APPENDIX

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 22-2647

[Filed January 31, 2024]

JERYL TURCO,
Appellant

v.

CITY OF ENGLEWOOD, NEW JERSEY

Appeal from the United States District Court
for the District of New Jersey
(D. C. No. 2-15-cv-03008)
District Judge: Honorable Susan D. Wigenton

Submitted under Third Circuit L.A.R. 34.1(a)
on May 19, 2023

Before: SHWARTZ, MONTGOMERY-REEVES and
ROTH, Circuit Judges

(Opinion filed: January 31, 2024)

OPINION[*]

ROTH, Circuit Judge

The District Court upheld a City of Englewood ordinance which authorized the creation of eight-foot buffer zones outside the entrances to health care and transitional facilities. Because the Ordinance is narrowly tailored, accords with the First Amendment, and is not overbroad, we will affirm the judgment of the District Court dismissing the complaint.

I. Factual and Procedural Background

In late 2013, "militant activists and aggressive protestors" associated with the Bread of Life evangelical ministry began to engage in "extremely aggressive, loud, intimidating, and harassing behavior" outside Metropolitan Medical Associates (MMA), a health care clinic that provides reproductive services to women, including abortions.[1] The City Council of Englewood, New Jersey (the City) discussed possible avenues for responding to the antiabortion protests, including an increase in police presence and patrols and prosecution of protestors based on third-party complaints. The City, however, found each solution ineffective.

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] Appx. 518, 526.

As a result, in March 2014, the City adopted a buffer-zone ordinance (the Ordinance) restricting the presence of certain persons, including sidewalk counselors and protestors, from areas in front of health care or transitional facilities.[2] In essence, the Ordinance created three overlapping buffer zones in front of qualifying facilities: "Two semicircular buffer zones extended outwards eight feet from either side of the facility's entrance. The third buffer zone spanned the width of the facility's entrance and extended to the street."[3]

Jeryl Turco, a non-violent "sidewalk counselor," not associated with the Bread of Life ministry, brought suit against the City pursuant to 42 U.S.C. § 1983, alleging that the Ordinance was overbroad and violated her First Amendment rights to freedom of speech, assembly, and association.[4] After discovery, the District Court granted Turco's cross-motion for summary

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[2] The Ordinance provides:

> Within the City of Englewood, no person shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Appx. 527–28.

[3] *Turco v. City of Englewood*, 935 F.3d 155, 159 (3d Cir. 2019).

[4] Appx. 42.

judgment, concluding that the statute was overbroad and not narrowly tailored to serve the government's interest.[5] On appeal, we reversed.[6] We set forth the appropriate standards for assessing First Amendment challenges and overbreadth and found that summary judgment was improper.[7] We then remanded for further proceedings consistent with our governing legal standards.[8]

The case proceeded to trial, after which the District Court found in favor of the City on all claims.[9] Turco appeals. Specifically, she contends that the District Court erred in holding that the Ordinance (1) does not burden Turco's constitutional rights to engage in free speech activities, (2) is narrowly tailored, and (3) is not overbroad.[10]

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. On appeal from a bench trial, we review all questions of

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[5] *Turco v. City of Englewood*, No. 2:15-cv-03008-SDW-LDW, 2017 WL 5479509, at *4–5 (D.N.J. Nov. 14, 2017).

[6] *Turco*, 935 F.3d at 158.

[7] *Id.* at 161–72.

[8] *Id.* at 172.

[9] *Turco v. City of Englewood*, 621 F. Supp. 3d 537, 553 (D.N.J. 2022).

[10] Appellant Br. 3.

law de novo.[11] "Although we generally review a district court's factual findings for clear error, '[i]n the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record.'"[12] Even so, we give "some deference" to the District Court's "reasonable assessment" due to its "familiarity with the facts and the background of the dispute between the parties even under our heightened review."[13]

III. First Amendment Challenge

We assess § 1983 challenges alleging First Amendment violations using a three-part test.[14] First, we must "determine whether the First Amendment protects the speech at issue."[15] Second, we must "consider 'the nature of the forum.'"[16] Third, we must "resolve 'whether the [government's] justifications for

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[11] *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 282–83 (3d Cir. 2014) (citation omitted).

[12] *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008) (quoting *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001) (alteration in original)).

[13] *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 381 (1997) (quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 769–70 (1994)).

[14] *Turco*, 935 F.3d at 161 (citing *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

[15] *Id.* at 161–62 (citing *Cornelius*, 473 U.S. at 797).

[16] *Id.* at 162 (quoting *Cornelius*, 473 U.S. at 797).

exclusion from the forum satisfy the requisite standard.'"[17]

At this stage, only the last prong of the test is at issue.[18] We have already held—and the parties agree—that the restrictions imposed are content-neutral.[19] Thus, intermediate scrutiny applies.[20] An ordinance withstands intermediate scrutiny if the ordinance is "narrowly tailored to serve a significant governmental interest."[21] Narrow tailoring requires that the ordinance not "burden substantially more speech than is necessary to further the government's legitimate interests."[22] The ordinance "need not be the least restrictive or least intrusive means of serving the government's interests."[23] Instead, the government simply "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[24]

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[17] *Id.* (quoting *Cornelius*, 473 U.S. at 797) (alteration in original).

[18] *Id.*

[19] *Id.*

[20] *Id.* (citing *McCullen v. Coakley*, 573 U.S. 464, 485–86 (2014)).

[21] *Id.* (quoting *Bruni v. City of Pittsburgh (Bruni I)*, 824 F.3d 353, 363–64 (3d Cir. 2016)).

[22] *Id.* (quoting *McCullen*, 573 U.S. at 486).

[23] *Id.* (quoting *McCullen*, 573 U.S. at 486) (internal marks omitted); *Ward v. Rock Racism*, 491 U.S. 781, 799 (1989)).

[24] *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 798).

A. The Government Interests.

The District Court properly recognized the City's substantial and legitimate interests, which the Ordinance plainly serves. In fact, we have already recognized cities' and states' substantial interest "in protecting the health and safety of its citizens, which 'may justify a special focus on impeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."[25] Buffer zones similar to those the Ordinance authorizes "'clearly serve' the 'government interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, and protecting a woman's freedom to seek pregnancy-related services.'"[26] At the same time, such rules "provide specific guidance to enforcement authorities [and] serve the interest in evenhanded application of the law."[27]

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[25] *Turco*, 935 F.3d at 166 (quoting *Hill v. Colorado*, 530 U.S. 703, 715 (2000)).

[26] *Id.* at 163 (quoting *McCullen*, 573 U.S. at 486–87); *see also Schenck*, 519 U.S. at 375–76 (recognizing same interests in buffer zones around clinics); *Hill*, 530 U.S. at 716–17 (recognizing "[t]he unwilling listener's interest in avoiding unwanted communication" and that "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests") (quoting *Madsen*, 512 U.S. at 772–73).

[27] *Turco*, 935 F.3d at 166 (quoting *Hill*, 530 U.S. at 715).

B. Burden on Sidewalk Counselors.

The District Court properly found that the Ordinance is narrowly tailored, and thus survives intermediate scrutiny, because the record and related case law demonstrate that the Ordinance does not place a substantial burden on Turco's ability to communicate.

The record demonstrates that, despite Turco's suggestion that the Ordinance makes it "more difficult for her to engage in speech activities,"[28] the burden is small as she can still engage in several forms of communication. Both before and after the adoption of the Ordinance, Turco concedes that she could talk "to patients on some kind of regular basis."[29] The District Court points to several alternate routes Turco can take to communicate with patients,[30] and the record demonstrates that despite the buffer zone, Turco still follows and speaks with patients up to 100 feet from the clinic, far beyond the buffer zone.

While Turco calls the buffer zone an "obstacle course,"[31] Turco testified that she could walk from one side of the building entrance to the other, and, until filing this lawsuit, Turco regularly passed through the buffer zone to speak to clients rather than run through

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[28] Appellant Br. 28.

[29] Appx. 128.

[30] *Turco*, 621 F. Supp. 3d at 549.

[31] Appx. 98.

the street. Another sidewalk counselor, Rosemary Garrett, also testified that she could still speak to and assist clinic patients after adoption of the buffer zone. Garrett was "not bothered by the new buffer zone" because it did not affect her counseling.[32] Instead, it was the hostile protestors from Bread of Life that "interfere[d] with [Garrett's] ability to counsel people."[33] Based on the record, aptly referred to by the District Court, the Ordinance does not place a substantial burden on Turco's speech.

This conclusion accords with existing case law. In *Hill v. Colorado*, the Supreme Court held that an eight-foot buffer zone withstood intermediate scrutiny because an "8-foot zone allows the speaker to communicate at a 'normal conversational distance.'"[34] The Court explicitly stated that "[s]igns, pictures, and voice itself can cross an 8-foot gap with ease."[35] Here, Turco will regularly stand *less than* eight feet from listeners. In *Hill*, the Ordinance imposed a floating buffer-zone requiring side-walk counselors to *remain* eight feet from patients while they are within 100 feet of a health care facility.[36] By contrast, here, because the

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[32] Appx. 469.

[33] Appx. 472.

[34] 530 U.S. at 726–27; *see also id.* at 729 ("[T]he 8–foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech.").

[35] *Id.* at 729.

[36] *Hill*, 530 U.S. at 707–08.

Ordinance imposes a fixed buffer zone, Turco will *at most* be eight feet from listeners at any time and only while they remain at opposite sides of the buffer zone in front of the facility.

While striking down several floating buffer zones, the Supreme Court has upheld fixed-buffer zones far larger than those the Ordinance here authorizes. For example, in *Schenck v. Pro-Choice Network of Western New York*, the Court upheld fixed fifteen-foot buffer zones around clinic doorways, driveways, and parking lot entrances.[37] Likewise, in *Madsen v. Women's Health Center, Inc.*, the Court upheld a fixed thirty-six-foot buffer zone around a clinic's entrances and driveway on a public street.[38] We are not persuaded by—and in fact, already rejected—Turco's contention that the burden on Turco's speech is greater than that in *Hill* and more akin to that in *McCullen*. The thirty-five-foot buffer zone in *McCullen* is a "substantial distinction" from the eight-foot one here.[39]

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[37] 519 U.S. at 371, 380–81.

[38] 512 U.S. at 757. We note that the buffer zones in *Schenck* and *Madsen* were created under injunctions, rather than statutes, and thus are assessed under a different, albeit more stringent, standard. *See id.* at 765 ("We believe that these differences require a somewhat more stringent application of general First Amendment principles [in the] context [of injunctions]."); *Schenk*, 519 U.S. at 362–70. Even so, under a stricter standard, the Supreme Court found that both zones pass muster under the First Amendment. *Madsen*, 512 U.S. at 757; *Schenck*, 519 U.S. at 371, 380–81.

[39] *See Turco*, 935 F.3d at 163.

Further, even if the buffer-zone makes certain forms of communicating more difficult, the District Court correctly recognized that the buffer-zone may simultaneously facilitate sidewalk counselors' communication. Turco recognized the strain Bread of Life protestors have placed on her ability to communicate her message, noting that she would "be able to counsel better . . . if they weren't there."[40] Similarly, Garrett stated that while the buffer zone did not harm her counseling efforts, her efforts were harmed by protestors' yelling and screaming. As Turco acknowledges, the Ordinance generally succeeded in calming down Bread of Life protestors. Thus, like in *Hill*, by "encourag[ing] the most aggressive and vociferous protestors to moderate their confrontational and harassing conduct," the Ordinance may "make it easier for thoughtful and law-abiding sidewalk counselors like [Turco] to make [herself] heard."[41] As a result, the Ordinance itself may alleviate the need for Turco to follow and communicate closely with each patient.

Accordingly, the Ordinance does not place a substantial burden on Turco's speech.

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[40] Appx. 121. Turco also noted that the escorts, who were present because of Bread of Life's aggressive tactics, interfered with her counseling efforts. Appx. 90.

[41] *Hill*, 520 U.S. at 727.

C. Less Restrictive Alternatives.

We also agree with the District Court's conclusion that the Ordinance is narrowly tailored because the City tried and considered less restrictive alternatives.[42]

Where "the burden on speech is de minimis, a regulation may be viewed as narrowly tailored" as "any challengers would struggle to show that 'alternative measures [would] burden *substantially* less speech.'"[43] By contrast, where the burden is substantial, the City needs to show that it seriously considered substantially less restrictive alternatives.[44] Because this is an "intensely factual . . . inquiry," we must broadly defer "to legislative judgments and [] the legislative body need not meticulously vet every less burdensome alternative."[45]

Because we agree with the District Court that the burden on Turco's speech is not substantial, our inquiry

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[42] In fact, we already recognized that, based on the record, the District Court could reasonably draw this conclusion. *Turco*, 935 F.3d at 167–69.

