NO. _____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CITY OF PITTSBURGH; PITTSBURGH CITY COUNCIL; MAYOR OF PITTSBURGH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

KEVIN H. THERIOT
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

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

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

Petitioners are sidewalk counselors who engage in quiet, one-on-one conversations with women visiting an abortion clinic in Pittsburgh, Pennsylvania. A painted semi-circle extends 15 feet from the clinic's door. Under the City's buffer-zone law, the counselors may not speak—or even pray—in this zone because the City views Petitioners' message of hope, personal concern, and assistance as advocacy or demonstration. Yet the City allows others to speak face-to-face in the zone for nearly any other reason.

Because the buffer zone burdens and disfavors the counselors' speech, they sued. Confronting the City's unmistakably invalid ordinance, the Third Circuit unilaterally construed the law to prohibit prayer or generic advocacy but to allow counseling. This exacerbated a 7-3 circuit split over whether federal courts have authority to limit state laws to avoid constitutional flaws. It then held the rewritten law—which Pittsburgh neither wanted nor requested—content neutral; rejected *McCullen*'s narrow-tailoring standard, in conflict with three circuits; and held the burden on speech insignificant or de minimis. After litigating five years, the result is an advisory opinion that neither binds state courts nor prohibits City officials from prosecuting Petitioners in the future, even for counseling. The questions presented are:

1. Whether federal courts have authority to save a state or local law from unconstitutionality by positing a limiting construction that has no state-law basis and contradicts governing authorities' understanding of their own law.

2. Whether Pittsburgh's buffer-zone ordinance violates the Free Speech Clause.

PARTIES TO THE PROCEEDING

Petitioners are Nikki Bruni, Julie Cosentino, Cynthia Rinaldi, Kathleen Laslow, and Patrick Malley, individuals and citizens of Pennsylvania.

Respondents are the City of Pittsburgh, the Pittsburgh City Council, and the Mayor of Pittsburgh, local government entities and officials.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Third Circuit, No. 18-1084, *Bruni* v. *City of Pittsburgh*, judgment entered October 18, 2019.

U.S. Court of Appeals for the Third Circuit, No. 15-1755, *Bruni* v. *City of Pittsburgh*, judgment entered June 1, 2016.

U.S. District Court for the Western District of Pennsylvania, No. 2:14-cv-1197-CB, *Bruni* v. *City of Pittsburgh*, final judgment entered November 16, 2017.

U.S. District Court for the Western District of Pennsylvania, No. 2:14-cv-1197-CB, final judgment entered March 6, 2015.

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The Third Circuit's ruling affirming in part and vacating in part is reported at 824 F.3d 353 (3d Cir. 2016) and reprinted at App.74a–140a.

The district court's decision denying the sidewalk counselors' motion for summary judgment and granting the City's motion for summary judgment is reported at 283 F. Supp. 3d 357 (W.D. Pa. 2017) and reprinted at App.42a–73a.

The Third Circuit's ruling affirming the grant of summary judgment in the City's favor is reported at 941 F.3d 73 (3d Cir. 2019) and reprinted at App.1a–41a.

STATEMENT OF JURISDICTION

On October 18, 2019, the Third Circuit issued its opinion affirming the district court's grant of summary judgment in the City's favor, and on November 27, 2019, the Third Circuit denied rehearing en banc. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On January 27, 2020, Justice Alito extended the time to file a petition for a writ of certiorari to March 26, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions appear at App.191a–195a.

INTRODUCTION

Ever since Pittsburgh enacted a 2005 buffer-zone ordinance to punish pro-life sidewalk counselors and supporters, federal courts have bent over backwards to save it, culminating in the Third Circuit disclaiming the ordinance's undisputed meaning. Because the ordinance did not withstand First Amendment scrutiny, the court "fixed" it by imposing a narrowing construction with no state-law basis that the City never advocated nor accepted. The court then jettisoned the narrow-tailoring requirement that *McCullen* v. *Coakley*, 573 U.S. 464 (2014), requires because even the rewritten ordinance did not satisfy it.

The Third Circuit did all this—exacerbating one circuit conflict and creating a new one—to save a buffer-zone law that is unabashedly content- and viewpoint-based and far from narrowly tailored. The decision continued a tradition associated with *Hill* v. *Colorado*, 530 U.S. 703 (2000), of excusing burdens on pro-life speech. Unless this Court intervenes, lower courts will continue applying different rules to pro-life sidewalk counselors and advocates.

The same constitutional principles that govern elsewhere apply here. To begin, federal courts cannot rewrite state laws. Under "our federalism," the Third Circuit had to accept Pittsburgh's interpretation of an ordinance the City wrote and administers. The Third Circuit's narrowing construction is ineffective because city officials and state courts are not bound by it, and they can still hold sidewalk counselors criminally liable in spite of it. A non-binding, advisory opinion is no basis for rejecting the sidewalk counselors' free-speech challenge.

What's more, Pittsburgh's ordinance targets expression and is not calculated to deal with an actual problem. It is a prophylactic and overbroad restriction on protected speech in traditional public fora that, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *McCullen*, 573 U.S. at 476 (cleaned up). The ordinance violates the Free Speech Clause.

That the City's law primarily impacts pro-life expression is no reason to ignore these realities; it is a reason to address them. And unless this Court intervenes, lower courts will continue to sweep blatant First Amendment violations under the rug. This Court's review is urgently needed to clarify that buffer and bubble zones are not exempt from federalism and free-speech principles.

STATEMENT OF THE CASE

A. The sidewalk counselors' ministry and participation in 40 Days for Life

Petitioners Nikki Bruni, Julie Cosentino, Cynthia Rinaldi, Kathleen Laslow, and Patrick Malley are sidewalk counselors who hold the sincere religious belief that abortion takes the life of a child. They put that conviction into practice outside a Planned Parenthood clinic located at 933 Liberty Avenue in Pittsburgh, Pennsylvania. The sidewalk counselors are not protestors; they offer women entering and leaving the clinic information about abortion alternatives, post-abortion resources, prayer, and personal support. Their message is one of "kindness, love, hope, gentleness, and help." Joint Appendix, *Bruni* v. *City of Pittsburgh* (3d Cir. Apr. 13, 2018) ("JA") at 574a.

The sidewalk counselors assist women in two primary ways. First, they have quiet conversations with and offer help and information to abortion-minded women. They provide receptive women with pamphlets about local pregnancy-center resources, pray with women, and peacefully express a message of caring support. And they take interested women to Catholic Charities to connect them with adoption assistance, financial resources, food, education, and daycare. Second, certain counselors take part in 40 Days for Life, a twice-annual vigil where participants pray outside abortion clinics and sometimes hold signs or wear shirts supporting life.

All of Petitioners' activities are peaceful and respectful. Their message may only be expressed through close, caring, and personal conversations or prayer vigils—not protests. They have never done anything unlawful, nor have they been accused of obstruction or harassment. They engage in lawful speech on public ways and sidewalks where it matters most—the place and time abortions are performed.

B. Pittsburgh's ordinance

The City enacted a buffer-zone ordinance in 2005, years after it ended permanent police details outside abortion clinics. Pittsburgh, Pa., Municipal Code 623.01–623.07; App.6a–7a, 192a–95a. It did so despite no record of arrests or prosecutions, App.32a–33a, 48a, and, on average, less than four police visits per month to Planned Parenthood, App.8a, 48a. City Council hearing testimony chiefly cited a need for police to mediate occasional disputes between pro-life speakers and clinic visitors or abortion escorts, plus unproven claims that pro-life speakers had impeded access to the clinic entrance. App.8a, 48a.

Pittsburgh's laws already barred obstructing traffic, passageways, and entrances. App.48a. Even though the record showed no arrests, targeted injunctions, or other enforcement of existing laws, a City Police Department commander testified that a buffer zone would make it easier to deter pro-life speakers from obstructing patients trying to reach the clinic's door. App.8a, 48a–49a. The City Council passed the ordinance and the Mayor signed it into law with the "intent" to (1) avoid "disputes between those seeking [abortions] and those who would counsel against their actions," (2) secure "unimpeded access to [abortion] services," and (3) promote "a more efficient . . . deployment of [police] services." App.44a. But as the City Council's chair and sponsor of the ordinance explained at the official hearing, the *real* goal was "protecting the listen[er] from unwanted communication." JA402a.

As written, the ordinance restricts speech in two ways. First, it prohibits knowingly approaching within an 8-foot bubble zone of another person—without consent—for purposes of leafletting, displaying a sign, or engaging in oral protest, education, or counseling within a radius of 100 feet from any entrance to a hospital, medical office, or clinic. App.194a. Second, the ordinance forbids knowingly congregating, patrolling, picketing, or demonstrating within a 15-foot buffer zone extending from any entrance to a hospital or health care facility. App.194a. The ordinance exempts public responders and authorized personnel. App.194a. And it penalizes violators with costly fines and even imprisonment. App.194a–95a.

Because the ordinance bars lawful speech on public ways and sidewalks, an earlier First Amendment challenge followed. The Third Circuit ruled in 2009 that Pittsburgh's *combination* of a bubble zone and buffer zone was insufficiently tailored and facially invalid under the First Amendment. *Brown* v. *City of Pittsburgh*, 586 F.3d 263, 283 (3d Cir. 2009). On the record presented, the court ruled that "either zone individually is [facially] lawful." *Id.* at 288. The court based that decision largely on *Hill* v. *Colorado*, 530 U.S. 703 (2000). *Brown*, 586 F.3d at 270–77. Because "the decision of which zone to employ belongs . . . to the City," *id.* at 288, the Third Circuit told the City to "inform the District Court of its preference, and the court should enjoin enforcement of the other zone." *Id.* at 288–89.

After inviting the City's views, the *Brown* district court issued a final order (1) enjoining enforcement of the bubble zone; (2) ordering the City to construe and enforce the ordinance so that no one (including Planned Parenthood's employees and volunteers) may picket or demonstrate via "any action, activity or signage" in the buffer zone; and (3) requiring the City to clearly mark the boundaries of any buffer zone it establishes under the ordinance. App.196a–97a.

In response, the City marked buffer zones outside only two health facilities in all metropolitan Pittsburgh. Coincidentally, they were the City's two abortion clinics. App.72a, 81a, 142a, 165a–66a. Elsewhere, the City chooses not to implement the ordinance's speech restrictions. App.72a–73a.

C. The buffer zone's impact on Petitioners' speech

A yellow semi-circle marks the buffer zone Pittsburgh established outside the Planned Parenthood on Liberty Avenue, extending onto the public sidewalk and street. The City intends and understands its ordinance to forbid leafletting and sidewalk counseling inside the yellow line. App.5a, 19a & n.12, 46a, 82a. It views these activities as demonstrating, and possibly congregating, patrolling, and picketing as well. App.11a, 26a n.18. For over a decade, Pittsburgh has barred pro-life sidewalk counselors from speaking within a 36-foot-long section of public sidewalk and street (at its widest point) outside an abortion clinic—the location where counselors' expression matters most. App.142a–43a.

The City always intended to enforce the ordinance against the counselors, and they avoided the buffer zone for fear of fines and imprisonment. App.19a n.12, 146a. But Pittsburgh allows others to speak freely in the zone because the City does not view their expression as "advocacy or demonstration." Br. for Appellees 37, No. 18-1084 (3d Cir. June 13, 2018) ("Appellees Br."). For instance, "talking about the weather," JA334a, or sports, JA692a–93a, in the zone is allowed. So too is any form of "purely social or random conversations," whatever that means. App.45a. In fact, sidewalk counseling is apparently the *only* type of one-on-one conversation the City bans. App.20a. Planned Parenthood escorts can enter the zone, surround women, talk over the counselors, and deflect women from conversing or accepting literature. JA59a–60a, 195a.

This disadvantages the counselors' speech. While others may speak to women about mundane issues until they walk through the clinic's door—even to speak over the counselors—the counselors must abruptly stop speaking about faith, nonprofit services, and life and death. Such disparate treatment deems the sidewalk counselors—and their message—illegitimate and untrustworthy. And it compresses the very short time counselors have to identify women approaching the clinic and engage in compassionate, personal conversations with them.

The buffer zone also undercuts the counselors' ability to leaflet. Once a woman enters the zone, the counselor must stop short. JA108a; Appellees Br. 22. It also makes quiet, one-one-one conversations difficult. Trying to speak 15-plus feet away, street noise would force counselors to raise their voice. JA114a–15a, 135a–36a. But using a loud voice is contrary to the sidewalk counselors' compassionate message and one-on-one ministry. JA574a.

Though sidewalk counselors may walk through the buffer zone to reach women, counselors may not speak or hold literature until they are back outside the yellow line. JA575a–76a, 587a, 596–97a. Initiating conversations before women enter the zone is hard at best. And if a woman is dropped off by car at the facility's front or uses the crosswalk, she is instantly in the buffer zone. JA588a, 597a.

In short, the buffer zone makes the counselors' conversations and leafletting less frequent and effective. JA574a, 579a, 586a, 591a, 596a. Sometimes a woman stops in the zone and stretches out her hand to receive literature. Yet the City bans counselors from reaching out to meet her at that critical moment.

JA108a; Appellees Br. 22. Some unborn children are saved even with the ordinance in place; there would likely be far more without it. JA576a.

D. Lower-court proceedings

The sidewalk counselors filed suit in 2014 in the U.S. District Court for the Western District of Pennsylvania, alleging that Pittsburgh's buffer zone violated their free speech rights. They requested a declaratory judgment holding the ordinance unconstitutional facially and as applied, plus an injunction barring the City from applying its speech ban to them or similarly situated persons. But the district court denied the counselors' injunctive request and granted the City's motion to dismiss in part. App.141a. It declared the ordinance facially content neutral, distinguished this Court's ruling in *McCullen* v. *Coakley*, 573 U.S. 464 (2014), held that Pittsburgh's ordinance is narrowly tailored, and dismissed the counselors' overbreadth claim. App.152a–78a.

On appeal, the Third Circuit did not decide whether *McCullen* and *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), altered its previous content-neutrality analysis in *Brown*. App.92a–93a. Instead, it assumed that the ordinance was facially content neutral because the sidewalk counselors still "present[ed] a viable free speech challenge." App.93a. "Because of the significant burden on speech that the Ordinance allegedly imposes, the City has the same obligation to use less restrictive alternatives to its buffer zone as the Commonwealth of Massachusetts had with respect to the buffer zone at issue in *McCullen*." App.103a.

The court reversed and remanded for Pittsburgh "to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." App.104a. And on remand, the district court again granted summary judgment to the City. App.42a. First, it distinguished *Reed* and deemed the City's ordinance content neutral under *Hill*. App.58a–62a. Second, the court distinguished *McCullen*, holding that Pittsburgh's buffer zone imposed "only a minimal burden" on the sidewalk counselors' speech. App.64a. "Accordingly, the City has no obligation to demonstrate that it tried—or considered and rejected—any [substantially less-restrictive] alternatives." App.69a. But even if *McCullen*'s narrow-tailoring requirement applied, the court believed that Pittsburgh "implicitly rejected" two alternatives: (1) stationing police at Planned Parenthood and (2) anti-obstruction laws. App.70a. Third, the district court held that, as limited by *Brown* (i.e., allowing enforcement of the buffer but not the bubble zone), the ordinance was not overbroad. App.71a–72a.

Back on appeal, the Third Circuit recognized Pittsburgh's "position that . . . sidewalk counseling falls within the prohibition on 'demonstrating'" within the buffer zone. App.11a. This was "highly problematic" because "the City interprets the word 'demonstrating' to apply to sidewalk counseling but not to peaceful one-on-one communication about other subjects, like sports teams." App.19a–20a. But rather than strike down the ordinance, the Third Circuit evaded the First Amendment violation by ignoring the City's reading of its own law and unilaterally rewriting it instead. App.19a–26a.

Citing constitutional avoidance, the Third Circuit believed it could facially uphold the ordinance by applying "a narrowing construction." App.20a, 22a, 25a. The City did not ask for that; it fully defended its law banning sidewalk counseling in the zone, the ordinance's clear purpose. App.23a–24a & nn.15–16. But referencing dictionary definitions, the court declared that sidewalk counseling is *not* congregating, patrolling, picketing, or demonstrating—no matter how Pittsburgh interprets its own law. App.22a–24a.

The Third Circuit thus rejected Pittsburgh's understanding of an ordinance the City drafted and had sole authority to enforce, substituting its own "reinterpretation." App.21a n.14 (cleaned up). Reviewing its own rewrite, the court held the ordinance facially content neutral. App.25a–26a. A pure ban on congregating, patrolling, picketing, or demonstrating regulated "the manner in which expressive activity occurs, not its content." App.25a. So the court applied intermediate scrutiny and "easily conclude[d]" that its amended ordinance met that standard. App.26a.

When it came to narrow tailoring, the Third Circuit faulted the sidewalk counselors for not anticipating that the court would rewrite the law. In the court's words, the counselors failed to "distinguish between the [o]rdinance as read to include sidewalk counseling [by Pittsburgh] and the [o]rdinance as read to exclude it [by the court]." App.28a. The Third Circuit did not view its revision as placing "a significant burden on speech," App.5a, 29a; instead, the burden was "de minimis," App.92a. On that basis, the court distinguished *McCullen* and held that the City had no burden to prove that it tried or considered less speech-burdening alternatives. App.32a–33a.

Even though the court acknowledged Pittsburgh failed to prove that it "tried or seriously considered arrests, prosecutions, or targeted injunctions" before resorting to a speech ban, such proof was unnecessary. App.32a. The court's redraft was itself "narrowly tailored to serve a significant governmental interest." App.33a (cleaned up). The Third Circuit also rejected the counselors' overbreadth claim, deferring (based on *Hill*) to the city council's judgment. App.33a–35a.

The result was affirmance of the summary-judgment grant. App.35a. This left the sidewalk counselors with no order enjoining Pittsburgh's expansive view of the ordinance—just the Third Circuit's unenforceable view of how the law should be read. The advisory opinion does not bind state courts, and it does not prohibit the City from prosecuting Petitioners in the future.

Judge Hardiman concurred, explaining that "*Reed* weakened precedents cited in the Court's content neutrality analysis," App.36a, especially *Hill*, App.37a–39a. He viewed the panel's decision as "constrain[ing] the City's enforcement discretion" and ensuring the law was construed in an "evenhanded" way. App.40a.

REASONS FOR GRANTING THE WRIT

Casting federalism aside, the Third Circuit joined the First and Ninth Circuits in holding that federal courts may unilaterally declare what a state or local law means to save it from unconstitutionality. But as this Court and the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held, federal courts lack authority to limit state and local laws. Because the Third Circuit's construction is advisory and nonbinding, it does not justify rejecting the sidewalk counselors' free-speech challenge.

Pittsburgh's buffer-zone ordinance is decidedly content- and viewpoint-based. The law's definition of demonstration or advocacy turns on speech's content, the law's predictable and intended operation is shielding women from pro-life messages, and in real-world effect the ordinance squelches speech on one topic—abortion. The law deserves and utterly fails strict scrutiny.

The ordinance also fails *McCullen*'s intermediate-scrutiny test. Because the City failed to enforce its existing laws or consider any less-speech-restrictive alternatives, it is not narrowly tailored. So the Third Circuit cast *McCullen*'s rule aside based on the novel and unjustifiable reason that the ordinance's impact on sidewalk counselors' speech is de minimis, in conflict with rulings by the First, Fourth, and Tenth Circuits. Moreover, Pittsburgh's ordinance is hopelessly overbroad because it bans all public displays of opinion on all subjects on public sidewalks in front of abortion clinics, regardless of whether this speech interferes with clinic access or safety, occurs when the clinic is open or closed, or involves law-abiders or law-breakers. Certiorari is warranted.

I. The Third Circuit's effort to save a ban on pro-life speech via a limiting construction conflicts with this Court's precedent and that of most courts of appeals.

The Third Circuit's rewriting of the City's ordinance flies in the face of "Our Federalism." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999) (cleaned up). Federal courts have no authority to limit state or local laws to save them. The court of appeals' attempt to do so here conflicts with this Court's precedent and exacerbates a lopsided circuit split between the First, Third, and Ninth Circuits on one hand, and the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits on the other.

A. States are independent sovereigns with full power to make and construe their own laws without federal intrusion.

The national government and States are both sovereign. *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977). This federalism is a central feature of the Constitution's design. *Arizona* v. *United States*, 567 U.S. 387, 398 (2012). It entrenches separate spheres of authority that the national and state governments are mutually "bound to respect." *Ibid.* One of federalism's main roles is safeguarding "the integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). The States are fully functional political entities. *Ibid.*; *Printz* v. *United States*, 521 U.S. 898, 919 (1997). And structural limits in the Constitution ensure that each state is "'controlled by itself,'" *Id.* at 922 (quoting Federalist No. 51, at 323), and "independent and autonomous within [its] proper sphere," *id.* at 928.

Unrestricted authority to make their own laws is one of the States' sovereign powers. *Danforth* v. *Minnesota*, 552 U.S. 264, 280 (2008). No federal-government branch may force a state to pass, alter, or rescind a law. *Steffel* v. *Thompson*, 415 U.S. 452, 469–70 (1974). The Constitution does not allow federal officials to "commandeer[ ] the state legislative process," *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018), or that of a state's "political subdivisions," *Printz*, 521 U.S. at 935. Such interference offends the "independence of state governments." *Trainor*, 431 U.S. at 441 (cleaned up).

Federalism thus plays a key role "in governing the relationship between federal courts and state" officials. *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976). State courts are the "ultimate expositors of state law," and federal courts are generally bound by their constructions, *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975), because "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns," *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). In contrast, federal courts' reading of state laws are "obviously not binding on state authorities." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 617 n.16 (1973).

When construing state or local laws, federal courts must proceed with humility and caution because their readings "set no precedent." *Ruhrgas AG*, 526 U.S. at 586. Their orders provide only "a forecast rather than a determination" of what state law is, a "tentative answer" that "may be displaced tomorrow" by state courts—or local officials—absent a binding federal court order that prohibits a broader interpretation of the law. *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 499, 500 (1941).

But the Third Circuit cast federalism aside and rewrote Pittsburgh's ordinance in a way that had no basis in state law and directly contradicted the City's construction and the law's purpose. The Third Circuit's "reinterpretation" of the ordinance, App.21a n.14 (cleaned up), upended the "delicate balance" the Constitution requires, *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 108 (1981). Equally troubling, the Third Circuit took this drastic step to avoid a proper constitutional challenge, cf. *New York* v. *Ferber*, 458 U.S. 747, 767 (1982), giving the sidewalk counselors nothing but an advisory ruling against them stating how state officials *could* (but need not) limit the buffer zone's reach.

B. Contrary to the Third Circuit's ruling, federal courts have no independent authority to narrow state laws.

When analyzing free-speech claims, this Court views federal and state laws differently. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 521 n.26 (1981) (plurality opinion). In a proper case, the Court will consider whether to impose a narrowing construction to save *federal* laws from unconstitutionality. *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971). But federal courts lack the "jurisdiction authoritatively to construe state legislation." *Ibid.*

The Third Circuit erased this distinction. It rejected the counselors' challenge by rewriting the City's ordinance with no basis in state law. App.19a–26a. That may advance the Third Circuit's goal of seeing the counselors "win by losing." Oral Argument at 23:02–04, *Bruni* v. *City of Pittsburgh* (3rd Cir. Feb. 7, 2019), https://bit.ly/2WkdH1M. But it runs headlong into this Court's precedent in at least four ways.

First, in assessing a free-speech challenge, this Court accepts authoritative state officials' construction of state law. *Broadrick*, 413 U.S. at 617. This is true regardless of whether the reading comes from a (1) state court, *Terminiello* v. *City of Chicago*, 337 U.S. 1, 5 (1949); (2) state agency or official, *Broadrick*, 413 U.S. at 617–18; *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154, 165 (1971); or (3) local government body or representative, *Forsyth Cty.* v. *Nationalist Movement*, 505 U.S. 123, 131 & n.9 (1992); *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988). To do otherwise allows the federal government to ignore state officials' view of state law, emasculating "the rightful independence of . . . state governments." *Pullman*, 312 U.S. at 501 (cleaned up).

Here, the Third Circuit admitted that Pittsburgh interpreted its ordinance to ban pro-life sidewalk counseling. App.5a, 19a & n.12, 23a–24a & nn.15–16. (After all, that's the very reason the City enacted the law.) But the court refused to accept that reading even though the City drafted the ordinance and is "entrusted with its administration." *Wadmond*, 401 U.S. at 165. Instead, the Third Circuit decided how best to "properly interpret[ ]" the City's own law, App.26a, based on its own reading, App.22a–26a.

Federalism forbids this. This Court defers to state authorities' construction of state law even if another reading seems more textually valid. *Forsyth*, 505 U.S. at 131 n.9 (what matters is not the text but how it has been "understood . . . by the county"); *Wadmond*, 401 U.S. at 162 (deferring to state authorities "entrusted with the definitive interpretation of the language of the Rule"). Because the City's "interpretation of its [ordinance] controls," the Third Circuit "erred in replacing [the City's] construction . . . with [its] own

notions." *Bd. of Educ. of Rogers* v. *McCluskey*, 458 U.S. 966, 971 (1982) (per curiam). Federal courts cannot "supplant the interpretation of [a local law given by officials] who adopted it and are entrusted with its enforcement." *Wood* v. *Strickland*, 420 U.S. 308, 325 (1975).

Second, this Court has long held that it lacks authority to unilaterally narrow state laws because state courts and officials "are the principal expositors of state law." *Moore* v. *Sims*, 442 U.S. 415, 429 (1979). While state courts may impose limiting constructions to keep state laws within constitutional bounds, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78 (1997), "it is not within [federal courts'] power to construe and narrow" a local law without reference to state-law authority. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972); *accord Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972). This Court generally "leave[s] to state courts the construction of state [and local] legislation." *United States* v. *12,200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973).

The Third Circuit assumed it had freewheeling power to narrow Pittsburgh's ordinance. App.20a–26a. Without relying on a single state authority, it held the City's ordinance does not apply to "the sidewalk counseling in which Plaintiffs engage." App.20a. This was plain error worthy of summary reversal because, as this Court has repeatedly recognized, federal courts "lack jurisdiction authoritatively to construe state legislation." *Gooding*, 405 U.S. at 520; cf. *Bd. of Educ. of Rogers*, 458 U.S. at 971 (summarily reversing a court of appeals' replacing of local officials' reading of their own law with its own).

In many free-speech cases, a narrowing construction of state law might solve a constitutional problem. *Moore*, 442 U.S. at 429–30. But the Third Circuit lacked "power to remedy the defects" of a local law. *Hynes* v. *Mayor & Council of Borough of Oradell*, 425 U.S. 610, 622 (1976); accord *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974) (federal courts "are without authority to cure" the lack "of a narrowing state court interpretation"). Whether or how to draft a constitutional ordinance is for state officials alone to decide. *Freedman* v. *Maryland*, 380 U.S. 51, 60 (1965). The Third Circuit could not remedy Pittsburgh's free-speech violation by inventing "nonbinding limits" on the buffer zone that have no state-law basis and which the City never proposed or accepted. *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

The Third Circuit's resuscitation is also worthless. Absent an injunction or other binding federal-court order, neither the City nor state courts are bound by the Third Circuit's rewriting. *E.g.*, *Hoy* v. *Angelone*, 720 A.2d 745, 750 (Pa. 1998) (the Supreme Court of Pennsylvania will consider federal interpretation of unsettled state law but "it is axiomatic that these decisions are not binding and that [it] is the final arbiter of state law"). Because the Third Circuit's interpretation is unenforceable and "may be discredited [by state officials] at any time," the court rendered five years of litigation meaningless based on an "advisory" opinion. *Moore*, 442 U.S. at 428; accord *Hynes*, 425 U.S. at 622 n.6 (rejecting even limits a city official suggested that did "not purport to be binding on the enforcement authorities").

Third, when a state law's meaning is disputed and a narrowing construction might solve a free-speech problem, this Court does one of three things: (1) forecasts whether the state's highest court would impose a narrowing construction, *Grayned*, 408 U.S. at 110–12; (2) certifies state-law questions to a state's highest court, *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 395–96 (1988); or (3) abstains, *Pullman*, 312 U.S. at 499. None of these pathways is available here because the ordinance's scope is not disputed. In this Court's words, Pittsburgh defended "the ordinance in its broadest terms," *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 (1975), and proclaimed that "under no circumstances" could sidewalk counselors engage in pro-life speech in the buffer zone, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 158 (1969).

Yet the Third Circuit refused to accept the ordinance's undisputed meaning because that meant the law was unconstitutional. App.20a. That approach is backwards. This Court will not even "ask a *state court* if it would care in effect to rewrite a statute." *City of Houston* v. *Hill*, 482 U.S. 451, 471 (1987) (emphasis added). But the Third Circuit purported to redraft the ordinance *itself*. If federal courts could do that, they would have no reason to forecast, certify, or abstain, as this Court has consistently done.

Fourth, this Court considers only narrowing constructions that state officials have "suggested." *Erznoznik*, 422 U.S. at 216 n.15. "[A] federal court must consider any limiting construction that a state court or enforcement agency has proffered," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (cleaned up), at least insofar as state officials' "proposed constructions are [ ]sufficient" to alter the

constitutional analysis, *City of Houston*, 482 U.S. at 469. Then a federal court will accept a state-initiated narrowing construction that is "reasonable and readily apparent," *Boos* v. *Barry*, 485 U.S. 312, 330 (1988); in other words, the state or local law must be "fairly susceptible" to the proffered limitation, *City of Lakewood*, 486 U.S. at 770 n.11.

Yet the Third Circuit created its own narrowing construction. The City did not ask for or want a limited buffer-zone law. But the Third Circuit purported to impose uninvited limits to sidestep clear First Amendment problems. The court lacked power to rewrite the City's law to make "an unconstitutional [ordinance] disappear." *Steffel*, 415 U.S. at 469.

C. The Third Circuit's ruling exacerbated a 7-to-3 circuit conflict that shows the federalism issue is entrenched and recurring and needs prompt resolution.

The Third Circuit admitted that rewriting the ordinance exacerbated a circuit split. App.21a n.14. While recognizing that "other Courts of Appeals take a contrary approach," the Third Circuit believed its own precedent "clear." App.21a–22a n.14. That precedent aligns with the First and Ninth Circuits, which also hold that federal courts can preempt local officials and declare independently what an ordinance means to save it from invalidity. *Cutting* v. *City of Portland*, 802 F.3d 79, 84–85 & n.8 (1st Cir. 2015) ("set[ting] to one side" a city's understanding of its own law if the city's reading would "make [the] law more vulnerable to constitutional challenge"); *Hoye* v. *City of Oakland*, 653 F.3d 835, 848 (9th Cir. 2011) (honoring a city's reading of its own ordinance only to

"*save*" it from First Amendment challenge, "not to condemn" it).

On the opposite side are the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, which do not use their own interpretations but instead rely exclusively on state authorities to say what state law means, even if state construction renders a law unconstitutional. *Va. Soc'y for Human Life, Inc.* v. *Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998) (rejecting a federal narrowing construction that would not "prevent the state from prosecuting" the plaintiff because federal narrowing constructions are "not binding upon state courts"); *Beckerman* v. *City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981) (refusing to "sit as a 'super' state legislature" and "impose [its] own narrowing construction onto [an] ordinance" that was not "offered by the Tupelo city council or the Mississippi courts"); *Eubanks* v. *Wilkinson*, 937 F.2d 1118, 1127–28 (6th Cir. 1991) (refusing to "draft a new limiting condition, thus reframing the [state] statute"); *Kucharek* v. *Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990) (federal narrowing constructions cannot prevent "the state [from] prosecut[ing] people for violating the statute as broadly construed"); *United Food & Commercial Workers Int'l Union* v. *IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988) (federal courts "may not impose their own narrowing construction" on state law) (cleaned up); *Z.J. Gifts D-4, LLC* v. *City of Littleton*, 311 F.3d 1220, 1233–34 (10th Cir. 2002) ("Federal courts lack jurisdiction authoritatively to construe state legislation.") (cleaned up); *Dimmitt* v. *City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) (refusing to "interfere[ ] with the state legislative process" by rewriting a state statute "in the guise" of a narrowing construction).

In other words, seven circuits agree that "[t]he principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance," *Hill* v. *City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986), *affirmed by City of Houston* v. *Hill*, 482 U.S. 451 (1987), and that nonbinding federal narrowing constructions are incapable of protecting First Amendment rights against state-law enforcement, *Va. Soc'y for Human Life*, 152 F.3d at 270; *Kucharek*, 902 F.2d at 517.

The only reason the sidewalk counselors lost their challenge is because they were unfortunate enough to reside in the Third Circuit, one of three circuits that erroneously applies its own version of "constitutional avoidance" to uphold invalid state laws. It cannot be that fundamental rights turn on such geographic bad luck. Only this Court may resolve the entrenched circuit conflict, ensure that federalism is respected, and stop lower courts from offering plaintiffs empty words and no real protection.

II. The Third Circuit's ruling that the ordinance is content neutral and narrowly tailored conflicts with this Court's precedent and other circuits' reading of *McCullen*.

To save Pittsburgh's anti-speech ordinance, the Third Circuit not only had to rewrite it, the court also had to reject *McCullen's* narrow-tailoring standard and adopt instead a new, intermediate-scrutiny test that conflicts with three circuits and aligns with none. This split also warrants review.

A. This Court's precedent establishes that Pittsburgh's ordinance is content- and viewpoint-based, not content neutral.

Under the First and Fourteenth Amendments, states cannot restrict expression based on message, ideas, subject matter, or content. *Reed*, 135 S. Ct. at 2226. Laws that apply "to particular speech because of the topic discussed or the idea or message expressed" are content based, *id.* at 2227, presumptively unconstitutional, and must withstand strict scrutiny to survive, *id.* at 2226. Only an exceptional law that is "narrowly tailored to serve compelling state interests" hits that high mark. *Ibid.*

Pittsburgh's buffer-zone ordinance is blatantly content- and viewpoint-based. The City allows others to speak at the same time (whenever), in the same place (the buffer zone), and in the same manner (quietly face-to-face) as the sidewalk counselors wish to express themselves. Only one difference exists: the *topic* of the sidewalk counselors' speech. The City allows peaceful one-on-one conversations in the zone about the weather, directions, sports, or any discussion it deems—in its discretion—purely social or random. JA334, 692a–93a; App45a. But Pittsburgh bans peaceful one-on-one conversations in the zone it views as "advocacy or demonstration," Appellees Br. 37, including speech about whether an unborn baby is alive or a human being, *id.* at 11, 13, 18–19.

