Church, Ms. Brown believes in the sanctity of human life and opposes the practice of abortion, which she believes to be the killing of innocent human life. (Exh. A, Verified Compl. ¶ 16.) It is a central tenet of the Catholic faith and a sincerely held religious belief of Ms. Brown that human life must be respected and protected absolutely from the moment of conception. (*Id*. at ¶ 17.) In addition, it is a central tenet of the Catholic faith and a sincerely held religious belief of Ms. Brown that the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being. (*Id*. at ¶ 18.) Ms. Brown practices and observes her religion by exercising her right of conscience, as well as her right to worship God through the dictate of her conscience to serve God in word and deed, by counseling individuals and engaging in other expression outside abortion facilities. (*Id*. ¶¶ 19-20.) As Ms. Brown was engaged in the exercise of her religious duties, Officer Alexander prohibited Ms. Brown, upon threat of arrest, from practicing her beliefs. (*Id*. ¶¶ 55-57.)

Once an individual has testified that an act is a part of her religious beliefs, the Court's inquiry into this issue must end. *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990). "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id*.

at 887. Just as the centrality and sincerity of Ms. Brown's religious beliefs are evident, the burden on her religious practice is equally evident. Indeed, there are few burdens on a religious practice more substantial than having its exercise subject to citation and threat of arrest by a police officer. As the Court recognized in *Smith*, "the 'exercise of religion' often involves not only belief and profession but the performance (or abstention from) physical acts." *Id*. at 877. Such physical acts include sidewalk counseling and leafleting, which are central to Ms. Brown's religious beliefs. (Exh. A, Verified Compl. ¶¶ 19-20.) Defendants' prohibition of the practice of these beliefs under threat of arrest violates the right to free exercise as applied to Ms. Brown.

2. The Ordinance is Subject to, and Cannot Overcome, Strict Scrutiny as Applied to Ms. Brown

The facts that Ms. Brown's free speech activities were carried out at the command of her religion, and that Officer Alexander's orders under threat of arrest place a substantial burden on her religion, lead directly into the next aspect of the free exercise standard: such official actions must be "neutral and of general applicability." *Lukumi*, 508 U.S. at 531. The Court noted that this inquiry must go beyond the face of the ordinance to address its application:

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.

Id. at 534. In Ms. Brown's case, the Ordinance may seem neutral on its face (and hence overbroad), but the danger lies in its application by Defendants. This is evidenced by the facts that Defendants prohibited Ms. Brown from engaging in speech opposing abortion in the public way and sidewalk area, but permit speech opposing pornography and other topics in the same location. (Exh. A, Verified Compl. ¶¶ 57-59.) Rather than applying the Ordinance to all speech, Defendants determine what speech is restricted by the Ordinance based on the content of the speech. The fact that this suppression occurred in a public forum makes the injury all the more

egregious. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (neutrality and equal treatment required with respect to access of a religious group to generally available government benefits and privileges, such as having access to an otherwise open forum).

This non-neutral, non-general application of the Ordinance can pass constitutional muster only if "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32; *see also Smith*, 494 U.S. at 872. As shown in § I(A)(3)(b), *supra*, there is no compelling governmental interest adequate to justify this type of unequal treatment against Ms. Brown's peaceful, sidewalk counseling and leafleting.

3. Defendants Cannot Satisfy Strict Scrutiny in Burdening Ms. Brown's Exercise of Religion

The Supreme Court set forth the compelling interest test in *Sherbert v. Verner*, 374 U.S. 398 (1963), where the Court stated that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id*. at 406 (citation omitted). Defendants cannot meet strict scrutiny, see § I(A)(3), *supra*, so the Ordinance violates the Free Exercise Clause as applied to Ms. Brown's speech.