[43] *Bruni v. City of Pittsburgh (Bruni II)*, 941 F.3d 73, 89 (3d Cir. 2019) (quotations omitted and emphasis in original); *see also Hill*, 520 U.S. at 726 ("[W]hen a content-neutral regulation does not *entirely foreclose* any means of communication, it may satisfy the tailoring *requirement* even though it is not the least restrictive or least intrusive means of serving the statutory goal." (emphases added)).

[44] *Bruni II*, 941 F.3d at 89.

[45] *Turco*, 935 F.3d at 170–71 (citing and quoting *Bruni I*, 824 F.3d at 357, 370 n.18).

can end there. Even so, we agree with the District Court that the City properly tried and considered less restrictive alternatives. Lynn Algrant, the President of Englewood City Council, and Timothy Dacey, the City Manager for Englewood, testified extensively about alternatives considered by the City.

For example, the City considered an increase in police patrols and police presence by both on-duty and off-duty officers. However, these efforts were unsuccessful.[46] Off-duty police officers had little interest in taking on the work. Further, due to financial constraints, vacancies in the police department, and ongoing violent crime throughout Englewood, police were limited in how often they could patrol the streets surrounding MMA. When they did patrol, de-escalations were temporary. Protestors could see the police coming down the one-way street, and would then stop their activity for a few minutes and resume once police had passed. Police also instituted a "no-go zone" in front of MMA's door, but protestors ignored the zone, taunting and filming the police officers in the process.[47]

The City also encouraged MMA to seek an injunction or file criminal complaints. Police, however, required clinic escorts to submit their full names on

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[46] *See Bruni II*, 941 F.3d at 90–91 (recognizing that the City attempted to increase police detail but these efforts were nonetheless unsuccessful due to costs and because "incident-based responses by the police . . . proved unsuccessful in preventing or deterring aggressive incidents and congestion").

[47] Appx. 246.

any police reports or complaints. Clinic escorts refused. They feared retribution from protestors, particularly after one found a picture posted online of herself inside a bullseye.

Affording the City the required deference, we are convinced based on the record that the City adequately considered less burdensome alternatives. Accordingly, we find that the Ordinance is narrowly tailored and satisfies intermediate scrutiny.

IV. Overbreadth

Turco also misses the mark in her appeal of the District Court's finding that the Ordinance is not overbroad.

To demonstrate overbreadth, "the overbreadth claimant bears the burden of demonstrating, 'from the text of [the law], and from actual fact,' that substantial overbreadth exists."[48] We agree with the District Court that Turco has not met her burden.

Turco first argues that the Ordinance is overbroad because it authorizes the creation of buffer zones outside facilities in which no confrontational speech occurred. This holds no merit. Both the Supreme Court and our Court have explicitly rejected this argument.[49] In *Hill*, the Supreme Court noted that "[t]he fact that the coverage of a statute is broader than the specific

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[48] *Turco*, 935 F.3d at 172 (quoting *United States v. Stevens*, 559 U.S. 460, 130 (2010) (emphases omitted)).

[49] *Hill*, 530 U.S. at 730–32; *Bruni I*, 824 F.3d at 373; *Brown v. City of Pittsburgh*, 586 F.3d 263, 273 (3d Cir. 2009).

concern is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute," as we recognize they do here.[50] As we have previously noted, "'[w]hen a buffer zone broadly applies to health care facilities' we may 'conclude the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.'"[51]

Turco next contends that the Ordinance is overbroad because buffer zones have been demarcated at several other facilities under the Ordinance. Courts, however, cannot strike down an ordinance "as overbroad unless the overbreadth is '*substantial* in relation to the [regulation's] plainly legitimate sweep.'"[52] In *Bruni I*, we rejected the plaintiff's theory of overbreadth because, despite the ordinance's broad authorization, the city only demarcated two buffer zones, which were both outside facilities that provide abortions.[53] Turco argues that the Ordinance here applied far more broadly because the City marked out

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[50] *Hill*, 530 U.S. at 730–31.

[51] *Turco*, 935 F.3d at 171 (quoting *Hill*, 530 U.S. at 731).

[52] *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (quoting *Sypniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 242, 259 (3d Cir. 2002) (emphasis added) (alterations in original)).

[53] *Bruni I*, 824 F.3d at 374 (recognizing that the ordinance was "only enforced outside of health care facilities which provide abortions").

buffer zones at other clinics.[54] The record, however, points to the demarcation of buffer zones at six health care facilities at most, none of which are transitional facilities. The record contains no evidence that the City has "enforced" these buffer zones in any way outside of these other facilities.[55] Thus, we are not convinced that this case is materially distinct from *Bruni I* or that a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[56]

Accordingly, we conclude that the Ordinance is not overbroad.

V. Conclusion

For the above reasons, we will affirm the judgment of the District Court, dismissing the complaint.

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[54] Appellant Br. 50–51.

[55] *See Bruni I*, 824 F.3d at 374.

[56] *See Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–771 (1982) (cleaned up)).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2647

[Filed January 31, 2024]

JERYL TURCO,)
Appellant)
)
v.)
)
CITY OF ENGLEWOOD, NEW JERSEY)
)

Appeal from the United States District Court
for the District of New Jersey
(D. C. No. 2-15-cv-03008)
District Judge: Honorable Susan D. Wigenton

Submitted under Third Circuit L.A.R. 34.1(a)
on May 19, 2023

Before: SHWARTZ, MONTGOMERY-REEVES and
ROTH, Circuit Judges

JUDGMENT

This case came to be heard on the record from the United States District Court for the District of New

Jersey and was submitted under Third Circuit L.A.R. 34.1(a) on May 19, 2023.

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court, entered August 12, 2022, be and the same is hereby, **AFFIRMED**. Costs taxed against Appellant.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: January 31, 2024

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 15-3008 (SDW) (LDW)

[Filed August 12, 2022]

JERYL TURCO,)
Plaintiff,)
)
v.)
)
CITY OF ENGLEWOOD, NEW JERSEY,)
Defendant.)
)

TRIAL OPINION

August 12, 2022

WIGENTON, District Judge.

This Court held a bench trial for two days in this matter regarding Plaintiff Jeryl Turco's ("Plaintiff" or "Turco") claims against Defendant City of Englewood, New Jersey ("Defendant," "Englewood," or the "City") for alleged violations of her civil rights. This Court has jurisdiction over the matter pursuant to 28 U.S.C § 1331, and venue is proper pursuant to 28 U.S.C. § 1391. Based on the testimony and evidence presented at trial, this Trial Opinion constitutes this Court's

findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). For the reasons stated below, this Court finds in favor of Defendant on all claims.

I. PROCEDURAL HISTORY

Plaintiff brought this action in April 2015, challenging the constitutionality of an ordinance adopted by Englewood in March 2014 (the "Ordinance") to create buffer zones around certain types of health care facilities, including Metropolitan Medical Associates ("MMA"). (D.E. 1.) MMA is an abortion clinic where Plaintiff regularly approaches patients outside to dissuade them from obtaining an abortion. (*See id.* ¶¶ 4, 17–22.) Plaintiff brings this suit pursuant to 42 U.S.C. § 1983 and claims that the Ordinance violates her rights to freedom of speech and freedom of assembly and association under the First Amendment of the U.S. Constitution, as well as her right to free speech under the New Jersey Constitution. (*See id.* ¶¶ 2, 69–80.)

On November 14, 2017, this Court issued an Opinion and Order granting Plaintiff's Motion for Summary Judgment and denying Defendant's Cross-Motion for Summary Judgment. (D.E. 49, 50.) On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded the case for further proceedings. *Turco v. City of Englewood, New Jersey*, 935 F.3d 155 (3d Cir. 2019). Consistent with the Third Circuit's opinion, this Court held a virtual bench trial on February 23–24, 2022, and the parties subsequently submitted post-trial briefs with proposed findings of fact and conclusions of law. (D.E. 91, 92.)

II. FINDINGS OF FACT

This Court, writing primarily for the parties, adopts the Parties' Stipulation of Undisputed Facts ("PSUF"), (Joint Ex. J-4),[1] and makes additional findings of fact as stated below:

A. Defendant's Efforts

In late 2013, militant activists and aggressive protestors associated with a religious organization called the Bread of Life began to gather outside MMA on Saturday mornings. (*See* PSUF ¶¶ 2–3, 10.) The Bread of Life protestors engaged in extremely aggressive, loud, intimidating, and harassing behavior towards patients, their companions, and even other anti-abortion groups. (*Id.* ¶ 5.) Following reports and statements to the Englewood City Council from an MMA lawyer and several physicians, as well as news coverage, Lynne Algrant visited the MMA site at 40 Engle Street to observe the situation firsthand. (*See* PSUF ¶¶ 6–7; Algrant, T1, 86:6 – 90:5, 92:23 – 95:21.)[2]

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[1] References to trial exhibits are to Plaintiff's Exhibits, Defendant's Exhibits, and Joint Exhibits. References to trial transcripts, (D.E. 93, 94), identify the witness, volume ("TI" or "T2"), and page: line.

[2] The activities of the Bread of Life were first brought to the attention of the City Council at its meeting on October 8, 2013. (PSUF ¶ 6.) Dr. Bruce Tisch, an MMA physician, read a prepared statement to the Council regarding escalating incidents at 40 Engle Street. (*Id.*) The statement was signed by Tisch and other physicians on behalf of "a large group consisting of business owners, employees," and City residents. (Pl. Ex. N.) The statement informed the City that a new "group of extremists" was using sound amplification devices, verbal abuse, and threatening actions to impede access to the clinic. (*See id.*) The new group was also

Ms. Algrant had been a member of the Englewood City Council since 2010 and was President of the Council in 2014 and 2015. (PSUF ¶ 20.) She observed a group of men surround a young woman coming onto Engle Street and scream in her face, until an escort volunteering with the MMA was able to help her push through the crowd and to the clinic. (*See* Algrant, T1, 86:6 – 93:22.) Ms. Algrant herself was also surrounded by men yelling at her and women trying to push things into her hands. (*See id.* at 93:23 – 95:6.)

After this experience, Ms. Algrant spoke with other City officials, including Business Manager Tim Dacey, Police Chief Arthur O'Keefe, and Counsel William Bailey, about what could be done to ensure patient safety. (*See id.* at 96:3–20.) Ms. Algrant spoke to Chief O'Keefe about hiring volunteer off-duty Englewood police officers to be present at MMA on Saturday mornings (which MMA agreed to pay for in accordance with City policy). (*Id.* at 97:18 – 98:2.) However, Chief O'Keefe advised that the City's off-duty police officers did not want the particular work, since there was a substantial difference between being in a squad car while someone paves a street and confronting hostile protestors. (*See id.* at 98:3–17.) Ms. Algrant then asked Chief O'Keefe to list the opportunity with the Teaneck

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"intimidat[ing] uninvolved citizens . . . on their way to their local synagogue" and was causing fear among children at the public library across the street. (*Id.*) According to Defendant's Chief of Police, Arthur O'Keefe, these activities included such things as physically confronting, screaming at, and intimidating young women and local business employees, causing him to fear that "more people would start to get hurt." (Joint Ex. J-3 at 21:12 – 22:2.)

and Tenafly Police Departments, but that did not succeed either. (*See id.* at 98:18–25; *see also* Dacey, T1, 166:13 – 167:2.)

Ms. Algrant also asked Chief O'Keefe to arrange patrol cars to go by the clinic more often on Saturday mornings when the Bread of Life protestors would be there, and either change or speed up the route to create more of a presence. (*See* PSUF ¶ 53; Algrant, T1, 99:1–7.) She reached out to Deputy Police Chief Larry Suffern on Wednesdays when she expected a Bread of Life protest the following Saturday, asking him to create a greater police presence. (Algrant, T1, 99:23 – 100:6.) However, because Engle Street was a one-way street, there was plenty of warning time for protestors to see the police coming—they would become temporarily peaceful as a police car drove by and then "heat up again" after the police car passed. (*Id.* at 100:7–17; *see* Dacey, T1, 167:22 – 168:3.) Ms. Algrant told Deputy Police Chief Suffern that the police needed to stop and get out of their cars, talk to the protestors, and make their presence known more assertively. (Algrant, T1, 100:18 – 101:12.) Nonetheless, while the police presence temporarily eased tensions at MMA, the hostile protests resumed immediately after officers left. (*See id.* at 101:16–24; PSUF ¶¶ 56–57; Joint Ex. J-3 (O'Keefe Deposition Excerpt) at 14:13-21; Dacey, T1, 168:4–9.)