What one says, not *how* one says it, determines whether Pittsburgh labels speech "demonstrating" or not. The City cannot rely on the visible manifestations conventionally associated with demonstrations or picketing to render the ordinance content neutral: sidewalk counseling involves no outward protest or

display of opinion, yet the City bans it anyway. No further evidence is needed that Pittsburgh's buffer zone prohibits speech "based on the message" the sidewalk counselors convey. *Reed*, 135 S. Ct. at 2227.

It makes no difference that (at least on its face) the ordinance bars *all* face-to-face conversations about abortion in the buffer zone. The "exclusion of several views on [the same subject] is just as offensive to the First Amendment as exclusion of only one. . . . The [notion] that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995).

Disfavoring "[i]deological messages," as Pittsburgh's ordinance does, is "a paradigmatic example of content-based discrimination." *Reed*, 135 S. Ct. at 2230. The law requires city officials to examine identical, face-to-face conversations and judge which contain advocacy. That "obvious content-based inquiry does not evade strict scrutiny review simply because" a buffer zone is involved. *Id.* at 2231. Rather, the City's prophylactic ban on advocacy on public ways and sidewalks makes its content-based discrimination worse. *McCullen*, 573 U.S. at 492–93.

On top of that, the ordinance's intended operation shows the law is content- and viewpoint-based. Pittsburgh enacted it to "provide unobstructed access" to abortion clinics, App.192a, even though its laws already barred obstructing traffic, passageways, and entrances. The ordinance's only added value is suppressing ideological messages that may dissuade women from clinics' doors. In fact, the City Council's hearing provided no grounds for an advocacy ban other than the deterrent effect of pro-life speech. The

City Council Chair who sponsored the ordinance bragged it was to prevent "verbal assault." JA402a.

But protecting women from pro-life messages is not content neutral. "[D]isfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2301 (2019) (cleaned up). To the extent this rule is inconsistent with *Hill*, 530 U.S. at 716–18, *Hill* should be distinguished, narrowed, or overruled, *McCullen*, 573 U.S. at 477. Prohibiting speech based on the offense or discomfort of hearers is content based, *id.* at 481; *Erznoznik*, 422 U.S. at 209–12, and it is the City Council's express purpose here, JA402a.

How the City fleshed out the ordinance also shows it is content based. Pittsburgh's painted buffer zones are on public sidewalks and streets located *only* in front of the City's two abortion clinics. App.72a, 81a, 142a, 165a–66a. Pittsburgh's ordinance has no speech-suppressing impact anywhere else. In its real operation and effect, the City's buffer-zone law targets speech on one subject: abortion. Veiled content-based restrictions on speech such as this are just as unlawful as their more blatant counterparts. *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting).

Because Pittsburgh's buffer-zone ordinance is content- and viewpoint-based, whether one examines its conditions, purpose, or real-world effect, the Third Circuit erred in refusing to apply strict scrutiny, as this Court's precedents demand. The City never made a serious effort to meet that standard because it cannot; as explained below, the ordinance fails even intermediate-scrutiny review.

B. To hold the ordinance narrowly tailored, the Third Circuit shifted the burden of proof to the sidewalk counselors, distorting *McCullen* and creating a conflict with three other circuits.

Concerned by lower courts "downplay[ing]" the "serious burdens" that buffer zones "impose" on protected speech, *McCullen* explained why that burden is, in fact, "especially significant." 573 U.S. at 487–89. But the rule *McCullen* applied is the usual intermediate-scrutiny standard for content-neutral time, place, or manner restrictions: they "must be narrowly tailored to serve a significant governmental interest." *Id.* at 486 (cleaned up).

Where *McCullen* broke new ground is clarifying what it means to be narrowly tailored and not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (cleaned up). To meet that benchmark, Pittsburgh must show it did not "too readily forego[ ] options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *Id.* at 490. The narrow-tailoring comparison *McCullen* requires is thus between the burden the City's buffer zone imposes on the sidewalk counselors' speech, and the burden on their speech imposed by "less intrusive means of addressing" the same concerns. *Id.* at 492.

While *McCullen* thus requires "the *government* [i.e., the City to] demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests," *id.* at 495 (emphasis added), the Third Circuit switched the burden of proof by inventing a novel precondition:

the sidewalk counselors must first prove that the ordinance imposed a "significant," App.5a, 29a, 32a, as opposed to "de minimis," App.29a, burden on their speech.

This burden-shifting rule finds no basis in *McCullen*, which does not distinguish between so-called "de minimis" and "significant" burdens on speech. And rightly so, for this Court recognizes "no *de minimis* exception for a speech restriction that lacks sufficient tailoring." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 567 (2001).

The Third Circuit held that Pittsburgh's no-advocacy zone imposed a trivial burden on sidewalk counselors' speech. App.32a–33a. But *McCullen* held that any fixed buffer zone around abortion clinics (1) compromises sidewalk counselors' ability to initiate face-to-face conversations, (2) brands them as untrustworthy or suspicious, (3) compels them to stop speaking or raise their voices and betray their compassionate message, and (4) makes leafletting more difficult. 573 U.S. at 487–90. Each one of these speech burdens is significant; together, the squelching of pro-life counselors' speech is severe.

No other circuit reads *McCullen* this way. To the contrary, the First, Fourth, and Tenth Circuits all hold that once a plaintiff shows that a time, place, or manner restriction impacts protected speech (especially in a public forum), the state must prove that less-restrictive measures would fail to achieve its interests. They employ no burden shifting or significant-burden-on-speech analysis. *United States* v. *Ackell*, 907 F.3d 67, 77 (1st Cir. 2018) ("First Amendment scrutiny" applies under *McCullen* once a "law restricts access to traditional public fora")

(cleaned up); *Rideout* v. *Gardner*, 838 F.3d 65, 74 (1st Cir. 2016) (applying *McCullen*'s narrow-tailoring analysis to "ballot selfies" that burdened political speech outside of a traditional public forum without analyzing the speech-burden's significance); *Reynolds* v. *Middleton*, 779 F.3d 222, 226, 231–32 (4th Cir. 2015) (if "speech [is] restricted," under *McCullen* the government must "*prove* that it actually *tried* other methods to address the problem"); *Verlo* v. *Martinez*, 820 F.3d 1113, 1135–37 (10th Cir. 2016) (*McCullen*'s narrow-tailoring analysis applies to speech restrictions meant to protect access and safety in "public fora," including the plaza outside a state courthouse).

If the sidewalk counselors here were litigating under the law of the First, Fourth, or Tenth Circuits, the outcome would be exactly the opposite. The Third Circuit admitted that Pittsburgh failed to "tr[y] or seriously consider[ ] arrests, prosecutions, or targeted injunctions" under existing laws, App.32a—all significantly less restrictive means of serving the City's ends that have the benefit of targeting wrongdoers specifically, rather than speakers generally. In fact, the record shows no arrests or prosecutions under existing laws *at all*. App.32a–33a, 48a. And if added protections were needed, *McCullen* describes numerous options that would suppress much less speech than Pittsburgh's buffer zone. 573 U.S. at 491–93. Because the City's ordinance is not narrowly tailored under *McCullen*, it fails even intermediate scrutiny. 573 U.S. at 490–92.

Such divergence in outcome by circuit cannot stand. This Court's review is essential to restoring *McCullen*'s legal framework and bringing the Third Circuit into line with other courts of appeals.

III. This Court's precedent establishes that Pittsburgh's ordinance is overbroad and constitutionally invalid.

Pittsburgh's ordinance violates the First Amendment for the added reason that "a substantial number of its applications are unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (cleaned up). The City's ability to restrict speech on public sidewalks and streets is extremely limited. *McCullen*, 573 U.S. at 477. Yet Pittsburgh prophylactically bans "passing out literature or . . . [any form of] advocacy," Appellees Br. 22, including displaying signs, *id*. at 44–45, on traditional public fora outside abortion clinics. And the City does this whether protected expression (1) interferes with access or safety, (2) occurs while the clinic is open or closed, or (3) involves proven law-abiders or law-breakers. In other words, the ordinance punishes pro-life and other speech without regard to whether doing so advances any City interests at all.

Fundamentally, the ordinance is based on the "mistaken premise" that all speakers outside abortion clinics pose serious dangers to access and safety. *Sec'y of State of Md.* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 966 (1984). But the majority of sidewalk counselors, 40-Days-for-Life participants, and others who speak outside abortion clinics engage only in peaceful expression in public places. Prohibiting an entire "universe of expressive activity," like advocacy or demonstration, *Bd. of Airport Comm'rs of City of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987), on public sidewalks is simply "too imprecise," *Joseph H. Munson Co.*, 467 U.S. at 968. Pittsburgh's law forecloses swathes of lawful protests or other displays

of opinion on countless subjects. Any harm caused by individually prosecuting the (hypothetical) rare block or outburst is greatly outweighed by the ordinance's (real-world) serial muting of protected speech. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380 (1977).

The overbreadth of Pittsburgh's law is even more apparent when considering the "constitutional difficulty" of policing the "murky" line between advocacy and non-advocacy speech. *Jews for Jesus*, 482 U.S. at 576. One person's activism is another person's mundane remark, and as explained at length above, the City bars only face-to-face conversations that involve the expression of pro-life views. Giving police such "virtually unrestrained power to arrest and charge persons with a violation of the [ordinance] is unconstitutional because the opportunity for abuse . . . is self-evident." *Ibid.* (cleaned up). Because the law "in all its applications falls short of constitutional demands," it is overbroad and invalid. *Joseph H. Munson Co.*, 467 U.S. at 965 n.13.

Nor would the Third Circuit's proposed narrowing of the ordinance change this result. Even if the City allowed sidewalk counseling and literature distribution in the zone, it would still ban all conventional forms of advocacy—including praying, holding signs, sporting buttons, or wearing symbolic clothing. Cf. *Jews for Jesus*, 482 U.S. at 575. None of these speech activities inherently harms abortion clinic safety and access. If Pittsburgh is concerned with obstruction or battery, it has ample means of deterring those illegal activities without targeting speech. "A painted line on the sidewalk [may be] easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495. To the extent *Hill* indicated a buffer zone might somehow "assist"

speakers in communicating their message, 530 U.S. at 727, it should be distinguished, narrowed, or overruled, *id.* at 791 (Kennedy, J., dissenting).

Relying on *Hill*, the Third Circuit deferred to the City's determination of what restriction on speech is overbroad and rejected the sidewalk counselors' overbreadth claim. App.35a (citing a Third Circuit decision that quotes *Hill*, 530 U.S. at 727, for the proposition that courts must defer to a city council's judgment in the overbreadth context). "But the First Amendment protects against the [g]overnment; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. Impartial courts must decide whether a law is "substantially overbroad, and therefore invalid." *Id.* at 482. They cannot allow the States to construe the Free Speech Clause for them.

IV. This case is an ideal vehicle to resolve conflicts on questions of vital importance that impact free speech nationwide.

This case is an ideal vehicle to address the questions presented for four reasons. First, the circuit conflict on the federalism issue is entrenched. Because the Court has not addressed this issue in quite some time, a minority of courts of appeals have veered off course. Only this Court can restore respect for state sovereignty and ensure that all federal courts defer to states' and cities' authoritative construction of their own laws.

Second, *McCullen* corrected lower courts' misconception that buffer zones impose no meaningful burdens on protected speech. But the Third Circuit construed *McCullen*'s narrow-tailoring rule out of existence and created a conflict with three other

courts of appeals in the process. Unless this Court steps in, *McCullen*'s rule will be a nullity.

Third, under the correct legal standard, this case's outcome is not close. The Third Circuit acknowledged that Pittsburgh's reading of its law was content-based and not narrowly tailored under *McCullen*. App.18a–20a; Oral Argument at 27:50–58, *Bruni* v. *City of Pittsburgh* (3rd Cir. Feb. 7, 2019), https://bit.ly/2WkdH1M (noting the "record here [is] full of content-based interpretations" of the ordinance). That is why it had to change not only what the ordinance forbids but also the intermediate-scrutiny standard so that the City could prevail. App.19a–33a.

Fourth, Pittsburgh's buffer-zone law is an over-broad, prophylactic, and gratuitous ban on protected speech in a traditional public forum that obstructs sidewalk counselors' ministry to women. This Court should so hold and end lower courts' attempts to save the City's unconstitutional law, thwarting sidewalk counselors' First Amendment claims. Given the law's obvious invalidity, Petitioners are entitled to a meaningful ruling that will actually protect their speech and expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN H. THERIOT
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

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

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

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APPENDIX

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1084

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

Appellants

v.

CITY OF PITTSBURGH; PITTSBURGH CITY
COUNCIL; MAYOR PITTSBURGH

On appeal from the United States District Court for
the Western District of Pennsylvania
(W.D. Pa. No. 2-14-cv-01197)
Honorable Cathy Bissoon, U.S. District Judge

Argued: February 6, 2019

Before: HARDIMAN, KRAUSE, and GREENBERG,
Circuit Judges

(Opinion Filed: October 18, 2019)

Kenneth J. Connelly
Elissa M. Graves
Kevin H. Theriot [ARGUED]
Kristen K. Waggoner
David A. Cortman
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260

Lawrence G. Paladin, Jr.
Suite 6C
15 Duff Road
Pittsburgh, PA 15235

Counsel for Plaintiff-Appellants Nikki Bruni, Julie Cosentino, Cynthia Rinaldi, Kathleen Laslow, and Patrick Malley

Julie E. Koren
Matthew S. McHale* [ARGUED]
Yvonne S. Hilton
City of Pittsburgh
Department of Law
414 Grant Street
313 City County Building
Pittsburgh, PA 15219

Counsel for Defendant-Appellees City of Pittsburgh, Pittsburgh City Council, Mayor Pittsburgh

William A. Bonner, I
12 Veterans Square
P.O. Box 259

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* Matthew S. McHale withdrew as counsel on July 3, 2019, prior to the issuance of this opinion.

Media, PA 19063

Counsel for Amicus Curiae Life Legal Defense Foundation

Jamie Cohn
Stephen M. Juris
Janice Mac Avoy
Fried Frank Harris Shriver & Jacobson
One New York Plaza
New York, NY 10004

Susan J. Frietsche
Women's Law Project
Western Pennsylvania Office
428 Forbes Avenue
Suite 1710
Pittsburgh, PA 15219

Counsel for Amici Curiae Women Law Project, National Abortion Federation

Stephen M. Crampton
P.O. Box 4506
Tupelo, MS 38803

Counsel for Amici Curiae Pro Life Action League, Sidewalk Advocates for Life

Steven W. Fitschen
The National Legal Foundation
524 Chesapeake
Chesapeake, VA 23322

Counsel for Amici Curiae Pacific Justice Institute, Concerned Women for America, National Legal Foundation

Matthew D. Staver
Horatio G Mihet
Roger K. Gannam
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854

Counsel for Amici Curiae Colleen Reilly and Becky Biter

Erek L. Barron
Whiteford Taylor & Preston
111 Rockville Pike
Suite 800
Rockville, MD 20850

Counsel for Amicus Curiae International Municipal Lawyers

OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

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

I. Background

A. Factual Background[1]

1. History of the Ordinance

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

In 2002, Planned Parenthood moved to its current location at 933 Liberty Avenue. Although the incidents lessened in severity, contemporaneous police logs and testimony from Sergeant William Hohos indicate that "the pushing," "the shoving," and "the blocking of the doors" continued, and the overtime

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

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

detail, reduced in size, continued to provide a police presence. JA 323a, JA 834a, JA 837a. After Pittsburgh was declared a financially distressed municipality in late 2003, however, fiscal constraints and the need for redeployment of limited police resources required the detail to be discontinued, and police were called to address the continuing incidents at the site on an as-needed basis. In the wake of the detail's discontinuation, the clinic reported an "obvious escalation in the efforts of the protestors," JA 357a, including an increase in "aggressive pushing, shoving and . . . harassing behavior that included shoving literature into people's pockets, hitting them with signs and blocking their entrance into the building," JA 352a.

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

at risk." JA 352a.

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

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

2. The Ordinance

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

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

in relevant part:

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

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

As originally passed, the Ordinance also included an "[e]ight-foot personal bubble zone," extending one hundred feet around clinics, in which people could not be approached without their consent "for the purpose

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[4] Although the Chapter does not define "health care facility," a "[m]edical [o]ffice/[c]linic" is defined as "an establishment providing therapeutic, preventative, corrective, healing and health-building treatment services on an out-patient basis by physicians, dentists and other practitioners." Pitts. Code § 623.02. Penalties for violating the Ordinance range from a $50 fine for a first offense to a thirty-day maximum (and three-day minimum) jail sentence for a fourth violation within five years. *Id*. § 623.05.

of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id*. § 623.03. Following a facial challenge to the Ordinance, we concluded that the Ordinance was content neutral and each zone was constitutionally permissible but the combination of the two zones was not. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 273, 276–81 (3d Cir. 2009). On remand, the City chose to abandon the floating bubble zone and retain only the fixed buffer zone that prohibited "congregat[ing], patrol[ling], picket[ing] or demonstrat[ing]." Pitts. Code § 623.04. That choice was effectuated by the District Court, which permanently enjoined the bubble zone and required the City to demarcate any fixed buffer zone prior to enforcement.[5]

3. Application of the Ordinance and Plaintiffs' Activities

Today, the City has demarcated buffer zones at two locations, both of which provide reproductive health services including abortions. *Bruni I*, 824 F.3d at 358. Plaintiffs Nikki Bruni, Cynthia Rinaldi, Kathleen Laslow, Julie Cosentino, and Patrick Malley engage in the bulk of their anti-abortion activities outside the buffer zone at Planned Parenthood. *See id*. at 359. In contrast to the conduct that gave rise to the Ordinance, Plaintiffs do not physically block patients' ingress or egress or engage in violent tactics. Instead, they engage in what they call "sidewalk counseling," meaning "calm" and "quiet conversations" in which

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[5] The injunction also required that the buffer zone be construed to prohibit "any person" from "picket[ing] or demonstrat[ing]" within the zone, including those allowed to enter the zone pursuant to their official duties. *See Brown*, 586 F.3d at 275.

they "offer assistance and information to" women they believe are considering having an abortion "by providing them pamphlets describing local pregnancy resources, praying, and . . . peacefully express[ing] [a] message of caring support."[6] JA 59a; *see* Appellants' Br. 9. That message, Plaintiffs explain, "can only be communicated through close, caring, and personal conversations, and cannot be conveyed through protests." JA 62a. Nonetheless, the City takes the position that Plaintiffs' sidewalk counseling falls within the prohibition on "demonstrating"—if not "congregating," "patrolling," and "picketing" too, see JA 334a–37a—so while they can engage in sidewalk counseling outside the zone, they cannot once within its bounds. *See Bruni I*, 824 F.3d at 359.

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

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

speech or leafleting.

In addition to "sidewalk counseling," Plaintiff Nikki Bruni is the local leader of a group participating in the "Forty Days for Life" movement, a global anti-abortion campaign.[7] Twice a year, campaign participants, including Plaintiffs, pray outside of abortion clinics from 7 AM to 7 PM continuously for forty days. They do so in shifts, and many participants wear or carry signs. As the leader of the group, Bruni organizes local churches to ensure people are always outside of the clinic so "there's always groups on the sidewalk present during the 40 Days all day every day." JA 141a. Although the exact number of participants is disputed, the record reflects a daily presence of somewhere between ten and forty people.

B. Procedural Background

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

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

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

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

We vacated the District Court's dismissal. *Id.* at 357, 373–74. Taking as true the complaint's allegations that the Ordinance had been enforced against Plaintiffs and had significantly hindered their speech, *id.* at 369, we concluded that the Ordinance "impose[d] a similar burden as that in *McCullen*," *id.* at 368 n.15, so that the City had the same obligation

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

as in *McCullen* to demonstrate "either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *id.* at 370. We thus remanded for factfinding on these issues, as well as a determination about "the proper scope of the Ordinance." *Id.* at 357, 374. Notwithstanding our earlier holding as to content neutrality in *Brown*, 586 F.3d at 273, 275, 277, we also directed the District Court to consider whether the Ordinance should still be considered content neutral in light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court's most recent pronouncement on the dividing line between content-neutral and content-based restrictions. *Bruni I*, 824 F.3d at 365 n.14.

On remand, the District Court accepted the City's contention that the Ordinance covered Plaintiffs' sidewalk counseling as a form of demonstrating and held that the Ordinance was content neutral, even under *Reed*. *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 361, 367–68 (W.D. Pa. 2017). It also distinguished the Ordinance from the statute in *McCullen* as creating a smaller buffer zone and allowing Plaintiffs to reach their audience through sidewalk counseling despite the buffer zone and therefore concluded that the Ordinance imposed "only a minimal burden on Plaintiffs' speech." *Id.* at 369–71. Accordingly, it held that the City "ha[d] no obligation to demonstrate that it tried—or considered and rejected"—the alternatives identified in *McCullen*, such as arrests or targeted injunctions, and even if the City did have such an obligation, it had been satisfied. *Id.* at 371–72. The Court therefore granted the City's motion for summary judgment. *Id.* at 373. This appeal followed.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review a district court's grant or denial of summary judgment de novo, *see EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 448 (3d Cir. 2015), and may affirm on any basis supported by the record, *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009). Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the context of a First Amendment claim, we "examine independently the facts in the record and 'draw our own inferences' from them." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002) (quoting C*hrist's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir. 1998)). Like the District Court, however, we review the facts in the light most favorable to the nonmoving party. *See Hugh*, 418 F.3d at 267.

III. Discussion

On appeal, Plaintiffs argue that the Ordinance violates the Free Speech and Free Press Clauses[9] of the First Amendment for three reasons: first, the Ordinance is content based and therefore subject to strict scrutiny; second, even if it is content neutral, the Ordinance is not narrowly tailored and thus does not survive intermediate scrutiny; and third, the

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

Ordinance is overbroad. After providing an overview of the general framework that guides our analysis, we address each of these arguments.

A. General Framework

Plaintiffs allege that the Ordinance is unconstitutional on its face. *See Bruni I*, 824 F.3d at 362. A facial challenge "seeks to vindicate not only [a plaintiff's] own rights," as in an as-applied challenge, but also "those of others who may . . . be adversely impacted by the statute in question." *Id.* (quoting *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 623 (3d Cir. 2013)). Although facial challenges in the First Amendment context are more forgiving than those in other contexts, *see United States v. Salerno*, 481 U.S. 739, 745 (1987), "all agree that a facial challenge [under the First Amendment] must fail where the statute has a plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted).

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

Here, the relevant test is that governing free speech claims. The government's ability to restrict speech in a traditional public forum, such as a

sidewalk, is "very limited." *McCullen*, 573 U.S. at 477 (citation omitted). That is because traditional public fora "are areas that have historically been open to the public for speech activities." *Id.* at 476. In such fora, the government may not restrict speech based on its "communicative content," *Bruni I*, 824 F.3d at 364 (quoting *Reed*, 135 S. Ct. at 2226)—that is, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *id.* at 363 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

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

The level of scrutiny a court applies to a restriction on speech depends on whether it is content based or content neutral. If the restriction is content based, it is subject to strict scrutiny and is therefore "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see McCullen*, 573 U.S. at 478. If a restriction is content neutral, "we apply intermediate scrutiny and ask whether it is 'narrowly tailored to serve a significant governmental interest.'" *Bruni I*, 824 F.3d at 363–64 (quoting *Madsen v. Women's*

Health Ctr., Inc., 512 U.S. 753, 764 (1994)). The threshold question, therefore, is whether the restriction here is content based or content neutral.[10]

B. Content Neutrality

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

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

[11] Plaintiffs make additional arguments in passing, but they are not persuasive. First, Plaintiffs contend that the City's purpose in adopting the Ordinance was to "target anti-abortion content" because the City Council's discussion about the Ordinance "centered entirely on abortion and the speech outside of abortion facilities in Pittsburgh." Appellants' Br. 40–41. But the Supreme Court explicitly rejected this argument in *McCullen*. *See* 573 U.S. at 481–82 ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion))). Second, Plaintiffs argue that the Ordinance is content based as applied because it is enforced only outside of reproductive health facilities and therefore affects only abortion-related speech. Plaintiffs did not make this argument at summary judgment below, and it is therefore forfeited. *See Keenan v. City of Philadelphia*, 983 F.2d 459, 471 (3d Cir. 1992). In any event, "a facially neutral law does not become content based simply because it may disproportionally affect speech on certain topics." *McCullen*, 573 U.S. at 480. *Reed*, decided one year after *McCullen*, does not speak to these aspects of *McCullen*'s analysis.

disagree.

In *Reed*, the Supreme Court considered the constitutionality of an ordinance that regulated the manner of display of outdoor signs depending on their subject matter. 134 S. Ct. at 2224–25. For example, the ordinance allowed "Political Signs" to be bigger in size and remain posted longer than those it defined as "Temporary Directional Signs." *Id*. at 2224–25, 2227. The Court held that the regulation was content based because the restrictions applied differently "depend[ing] entirely on the communicative content of the sign[s]." *Id*. at 2227. As relevant here, the Court noted that whereas "[s]ome facial distinctions . . . are obvious," such as "defining regulated speech by particular subject matter," others are more "subtle," such as "defining regulated speech by its function or purpose." *Id*.

The thrust of Plaintiffs' argument is that the Ordinance is content based because the City interprets the word "demonstrating" to apply to sidewalk counseling but not to peaceful one-on-one communication about other subjects, like sports teams, and, as a result, law enforcement must examine the content of any speech to determine if it is prohibited. However, despite the assumptions of both parties,[12]

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[12] Although Plaintiffs contend that the City "enforces" the Ordinance "to suppress [their] leafletting and sidewalk conversations" within the buffer zone, Appellants' Br. 17, the record does not reflect any prosecution, arrest, or even citation. Instead, it reflects that, except for isolated instances in which police were called to Planned Parenthood but took no action, Plaintiffs avoided the buffer zone based on an assumption, shared by the City, about the scope of the Ordinance. The realistic threat of the City's enforcement is sufficient for purposes of Plaintiffs' standing. *See Susan B. Anthony List v.*

nothing in the plain language of the Ordinance supports a construction that prohibits peaceful one-on-one conversations *on any topic* or conducted *for any purpose* at a normal conversational volume or distance. In short, the Ordinance as written does not prohibit the sidewalk counseling in which Plaintiffs seek to engage within the zone.

No doubt, if the Ordinance by its terms did prohibit one-on-one conversations about abortion but not about other subjects within the zone, it would be highly problematic, *see Reed*, 135 S. Ct. at 2230, particularly where, as here, the speech alleged to be prohibited occurs on a public sidewalk and constitutes one-on-one "normal conversation and leafletting," *McCullen*, 573 U.S. at 488—"core political speech entitled to the maximum protection afforded by the First Amendment," *Bruni I*, 824 F.3d at 357. But under the doctrine of constitutional avoidance, "[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."[13]

Driehaus, 573 U.S. 149, 158 (2014). As we explain below, however, it does not preclude us under the doctrine of constitutional avoidance from adopting a narrowing construction of the Ordinance.

[13] As we said in *Brown*, "[t]his principle of interpretation is consistent with Pennsylvania law." 586 F.3d at 274 n.13 (citing *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 827 (Pa. 1974); and *Dole v. City of Philadelphia*, 11 A.2d 163, 168–69 (Pa. 1940)). And this is a particularly compelling case in which to apply the doctrine given the constitutional concerns inherent in restricting this kind of speech. As the Court explained in *McCullen*, "'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" 573 U.S. at 488 (quoting *Meyer v. Grant*, 486 U.S.

Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.").

Of course, we may not "rewrite a . . . law to conform it to constitutional requirements," *United States v. Stevens*, 559 U.S. 460, 481 (2010) (citation omitted), but, as we have recognized on many occasions, "[i]n the absence of a limiting construction from a state authority, we must 'presume any narrowing construction or practice to which the law is fairly susceptible.'"[14] *Brown*, 586 F.3d at 274 (quoting

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414, 424 (1988)). Indeed, "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment." *Id*. at 489 (quoting *Schenck*, 519 U.S. at 377).

[14] That is not to say that the City's interpretation of the Ordinance is irrelevant—it is a consideration in a court's determination of whether to adopt a limiting construction. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *see also Ward*, 491 U.S. at 795–96. But the City's interpretation has not been adopted by any Pennsylvania court, and where no state court has weighed in and the Ordinance is readily susceptible to a "reinterpretation" consistent with the Ordinance's text, the City's position is not dispositive. *Free Speech Coal., Inc. v. Attorney Gen. of the U.S.*, 677 F.3d 519, 539 (3d Cir. 2012); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215–16, 215 n.10 (3d Cir. 2001); *see also U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (stating, outside of the constitutional avoidance context, that litigants cannot "extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles" by agreeing on the proper construction of the law); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) ("[W]e are not required to . . . adopt an

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 n.11 (1988)); *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 n.10 (3d Cir. 2001) (explaining that where a state court has not authoritatively construed the terms of a stated policy, "we are . . . required to give it a reasonable narrowing construction if necessary to save it from unconstitutionality"); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) ("To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.").

Here, the Ordinance is readily susceptible to a narrowing construction. The text of the Ordinance says nothing about leafletting or peaceful one-on-one conversations, let alone on a particular topic or for a particular purpose. And, to put a fine point on it, the floating bubble zone, which was enjoined years ago, did prohibit "passing a leaflet," "educating," or "counseling." Pitts. Code § 623.03. Those are *not* the activities that remain prohibited in the zone, and "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, at 194 (6th rev. ed. 2000)).

The Ordinance prohibits four—and only four—

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interpretation precluded by the plain language of the ordinance." (citation omitted)). While other Courts of Appeals take a contrary approach, *see United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988); *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986), our precedent is clear, *see Free Speech Coal., Inc.*, 677 F.3d at 539; *Brown*, 586 F.3d at 274; *Saxe*, 240 F.3d at 215–16, 215 n.10.

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

To "congregate" means "to collect into a group or crowd." *Congregate*, Merriam-Webster's Collegiate Dictionary 262 (11th ed. 2005) [hereinafter Merriam-Webster's]; *see also Congregate*, The American Heritage Dictionary of the English Language 388 (4th ed. 2006) [hereinafter American Heritage] (defining "congregate" as "bring or come together in a group, crowd, or assembly"). To "patrol" is "to carry out a patrol," defined in turn as "the action of traversing a district or beat or of going the rounds along a chain of guards for observation or the maintenance of security," *Patrol*, Merriam-Webster's 909, and "[t]he act of moving about an area especially by an authorized and trained person . . . for purposes of observation, inspection, or security," *Patrol*, American Heritage 1290. To "picket" is to "serve as a picket," defined as "a person posted for a demonstration or protest." *Picket*, Merriam-Webster's 937; *see also Picket*, American Heritage 1327 (defining "picket" as "to post as a picket" where "picket" is defined as "[a] person or group of persons present

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

outside a building to protest"). And to "demonstrate" is defined as "to make a demonstration," which is defined in turn as "an outward expression or display" and "a public display of group feelings toward a person or cause." *Demonstrate*, Merriam-Webster's 332; *see also Demonstrate*, American Heritage 484 (defining "demonstrate" as "[t]o participate in a public display of opinion").

Plaintiffs' sidewalk counseling does not meet any of these definitions. While the Supreme Court has noted that a grouping of three or more people may constitute "congregat[ing]," *see Boos v. Barry*, 485 U.S. 312, 316–17 (1988), approaching someone *individually* to engage in a *one-on-one* conversation no more constitutes "congregat[ing]" than walking alongside another person constitutes "patrol[ling]." And while signs and raised voices may constitute "picket[ing]" or "demonstrat[ing]," speaking to someone at a normal conversational volume and distance surely does not. Simply calling peaceful one-on-one conversations "demonstrating" or "picketing" does not make it so when the plain meaning of those terms does not encompass that speech.[16]

Moreover, the activities that the Ordinance does prohibit render it content neutral under binding

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

Supreme Court precedent. No doubt due to the easily identifiable nature and visibility of "congregat[ing], patrol[ling], picket[ing] or demonstrat[ing]," Pitts. Code § 623.04, the Court has repeatedly considered regulation of those activities to be based on the manner in which expressive activity occurs, not its content, and held such regulation content neutral. *See Madsen*, 512 U.S. at 759, 763–64 (addressing the precise language at issue here, "congregating, picketing, patrolling, [and] demonstrating," and concluding that the injunction prohibiting those activities was content neutral); *see also Snyder v. Phelps*, 562 U.S. 443, 456 (2011); *Hill*, 530 U.S. at 721; *Schenck*, 519 U.S. at 383–85; *United States v. Grace*, 461 U.S. 171, 181–82 (1983).[17] Nor does *Reed* alter that conclusion. *See Reed*, 135 S. Ct. at 2228–29.

In short, the doctrine of constitutional avoidance counsels that we impose a limiting construction where, as here, a statute has not been construed by a state court and is not only susceptible to a narrowing construction but also demands that construction on

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

its face. *See Am. Booksellers*, 484 U.S. at 397; *Brown*, 586 F.3d at 274; *Saxe*, 240 F.3d at 215 n.10. Because the Ordinance, as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations—there is no need for law enforcement "to examine the content of the message . . . to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (citation omitted). The Ordinance so read is thus content neutral and subject to intermediate scrutiny.

C. Application of Intermediate Scrutiny

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

As Plaintiffs acknowledge, the interests that the

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

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

To be narrowly tailored, a regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests."

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[19] To the extent Plaintiffs argue that the City's stated interests were not substantiated on remand, the record—including reports of violent incidents, obstruction of patients' ingress and egress, and aggressive confrontations—establishes otherwise. *See supra* Section I.A.1. Plaintiffs' additional argument that there has been no obstructive conduct preventing access to the clinic's entrance in recent years and, therefore, that the Ordinance is no longer necessary is also belied by the record. For starters, there is evidence in the record to the contrary. For example, a clinic escort declared in 2014 that she was "aware of incidents at [Planned Parenthood] in which escorts were pushed by a protester and where protesters placed their hands on patients and thrust their leaflets inside patients' coat pockets or handbags." JA 709a–10a. More importantly, the fact that an otherwise constitutional restriction on speech is successful in serving the interests for which it was intended is hardly a reason to strike it down.

McCullen, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799). At the same time, it "'need not be the least restrictive or least intrusive means of' serving the government's interest," *id*. (quoting *Ward*, 491 U.S. at 798), and we "afford[ ] some deference to a municipality's judgment in adopting a content-neutral restriction on speech," *Bruni I*, 824 F.3d at 370.