E. <u>The Ordinance Violates the Pennsylvania Religious Freedom Protection Act, 71 PA. STAT. ANN. §§ 2401-2407, as Applied to Ms. Brown</u>

Ms. Brown has a reasonable probability of success on the merits because, as applied to her, the Ordinance violates the Pennsylvania Religious Freedom Protection Act, 71 PA. STAT. ANN. §§ 2401-2407. Defendants' Ordinance put an end to Ms. Brown's ability to freely exercise her religion as she has peacefully done for over fifteen (15) years. The Religious Freedom Protection Act (hereinafter "RFPA") provides that an "agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability, unless the agency proves, by a preponderance of the evidence that the burden is (1)

[i]n furtherance of a compelling interest of the agency, and is (2) [t]he least restrictive means of furthering the compelling interest." *Combs v. Homer Ctr. Sch. Dist.*, No. 04CV1599, 2005 WL 3338885 (W.D. Pa. Dec. 8, 2005) (quoting 71 PA. STAT. ANN. § 2404). A local law or ordinance "substantially burdens a person's free exercise of religion" where it does any of the following:

1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
2) Significantly curtails a person's ability to express adherence to the person's religious faith.
3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 PA. STAT. ANN. § 2403. The RFPA applies to "any State or local law or ordinance and the implementation of that law or ordinance." 71 PA. STAT. ANN. § 2406.

In violation of the RFPA, Defendants' Ordinance substantially burdens Ms. Brown's free exercise of religion under each of the Act's four (4) separate prohibitions. The Ordinance significantly constrains or inhibits Ms. Brown's expression of peaceful sidewalk counseling and leafleting, which is mandated by her sincerely held religious beliefs. (Exh. A, Verified Compl. ¶¶ 16-20, 125.) As a Christian and member of the Catholic Church, the Ordinance significantly curtails Ms. Brown's ability to express adherence to her religious faith. (*Id*. at ¶¶ 16-20, 126.) Also, the Ordinance denies Ms. Brown a reasonable opportunity to engage in peaceful sidewalk counseling and leafleting in opposition to abortion, which are fundamental activities to Ms. Brown's religion. (*Id*. ¶¶ 16-20, 127.) The Ordinance compels conduct or expression which violates specific tenets of Ms. Brown's religious faith: human life must be respected and protected absolutely from the moment of conception (*Id*. ¶ 17), and the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being (*Id*. ¶ 18). In addition, the Ordinance forces Ms. Brown to choose between following her religious beliefs under the threat of arrest and following the Ordinance to the neglect of her religious beliefs. (*Id*.)

Not only do Defendants fail to assert a compelling governmental interest to substantially burden Ms. Brown's free exercise rights, s*ee* § I(A)(3)(b), *supra*, but also Defendants fail to show that the Ordinance is the "least restrictive means" to further any asserted interest. While Defendants allegedly seek to "reduce the risk of violence and provide unobstructed access" to abortion facilities, there are many "available, effective alternatives" than to censor the peaceful, non-obstructive speech of Ms. Brown. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Thus the Ordinance violates the RFPA as applied to Ms. Brown's speech.

II. MS. BROWN IS SUFFERING IRREPARABLE HARM

Ms. Brown is entitled to preliminary injunctive relief because she is suffering irreparable harm to her constitutional rights. It is undisputed that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Defendants are banning Ms. Brown from exercising her First Amendment right to stand on a public sidewalk to leaflet and have peaceful conversations with women who are contemplating abortions. As grounds for this great loss, Defendants point to concerns that Ms. Brown has never contributed to or promoted. Ms. Brown will continue to suffer irreparable harm at the hands of Defendants until she is permitted to resume the expressive activities that she has caringly engaged in for over fifteen (15) years.

III. GRANTING RELIEF TO MS. BROWN WOULD NOT HARM DEFENDANTS

This Court should award preliminary injunctive relief to Ms. Brown because granting relief will not harm Defendants who already permit speech concerning other topics in the same public way and sidewalks that Ms. Brown seeks access. (Exh. A, Verified Compl. ¶¶ 59, 77-78.) Defendants have not asserted a compelling interest that could outweigh the free speech rights at stake in this case. Clearly, Defendants will not suffer any legally cognizable harm by being enjoined from continuing their unconstitutional deprivation of Ms. Brown's expressive rights.

IV. GRANTING RELIEF TO MS. BROWN SERVES THE PUBLIC INTEREST

Ms. Brown should be granted preliminary injunctive relief because this will serve the public interest. "The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986). Here, "significant societal interests" are not being served in that women are not receiving information during a difficult time in life. While some individuals may not desire Ms. Brown's information, injunctive relief is still in the "public interest" because "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003).

CONCLUSION

For these reasons, this Court should grant this Motion for Preliminary Injunction.

Submitted this 28th day of June, 2006, by: /s/ Elizabeth A. Murray

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2006, a copy of the foregoing Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent to counsel for Defendants by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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