Ms. Algrant spoke with Chief O'Keefe and Mr. Dacey about having a regular police presence stationed at MMA on Saturday mornings, but the officials concluded that it was financially prohibitive, was contrary to the City's policy against providing off-duty

police officers to private businesses without reimbursement, and would negatively impact the City's ability to address crime and rebuild after Hurricane Sandy. (*See* Algrant, T1, 101:25 – 102:9, 104:6–20; Dacey, T1, 168:10 – 174:4.) The City was "short on cash," "there were more vacancies [in the police department] than there should have been," and the department was "too strained," as the City "had problems with shootings, drive-by shootings, drug issues, [and] gang issues," unlike most other towns in Bergen County. (Dacey, T1, 168: 13 – 169:11.) Mr. Dacey testified that it would have cost "about $100 an hour" per officer to increase the police presence at MMA, but he also stated that he never performed a full calculation of the costs involved because using taxpayer funds to protect a private organization was against City policy. (*Id.* at 170:9; 183:14 – 186:8.)

In response to the escalating dangers to patients, Ashley Gray co-founded a volunteer escort program at MMA to escort patients to the clinic when they arrived at the area. (*See* PSUF ¶ 24.) The volunteers risked their own safety because the Bread of Life protestors took pictures of them, their cars, and their license plates. (Dacey, T1, 175:10–14.) To reduce the risk, the escorts were required to avoid using their real names and avoid engaging with the protestors. (*See* PSUF ¶¶ 51, 52.) Beginning in December 2013, Ms. Gray sent weekly "escort reports" to Ms. Algrant about the activities of the Bread of Life group. (*See* Gray, T2, 235:13–24; Pl. Ex. CC.) Such activities included: "blocking access to the clinic door"; "blocking patients and escorts on the sidewalk"; "shouting into the clinic when the door is opened"; "creating tripping hazards";

"repeated physical assault of escorts"; "screaming directly into [patients'] faces"; and "videotaping [patients]," making them "hysterical." (Pl. Exs. X, BB.) Ms. Gray also sent Ms. Algrant photographic and video evidence of these activities. (Algrant, T1, 139:14–20.) Bread of Life protestors recorded some of their own activities as well and posted about their activities on YouTube and Facebook. (*See id.* at 96:24 – 97:11; Gray, T2, 258:19 – 259:3, 266:24 – 267:13; Pl. Ex. DD.) Using Google and other internet tools, Ms. Gray was able to learn the names of six of the members of the Bread of Life group, as well as the location of their church, and she forwarded this information to Ms. Algrant. (*See* Gray, T2, 266:8 – 267:13; Pl. Ex. DD.)

Ms. Algrant talked to the escorts about filing complaints against problematic protestors, but the escorts felt unsafe doing so, as did patients, their companions, and MMA staff. (*See* Algrant, T1, 112:14 – 113:4, 113:10 –114:3, 117:17 – 118:14.) New Jersey does not permit filing anonymous complaints, and the City concluded that any individual who filed a complaint would be in danger of reprisal from the Bread of Life protestors. (*See id.*; Dacey, T1, 175:1–20 ("So we talked to the physicians and the employees [about filing a complaint] and they were very reluctant, because we actually also talked to them about possibly getting an injunction against the Bread of Life protestors. And they were very leery about doing it because they were scared of retribution towards them.").) In one incident, a young escort became "hysterical" when a police officer insisted that she give her name and home address to file a report about a dangerous encounter with some of the protestors.

(Algrant, T1, 109:5 – 110:2.) After Ms. Algrant called Deputy Chief Larry Suffern, the escort was eventually permitted to use the clinic's address. (*Id.* at 110:4–19.)

However, even with the benefit of using the MMA address, there was still risk to individuals who filed complaints, and only "a handful" of "[m]ore than 100" escorts have filed complaints. (Taylor, T2, 293:9–12.)[3] For example, when the Bread of Life protestors learned Ashley Gray's name, they targeted her personally, showing her pictures and a video of her that they had found on the internet, which she found "[v]ery intimidating." (Gray, T2, 244:23 – 245:11.) Ms. Gray stopped escorting at MMA in 2020, in part because she feared that the protestors would find out about her father's death from COVID and use that information to "taunt [her], say unkind things, and harass" her. (*Id.* at 226:13–24, 271:1–7.) Another former volunteer escort, Andrea Long, testified that escorts were also reluctant to file complaints because the subsequent court proceedings required them to attend multiple hearings, take off work, and potentially explain to their employer that they volunteered at an abortion clinic. (*See* PSUF ¶ 25; Long, T2, 330:17–24.) The escorts who did file complaints were generally team leaders and did so in the most "flagrant" cases, *i.e.*, when protestors remained in the buffer zone after the Ordinance was enacted and continued to harass or threaten patients or

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[3] Christine Taylor has been a volunteer escort at MMA since 2016. (PSUF ¶ 32.)

escorts despite requests to stop. (Taylor, 290:19 – 293:12; Long, 329:2 – 330:13.)[4, 5]

Defendant adopted the Ordinance (#14-11) on March 18, 2014, in order to deescalate the situation at MMA by creating a degree of separation between the Bread of Life protestors and MMA patients, doctors, staff, companions, and escorts. (*See* Pl. Ex. 3 at 13–14 (Defendant's Answer to Plaintiff's Interrogatory No. 9); Dacey, T1, 178:19 – 180:6; Algrant, T1, 116:6 – 117:13; Joint Ex. J-3 (O'Keefe Deposition Excerpt) at 25:8–18.) "The practical effect of the ordinance was the creation of . . . [t]wo semicircular buffer zones extend[ing] outwards eight feet from either side of the facility's entrance" and driveway, as well as a "third buffer zone spann[ing] the width of the facility's entrance [and driveway] and extend[ing] to the street." *Turco*, 935

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[4] For example, prior to the enactment of the Ordinance, at least four individuals filed complaints with the police about the actions of the Bread of Life group. (*See* Pl. Exs. BB and CC; Algrant, T1, 109:5 – 110:19.) Since the enactment of the Ordinance, Ms. Taylor has filed three complaints and Ms. Long has filed five complaints. (*See* Taylor, T2, 292:17 – 293:6; Long, T2, 325:3 – 329:17.)

[5] While Ms. Gray, Ms. Taylor, and Ms. Long have written about their experiences at MMA online or in published writings, most MMA escorts have not. (*See* Gray, T2, 260:11 – 261:9; Taylor, T2, 297:4 – 301:10; Long, T2, 332:7 – 333:11.)

F.3d at 159.[6] "A picture of the buffer zones (shown in yellow) is set forth below:"

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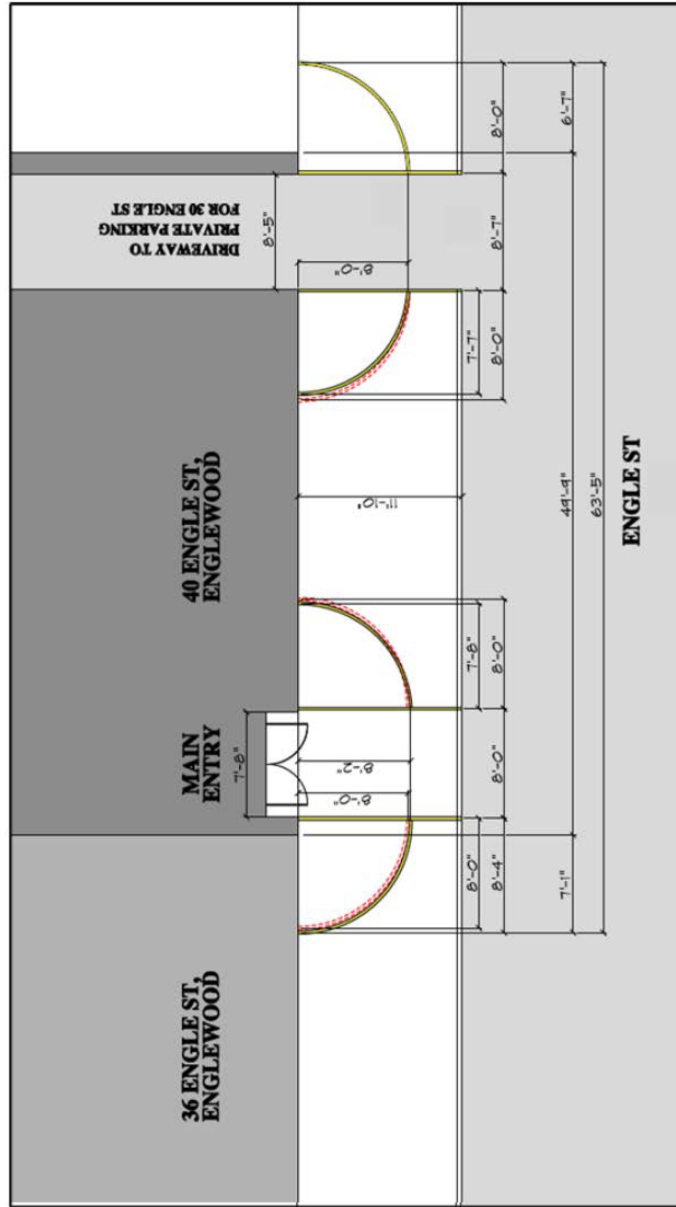
[6] The Ordinance states, in relevant part:

> A. Definitions. As used in this section, the following terms shall have the meanings indicated:
>
> 1. "Health care facility" – as set forth in N.J.S.A. 26:2H 2.
> 2. "Transitional facility" – Community residences for the developmentally disabled and community shelters for victims of domestic violence as those terms are defined in N.J.S.A. 40:55D-66.2.
>
> B. Within the City of Englewood, no person shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:
>
> 1. persons entering or leaving such facility;
> 2. employees or agents of such facility acting within the scope of their employment;
> 3. law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
> 4. persons using the public sidewalk or street right of way adjacent to such facility solely for the purpose of reaching a destination other than such facility
>
> C. The provisions of subsection B shall only take effect during such facility's business hours and if the area contained within the radius and rectangle described in said subsection B is clearly marked and posted.

(PSUF ¶ 10.)

Id. at 159–60 (image cropped). The diagram below shows the sidewalk in front of MMA, with yellow lines as painted:



(Joint Ex. J-1 (image cropped) (depicting the south side of Engle Street on the left side of the diagram).)

After the Ordinance was enacted, the situation at MMA generally became calmer. (Algrant, T1, 121:8 – 123:25.) Sidewalk counselors and protestors could still talk to patients, but anyone needing to enter or exit the clinic had eight feet of space to do so without physical harassment. (*See id.*) The clinic door could open out without obstruction because the buffer zone cleared out the overcrowded space in front of the entrance. (*See id.*) In fact, Ms. Algrant stopped receiving weekly escort reports and escorts reduced the number of shifts they worked. (*See id.*) Ms. Gray believed so strongly that the buffer zone was working and needed to stay that she used her name in her 2015 certification in this case. (Gray, T2, 269:20 – 270:5.) Ms. Gray testified that the buffer zone created space that prevented confrontations that could easily escalate, and stopped people from positioning themselves so close to the front door that they intimidated patients. (*See id.* at 241:5–19.) It helped the escorts get people in and out of the clinic entrance more easily. (*See id.*) Sidewalk counselors and protestors no longer followed patients all the way up to the front door, blocking other people behind them who were trying to enter the building. (*See* Long, T2, 323:16 – 324:21.) Witnesses, including Plaintiff, agreed that the Bread of Life protestors generally respected the buffer zone, perhaps going through it but rarely remaining in it. (*See* Turco, T1, 58:15–20; Algrant, T1, 121:15–18; Long, T2, 320:8–10, 321:25 – 322:2; Taylor, T2, 289:12–14.)

Nonetheless, some issues still remained. Ms. Gray explained that "there were bumps in the road. The presence of the protestors really kind of ebbed and flowed. So for example, when there was something

about abortion in the news, a lot more [protestors] would come and that would present additional challenges even with the buffer zone helping the situation." (Gray, T2, 241:20 – 242:2.) Months after the Ordinance went into effect, Ms. Algrant received two reports stating that Bread of Life was becoming "louder and more numerous than in a long while," and that "this most intimidating group seems to be growing." (Algrant, T1, 144:20 – 145:16.) However, Ms. Algrant stated that these reports concerning "flare-ups" were "sporadic" and relatively infrequent compared to the situation in the months prior to the Ordinance's enactment, when "they were coming in all the time." (*Id.* at 155:23 – 156:1.) Still, another sidewalk counselor, Rosemary Garrett testified at her deposition that the buffer zones did not reduce the obnoxious behavior of Bread of Life protestors. (*See* Joint Ex. J-2 at 38:17 – 39:9; PSUF ¶¶ 22, 23.)