In arguing that the restriction on speech here is not narrowly tailored, Plaintiffs do not distinguish between the Ordinance as read to include sidewalk counseling and the Ordinance as read to exclude it. Rather, quoting *Bruni I*, they contend we "already made clear that 'the City has the same obligation to use less restrictive alternatives to its buffer zone as . . . Massachusetts had with respect to the buffer zone at issue in *McCullen*.'" Appellants' Br. 25 (quoting *Bruni I*, 824 F.3d at 369). So, say Plaintiffs, just as in *McCullen*, the City had to demonstrate on remand that "substantially less-restrictive alternatives," including arrests, prosecutions, and injunctions, "were tried and failed, or . . . were closely examined and ruled out for good reason." *Bruni I*, 824 F.3d at 370. Because the City here concededly failed to make a showing of that magnitude, Plaintiffs contend the Ordinance necessarily fails intermediate scrutiny.

Plaintiffs mistake the import of *Bruni I* in two respects. First, in reviewing the District Court's dismissal of Plaintiffs' complaint, we did not conclusively determine that the City "ha[d] the same obligation to use less restrictive alternatives" as in *McCullen*. *Bruni I*, 824 F.3d at 369. As appropriate at the pleading stage, we "accept[ed] all [of Plaintiffs'] factual allegations as true," *id*. at 360 (citation omitted), and held that "[b]ecause of the significant burden on speech that the Ordinance *allegedly*

imposes, the City ha[d] the same obligation to use," *id*. at 369 (emphasis added), or show that it "seriously considered, substantially less restrictive alternatives," *id*. at 357, as in *McCullen*. On that basis, we remanded for a determination of the proper scope of the Ordinance, the actual burden on Plaintiffs' speech, and a means–ends analysis "by the standard that *McCullen* now requires." *Id*. at 375.

Second, to the extent Plaintiffs' argument is that *McCullen* imposes on a municipality "the same obligation" as on Massachusetts—even in the absence of a "significant burden on speech," *id*. at 369—they are mistaken. As we recognized in *Bruni I*, where the burden on speech is de minimis, a regulation may "be viewed as narrowly tailored, even at the pleading stage," *id*. at 372 n.20, and *McCullen* and *Bruni I* both observed that where there is only "a slight burden on speech, any challengers would struggle to show that 'alternative measures [would] burden *substantially* less speech,'" *id*. (alteration in original) (quoting *McCullen*, 573 U.S. at 495). In short, while *McCullen* and *Bruni I* made clear that a "rigorous and fact-intensive" inquiry will be required where a restriction imposes a significant burden on speech, *Bruni I*, 824 F.3d at 372, they also made clear (and logic dictates) that a less demanding inquiry is called for where the burden on speech is not significant—whether due to a restriction's scope, the size of the speech-free zone, or some combination of the two.[20]

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[20] In *Bruni I*, we explained that when dealing with core speech, such as sidewalk counseling, whether a restriction is less burdensome in "degree"—meaning size in the context we used it—is not necessarily dispositive of whether the burden on speech is significant. 824 F.3d at 368. A court must also consider

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

As to scope, although the restrictions in those cases were more targeted in that they were created by way of injunction, not legislation, *see Schenck*, 519 U.S. at 361; *Madsen*, 512 U.S. at 757, the Ordinance is narrower in scope because it limits only congregating, patrolling, picketing, and demonstrating within a fifteen-foot buffer zone, and does not sweep in the "one-on-one communication," including "normal conversation and leafletting," that *McCullen* emphasized "have historically been more closely associated with the transmission of ideas," 573 U.S. at 488. Thus, so long as she is not "congregating" with others in the buffer zone, an individual plaintiff is not

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the burden as "a matter of . . . kind," referring to the type of speech a restriction prohibits. *Id*. Elsewhere in the opinion, however, we also recognized that there may be cases where the "degree" of burden is so minimal that it, alone, will determine whether the burden on speech should be considered significant, thus potentially negating any need for the government to show that substantially less-restrictive alternatives were tried and failed or seriously considered and reasonably rejected. *See id*. at 372 n.20 (quoting *McCullen*, 573 U.S. at 495). As "degree" could refer to the size of the zone or significance of the burden, depending on the context, and both subjects are mentioned in today's opinion, we will use the terms "scope" and "size," rather than "kind" and "degree," for the sake of clarity.

barred by the Ordinance from engaging in sidewalk counseling inside its borders. *Cf. Schenck*, 519 U.S. at 367, 369–70, 383–84 (describing and upholding the district court's decision to allow only two sidewalk counselors inside the fifteen-foot buffer zone); *Madsen*, 512 U.S. at 759 (prohibiting not only "congregating, picketing, patrolling, [and] demonstrating" within the zone but also "entering").

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

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

[21] In *McCullen*, Massachusetts did not assert such economic hardships. While the Court noted that "the prime objective of the

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

True, as Plaintiffs point out, this record does not reflect that the City tried or seriously considered arrests, prosecutions, or targeted injunctions, which Plaintiffs would have us treat as dispositive. But where the burden imposed by a restriction on speech is not significant, the government need demonstrate neither that "it has tried or considered *every* less burdensome alternative," *Bruni I*, 824 F.3d at 370, nor that it tried or considered every less burdensome alternative discussed in *McCullen*. Instead, as we reiterated in *Turco*, this is an "intensely factual . . . inquiry," 935 F.3d at 170, that must account for "the 'broad principle of deference to legislative judgments' and that a legislative body 'need not meticulously vet every less burdensome alternative,'" *id.* at 171 (quoting *Bruni I*, 824 F.3d at 370 n.18). And, as we recognized there in remanding for further fact-finding, a municipality can demonstrate that it "attempted . . . [or] considered alternative means of

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

bringing order to the sidewalk" even if it "ha[s] not 'prosecute[d] any protestors for activities taking place on the sidewalk' and 'did not seek injunctive relief against individuals whose conduct was the impetus for the Ordinance.'" *Id.* at 167 (second alteration in original) (quoting *Turco v. City of Englewood*, No. 2:15-cv-03008, 2017 WL 5479509, at *5 (D.N.J. Nov. 14, 2017)). The ultimate question remains whether a restriction on speech "burden[s] *substantially* more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486 (emphasis added) (quoting *Ward*, 491 U.S. at 799).

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

D. Overbreadth

Finally, Plaintiffs argue that the Ordinance is unconstitutionally overbroad because it authorizes the City to create buffer zones at any health facility in the City, regardless of whether the City has identified a problem at the location in the past. A law may be overbroad under the First Amendment where "a substantial number of its applications are

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[22] We recognize that the City may have a legitimate concern about access to healthcare facilities if it transpires that multiple one-on-one conversations impair access to the facilities, *see McCullen*, 573 U.S. at 486–87, and that the City may then have occasion to revisit the terms of the Ordinance having developed a record that would satisfy *McCullen* and *Bruni I*, as well as the content-neutrality requirement of *Reed*. *See Turco*, 935 F.3d at 162–63. That, however, is not the Ordinance before us today.

unconstitutional, judged in relation to the [law's] plainly legitimate sweep." *Bruni I*, 824 F.3d at 374 (quoting *Stevens*, 559 U.S. at 473). The overbreadth doctrine is "strong medicine," *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir. 1992) (citation omitted), should therefore be "used sparingly," *id.*, and will "not be[ ] invoked when a limiting construction has been or could be placed on the challenged" law, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Plaintiffs' overbreadth challenge is not well-founded. As a general matter, "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance," *Hill*, 530 U.S. at 730–31, and its applicability more generally is one of the reasons that we consider it to be a content-neutral restriction on speech, *see id.* at 731. For that reason, "[w]hen a buffer zone broadly applies to health care facilities" to include "buffer zones at non-abortion related locations," we may then "conclude 'the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.'" *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 730–31).

Nor is the Ordinance overbroad because it affords the City discretion to select particular health facilities at which it will demarcate a buffer zone. Since the demarcation requirement was put in place approximately ten years ago, the City has exercised that discretion as to only two facilities, both of which suffered from violence and obstruction in the past. Yet we may not, as Plaintiffs suggest, simply assume that "the statute's very existence may cause others not before the court to refrain from constitutionally

protected speech or expression." *Broadrick*, 413 U.S. at 612. Instead, we revert again to the "principle . . . well-established in First Amendment jurisprudence"—"our duty to 'accord a measure of deference to the judgment' of [the] city council,'" *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 727), considering "[the] statute's application to real-world conduct, not fanciful hypotheticals," *id.* at 172 (quoting *Stevens*, 559 U.S. at 485). Applying that principle here, we conclude the Ordinance is not substantially overbroad.

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

IV. Conclusion

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

Nikki Bruni et al. v. City of Pittsburgh et al. (Bruni II), No. 18-1084

HARDIMAN, *Circuit Judge*, concurring.

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

I

It is true that the Supreme Court has held that restricting "congregating, picketing, patrolling, [and] demonstrating" around abortion clinics is facially content neutral. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 759, 757–65 (1994); *see* Op. 26–27. The Court has even extended this content neutrality to "wildly expansive definitions" of "demonstrate" and "picket." *Hill v. Colorado*, 530 U.S. 703, 744 (2000) (Scalia, J., dissenting); *see id.* at 721–22 (majority opinion) ("defining 'demonstrate' as 'to make a public display of sentiment for or against a person or cause' and 'picket' as an effort 'to persuade or otherwise influence'" (quoting Webster's Third New International Dictionary 600, 1710 (1993))); *see also Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 374 n.6, 381–82 (1997) (upholding injunction against "demonstrating," even though it would target some "stationary, nonobstructive demonstrations").

The continued vitality of this content neutrality analysis is questionable after *Reed*. Before *Reed*, the Court vacillated between two tests for content

neutrality. *See generally* Genevieve Lakier, *Reed v Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233; Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996). In cases like *Hill*, *Schenck*, and *Madsen*, the "government's purpose [w]as the threshold consideration." *Madsen*, 512 U.S. at 763; *see Hill*, 530 U.S. at 719; *Schenck*, 519 U.S. at 371–74 & n.6 (relying solely on *Madsen* to hold injunction content neutral). But in other cases, the Court's first consideration was whether a law "draw[s] content-based distinctions on its face." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Any law that did so was necessarily content based, no matter the government's purpose. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–17, 122 n.* (1991).

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

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

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

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

The second case that underscores the protection afforded to speech's function or purpose is *NAACP v. Button*, 371 U.S. 415 (1963). *See Reed*, 135 S. Ct. at 2229. In that case, Virginia "attempt[ed] to use a statute prohibiting 'improper solicitation' by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People." *Id.* (quoting *Button*, 371 U.S. at 438). The *Button* Court rejected that attempt, holding that

"advocacy" and "'the opportunity to persuade to action'" are First Amendment rights. 371 U.S. at 437–38 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)). Describing the Virginia law over 50 years later, the *Reed* Court called it "facially content-based." 135 S. Ct. at 2229.

So *Reed* demands that we construe the Ordinance narrowly. And it steers us away from precedents that focused on a law's purpose rather than its facial effect. For laws once held content neutral because of purpose may well be facially content based after *Reed*. *Compare, e.g., Hill*, 530 U.S. at 720–21 (holding content neutral a ban on "picketing," "demonstrating," "protest, education, or counseling" even though it may require the government "to review the content of the statements made"), *with McCullen*, 573 U.S. at 479 ("The [buffer zone law] would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed . . . .'" (quoting *FCC v. League of Women Voters of Ca.*, 468 U.S. 364, 383 (1984))), *and Reed*, 135 S. Ct. at 2227–29 (highlighting facially content based laws that target solicitation and educational communications). Even some purposes previously held content neutral may now be content based. *Compare, e.g., Hill*, 530 U.S. at 716 (citing "[t]he unwilling listener's interest in avoiding unwanted communication"), *and Turco v. City of Englewood*, 935 F.3d 155, 162, 166-67 (3d Cir. 2019) (citing that interest to support narrow tailoring of concededly content neutral law), *with McCullen*, 573 U.S. at 481 ("To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" (quoting *Boos v. Barry*, 485 U.S. 312, 321

(1988))), *and Reed*, 135 S. Ct. at 2227 (protecting speech's "function or purpose").

II

Today our Court does what *Reed* requires. We hold that "[b]ecause the Ordinance, as properly interpreted, does not extend to sidewalk counseling—or any other calm and peaceful one-on-one conversations," the City cannot examine the content of a conversation to decide whether a violation has occurred. Op. 27–28. It will instead examine, for example, decibel level, the distance between persons, the number of persons, the flow of traffic, and other things usually unrelated to the content or intent of speech. *See, e.g., Reed*, 135 S. Ct. at 2228 (confirming that banning sound amplification is content neutral); *id.* at 2232 (stating that "entirely forbidding the posting of signs" is content neutral); *McCullen*, 573 U.S. at 491–92 (collecting laws that, by penalizing conduct like obstruction or assault, may pass intermediate scrutiny).

The Court's decision constrains the City's enforcement discretion. Pittsburgh cannot target quiet conversations even if they are not in a tone of "kindness, love, hope, gentleness, and help." Op. 11 n.6 (quoting JA 574a); *see, e.g., id.* at 25–26. It must allow not only conversations that help and love, but also those that serve any other "function or purpose" within the bounds of protected speech. *Reed*, 135 S. Ct. at 2227; *see, e.g., id.* at 2228–29 (discussing *Sorrell*, 564 U.S. at 563–64 ("educati[ng]" and "marketing"), and *Button*, 371 U.S. at 438–40 ("solicit[ing]," "advoca[ting]," and "urg[ing]")).

And the City's enforcement of the Ordinance must be evenhanded. Consider clinic employees and agents

who, under the injunction issued in *Brown v. City of Pittsburgh*, can "congregate" or "patrol" when helping persons enter or exit a clinic. *See* 586 F.3d 263, 273–75 (3d Cir. 2009); *Brown v. City of Pittsburgh*, 2010 WL 2207935, at *2 n.2 (W.D. Pa. May 27, 2010); JA 1324a (permanent injunction order). Before today, the City's broad and amorphous interpretation of the Ordinance risked allowing those employees to engage in speech that others could not. That sort of disparate treatment would now be content or viewpoint based. *See Reed*, 135 S. Ct. at 2230 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and *Citizens United v. FEC*, 558 U.S. 310 (2010)). Our decision today clarifies that the words "congregate" and "patrol" address conduct—the assembly of people in one place or the action of pacing back and forth. *See* Op. 25. So interpreted, the *Brown* injunction's narrow exception does not discriminate between types of speech.

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

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

NIKKI BRUNI, *et al.*, Plaintiffs, v. CITY OF PITTSBURGH, *et al.*, Defendants.	)	Civil Action No. 14-1197 Judge Cathy Bissoon

MEMORANDUM AND ORDER

I. MEMORANDUM

Pending before the Court are Plaintiffs' Motion for Summary Judgment (Doc. 68) and Defendants' Motion for Summary Judgment (Doc. 69). Upon full consideration of the evidence presented, Plaintiffs' Motion for Summary Judgment will be denied, and Defendants' Motion for Summary Judgment will be granted.

A. Factual Background

1. The Ordinance

In December 2005, the Pittsburgh City Council adopted Ordinance No. 49, Bill No. 2005-1944, supplementing the Pittsburgh Code of Ordinances, Title 6: Conduct, Article I: Regulated Rights and Actions, by adding Chapter 623, entitled "Public Safety at Health Care Facilities." Pittsburgh Code of Ordinances § 623.01 *et seq.*, (the "Ordinance"). Plaintiffs' Concise Statement of Material Facts (Doc.

74) ¶ 1; Defendants' Response to Plaintiffs' Concise Statement of Material Facts (Doc. 82) ¶ 1. The Ordinance became effective on December 30, 2005. Doc. 74 ¶ 1; Doc. 82 ¶ 1.

In relevant part, the challenged Ordinance provides as follows:

> § 623.04 FIFTEEN-FOOT BUFFER ZONE
>
> No person or persons shall knowingly congregate, patrol, picket, or demonstrate in a zone extending 15 feet from any entrance to the hospital and or health care facility. This section shall not apply to police and public safety officers, 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.

Doc. 74 ¶¶ 2, 140; Doc. 82 ¶¶ 2, 140. The Ordinance exempts "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" from the entirety of Section 623.04. Doc. 74 ¶ 141; Doc. 82 ¶ 141.

In adopting the Ordinance, the City Council also ratified a preamble, titled "Intent of Council," that described the goals the City sought to accomplish as follows:

> The City Council recognizes that access to Health Care Facilities for the purpose of obtaining medical counseling and treatment is important for residents and visitors to the

City. The exercise of a person's right to protest or counsel against certain medical procedures is a First Amendment activity that must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and The City of Pittsburgh Bureau of Police has been consistently called upon in at least two locations within the City to mediate the disputes between those seeking medical counseling and treatment and those who would counsel against their actions so as to (i) avoid violent confrontations which would lead to criminal charges and (ii) enforce existing City Ordinances which regulate use of public sidewalks and other conduct; Such services require a dedicated and indefinite appropriation of policing services, which is being provided to the neglect of the law enforcement needs of the Zones in which these facilities exist. The City seeks a more efficient and wider deployment of its services which will help also reduce the risk of violence and provide unobstructed access to health care facilities by setting clear guidelines for activity in the immediate vicinity of the entrances to health care facilities; The Council finds that the limited buffer and bubble zones outside health care facilities established by this chapter will ensure that patients have unimpeded access to medical services while ensuring that the First Amendment rights of demonstrators to communicate their message to their intended audience is not impaired.

Doc. 74 ¶ 7; Doc. 82 ¶ 7.

A permanent injunction altered the Ordinance in 2009, requiring, *inter alia*, that the City clearly demarcate any buffer zone prior to its enforcement. Order Granting Permanent Injunction (the "Injunction"), Civil Action No. 06-393, Doc. 85, ¶ 1 (W.D. Pa. Dec. 17, 2009). Presently, two "buffer zones" are delineated and enforced in the City of Pittsburgh, both of which are located outside of reproductive health care facilities where abortions are performed. Doc. 74 ¶ 149; Doc. 82 ¶ 149. One of the two buffer zones is indicated by a bright, yellow semi-circle painted around the entrance of 933 Liberty Avenue, the downtown Planned Parenthood clinic ("933 Liberty" or "downtown Planned Parenthood"). Doc. 74 ¶¶ 111, 122; Doc. 82 ¶¶ 111, 122. The inside of the yellow arc measures 15 feet in radius from the center of the closed front doors of the Planned Parenthood facility. Doc. 74 ¶ 123; Doc. 82 ¶ 123.

According to the City, the Ordinance "applies to any type of protesting within the buffer zone." Doc. 74 ¶ 155; Doc. 82 ¶ 155. However, "purely social or random conversations (like going up to someone to ask directions or what time it is) are not intended to be covered by the Ordinance." Doc. 74 ¶ 156; Doc. 82 ¶ 156. When Plaintiffs filed this lawsuit, they believed that the Ordinance completely prohibited their passage through the buffer zone, even if they were not engaging in sidewalk advocacy during such passage. Defendants' Concise Statement of Material Facts (Doc. 71) ¶ 86; Plaintiffs' Response to Defendants' Concise Statement of Material Facts (Doc. 79) ¶ 86. However, since then, the City has explained to Plaintiffs that the buffer zone does not apply to "individuals who are simply walking through the 15

foot zone to get to from one location to another, provided that such passage does not obstruct access to the facility." Doc. 74 ¶ 87; Doc. 82 ¶ 87; Doc. 74 ¶ 154; Doc. 82 ¶ 154. For purposes of this lawsuit, there appears to be no dispute that "sidewalk counseling" within the 15 foot buffer zone is prohibited.

2. History of the Ordinance

Prior to moving to 933 Liberty Avenue, Planned Parenthood maintained its downtown location on Fifth Avenue. Doc. 74 ¶ 112; Doc. 82 ¶ 112. In the mid- and late-1990's, there were numerous incidents involving violence, disruption and obstruction of entrances at the Fifth Avenue location. Doc. 71 ¶ 1; Doc. 79 ¶ 1. As a result, in the mid-90's, Pittsburgh police deployed crowd-control barriers outside abortion clinics in order to maintain order and security, separating demonstrators from each other and from patients attempting to visit the clinic for health care. Doc. 71 ¶ 4; Doc. 79 ¶ 4. After Planned Parenthood moved to the 933 Liberty Avenue location in 2002, the incidents became less frequent and severe; however, there still were regular incidents involving "pushing," "shoving" and "verbal harassment" at the downtown Planned Parenthood. See Def. App., Ex. J, Hohos Dep. (Doc. 72-10) at 31:23-32:12 ("New location was, like I said, not as severe, but we still had our incidents. We still had the pushing and the shoving between the escorts and the pro-life folks and, you know, the blocking of the doors, that was still occurring when people would sit in front of doors. Not on a much regular basis as before, but that -- that conduct still continued to a large -- to a large degree. A lot of it was verbal. Depending on which side the argument you were on or the cause, a lot of it was verbal harassment between both parties, both

sides."); id. at 42:2-5 (Sergeant William Hohos explaining that he has personally witnessed "pro-life individuals forcing literature into patients' pockets"); id. at 52:13-15 ("We were still very active between the years of 2002 to 2005. 'We' being the police."). To mitigate these incidents, the Bureau of Police employed an overtime detail of police officers stationed outside the downtown Planned Parenthood. Doc. 71 ¶ 6; Doc. 79 ¶ 6.

On December 29, 2003, the City of Pittsburgh was declared a financially distressed municipality by the Commonwealth of Pennsylvania's Department of Community and Economic Development. Doc. 71 ¶ 14; Doc. 79 ¶ 14. Following the determination of the City's distressed status, the Bureau of Police discontinued the overtime detail of police officers assigned to the downtown Planned Parenthood, although police would still respond to 911 or other specific calls for law enforcement. Doc. 71 ¶ 19; Doc. 79 ¶ 19. Thereafter, on November 29, 2005, the Ordinance was introduced before the City Council. Doc. 74 ¶ 126; Doc. 82 ¶ 126. A committee meeting was held on December 7, 2005, followed by hearing for public comment on December 13, 2005. Doc. 74 ¶¶ 126-128; Doc. 82 ¶¶ 126-128; Doc. 71 ¶ 23; Doc. 79 ¶ 23. At those proceedings, dozens of witnesses offered statements to the City Council, including President and CEO of Planned Parenthood of Western Pennsylvania, Kimberly Evert. Doc. 71 ¶ 24; Doc. 79 ¶ 24. Ms. Evert testified that, in January 2005, the City's budget problems "resulted in the elimination of the police assignment" to the downtown Planned Parenthood. Doc. 72-3, Exhibit C, at p. 8. Ms. Evert testified that "without [police] supervision there has been an increase in unlawful behavior that is putting . . .

patients, their families, pedestrians and even protestors at risk." Id. As evidence, Ms. Evert stated that, in 2004, patients made 16 complaints about protestors, whereas from February 2005 to November 2005, "there were 13 cases of aggressive pushing, shoving and hitting, and 30 complaints of harassing behavior that included shoving literature into people's pockets, hitting them with signs and blocking their entrance into the building." Id.

Commander Donaldson of the Pittsburgh Police Department also addressed the City Council on December 7, 2005. Doc. 74 ¶ 133; Doc. 82 ¶ 133. Commander Donaldson stated that, while the City did not arrest any protestors outside 933 Liberty Avenue within the six months prior to the committee meeting, police had been summoned to that location 22 times in that 6-month period. Doc. 74 ¶ 135; Doc. 82 ¶ 135; Doc. 72-3, Exhibit C, at pp. 52-54. Commander Donaldson explained that "[t]ypically, [the police] are called to mediate confrontations between the people going into the clinic and the protestors or the escorts . . . and other times it was the doorway was obstructed or they followed the people to the doorway or . . . the signs are obstructing the front of the building. . ." Doc. 72-3, Exhibit C, at p. 60. In response to questioning by a Council member, Commander Donaldson acknowledged that, prior to the enactment of the Ordinance, the City already had laws on the books that it could rely upon to arrest and prosecute individuals obstructing traffic, passageways, and doorways. Doc. 74 ¶ 134; Doc. 82 ¶ 134. Commander Donaldson explained, however, that those laws were not as effective as a buffer zone in deterring those who attempted to "block" patients from entering the downtown Planned Parenthood by obstructing their

passage before they reached the front door of the building. Doc. 72-3, Exhibit C, at p. 54 ("What I am saying is there are laws currently on the book that would address obstructing traffic or passageways or highway. A number of times what the complaints are at the 933 Liberty Avenue is that they are obstructing the access to the clinic itself. Now there are currently laws for obstructing the doorway, but what this would do is it would set a 15-foot parameter [sic]. So it would be clearly defined. It wouldn't be in front of the obstructing the door per say [sic], but you couldn't be within 15 feet of it. I think it would be along the same lines of either obstructing someone's driveway or blocking someone's driveway. They are two clearly different points. One it makes it difficult to get into your driveway. The other one it makes it impossible to get into your driveway.").

Following these hearings, the City Council passed the Ordinance and the Mayor signed it into law. Doc. 71 ¶ 26; Doc. 79 ¶ 26.

3. Plaintiffs' "Sidewalk Counseling"

Plaintiffs regularly engage in anti-abortion activities outside the buffer zone at the downtown Planned Parenthood. Doc. 71 ¶ 44; Doc. 79 ¶ 44. Their advocacy takes the form of "sidewalk counseling," through which they "seek to have quiet conversations and offer assistance and information about options available . . . other than abortion to people who are about to enter or who exit the facility." Doc. 71 ¶ 46; Doc. 79 ¶ 46. Plaintiff Nikki Bruni is the local head of a group participating in the "Forty Days for Life" movement, a global anti-abortion campaign whose self-described mission is "to bring together the body of Christ in a spirit of unity during a focused 40[-]day

campaign of prayer, fasting, and peaceful activism, with the purpose of repentance, to seek God's favor to turn hearts and minds from a culture of death to a culture of life, thus bringing an end to abortion." Doc. 71 ¶ 45; Doc. 79 ¶ 45. Ms. Bruni began sidewalk counseling in early 2010. Doc. 74 ¶ 25; Doc. 82 ¶ 25. Plaintiff Julie Cosentino began sidewalk counseling outside the downtown Planned Parenthood in July 2014, generally going to the clinic on Saturdays. Doc. 71 ¶ 49; Doc. 79 ¶ 49. Plaintiff Cynthia Rinaldi began sidewalk counseling outside the downtown Planned Parenthood approximately 5 to 6 years ago. Doc. 74 ¶ 56; Doc. 82 ¶ 56. Plaintiff Kathleen Laslow began sidewalk counseling outside the downtown Planned Parenthood approximately three years ago. Doc. 74 ¶ 73; Doc. 82 ¶ 73. Patrick Malley began sidewalk counseling in 2010 or 2011, and typically goes to the downtown Planned Parenthood facility on Tuesdays and Fridays. Doc. 74 ¶¶ 91, 93; Doc. 82 ¶¶ 91, 93. None of the Plaintiffs in this case has experience or knowledge about conditions outside the downtown Planned Parenthood before the passage of the Ordinance in 2005 or the modified Ordinance in 2009. Doc. 71 ¶ 11; Doc. 79 ¶ 11.

Abortions are performed at the downtown Planned Parenthood on Tuesdays, Fridays and Saturdays. Doc. 71 ¶ 52; Doc. 79 ¶ 52. On those days, between two to four individuals engage in some form of sidewalk counseling or demonstrating outside of the buffer zone. Doc. 71 ¶¶ 54-55; Doc. 79 ¶¶ 54-55. During Forty Days for Life and other nationally organized clinic protest campaigns, this number may increase to as many as 35 to 40. Doc. 71 ¶ 56; Doc. 79 ¶ 56. Plaintiffs admit that, outside the 15-foot buffer zone, Plaintiffs and their allies are free to walk

anywhere on the sidewalk and engage in advocacy, attempting to speak to people who are going to the clinic. Doc. 71 ¶ 68; Doc. 79 ¶ 68. The Ordinance also does not prohibit a willing listener from: (1) slowing down or stopping while approaching the buffer zone in order to listen or talk to Plaintiffs, Doc. 71 ¶ 69; Doc. 79 ¶ 69; (2) exiting the zone in order to listen or talk to Plaintiffs, Doc. 71 ¶ 70; Doc. 79 ¶ 70; or (3) standing inside the buffer zone and having a conversation with Plaintiffs standing a few inches or feet away, outside the zone, Doc. 71 ¶ 71; Doc. 79 ¶ 71. Plaintiffs also admit that the Ordinance does not prohibit them from: (1) attempting to engage a person leaving the clinic in a discussion, as that person walks down the sidewalk, Doc. 71 ¶ 72; Doc. 79 ¶ 72; (2) beginning a conversation with a person and continuing that conversation outside the buffer zone for as long as they want, Doc. 71 ¶ 73; Doc. 79 ¶ 73; or (3) walking with a willing listener to a calmer or quieter location, anywhere outside the buffer zone, to talk further. Doc. 71 ¶ 74; Doc. 79 ¶ 74.

Several of the Plaintiffs testified or declared that they have had trouble communicating with people outside the downtown Planned Parenthood because of street or traffic noise. Doc. 71 ¶¶ 89, 90; Doc. 79 ¶¶ 89, 90. Plaintiff Cosentino testified, however, she has never had trouble communicating with or trying to get a message to people because of street noise or traffic noise. Doc. 71 ¶ 90; Doc. 79 ¶ 90. Plaintiffs also cite no specific instances where someone has told any of Plaintiffs that they were unable to hear Plaintiffs' message because of traffic noise or the distance due to the buffer zone. Doc. 71 ¶ 91; Doc. 79 ¶ 91. Furthermore, at the preliminary injunction hearing in December 2014, Plaintiff Bruni admitted she had

no evidence that the buffer zone impeded her from talking with willing listeners. Doc. 71 ¶ 58; Doc. 79 ¶ 58 (citing Hr'g Tr. 32 ("THE COURT: . . . What evidence do you have that people who desire to engage in close conversation with you are not doing so because of the buffer zone? THE WITNESS: I don't have any.")). Plaintiff Bruni also testified that, between 2009 and the date the Complaint was filed, she has been able to communicate her message to the intended recipients "occasionally." Doc. 71 ¶ 59; Doc. 79 ¶ 59. She testified that, rarely, women inside the buffer zone will come out of the zone to have a conversation with her. Doc. 71 ¶ 60; Doc. 79 ¶ 60. She admits that sometimes women going to the clinic refuse to talk to her, no matter what her distance from them. Doc. 71 ¶ 61; Doc. 79 ¶ 61.

Since approximately 2011, Plaintiff Bruni has been keeping a log of instances where people approaching the Planned Parenthood clinic have reportedly been persuaded not to have abortions. Doc. 71 ¶ 62; Doc. 79 ¶ 62. The log is titled "Log of Saved Babies from abortion at Planned Parenthood, 933 Liberty Avenue, Pittsburgh." Doc. 71 ¶ 62; Doc. 79 ¶ 62. This log records dozens of instances of sidewalk counselors not only communicating their message to others but reportedly persuading people to not have abortions. Doc. 71 ¶ 63; Doc. 79 ¶ 63. Plaintiff Bruni has also "taken a few women to the Crisis Pregnancy Center" after encountering them at the Planned Parenthood clinic. Doc. 71 ¶ 67; Doc. 79 ¶ 67. Likewise, Plaintiff Rinaldi has "often" accompanied women "to nearby Catholic Charities, in order to connect them to resources such as adoption assistance, monetary assistance, food, education, and day care." Doc. 71 ¶¶ 51, 65; Doc. 79 ¶¶ 51, 65; Doc.

74 ¶ 58; Doc. 82 ¶ 58.

B. Procedural History

By way of background and procedural history, at the time the Pittsburgh City Council enacted the Ordinance, it contained the following two provisions:

> § 623.03 – EIGHT FOOT PERSONAL BUBBLE ZONE. No person shall knowingly approach another person within eight (8) feet 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 (100) feet 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 (15) feet 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.

Pittsburgh, Pa., Code tit. 6, §§ 623.03-04.

Shortly after taking effect, the Ordinance was challenged as, *inter alia*, facially invalid under the

First Amendment. Brown v. City of Pittsburgh, 543 F. Supp. 2d 448 (W.D. Pa. 2008) (Fischer, J.). The district court denied the plaintiffs' Motion for a Preliminary Injunction and dismissed several counts of the complaint. Id. The plaintiffs appealed, and the Court of Appeals for the Third Circuit affirmed in part, reversed in part and dismissed in part. Brown v. City of Pittsburgh, 586 F.3d 263 (3d Cir. 2009). The Court of Appeals held that the eight foot bubble zone (the "bubble zone") and the fifteen foot buffer zone (the "buffer zone") each individually passed constitutional muster, but when considered in combination, imposed a facially unconstitutional burden on free speech. Id. The Court of Appeals remanded the case back to district court for further proceedings. Id.

Post-remand, the district court ordered that the bubble zone provision at section 623.03 be "permanently enjoined *in toto*." Injunction at ¶ 1. Section 623.04, creating the fixed buffer zone, remained, although the Injunction required that the buffer zone provision be construed to prohibit "all persons" from picketing and demonstrating within the boundaries of the buffer zone. Id. at ¶ 2; see Brown, 586 F.3d at 275 ("We find § 623.04 amenable to the content-neutral construction urged by the City, that is, an interpretation prohibiting even the exempted classes of persons from 'picketing or demonstrating' within the buffer zone.") (internal alterations omitted). Accordingly, the exemption for "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" does not permit those persons to engage in "any action, activity or signage in the form of picketing or demonstrating." Injunction at ¶ 2. The Injunction further requires that the City provide Pittsburgh City Police with oral and written training materials regarding enforcement of the Ordinance. Id. at ¶ 3. Finally, as discussed, the Injunction provides that the City must "clearly mark the boundaries of any 15 foot buffer zone in front of any hospital, medical office or clinic prior to the enforcement of the Ordinance." Id. at ¶ 5.

On June 26, 2014, the Supreme Court issued its decision in McCullen v. Coakley, striking down the amended Massachusetts Reproductive Health Care Facilities Act (the "MRHCA") as insufficiently narrowly tailored to achieve the Commonwealth's legitimate government interests. 134 S.Ct. 2518 (2014). The MRHCA, as amended, "ma[de] it a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any 'reproductive health care facility,' defined as 'a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Id. at 2522. On September 4, 2014, Plaintiffs filed a complaint (the "Complaint") lodging both facial and as applied challenges to the Ordinance, in light of McCullen. Compl. at ¶ 1 (Doc. 1). Plaintiffs also sought a preliminary injunction to prevent the City from enforcing the Ordinance against them. The City responded by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Following a hearing on the preliminary injunction motion, this Court granted the City's motion to dismiss Plaintiffs' facial challenges to the Ordinance under the First

Amendment and the Due Process Clause of the Fourteenth Amendment. (Doc. 28). In addition, the Court denied the Plaintiffs' motion for a preliminary injunction. (Id.) After the District Court's ruling, the Plaintiffs moved to voluntarily dismiss their as-applied challenges to the Ordinance, their claim under the Equal Protection Clause, and their claim of selective enforcement against the Mayor of Pittsburgh. (Doc. 29).

Plaintiffs appealed the Court's dismissal of their First Amendment and Due Process claims against the City to the Court of Appeals for the Third Circuit.[1] On June 1, 2016, the Third Circuit vacated the dismissal of Plaintiffs' First Amendment claims "so that they may be considered after appropriate development of a factual record." Bruni v. City of Pittsburgh, 824 F.3d 353, 357 (3d Cir. 2016). The Court of Appeals held that this Court erred in relying on materials presented outside the pleadings—including testimony from the preliminary injunction hearing—in dismissing the Complaint, and stated that, at the motion to dismiss stage, the Court must credit Plaintiffs' allegations that, *inter alia*, the Ordinance "prohibits Plaintiffs and others from effectively reaching their intended audience," that "[t]he zones created by the Ordinance make it more difficult [for the] Plaintiffs to engage in sidewalk counseling, prayer, advocacy, and other expressive activities," and that the Ordinance "will cause conversations between the Plaintiffs and those entering or exiting the facilities to be far less frequent and far less successful." Id. at 368. The Court of Appeals explained

[1] Plaintiffs did not appeal the Court's denial of their preliminary injunction motion.

that, "taking those allegations as true, the burden on the Plaintiffs' speech is akin to that imposed upon the petitioners in McCullen," and thus the City must satisfy the narrow tailoring analysis by demonstrating "either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." Id. at 370.

Following remand, the parties conducted discovery on the relevant issues, and, on June 30, 2017, filed the instant cross motions for summary judgment, which are now ripe for adjudication. (Docs. 68 & 69).

C. Analysis

1. First Amendment Free Speech and Free Press Claim

The Court will first consider Plaintiffs' facial challenges to the Ordinance under the Free Speech and Free Press Clauses of the First Amendment.[2] "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015) (quoting U.S. Const., Amdt. 1). The animating purpose behind the First Amendment "lies [in] the principle that each person should decide for himself or herself the ideas and beliefs deserving of

[2] The Court applies the same analysis to Plaintiffs' challenges under the Free Speech and Free Press Clauses. As the Court of Appeals held in Bruni, "Plaintiffs' free press claim is, in this context, properly considered a subset of their broader free speech claim, given that the Freedom of the Press Clause and the Free Speech Clause both protect leafleting from government interference." Bruni, 824 F.3d at 373.

expression, consideration, and adherence." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994). Thus, "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" Reed, 135 S. Ct. at 2226 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Id. (citations omitted). "In contrast, [laws] that are unrelated to the content of speech are subject to an intermediate level of scrutiny, [ ] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." Turner Broad. Sys., 512 U.S. at 642 (citing Clark v. Community for Creative Non–Violence, 468 U.S. 288, 293 (1984)).

i. Whether the Ordinance is Content-Based or Content-Neutral

In Bruni, the Third Circuit instructed this Court on remand "to examine Reed and its effect on the content-neutrality analysis to decide whether that case compels a break from Brown's holding that the Ordinance is a content-neutral restriction on speech." Bruni, 824 F.3d at 365 n.14. Plaintiffs argue that the United States Supreme Court's holding in Reed requires that strict scrutiny be applied to the Ordinance because it prohibits certain types of speech—congregating, patrolling, picketing, and demonstrating—while permitting other speech such as "asking for directions" or "talking about the weather." Doc. 73 at 19-20. The Court disagrees.

In Hill v. Colorado, the Supreme Court found that a statute which prohibits engaging in "oral protest, education, or counseling" with individuals attempting to enter a health care facility was content-neutral, despite not restricting casual speech such as saying "good morning" in the same area. Hill, 530 U.S. at 724. The Hill Court found the statute in question content-neutral because its "restrictions appl[ied] equally to all demonstrators, regardless of viewpoint, and the statutory language ma[de] no reference to the content of the speech." Id. at 719-20. The Court acknowledged that "the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute," but found that "it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether sidewalk counselors are engaging in oral protest, education, or counseling rather than pure social or random conversation" and that a "cursory examination" did not render the statute facially content-based." Id. at 721-22. Citing to Hill, the Court of Appeals in Brown held that the Ordinance at issue in this case is content-neutral. Brown, 586 F.3d at 273, 275.

Contrary to Plaintiffs' argument, Reed does not change this analysis. As an initial matter, Reed did not overturn its prior holdings in Hill, either expressly or implicitly, and thus Hill remains good law. Indeed, the Reed Court affirms Hill's central holding that government can still enact reasonable content-neutral time, place and matter restrictions. 135 S.Ct. at 2228-29. Specifically, Justice Alito, in a concurrence joined by Justices Kennedy and Sotomayor, listed a variety of content-neutral sign

restrictions that would be permissible under the decision. Id. at 2233. Most notably, Justice Alito recognized that content-neutral location restrictions also are still permitted. Id.

Furthermore, the Ordinance at issue here is entirely distinguishable from the one at issue in Reed, which explicitly distinguished signs based upon content. Id. at 2224-25. As the Reed Court explained, the Town of Gilbert's complex Sign Code exempted twenty-three categories of signs—based on their content—from the town's general ban on posting outdoor signs, and made additional content distinctions among the categories of exempted signs, including several content-based distinctions among event-related signs. Id. In particular, the Sign Code gave different amounts of leeway to event-related signs depending on whether the event was, for example, political, commercial, construction-related, "special-event," religious or charitable. Political signs, including any "temporary sign designed to influence the outcome of an election called by a public body," enjoyed relatively generous time limits; they could be posted for up to sixty days before a primary election, and, if the candidate to which they referred advanced to the general election, they could remain posted until fifteen days following the general election. Id. at 2225. In contrast, the Sign Code gave least favorable treatment to the kind of sign that the petitioner church in Reed sought to use: "Temporary Directional Signs Relating to a Qualifying Event." Id. Such a sign, defined as one that directed 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," could only be displayed for twelve

hours before the event, and had to be removed within an hour after the event. Id.

The Reed Court explained:

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas.

Id. at 2227.

The Supreme Court emphasized that the Sign Code's distinctions did not merely "hinge on 'whether and when an event is occurring,'" and did not just "permit citizens to post signs on any topic whatsoever within a set period leading up to an election." Id. at 2231. Rather, the Code impermissibly required town officials to examine each sign to determine whether, for example, it was "designed to influence the outcome of the election" and so had to come down within fifteen days of the election, or was more generally "ideological," in which case no time limit applied. Id. at 2231. Pittsburgh's Ordinance does no such thing. The Ordinance does not advantage one message over another based upon content. Rather, as the Injunction

specifies, the buffer zone applies equally to all messages. Furthermore, as the Hill Court held, members of law enforcement can identify congregating, patrolling, picketing, and demonstrating without knowing or needing to ascertain the content of the speech. See Hill, 530 U.S. at 721. Because "congregating, patrolling, picketing, and demonstrating" all involve obvious visual manifestations, law enforcement can determine whether the Ordinance is being violated by merely observing individuals within the restricted zones.

For these reasons, this Court continues to hold, as the Court of Appeals did in Brown, that the Pittsburgh Ordinance is a content-neutral time, place or manner restriction upon speech.

ii. Application of Intermediate Scrutiny

Because the Ordinance is content-neutral, it is subject to intermediate scrutiny. As the McCullen Court explained:

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

134 S.Ct. at 2535 (quoting Ward, 491 U.S. at 798-799); see also Brown, 586 F.3d at 276-77 ("As a content-

neutral time, place and manner regulation, the buffer zone is constitutionally valid if it is narrowly tailored to serve the government's significant interest and leaves open ample alternative channels of communication. The zone may be narrowly tailored even if it is not the least restrictive or least intrusive means of serving those interests. . . . 'Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'") (citing Hill, 530 U.S. at 725-26).

Plaintiffs do not dispute that the government's interests in enforcing the Ordinance are significant. See Bruni, 824 F.3d at 368 (noting that "Plaintiffs in the present case do not dispute the significance of the City's interests," such as "ensuring patients have 'unimpeded access to medical services,' eliminating the 'neglect' of other law enforcement needs, and letting the City provide 'a more efficient and wider deployment of its services.' Pittsburgh Pa., Code § 623.01.") As the Supreme Court repeatedly has held, "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" are significant governmental interests. McCullen, 134 S.Ct. at 2535 (quoting Schenck v. Pro–Choice Network, 519 U.S. 357, 376 (1997), then citing Madsen, 512 U.S. at 767–68)). Not only does the government have "undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities," but "[t]he buffer zones clearly serve these interests." McCullen, 134 S.Ct. at 2535, 2541. Thus, the only issue in dispute is whether the City's regulation

"burden[s] substantially more speech than is necessary to further the government's legitimate interests." McCullen, 134 S. Ct. at 2535 (quoting Ward, 491 U.S. at 799).

In Bruni, the Majority and Judge Fuentes, concurring, agreed that "that the degree of burden on speech [by Pittsburgh's buffer zone] is less than that in McCullen, because the zones in Massachusetts were larger, applied state-wide, and limited any entry into the prohibited areas." Bruni, 824 F.3d at 368 n.15; see also id. at 382-385. The Majority, however, declined to "contrast[ ] the two laws in lengthy dicta" because the Majority and Concurrence agreed that the allegations, taken as true, survived dismissal. Id. at n.15. At the summary judgment stage, however, the Court need not accept the parties' conclusory allegations as true. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rather, the Court must consider the entire evidentiary record, crediting the evidence presented by the non-moving party and drawing all justifiable inferences in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). Here, the Court finds that the undisputed evidence of record demonstrates that the Ordinance, unlike the ordinance at issue in McCullen, imposes only a minimal burden on Plaintiffs' speech.

The Court first notes that the buffer zone in this case is considerably smaller that the buffer zone at issue in McCullen. Although the Bruni Court clarified that this difference in size is not dispositive, the Majority affirmed that size is "one feature" in determining "the burden on speech that such zones impose." 824 F.3d at 368. The McCullen Court noted that the Massachusetts legislature pursued their interests "by the extreme step of closing a *substantial*

portion of a traditional public forum to all speakers." McCullen, 134 S.Ct. at 2541 (emphasis added). Specifically, the Court noted that MRHCA authorized overlapping zones around entrances and driveways creating speech-free areas as much as 93 feet and 100 feet long, respectively. Id. at 2527-28. In contrast, here, the Ordinance does not close a "substantial portion" of the public sidewalk. Rather, as Judge Fuentes correctly calculated in his Concurrence, "the radius of the Pittsburgh buffer is less than half the radius of the Massachusetts buffer, and creates a zone whose total area is less than one-fifth the area of the Massachusetts zone. (Put differently, the Massachusetts zone was 2.3 times longer, and its total area was 5.4 times larger.)." Bruni, 824 F.3d at 382.

Furthermore, unlike in McCullen, there is undisputed evidence in this case that Plaintiffs are able to communicate their anti-abortion message using their preferred form of expression—*i.e.*, sidewalk counseling. The McCullen Court noted that, at certain locations, the MRHCA forced sidewalk counselors to cross the street from the abortion clinics where they sought to counsel — silencing their conversational speech and foreclosing their ability to place leaflets close to patients' hands. 134 S.Ct. at 2527-28. Here, in contrast, Plaintiffs sidewalk counsel immediately outside the boundary of the buffer zone – they are not pushed to the other side of the street. Doc. 71 ¶ 68; Doc. 79 ¶ 68. Nonetheless, several Plaintiffs state that the buffer zone "exacerbates the difficulty of engaging in close, one-on-one conversations outside the Planned Parenthood facility due to 'loud' street noise along Liberty Avenue," and that they must "raise their voice or even shout to be heard by people 15 feet or more away."

Doc. 74 at ¶¶ 96, 165-166. However, Plaintiff Cosentino testified at her deposition she has never had trouble communicating or trying to get a message to people because of street noise or traffic noise. Doc. 71 ¶ 90; Doc. 79 ¶ 90. Furthermore, at the preliminary injunction hearing in December 2014, Plaintiff Bruni admitted she had no evidence that the buffer zone impeded her from talking with willing listeners. Doc. 71 ¶ 58; Doc. 79 ¶ 58 (citing Hr'g Tr. 32 ("THE COURT: . . . What evidence do you have that people who desire to engage in close conversation with you are not doing so because of the buffer zone? THE WITNESS: I don't have any.")). Plaintiffs also cite no specific instances where someone has told any of Plaintiffs that they were unable to hear Plaintiffs' message because of traffic noise or the distance due to the buffer zone. Doc. 71 ¶ 91; Doc. 79 ¶ 91. Plaintiffs further admit that, rather than yell at a potential patient arriving from the other side of the buffer zone, they can walk through the buffer zone in an attempt to reach that person on the other side. Doc. 71 ¶ 87; Doc. 79 ¶ 87. Thus, even crediting Plaintiffs' testimony, the Court finds that Plaintiffs have not demonstrated that their ability to engage in one-on-one conversations with patients is substantially burdened by the presence of the buffer zone.[3]

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[3] Plaintiffs further contend that, when relegated to any distance away from the entrance to the downtown Planned Parenthood, it becomes more difficult for them to identity who is a patient and who is not. Doc. 74 at ¶ 161. However, as the Court previously found, this is not a burden on their right to free speech. If anything, Plaintiffs engage in more speech, not less, in an effort to disseminate their message to all potential patients. A right to engage in normal conversation and leaflet on a public

Moreover, Plaintiffs' own records reflect not only that they are able to communicate with patients, but, in some instances, have accomplished their intended goal of persuading women not to have abortions. Doc. 71 ¶¶ 62-67; Doc. 79 ¶¶ 62-67. Plaintiffs speculate that they would be able to communicate with more women, and perhaps persuade more of them not to have abortions, if they could walk alongside patients all the way to and from the entrance of the clinic. But Plaintiffs offer no concrete evidence to support this claim. Unlike in McCullen, where the plaintiffs engaged in sidewalk counseling both before and after the MRHCA went into effect and stated that the number of people they reached sharply declined after the larger buffer zones were imposed, Plaintiffs admit that they did not engage in sidewalk counseling at the downtown Planned Parenthood before the Ordinance was passed and thus have no basis to compare the efficacy of their speech with and without a buffer zone. Doc. 71 ¶ 11; Doc. 79 ¶ 11. Plaintiffs further admit that they have no power or right to force unwilling listeners to engage in conversation with them. Thus, the fact that many people entering and exiting the clinic do not wish to speak to Plaintiffs or take literature from them is not evidence that the Ordinance substantially limits Plaintiffs' speech but rather, more likely, that these individuals simply do not wish to engage with Plaintiffs.[4] See Hill, 530 U.S.

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sidewalk does not equate to a right to know if those with whom you communicate are, indeed, your target audience.

[4] For instance, Plaintiff Bruni testified that, on some occasions, people inside the buffer zone who observe sidewalk counselors offering them literature reach out their hands to receive such literature, expecting the sidewalk counselors to come to them. Doc. 74 ¶ 167. Ms. Bruni speculates that, because the sidewalk

at 718 ("[N]o one has a right to press even 'good' ideas on an unwilling recipient.") (quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)).

In short, the undisputed evidence in this case demonstrates that the Ordinance places only a minimal burden on Plaintiffs' First Amendment free speech rights.

iii. The City's Consideration of Less Restrictive Alternatives

As discussed, the Court of Appeals in Bruni held that Plaintiffs had adequately alleged in their Complaint that the Ordinance posed a "significant burden on speech." Bruni, 824 F.3d at 369. Thus, the Third Circuit found that "the City has the same obligation to use less restrictive alternatives to its buffer zone as the Commonwealth of Massachusetts had with respect to the buffer zone at issue in McCullen." Id. However, in light of this Court's finding, based on a more developed evidentiary record, that the 15-foot buffer zone does *not* substantially burden speech, the City does not have this same obligation. As Judge Fuentes explains in his Concurrence: "The adverb supplies the test: the

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counselors cannot enter the buffer zone, people inside the buffer zone could be less likely to take the sidewalk counselors' literature. Id. Ms. Bruni admits, however, that there is nothing preventing her from speaking to these individuals and explaining to them that they have to walk outside the buffer zone to receive the literature. Doc. 75, Exh. C, 41:24-42:5; 42:19-20. She also admits there is no physical barrier preventing them from walking outside the buffer zone. Id. Given Ms. Bruni's admission that patients interested in the literature could easily walk outside the buffer zone to receive it, the Court can reasonably infer that their decision not to do so reflects their lack of interest in the material.

operative question, in this case and others, is whether the proposed alternatives would burden ***substantially*** less speech while still furthering the government's interests." Bruni, 824 F.3d at 379 (emphasis in original). Here, given the Court's finding that the Ordinance's restriction on speech is minimal, the Court finds that the alternatives considered in McCullen are not, in fact, *substantially* less-restrictive. Accordingly, the City has no obligation to demonstrate that it tried—or considered and rejected—any such alternatives.

However, even assuming, *arguendo*, that the City had such an obligation, the Court finds that it has met its burden. First, contrary to Plaintiffs' contention, the Court finds undisputed evidence in the record that the City enacted the Ordinance to address an "actual problem" in need of solving. Doc. 73 at 13 (citing United States v. Playboy Entm't Grp., 529 U.S. 803, 823 (2000)). As discussed, during the City Council meeting on December 7, 2005, the President and CEO of Planned Parenthood of Western Pennsylvania, Kimberly Evert, testified that the number of complaints went up considerably after the City stopped stationing police at the downtown Planned Parenthood, explaining that between February 2005 to November 2005, "there were 13 cases of aggressive pushing, shoving and hitting, and 30 complaints of harassing behavior that included shoving literature into people's pockets, hitting them with signs and blocking their entrance into the building." Doc. 72-3, Exhibit C, at p. 8. Moreover, Commander Donaldson of the Pittsburgh Police Department testified that, while the City did not arrest any protestors outside 933 Liberty Avenue within the six months prior to the committee meeting,

police had been summoned to that location 22 times in that 6-month period. Doc. 74 ¶ 135; Doc. 82 ¶ 135; Doc. 72-3, Exhibit C, at Pages 52-53. This evidence is sufficient to justify the City's passage of the Ordinance. See Bruni, 824 F.3d at 370 ("[A]nalysis under intermediate scrutiny affords some deference to a municipality's judgment in adopting a content-neutral restriction on speech.").

Furthermore, the Court finds sufficient evidence that the City "seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective.'" Bruni, 824 F.3d at 371 (citing McCullen, 134 S.Ct. at 2539). Here, the legislative record clearly shows that the City tried, and considered and rejected, at least two alternative measures prior to enacting the Ordinance. First, the City Council considered Ms. Evert's testimony that the City had previously stationed police at the downtown Planned Parenthood, but that this practice had become too expensive in light of the City's budget problems. Doc. 72-3, Exhibit C, at p. 8. Second, Commander Donaldson testified that the enforcement of the City's anti-obstruction laws would not be as effective as a buffer zone in deterring those who attempted to "block" patients from entering the clinic by obstructing their passage before they reached the front door of the building. Doc. 72-3, Exhibit C, at p. 54. After hearing testimony about these two alternative measures (*i.e.*, maintaining an overtime police presence, and enforcing existing anti-obstruction statutes), the City Council voted to adopt the Ordinance. In doing so, the City Council implicitly rejected the alternatives discussed, presumably for the reasons stated on the record.

Plaintiffs argue that the City should have

considered any number of other alternatives prior to adopting the Ordinance, including targeted injunctions and/or the enforcement of anti-harassment statutes. Doc. 73 at 14-18. However, the Bruni Court affirmed that the City need not demonstrate that "it has tried or considered every less burdensome alternative to its Ordinance." Bruni, 824 F.3d at 371 (citing Ward, 491 U.S. at 800). To the contrary, the Court of Appeals took pains to give "repeated recognition of the broad principle of deference to legislative judgments and our explicit assurance that legislatures need not meticulously vet every less burdensome alternative. . . ." Id. at n.18; see also id. ("[W]e mean what we say."). Furthermore, as discussed, in light of the Court's finding that the current law burdens very little speech to begin with, there is no reason to believe that any of these alternative measures would burden *substantially* less speech than does the current Ordinance.

For the reasons discussed above, the Court finds that the Ordinance does not "burden substantially more speech than is necessary to further [the City's] legitimate interests." See McCullen, 134 S. Ct. at 2535. Accordingly, the Court will grant Defendants' Motion for Summary Judgment, and deny Plaintiffs' Motion for Summary Judgment, as to Plaintiffs' facial First Amendment Free Speech and Free Press claims.

2. Overbreadth Claim

Plaintiffs also argue that the Ordinance is facially overbroad "because it authorizes the creation of zones at non-abortion locations where the City does not even claim there has been a justification for banning speech." Doc. 73 at 23.

A statute is overbroad when "a substantial

number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Bruni, 824 F.3d at 374 (internal quotation marks omitted). The Supreme Court has cautioned that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). In Hill, the Supreme Court rejected the plaintiffs' overbreadth challenge to a Colorado statute that created floating buffer zones at the entrances to health care facilities, finding "the comprehensiveness of the statute [to be] a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." Hill, 530 U.S. at 731. The Brown Court relied on that holding in finding that, to the extent that Brown brought a facial overbreadth challenge, "her attack is foreclosed by Hill." 586 F.3d at 282 n. 21. As this Court previously explained, the McCullen Court did not conduct an overbreadth analysis, and thus Brown and Hill's application of the overbreadth doctrine remains good law. Nevertheless, in Bruni, the Court of Appeals found that it was premature to dismiss an overbreadth claim "absent a well-supported conclusion regarding the proper scope of the Ordinance." 824 F.3d at 374.

Following discovery, there remains no dispute as to the scope of the Ordinance as modified by this Court's permanent injunction. As the City argues, the Injunction requires a clear demarcation of any buffer zones, and the City has demarcated only two such buffer zones, both located at the entrances of reproductive healthcare facilities. Doc. 74 ¶ 149; Doc. 82 ¶ 149. Plaintiffs cite no evidence that the City has enforced or attempted to enforce the Ordinance at any

other locations. Indeed, in their lawsuit, Plaintiffs focus almost exclusively on a single buffer zone located at the downtown Planned Parenthood. Thus, the Court finds no evidence that, as limited by the Injunction, the current Ordinance raises any overbreath issue, and will grant summary judgment to Defendants on this claim as well.

II. ORDER

For the reasons stated above, Defendants' Motion for Summary (Doc. 69) is GRANTED and Plaintiffs' Motion for Summary Judgment (Doc. 68) is DENIED. A judgment order pursuant to Federal Rule of Civil Procedure 58 will follow.

IT IS SO ORDERED.

November 16, 2017

s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1755

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

Appellants

v.

CITY OF PITTSBURGH; PITTSBURGH CITY
COUNCIL; MAYOR OF PITTSBURGH

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-14-cv-1197)
District Judge: Hon. Cathy Bissoon

Argued
November 6, 2015

Before: FUENTES, JORDAN, and VANASKIE,
Circuit Judges.

(Filed June 1, 2016)

Matthew S. Bowman [ARGUED]
Alliance Defending Freedom
440 First St., NW – Ste. 600
Washington, DC 20001

David A. Cortman
Alliance Defense Fund
1000 Hurricane Shoals, N.E.
Bldg. D – Ste. 1100
Lawrenceville, GA 30043

Elissa M. Graves
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260

Lawrence G. Paladin, Jr.
#6C 15 Duff Road
Pittsburgh, PA 15235
Counsel for Appellants

Michael E. Kennedy
Matthew S. McHale [ARGUED]
Lourdes Sanchez Ridge
City of Pittsburgh
Department of Law
414 Grant Street
313 City County Bldg.
Pittsburgh, PA 15219
Counsel for Appellees

Erek L. Barron
Whiteford Taylor & Preston
7501 Wisconsin Avenue
Ste. 700 West
Bethesda, MD 20814
Counsel for Amicus Curiae

OPINION OF THE COURT

JORDAN, *Circuit Judge*.

This case puts at issue again an ordinance of the City of Pittsburgh that prohibits certain speech within fifteen feet of health care facilities. Plaintiffs Nikki Bruni, Julie Cosentino, Cynthia Rinaldi, Kathleen Laslow, and Patrick Malley engage in what they call "sidewalk counseling" on the public sidewalk outside of a Pittsburgh Planned Parenthood facility in an effort, through close conversation, to persuade women to forego abortion services. The Plaintiffs filed suit in the United States District Court for the Western District of Pennsylvania, claiming that the Pittsburgh ordinance limiting their ability to approach people near the Planned Parenthood entrance violates their First and Fourteenth Amendments rights. We previously upheld the City's so-called "buffer zone" ordinance against the same kind of challenge in *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009). Despite that, the Plaintiffs argue that the Supreme Court's recent decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) — which struck down a similar Massachusetts state law — has sufficiently altered the constitutional analysis to compel a different result than we reached in *Brown*. The District Court disagreed, hewing to our analysis in *Brown* and thus largely dismissing the Plaintiffs'

constitutional challenge to the Ordinance.[1]

We will vacate in part and affirm in part. Considered in the light most favorable to the Plaintiffs, the First Amendment claims are sufficient to go forward at this stage of the litigation. The speech at issue is core political speech entitled to the maximum protection afforded by the First Amendment, and the City cannot burden it without first trying, or at least demonstrating that it has seriously considered, substantially less restrictive alternatives that would achieve the City's legitimate, substantial, and content-neutral interests. *McCullen* teaches that the constitutionality of buffer zone laws turns on the factual circumstances giving rise to the law in each individual case — the same type of buffer zone may be upheld on one record where it might be struck down on another. Hence, dismissal of claims challenging ordinances like the one at issue here will rarely, if ever, be appropriate at the pleading stage. Instead, factual development will likely be indispensable to the assessment of whether an ordinance is constitutionally permissible. We express no view on the ultimate merits of the Plaintiffs' claims in this case, but, following the guidance of *McCullen*, we will vacate the dismissal of the First Amendment claims so that they may be considered after appropriate development of a factual record. Because the First Amendment claims cover all of the Plaintiffs' contentions, and the Fourteenth Amendment claim is simply a recasting of free expression arguments, we will affirm the dismissal of that claim.

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[1] As more fully noted herein, *see infra* 359 n.5, some of the Plaintiffs' claims were permitted to stand but the Plaintiffs have since voluntarily dismissed them.

I. BACKGROUND[2]

A. The Ordinance

On December 13, 2005, Pittsburgh's City Council adopted Ordinance No. 49, which added Chapter 623 to the Pittsburgh Code of Ordinances. That Chapter, titled "Public Safety at Health Care Facilities," went into effect later in the month.

The part of the Ordinance that is now in dispute is § 623.04, which establishes a "Fifteen-Foot Buffer Zone." It states that:

> [n]o person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending fifteen (15) feet 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.

Pittsburgh Pa., Code § 623.04. Although the term "health care facility" is not defined in the Chapter, a "[m]edical office/clinic" is defined as "an

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[2] Because the District Court dismissed the Plaintiffs' Complaint in response to the City's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), in setting out the factual background here, we accept as true all facts alleged in the Complaint and draw all reasonable inferences in favor of the Plaintiffs. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

establishment providing therapeutic, preventative, corrective, healing and health-building treatment services on an out-patient basis by physicians, dentists and other practitioners." *Id.* § 623.02.

In adopting the buffer zone Ordinance, the City Council also ratified a preamble, titled "Intent of Council," that described the goals the City sought to accomplish:

> The City Council recognizes that access to Health Care Facilities for the purpose of obtaining medical counseling and treatment is important for residents and visitors to the City. The exercise of a person's right to protest or counsel against certain medical procedures is a First Amendment activity that must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and
>
> The City of Pittsburgh Bureau of Police has been consistently called upon in at least two (2) locations within the City to mediate the disputes between those seeking medical counseling and treatment and those who would counsel against their actions so as to (i) avoid violent confrontations which would lead to criminal charges and (ii) enforce existing City Ordinances which regulate use of public sidewalks and other conduct;
>
> Such services require a dedicated and indefinite appropriation of policing services, which is being provided to the neglect of the law enforcement needs of the Zones in which these facilities exist.

> The City seeks a more efficient and wider deployment of its services which will help also reduce the risk of violence and provide unobstructed access to health care facilities by setting clear guidelines for activity in the immediate vicinity of the entrances to health care facilities;
>
> The Council finds that the limited buffer and bubble zones outside of health care facilities established by this chapter will ensure that patients have unimpeded access to medical services while ensuring that the First Amendment rights of demonstrators to communicate their message to their intended audience is not impaired.

Id. § 623.01. Violations of the Ordinance are met with graduated penalties, ranging from a $50 fine for a first offense to a thirty-day maximum (and three-day minimum) jail sentence for a fourth violation within five years. *Id.* § 623.05. As originally passed, the Ordinance also included an eight-foot "floating bubble zone," which established a 100-foot area around clinics in which people could not be approached without their consent within eight feet "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* § 623.03.

The Ordinance was challenged in court shortly after its passage. In *Brown v. City of Pittsburgh*, we held that, although the fifteen-foot fixed buffer zone and the eight-foot floating bubble zone were each on their own constitutionally permissible, the combination of the two imposed a facially-unconstitutional burden on free speech. 586 F.3d at 276, 281. On

remand, the District Court issued an order permanently enjoining enforcement of the eight-foot floating bubble zone. Importantly for present purposes, the order also required that the fifteen-foot buffer zone be construed to prohibit "any person" from "picket[ing] or demonstrat[ing]" within the fixed buffer zone.[3] (App. at 150a.) The Plaintiffs challenge the constitutionality of the law as modified by the permanent injunction.

B. Application of the Ordinance

Although the Ordinance applies, on its face, at all hospitals and health care facilities in Pittsburgh, the City has demarcated only two actual buffer zones, both outside the entrances of facilities that provide abortion services. The allegations in the Complaint relate primarily to the Plaintiffs' experiences at one of those two locations — the Planned Parenthood facility located at 933 Liberty Avenue. At the front of that facility, a painted yellow semi-circle marks the buffer zone boundary within which the Ordinance bans demonstrating or picketing.

According to their Complaint, the Plaintiffs "regularly engage in peaceful prayer, leafleting, sidewalk counseling, pro-life advocacy, and other peaceful expressive activities" outside of that Planned Parenthood location. (App. at 51a.) In their sidewalk counseling, they "seek to have quiet conversations and offer assistance and information to abortion-minded women by providing them pamphlets describing local pregnancy resources, praying, and ...

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[3] The order also required the City to provide training to the Pittsburgh City Police concerning proper enforcement of the Ordinance and to mark clearly the boundaries of any fixed buffer zone.

peacefully express[ing] this message of caring support to those entering and exiting the clinic." (App. at 58a.) The City reads the Ordinance to prohibit sidewalk counseling as a form of "demonstrating" and has enforced the ban against those who, like the Plaintiffs, would engage in counseling within the buffer zone. The prohibition "make[s] it more difficult [for the] Plaintiffs to engage in sidewalk counseling, prayer, advocacy, and other expressive activities." (App. at 60a.) Because close, personal interaction is "essential to [the Plaintiffs'] message," as they wish to be viewed as counselors, "rather than to merely express [their] opposition to abortion or to be seen as protesting" (App. at 60a-61a), the Ordinance frustrates effective communication of their message. The prohibition also interferes with the Plaintiffs' activities because they "are often unable to distinguish patients from passer[s]by at the distance that the zones require [the] Plaintiffs to remain." (App. at 61a.)[4]

C. Procedural History

Less than two years ago, the Supreme Court decided *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), which struck down a Massachusetts fixed buffer zone

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[4] In their Complaint, the Plaintiffs also describe specific episodes that have occurred outside of the Liberty Avenue Planned Parenthood, episodes in which their counseling was interrupted. For example, Plaintiff Cosentino stated that on one occasion a clinic escort "yelled loudly" at her while she was speaking with a young woman outside of the buffer zone, and multiple clinic employees then "surrounded the young woman" and led her into the clinic. (App. at 58a-59a.) On another occasion, Plaintiff Rinaldi stated that a security guard stifled her speech outside of the buffer zone while she was discussing adoption options with a young woman.

statute as insufficiently narrowly tailored to achieve the significant government interests asserted for it. Soon thereafter, the Plaintiffs in this suit filed their claims under 42 U.S.C. § 1983 against the City of Pittsburgh, the Pittsburgh City Council, and the Mayor of Pittsburgh. The Plaintiffs brought facial challenges against the Ordinance under the First Amendment's Free Speech and Free Press Clauses, and another facial challenge under the Due Process Clause of the Fourteenth Amendment.[5] They also sought a preliminary injunction to prevent the City from enforcing the Ordinance against them. The City responded with a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint for failure to state a claim.

The District Court held a hearing on the motion for a preliminary injunction, at which the Court heard testimony from Plaintiff Bruni and Ms. Kimberlee Evert, the CEO and President of Planned Parenthood of Western Pennsylvania. The parties also submitted documentary evidence. The City submitted declarations from Evert and Ms. Paula Harris, a "clinic escort" at the facility.[6] The Plaintiffs submitted two affidavits, one from Plaintiff Laslow and the other

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[5] The Plaintiffs' Complaint also included as-applied challenges, an Equal Protection claim, and a selective enforcement claim against the Mayor of Pittsburgh, all of which the District Court did not dismiss. After the District Court's ruling, the Plaintiffs moved to voluntarily dismiss those remaining claims, which are, consequently, not before us on appeal.

[6] "A clinic escort is a volunteer who is trained to walk alongside patients and their companions who want to be accompanied as they approach or leave a health care facility." (App. at 152a.)

from their counsel, Matthew Bowman.

The District Court granted the City's motion to dismiss the Plaintiffs' facial challenges to the Ordinance under the First Amendment and the Due Process Clause of the Fourteenth Amendment.[7] In addition, the Court denied the Plaintiffs' motion for a preliminary injunction.

The Plaintiffs then filed this timely appeal. They seek review only of the dismissal of their First Amendment and Due Process claims against the City and not the denial of their preliminary injunction motion.

II. DISCUSSION[8]

A. Standard of Review

"[O]ur standard of review of a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) is plenary." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006). In considering a Rule 12(b)(6) motion, courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotation marks omitted). While "accept[ing] all of the complaint's well-pleaded facts as true," the district court "may disregard any legal

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[7] The Court also dismissed all claims against the City Council, which the Plaintiffs do not challenge in this appeal.

[8] The District Court had subject matter jurisdiction under 28 U.S.C. § 1331; we exercise jurisdiction pursuant to 28 U.S.C. § 1291.

conclusions." *Id.* at 210-11.