However, when this Court invalidated the Ordinance in 2017, "[i]t was absolute chaos." (Taylor, T2, 287:18–20.) Protestors on microphones and loudspeakers or with huge signs would stand right next to the door or even chase patients right up to the door. (*See id.* at 288:2–23.) Taylor testified to the impact on patients, stating, "I don't know how many patients I have had hold my hand, grab me, cry on my shoulder, tuck their head into my neck so that they don't have to look at it." (*Id.* at 287:6–8.) One protestor would walk up to the front door and just scream. (Long, T2, 319:9 – 320:4.) Even Plaintiff would follow patients up to the front door. (*Id.* at 318:3–5.) Sometimes a patient's companion who was behind Plaintiff would not be able

to get around her to reach the entrance. (*Id.* at 318:6–9.)

B Plaintiff's Ministry

Plaintiff is not a hostile or aggressive anti-abortion protestor. (PSUF ¶ 14.) Rather, she refers to herself as a "sidewalk counselor." (*Id.*) Since 2007, her practice has been to calmly approach women entering MMA and attempt to engage in peaceful, nonconfrontational conversations. (*Id.* ¶ 15.) She believes that such conversational interaction is far more effective than the aggressive approach used by the Bread of Life protestors. (*Id.*)

Unlike other sidewalk counselors, however, Plaintiff does not remain stationary. (*Id.* ¶ 67.) She runs in all different directions to meet patients as they approach the clinic. (*See* Turco, T1, 41:11–17 ("I will approach a girl from anywhere that she is coming. And the sooner I get to her, the more time I have to be able to share literature, share a message . . . ."), 44:11–21.) In fact, the clinic escorts call Plaintiff "the Runner" because she runs up to patients as they are arriving and runs after and follows patients as they are leaving, for a block or more, even as they are going to their cars, and even as they are crossing Engle Street. (*See* Gray, T2, 240:14 – 241:2; Long, T2, 314:13–20, 318:11–17; Turco, T1, 44:22–24, 45:8–9; Taylor, T2, 284:18 – 285:8.) Plaintiff generally meets patients at some distance from the buffer zone and walks with them to the perimeter of the buffer zone because she requires about 30 to 45 seconds to convey her message and hand them literature. (*See* Turco, T1, 43:14–25, 45:25 – 46:3, 46:13–15; *see also* Taylor, T2, 283:18 – 284:10; Long,

T2, 316:2 – 317:11.) She has used this approach whether or not there is a buffer zone. (*See* Turco, T1, 48:10–16.)

Prior to the enactment of the Ordinance, Plaintiff was free to approach women on the public sidewalk in front of MMA and accompany them all the way to the clinic door without being hindered by the buffer zones in front of the MMA main entrance and driveway. (*See* Turco, T1, 13:22 – 15:23.) Thus, if Plaintiff was standing south of the clinic doorway area and saw a patient approaching from north beyond the driveway, she was free to run up the sidewalk to the patient in a straight line, try to engage in conversation, hand literature to the patient, and walk with the patient all the way back to the clinic door. (*See id.*)

With the Ordinance in effect, if Plaintiff is standing to the south of the doorway area and sees a patient approaching from north beyond the driveway, she must walk around the radius arc to the left of the doorway, sidestep to the street to avoid the rectangular zone in front of the doorway, hurry to the next rectangular zone by the driveway, and sidestep that zone by going into the street, before she can try to engage the patient. (*See id.* at 24:25 – 25:14; Joint Ex. J-1.) While trying to converse with that patient on the way back toward the clinic door, Plaintiff must sidestep to avoid the driveway radius arcs and rectangular area, and then reconnect with the patient who has likely continued walking in a straight line. If successful, Plaintiff must then stop at the radius arc to the north of the door or at the doorway rectangular zone.

However, in practice, Plaintiff can easily walk in the street gutter to traverse the rectangular buffer zones, which she does. (*See* Turco, T1, 64:9–16.) Plaintiff can also get into the area between the two rectangular buffer zones by crossing Engle Street. (*See id.* at 62:5–24.) In fact, if a patient is approaching from the north, Plaintiff sometimes just runs up Engle Street to meet the patient, avoiding the sidewalk entirely. (*See id.* at 47:2–11.)

When a patient is approaching from the south, Plaintiff's ministry is minimally affected. (PSUF ¶ 68.) Plaintiff will run down Engle Street, as she did before the Ordinance, and meet the patient as far as the next intersection so that she will have the time she needs to talk to the patient. (*See* Turco, T1, 45:10 – 46:12.) Plaintiff is able get to the buffer zone on the south side of the clinic without obstruction and be no more than eight feet from the MMA doorway. (*See id.*)[7]

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[7] During the COVID-19 pandemic, Sofia, a restaurant adjacent to MMA and south of it on Engle Street, set up tables and planters outside its restaurant and MMA. (*See* Taylor, T2, 293:18–19; Long, T2, 334:24 – 335:2.) The planters differ in size and move fairly frequently, as do the tables, sometimes depending on holidays or the season. (*See* Taylor, T2, 293:20 – 294:25; Long, T2, 335:3–6.) Plaintiff can walk around the planters; they are set on the edge of the sidewalk by the curb, not in the middle of the sidewalk. (*See* Taylor, T2, 295:14–24.) The distance from the MMA building to the street is 11 feet 10 inches, so there is at least 3 feet 10 inches of space between the end of the semicircular buffer zones and the street. (*See* PSUF ¶ 44.) However, the objects do add to the difficulty of trying to communicate with patients. Plaintiff estimates that the objects take up "probably half the sidewalk you could use." (Turco, T1, 39:17–24.) Even one of Defendant's witnesses, Andrea Long, testified that Sofia's objects narrowed the

Overall, Plaintiff has talked to patients on some kind of regular basis both before and after Englewood's adoption of the Ordinance, but the Ordinance has resulted in "some obstruction" and "some difficulty" in her ability to do so "at least 50 percent of the time." (*Id.* at 28:7–11; PSUF ¶ 63.) The difficulty involved with navigating the buffer zones, and being forced to go out into the street, is compounded by the presence of cars, delivery trucks, and sometimes snow. (*See* Turco, T1, 63:22 – 64:4.) However, Plaintiff admits that the Bread of Life protestors have also negatively impacted her ability to communicate with patients, as they cause patients to run into the clinic as quickly as possible. (*See* PSUF ¶ 65; Turco, T1, 48:25 – 49:13.)

Other sidewalk counselors have been able to talk to patients on a regular basis both before and after the Ordinance went into effect. (*See* PSUF ¶ 64.) For example, Rosemary Garrett, who began sidewalk counseling outside of MMA in 2013, remains stationary. (*See* PSUF ¶¶ 22, 23.) She testified at her deposition that she was not bothered by the new buffer zone and was able to counsel patients even when the buffer zone was there. (*See* Joint Ex. J-2 at 28:6 – 29:13.)

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passageway for walking by "maybe half," but added that Plaintiff could still walk up to the circular buffer zone on the south side of the main entrance. (Long, T2, at 342:1–8, 343:2–19.)

III. CONCLUSIONS OF LAW

A. Narrow Tailoring

As the Third Circuit explained on appeal, § 1983 lawsuits that allege a First Amendment violation are analyzed using a three-part test. *Turco*, 935 F.3d at 161 (citing *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). The court must (1) "determine whether the First Amendment protects the speech at issue"; (2) "consider the 'nature of the forum'"; and (3) "resolve 'whether the [government's] justifications for exclusion from the relevant forum satisfy the requisite standard.'" *Id.* at 161–62 (quoting *Cornelius*, 473 U.S. at 797.) "Only the third prong of the test is at issue in this" case, as Defendant "concedes that the First Amendment fully protects the speech at issue here and that the Ordinance clearly regulates speech in a traditional public forum (i.e., the sidewalk)." *Id.* at 162 (citations omitted). The parties also agree that the restrictions imposed are content-neutral—the Ordinance impacts the speech of those who support abortion as well as those who oppose it. *Id.* (citations omitted). This Court therefore applies intermediate scrutiny. *Id.* (citation omitted).

To withstand intermediate constitutional scrutiny, "the Ordinance must be 'narrowly tailored to serve a significant governmental interest.'" *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). For a content-neutral speech restriction such as the Ordinance "'to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting

McCullen, 573 U.S. at 486). "Unlike a content-based speech restriction, the Ordinance 'need not be the least restrictive or least intrusive means of' serving the government's interests." *Id.* (quoting *McCullen*, 573 U.S. at 486). "Rather, the First Amendment prohibits the government from regulating speech in a way that would allow a substantial burden on speech to fall in an area that 'does not serve to advance its goals.'" *Id.* (quoting *McCullen*, 573 U.S. at 486.) With this framework in mind, this Court applies intermediate scrutiny below.

1. Defendant's Legitimate Interests

As the Third Circuit observed, "the state ha[s] an interest in protecting health and safety, 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.'" *Id.* at 166 (summarizing and quoting *Hill v. Colorado*, 503 U.S. 703, 715 (2000)). Englewood's Ordinance serves this interest by creating an unobstructed pathway for patients to enter the MMA clinic without confrontation. Furthermore, "the buffer zones 'clearly serve' the 'government interests in 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.'" *Id.* at 163 (citing *McCullen*, 573 U.S. at 486–87); *see also Bruni v. City of Pittsburgh*, 941 F.3d 73, 88 (3d Cir. 2019) (citing *Turco* and holding that buffer zones serve such "legitimate" public interests). The Ordinance's clearly marked buffer zones also '"provide specific guidance to enforcement authorities [and] serve the

interest in evenhanded application of the law,'" by avoiding "'the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary.'" *Turco*, 935 F.3d at 166 (quoting *Hill*, 503 U.S. at 715, 729). Because the government's interests here are plainly significant and legitimate, this Court will proceed to evaluate whether the Ordinance is narrowly tailored to further those interests.

2. Burden on Plaintiff's Speech

To be narrowly tailored, the Ordinance "'must not burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 161 (quoting *McCullen*, 573 U.S. at 486). Upon reviewing the testimony and other evidence in this matter, this Court finds that the burden on Plaintiff's speech is not substantial because the overall impact of the Ordinance on Plaintiff's ministry has been relatively small. Plaintiff is still able to meet patients at some distance from the buffer zones and walk with them to the perimeter of the doorway buffer zone, giving her about 30 to 45 seconds to convey her message and hand them literature. (*See* Turco, T1, 43:14–25, 45:25 – 46:3, 46:13–15; *see also* Taylor, T2, 283:18 – 284:10; Long, T2, 316:2 – 317:11.) Her approach has not changed since the Ordinance was enacted, (*see* Turco, T1, 48:10–16), and the few extra seconds in the buffer zone that she has lost during the walk to the MMA entrance are not substantial if the

patient is unwilling to listen. If the patient is willing to stop and listen, then the Ordinance has no impact at all. If anything, the Ordinance may have given Plaintiff more opportunities to engage patients by decreasing the size and aggressiveness of the Bread of Life group, which caused patients to run into the clinic as quickly as possible. (*See* PSUF ¶ 65; Turco, T1, 48:25 – 49:13.)

With respect to her runs *to* the patients, the buffer zones only impact Plaintiff's ministry when a patient is approaching from the north side of Engle Street, preventing her from being able to run to the patient in a straight line on the sidewalk. (*See* Turco, T1, 13:22 – 15:23, 24:25 – 25:14; Joint Ex. J-1.) However, the buffer zones only extend to the end of the sidewalk in front of the MMA entrance and driveway—Plaintiff can otherwise run along the sidewalk or run in the gutter as needed. (*See* Turco, T1, 47:2–11, 64:9–16.) In fact, this has been her practice, as Plaintiff and several escorts testified that she often *crosses* Engle Street to meet patients coming from the other side or walking back to their cars. (*See id.* at 44:22–24, 45:8–9; Gray, T2, 240:14 – 241:2; Long, T2, 314:13–20, 318:11–17; Taylor, T2, 284:18 – 285:8.)[8]

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[8] To the extent that Sofia's outdoor dining setup has created additional obstacles for Plaintiff when she is running to patients approaching from the south side or walking back with them to the clinic, these obstacles do not prevent her from using the sidewalk or gutter, but only narrow her passage. (*See* Taylor, T2, 295:14–24; Long, T2, 342:1–8, 343:2–19.) Moreover, these obstacles affect Plaintiff and the patients equally. If anything, having to slowly navigate a narrow passage between the restaurant's planters and tables with a pregnant patient would only increase the duration of Plaintiff's conversation with the patient.