In considering a motion to dismiss, the district court is also bound not to "go beyond the facts alleged in the Complaint and the documents on which the claims made therein [are] based." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997). The court may, however, rely upon "exhibits attached to the complaint and matters of public record." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). If other "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). When that occurs, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.*[9] "The element that triggers the conversion [from a Rule 12(b)(6) dismissal motion into a Rule 56 motion for summary judgment] is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material." 5C Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 1366 (3d ed.). "The reason that a court must convert a motion to dismiss to a summary judgment motion if it considers extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond." *Pension Benefit. Guar. Corp.*,

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[9] Although notice need not be express, we have recommended that district courts provide express notice because it "is easy to give and removes ambiguities." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 288 n.11 (3d Cir. 1999). The City's motion to dismiss was styled only as a motion to dismiss and made no reference to possible conversion into a summary judgment motion. A review of the transcript of the motions hearing verifies that neither the Court nor the parties ever mentioned such a conversion.

998 F.2d at 1196.

The District Court here based its decision to dismiss not only upon the allegations in the Complaint but also, it appears, upon testimony given at the hearing and the supplemental declarations filed by Harris, Evert, Laslow, and Bowman. Indeed, in dismissing the Plaintiffs' facial challenges to the Ordinance, the Court seems to have based its decision entirely on its analysis of the merits of the preliminary injunction motion.[10] Although it relied upon extra-pleading materials, the Court never discussed treating the motion as one for summary judgment.

Thus before reaching the merits, we face a difficulty. "We have previously stated that the label a district court places on its disposition is not binding on an appellate court." *Rose v. Bartle*, 871 F.2d 331, 339-40 (3d Cir. 1989). Because the District Court relied, at least in part, on materials presented outside of the pleadings, "we are constrained ... to treat the district court's disposition of the matter pursuant to Rule 56, and not Rule 12(b)(6)." *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 284 (3d Cir. 1991). But the Plaintiffs were not given the "reasonable opportunity" to present additional evidence as was their right under Rule 12(d). That was error. "We have held that it is reversible error for a district court to convert a motion under Rule 12(b)(6) ... into a motion for summary judgment

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[10] Specifically, the District Court engaged in a careful analysis of the merits of the Plaintiffs' preliminary injunction motion, and then incorporated that analysis into a relatively brief discussion of the motion to dismiss by saying only, "*See* analysis *supra*." (App. at 35a.)

unless the court provides notice of its intention to convert the motion and allows an opportunity to submit materials admissible in a summary judgment proceeding or allows a hearing."[11] *Rose*, 871 F.2d at

[11] It is not enough that the Plaintiffs had an opportunity to submit evidence in connection with the preliminary injunction motion. Even if the parties understood that the City's motion to dismiss was being converted to a motion for summary judgment, the standards governing a motion for a preliminary injunction and a motion for summary judgment are entirely different, and it cannot be assumed that a response to one was meant as a response to the other. As the Plaintiffs point out, evidence was offered only to support their request for a preliminary injunction, and should not have been treated as their entire defense to an improperly-converted summary judgment motion "without giving [Plaintiffs] an opportunity to show ... that the City's evidence fails" to withstand proper scrutiny. (Reply Br. at 22.) With no reflection of notice or an agreement to treat the record developed for the preliminary injunction as being a full record for summary judgment, conversion of the motion was not justified. Moreover, the "undeveloped factual record" (App. at 22a) that the District Court determined was insufficient to support a preliminary injunction was no better developed for purposes of summary judgment.

Even had the District Court restricted its review to the pleadings, it erred by directly equating the standard for evaluating a preliminary injunction with the standard applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). On a motion for a preliminary injunction, a plaintiff bears the burden to show, among other things, "that he is likely to succeed on the merits ... ." *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (citation omitted). To withstand a motion to dismiss, on the other hand, a plaintiff need only demonstrate that he "may be entitled to relief under any reasonable reading of the complaint," *Mayer v. Belichick*, 605 F.3d 223, 229 (3d Cir. 2010), and "[t]he defendant bears the burden of showing that no claim has been presented," *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). Given the significant differences between those two standards, a plaintiff's failure to meet his burden on a motion for a

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Nevertheless, the failure to follow the dictates of Rule 12(d) is subject to a harmless error analysis and may be excused if no prejudice to the plaintiffs would result. *Ford Motor Co.*, 930 F.2d at 284-85. "Thus, even where the opportunity to submit pertinent material is not given, a grant of summary judgment for a defendant may be affirmed where there is no state of facts on which plaintiff could conceivably recover." *Id.* at 285 (internal quotation marks omitted). In our harmless error analysis, the "standard of review ... is plenary: we may affirm if, and only if, on the basis of the complaints filed by these plaintiffs there was no set of facts which could be proven to establish defendants' liability." *Rose*, 871 F.2d at 342. We therefore review the Complaint against the motion to dismiss standard. Neither the documentary nor the testimonial evidence submitted below will be considered in assessing the merits of the City's motion to dismiss.[12]

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preliminary injunction does not mean *ipso facto* that the complaint fails to state a claim.

[12] The amicus brief submitted by Planned Parenthood of Western Pennsylvania and Pittsburgh Pro-Choice Escorts also includes a considerable amount of evidence that purports to be testimony taken by the Pittsburgh City Council during the original 2005 hearing on whether to adopt the Ordinance. The testimony may be significant, as it speaks to the alleged need for the buffer zones and the alternatives employed by the City prior to its enactment. But we cannot consider it in our review, as the testimony would, again, effectively convert the motion to dismiss into one for summary judgment. Moreover, it does not appear to have been before the District Court and is not part of the record in this case.

B. Merits Analysis

On appeal, the Plaintiffs' mount facial challenges to the Ordinance under both the Free Speech and Free Press Clauses of the First Amendment as proscribing protected speech, and under the Due Process Clause of the Fourteenth Amendment due to the Ordinance's allegedly vesting "unbridled discretion" in City officials. (Opening Br. at 16.) A facial challenge "seeks to vindicate not only [a plaintiff's] own rights, but those of others who may also be adversely impacted by the statute in question." *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 623 (3d Cir. 2013) (quoting *City of Chi. v. Morales*, 527 U.S. 41, 55 n.22 (1999)). A successful as-applied challenge bars a law's enforcement against a particular plaintiff, whereas a successful facial challenge results in "complete invalidation of a law." *CMR D.N. Corp.*, 703 F.3d at 624. The distinction between facial and as-applied constitutional challenges, then, is of critical importance in determining the remedy to be provided.

In evaluating a facial challenge we must look beyond the application of an ordinance in the specific case before us. To ultimately succeed on the merits, a plaintiff theoretically has "to establish that no set of circumstances exists under which [the ordinance] would be valid, or that the [ordinance] lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations and quotation marks omitted). In the First Amendment context, the Supreme Court has softened that daunting standard somewhat, saying that a law may also be invalidated on its face "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.*

at 473 (internal citations and quotation marks omitted).

Despite those pronouncements, the Supreme Court has also recognized that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("The label is not what matters."). As already stated, the distinction goes to the breadth of the remedy provided, but "not what must be pleaded in a complaint." *Citizens United*, 558 U.S. at 331. The Court has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124-25 (10th Cir. 2012) (collecting cases); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (warning courts deciding facial challenges not to "speculate about 'hypothetical' or 'imaginary' cases"); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting denial of cert.) (noting that the "no set of circumstances" formulation "has been properly ignored in subsequent cases," and collecting cases). "[W]here a statute fails the relevant constitutional test (such as strict scrutiny ... or reasonableness review), it can no longer be constitutionally applied to anyone — and thus there is 'no set of circumstances' in which the statute would be valid. The relevant constitutional test, however,

remains the proper inquiry." *Doe*, 667 F.3d at 1127. We therefore consider the Plaintiffs' facial challenge to the City's buffer zone Ordinance by resort to the analytical framework governing free speech claims.

1. Free Speech Claim

That framework typically begins with an assessment of whether the challenged law restricts speech based upon its content. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Such "[c]ontent-based prohibitions ... have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). To guard against that threat, the First Amendment requires that, if a statute draws a content-based distinction — thereby favoring some ideas over others — we apply strict scrutiny to the challenged law. Under that heightened scrutiny, the law is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). A content-based restriction, unlike a neutral law, must also be "the least restrictive or least intrusive means of serving the government's interests." *McCullen*, 134 S. Ct. at 2535 (internal quotation marks omitted). As such, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks omitted). If, on the other hand, the law is content-neutral, we apply

intermediate scrutiny and ask whether it is "narrowly tailored to serve a significant governmental interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994).

a. Assuming Content Neutrality

The Plaintiffs contend that the Ordinance constitutes a content-based restriction on speech and is thus subject to strict scrutiny. Although we held in *Brown* that Pittsburgh's buffer-zone Ordinance was content-neutral, *see Brown*, 586 F.3d at 275, the Plaintiffs argue that that conclusion is inconsistent with the Supreme Court's post-*Brown* decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which they say changed how courts draw the line between content-neutral and content-based restrictions. In *Reed*, the Supreme Court held that a town code governing the manner of display of outdoor signs that distinguished between ideological, political, and directional signs was an impermissible content-based restriction on speech. In reaching that conclusion, the Court defined content-based laws as "those that target speech based on its communicative content ...." *Reed*, 135 S. Ct. at 2226. Of relevance here, the Court identified a "subtle" way in which statutes can, on their face, discriminate based upon content, namely by "defining regulated speech by its function or purpose." *Id.* at 2227. The Plaintiffs in the present case contend that, in defining proscribed expression as that which involves "demonstrating" or "picketing," Pittsburgh's Ordinance runs afoul of *Reed* by limiting speech based upon its intended purpose.

Although the Plaintiffs make a compelling argument that *Reed* has altered the applicable analysis of content neutrality, we need not consider

the impact of *Reed* because the Complaint presents a viable free speech challenge to the buffer-zone Ordinance under the lower standard of scrutiny to which a content-neutral restriction on speech is subject. We can assume the Ordinance is content-neutral, even though the City contends we may not do so — which is ironic since the City is the party benefitting from the assumption. The City relies on *McCullen*, pointing out that the Supreme Court, in striking down the Massachusetts buffer zone law, addressed content-neutrality to determine the applicable level of scrutiny. 134 S. Ct. at 2530. The Court concluded that the Massachusetts law, which prohibited "knowingly stand[ing]" within thirty-five feet of the entrance of facilities where abortions are performed, *id.* at 2525, was a content-neutral restriction on free expression, *id.* at 2534. Although the Court recognized that it was empowered to simply assume, without deciding, that the law was subject to a less stringent level of scrutiny — as it ultimately struck down the statute under that lesser scrutiny anyway — it went ahead and engaged in the content-neutrality analysis at the first step, the "ordinary order of operations," because doing so would not have placed the Court at risk of "overruling a precedent."[13] *Id.* at 2530.

Here, by contrast, the conclusion that the Ordinance is a content-based restriction on speech

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[13] To clarify the point, the Supreme Court contrasted an earlier case, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445-46 (2014). In *McCutcheon*, the Court assumed a lower level of First Amendment scrutiny in striking down a challenged statute because deciding to apply heightened scrutiny would have needlessly required the Court to revisit its past decisions on the subject.

would require us to overrule our holding in *Brown* that the Ordinance imposes only a content-neutral ban. We need not take that step, though, as we would reverse the dismissal of the Plaintiffs' free speech claim even under the lesser scrutiny reserved for content-neutral restrictions on speech. Accordingly, we will assume, as was held in *Brown*, that the Ordinance is content neutral and apply the intermediate level of scrutiny due such restrictions.[14]

b. Brown *and its Antecedents*

To satisfy intermediate scrutiny, a content-neutral limitation on speech "must be 'narrowly tailored to serve a significant governmental interest.'" *McCullen*, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *Id.* (internal quotation marks and brackets omitted). Before *McCullen*, the Supreme Court had decided three cases involving similar buffer zones at medical facilities. In the first two of those cases — *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) — the Court confronted the issue in the context of injunctions prohibiting specific individuals from interfering with public access to clinics. It viewed both restrictions, a thirty-six foot buffer zone in *Madsen* and a fifteen foot zone in

[14] Although we do not address the issue, should it arise and need to be addressed on remand, the District Court will need to examine *Reed* and its effect on the content-neutrality analysis to decide whether that case compels a break from *Brown*'s holding that the Ordinance is a content-neutral restriction on speech.

Schenck, as sufficiently narrowly tailored and thus upheld them under intermediate scrutiny.

In *Madsen*, the Court noted that the thirty-six foot buffer zone at issue in that case was created by way of injunctive relief only after a first injunction (which enjoined the specified protesters from blocking or interfering with public access to the clinic) proved insufficient to serve the government's stated interests. *Madsen*, 512 U.S. at 769-70. The Court also emphasized that "the state court found that [those protesters] repeatedly had interfered with the free access of patients and staff" to the clinic in question before issuing the injunction, leaving the state court with "few other options to protect access" to the clinic. *Id.* at 769.

Similarly, in *Schenck*, the Court upheld the fixed buffer zone because "the record show[ed] that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots." 519 U.S. at 380. The *Schenck* Court also struck down a floating bubble zone as insufficiently tailored to the government's interests. *Id.* at 377-80. The restriction was overbroad chiefly because of the type of speech it restricted (leafleting and other comments on matters of public concern) and the nature of the location (a public sidewalk). *Id.* at 377. The Court emphasized the potential for uncertainty that a floating bubble zone creates — "[w]ith clinic escorts leaving the clinic to pick up incoming patients and entering the clinic to drop them off, it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" — and the

resultant "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378. In contrast with the fixed buffer zone which was upheld, the floating zone "[could] not be sustained on th[e] record" before the Court. *Id.* at 377.

In the third buffer zone case, *Hill v. Colorado*, the Supreme Court held, in spite of its earlier ruling in *Schenck*, that an eight-foot floating bubble zone satisfied intermediate scrutiny's narrow tailoring requirement. 530 U.S. 703, 725 (2000). The *Hill* Court explained the differences between the bubble zones in the two cases. *See id.* at 726-27. *Schenck* involved a fifteen-foot bubble zone, whereas *Hill*'s was eight feet, which, the Court concluded, allowed speech "at a normal conversational distance." *Id.* at 726-27 (internal quotation marks omitted). By the Court's estimation, the eight-foot zone would have no "adverse impact" on one's ability to read a sign, would permit oral communication "at a normal conversational distance," and would not "prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material ... ." *Id.* at 726-27 (internal quotation marks omitted). "Signs, pictures, and voice itself can cross an 8-foot gap with ease." *Id.* at 729. Additionally, the *Hill* statute allowed the speaker to remain in one place while other people passed within eight feet. *Id.* at 727. Finally, the *Hill* statute also required that any violation be "knowing," so that an inadvertent breach of the zone would not be unlawful. *Id.*

Although we previously concluded in *Brown* that the City's Ordinance was sufficiently narrowly tailored, we did so out of deference to the Supreme Court's holdings in *Madsen* and *Schenck*. *See Brown*,

586 F.3d at 276. But each of those cases, as well as *Hill*, implies that the application of intermediate scrutiny's narrow tailoring analysis must depend on the particular facts at issue. That implication was made explicit in *McCullen*.

c. McCullen*'s Clarification of the Law*

In *McCullen*, the Supreme Court struck down the Massachusetts law's thirty-five foot buffer zone as insufficiently narrowly tailored under intermediate scrutiny. It concluded that the zone "burden[s] substantially more speech than necessary to achieve the Commonwealth's asserted interests." *McCullen*, 134 S. Ct. at 2537. The Court started its analysis by recognizing the nature of the burden the buffer zone imposed upon the petitioners' speech. Like the Plaintiffs here, the petitioners in *McCullen* engaged in sidewalk counseling in an effort to persuade women entering abortion facilities to consider alternatives. *Id.* at 2527. Given that mode of expression, the Court emphasized the petitioners' need to engage in "personal, caring, consensual conversations" rather than "chanting slogans and displaying signs" as a form of protest against abortion. *Id.* at 2536. It was thus insufficient that the counselors could be seen and heard at a distance by the women in the buffer zone, because "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." *Id.* at 2537.

The limitation on their speech also occurred, as it does here, in the quintessential public forum of public streets and sidewalks, areas that occupy "a special position in terms of First Amendment protection ... ." *Id.* at 2529 (internal quotation marks omitted). The

restriction thus struck at the heart of speech protected by the First Amendment. *See id.* at 2536 ("[W]hile the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms — such as normal conversation and leafletting on a public sidewalk — have historically been more closely associated with the transmission of ideas than others."). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.*

Balanced against that significant burden on speech was the means chosen to effectuate the government's purpose. *McCullen* emphasized the unusual nature of such buffer zone laws — at the time *McCullen* was decided, only six (including Pittsburgh's) existed across the entire United States, *id.* at 2537 n.6 — which "raise[d] concern that the Commonwealth ha[d] too readily forgone options that could serve its interests just as well ... ." *Id.* at 2537. In the Supreme Court's view, Massachusetts had a number of less speech-restrictive alternatives available to address its goals: it could utilize "existing local ordinances" banning obstruction of public ways, *id.* at 2538; "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like," *id.*; and "targeted injunctions" like those in *Madsen* and *Schenck*, *id.* The Court also emphasized that the congestion problem the Commonwealth cited arose mainly at one Boston clinic, which did not justify "creating 35-foot buffer zones at every clinic across the Commonwealth." *Id.* at 2539.

The Court further rejected the Commonwealth's contention that it "ha[d] tried other approaches, but they do not work." *Id.* Although the Commonwealth

claimed it had revised the statute because an earlier, less restrictive, version was too difficult to enforce, the Court noted that Massachusetts could not document a single prosecution brought under its previous statutes "within at least the last 17 years" and "the last injunctions ... date[d] to the 1990s." *Id.* The Commonwealth had thus not met its narrow-tailoring burden because it "ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor ha[d] it shown that it considered different methods that other jurisdictions have found effective." *Id.* In light of the "vital First Amendment interests at stake, it [was] not enough for Massachusetts simply to say that other approaches have not worked." *Id.* at 2540. It had to either back up that assertion with evidence of past efforts, and the failures of those efforts, to remedy the problems that existed outside of the Commonwealth's abortion clinics, or otherwise demonstrate its serious consideration of, and reasonable decision to forego, alternative measures that would burden substantially less speech. The Court recognized that a buffer zone would likely make the Commonwealth's job easier, but "the prime objective of the First Amendment is not efficiency." *Id.* "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* In the absence of that kind of fact-specific showing, the Supreme Court struck down the buffer zone law as insufficiently narrowly tailored under intermediate scrutiny.

d. Application of Intermediate Scrutiny to Pittsburgh's Ordinance

As to the government interests at stake in a case like this, all four of the Supreme Court's buffer zone precedents – *Madsen*, *Schenck*, *Hill*, and *McCullen* – accepted that the laws at issue furthered significant government interests. *Schenck* identified those interests as: "protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients ... ." 519 U.S. at 372. Here, the statement of intent of the Pittsburgh City Council asserts the same kinds of justifications: ensuring patients have "unimpeded access to medical services," eliminating the "neglect" of other law enforcement needs, and letting the City provide "a more efficient and wider deployment of its services." Pittsburgh Pa., Code § 623.01. Consistent with *Schenck*, we held in *Brown* that the Ordinance served significant governmental interests. 586 F.3d at 276. Nothing since *Brown* has altered that conclusion. Indeed, *McCullen* noted that such goals reflect "undeniably significant interests," 134 S. Ct. at 2541, and the Plaintiffs in the present case do not dispute the significance of the City's interests.

Nevertheless, the Ordinance must still be narrowly tailored to serve those interests. The District Court, applying intermediate scrutiny (without the benefit of *Reed*), essentially concluded that its analysis was controlled by our narrow-tailoring holding in *Brown*. The Court reasoned that *McCullen* had not "explicitly overrule[d] *Hill* or articulate[d] a deviation from the standard outlined in that case." (App. at 26a.) In the absence of a clear

break from precedent, the District Court concluded that it was bound by our prior analysis. In the District Court's view, *McCullen* also did not represent a binding application of the intermediate scrutiny standard because that case involved a thirty-five foot buffer zone and thus imposed a greater "degree of burden" on speech than the fifteen-foot zone in Pittsburgh. (App. at 31a.)

Of course, in a mathematical sense the degree of infringement on the Plaintiffs' speech here is less than that imposed on the petitioners in *McCullen*, fifteen feet being less than thirty-five. But more than math is involved, and, even at fifteen feet, Pittsburgh's buffer zone raises serious questions under the First Amendment. None of the four prior cases assessing buffer zones turned solely on the size of the zones. What matters is the burden on speech that such zones impose, of which size is one but only one feature. Indeed, smaller buffer zones are not always better: *McCullen* struck down a thirty-five foot zone even though *Madsen* had previously upheld a slightly larger zone. *McCullen* never referenced the size of the approved zone in *Madsen* or that the Massachusetts zones were actually smaller. Those cases turned on their distinct factual records, not a simple difference in real estate. *McCullen* emphasized the "serious burdens" that the law imposed on speech by "compromis[ing] petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'" 134 S. Ct. at 2535. Any difference between the burden on speech in *McCullen* and that here is a matter of degree rather

than kind.[15] Thus, the size of the zone at issue here is not dispositive, and we must look more broadly at the allegations of the Complaint.

According to those allegations, Pittsburgh's buffer zone Ordinance "prohibits Plaintiffs and others from effectively reaching their intended audience." (App. at 56a.) The Complaint further alleges that "[t]he zones created by the Ordinance make it more difficult [for the] Plaintiffs to engage in sidewalk counseling, prayer, advocacy, and other expressive activities," (App. at 60a), and that the Ordinance "will cause conversations between the Plaintiffs and those entering or exiting the facilities to be far less frequent

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[15] We agree with the observation of our concurring colleague that the degree of burden on speech here is less than that in *McCullen*, because the zones in Massachusetts were larger, applied state-wide, and limited any entry into the prohibited areas. But the protracted discussion undertaken by the concurrence in an effort to contrast *McCullen* with this case is unnecessary, since the differences do not change the applicable analysis under intermediate scrutiny. As far as we can tell, the concurrence does not contend that those differences somehow save the Ordinance at issue here from intermediate scrutiny or subject it to a lesser level of review. In fact, our colleague says that he "cannot conclude, on the basis of the allegations in the Complaint, that the Pittsburgh buffer zones operate so differently from the Massachusetts zones that Plaintiffs cannot advance past the pleading stage." (Concurrence at 25.) Because we agree with that statement, we see little point in contrasting the two laws in lengthy dicta. Any law that imposes a similar burden as that in *McCullen* — foreclosing speech about an important subject in a quintessential public forum "without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes," 134 S. Ct. at 2541 — is subject to the same narrow tailoring analysis as the Supreme Court employed in that opinion. The concurrence does not deny that Pittsburgh's Ordinance is such a law. We are simply following where *McCullen* has led.

and far less successful." (App. at 60a.) Taking those allegations as true, the burden on the Plaintiffs' speech is akin to that imposed upon the petitioners in *McCullen*, and nothing in the Complaint suggests otherwise.[16]

Because of the significant burden on speech that the Ordinance allegedly imposes, the City has the same obligation to use less restrictive alternatives to its buffer zone as the Commonwealth of Massachusetts had with respect to the buffer zone at issue in *McCullen*. As stated, that obligation requires that the government "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540. The statement of intent of the Pittsburgh City Council — in which the Council stated that Pittsburgh's police had "been consistently called upon in at least two locations within the City to

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[16] The concurrence offers some suppositions about the possible ways the Ordinance might affect people, like Plaintiffs, engaging in sidewalk counseling. For example, it notes that counselors will likely be able to distinguish patients from passersby because "[a] patient heading toward a clinic will almost certainly have manifested her intention to enter the clinic by the time she is 15 feet from its entrance" (Concurrence at 19), even though the photograph of the Planned Parenthood buffer zone provided by the City shows that it extends to the edge of the sidewalk and into the street, which would seemingly make it quite difficult for counselors to make any distinction between patients walking into the clinic and pedestrians walking by it. Despite the guesswork, the concurrence concludes by emphasizing that, "it is not the Court's role on a 12(b)(6) motion to supplant the well-pleaded allegations with its own speculation, or to question the Plaintiffs' characterization of their experiences." (Concurrence at 23.) That last observation is certainly correct, which is why we have opted not to speculate or question the allegations of the Complaint.

mediate the disputes .... [causing] indefinite appropriation of policing services," Pittsburgh Pa., Code § 623.01 — does not by itself satisfy the required constitutional scrutiny of the Ordinance. Although "we must accord a measure of deference" to the government's judgment, *Hill*, 530 U.S. at 727, as in *McCullen*, "it is not enough for [the City] simply to say that other approaches have not worked." 134 S. Ct. at 2540. We recognize that the City need not employ "the least restrictive or least intrusive means of serving its interests," *Ward*, 491 U.S. at 798, but it must, in some meaningful way, "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests," *McCullen*, 134 S. Ct. at 2540. Because the City has available to it the same range of alternatives that *McCullen* identified — anti-obstruction ordinances, criminal enforcement, and targeted injunctions — it must justify its choice to adopt the Ordinance. To do so, the City would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason.[17]

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[17] The concurrence repeatedly tries to downplay the significance of *McCullen* — variously referring to the opinion as "incremental," "modest," and "unexceptional" (Concurrence at 4-5) — and devotes much of its energy to narrowing that case only to its facts. It does so, presumably, in service of a desire to avoid the import of the Supreme Court's decision. Consider our colleague's reading of *McCullen*: "[u]nlike the majority, I do not believe that *McCullen* announces a general rule requiring the government to affirmatively prove that less-restrictive measures would fail to achieve its interests." (Concurrence at 1-2.) Then try to reconcile that with the actual language of *McCullen*: "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden

substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." 134 S. Ct. at 2540. We are more ready than our colleague is to take the high Court at its word, and that is the heart of our disagreement with him.

Nevertheless, he asserts that our analysis "is contrary to *McCullen* and distorts First Amendment doctrine." (Concurrence at 7.) Far from it. We are doing nothing more than applying *McCullen* according to its terms. In the unanimous language of the Supreme Court, "it is not enough for [the government] simply to say that other approaches have not worked." *Id.* Again, the burden is on the government to actually demonstrate that alternative measures would fail to meet the government's legitimate ends. We are simply holding the City to that standard, as was done in *McCullen*.

The concurrence claims that we have neglected to answer "the central constitutional question: assuming that the proposed alternatives would burden less speech than a 15-foot buffer zone, would they burden *substantially* less speech?" (Concurrence at 14.) But *McCullen* answered that question for us; it just did not provide the answer our concurring colleague might prefer. In that opinion, the Supreme Court laid out some of the less-burdensome alternatives to a buffer zone law. Because the burden on Plaintiffs' speech here is akin to that present in *McCullen*, the City similarly "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." 134 S. Ct. at 2539. The existence of those substantially less burdensome alternatives obligates the City to try them or consider them. Again, that is not our requirement. It is the Supreme Court's: "the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *Id.* Our analysis here is not nearly the novelty that the concurrence suggests. This case calls for nothing more than a straightforward application of *McCullen* — the Ordinance imposes the same kind of burden on speech, the same less burdensome options are available, and the City has similarly

By that statement, we do not suggest that the City must demonstrate that it has used the least-restrictive alternative, nor do we propose that the City demonstrate it has tried or considered *every* less burdensome alternative to its Ordinance. *See Ward*, 491 U.S. at 800 (concluding that "[t]he Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was the least intrusive means of achieving the desired end" (internal quotation marks omitted)). On the contrary, analysis under intermediate scrutiny affords some deference to a municipality's judgment in adopting a content-neutral restriction on speech.[18] But the municipality may not forego a range

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failed to try or to consider those alternatives to justify its Ordinance.

[18] Despite our repeated recognition of the broad principle of deference to legislative judgments and our explicit assurance that legislatures need not meticulously vet every less burdensome alternative, the concurrence nonetheless persists in suggesting that we are somehow saying the opposite, "eliminat[ing] much of the discretion" given to lawmakers and "requiring governments to adopt the least restrictive alternative." (Concurrence at 11-12.) Both fears are unfounded. We can only say what we have repeatedly said elsewhere in this opinion: we are imposing neither requirement. All we can do to allay the concurrence's concerns, we surmise, is to emphasize that we mean what we say.

The concurrence similarly claims that we are conducting an unprecedented "show us your work" review of the underlying legislative record, "something no court has ever required." (Concurrence at 9.) Although we (yet again) acknowledge the need for deference, heightened scrutiny must mean *something*. It is impossible to read *McCullen* any other way. That case dug into the record, discussed the substantially less burdensome alternatives available, and assessed the Commonwealth's

of alternatives — which would burden substantially less expression than a blanket prohibition on Plaintiffs' speech in a historically-public forum — without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed. Properly crediting the allegations of the Complaint, Pittsburgh has not met that burden.

Of course, the City had no opportunity to properly produce such evidence at the motion-to-dismiss stage. Instead, we must accept as true at this stage of the case the Complaint's allegation that "no specific instances of obstructive conduct outside of hospitals or health care facilities in the City of Pittsburgh ...

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failure to use those alternatives to address its significant interests. And that was not a novel approach. Past intermediate scrutiny cases engage in similar review of the legislative record. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (assessing "must carry" provision by scrutinizing the legislative record, and ultimately asking "whether the legislative conclusion was reasonable and *supported by substantial evidence in the record before Congress*" (emphasis added)); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (examining the legislative record supporting the City of Renton's adoption of its ordinance prohibiting adult movie theaters within 1,000 feet of residential areas); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (striking down content-based restriction on speech, under strict scrutiny, citing the "near barren legislative record relevant to th[at] provision"). The government bears the burden to establish the reasonable fit between the challenged law and its asserted objective. *Bd. of Trs. of State. Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989). That burden — and the protection of speech that heightened judicial scrutiny is meant to ensure — would be meaningless indeed if it did not ask the government, at the very least, to justify its choice to prohibit speech where substantially less burdensome alternatives are available.

provide support for the law ... ." (App. at 56a.)[19] The Plaintiffs further claim that "[n]o speech activities on the public sidewalks and ways outside the Liberty Avenue Planned Parenthood in recent years have caused a problem preventing access to its entrances." (App. at 57a.) Again, these assertions must be credited at this stage. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

McCullen required the sovereign to justify its regulation of political speech by describing the efforts it had made to address the government interests at stake by substantially less-restrictive methods or by showing that it seriously considered and reasonably rejected "different methods that other jurisdictions have found effective." 134 S. Ct. at 2539. Such proof can only be considered, however, after a fair opportunity for discovery and the production of evidence. Indeed, when a complaint states a plausible First Amendment claim of the type advanced here and substantially less burdensome alternatives appear to have been available to the city or state, the city or state will rarely be able to satisfy narrow tailoring at the pleading stage.[20] At this early point in the present

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[19] One might argue that the qualifying phrase "provide support for the law" makes that allegation primarily a legal rather than a factual contention. *See Fowler*, 578 F.3d at 210-11 (holding that a court presented with a motion to dismiss "may disregard any legal conclusions" set out in the complaint). Viewing it generously for the Plaintiffs, however, we will take it to mean that no meaningful obstruction has occurred.

[20] Although this is not such a case, there may be cases in which it is clear — before any evidence is produced regarding the government's history of attempting and considering alternatives — that the chosen regulation is reasonably narrowly tailored under intermediate scrutiny. For example, were one to challenge

case, without such proof, the Plaintiffs' First Amendment claims cannot be dismissed. We instead must credit the allegations of the Complaint, which plausibly state a claim that the City's Ordinance "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535 (internal quotation marks omitted).

The City contends, consistent with the District Court's opinion, that *McCullen* did not alter the narrow-tailoring analysis to the degree necessary to change the conclusion we reached in *Brown*. But *McCullen* employs a level of rigor that *Brown* did not approach. In fact, *Brown* engaged in no narrow-tailoring analysis of its own. It instead incorporated the analyses of *Madsen* and *Schenck* by reference and concluded that Pittsburgh's buffer zone was "*a fortiori* constitutionally valid" in light of those past cases. *Brown*, 586 F.3d at 276. At the very least, *McCullen* has called that approach into question, clarifying that the particular facts of each case must be examined.[21]

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the hypothetical *de minimis* sound amplification law posited by the concurrence, that regulation would likely be viewed as narrowly tailored, even at the pleading stage. With such a slight burden on speech, any challengers would struggle to show that "alternative measures [would] burden *substantially* less speech." *McCullen*, 134 S. Ct. at 2540 (emphasis added).

We also note that our emphasis on the need for the development of a factual record arises not only from the general principle that a court should have a sufficient basis to support its legal conclusions but more particularly from the Supreme Court's instruction in *McCullen* on the importance of a factual record in considering the constitutionality of such buffer zone laws.

[21] In this way, we entirely agree with the concurrence's observation that *McCullen* requires that courts may no longer

No buffer zone can be upheld *a fortiori* simply because a similar one was deemed constitutional, since the background facts associated with the creation and enforcement of a zone cannot be assumed to be identical with those of an earlier case, even if the ordinances in the two cases happened to be the same.

McCullen made this evident when it struck down a smaller buffer zone than that which was upheld in *Madsen*. Also, both *Madsen* and *Schenck* involved plaintiff-specific injunctions, which is one of the less-restrictive alternatives identified by *McCullen* that a sovereign should utilize before turning to "broad, prophylactic measures" like generally-applicable buffer zones that "unnecessarily sweep[ ] in innocent individuals and their speech." *McCullen*, 134 S. Ct. at 2538. And it may be noteworthy that *Brown* considered its narrow-tailoring conclusion to be "bolstered" by the First Circuit's opinion in *McCullen*, which was the very decision later reversed by the Supreme Court. *Brown*, 586 F.3d at 276.

McCullen represents an important clarification of the rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis, and the decision is sufficient to call into question our conclusion in *Brown*. *See In re Krebs*, 527 F.3d 82, 84 (3d Cir. 2008) ("A panel of this Court may reevaluate the holding of a prior panel which conflicts with intervening Supreme Court precedent."). The recent instruction from *McCullen* and the factual allegations of the Complaint combine to require that we vacate the District Court's grant of the City's motion to dismiss

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hold "that a speech regulation is constitutional if it is facially similar to a restriction upheld in a prior Supreme Court case." (Concurrence at 5.)

the Plaintiffs' free speech claims. Because the Plaintiffs' Complaint should not have been dismissed, the District Court's improper consideration of materials beyond the pleadings to convert the motion to one for summary judgment cannot be treated as harmless error.

2. Free Press Claim

The Plaintiffs also raise a claim under the Freedom of the Press Clause of the First Amendment, because "the Ordinance prohibits them from leafleting on public sidewalks." (Opening Br. at 37.) The District Court did not directly address that aspect of the Plaintiffs' First Amendment claim, instead dismissing the facial challenge in its entirety. On appeal, the City argues that the free press claim "properly fell along with the rest of the First Amendment claim under the district court's analysis." (Appellee's Br. at 42 n.4.)

The City's contention is correct in the abstract. Had the District Court properly dismissed the Plaintiffs' free speech claim, it would also have been proper to dismiss their free press claim, because the Plaintiffs' free press claim is, in this context, properly considered a subset of their broader free speech claim, given that the Freedom of the Press Clause and the Free Speech Clause both protect leafleting from government interference. *See Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[T]he speech in which Mrs. McIntyre engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is the essence of First

Amendment expression.").

But as the claims could properly fall together, the converse is also true here: resuscitation of the broader free speech claim requires us to vacate the dismissal of the free press claim. In light of the burden the Ordinance places on speech, the City's inability to show at the motion to dismiss stage that substantially less burdensome alternatives would fail to achieve its interests dooms its broad prohibition on all of the Plaintiffs' expressive activities, including the prohibition on leafleting.

3. Overbreadth Claim

The Plaintiffs next contend that the Ordinance violates the First Amendment by imposing an unconstitutionally overbroad restriction on speech "because it authorizes the creation of zones at non-abortion locations where the City does not even claim there has been a justification for banning speech." (Opening Br. at 38.) The City responds — just as the District Court did in dismissing this claim — that their argument is "foreclosed by this Court's decision in *Brown*." (Answering Br. at 42.) In *Brown*, we rejected the plaintiff's facial overbreadth challenge because such a claim was undercut by *Hill*. 586 F.3d at 282-83 n.21. *Hill* involved a floating bubble zone that applied, like Pittsburgh's Ordinance, to "any health care facility." *Hill*, 530 U.S. at 707. Despite that, the Supreme Court upheld the statute against a facial challenge to its overbreadth. *Id.* at 730-32. "The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance," the Court noted. *Id.* at 730-31. In fact, said the Court, "the comprehensiveness of the statute is a virtue, not a vice, because

it is evidence against there being a discriminatory governmental motive." *Id.* at 731.

Like the statute at issue in *Hill*, a buffer zone under the Ordinance can be established at any "hospital, medical office or clinic ... ." (App. at 150a.) But the Plaintiffs' Complaint alleges that the Ordinance "is only enforced outside of health care facilities which provide abortions" (App. at 56a); the entirety of the discussion of the Ordinance's enforcement in the Complaint relates to a single Planned Parenthood location.

The *McCullen* Court did address the breadth of the Massachusetts buffer zone statute, but it did so only in the context of its free speech analysis and discussion of the disconnect between the government interests at stake and the means through which it sought to vindicate those interests. *McCullen*, 134 S. Ct. at 2539 (noting that interests pertaining "mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings" do not require "creating 35-foot buffer zones at every clinic across the Commonwealth"). Given its holding striking down the law, *McCullen* explicitly did not reach the petitioners' overbreadth challenge. *Id.* at 2540 n.9.

We think it unwise for us to assess the proper scope of the City's Ordinance without there first being a resolution of the merits of the Plaintiffs' free speech claim. It is true that the breadth of the challenged law plays a role in the narrow-tailoring analysis of the Plaintiffs' free speech claim. *See Brown*, 586 F.3d at 273 n.10 ("What the petitioners classified as an 'overbreadth' problem, in other words, was better understood analytically as a concern to be addressed

within the framework of ... [a] narrow-tailoring test."); *McCullen*, 134 S. Ct. at 2539 (comparing breadth of statute against government interest in striking down statute on narrow-tailoring grounds). But we cannot adequately assess the overbreadth argument absent a well-supported conclusion regarding the proper scope of the Ordinance. "[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks omitted). Without the developed factual record that *McCullen* requires, we do not know the "legitimate sweep" of the buffer zone law, and thus whether it substantially exceeds that sweep. As with the Plaintiffs' other First Amendment claims, it is premature to dismiss their overbreadth challenge. Accordingly, we will reverse the District Court's dismissal of the overbreadth claim.

4. Due Process Claim

Finally, the Plaintiffs maintain that the Ordinance violates the Due Process Clause of the Fourteenth Amendment because it "vests unbridled discretion in the City to create buffer zones outside of any hospital or health care facility in the City of Pittsburgh." (Opening Br. at 42.) The District Court dismissed that claim because the substance of the claim is "more appropriately characterized as violations under the First Amendment." (App. at 39a.)

The District Court properly pointed out that all of the precedents cited by the Plaintiffs involved First Amendment claims. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government

behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotation marks omitted). Any concerns about the exercise of discretion vested in City officials can be addressed in an as-applied challenge to the Ordinance's enforcement under the First Amendment.[22] We thus agree with the District Court that "[t]he First Amendment is the proper constitutional home for Plaintiffs' freedom of speech and press claims ... ." (App. at 37a.) Accordingly, we will affirm the District Court's dismissal of the Plaintiffs' Due Process claim.[23]

III. CONCLUSION

For the foregoing reasons, we will vacate the District Court's dismissal of the Plaintiffs' First Amendment claims and affirm the dismissal of their Due Process claim. Again, nothing in this opinion should be construed as a conclusion about the ultimate merits of the claims or defenses advanced by the parties. There are not enough facts in the record

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[22] In granting the parties' motion to voluntarily dismiss with prejudice the as-applied challenges, the District Court's order noted: "The parties specify that dismissal is with prejudice to these two existing matters, but the prejudice does not prevent assertion of such claims against future applications of the ordinance by the City." (District Court Docket, Doc. 31.)

[23] Although the Plaintiffs also raised a procedural due process claim, which the District Court dismissed, they have made no argument before us concerning that claim. Accordingly, any argument supporting the procedural due process claim is waived. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.").

for us to make any such comment, even were we so inclined. That is the problem. We reverse so that the Plaintiffs' claims may be aired and assessed by the standard that *McCullen* now requires.

FUENTES, *Circuit Judge*, concurring in the judgment.

I agree with the majority that the allegations in the Complaint, taken as true, establish that Pittsburgh's Ordinance restricting certain speech within 15 feet of designated health care facilities violates the intermediate-scrutiny standard for time, place, and manner regulations. I disagree, however, with the majority's reasoning in support of that result. In particular, I disagree with its conclusion that the Supreme Court's decision in *McCullen v. Coakley*[1] requires governments that place "significant" burdens on speech to prove either that less speech-restrictive measures have failed or that alternative measures were "seriously" considered and "reasonably" rejected. That interpretation distorts narrow-tailoring doctrine by eliminating the government's latitude to adopt regulations that are not "the least restrictive or least intrusive means of serving the government's interests."[2] Nothing in *McCullen* or the Supreme Court's First Amendment jurisprudence requires us to apply such a rule. Accordingly, as to Plaintiffs' free-speech claim, I concur only in the judgment.[3]

I.

My disagreement with the majority stems entirely from our differing interpretations of *McCullen*. Unlike the majority, I do not believe that *McCullen* announces a general rule requiring the

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[1] 134 S. Ct. 2518 (2014).

[2] *Id.* at 2535 (internal quotation marks omitted).

[3] I agree with the majority's disposition of Plaintiffs' free press, overbreadth, and due process claims.

government to affirmatively prove that less-restrictive measures would fail to achieve its interests. Before addressing the source of this disagreement, therefore, I think it is useful to review *McCullen* and to situate it among the Supreme Court's narrow-tailoring and abortion-protest precedents.

McCullen is, first and foremost, a straightforward application of the *Ward* narrow-tailoring standard for time, place, and manner regulations. Such regulations "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[4] But the regulation "'need not be the least restrictive or least intrusive means of' serving the government's interests."[5] The ultimate question is whether the government has achieved an appropriate "balance between the affected speech and the governmental interests that the ordinance purports to serve."[6]

McCullen was a case of extreme imbalance—so much so that the Supreme Court unanimously agreed that the challenged statute failed narrow tailoring. The Massachusetts law at issue imposed remarkably onerous burdens on speakers, prohibiting all speech by all non-exempt persons in a 35-foot section of the public way at all abortion clinics in the entire state of Massachusetts.[7] As the Supreme Court recognized,

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[4] *McCullen*, 134 S. Ct. at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

[5] *Id.* at 2535 (quoting *Ward*, 491 U.S. at 798).

[6] *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002).

[7] *McCullen*, 134 S. Ct. at 2526.

"closing a *substantial* portion of a traditional public forum to *all* speakers" is an "extreme step."[8] Likewise, "categorically exclud[ing] non-exempt individuals" from particular zones was certain to "unnecessarily sweep in innocent individuals and their speech."[9] And the risks were not simply hypothetical. Based on the record, the Court concluded that the Massachusetts buffer zones "impose[d] *serious* burdens on petitioners' speech" and "carve[d] out a *significant* portion of the adjacent public sidewalks, pushing petitioners *well back* from the clinics' entrances and driveways."[10]

The Massachusetts law also departed significantly from the regulations upheld in the Supreme Court's prior abortion-protest cases. Unlike the injunctions in *Madsen v. Women's Health Center, Inc.*[11] and *Schenck v. Pro–Choice Network of Western N.Y.*,[12] which were targeted at specific defendants in specific locations, the Massachusetts law prohibited speech by all persons at all abortion clinics throughout the state. Unlike the so-called "bubble zones" in *Hill v. Colorado*,[13] the Massachusetts law forbade speakers from even standing in the buffer zone, thereby foreclosing leafletting or consensual conversations within the zone. And it did so by cordoning off an entire portion of the public forum to

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[8] *Id.* at 2541 (emphasis added).

[9] *Id.* at 2538.

[10] *Id.* at 2537-38 (emphasis added).

[11] 512 U.S. 753 (1994).

[12] 519 U.S. 357 (1997).

[13] 530 U.S. 703 (2000).

all speakers and all messages.

The fact that the Massachusetts law imposed "truly exceptional" burdens on speakers also naturally suggested that Massachusetts had "too readily forgone options that could serve its interests just as well."[14] The Court proposed a number of less-intrusive alternatives: access problems could be addressed through a law that prohibited deliberate obstruction of clinic entrances; harassment could be addressed by an ordinance like the one adopted in New York City that makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility"; and targeted injunctions could be used against particularly troublesome individuals.[15] But because Massachusetts could not identify a single prosecution brought under the other laws at its disposal, it could not show "that it seriously undertook to address the problem with less intrusive tools readily available to it."[16] The Court concluded that Massachusetts could not enact such an extreme speech prohibition without offering a correspondingly comprehensive justification.

McCullen, fairly read, represents an incremental advance in narrow-tailoring doctrine. As the majority implicitly recognizes, *McCullen* did not alter the substantive standard for time, place, and manner restrictions. What it did, rather, is direct courts toward a more nuanced mode of narrow-tailoring analysis. It is no longer enough to say, as we did in

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[14] *McCullen*, 134 S. Ct. at 2537.

[15] *Id.* at 2537-39.

[16] *Id.* at 2539.

Brown v. City of Pittsburgh,[17] that a speech regulation is constitutional if it is facially similar to a restriction upheld in a prior Supreme Court case. Instead, courts must scrutinize the practical operation of the regulation at issue, including its effects on particular types of messaging (*e.g.*, sidewalk counseling and handbilling), the degree to which it privileges ease of enforcement rather than legitimate public access interests, and, in appropriate cases, the availability of less burdensome alternatives. Such scrutiny is especially warranted where, as in *McCullen*, the government enacts a blanket prohibition to address a localized problem.

These are modest, commonsense propositions. Notably, not a single Supreme Court justice considered *McCullen*'s narrow-tailoring analysis worthy of dissent or separate comment—a remarkable consensus in a case pitting abortion-access interests against the right to free speech. That unanimity is not surprising in light of the extreme facts presented and the straightforward doctrinal analysis required. *McCullen*, when read against its precedents, is best understood as a boundary-setting exercise—a corrective but ultimately unexceptional exposition of narrow-tailoring doctrine.

II.

The majority reads *McCullen* differently. *McCullen*, it says, announces a new rule: henceforth, the government must justify any law that places a "significant" burden on speech "by describing the efforts it ha[s] made to address the government interests at stake by substantially less-restrictive

[17] 586 F.3d 263 (3d Cir. 2009).

methods or by showing that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective.'"[18] Applying the rule to this case, the majority states that the City "has the same obligation to use less restrictive alternatives . . . as the Commonwealth of Massachusetts had with respect to the buffer zone at issue in *McCullen*."[19] Therefore, regardless of any differences in size and prohibited conduct between the Massachusetts buffer zones and the City's buffer zones, the Ordinance is flatly unconstitutional unless the City can "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason."[20] The majority acknowledges that under this rule,

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[18] Maj. Op. 27, 31 (quoting *McCullen*, 134 S. Ct. at 2539.) As the majority acknowledges, the rule it announces today applies only to laws, like the buffer zone in *McCullen*, that place a "significant burden on speech." *Id.* 27. The rule does not apply in the mine run of cases involving ordinary or *de minimis* time, place, and manner restrictions. *Id.* 32 n.20.

An example may illustrate the distinction. Imagine that a beach town adopts a *de minimis* time, place and manner restriction: no person may use an electronic sound-amplification device on the beach between the hours of 1:00 a.m. and 6:00 a.m. Under today's decision, this law should be upheld simply because it hardly burdens any speech, and certainly does not burden more speech than necessary to achieve the government's interests. The town government need not prove either that it attempted or that it seriously considered and reasonably rejected less restrictive alternatives, such as a law saying no amplification devices between 2:00 a.m. and 5:00 a.m., or a law saying no amplification devices within 100 feet of a beachfront residence, or a law saying no amplifiers above 50 watts.

[19] Maj. Op. 27.

[20] Maj. Op. 28.

"dismissal of claims challenging ordinances like the one at issue here will rarely, if ever, be appropriate at the pleading stage."[21] But "without such proof, the Plaintiffs' First Amendment claims cannot be dismissed."[22]

I believe that the majority's new "proof of prior efforts" rule is contrary to *McCullen* and distorts First Amendment doctrine. It is, of course, indisputably true that under *McCullen*, the government cannot take "the *extreme* step of closing a *substantial portion* of a traditional public forum to *all* speakers" without "seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes."[23] But that is not the same thing as saying that *every* "significant" time, place, and manner law—or even every buffer zone—must be supported by evidence that the government vetted less-restrictive alternatives prior to the law's adoption, regardless of the burden the law actually places on speech. Such a rule stretches *McCullen* too far, risks untoward results, and disregards *McCullen*'s express statement that a regulation—even one that places "significant" burdens on speech—need not be the least restrictive or least intrusive means of serving the government's interests.

Contrary to the majority's reading, *McCullen*'s invocation of less-restrictive alternatives did not break new ground in First Amendment doctrine. The burden is always on the government to prove that a

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[21] Maj. Op. 4.

[22] Maj. Op. 32.

[23] *McCullen*, 134 S. Ct. at 2541 (emphasis added).

time, place, or manner restriction does not "burden substantially more speech than is necessary to further the government's legitimate interests."[24] A necessary part of that inquiry is whether there are less-restrictive alternatives that could meet the government's interests.[25] It is therefore unexceptional to say, as the Court did in *McCullen*, that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests."[26] If the government's needs could be met by alternatives that "burden substantially less speech," then the challenged regulation *ipso facto* "burdens substantially more speech than is necessary." But the adverb supplies the test: the operative question, in this case and others, is whether the proposed alternatives would burden ***substantially*** less speech while still furthering the government's interests. In practice, this means that a city faced with a range of possible solutions to a public nuisance is free to reject less-burdensome options, so long as it does not reject viable options that would burden *substantially* less

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[24] *Ward*, 491 U.S. at 799.

[25] *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 529 (1996) ("The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." (O'Connor, J. concurring)).

[26] 134 S. Ct. at 2540. It also seems implausible that the Supreme Court would choose to announce a new, standalone First Amendment tailoring rule in the middle of a paragraph at the end of an opinion section devoted to rejecting a party's arguments.

speech.

The majority opinion grafts an additional requirement onto the "substantially more speech than necessary" test: a municipality must now also prove that, before adopting a regulation that "significantly" burdens speech, it either attempted or "seriously considered" and "reasonably rejected" less-intrusive alternatives. This rule improperly elevates one element of the narrow-tailoring inquiry—the availability of less-burdensome alternatives—into a standalone rule of constitutionality. And it does so by converting our inquiry from an after-the-fact assessment of the burdens and benefits of a regulation (what *McCullen* actually requires) into a review of the sufficiency of the underlying legislative record (something no court has ever required). I see no reason why we should begin conducting judicial audits of the legislative rulemaking process.[27] As

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[27] Note the fundamental oddity of today's rule, which essentially requires legislatures to "show us their work" and prove that they took certain considerations into account during the rulemaking process. We frequently assess speech statutes by asking what problem the statute was meant to solve and how well it does so in practice. And as the majority notes, we will sometimes review the legislative record when deference requires us to assess whether Congress acted reasonably, *see Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195-96 (1997), or when determining whether the government's justification for a regulation is purely speculative, *see City of Renton v. Playtime Theatres*, 475 U.S. 41, 50-52 (1986). But I am unaware of any First Amendment context in which we affirmatively require a legislative body to produce a record of its underlying decisionmaking processes, and then base our constitutional determination on whether the legislature crossed off each item on a prescribed factfinding checklist before it enacted the rule in question. Intermediate scrutiny requires us to defer to a legislature's judgments, not dictate its rulemaking procedures. *See Turner Broad. Sys.*, 520 U.S. at 218

McCullen makes clear, the constitutionality of a speech regulation depends on its scope and its effects, not on whether whether the legislative body satisfied some indeterminate set of preconditions before it began drafting. The Supreme Court's time, place, and manner jurisprudence is concerned with outcomes

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("It is well established a regulation's validity does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.") (internal quotation omitted); *City of Renton*, 475 U.S. at 50-52 (cities enacting time, place, and manner regulations need not produce evidence specifically relating to the city's problems or needs and may instead rely on the experiences of other cities).

The novelty of this type of constitutional review raises a variety of practical questions, none of which are answered in the majority opinion. For starters: How can a government ever determine, prior to legislating, which alternatives it must "seriously consider"? What constitutes a "reasoned" rejection? When a government legislates to address a new problem (*i.e.*, in the absence of practical enforcement experience), what weight should courts give to predictive judgments about the drawbacks or benefits of a rejected proposal? How, if at all, does the "seriously considered/reasonably rejected" standard incorporate the Supreme Court's instruction in *Hill*, 530 U.S. at 727, that we must "accord a measure of deference" to the legislature's judgment regarding how best to accommodate competing interests? Can a government "reasonably reject" a viable alternative that would burden substantially less speech than the chosen option?

The majority leaves these questions to future courts. In light of the novelty of the required inquiry and the fact that most (if not all) municipal time, place, and manner restrictions are not supported by the type of factual record today's decision requires, it is worth reemphasizing that the majority's rule only applies to laws that place *significant* burdens on speech. In the vast majority of cases, litigants and District Courts need not consult legislative history or grapple with the questions raised here.

rather than procedure.

By extending judicial scrutiny to the legislative process itself, the majority's new tailoring standard improperly eliminates much of the discretion that *Ward* and *McCullen* confer on municipal decision-makers.[28] *Ward* tells municipalities that they need not entertain every conceivable less-intrusive alternative before adopting a speech law, because hypothetical regulations that would not burden substantially less speech than the chosen option are irrelevant to the First Amendment calculus.[29] Today's opinion, by contrast, tells municipalities not only that they must entertain such alternatives, but that they must also prepare a record demonstrating that they "seriously considered" and "reasonably rejected" such alternatives during the rulemaking process. Similarly, *Ward* directs courts not to "sift[ ] through all the available or imagined alternative means of regulating" a given activity to "determine whether the city's solution was 'the least intrusive means' of achieving the desired end."[30] Today's decision requires courts to sift through the available or imagined alternatives to a challenged regulation and determine whether the city "reasonably rejected" each

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[28] *See also Hill*, 530 U.S. at 727 (courts evaluating whether a speech restriction "is the best possible accommodation of the competing interests at stake" must "accord a measure of deference" to the legislature's judgment).

[29] *See Ward*, 491 U.S. at 797 ("[R]estrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'") (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

[30] *Ward*, 491 U.S. at 797.

one. This approach would be understandable if *McCullen* had disavowed or limited *Ward*. But *McCullen* expressly follows *Ward* and preserves government discretion by reaffirming that a time, place, and manner regulation "'need not be the least restrictive or least intrusive means of' serving the government's interests."[31] Here, a rule that strikes down speech laws whenever the government cannot justify the non-adoption of less-restrictive alternatives treads impermissibly close to a rule requiring governments to adopt the least restrictive alternative.

Today's opinion also introduces a fundamental inconsistency into our narrow-tailoring doctrine. *McCullen* and its predecessors establish that any time, place and manner regulation is constitutional so long as it does not burden substantially more speech than necessary to achieve the government's aims. The majority's new rule bypasses this inquiry in cases of "significant" burden and instead mandates a finding of unconstitutionality whenever the government cannot prove that it tried, properly considered, or reasonably rejected less-restrictive alternatives. This means that even if a regulation objectively does not burden substantially more speech than necessary, it will *still* be unconstitutional if the government cannot prove that it engaged in the prescribed factfinding. But this is not how narrow tailoring works. Under *McCullen* and its predecessors, a regulation can be perfectly constitutional even if the government has no record of how it arrived at its rulemaking, so long as the regulation does not burden substantially more speech than necessary to serve a legitimate

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[31] *McCullen*, 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 798).

government interest.[32] The lack of such a record may be relevant to the narrow-tailoring analysis, for all the reasons explained in *McCullen*—but it is not dispositive.

This case illustrates my concern. The majority holds that the plaintiffs have successfully pleaded a constitutional violation because (1) the City has available to it less-restrictive alternatives such as "anti-obstruction ordinances, criminal enforcement, and targeted injunctions," and (2) the City has failed to try such measures or to justify its decision not to adopt them.[33] But this approach fails to address the central constitutional question: assuming that the proposed alternatives would burden less speech than a 15-foot buffer zone, would they burden ***substantially*** less speech?[34] Or do they fall within the range of slightly less burdensome restrictions that the City remains free to reject out of hand because it is not obligated to choose the least restrictive alternative? To answer, we would need to assess the actual burden imposed by the Ordinance; how much less burdensome the proposed alternatives would be; and how likely it is that the proposed alternatives

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[32] The inverse also holds true: if a law burdens substantially more speech than necessary to achieve the government's interests, it should be declared unconstitutional regardless of the government's proffered justification.

[33] Maj. Op. 28.

[34] As explained in Section III, *infra*, the Pittsburgh buffer zone at issue here burdens far less speech than the Massachusetts zone in *McCullen*. Therefore, we cannot simply assume that the alternative measures discussed in the *McCullen* opinion would also burden substantially less speech than the Pittsburgh Ordinance.

would meet the City's legitimate interests. The majority's *per se* proof rule skips over this analysis and proceeds straight to the outcome.

To the extent the majority reads *McCullen* as adopting a special rule for buffer zones, that distinction does not appear on the face of the *McCullen* opinion or follow naturally from the Supreme Court's reasoning. As the majority recognizes elsewhere, what *McCullen* actually demands is a nuanced tailoring analysis that accounts for context and practical consequences—not a rigid new tier of scrutiny for statutes that create physical zones of exclusion. After all, every time the government builds a fountain in a public park or installs a planter on the sidewalk, it is technically "carving out" a piece of the public forum and preventing its use as a site for expression. We may safely assume that the Supreme Court did not intend such projects to be unconstitutional unless a city can prove that smaller fountains and planters cannot meet the city's beautification needs. But I am also confident that the *McCullen* Court did not intend to require courts to develop a special body of jurisprudence to deal with such questions.

In short, nothing in *McCullen* or its antecedents requires courts to strike down a time, place, and manner restriction whenever the government cannot prove that it tried or seriously considered less intrusive measures. Narrow tailoring permits a fit between the legislature's goal and method "that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one

whose scope is in proportion to the interest served."[35] Plaintiffs will always be able to conceive and plead less burdensome alternatives to a given regulation. Forcing the government to identify those alternatives and affirmatively disprove their viability prior to legislating would convert narrow tailoring from a "reasonable fit" requirement to a "perfect fit" requirement. The availability of less-burdensome alternatives is relevant only to the extent it informs the ultimate question: whether the regulation "'burden[s] *substantially* more speech than is necessary to further the government's legitimate interests.'"[36] That standard, rather than the majority's inflexible "proof of prior efforts" rule, should govern the outcome of this case.

III.

Plaintiffs' invocation of less-intrusive alternatives therefore does not resolve this case. We still must ask: under the fact-specific tailoring analysis required by *McCullen*, does the Pittsburgh Ordinance burden substantially more speech than is necessary to further the City's legitimate interests in protecting women's access to pregnancy-related services, ensuring public safety, and promoting the free flow of traffic? The majority says "yes," in part because it views the burdens imposed by the Ordinance as functionally indistinguishable from the burdens imposed by the Massachusetts law in *McCullen*. I am less certain. While I ultimately agree that the

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[35] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

[36] *McCullen*, 134 S. Ct. at 2535 (emphasis added) (quoting *Ward*, 491 U.S. at 799).

Plaintiffs have adequately pleaded a First Amendment violation, there are numerous distinctions between the buffer zones in *McCullen* and the buffer zones in this case. These distinctions demonstrate why this case cannot be decided simply by citing the prospect of less-burdensome alternatives.

Size of the Zones. The most obvious difference between the Pittsburgh buffer zones and the *McCullen* buffer zones is their size. The radius of the Pittsburgh buffer is less than half the radius of the Massachusetts buffer, and creates a zone whose total area is less than one-fifth the area of the Massachusetts zone. (Put differently, the Massachusetts zone was 2.3 times longer, and its total area was 5.4 times larger.) The Pittsburgh Ordinance therefore carves out a substantially smaller piece of the public forum.[37] I agree with the majority that size alone is not dispositive, and that what ultimately matters is "the burden on speech that such zones impose."[38] But when the regulation in question enforces physical distances between speakers and listeners, the distance *is* the burden. And there is reason to think that the difference in size between the Massachusetts and Pittsburgh zones is constitutionally significant.

The first point to bear in mind is that the buffer zone perimeter is not an impermeable barrier that

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[37] *Cf. McCullen*, 134 S. Ct. at 2535 (the Massachusetts zones "carve out a significant portion of the adjacent public sidewalks"); *id.* at 2541 (Massachusetts has taken "the extreme step of closing a substantial portion of a traditional public forum to all speakers").

[38] Maj. Op. 26.

prevents the transmission of Plaintiffs' message to individuals within the zone. Plaintiffs can speak to women who are inside the zone or hand leaflets to them if they are within arm's reach. Plaintiffs can begin a conversation with a woman outside the zone and continue it as the woman enters the zone, or can initiate a conversation with a woman while she is in the zone and continue it as she exits.

The second, closely related point is that, because the zone is situated around a point of ingress and egress, potential listeners will be moving through the zone rather than standing in a fixed location beyond earshot. And the 15-foot buffer does not require Plaintiffs to remain 15 feet away from patients—just 15 feet away from the clinic doors. Practically speaking, then, a woman entering the clinic will at first be quite close to the speaker and then only gradually move 15 feet away, while a woman exiting the clinic will begin 15 feet away but then move into close proximity.

Therefore, a buffer zone around clinic entrances does not really exclude speech throughout a physical zone, but rather creates a temporal window during which listeners are unable or less likely to receive the speaker's message. The length of that window defines the actual speech burden imposed by the buffer regulation. Here, the window seems short. With respect to oral communication, the Supreme Court in *Hill* concluded that a rule prohibiting speakers from entering within eight feet of a listener still "allows the speaker to communicate at a normal conversational distance."[39] Accepting this premise, the Ordinance

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[39] *Hill*, 530 U.S. at 726-27.

creates two relevant zones: an eight-foot zone in which listeners can presumptively be reached through Plaintiffs' particular brand of conversational messaging, and a seven-foot zone in which listeners cannot be reached (or only reached with difficulty). Women entering or leaving a clinic will likely traverse this seven-foot "no-speech" zone in three or four steps—a matter of seconds. The deprivation of those few seconds of messaging seems like a minimal burden on Plaintiffs' speech.

It also seems like a much lesser burden than the one imposed by the Massachusetts buffer zone, which created a 27-foot "no-speech" zone in which women presumably could not be reached. And while it may be debatable whether Plaintiffs would truly be unable to communicate with a woman in the inner seven-foot zone around Pittsburgh clinics, it is much more likely that they would have been completely unable to communicate with a woman who was well within the 27-foot zone in *McCullen*. By the same token, if women traversing the Pittsburgh buffer zone largely remain within earshot of Plaintiffs' message, that would also alleviate the concern raised in *McCullen* that "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled [sidewalk counselors'] message."[40]

Plaintiffs, following the Supreme Court's lead in *McCullen*, also allege that the Ordinance makes it more difficult for them to distinguish patients from passersby and initiate conversations before they enter the buffer zone. I have not found support for the

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[40] *McCullen*, 134 S. Ct. at 2537.

implicit premise that speakers have a First Amendment right to identify preferred listeners. Either way, here again there is a qualitative distinction between a 35-foot buffer and a 15-foot buffer. A patient heading toward a clinic will almost certainly have manifested her intention to enter the clinic by the time she is 15 feet from its entrance, but is less likely to have done so at 35 feet out. A patient would have to be lost or particularly furtive to avoid being noticed by counselors standing 15 feet from the clinic doors. Thus, assuming that Plaintiffs' ability to recognize patients is a valid First Amendment consideration, I doubt that the Ordinance seriously hampers that ability.

The Ordinance does, however, place a greater burden on leafleting. Unlike the statute in *Hill*, the Ordinance does not allow speakers to stand within the zone and hand out literature to passing women, but rather forces them to do so from outside the zone. But as we noted in *Brown*, "[a]lthough the buffer zone, standing alone, would require leafletters to remain beyond arm's reach of a medical facilities' entrances, they would still be able to approach individuals outside of the 15-foot radius in order to distribute their literature."[41] In *Hill*, the Supreme Court "noted approvingly that the bubble zone allowed leafletters to stand stationary in the path of oncoming pedestrians," which is also the case for Plaintiffs 15 feet away from the clinic entrance.[42] And because the smaller 15-foot zone gives Plaintiffs more time to identify potential patients, it affords greater

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[41] *Brown*, 586 F.3d at 281.

[42] *Id.* at 278 (citing *Hill*, 530 U.S. at 727-28).

opportunity to physically intercept listeners and offer literature.

Scope of Prohibited Activity. The Massachusetts law made it unlawful for anyone to "knowingly enter or remain" within a buffer zone. The Pittsburgh Ordinance makes it unlawful to "knowingly congregate, patrol, picket or demonstrate" within a buffer zone. There are at least two consequential distinctions between these prohibitions.

First, as the *McCullen* Court disapprovingly observed, the Massachusetts law prohibited all speech of any kind within the zone, from political advocacy all the way down to cell phone conversations or casual discussions about the weather. The Pittsburgh Ordinance, by contrast, restricts only certain kinds of protest speech—"picketing" and "demonstrating."[43] To be sure, such speech is core First Amendment speech. But it is nonetheless true that the Ordinance's prohibitions sweep far less widely than the Massachusetts law, and do not prohibit innocent or casual speech within the zone.

Second, the Ordinance, unlike the Massachusetts law, permits protesters and counselors to move through the buffer zone. This understanding has been confirmed by the City in a limiting interpretation.[44]

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[43] The majority is therefore incorrect to characterize the Ordinance as a "blanket prohibition on Plaintiffs' speech in a historically-public forum." Maj. Op. 30.

[44] *See Brown*, 586 F.3d at 274 ("When considering a facial challenge to a state law, 'a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.'" (quoting *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982))).

The City explains in its brief that before the December 2014 preliminary injunction hearing, "Ms. Bruni and the other plaintiffs apparently believed the Ordinance prohibited them from passing through the zone at all even if they refrained from prohibited conduct while in the zone—for example, if they were standing on one side of the clinic's doorway and wanted to engage someone approaching from the other side. However, that erroneous understanding has been clarified . . . ."[45] To the extent this limitation gives Plaintiffs greater opportunity to physically intercept patients before they enter the zone or on their way out, it bears directly on whether the Ordinance burdens sidewalk counseling "substantially" more than necessary.

Statutory Reach. A key failing of the Massachusetts law was its overbreadth: while the record showed that congestion was only a problem at one Boston clinic on Saturday mornings, the law created permanent buffer zones at every single clinic throughout the state. "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution."[46] The Pittsburgh Ordinance, by contrast, only applies to clinics within one city. Moreover, following the District Court's post-remand injunction, the City must clearly demarcate any buffer zone prior to its enforcement.[47] The Complaint only identifies one such demarcated buffer zone, outside the

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[45] City Br. 18.

[46] *McCullen*, 134 S. Ct. at 2539.

[47] App. 150a.

downtown Planned Parenthood Clinic.[48] And because the Ordinance only prohibits certain types of protest speech, it does not ban speech throughout the week like the Massachusetts law, but only at times when protest activity actually occurs. In contrast to the Massachusetts law, the Pittsburgh Ordinance appears tailored to address a particular problem in a particular location at particular times.

* * *

Accordingly, there are strong practical and doctrinal reasons to conclude that the City's buffer zones are qualitatively different from—and burden significantly less speech than—the Massachusetts buffer zones in *McCullen*. There is correspondingly less reason to conclude that the mere possibility of less-intrusive alternatives requires a finding that the Ordinance burdens substantially more speech than necessary.

I agree with the majority, however, that it is not the Court's role on a 12(b)(6) motion to supplant the well-pleaded allegations with its own speculation, or to question the Plaintiffs' characterization of their experiences. The Ordinance may function in the ways I have described above; it may not. What Plaintiffs allege in the Complaint, however, is that the Ordinance "prohibits Plaintiffs and others from effectively reaching their intended audience"; that the Pittsburgh zones "make it more difficult [for the] Plaintiffs to engage in sidewalk counseling, prayer, advocacy, and other expressive activities"; and that the Ordinance "will cause conversations between the Plaintiffs and those entering or exiting the facilities

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[48] App. 57a.

to be far less frequent and far less successful."[49] These are plausible consequences of the buffer zone's restrictions on sidewalk counseling activity, which, according to Plaintiffs, can only be undertaken "through close, caring, and personal conversations, and cannot be conveyed through protests."[50] And while Plaintiffs may be able to speak with women in the zone, there is no dispute that the Ordinance categorically prohibits leafleting within a fixed portion of a public forum.[51]

The Complaint also includes allegations suggesting that the Ordinance sweeps more broadly than necessary to meet the City's interests. As in *McCullen*, the City's use of a fixed buffer zone plausibly suggests that the City adopted the Ordinance because it would be easy to enforce, rather

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[49] App. 56a, 60a.

[50] App. 61a.