As the Third Circuit concluded, this case is distinguishable from *McCullen v. Coakley*, 573 U.S. 464 (2014), in which the Supreme Court struck down a Massachusetts law establishing a 35-foot buffer zone—Defendant's Ordinance establishes only an eight-foot buffer zone and "[t]his is a substantial distinction." *Turco*, 935 F.3d at 163. The Massachusetts buffer zone carved out a significant portion of the adjacent sidewalks and required counselors to stand "well back" from the clinic, "prohibit[ing] McCullen and her colleagues from effectively engaging in sidewalk counseling either verbally or by handing literature to the patients." *Id.* at 163–64 (citing *McCullen*, 573 U.S. at 487–88). That is not the case here. Although the Ordinance adds "some difficulty" to Plaintiff's efforts to reach patients "at least 50 percent of the time," (Turco, T1, 28:7–11), there was no testimony that the eight-foot buffer zones prohibit Plaintiff from engaging in the one-on-one conversations that are central to her sidewalk counseling. An eight-foot gap is sufficiently narrow for Plaintiff and patients to converse in a normal tone with ease. *See Hill*, 503 U.S. at 726–27 ("[T]his 8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" (quoting *Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 377 (1997))). It is also narrow enough for Plaintiff to hand literature to willing recipients, who can easily step towards her. *See Turco*, 935 F.3d at 166 ("[I]t [i]s important to distinguish between 'state restrictions on a speaker's right to address a willing audience and those [restrictions] that protect listeners from unwanted communication.'" (quoting and analyzing *Hill*, 503 U.S. at 715–16)). As a result, Plaintiff has been able to talk to patients on a regular basis both

before and after the Ordinance was enacted, as have other sidewalk counselors such as Rosemary Garrett. (*See* PSUF ¶¶ 63, 63; Joint Ex. J-2 at 28:6 – 29:13.)

The present case is more akin to *Hill*, in which the Supreme Court upheld another eight-foot buffer zone.[9] *See* 503 U.S. at 703. Plaintiff points to several distinctions between this case and *Hill*. (*See* D.E. 91 at 29–30 ¶¶ 23–26.) Unlike the Ordinance, the *Hill* statute more accurately created an eight-foot bubble zone—within a 100-foot buffer zone—that prohibited individuals from knowingly approaching another person within eight feet of that person to pass a leaflet, counsel, or hold a sign unless that person consented. *See Hill*, 530 U.S. at 707–08. Thus, the bubble zone

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[9] On June 27, 2022, Plaintiff submitted a notice of supplemental authority, asking this Court to ignore *Hill's* precedential status in view of the Supreme Court's recent decisions in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), and *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022). (D.E. 95.) This Court declines to do so. *Dobbs* cites to *Hill* once in more than 200 pages. *See Dobbs*, 142 S. Ct. 2275–76 ("The Court's abortion cases have . . . distorted First Amendment doctrines." (citing two dissenting opinions in *Hill*)). This is classic dicta—the instant case and *Hill* concern First Amendment rights, while *Dobbs* concerns the right to an abortion and explicitly "emphasize[s] that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 2277–78. In *City of Austin*, Justice Thomas castigated *Hill* in his dissent, 142 S. Ct. at 1481–91, and the majority responded by saying, "[W]e do not . . . 'resuscitat[e]' a decision that we do not cite . . . ." *Id.* at 1475 (quoting the dissent). That the majority expressly declined to engage with the dissent's attack on *Hill* (in a case about signage) is not a sufficient basis for this Court to ignore *Hill*'s precedential status.

could be pierced when the listener consented. *See id*. In contrast to the operation of the Colorado law in *Hill*, Plaintiff here cannot cross into a buffer zone imposed by the Ordinance to continue speaking one-on-one with a patient, even if the patient consents. Although this distinction is meaningful, it does not make Defendant's Ordinance more burdensome than the statute in *Hill*. Outside the 8-foot buffer zone, Plaintiff is able to approach anyone, without any gap, and regardless of whether they consent. The *Hill* plaintiffs were unable to do this within 100 feet of health care facilities. Inside the 8-foot buffer zone, patients can still hear from Plaintiff regardless of whether they consent. They can also receive literature from Plaintiff if they consent, by stepping towards her. Accordingly, any burden on Plaintiff's speech caused by Defendant's Ordinance is not substantial, especially in view of Defendant's significant interests.

3. Less Restrictive Means

"[W]here the burden on speech is de minimis, a regulation may be viewed as narrowly tailored," because "challengers would struggle to show that alternative measures would burden *substantially* less speech." *Bruni*, 941 F.3d at 89 (internal quotation marks, citations, and alteration omitted). While "a rigorous and fact-intensive inquiry will be required where a restriction imposes a significant burden on speech, . . . 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." *Id.* (internal quotations marks and citations omitted).

Even assuming that the burden on Plaintiff's speech is substantial, this Court is satisfied that Englewood has "show[n] that it tried or 'seriously considered[ ] substantially less restrictive alternatives.'" *Reilly v. City of Harrisburg*, 790 F. App'x 468, 473 (3d Cir. 2019) (quoting *Bruni*, 941 F.3d at 89). In *McCullen*, the Supreme Court identified multiple alternative measures that Massachusetts could have taken instead of enacting a buffer zone ordinance, including: (1) using an unchallenged subsection of that act, which prohibited blocking entrances, without banning speech; (2) enacting a local version of the federal Freedom of Access to Clinic Entrances Act ("FACE Act"), 18 U.S.C. § 248; (3) enacting an ordinance specifically prohibiting harassment near health care facilities; (4) using existing ordinances against obstruction of driveways; (5) using "generic criminal statutes"; and (6) seeking injunctive relief as necessary against specific persons with a history of obstructing access. *See McCullen*, 573 U.S. at 490–93.

Defendant did not avail itself of any of these less restrictive alternatives,[10] but that alone is not dispositive. *See Bruni*, 941 F.3d at 91. The testimony from City officials credibly showed that they considered some of these alternatives but ran into the same problems that would render all of the *McCullen* alternatives less effective: the City was struggling financially and had multiple vacancies in its already-strained police department; off-duty police officers were not volunteering to monitor MMA; Bread of Life protestors were generally peaceful when they saw police officers arriving; and patients, companions, volunteer escorts, and MMA physicians and staff were all generally afraid of filing complaints against Bread of Life protestors because of the risk of reprisal. *See* discussion *supra* Section II.A.

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[10] Plaintiff specifically faults Defendant for (1) adopting the Ordinance in place of a former ordinance that prohibited blockading, obstructing, and impeding access to health care and transitional facilities; (2) not enacting a local version of the FACE Act or a buffer zone law like Pittsburgh's, which (as eventually interpreted by the Third Circuit) would have addressed the patrolling, picketing, and demonstrating of the Bread of Life group, but allowed sidewalk counselors to engage in one-on-one communications; (3) not prosecuting Bread of Life protestors for violating laws already on the books, such as those prohibiting harassment, disorderly conduct, and simple and aggravated assault; (4) not pursuing injunctive relief against bad actors caught on photo or video; and (5) not ascertaining whether any of the protestors were already subject to an injunction issued against certain MMA protestors in *United States v. Gregg*, 32 F. Supp. 2d 151, 161–62 (D.N.J. 1998). (*See* D.E. 91 at 32–33 ¶¶ 32–36.)

City officials were entitled to consider these obstacles while crafting a solution, *see Bruni*, 941 F.3d at 91 n.21, and they were not required to "meticulously vet every less burdensome alternative," *Turco*, 935 F.3d at 171 (quotation omitted), particularly where the situation at MMA required urgent action and the chosen solution created a much safer situation for all parties, *see* discussion *supra* Section II.A. Accordingly, this Court finds that the Ordinance is "narrowly tailored to serve a significant governmental interest," *McCullen*, 573 U.S. at 477 (quotation omitted), and it therefore satisfies intermediate scrutiny.

B. Overbreadth

In the alternative, Plaintiff argues that even if the Ordinance is narrowly tailored, it is unconstitutional because it is overbroad. (*See* D.E. 91 at 38–40 ¶¶ 49–56.) The Ordinance broadly applies to all health care facilities and transitional facilities in Englewood. (*See* PSUF ¶ 10.) Plaintiff argues that "the Ordinance fails overbreadth because it creates buffer zones at all health care and transitional facilities without any legal justification to apply such a sweeping remedy to address problems at one location." (D.E. 91 at 38 ¶ 50 (emphases omitted).) As for the reasons for this inclusion, Ms. Algrant testified that the City did not want protestors making it difficult for people to get in and out of transitional facilities, (Algrant, T1, 125:13–17), and Mr. Dacey testified that the Ordinance was intended to reach all health care and transitional facilities because "protests can pop up any day for any reason anywhere," (Dacey, T1, 179:3–8). Plaintiff contends that Defendant failed to identify a history or

an example of such protests taking place outside transitional facilities in Englewood. (*See* D.E. 91 at 39 ¶ 52.) Plaintiff further argues that restricting First Amendment activities in buffer zones outside every health care and transitional facility in Englewood goes far beyond any justification that the City has for attempting to regulate one group of protestors at one location. (*See id.* at 39 ¶ 54.)

A law is "impermissibly overbroad" when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n.6 (2008) (internal quotation marks and citation omitted). "'[T]he overbreadth claimant bears the burden of demonstrating, from the text of [the law], and from actual fact, that substantial overbreadth exists.'" *Turco*, 935 F.3d at 172 (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010)). "'In determining whether a statute's overbreadth is substantial, [a court must] consider a statute's application to real-world conduct, not fanciful hypotheticals.'" *Id.* (quoting *Stevens*, 559 U.S. at 485.)

In the Court's view, Plaintiff has not met her burden of showing that substantial overbreadth exists. "'[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.'" *Bruni*, 941 F.3d at 92 (quoting *Turco*, 935 F.3d at 171). In *Bruni*, the

Third Circuit rejected a similar overbreadth argument against an ordinance that "authorizes [Pittsburgh] to create buffer zones at any health facility in the [c]ity, regardless of whether the [c]ity has identified a problem at the location in the past." *Id.* at 91. The Third Circuit explained that "'[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.'" *Id.* at 92 (quoting *Hill*, 530 U.S. at 730–31). In fact, Pittsburgh had only enforced its ordinance at "two facilities, both of which [had] suffered from violence and obstruction in the past." *Id.* at 91. Similarly, Englewood's Ordinance has been applied only at the MMA clinic, given the unique history of harassment and violence at that site. As in *Bruni*, the Ordinance only applies when the buffer zones are "clearly marked and posted," (PSUF ¶ 10), and Plaintiff has not submitted evidence of its application at any transitional facilities. The overbreadth doctrine "is to be used sparingly, where the demonstrated overbreadth is considerable," and only where there is "a realistic danger that the [law] will significantly compromise recognized First Amendment protections of parties not before the Court." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir. 1992) (quotation and citations omitted). No such danger realistically exists here, and this Court therefore finds Defendant's Ordinance to be constitutional, both on its face and as applied to Plaintiff.

IV. CONCLUSION

For the reasons set forth above, this Court finds in favor of Defendant on all claims.[11, 12] An appropriate order follows.

s/ *Susan D. Wigenton*
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Hon. Leda D. Wettre, U.S.M.J.
Parties

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[11] This Court does not address the parties' arguments regarding the doctrine of constitutional avoidance, (*see* D.E. 91 at 22–24; D.E. 92 at 37–39), because it finds that the Ordinance is constitutional without a narrowing construction.

[12] The parties did not meaningfully brief Plaintiff's First Amendment freedom of assembly and association and state law freedom of speech claims. Nonetheless, this Court notes that its First Amendment freedom of speech analysis equally applies to Plaintiff's remaining claims. *See McTernan v. City of York, PA*, 564 F.3d 636, 644 n.3 (3d Cir. 2009) ("[Plaintiff] references his claim of right to assembly but does not set forth a separate argument in his brief. For purposes of our analysis, we conclude that this claim is encompassed in his free speech claim." (internal citation omitted)); *Twp. of Pennsauken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999) ("Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Court's analysis.").

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 15-3008 (SDW) (LDW)

[Filed August 12, 2022]

JERYL TURCO,
Plaintiff,

v.

CITY OF ENGLEWOOD, NEW JERSEY,
Defendant.

ORDER & JUDGMENT

August 12, 2022

WIGENTON, District Judge.

This Court held a bench trial for two days in this matter regarding Plaintiff Jeryl Turco's ("Plaintiff") claims against Defendant City of Englewood, New Jersey ("Defendant"). For the reasons stated in this Court's Trial Opinion dated August 12, 2022,

IT IS, on this 12th day of August 2022,

ORDERED that judgment is entered in favor of Defendant on all claims, and

ORDERED that Plaintiff's Complaint is **DISMISSED**.