[51] The ability to leaflet was a key feature of the Colorado statute upheld in *Hill* and a crucial failing of the Massachusetts law struck down in *McCullen*. As *Hill* acknowledged and *McCullen* emphasized, "handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection." *McCullen*, 134 S. Ct. at 2536. A sidewalk counselor who stands in place offering leaflets for a patient to accept or reject does not seem like a serious impediment to patient access or public safety. That said, the Ordinance could conceivably be construed to permit leafleting in the buffer zone while still prohibiting counseling and other forms of importunate speech. The Ordinance only prohibits "congregating," "patrolling," "picketing," and "demonstrating" within the zone. Silent leafleting does not fit cleanly into "picketing" or "demonstrating," and clearly is not covered by "congregating" or "patrolling." The Ordinance may be susceptible to a limiting construction in this regard.

than because less intrusive measures could not serve its legitimate interests. Plaintiffs also claim that different laws targeted only at harassing or obstructive behavior, such as the ones discussed in *McCullen*, would burden less speech than the fixed buffer zones imposed by the Ordinance. And crucially, Plaintiffs allege that "no specific instances of obstructive conduct outside of hospitals or health care facilities in the City of Pittsburgh . . . provide support for the law."[52]

McCullen instructs us to be sensitive to context and to the practical effects of the Ordinance on Plaintiffs' particular messaging strategy. The allegations in the Complaint, taken as true, plausibly establish that the Ordinance burdens substantially more speech than is necessary to achieve the City's legitimate interests. It is up to a factfinder to determine whether the Ordinance in fact burdens "substantially" more speech than necessary (or, conversely, whether alternative measures would burden "substantially" less speech while still meeting the City's interests). I disagree with the majority's conclusion that the availability of unexamined, less-restrictive alternatives is sufficient, standing alone, to establish a constitutional violation. But I cannot conclude, on the basis of the allegations in the Complaint, that the Pittsburgh buffer zones operate so differently from the Massachusetts zones that Plaintiffs cannot advance past the pleading stage.

Accordingly, I concur in the judgment denying the City's motion to dismiss the free speech claim.

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[52] App. 56a.

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

NIKKI BRUNI, JULIE COSENTINO, CYNTHIA RINALDI, KATHLEEN LASLOW, and PATRICK MALLEY, Plaintiffs, v. CITY OF PITTSBURGH, PITTSBURGH CITY COUNCIL, and WILLIAM PEDUTO, in his official capacity as Mayor of the City of Pittsburgh, Defendants.	Civil Action No. 14-1197 Judge Cathy Bissoon

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. 3) and Defendants' Motion to Dismiss (Doc. 15). A hearing took place on December 3, 2014. Upon full consideration of the evidence presented, Plaintiffs' Motion for Preliminary Injunction will be denied, and Defendants' Motion to Dismiss will be granted in part and denied in part.

A. Findings of Fact

Section 623.04 of the Pittsburgh Code of Ordinances, titled "Fifteen Foot Buffer Zone," sets forth that:

> [n]o person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending fifteen (15) feet 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.

Pittsburgh, Pa., Code tit. 6, § 623.04 (the "Ordinance"). A permanent injunction altered the Ordinance in 2009, requiring, *inter alia*, that the City clearly demarcate any buffer zone prior to its enforcement. Order Granting Permanent Injunction (the "Injunction" or "Inj."), ECF 2:06-cv-00393, Doc. 85, ¶ 1 (W.D. Pa. Dec. 17, 2009). Presently, two "buffer zones" are delineated and enforced in the City of Pittsburgh, both of which are located outside of reproductive health care facilities where abortions are performed. One of the two buffer zones is indicated by a bright, yellow semi-circle painted around the entrance of 933 Liberty Avenue, the downtown Planned Parenthood clinic ("933 Liberty" or "downtown Planned Parenthood"). The buffer zone outside of that location extends fifteen feet in each direction from the outside edge of the double-door

entrance; at its widest point, it is approximately 36 feet long.

Defendants' asserted interests in maintaining the buffer zone Ordinance include "protecting the woman's freedom to get necessary medical care, and insuring public safety and order," in addition to "ensur[ing] that patients have unimpeded access to medical services while ensuring that the First Amendment rights of demonstrators to communicate their message to their intended audience is not impaired." Tr. of Hearing on Mot. For Prelim. Inj. and Mot. To Dismiss, Dec. 3, 2014, ("Tr.") (Doc. 23) at p. 89; Pittsburgh, Pa., Code tit. 6, § 623.01. Prior to the enactment of the Ordinance, there were incidents of physical intimidation, violence and obstruction where the buffer zone now stands. Such incidents have rarely, if ever, occurred since the buffer zone has been implemented.

Plaintiffs regularly engage in anti-abortion activities outside of the buffer zone at the downtown Planned Parenthood. Their advocacy takes the form of "sidewalk counseling," through which they "seek to have quiet conversations and offer assistance and information to abortion-minded women by providing them pamphlets describing local pregnancy resources, praying, and peacefully expressing this message of caring support to those entering and exiting the clinic." Pl.'s Proposed Findings of Fact and Conclusions of Law (Doc. 25) at p. 8, ¶ 20. Plaintiff Nikki Bruni ("Plaintiff Bruni" or "Mrs. Bruni") began sidewalk counseling at the downtown Planned Parenthood in 2009, after the Injunction invalidated a provision of the Ordinance that had previously banned sidewalk counseling within 100 feet of the clinic entrance. The buffer zone has been in place

since before Mrs. Bruni began sidewalk counseling. She regularly engages in prayer, leafleting, sidewalk counseling, and general anti-abortion advocacy outside of the buffer zone's yellow boundary line.

Mrs. Bruni stands directly outside of the buffer zone, approaches potential Planned Parenthood patients, and offers them literature and conversation about alternatives to abortion. If she is walking alongside a Planned Parenthood patient headed towards the clinic entrance, she stops at the buffer zone's boundary. From there, she continues to speak, and outstretches her arm to offer literature. At that point, the patient may continue the approximately five additional steps into the clinic; stop in her tracks and continue to converse with Mrs. Bruni; or exit the buffer zone in order to continue the conversation. All three scenarios have occurred. The buffer zone does not prevent a willing listener from stopping within the zone in order to accept Mrs. Bruni's literature and listen to her message, or from exiting the zone in order to converse with her further. The Ordinance does not prevent Mrs. Bruni or anyone else from engaging in sidewalk counseling with individuals leaving the clinic, once they exit the buffer zone.

Mrs. Bruni believes that she would reach more people if permitted to walk with them for the additional fifteen feet between the edge of the buffer zone and the clinic entrance. It is not often that the women she approaches stop, turn around, and exit the buffer zone in order to continue to speak with her, although this has occurred from time to time. Ninety percent of those entering the downtown Planned Parenthood facility are doing so for non-abortion-related purposes.

Abortions are performed at the downtown Planned Parenthood on Tuesdays, Fridays and Saturdays. On those days, approximately four to six individuals engage in some form of demonstrating or picketing outside of the buffer zone. More individuals are present during the bi-annual Forty Days for Life campaign. See infra. Paula Harris ("Ms. Harris"), Planned Parenthood Volunteer Coordinator, and Kim Evert, President and CEO of Planned Parenthood of Western Pennsylvania, can hear those outside of the zone speaking in normal, conversational tones, even when they stand at the clinic entrance, the point farthest from the edge of the zone. Patients regularly enter the clinic holding literature given to them by sidewalk counselors.

Defendants have acknowledged that ordinary pedestrian traffic is permitted in the buffer zones. Prior to the December 3, 2014, Motion Hearing, Plaintiff Bruni understood the Ordinance to prohibit sidewalk counselors from walking through the buffer zone in order to reach a patient approaching the clinic from its other side. She stated that the buffer zone forecloses her opportunity to reach those patients for that reason. Defendants clarified that the Ordinance does not prohibit sidewalk counselors from walking through the buffer zone in order to reach a particular audience, as long as they refrain from engaging in sidewalk counseling as they do so. As such, Mrs. Bruni may access potential patients who approach the downtown Planned Parenthood from either side of the zone. Mrs. Bruni acknowledged that it will be easier to engage in sidewalk counseling now that she knows she is permitted to walk through the buffer zone.

Mrs. Bruni has been an organizer and leader of

the Pittsburgh Forty Days for Life campaign since 2010. The campaign occurs every spring and fall, and the individuals involved pray outside of abortion clinics from 7:00 am to 7:00 pm every day for forty days. The participants additionally engage in sidewalk counseling. Plaintiffs do not shout their message, but rather aim to engage women in one-on-one conversation.

The City of Pittsburgh reads the Ordinance to prohibit sidewalk counseling, as a form of "picketing" or "demonstrating," within the demarcated buffer zones. Defendants have not issued any citations for violations of the Ordinance since the Injunction was issued. They have expressed an intent to enforce the Ordinance against those who engage in sidewalk counseling within the buffer zone. Plaintiffs refrain from sidewalk counseling within the demarcated buffer zone for fear of being subjected to penalties of monetary fines and, if violations are repeated, incarceration. See Pittsburgh, Pa., Code tit. 6, § 623.05 (indicating the penalties imposed for violations of the Ordinance).

Defendants have not stated whether they intend to enforce the Ordinance as against agents or employees of the downtown Planned Parenthood and, if they do so intend, what agent or employee actions might constitute a violation of the Ordinance. Plaintiffs accuse Planned Parenthood escorts of congregating and demonstrating within the buffer zone, in violation of the Ordinance. On one occasion, Plaintiff Laslow witnessed an escort stand inside the buffer zone and speak to an anti-abortion advocate, located outside of the zone. She also witnessed escorts standing within the zone, speaking to one another. She does not report the contents of either

communication. Ms. Laslow recounts that when she reported her observations to City of Pittsburgh Police Officer Viskovicz, he informed her that the Ordinance did not prohibit these actions, as the escorts are "exempt." Pl.'s Supp. Br. (Doc. 24), Ex. 1 ("Laslow Aff.") at ¶ 8. There is no evidence that Officer Viskovicz made any inquiry into the substance or context of the escorts' statements or actions.

Ms. Harris has been the volunteer coordinator for clinic escorts at the downtown Planned Parenthood for approximately 17 years. She trains and supervises escorts, and volunteers as an escort herself. "A clinic escort is a volunteer who is trained to walk alongside patients and their companions who want to be accompanied as they approach or leave a health care facility." Def.'s Br. in Opp'n. (Doc. 13), Ex. 2 ("Harris Aff.") at ¶ 2. The role of the clinic escort is not to prevent communication between patients and anti-abortion activists; it is to "provide a calming, peaceful, patient-focused presence and to ensure that protests do not endanger patients or impede women's access to medical care." Id. at ¶ 3. Ms. Harris "trains [the] escorts specifically to never engage in political proselytizing of any kind while in the buffer zone because [she] understand[s] that there is a Court order that prohibits that conduct." Id. at ¶ 5.

B. Procedural History

By way of background and procedural history, the Pittsburgh City Council enacted the Ordinance, supplementing the Pittsburgh Code of Ordinances, in December of 2005. Pittsburgh, Pa., Code tit. 6, §§ 623.01-.07. In relevant part, the Ordinance set forth:

> § 623.03 – EIGHT FOOT PERSONAL BUBBLE ZONE. No person shall knowingly

> approach another person within eight (8) feet 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 (100) feet 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 (15) feet 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.

Pittsburgh, Pa., Code tit. 6, §§ 623.03-.04 "Hospital" is defined as:

> An institution that:
>
> (1) Offers services beyond those required for room, board, personal services and general nursing care; and,
> (2) Offers facilities and beds for use beyond 24 hours by individuals requiring diagnosis, treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy; and,

> (3) Regularly makes available clinical laboratory services, diagnostic X-ray services, and treatment facilities for surgery or obstetrical treatment of similar extent. Hospitals may include offices for medical and dental personnel, central facilities such as pharmacies, medical laboratories and other related uses.

Ordinance § 623.02. "Health care facility," as referenced in section 623.04 of the Ordinance, is not defined therein.

Shortly after taking effect, the Ordinance was challenged as, *inter alia*, facially invalid under the First Amendment. Brown v. City of Pittsburgh, 543 F.Supp.2d 448 (W.D. Pa. 2008) (Fischer, J.). The district court denied the plaintiffs' Motion for a Preliminary Injunction and dismissed several counts of the complaint. Id. The plaintiffs appealed, and the Court of Appeals for the Third Circuit affirmed in part, reversed in part, and dismissed in part. Brown v. City of Pittsburgh, 586 F.3d 263 (3d Cir. 2009). Relevant to the instant motion, the Third Circuit reached the merits of the facial challenge to the Ordinance. It held that the eight foot bubble zone (the "bubble zone") and the fifteen foot buffer zone (the "buffer zone") each individually passed constitutional muster, but when considered in combination, imposed a facially unconstitutional burden on free speech. Id. The Court of Appeals remanded the case back to district court for further proceedings. Id.

Post-remand, the district court ordered that the bubble zone provision at section 623.03 be "permanently enjoined *in toto*." Inj. at ¶ 1. Section 623.04, creating the fixed buffer zone, remained,

although the Injunction required that the buffer zone provision be construed to prohibit "all persons" from picketing and demonstrating within the boundaries of the buffer zone. Id. at ¶ 2; see Brown, 586 F.3d at 275 ("We find § 623.04 amenable to the content-neutral construction urged by the City, that is, an interpretation prohibiting even the exempted classes of persons from 'picketing or demonstrating' within the buffer zone.") (internal alterations omitted). Accordingly, the exemption for "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" does not permit those persons to engage in "any action, activity or signage in the form of picketing or demonstrating." Inj. at ¶ 2. Rather, it creates an exemption from the ban on congregating and patrolling, but only for emergency personnel "in the course of their official business" and agents/ employees of hospitals and health care facilities, insofar as they are engaged in "assisting patients and other persons to enter or exit" the relevant facility. This exemption is a narrow one; health care facility or hospital employees may not congregate or patrol within the zones unrelated to assisting individuals with facility ingress and egress. The Injunction further requires that the City provide Pittsburgh City Police with oral and written training materials regarding enforcement of the Ordinance. Id. at ¶ 3.

On June 26, 2014, the Supreme Court issued its decision in McCullen v. Coakley, striking down the amended Massachusetts Reproductive Health Care

Facilities Act (the "MRHCA") as insufficiently narrowly tailored to achieve the Commonwealth's legitimate government interests. 134 S.Ct. 2518 (2014). The MRHCA as amended "ma[de] it a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any 'reproductive health care facility,' defined as 'a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Id. at 2522. On September 4, 2014, Plaintiffs filed a complaint (the "Complaint") lodging a facial and as applied challenge to the Ordinance, in light of McCullen. Compl. at ¶ 1 (Doc. 1). On September 5, 2014, Plaintiffs moved the Court to issue a preliminary injunction "to restrain Defendants, and all persons acting at their command or direction, from enforcing Pittsburgh Code of Ordinance [*sic*] § 623.01 *et. seq*. because it is unconstitutional on its face and as applied to Plaintiffs' and others' expressive activities." Pl.'s Mot. for Prelim. Inj.

C. Conclusions of Law

1. Motion for Preliminary Injunction

A party seeking a preliminary injunction must demonstrate the following: (1) a likelihood of success on the merits; (2) that he or she will suffer irreparable harm if the injunction is denied; (3) that granting relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. Miller v. Mitchell, 589 F.3d 139, 147 (3d Cir. 2010) (citing Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 524 (3d Cir. 2004)). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by

a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); see also P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 508 (3d Cir. 2005) (holding that the plaintiff bears the burden of establishing each element in his or her favor before the Court may award this "extraordinary remedy"); O'Neill v. Twp. of Lower Southampton, 2000 WL 337593, at 1 (E.D. Pa. 2000) ("The grant of an injunction, prior to a full hearing on the merits, is an extraordinary remedy and requires Plaintiff to meet a high burden of proof."). The Court finds that, based upon the testimony, evidence and arguments presented, Plaintiffs have not met their high burden of demonstrating a likelihood of success on the merits.

Plaintiffs challenge the Ordinance as a violation of the First and Fourteenth Amendments, but they restrict their Motion for a Preliminary Injunction to a portion of their First Amendment claim. The Court addresses each of their arguments in turn.

a) Overbreadth

Plaintiffs argue that the Ordinance is facially overbroad, restricting the speech of Plaintiffs and others "at countless locations throughout the City where there is no plausible justification for the ordinance." Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. ("Pl.'s Mem.") (Doc. 4) at 7-8. In support of this argument, Plaintiffs cite the McCullen Court's decision to strike down the MRHCA as violation of the First Amendment, in that it restricted substantially more speech than necessary to protect a compelling government interest. Id. at 8. However, the McCullen Court made such a finding in the context of a narrow tailoring analysis, not an overbreadth one. 134 S.Ct.

2518. In fact, they specifically noted that they "need [not] consider petitioners' overbreadth challenge." Id. at n. 9. As they did not reach the overbreadth issue, they did not alter the relevant doctrine that was applied in Hill v. Colorado, 530 U.S. 703 (2000), and, subsequently, Brown. 586 F.3d 263.

The court of appeals in Brown found that to the extent that Brown brought a facial overbreadth challenge, "her attack is foreclosed by Hill [, 530 U.S. at 730]." 586 F.3d at n. 10, 21. As McCullen is not intervening law on the issue of overbreadth, Hill's application of the overbreadth doctrine remains good law.[1] The Court of Appeals for the Third Circuit's finding, pursuant to Hill, that the Ordinance is not facially overbroad remains binding on this Court. In light of Brown's precedential holding, and the fact that Plaintiffs cite arguments from McCullen's narrow tailoring analysis, Plaintiffs have failed to demonstrate a likelihood of success on the merits of a constitutional overbreadth claim. See Brown, 586 F.3d at n. 10 (holding that "[w]hat the petitioners classified as an 'overbreadth' problem . . . was better understood analytically as a concern to be addressed within the framework of Ward's narrow-tailoring test.") (quoting Hill, 530 U.S. at 731).

b) Content-Based Claim

Plaintiffs argue that the Ordinance is "content and viewpoint based on its face," and as-applied, and is thus subject to strict scrutiny. Pl.'s Mem. at 12. The

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[1] The Court of Appeals for the Third Circuit noted that the Hill Court found "the comprehensiveness of the statute [to be] a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." 586 F.3d at n. 10 (quoting Hill, 530 U.S. at 731).

Court first addresses Plaintiffs' facial content-discrimination challenge. Again, here, the Court of Appeals for the Third Circuit has already found the Ordinance to be facially content-neutral. Brown, 586 F.3d at 270-71, 275 (citing Hill, 530 U.S. 703). Thus, only if McCullen overruled or altered the content-neutrality doctrine as set forth in Hill — thereby abrogating Brown — may the Court revisit this claim. Plaintiffs have not persuaded the Court that McCullen has altered Hill's content-neutrality analysis, and thus they have not demonstrated a likelihood of success on the merits of a facial content-discrimination challenge.

The McCullen Court found the MRHCA to be content-neutral. Rather than ban physical presence within a fixed buffer zone like the MRHCA, the Ordinance bans congregating, patrolling, picketing or demonstrating within such a zone. Pittsburgh, Pa., Code tit. 6, § 623.04. If an individual is accused of "demonstrating" or "picketing" within the buffer zone, a police officer may need to inquire as to that person's statements in order to determine if she was violating the Ordinance or, for example, merely saying "good morning" to her fellow pedestrians. Plaintiffs argue that McCullen altered the test for content-neutrality utilized in Hill when it noted that a law or regulation may be viewpoint-based if it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." McCullen, 134 S.Ct. at 2531 (quoting F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)); Pl.'s Mem. at 12. Plaintiffs state that, "[n]otably, this test for content-based speech was rejected in Hill v. Colorado, 530 U.S. 703, 720-24 (2000). But the more recent and unanimous definition

set forth in McCullen controls." Id. at fn. 5.

Contrary to Plaintiffs' contentions, McCullen did not overrule the content-neutrality standard applied in Hill. The Hill Court clarifies that a regulation is content-based if its application turns on the *substance* of a communication, not the mode or method of expression. Hill, 530 U.S. at 719-725 (relying on Carey v. Brown, 447 U.S. 455 (1980) as the source of its content-neutrality doctrine). The petitioners in Hill presented an argument similar to Plaintiffs', noting that Colorado's law applied to some, but not all, oral communications within a bubble zone.[2] The Hill Court elucidated that "content" refers to either the topic discussed or the viewpoint expressed, explaining:

> [a]lthough our opinion [in Carey] stressed that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," we appended a footnote to that sentence explaining that it was the fact that the statute placed a prohibition on discussion of particular *topics*, while others were allowed, that was constitutionally repugnant. Regulation of the *subject matter* of the messages, though not as obnoxious as *viewpoint*-based regulation, is also an objectionable form of content-based

[2] The Colorado statute only applied when one approached within eight feet of another "for the purpose of . . . engaging in oral protest, education, or counseling." Hill, 530 U.S. at 720. It thus required law enforcement to distinguish between "oral protest, education, or counseling," on the one hand, and all other communications, on the other. The Supreme Court found this to law to be content-neutral.

regulation.

Hill, 530 U.S. at 722-23 (internal citations omitted) (emphasis added). It is the need for law enforcement to analyze the substance of speech, resulting in the disproportionate regulation of expression on certain topics or viewpoints, that renders a statute or practice content-based.

In contrast, "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose." Id. at 721. In particularly relevant dicta, the Hill Court noted that:

> cases may arise in which it is necessary to review the content of the statements made by a person approaching within eight feet of an unwilling listener to determine whether the approach is covered by the statute. But that review need be no more extensive than a determination whether a general prohibition of "picketing" or "demonstrating" applies to innocuous speech. The regulation of such expressive activities, by definition, does not cover social, random, or other everyday communications. See Webster's Third New International Dictionary 600, 1710 (1993) (defining "demonstrate" as "to make a public display of sentiment for or against a person or cause" and "picket" as an effort "to persuade or otherwise influence"). Nevertheless, we have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.

530 U.S. at 721-22. The Hill Court held that the

Colorado statute is content neutral because it "is not limited to those who oppose abortion" and "it applies to all . . . demonstrators whether or not the demonstration concerns abortion." Id. at 725.

Nothing in McCullen indicates tension with the doctrine as set forth in Hill. While the Supreme Court states that "[t]he Act would be content-based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," the decision provides no indication that the McCullen Court understands "content" any differently than the Supreme Court did in Hill. McCullen, 134 S.Ct. at 2531. In fact, McCullen makes this statement when specifically addressing an allegation that the application of the MRHCA burdened speech on the topic of abortion more than any other subject matter. This Court finds unpersuasive Plaintiffs' position that the Supreme Court — in one line and without a citation to Hill — intended to radically alter the content-neutrality standard as carefully and thoroughly set forth in that case. Thus, Hill's essential holding is controlling, and Brown's application of that standard, and conclusion that the Ordinance is facially content-neutral, remains intact and binding on this Court.[3] See Brown, 586 F.3d at

[3] The Court additionally notes that there have been four Supreme Court cases addressing the First Amendment rights of anti-abortion protesters outside reproductive healthcare facilities. The Supreme Court has now found that four differently-worded statutes and injunctions creating buffer or bubble zones around abortion clinics to be content-neutral. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 762-764 (1994); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997); Hill, 530 U.S. 703; McCullen, 134 S.Ct.

270-72.

Plaintiffs also argue that the Ordinance is facially content-based because it exempts "facility employees who escort clinic patients into the abortion facility, and by that exemption, exempts their speech." Pl.'s Mem. at 13-14. Plaintiffs criticize Defendants' failure to amend the Ordinance in light of the Injunction, and contend that the law discriminates based on viewpoint by permitting clinic escorts to demonstrate and picket within the buffer zone. The Brown Court found the Ordinance "amenable to the content-neutral construction urged by the City, that is, an interpretation prohibiting even the exempted classes of persons from 'picketing or demonstrating' within the buffer zone." 586 F.3d at 275 (internal alterations omitted). That construction was later incorporated into the district court's permanent injunction. Inj. at ¶ 2 ("Defendants shall construe and enforce Section

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2518. Notably, in Madsen, the Supreme Court found an injunction banning "congregating, picketing, patrolling, [or] demonstrating,"— as is the case in the City of Pittsburgh's Ordinance — to be content-neutral. 512 U.S. 753, 762-764 (1994). Most recently, the McCullen Court found the MRHCA to be content-neutral. In addition, the Court of Appeals for the Third Circuit found Section 623.04 of the Ordinance to be content neutral when it was challenged prior to McCullen. Brown, 586 F.3d at 275.

As Brown relied not only on Hill for its content-neutrality doctrine, but also on Madsen and Schenck, Plaintiffs must demonstrate that McCullen altered the doctrine in each of those cases in order to make appropriate a second review of the facial content-neutrality of the Ordinance. While our analysis may end with a re-affirmance of the doctrine in Hill, the Court notes that Plaintiffs also have failed to demonstrate that McCullen altered the content-neutrality analysis as espoused in Madsen, Schenck and Brown.

623.04 of the Ordinance in a manner that does not permit *any person* to picket or demonstrate within the boundaries of the 15 foot buffer zone.") (emphasis added). Plaintiffs' Memorandum ignores the Court's obligation to follow the holdings of the Court of Appeals for the Third Circuit, and the previous Injunction, when assessing the Ordinance in the instant case. When questioned about this during the December 3, 2014, hearing, Plaintiffs stipulated that they challenge the law as modified by the Injunction. Tr. at p. 10. As Plaintiffs concede[4] that they challenge the present law, which was deemed content-neutral by the Court of Appeals for the Third Circuit, their argument to the contrary is foreclosed. See Brown, 586 F.3d at 275. For the above reasons, the Ordinance is facially content-neutral, and thus Plaintiffs have not demonstrated a likelihood of success on the merits of a claim that it discriminates based on viewpoint, requiring the application of strict scrutiny. Brown, 586 F.3d at 275 (holding that section 623.04 of the Ordinance, read in light of the City's limiting construction which was later incorporated into the Injunction, is facially content-neutral).

Plaintiffs further argue that the Ordinance is "*applied* in a viewpoint discriminatory manner under McCullen." Pl.'s Mem. at 13 (emphasis added). "Plaintiffs have observed . . . clinic escorts engaging in pro-abortion speech and conduct within the confines of the zone, and the escorts have not been charged with a violation of the Ordinance." Id. As such, Plaintiffs contend that even if the *Ordinance* is

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[4] The Court notes that no concession on this point is required in order to reach the same conclusion. Any challenges to a version of a law that is no longer in effect necessarily are moot.

not facially content-based, the "*rule* that the City actually enforces, distinct from the ordinance, is content discriminatory and unconstitutional." Hoye v. City of Oakland, 653 F.3d 835 at 849 (emphasis added); McCullen, 134 S.Ct. at 2533-24 (citing Hoye, 653 F.3d at 849-852). In essence, Plaintiffs allege selective enforcement. In spite of Plaintiffs' repeated citations of McCullen with respect to this argument, the McCullen petitioners "nowhere allege[d] selective enforcement," and thus that case is not controlling on this issue. Id. at 2534.

A claim of selective enforcement necessarily turns on the facts. On the record here, there remains an issue of fact as to whether the Ordinance is selectively enforced. While no witness testified at the motion hearing about instances of selective enforcement, attached to their supplemental brief, Plaintiffs submitted two affidavits, one by sidewalk counselor Plaintiff Laslow, and the other by counsel for Plaintiffs, Matthew S. Bowman. Pl.'s Supp. Br., Exs. 1-2. Plaintiff Laslow avers that, on December 20, 2014, she witnessed: 1) an escort within the buffer zone speaking to a "pro-life individual" outside of the zone, and 2) two escorts standing within the buffer zone, speaking to one another. Laslow Aff., ¶ 3. She did not report the contents of either conversation. She called the Pittsburgh Police non-emergency line to report an alleged violation of the Ordinance, and left a voicemail. Id. at ¶ 4. Plaintiff Laslow avers that she "believed the escorts standing and speaking in the zone may have violated the buffer zone Ordinance's prohibition on congregating in the zone, and on speaking to one another and to pro-lifers while escorts were in the zone." Id. That same day, she again witnessed escorts standing in the zone, speaking to

one another. She again called the non-emergency number and left a voicemail. Id. at ¶ 5. The police did not "come to the scene immediately following [her] reports." Id. at ¶ 6. She encountered Police Officer Viskovicz "at the scene" later that day — he was there on a separate matter — and informed him that she had observed "escorts congregating and conversing in the buffer zone, and calling out to pro-life individuals outside of the buffer zone." Id. at ¶ 7. Officer Viskovicz "informed [her] that the Ordinance does not prohibit escorts from doing any of these things in the zones. He stated that according to Pittsburgh police policy the escorts are exempt, and therefore they may congregate in the zones, speak to each other in the zones, or speak at pro-life individuals who are present outside the zone." Id. at ¶ 8. Mr. Bowman's affidavit alleges that Defendants are permitting escorts to "congregate" within the buffer zone, and that the City has not stipulated to its understanding that the Ordinance either permits or prohibits clinic escorts from congregating, speaking to each other, and speaking to "pro-lifers" from within the zone. Pl.'s Supp. Br. at Ex. 2 ("Bowman Aff.").[5]

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[5] As stated *supra*, the Ordinance prohibits congregating, patrolling, picketing or demonstrating within the buffer zone, but exempts "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." Pittsburgh, Pa., Code tit. 6, § 623.04. The Court of Appeals for the Third Circuit accepted the City's limiting construction of the Ordinance and interpreted its exemption to permit employees or agents of the health care facility to congregate or patrol in the buffer zone, only insofar as they are "engaged in assisting patients and other persons to

As long as such agents are congregating in connection with "assisting patients and other persons to enter and exit the facility," this is permitted by the Ordinance in light of the Injunction.[6] See Brown, 586 F.3d at 275; Inj. at ¶ 2. Plaintiff Laslow does not provide any facts related to whether the escorts congregating within the buffer zone were engaged in assisting patients to enter or exit the clinic. The Court has no evidence before it that indicates that the escorts were *not* engaged in such assistance — or, more precisely, waiting for patients in order to assist them — at the time they were congregating. Setting aside the misguided contention that escorts may never lawfully congregate within the buffer zone, Plaintiffs seem to understand the Ordinance to prohibit the escorts from speaking to one another within the zone, perhaps as a version of "demonstrating" or "picketing." Pl.'s Mem. at 14 ("Here, the Ordinance allows being in the zone but not speaking, and its exception for clinic employees does

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enter and exit the facility." Brown, 586 F.3d at 275. The exemption does not permit those persons to picket or demonstrate. Id.; Inj. at ¶ 2. It appears that Plaintiffs interpret the Ordinance in light of the Injunction to entirely ban agents and employees of health care facilities from congregating or patrolling; this is an inaccurate interpretation of the law.

[6] Plaintiffs allege that counsel for Defendants indicated that he did not believe that escorts were permitted to "congregate" within the zone. To the extent that counsel indicated as much, the extensively litigated record indicates otherwise. Further, Defendants contend before this Court that the Injunction prohibits health care facility employees from "demonstrating" and "picketing" only. Def.'s Supp. Br. at 3, n. 1. Regardless of Defendants' position, under Brown and the Injunction, escorts may congregate and/or patrol while engaged in assisting patients and others to enter and exit the facility.

not say they cannot speak – it exempts them entirely if they are assisting patients."). Nowhere does the Ordinance ban speech itself. Assuming *arguendo* that the escorts are lawfully congregating, as the record contains no indication otherwise, Plaintiffs have not as of yet explained how the escorts' speech to one another while inside the buffer zone constitutes picketing or demonstrating, in violation of the Ordinance. Pittsburgh, Pa., Code tit. 6, § 623.04.

Lastly, Plaintiffs argue that escorts are impermissibly "speaking," or "calling out" to "pro-lifers," and law enforcement fails to enforce the Ordinance against them. Bowman Aff. at ¶ 6; Laslow Aff. at ¶ 7. Once again, the Court lacks a developed factual record on this allegation. Plaintiffs do not provide details about the single specific incident they report to the Court. There is no evidence, thus far, regarding what the escorts said to the anti-abortion individuals, or the context in which they said it. Ms. Harris, volunteer coordinator for clinic escorts at the downtown Planned Parenthood, avers that she "trains [her] escorts specifically to never engage in political proselytizing of any kind while in the buffer zone because [she] understand[s] that there is a Court order that prohibits that conduct." Harris Aff. at ¶ 5. Without additional facts indicating that the "speaking" or "calling out" constituted "picketing" or "demonstrating," Plaintiffs have not met their burden of persuading the Court that they have a reasonable likelihood of success on a selective enforcement claim.[7] See Hill, 530 U.S. at 721-22 (noting that law

[7] Like in McCullen, "[i]t would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zone [while assisting patients to enter and exit the facility]. In that case, the escorts would not seem to

enforcement may permissibly consider the contents of speech in order to distinguish "demonstrating" from casual conversation); P.C. Yonkers, 428 F.3d at 508 (holding that Plaintiffs bear the burden of persuasion when they move for a preliminary injunction). Contrast Hoye, 653 F.3d at 849-851 (finding evidence of selective enforcement after reviewing a police training video, a police training bulletin, a deposition of a police department Captain, and admissions during oral argument).

Due to the undeveloped factual record in this area, Plaintiffs have not met their burden of demonstrating that they are entitled to a preliminary injunction. See Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F.Supp. 616 (D.N.J. 1989) (holding that the moving party must offer proof beyond unverified factual allegations to demonstrate entitlement to a preliminary injunction). However, while Plaintiffs have not met their high burden with respect to their selective enforcement claim at this preliminary injunction stage, the allegations regarding Officer Viskovicz's discussion with Plaintiff Laslow give it pause. His alleged statement, that the escorts are simply "exempt" from the Ordinance, is inaccurate. As discussed *supra*, the exemption for

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be violating the Act because the speech would be within the scope of their employment. The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones." 134 S.Ct. at 2534.

health care facility employees and agents is a narrow one. Escorts may never "demonstrate" or "picket," and they may "congregate" or "patrol" only insofar as they are engaged in assisting individuals to enter or exit the facility. It strikes the Court that such a narrow exception would require at least a cursory inquiry by law enforcement into the escorts' purpose when congregating, and the subject matter and context of alleged communications by the escorts, especially those directed towards anti-abortion activists. The Court anticipates that discovery will bear out additional details regarding the City of Pittsburgh Police training with respect to the Ordinance, and their enforcement practices. The Court will revisit Plaintiff's content-discrimination as-applied challenge when the factual record is more developed, as appropriate.