SO ORDERED.

s/ *Susan D. Wigenton*
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Hon. Leda D. Wettre, U.S.M.J.
Parties

APPENDIX E

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3716

[Filed August 19, 2019]

JERYL TURCO,

v.

CITY OF ENGLEWOOD, NEW JERSEY
Appellant

Appeal from the United States District Court
for the District of New Jersey
(No. 2-15-cv-03008)
District Judge: Honorable Susan D. Wigenton

Argued July 17, 2018

Before: McKEE, VANASKIE* and SILER**,
Circuit Judges.

(Opinion Filed: August 19, 2019)

Donald A. Klein **[Argued]**
Weiner Law Group
629 Parsippany Road
P.O. Box 438
Parsippany, NJ 07054
Attorney for Appellant

Francis J. Manion **[Argued]**
American Center for Law and Justice
6375 New Hope Road
New Hope, KY 40052
Attorney for Appellee

OPINION OF THE COURT

McKEE, *Circuit Judge*.

The City of Englewood, New Jersey, appeals the District Court's grant of summary judgment in favor of a plaintiff who claimed that an ordinance the City enacted to create a buffer zone around clinics where

* The Honorable Thomas I. Vanaskie retired from the Court on January 1, 2019 after the submission of this case, but before the filing of the opinion. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and Third Circuit I.O.P. Chapter 12.

** The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

abortions are performed violated her freedom of speech, association, and assembly. Because we conclude that there are genuine issues of material fact precluding the entry of summary judgment to either side, we will reverse and remand for further proceedings.

I. BACKGROUND

In March 2014, the City Council of Englewood amended its ordinances to address aggressive antiabortion protests that had been regularly occurring outside of Metropolitan Medical Associates ("MMA"or "the clinic")—a health clinic that provided reproductive health services, including abortions, to women.[1] We will discuss the incidents at MMA in more detail below, but at the outset, it is important to note that this dispute arises against a background that included "militant activists and aggressive protestors" beginning to gather outside of the facility in late 2013.[2] Many of these protestors were associated with an evangelical ministry called the Bread of Life. The Bread of Life had ties to other radical antiabortion organizations including those which support violent reprisal against abortion providers. The Bread of Life protestors engaged in extremely aggressive, loud, intimidating, and harassing behavior towards patients, their companions, and even other groups whose views generally aligned with the Bread of Life's antiabortion position.

[1] The facts included in this preliminary recitation are undisputed by the parties.

[2] JA 428.

The new ordinance read:

A. Definitions. As used in this section, the following terms shall have the meanings indicated:

1. "Health care facility"—as set forth in N.J.S.A. 26:2H 2.
2. "Transitional facility"— Community residences for the developmentally disabled and community shelters for victims of domestic violence as those terms are defined in N.J.S.A. 40:55D-66.2.

B. Within the City of Englewood, no person shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following

1. persons entering or leaving such facility;

2. employees or agents of such facility acting within the scope of their employment

3. law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
4. persons using the public sidewalk or street right of way adjacent to such facility solely for the purpose of reaching a destination other than such facility

C. The provisions of subsection B shall only take effect during such facility's business hours and if the area contained within the radius and rectangle described in said subsection B is clearly marked and posted.

The practical effect of the ordinance was the creation of three overlapping buffer zones at any qualifying facility. Two semicircular buffer zones extended outwards eight feet from either side of the facility's entrance. The third buffer zone spanned the width of the facility's entrance and extended to the street. A picture of the buffer zones (shown in yellow) is set forth below:

Prior to enacting the disputed ordinance, the City had increased police patrols on mornings when it anticipated Bread of Life protestors would be present.[3] Police officers present on the scene imposed informal "no go zones" where protestors could not stand. Those zones were similar to the buffer zones that were part of the Ordinance. Although the police presence temporarily eased tensions at MMA, the hostile protests and resulting problems resumed immediately after officers left the clinic.

Plaintiff/Appellee Jeryl Turco was not one of the hostile or aggressive anti-abortion protestors. Rather, she refers to herself as a "sidewalk counselor." It is

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[3] The Bread of Life protestors generally gathered on Saturday mornings.

undisputed that, unlike the violent and aggressive anti-abortion protestors affiliated with groups such as Bread of Life, her practice was to calmly approach women entering the clinic and attempt to engage in peaceful, nonconfrontational communication. She believes that such conversational interaction is far more effective than the tactics favored by the aggressive protestors. In addition, Turco routinely offered rosaries and literature about prenatal care to patients entering the clinic. She also invited the women to accompany her to a crisis pregnancy center across the street, and often attempted to reassure the women by telling them things such as: "we can help you" and "we are praying for you."

Turco brought this action against the City of Englewood pursuant to 42 U.S.C. § 1983 to enjoin enforcement of the Ordinance because she believed that it hampered her efforts to provide counseling. She alleged that the Ordinance violated her First Amendment rights to freedom of speech, assembly, and association. She sought a declaration that the Ordinance was unconstitutional on its face and as applied and sought to enjoin its enforcement.

The District Court held the motion in abeyance until we decided *Bruni v. Pittsburgh*,[4] a case involving a similar ordinance in the City of Pittsburgh that was then pending in our court. After we decided *Bruni*, Turco elected not to renew her motion for a preliminary injunction, and the parties proceeded to discovery.

[4] 824 F.3d 353 (3d Cir. 2016).

Upon completion of discovery, the District Court granted Turco's cross-motion for summary judgment.[5]

The District Court concluded that the statute was overbroad and not narrowly tailored to serve the government's interest. In explaining why it believed the Ordinance was overbroad, the Court explained that the City "did not create a targeted statute to address the specific issue of congestion or militant and aggressive protestors outside of the Clinic."[6] Rather, it found that the City had "created a sweeping regulation that burdens the free speech of individuals, not just in front of the Clinic, but at health care and transitional facilities citywide."[7]

Perhaps somewhat understandably, the District Court's overbreadth analysis overlapped considerably with its narrow tailoring analysis.[8] The District Court found that the statute was not narrowly tailored because the City failed to demonstrate that it had "employ[ed] alternative, less restrictive means" of addressing the hostile protestors on the clinic's sidewalk.[9] Instead, the Court found, the City had "put[] forth speculative assertions that it tried and/or

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[5] *Turco v. City of Englewood*, No. 2:15-cv-03008, 2017 WL 5479509, at *1 (D. N.J. Nov. 14, 2017).

[6] *Id.* at *4.

[7] *Id.*

[8] *See id.* (addressing the "narrowly-tailored requirement" in the overbreadth analysis section).

[9] *Id.* at *5.

seriously considered less restrictive alternatives, such as increased police presence [or] injunctive relief, prior to adoption of the amended Ordinance."[10] Accordingly, the Court granted Turco's motion for summary judgment, and this appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review appeals from the grant of summary judgment *de novo*.[11] We apply the same test as the district court: viewing the evidence in the light most favorable to the nonmoving party, we ask whether there is any genuine issue of material fact.[12] "The mere existence of some evidence in support of the nonmovant is insufficient to deny a motion for summary judgment; enough evidence must exist to enable a jury to reasonably find for the nonmovant on the issue."[13]

III. DISCUSSION

We analyze § 1983 lawsuits that allege a First Amendment violation using a three-part test.[14] First,

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[10] *Id.*

[11] *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (*en banc*).

[12] *Kelly v. Borough of Carlisle*, 622 F.3d 248, 253 (3d Cir. 2010).

[13] *Id.* (internal quotation marks omitted) (quoting *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009)).

[14] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

we determine whether the First Amendment protects the speech at issue.[15] Next, we consider the "nature of the forum."[16] Finally, we resolve "whether the [government's] justifications for exclusion from the relevant forum satisfy the requisite standard."[17]

Only the third prong of the test is at issue in this appeal. The City concedes that the First Amendment fully protects the speech at issue here and that the Ordinance clearly regulates speech in a traditional public forum (i.e., the sidewalk).[18] The parties also agree—as do we—that the restrictions imposed are content-neutral because they regulate "the total quantity of speech by regulating the time, the place or the manner in which one can speak . . . ."[19] The Ordinance impacts the speech of those who support abortion as well as those who oppose it; it is clearly

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See Turco*, 2017 WL 5479509, at * 4 (noting that Englewood did "not challenge the fact that the speech at issue is protected under the First Amendment, or that its Ordinance suppresse[d] speech in a traditional forum"). Indeed, public streets and sidewalks are the "quintessential public forum" and occupy a "special position in terms of First Amendment protection." *Bruni*, 824 F.3d at 366 (citation and internal quotation marks omitted). When the government imposes restrictions on communication in these areas, "it imposes an especially significant First Amendment burden." *Id.* (citation and internal quotation marks omitted).

[19] *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1053–54 (3d Cir. 1994) (citations omitted).

content neutral.[20] We therefore apply intermediate scrutiny.[21] Accordingly, to withstand constitutional scrutiny, the Ordinance must be "narrowly tailored to serve a significant governmental interest."[22]

This "tailoring requirement does not simply guard gainst an impermissible desire to censor."[23] Rather, "by demanding a close fit between ends and means," the narrow tailoring requirement prevents the suppression of speech "for mere convenience."[24] For a content neutral speech restriction—such as the Ordinance—"to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[25] Unlike a content-based speech restriction, the Ordinance "'need not be

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[20] *See McCullen v. Coakley*, 573 U.S. 464, 485 (2014). As explained in depth below, *McCullen* considered a legislatively enacted buffer zone similar to the one enacted here. The Supreme Court concluded that such enactments were "neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny." *Id.* In light of this authority and the parties' agreement that we should apply intermediate scrutiny, we need not discuss the appropriate level of scrutiny in detail.

[21] *Id.* at 485–86.

[22] *Bruni*, 824 F.3d at 363–64 (internal quotation marks omitted) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994)).

[23] *McCullen*, 573 U.S. at 486.

[24] *Id.*

[25] *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

the least restrictive or least intrusive means of serving the government's interests."[26] Rather, the First Amendment prohibits the government from regulating speech in a way that would allow a substantial burden on speech to fall in an area that "does not serve to advance its goals."[27]

The Supreme Court's decision in *McCullen v. Coakley* offers a useful starting point for our analysis. There, the Massachusetts legislature amended its Reproductive Health Care Facilities Act to address protests outside of abortion clinics. The amended Act made it a crime to knowingly stand on a "public way or sidewalk" within thirty-five feet of the entrance or driveway to any facility where abortions were performed.[28] In nearly all material respects, the amended Act was identical to the Ordinance before us, except the Massachusetts law established a thirty-five foot buffer zone and the Ordinance establishes an eight-foot buffer zone. This is a substantial distinction that the District Court did not adequately discuss in relying upon *McCullen* to support its order granting summary judgment to Turco.[29] Nor did the District

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

[27] *Id.* (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 799)).

[28] Mass. Gen. Laws, ch. 266 § 120E½ (2012).

[29] *See Turco*, 2017 WL 5479509, at *5 n.3 (noting only that "the size of the buffer zone is not dispositive because [Englewood] has failed to meet its burden and show that the Ordinance is narrowly tailored to serve a legitimate governmental interest").

Court fully appreciate the difference between the presence of demonstrable alternatives in *McCullen* and the evidence on this record that explains why less restrictive means were not likely to serve the City's interests here.

In *McCullen*, a sidewalk counselor (McCullen), sued to enjoin enforcement of a Massachusetts statute that made it a crime to stand within thirty-five feet of the entrance of any place where abortions were performed. Following a trial based on a stipulated record, the district court denied her challenge, the Court of Appeals for the First Circuit affirmed, and the Supreme Court granted certiorari.

After concluding that the Act was a content-neutral restriction on speech in a traditional public forum (sidewalks), the Court declared the statute unconstitutional. The Court's holding was based on the fact that "[t]he buffer zones burden substantially more speech than necessary to achieve [Massachusetts's] asserted interest[]."[30] The Court began its narrow-tailoring analysis by identifying the interests at stake. It noted that the buffer zones "clearly serve" the "government interests in '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.'"[31]

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[30] *McCullen*, 573 U.S. at 490.

[31] *Id.* at 486–87 (quoting *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997)).

But the zones also placed "serious burdens" on the counselors' speech interests.[32] The thirty-five foot buffer zones resulted in a heavy burden on "one-on-one communication," which is the sidewalk counselors' preferred method of speech.[33] Imposing such a burden on that type of speech demands particular constitutional protection because it is "the most effective, fundamental, and perhaps economical avenue of political discourse."[34] Similarly, leafleting in support of controversial viewpoints is the "essence of First Amendment expression."[35] Accordingly, "[n]o form of speech is entitled to greater constitutional protection."[36] In sum, the Court concluded that government-imposed burdens on one-on-one communication, such as those imposed by the Massachusetts statute, implicated particularly significant First Amendment concerns.[37]

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[32] *Id.* at 487.

[33] *Id.* at 488 (internal quotation marks omitted) (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)).

[34] *Id.* (internal quotation marks omitted) (quoting *Meyer*, 486 U.S. at 424)).

[35] *Id.* at 489 (internal quotation marks omitted) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)).

[36] *Id.* at 489 (internal quotation marks omitted) (quoting *McIntyre*, 514 U.S. at 347); *see also Schenk*, 519 U.S. at 377 ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment.").

[37] *Id.*

Moreover, the Massachusetts buffer zones carved out "a significant portion of the adjacent public sidewalks" and required the counselors to stand "well back" from the clinic.[38] The Court identified "uncontradicted testimony" that showed the buffer zones prohibited McCullen and her colleagues from effectively engaging in sidewalk counseling either verbally or by handing literature to the patients.[39] As a result, the zones significantly impacted McCullen's ministry.[40] McCullen estimated that she had been able to persuade eighty women to refrain from having abortions since the Act was amended to create the thirty-five foot buffer zone, but that this figure was "far fewer people" than she previously reached.[41] Jean Zarella, another petition in *McCullen*, described a far more dramatic affect of the Massachusetts Act. Before its passing, she stated that she had an estimated one-hundred "successful interactions." After its enactment, the buffer zones prevented her from persuading a single patient.[42]

The Court in *McCullen* rejected the government's contention that it had tried other approaches to address the hostile sidewalk protestors, but that such approaches were ineffective. Instead, the Court

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[38] *Id.* at 487.

[39] *Id.* at 487–88.

[40] *Id.* at 487.

[41] *Id.*

[42] *Id.* at 487–88.

concluded that "the Commonwealth [of Massachusetts had] too readily foregone options that could [have] serve[d] its interests just as well, without substantially burdening the kind of speech in which [the sidewalk counselors] wish[ed] to engage."[43] It noted that Massachusetts had not initiated criminal prosecutions for existing laws that the hostile protestors could have been construed to have violated.[44] It also had not sought injunctions against the hostile group in the approximately twenty years leading up to the Act's amendment. "In short," the Court concluded, Massachusetts "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."[45]

Even though the District Court failed to fully appreciate the distinctions between *McCullen* and this case, the Court here did fully appreciate the extent to which *McCullen* should inform its inquiry into the constitutionality of the Ordinance. The background giving rise to the buffer zone in Massachusetts and that which prompted the City of Englewood to enact the buffer zone here are similar. The competing interests are identical. Except for the size of the prescribed buffer zones, the text of the two legislative enactments is nearly the same. In fact, if the record

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[43] *Id.* at 490.

[44] *Id.* at 494.

[45] *Id.*

here included uncontradicted facts similar to those on the record in *McCullen*, then the Court's holding there would certainly dictate a similar outcome here. However, this record differs from the one in *McCullen* in two very important ways. First, the buffer zones' exact impact on the sidewalk counselors' speech and the concomitant efficacy of their attempts to communicate is unclear on this record. Indeed, Turco admitted that she continued to speak with patients entering the clinic after the enactment of the buffer zones. At the very least, there is contradictory evidence regarding the extent to which the buffer zone prevented Turco from communicating her message as she wanted. Second, the record—properly viewed in the light most favorable to the City—established that the City considered and attempted to implement alternative means of regulating speech, and that the City did attempt to enforce existing laws before creating the buffer zone. Those measures failed. Accordingly, we cannot agree that Turco was entitled to judgment as a matter of law.

A. The Buffer Zones' Impact on "Sidewalk Counselors."

During discovery, Turco agreed that she could talk "to patients on some kind of regular basis both before and after [the] adoption of the buffer zone ordinance."[46] But she also stated that navigating the buffer zones was akin to traversing an "obstacle course."[47]

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[46] JA 222–23.

[47] JA 224.

Nevertheless, Turco testified that she was able to walk from one side of the entrance to the other,[48] even though an occasional snow bank or parked car sometimes imposed difficulties.[49]

Similarly, Rosemary Garrett, who also refers to herself as "a sidewalk counselor," testified that she was still able to help women even after the buffer zones were implemented.[50] Specifically, she stated in her deposition that she "wasn't bothered by the new buffer zone" because it did not affect her ministry.[51] In fact, she stated that her counseling efforts were thwarted only when the hostile protestors began "yelling and screaming" and displaying "disturbing pictures."[52] When that happened, the women began running into the clinic to avoid the protests, which prevented the sidewalk counselors from approaching the women and offering help.[53] According to Garrett, it was the "aggressive" actions of the anti-abortion protestors—not the buffer zones—that lead her to stand at the far corner from the entrance of the facility in order to conduct her ministry.[54]

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[48] JA 224.

[49] JA 225.

[50] JA 135.

[51] JA 134.

[52] JA 135–36.

[53] JA 135, 137.

[54] JA 137–38.

Thus, on this record, we cannot say that the eight-foot buffer zone imposed an inappropriate burden on speech as a matter of law. Moreover, such a conclusion would be directly at odds with the Supreme Court's decision in *Hill v. Colorado*.[55] There, the Court considered whether a Colorado statute that regulated speech within 100 feet of a health care facility violated the First Amendment. Specifically, the statute made it "unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, '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."[56] The statute made it "more difficult [for sidewalk counselors] to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities."[57]

Some of those who referred to themselves as "sidewalk counselors" sued Colorado, alleging that the statute violated the First Amendment. After the Colorado state courts denied the challenge, the Supreme Court granted certiorari.

As in *McCullen*, the Court began its analysis by discussing the interests at stake, finding that the plaintiffs' "First Amendment interests . . . [were] clear and undisputed" because, *inter alia* "the public

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[55] 530 U.S. 703 (2000).

[56] *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).

[57] *Id.* at 708.

sidewalks, streets, and ways affected by the statute [were] 'quintessential' public forums for free speech" and the plaintiffs' ability to communicate was "unquestionably lessened" by the Colorado statute.[58]

Concomitantly, the Court noted that the state had an 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."[59] Moreover, the Court noted that "rules that provide specific guidance to enforcement authorities serve the interest in evenhanded application of the law."[60] Finally, the Court found that it was mportant to distinguish between "state restrictions on a speaker's right to address a willing audience and those [restrictions] that protect listeners from unwanted communication."[61] It noted that the First Amendment protected a speaker's "right to attempt to persuade others to change their views," but "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[62] The Court explained the reasonableness and necessity for the eight foot buffer zone as follows:

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[58] *Id.* at 714–15.

[59] *Id.* at 715 (citation omitted) (citing *Madsen*, 512 U.S. at 753).

[60] *Id.*

[61] *Id.* at 715–16.

[62] *Id.* at 716 (citation omitted).

> The statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators . . . . [T]he statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. . . . [T]he 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease.[63]

Given the record in *Hill*, the statute satisfied the Court's narrow tailoring analysis. It found that the eight-foot buffer zone between speakers and passersby did not greatly affect communications.[64] Clinic patients were still able to read signs,[65] sidewalk counselors

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[63] *Id.* at 729

[64] *Id.* at 726.

[65] *Id.* ("The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators.").

could conduct conversations in a normal tone,[66] and the buffer zone allowed a leafleteer to stand "near the path of oncoming pedestrians [while] proffering his or her material, which the pedestrians [could] easily accept."[67] The District Court did not explain why the eight-foot buffer zone here was unconstitutional despite the Supreme Court's conclusion that the eight-foot buffer zone in *Hill* passed constitutional muster. In fact, the District Court did not even cite *Hill*.

Given the Court's analysis in *Hill*, we simply cannot conclude that the eight-foot buffer zones established under the Ordinance posed a severe burden on speech, and the record is clearly inadequate to support such a conclusion as a matter of law. Rather, we conclude that there are material issues of genuine fact regarding the extent to which Turco retained the ability to communicate despite enactment of the eight-foot buffer zone.

B. Less Restrictive Alternatives.

We also disagree with the District Court's conclusion that the record shows that the City failed to consider less restrictive means of regulating speech in front of the clinic. To be sure, the District Court was

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[66] *Id.* at 726–27 ("[T]his 8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" (quoting *Schenk*, 519 U.S. at 377)).

[67] *Id.* at 727. The Court allowed that the "8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients." *Id.* Ultimately, it found that the Colorado restriction adequately protected the rights of the counselors to convey their message.

clearly correct when it found that the City had 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."[68] Those facts are not disputed.

However, the City and its representatives explained that it had attempted to increase police presence at the Clinic, had considered alternative means of bringing order to the sidewalk, and proffered reasonable explanations for why those and other means were ineffective. The former Chief of Police, Arthur O'Keefe, testified that, given the limitations of "manpower" and the need to be able to deploy officers in response to emergencies such as drive-by shootings, it was not feasible to permanently provide a significantly increased police presence at the clinic.[69] He also stated that some off-duty officers worked at the clinic, but that the police department had "finite resources" and much of it was devoted to violent crime.[70] Accordingly, he could not "simply dedicate an officer four hours at a time every day to enhance their security."[71]

During her deposition, Lynn Algrant, the President of Englewood City Council, testified extensively about the alternative means that the Council considered and why they were ineffective. She stated that the City had

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[68] *Turco*, 2017 WL 5479509, at *5.

[69] JA 207.

[70] JA 207.

[71] *Id.*

attempted to increase police presence at the clinic on a volunteer basis, but officers were not signing-up for any shifts.[72] She also testified that, despite manpower restrictions, on-duty officers were regularly dispatched to the clinic, but the hostile protests would resume as soon as the officers left.[73] Algrant said that she encouraged the clinic to seek an injunction or file criminal complaints, but those efforts were hampered because the clinic escorts feared for their safety.[74] She recalled occasions where clinic escorts were so frightened that they became "hysterical,"[75] yet they still refused to file complaints because of the threat of retaliation from the hostile protestors. The safety concerns were not unwarranted. One of the women at the clinic found a picture of herself on the internet inside of a bullseye, and as a result, the clinic escorts "were extremely protective of their privacy and extremely protective for their safety."[76]

Timothy Dacey, the City Manager for Englewood, supported Algrant's testimony. He believed that "it [would have been] cost prohibitive for [the City] to provide security for the clinic."[77] Dacey also stated that

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[72] JA 54.

[73] JA 55, 58–59.

[74] JA 60, 64.

[75] JA 75.

[76] JA 64.

[77] JA 86.

the police department's policy prohibited them from providing individual security coverage to private businesses.[78] He also testified that an increase in police patrols in the area were ineffective, and that the clinic escorts were too fearful to make complaints.[79] Chief O'Keefe confirmed this in his testimony, stating that some of the targets of the protestors' ire gave their names, but "many other people that were involved in incidents did not" because they were "concerned about subsequent identification or . . . were emotionally too distraught to become involved further."[80]

This fear was also borne out by the deposition testimony from clinic escorts and through e-mails between the escorts and City officials. One clinic escort testified that "antiabortion groups [were] notorious for finding out people's personal information, whether patients or abortion providers or escorts" and using it to further target their acts of harassment.[81] She stated that her colleagues "have had antiabortion protesters show up at their place of work, their houses, [and] put their phone numbers and addresses and personal information and photos on websites."[82] As a result, the clinic escorts were "very careful to not let the protestors get any of our personal information" and used

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[78] JA 87.

[79] JA 88–89.

[80] JA 205.

[81] JA 145.

[82] JA 145.

nicknames for each other while conversing on the sidewalk.[83] The sidewalk escort testified that she was concerned about the Bread of Life's apparent affiliation with a "fringe antiabortion group[]," Abolish Human Abortion.[84] That group was itself aligned with "domestic terrorists" and "clinic bombers."[85] She also testified that the Bread of Life protestors were aligned with "Operation Rescue" a group that also aligned itself "with clinic bombers and celebrate[d] the murders of abortion doctors."[86]

That same clinic escort submitted a certification which included as exhibits several detailed accounts of the chaotic sidewalk environment that had developed outside of the clinic.[87] She noted that the Bread of Life protestors filmed the patients' license plates when they parked their cars, but she was unsure what they did with the information.[88] She also stated that the hostile protests had escalated to a point that included "repeated physical assaults of escorts."[89]

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[83] JA 145.

[84] JA 146.

[85] JA 146.

[86] JA 146.

[87] JA 166.

[88] JA 181.

[89] JA 179.

In summary, the testimony of the various stakeholders when properly viewed in the light most favorable to the City demonstrated that the City considered alternative means of restricting speech around the clinic. A jury could find that financial restraints and fear of reprisal prevented these measures from being effective. We therefore hold that this record was not appropriate for summary judgment.