Plaintiffs make a second selective enforcement — or content-based as-applied —argument: while the Ordinance, by its terms, applies at all hospitals and health care facilities, they contend that it is enforced only outside of reproductive health clinics where abortions are performed. Pl.'s Mem. at 14. As such, the Ordinance is "applied in order to restrict speech related to the topic of abortion." Id. It is axiomatic that if Plaintiffs are challenging the "rule that the City actually enforces, distinct from the ordinance, [as] content discriminatory and unconstitutional," there must be evidence that said rule is, in fact, content-discriminatory, and unconstitutional. Hoye v. City of Oakland, 653 F.3d 835, 849. Plaintiffs' arguments do not establish a reasonable likelihood of success on the merits of this alternative theory.

It is the case that only two buffer zones have been demarcated in the City of Pittsburgh, both of which

are located outside of reproductive health care facilities where abortions are performed. For the purposes of this analysis, the Court assumes *arguendo* that Defendants are enforcing the "rule" by replacing the phrases "hospital and or health care facility" in the Ordinance with "reproductive health care facility" and/or "abortion clinic." Plaintiffs have not established how such an alteration would render the enforcement content-based.

The Ordinance as enforced in the allegedly viewpoint-discriminatory manner set forth by Plaintiffs (the "rule") bears increasing resemblance to the *content-neutral* MRHCA challenged in McCullen. 134 S.Ct. 2518 (holding the MRHCA, which applied only at reproductive health facilities, to be content-neutral). The petitioners in that case similarly argued that, given the MRHCA applied only at reproductive health care facilities where abortions were performed, "'virtually all speech affected by the [MRHCA] is speech concerning abortion,' thus rendering [it] content based." McCullen, 134 S.Ct. at 2531 (internal citations omitted). The Supreme Court disagreed, noting:

> [i]t is true, of course, that by limiting the buffer zones to abortion clinics, the [MRHCA] has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."

Id. at 2531 (internal citations omitted). Plaintiffs argue that enforcement of the Ordinance more narrowly than its wording authorizes, evinces Defendants' intent to restrict anti-abortion speech because of the content of its message. "We cannot infer such a purpose from [the Ordinance's] limited scope." Id. at 2532. As noted in McCullen, "'States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.'" Id. at 2532 (quoting Burson v. Freeman, 504 U.S. 191, 207 (1992) (plurality opinion)). Legislatures should be encouraged to pursue solutions to problems that "restrict[ ] less speech, not more." Id. Given the Supreme Court's determination that a law explicitly creating buffer zones only at abortion clinics was content-neutral, Plaintiffs have not demonstrated a likelihood of success on the claim that the similar enforcement of the Ordinance is content-discriminatory.

c) Intermediate Scrutiny[8]

As Plaintiffs have not established that the

[8] In addition to arguing for the application of strict scrutiny due to content-discrimination, Plaintiffs implore the Court to apply an amorphous heightened level of review, claiming that the "Supreme Court gives the City no ability to pursue the interests of reducing violence and obstruction by *restricting speech itself*." Pl.'s Mem. at 11 (emphasis in original). As a threshold matter, the Court observes that the Ordinance does not restrict speech per se, but rather is a time, place and manner regulation. Brown, 586 F.3d at 276 ("As a content-neutral time, place, and manner regulation, the buffer zone is constitutionally valid if it is narrowly tailored to serve the government's significant interest and leaves open ample alternative channels of communication."). As we make clear, such a regulation is subject to intermediate scrutiny, *i.e.*, the narrow tailoring test. See supra. Contrary to

Ordinance is content-based at this juncture, the Ward narrow tailoring test applies. Brown, 586 F.3d at 271-272. The McCullen Court reiterates that:

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

134 S.Ct. at 2535 (quoting Ward, 491 U.S. at 798-799); see also Brown, 586 F.3d at 276-77 ("As a content-neutral time, place and manner regulation, the buffer zone is constitutionally valid if it is narrowly tailored to serve the government's significant interest and leaves open ample alternative channels of communication. The zone may be narrowly tailored

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Plaintiffs' position, McCullen declined to hold that no legislative body may ever create any incidental burden on speech if direct regulation of the problematic behaviors — *e.g.* harassment, obstruction, assault, etc. — is a theoretical possibility. Even when applying strict scrutiny, it is not the case that a law may burden no speech. See, e.g., Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 358 (1997) ("[T]he challenged provisions [may] ... burden no more speech than necessary to serve a significant government interest.") (quoting Madsen v. Women's Health Center, 512 U.S. 753, 765 (1994)). For those reasons, Plaintiffs contention is unpersuasive, and the Court proceeds to apply intermediate scrutiny, consistent with McCullen and Brown.

even if it is not the least restrictive or least intrusive means of serving those interests. . . . 'Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'") (citing Hill, 530 U.S. at 725-26).

Plaintiffs argue that although McCullen relied on Ward's historic time, place and manner narrow tailoring test, it did so "far more rigorously" than had been done previously. Pl.'s Reply at 2. While Plaintiffs dance around the point, their position is clear: McCullen overruled Hill, upon which the Court of Appeals for the Third Circuit's decision in Brown was based. Therefore, they argue, this Court must once again consider whether the Ordinance survives intermediate scrutiny. The Court does not agree.

First, the Supreme Court did not explicitly overrule Hill or articulate a deviation from the standard outlined in that case. This Court is unwilling to infer that the McCullen Court covertly overruled Hill, altering the standard iterated in Ward, in direct contradiction of itself. As stated *supra*, the Supreme Court makes clear that it applies a narrow tailoring test in McCullen. The McCullen Court then relies on the very same narrow tailoring test in Hill. This standard also was relied upon in Brown to find that the Ordinance challenged in the instant action survives intermediate scrutiny. As the doctrine on narrow tailoring has not changed since the Court of Appeals for the Third Circuit found section 623.04 to pass constitutional muster, it would be inappropriate for this Court to revisit that determination now. This is particularly true in light of the Injunction, which further narrowed the Ordinance in accordance with the directives of the

Third Circuit. If the Supreme Court opted to leave Hill intact in deciding McCullen, far be it for this Court to do otherwise. We are bound by the decision of the Court of Appeals for the Third Circuit. Brown, 586 F.3d at 276 (holding that Section 623.04 of the Ordinance is a constitutional time, place or manner regulation of speech).

The Court further notes that the Brown Court relied not only on the Supreme Court's jurisprudence in Hill, but also in Madsen, 512 U.S. 753 (1994) and Schenck, 519 U.S. 357 (1997):

> In *Madsen* and *Schenck*, the Supreme Court upheld buffer zones extending thirty-six and fifteen feet, respectively, from clinic entrances. As noted, because those buffer zones were established by injunctions rather than generally applicable legislation, they were subject to a more demanding standard of review: the Court asked "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." The government interests at stake here are significant and largely overlap with those recognized in *Madsen* and *Schenck*. Accordingly, since the Court upheld the buffer zones in *Madsen* and *Schenck* (one of which was more than twice as large as the buffer zone here), finding them sufficiently tailored under a test more exacting than the one applicable here, the buffer zone established by the Ordinance is a *fortiori* constitutionally valid.

Brown, 586 F.3d at 276 (internal citations omitted).

Nowhere in McCullen does the Supreme Court invalidate either of those two cases, or even delve particularly deeply into their reasoning. Hill, Madsen, and Schenck remain good law; those three cases comprise the basis for the previous challenge of the Ordinance, and the Court remains bound by Brown.

In the event that Plaintiffs are arguing that McCullen's *application* of intermediate scrutiny renders the Ordinance invalid, the Court likewise is not persuaded. The Court could only come to that conclusion if the facts before the Supreme Court were so similar to those in the instant action as to make clear that the decision in Brown was an improper application of the relevant standard. Given the many factual distinctions between the MRHCA and the Ordinance, the Supreme Court's invalidation of the MRHCA does not render this Ordinance unconstitutional.

First, the burden on speech was significantly greater under the MRHCA, as the buffer zones had a radius of at least 35, not 15, feet, and were implemented statewide. This Court notes that the difference in the buffer zone coverage is more stark when considered in diameter, or length — the MRHCA created buffer zones *at least* 70 feet long, whereas the buffer zone at the downtown Planned Parenthood is half that. In two instances, the MRHCA authorized overlapping zones around entrances and driveways creating speech-free areas as much as 93 feet and 100 feet long, respectively. McCullen, 134 S.Ct. at 2527-28. The Supreme Court noted that at certain locations the MRHCA forced sidewalk counselors to cross the street from the abortion clinics where they sought to counsel — silencing their

conversational speech and foreclosing their ability to place leaflets close to patients' hands — a fact that is not present here. Id. The Supreme Court repeatedly observes the degree of the burden on speech imposed by the MRHCA. See, e.g., id. at 2535 (noting that "the buffer zones impose *serious* burdens on petitioners' speech") (emphasis added); see also id. ("At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a *significant portion* of the adjacent public sidewalks, pushing petitioners *well back* from the clinics' entrances and driveways.") (emphasis added). While these emphasized terms are inherently subjective, Plaintiffs have not demonstrated a sufficient factual similarity between the restrictions imposed by the Ordinance here and that imposed by the MRHCA to allow this Court to find that an equally serious burden is placed on Plaintiffs' speech.

Given the nature of sidewalk counseling, it appears that the McCullen petitioners' preferred mode of expression was nearly entirely foreclosed by the buffer zones created by the MRHCA. They were relocated sufficiently far away from entrances and driveways of reproductive health facilities that they were left with the consolation that the MRHCA "does not prevent petitioners from engaging in various [other] forms of 'protest'—such as chanting slogans and displaying signs—outside the buffer zone." Id. at 2536. However, the petitioners were sidewalk counselors, not chanters and sign-holders. The Supreme Court observed that "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." Id. at 2537 (internal citations omitted). The same is simply not true here.

In the instant action, Plaintiffs sidewalk counsel immediately outside the boundary of the buffer zone. They are not pushed across the street, from where they must yell. They are not relegated to a distance so far from the entrance of the downtown Planned Parenthood that they may not approach potential patients in order to hand them literature and speak to them in normal, conversational tones. Even when Plaintiffs stand at the edge of the buffer zone, they may speak in conversational tones that carry to the facility entrance. With an outstretched arm, they may reach into the zone and offer literature to patients, many of whom accept that literature and bring it into the facility. During the December 3, 2014, hearing, Defendants clarified that anyone may walk through the buffer zone in order to approach a potential patient who is arriving at the clinic from its other side. Plaintiff Bruni acknowledged that this clarification relieves some of the burden she previously believed the Ordinance imposed on her sidewalk counseling.

While Plaintiffs' message is restricted in that they cannot continue to walk alongside women as they approach within fifteen feet of the entrance, that method of communication is not foreclosed or effectively stifled. The Court notes that Plaintiff Bruni did not begin to engage in sidewalk counseling until well after the initial implementation of the Ordinance. It is noteworthy that she has been permissibly engaging in sidewalk counseling, albeit outside of the buffer zone, since 2009. She engages in the very constitutionally protected expression she desires, just not within a small zone surrounding the entrance to the downtown Planned Parenthood. It is clear from her testimony regarding her frequent

sidewalk counseling outside of abortion clinics over the past five years that the buffer zone has not foreclosed this form of desired expression nor effectively stifled her message.

Plaintiffs contend that, when relegated to any distance away from the entrance to the downtown Planned Parenthood, it becomes more difficult for them to identity who may be a patient and who is not. The Court does not see this as a burden on their right to free speech. If anything, Plaintiffs engage in more speech — *i.e.* sidewalk counseling — not less, in an effort to disseminate their message to all potential patients. A right to engage in normal conversation and leaflet on a public sidewalk does not equate to a right to know if those with whom you communicate are, indeed, your target audience. This argument was not articulated in McCullen, and it does not convince the Court that the Ordinance presents an equivalent substantial burden on Plaintiffs' speech to the burden before the Supreme Court in McCullen.

The McCullen Court also noted that the sidewalk counselors in Massachusetts often approach vehicles entering driveways, as 90% of patients arrived by car at one particular clinic. Id. at 2528; see also id. at 2537 ("[Petitioners] claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot."). It is a greater burden on speech to be distanced from a car than from a pedestrian, as any distance of separation means that the car may easily drive by the sidewalk counselor, entirely insulated from his or her message. Id. at 2536 ("In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots."). In contrast, the maximum

separation between a pedestrian and a sidewalk counselor in Pittsburgh, possibly after passing that counselor before entering the buffer zone, does not create the same burden on speech. As noted, Plaintiffs can and do continue to offer literature to those walking in front of the downtown Planned Parenthood. As would be the case with or without the buffer zone, some patients accept the information, and others do not.

Plaintiffs additionally argue that the Ordinance is like the MRHCA in that it leaves open "no corresponding alternative channel of communication." Pl.'s Reply at 3. It is indeed the case that, in order to be constitutional, the Ordinance must leave open "ample alternative channels for communication." McCullen at 2529 (citing Ward, 491 U.S. at 791). Unlike in McCullen, alternative channels for sidewalk counseling exist in the instant matter. The Brown Court held that, "[a]lthough the buffer zone, standing alone, would require leafletters to remain beyond arm's reach of a medical facilities' entrances, they would still be able to approach individuals outside of the fifteen-foot radius in order to distribute their literature." 586 F.3d. at 281. In Hill, the Supreme Court "noted approvingly that the bubble zone allowed leafletters to stand stationary in the path of oncoming pedestrians," which is also the case for Plaintiffs fifteen feet away from the clinic entrance. Id. at 278 (citing Hill, 530 U.S. at 727-28). While the Supreme Court found that the MRHCA, with its distinctly larger buffer zone, foreclosed alternative channels of communication such that it impermissibly violated the First Amendment, Plaintiffs have not demonstrated a sufficient factual basis upon which the Court can find that the

Ordinance indeed leaves open "no corresponding alternative channel of communication." It is undisputed that Plaintiffs engage currently in sidewalk counseling, some of them multiple times per week. This fact alone is sufficient evidence of the existence of ample alternative channels of communication.

The McCullen Court notes that the Massachusetts legislature pursued their interests "by the extreme step of closing a *substantial portion* of a traditional public forum to all speakers." Id. at 2541 (emphasis added). Given the record before the Court, Plaintiffs have not demonstrated that a similarly "substantial portion" of the sidewalk has been closed by the Ordinance. Due to the factual dissimilarities between McCullen and the instant case with respect to the degree of burden imposed on the petitioners' and Plaintiffs' speech, respectively, the Supreme Court's invalidation of the MRHCA does not compel the invalidation of Pittsburgh's less burdensome Ordinance. Pursuant to Brown, and in light of McCullen, the Ordinance remains narrowly tailored to pursue legitimate government interests.

Plaintiffs raise one additional argument not addressed by Brown, which this Court will consider accordingly. 586 F.3d. 263. Plaintiffs argue that the Ordinance fails narrow tailoring, facially, as it "applies to hospitals and health care facilities," meaning that it creates the ability to enforce buffer zones outside of, "*inter alia*, dentist offices, out-patient medical laboratories, urgent care facilities, family practitioners, hospitals—the list is endless under the City's incredibly broad definition of 'health care facility,' in order to treat a problem that has historically existed only outside of abortion clinics."

Pl.'s Mem. at 10-11.

As discussed *supra*, the government has legitimate interests in "ensuring that patients have unimpeded access to medical services," as well as in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy" and "ensuring the public safety and order." Pittsburgh, Pa., Code tit. 6, § 623.01; Brown, 586 F.3d at 269. The Supreme Court in Hill recognized that "[i]t is a traditional exercise of the States' police powers to protect the health and safety of its citizens. That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." 530 U.S. at 715 (internal citations and quotations omitted). McCullen did not overrule Hill's holding. The MRHCA created buffer zones outside of "reproductive health care facilities," and not health care facilities more broadly, in order to pursue a narrower government interest than that asserted here. Thus, the McCullen Court had no opportunity to opine on the issue of whether a broader government interest in regulating sidewalks outside of hospitals and health care facilities is "legitimate," or what kind of law would be narrowly tailored (or not) to preserve that interest. Given Hill's holding that such broad government interests are indeed legitimate, Plaintiffs have not shown a likelihood of success on the claim that an Ordinance regulating the time, place and manner of speech in front of hospitals and health care facilities necessarily fails a narrow tailoring analysis. See Hill, 530 U.S. 703.

d) Conclusion

McCullen "noted the historical importance" of Plaintiffs' desired First Amendment expressions — distribution of literature and engagement in personal conversations in a traditional public forum. Pl.'s Mem. at 11; see also Pl.'s Reply at 3-4. The Court understands the constitutional import of Plaintiffs' First Amendment rights. As previously held in Brown, the Ordinance does not unconstitutionally infringe upon those rights, as it is a facially content-neutral time, place or manner regulation of speech. It is narrowly tailored to achieve legitimate government interests, and is thus constitutional on its face. There remains a genuine issue of fact with respect to Plaintiffs' allegation that Defendants engage in selective enforcement of the Ordinance. There is insufficient evidence in the record to support a conclusion that Plaintiffs have established a likelihood of success on the merits of that claim. As Plaintiffs have not demonstrated a likelihood of success on the merits of their First Amendment claims, the Court need not reach the remaining requirements for a successful motion for preliminary injunction. For these reasons, Plaintiffs' Motion for Preliminary Injunction will be denied.

2. Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When faced with a motion to dismiss, a court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions."

Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

a) Violation of Freedom of Speech and of the Press under the First Amendment

Defendants contend that Brown forecloses Plaintiffs' First Amendment freedom of speech claims, and that McCullen did not abrogate Brown. Def.'s Mot. to Dismiss at ¶¶ 12-22. However, as noted above, Plaintiffs put forth a selective enforcement claim, alleging that Defendants allow Planned Parenthood escorts to engage in advocacy in the buffer zones, in violation of the Ordinance, while enforcing the Ordinance as against anti-abortion sidewalk counselors. If we accept their facts as alleged, Plaintiffs indeed state a selective enforcement —or content-based as-applied — claim for relief plausible on its face, under the First Amendment freedom of speech. See supra. As set forth above, there remain issues of fact surrounding this particular claim and, as such, dismissal is inappropriate.

Plaintiffs further allege that the Ordinance infringes upon their "freedom of the press, [which] protects the[ir] leafleting activities." Pl.'s Resp. (Doc. 18) at 10. Defendants argue that "no facts [are] alleged in support of such cause of action." Def.'s Mot. to Dismiss at ¶ 6. "The right of freedom of speech and press has broad scope. . . .This freedom embraces the right to distribute literature." Martin v. City of Struthers, 319 U.S. 141 (1943). The Court finds that insofar as Plaintiffs state a selective enforcement claim, their First Amendment freedom of the press is implicated as well. As such, Defendants' motion for dismissal of Plaintiff's selective enforcement First

Amendment freedom of speech and press claim will be denied.

However, Plaintiffs' First Amendment claim is not limited to a theory of selective enforcement, as discussed above. Compl. at ¶¶ 79-105. To the extent they allege unconstitutional overbreadth; a failure to survive intermediate scrutiny; facial content-discrimination; content-discrimination as-applied due to the existence of buffer zones only at abortion clinics; and content-discrimination due to the necessity of law enforcement to review the content of speech in order to enforce the Ordinance, those claims have been addressed by the Court. See analysis supra. Insofar as Plaintiffs seek relief pursuant to the First Amendment under these theories, they have not stated a plausible claim for relief, and those iterations of their "First Claim" will be dismissed. Id.

Plaintiffs further allege that the Ordinance imposes an unconstitutional prior restraint on speech. Compl. at ¶¶ 95-96. Defendants argue that Plaintiffs have not stated a claim for relief on this basis, as "[t]he term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." Def.'s Br. in Supp. (Doc. 16) at 7 (emphasis in original) (quoting Alexander v. United States, 509 U.S. 544 (1993)). Smolla and Nimmer explain that:

> [t]he phrase "prior restraint" . . . is a term of art referring to judicial orders or administrative rules that operate to forbid expression before it takes place. In First Amendment jurisprudence, prior restraints are thus traditionally contrasted with

> "subsequent punishments," which impose penalties on expression after it occurs.

Smolla & Nimmer on Freedom of Speech (2014) § 15:1. The Ordinance, with its imposition of penalties after a violation has occurred, provides "subsequent punishments" and is not a "prior restraint" within the generally understood definition of that term.

Plaintiffs refer to the Supreme Court's discussion of prior restraints in Hill as applicable to the instant challenge. Pl.'s Resp. at 9. However, that analysis was relevant in Hill only because the petitioners specifically challenged the Colorado statute's requirement that sidewalk counselors obtain a pedestrian's consent before approaching within eight feet, in order to engaging in oral protest, education, or counseling. The Supreme Court declined to deem that a prior restraint. Hill, 530 U.S. at 733 (noting that the Supreme Court had previously rejected the prior restraint argument in Schenck and Madsen, and rejected it once again with respect to Colorado's statute). Moreover, the Ordinance here does not contain any such consent requirement, or any other element that could be considered a prior restraint on speech. Contrary to Plaintiffs' arguments, it is the case here, as it was in Hill, that "[u]nder this statute, absolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited." Id. at 734. For these reasons, Plaintiffs have not stated a prior restraint claim on which relief could be granted. That claim will be dismissed.

Plaintiffs allege that the Ordinance is impermissibly vague pursuant to the First Amendment, failing to "put a reasonable person on notice of what it prohibits, and lacks the clarity

required of restrictions on protected speech." Compl. at ¶ 97. Defendants argue that "[t]he Ordinance – especially as it is construed in light of the permanent injunction – clearly prohibits certain activities within the 15 foot 'buffer zone,'" and thus the Court should dismiss Plaintiffs' void for vagueness claim. Def.'s Br. in Supp. at 8. Plaintiffs do not respond to Defendants' motion to dismiss their unconstitutional vagueness claim. Upon review of the factual allegations in the Complaint, no facts alleged support this challenge. Nowhere do Plaintiffs allege that they are not on reasonable notice of what the Ordinance prohibits. Rather, Plaintiffs make clear in the Complaint that they understand the Ordinance to prohibit them from sidewalk counseling, congregating, patrolling or otherwise demonstrating or picketing, within the buffer zone. Compl. at ¶ 66. As Plaintiffs have failed to state a First Amendment void for vagueness claim for relief, that claim will be dismissed.

For the reasons stated, Plaintiffs' First Amendment Claim remains insofar as they allege selective enforcement, or content-discrimination as-applied. The remaining iterations of their First Amendment claim for relief will be dismissed.

b) Violation of Substantive and Procedural Due Process under the First and Fourteenth Amendments

Defendants allege that the gravamen of Plaintiffs' substantive due process claim under the Fourteenth Amendment relates to the alleged suppression of their freedom of speech. Def.'s Br. in Supp. at 3. "Therefore, the First Amendment, rather than the Fourteenth Amendment's notion of substantive due process provides the proper context for analyzing this

claim." Id. (citing Albright v. Oliver, 510 U.S. 266 (1994)). "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Albright, 510 U.S. at 273; see also Donahue v. Gavin, 280 F.3d 371 (3d Cir. 2002) (citing Albright, 510 U.S. 266).

Plaintiffs contend that the Fourteenth Amendment protects their fundamental rights to freedom of speech and of the press, and thus a substantive due process challenge is proper. Pl.'s Resp. at 12; see generally Compl. at ¶¶ 107-12, 117-18. They argue that said fundamental rights are deprived in an arbitrary or capricious manner, as Defendants do not create and enforce buffer zones at every location where authorized to do so. Id. They reason that "Defendants are impermissibly and arbitrarily targeting Plaintiffs because of their speech related to abortion, and their pro-life speech in particular." Id.

The First Amendment is the proper constitutional home for Plaintiffs' freedom of speech and press claims; "substantive due process, with its scarce and open-ended guideposts, can afford [them] no relief." Albright, 510 U.S. at 274. Plaintiffs have alleged no facts to support an allegation that Defendants enforce the Ordinance in an "arbitrary or capricious" manner. Rather, they allege that Defendants enforce the Ordinance in a manner that specifically aims to burden speech on abortion generally, and anti-abortion speech in particular. These allegations are better suited for challenge under the First Amendment, which provides an "explicit textual

source of constitutional protection" for impermissible abridgments of freedom of speech and the press. Plaintiffs have properly alleged that the Ordinance targets abortion-related, or anti-abortion, speech in their content-based First Amendment challenge, further demonstrating that the First Amendment is the source of their rights, and the more appropriate authority for their claim for relief.

To the extent that Plaintiffs allege a substantive due process challenge based on the City's impermissible "unfettered discretion" to demarcate and enforce additional buffer zones, they have also not stated a claim for relief. See Pl.'s Resp. at 11-13. Plaintiffs cite a number of cases for the proposition that such broad discretion would violate their substantive due process rights. Id. Problematically, none of those citations relate to an analysis under the substantive due process doctrine of the Fourteenth Amendment. Cox v. Lousiana, 379 U.S. 536, 558 (1965) ("But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the *First Amendment*. . . ") (emphasis added); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (noting that "the danger of censorship and of abridgment of our precious *First Amendment* freedoms is too great where officials have unbridled discretion over a forum's use") (emphasis added); City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (analyzing the constitutional limits on discretion required by the First Amendment); Forsyth County v. Nationalist Movement, 505 U.S. 123 (discussing impermissibly arbitrary application of

prior restraints on speech pursuant to the First Amendment).

As Plaintiffs' substantive due process claims are more appropriately characterized as violations under the First Amendment, they fail to state a claim upon which relief may be granted under the Fourteenth Amendment.

Defendants argue that Plaintiffs' procedural due process claims "should be dismissed because the protections of procedural due process do not extend to generally applicable legislative actions." Def.'s Br. in Supp. at 3. Plaintiffs cite only one case, Winters v. New York, 333 U.S. 507 (1948), for the proposition that procedural due process is implicated when a statute limits the freedom of expression "yet fails 'to give fair notice of what acts will be punished and such a statute's inclusion of prohibition against expressions, protected by the First Amendment.'" 333 U.S. at 509-10. Winters was an appeal of a criminal conviction under a New York statute. Id. The due process clause of the Fourteenth Amendment was implicated because of the procedural posture of a criminal appeal — appellant was deprived of due process and freedoms of speech or press via his prosecution for violating the statute. The instant matter is not a criminal prosecution. There are no allegations that Plaintiffs have been subjected to any state proceedings in which any process would come due to them. The crux of their argument is, rather, that the Ordinance is unconstitutionally vague, failing to give them fair notice of what First Amendment expressions, if any, it covers. This argument is better suited to a First Amendment analysis. Albright, 510 U.S. at 273; see analysis supra. Defendants' motion to dismiss Plaintiffs

procedural due process claim will be granted.

c) Claims as against Mayor William Peduto and Pittsburgh City Council

Defendants request that the Court dismiss Mayor William Peduto ("Mayor Peduto") from this action, as "official capacity suits are the equivalent of suing the government entity itself." Def.'s Br. in Supp. at 3 (citing Kentucky v. Graham, 473 U.S. 159 (1985)). They further argue that the Pittsburgh City Council should be terminated as a defendant as well, as the City of Pittsburgh is the "real party in interest and . . . also a named defendant." Id. at 4.

Plaintiffs charge Mayor Peduto with "executing and enforcing" the Ordinance, allegedly in a content-discriminatory manner; the Pittsburgh City Council is charged with enacting the Ordinance. Compl. at ¶¶ 16-19. It would be premature to dismiss Mayor Peduto at this early stage, prior to discovery with respect to Plaintiffs' selective enforcement claim and Mayor Peduto's role, if any, in such enforcement. It is commonplace to name multiple defendants, "whether corporate, municipal, or individual" in Section 1983 claims such as this one. Compl. at ¶ 6; Coffman v Wilson Police Dep.'t, 739 F.Supp. 257, 262 (E.D. Pa 1990) (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 473-74 (1986) (city, county, police chief, county sheriff, Board of County Commissioners, prosecutor, and police officers all named as defendants); Graham, 473 U.S. at 161-62 (local law enforcement and city named as defendants)). In contrast, Plaintiffs make no meaningful allegations regarding the role of Pittsburgh City Council in the enforcement of the Ordinance. Defendants' motion to dismiss Mayor Peduto from this case will be denied. Their motion to

dismiss all claims as against the Pittsburgh City Council will be granted.

d) Conclusion

For the reasons stated, Defendants' Motion to Dismiss Plaintiffs' First Amendment claims will be granted in part and denied in part. To the extent that Plaintiffs allege a selective enforcement, or content-discriminatory as-applied, First Amendment claim, Defendants' motion will be denied. In all other respects, Defendants' Motion to Dismiss Plaintiffs' First Amendment claims is granted. Defendants' Motion to Dismiss Plaintiffs' substantive and procedural due process claims is granted. Defendants' motion to dismiss all claims as against Mayor Peduto will be denied. Their motion to dismiss all claims as against the Pittsburgh City Council will be granted.

The Court notes that in Defendants' "wherefore clause," they additionally seek dismissal of Plaintiffs' "*Third*" claim as it relates to the Fourteenth Amendment. Plaintiffs' Third Claim is rooted in the Fourteenth Amendment's equal protection clause. Defendants, however, present no arguments on Plaintiffs' equal protection theory. Indeed, there is no other reference to the equal protection claim in Defendants' Motion to Dismiss or Brief in Support. As such, the Court will not *sua sponte* dismiss this claim.

ORDER

For the reasons stated above, Plaintiffs' Motion for Preliminary Injunction (**Doc. 3**) is **DENIED**. Defendants' Motion to Dismiss (**Doc. 15**) is **DENIED** insofar as it seeks to dismiss: 1) Plaintiffs' First Amendment freedom of speech and press selective enforcement claim, and 2) all claims as against Mayor

William Peduto. Defendants' Motion to Dismiss is **GRANTED** in all other respects.

Defendants shall file their Answer on or before March 20, 2015.

IT IS SO ORDERED.

March 6, 2015 s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1084

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

v.

CITY OF PITTSBURGH; PITTSBURGH CITY COUNCIL; MAYOR PITTSBURGH

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

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: November 27, 2019
Lmr/cc: All Counsel of Record

Excerpts from United States Constitution

Article III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . .

Amendment XIV, § 1

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Pittsburgh Code of Ordinances

CHAPTER 623:
PUBLIC SAFETY AT HEALTH CARE FACILITIES

§ 623.01 - INTENT OF COUNCIL.

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

The City of Pittsburgh Bureau of Police has been consistently called upon in at least two (2) locations within the City to mediate the disputes between those seeking medical counseling and treatment and those who would counsel against their actions so as to (i) avoid violent confrontations which would lead to criminal charges and (ii) enforce existing City Ordinances which regulate use of public sidewalks and other conduct;

Such services require a dedicated and indefinite appropriation of policing services, which is being provided to the neglect of the law enforcement needs of the Zones in which these facilities exist.

The City seeks a more efficient and wider deployment of its services which will help also reduce the risk of violence and provide unobstructed access to health care facilities by setting clear guidelines for activity in the immediate vicinity of the entrances to health care facilities;

The Council finds that the limited buffer and bubble zones outside of health care facilities established by this chapter will ensure that patients have unimpeded access to medical services while ensuring that the First Amendment rights of demonstrators to communicate their message to their intended audience is not impaired.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.02 - DEFINITIONS.

Hospital means an institution that:

(1) Offers services beyond those required for room, board, personal services and general nursing care; and,

(2) Offers facilities and beds for use beyond twenty-four (24) hours by individuals requiring diagnosis, treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy; and,

(3) Regularly makes available clinical laboratory services, diagnostic X-ray services, and treatment facilities for surgery or obstetrical treatment of similar extent.

Hospitals may include offices for medical and dental personnel, central facilities such as pharmacies, medical laboratories and other related uses.

Medical office/clinic means an establishment providing therapeutic, preventative, corrective, healing and health-building treatment services on an out-patient basis by physicians, dentists and other practitioners. Typical uses include medical and dental offices and clinics and out-patient medical

laboratories.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.03 - EIGHT-FOOT PERSONAL BUBBLE ZONE.

No person shall knowingly approach another person within eight (8) feet 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 (100) feet from any entrance door to a hospital and/or medical office/clinic.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.04 - FIFTEEN-FOOT BUFFER ZONE.

No person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending fifteen (15) feet 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.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.05 - PENALTY.

Any person, firm, or corporation who pleads guilty or nolo contendere, or is convicted of violating of this section shall be guilty of a summary offense and punished by a fine of at least fifty dollars ($50.00) for

the first offense; a fine of at least one hundred fifty dollars ($150.00) for a second offense within five (5) years; and a fine of three hundred dollars ($300.00) for a third offense within five (5) years.

For fourth and subsequent offenses within five (5) years the fine shall not be less than three hundred dollars ($300.00) and/or imprisonment for not less than three (3) days but not more than thirty (30) days.

No part of the minimum fine may be suspended or discharged, except upon proof and a finding of indigence by the court. Indigent defendants may pay fines imposed under this section by participation in a court designated community service program, crediting the commensurate dollar amount of each hour of community service toward payment of the minimum fine owed.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.06 - SEVERABILITY.

The provisions of this Chapter are severable. If any portion of this Chapter is held invalid, unenforceable, or unconstitutional by any court of competent jurisdiction, it shall not affect the validity of the remaining portions of this Chapter, which shall be given full force and effect.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

§ 623.07 - EFFECTIVE DATE.

This Chapter shall become effective immediately upon the signature of the Mayor, or ten (10) days after the City Clerk provides this ordinance to the mayor for signature.

(Am. Ord. 49-2005, § 1, eff. 12-30-2005)

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

MARY KATHRYN BROWN, Plaintiff, vs. CITY OF PITTSBURGH, et al., Defendants.	)	Civil Action No. 06-393 Judge Nora Barry Fischer

ORDER GRANTING PERMANENT INJUNCTION

1.) Section 623.03 of the Ordinance No. 49, Pittsburgh Code title 6, enacted in December, 2005, is hereby permanently enjoined *in toto*.

2.) Defendants shall construe and enforce Section 623.04 of the Ordinance in a manner that does not permit any person to picket or demonstrate within the boundaries of the 15 foot buffer zone. Accordingly, assisting patients and other persons to enter or exit a hospital, medical office or clinic is permissible if it does not include any action, activity or signage in the form of picketing or demonstrating.

3.) Defendants shall provide training to Pittsburgh City Police concerning proper enforcement of the Ordinance, in both written and oral form.

4.) Defendants shall provide a copy of such written training materials to Plaintiff.

5.) Defendants shall clearly mark the boundaries of any 15 foot buffer zone in front of any hospital, medical office or clinic prior to the enforcement of the Ordinance.

6.) Defendants shall remove any and all current markings that delineate the now-stricken 100 foot zone.

7.) The submission of this Order resolves all outstanding matters of dispute between the parties, except for the parties' remaining dispute concerning attorney fees, costs and/or prevailing party status.

This Order shall constitute the final judgment of the Court in this matter.

The foregoing is HEREBY ORDERED, ADJUDGED, and DECREED.

s/Nora Barry Fischer
Nora Barry Fischer

Dated: December 17, 2009.
CC/ECF: All counsel of record.