C. Our Decision in *Bruni*.

Our decision here is consistent with our earlier decision in *Bruni*.[90] There, we considered whether a Pittsburgh Ordinance that established fifteen-foot buffer zones around all health care facilities violated the First Amendment. That ordinance read:

> 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.[91]

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[90] 824 F.3d 353 (3d Cir. 2016).

[91] Pittsburgh Pa., Code § 623.04.

We noted that, on its face, this statute applied to all hospitals and health care facilities in Pittsburgh.[92] However, the City had only ever demarcated two buffer zones, both in front of facilities that provided abortion services.[93] A group of persons who wanted to communicate with women entering the clinics sued the City of Pittsburgh, claiming that the ordinance violated the First Amendment.[94] They also sought a preliminary injunction.[95] Following a hearing on the injunction, the District Court granted Pittsburgh's motion to dismiss the complaint. The plaintiffs appealed and we reversed.

We held that the District Court erred by dismissing the plaintiffs' complaint and remanded for further factual development. Specifically, we found that allegations in the complaint suggested that the burden imposed on speech was akin to that in *McCullen*.[96] The plaintiffs alleged that the buffer zone prevented them from reaching their intended audience and made conversations with the clinic's patients much more difficult.[97] Because the case was still at the pleading stage, those allegations were sufficient to require the government to prove "either that substantially less-

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[92] *Bruni*, 824 F.3d at 358.

[93] *Id.*

[94] *Id.* at 359.

[95] *Id.*

[96] *Id.* at 369.

[97] *Id.*

restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason."[98] We noted that Pittsburgh could not simply forego the range of alternatives available to it "without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed."[99] Finally, *Bruni e*mphasized the "rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis," and cautioned that the facts developed as the proceedings commenced would ultimately decide whether the restriction was justified.[100]

Although *Bruni* arose at the pleading stage and the case before us was resolved through a motion for summary judgment, *Bruni* is instructive because it highlights the intensely factual nature of the inquiry that is usually needed to resolve disputes arising from imposition of buffer zones such as this one. We emphasized 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."[101]

This record contains a multitude of contradicting factual assertions. Some facts suggest that the buffer

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[98] *Id.* at 370.

[99] *Id.* at 371.

[100] *Id.* at 372–73.

[101] *Id.* at 357.

zones imposed a significant restraint on the plaintiff' ability to engage in constitutionally-protected communication. Others support Englewood's position that the buffer zones hardly affected plaintiff's ability to reach her intended audience. Some facts support plaintiff's argument that the City had foregone less-restrictive options to address the chaotic environment outside of the clinic. Others show that Englewood considered these options and reasonably rejected them or found them to be ineffective.[102] In short, the record does not conclusively demonstrate that either party is entitled to summary judgment on the narrow tailoring claim.

D. Overbreadth.

We also find that the District Court erred in finding that the ordinance was overbroad. Englewood correctly argues that the District Court's reliance on *McCullen* was misplaced. There, the Supreme Court explicitly stated that it did not "need [to] consider [the] petitioners' overbreadth challenge" because it found that Massachusetts's statute was not narrowly tailored.[103] In relying on *McCullen*, the District Court seems to have conflated the narrow-tailoring analysis with the overbreadth analysis.[104] To support its

[102] Turco characterized the "the unwillingness of witnesses to come forward with complaints about criminal behavior [as] . . . preeminently a matter of factual dispute" in her pleadings. (Docket #45, 10).

[103] *McCullen*, 573 U.S. at 496 n.9.

[104] JA 11.

conclusion that the Ordinance was overbroad, the District Court stated: "To meet the narrowly-tailored requirement, Defendant must create an Ordinance that targets the exact wrong it seeks to remedy."[105] Although overbreadth and narrow tailoring are related,[106] the Supreme Court has rejected the District Court's assertion that an Ordinance must precisely target the acts it was passed to remedy.[107]

In *Hill*, the Supreme Court held that "[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. What is important is that all persons entering or leaving health care facilities share the interests served by the statute."[108] When a buffer zone broadly applies to health care facilities, we may conclude "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive."[109]

Bruni also discussed the plaintiffs' allegation that the statute was overbroad because it authorized

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[105] JA 11 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.")).

[106] *See Bruni*, 824 F.3d at 374 ("It is true that the breadth of the challenged law plays a role in the narrow-tailoring analysis of the Plaintiffs' free speech claim." (citations omitted)).

[107] *Hill*, 530 U.S. at 730–31.

[108] *Id.*

[109] *Id.* at 731.

creation of buffer zones at non-abortion related locations.[110] We declined to find that the ordinance was facially unconstitutional without further development in the record. We reiterated the Supreme Court's admonition in *Hill* that the comprehensiveness of a statute demonstrates a lack of discriminatory motive and is not constitutionally determinative.[111] Ultimately, in *Bruni* we concluded that we could not assess the breadth of the ordinance absent a "well-supported conclusion" about how widely it swept.[112] We also reiterated the "broad principle of deference to legislative judgments" and that a legislative body "need not meticulously vet every less burdensome alternative."[113] This principle is well-established in First Amendment jurisprudence, and we are mindful of our duty to "accord a measure of deference to the judgment" of Englewood city council.[114]

We conclude that the District Court erred in granting summary judgment because the ordinance was not overbroad. Courts may not strike down a regulation as "overbroad unless the overbreadth is substantial in relation to the [regulation's] plainly

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[110] *Bruni*, 824 F.3d at 373–74.

[111] *Hill*, 530 U.S. at 731.

[112] *Bruni*, 824 F.3d at 374.

[113] *Id.* at 370 n.18.

[114] *Hill*, 530 U.S. at 727.

legitimate sweep."[115] The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*."[116] The hesitation to label a statute overbroad arises from a court's need to strike a balance between competing social costs:

> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious armful effects."[117]

"In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals."[118] "[T]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law], *and from actual fact,*' that substantial overbreadth exists."[119]

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[115] *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (alteration in original) (internal quotation marks and citations omitted).

[116] *United States v. Stevens*, 559 U.S. 460, 485 (2010) (emphasis in original).

[117] *McCauley*, 618 F.3d at 241 (quoting *United States. v. Williams*, 553 U.S. 285, 292 (2008)).

[118] *Stevens*, 559 U.S. at 485 (citations omitted).

[119] *Id.* (alteration in original) (emphasis in original) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)).

The same concern is present here. The record is essentially devoid of any factual development concerning the "legitimate sweep" of the buffer zones. We therefore "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."[120] Accordingly, we will also reverse the District Court's grant of summary judgment on grounds that the statute was overbroad.

III.

For the foregoing reasons, the District Court's order granting summary judgment is hereby reversed, and the case remanded for proceedings consistent with this opinion.

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[120] *Bruni*, 824 F.3d at 374.

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 17-3716

[Filed August 19, 2019]

JERYL TURCO,

v.

CITY OF ENGLEWOOD, NEW JERSEY
Appellant

Appeal from the United States District Court
for the District of New Jersey
(No. 2-15-cv-03008)
District Judge: Honorable Susan D. Wigenton

Argued July 17, 2018

Before: McKEE, VANASKIE[1] and SILER[2],
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was argued on July 17, 2018.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the District Court's order entered on November 15, 2017, is hereby REVERSED, and the case is REMANDED in accordance with the opinion of this Court.

Attest:

s/ Patricia S. Dodszuweit
Clerk

Dated: August 19, 2019

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[1] The Honorable Thomas I. Vanaskie retired from the Court on January 1, 2019 after the submission of this case, but before the filing of the opinion. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and Third Circuit I.O.P. Chapter 12.

[2] The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

APPENDIX G

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Case No. 2:15-cv-03008 (SDW)(LDW)

[Filed November 14, 2017]

JERYL TURCO,)
Plaintiff,)
)
v.)
)
CITY OF ENGLEWOOD, NEW JERSEY,)
Defendant.)
)

OPINION

November 14, 2017

WIGENTON, District Judge.

Before this Court are Plaintiff Jeryl Turco's ("Plaintiff") Motion for Summary Judgment (ECF No. 43) and Defendant City of Englewood, New Jersey's ("Defendant") Cross-Motion for Summary Judgment (ECF No. 44), both pursuant to Federal Rule of Civil Procedure 56. Jurisdiction is proper pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391. This opinion is issued without oral argument pursuant to Federal Rule of Civil Procedure 78. For the

reasons discussed below, Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Cross-Motion for Summary Judgment is **DENIED** as moot.

I. BACKGROUND

Plaintiff Jeryl Turco brings the instant civil rights action under 42 U.S.C. § 1983, alleging that Defendant City of Englewood's Ordinance No. 14-11 (the "Ordinance") violates the First Amendment and New Jersey Constitution. (*See generally* ECF No. 1 ("Compl."); ECF No. 43-3.)

A. The Ordinance

On March 18, 2014, Defendant enacted the subject Ordinance, which amended Section 307-3, in relevant part, to prohibit any person within the City of Englewood from knowingly entering or remaining:

> on a public way or sidewalk adjacent to a health care facility or transitional facility *within a radius of eight feet* of any portion of an entrance, exit, or driveway . . . or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit, or driveway. This subsection shall not apply to the following:--
>
> (1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

See Englewood City Code § 307-3 (emphasis added). The Ordinance was created in response to militant activists and aggressive protestors congregating outside of Metropolitan Medical Associates, an abortion clinic located at 40 Engle Street in Englewood, New Jersey ("the Clinic").

Plaintiff is a pro-life advocate who regularly engages in sidewalk counseling of the Clinic's prospective clients. Sidewalk counselors distribute literature and/or rosaries to, and communicate with, clients entering the Clinic. (Compl. ¶ 43.) Plaintiff's objective is to try to engage the Clinic's clients in "quiet, friendly, non-confrontational conversation with a view toward offering them alternatives to abortion." (Pl.'s Statement of Material Facts ("SMF") ¶ 5.) Thus, it is essential to Plaintiff's form of counseling that she be able to get in close proximity to prospective clients in order to engage in direct, one-on-one communication in front of the Clinic. (*Id.* at ¶ 6.)

The Ordinance establishes a buffer zone that stretches along the Clinic's entrance, exit and driveway. (Compl. ¶¶ 28, 38, 48.) The buffer zone extends eight feet to the left and eight feet to the right of the Clinic's doorway or driveway down to the street. As a result, Plaintiff and others similarly situated are excluded from approximately twenty-four feet on either end of the Clinic, or forty-eight feet in total of the public sidewalk outside the Clinic.

B. Procedural History

After the Supreme Court in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), unanimously struck down a statute in Massachusetts that contained language identical to the present Ordinance, Plaintiff filed a Complaint seeking a declaration that the Ordinance is facially unconstitutional and unconstitutional as applied to her. (Compl. ¶ 81.) Plaintiff claims that the buffer zone "chill[s]" her freedom of speech and assembly protected by the First Amendment of the United States Constitution (First & Second Claims for Relief) and by Article I, para. 6 of the New Jersey Constitution (Third Claim for Relief). (Compl. ¶ 55.) Plaintiff seeks to permanently enjoin Defendant, City of Englewood, and those acting in concert or participation with them, from enforcing the Ordinance against Plaintiff and others similarly situated while they use traditional public forums in Englewood. (*Id*. at ¶ 81.)

Plaintiff previously filed a Motion for Preliminary Injunction (ECF No. 15), which this Court held in abeyance while *Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016) was pending appeal in the Third Circuit. *Bruni* involved the City of Pittsburgh's

buffer-zone ordinance, which prohibited the plaintiffs from engaging in sidewalk counseling within fifteen feet of health care facilities. On appeal, the plaintiffs sought review of the District Court's dismissal of their First Amendment and Due Process claims, which challenged the ordinance as unconstitutional. The Third Circuit vacated the District Court's order dismissing the plaintiffs' First Amendment claims and remanded the case so that the District Court could consider the plaintiffs' claims under the *McCullen* standard. After *Bruni* was decided, this Court granted Plaintiff leave to refile her motion. (ECF No. 28) Plaintiff did not refile her motion and instead requested that the Court enter a discovery schedule. (ECF No. 29.) The instant motions for summary judgment followed.

II. SUMMARY JUDGMENT STANDARD

The court will grant a motion for summary judgment where, "after adequate time for discovery and upon motion, the 'nonmoving party' fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Rule 56 provides the court with authority to "grant summary judgment if the movant shows that 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). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be

no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is only "material" for purposes of a summary judgment motion if a dispute over that fact "might affect the outcome of the suit under the governing law." *Id.* at 248. A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The dispute is not genuine if it merely involves "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof. *Celotex Corp.*, 477 U.S. at 322-23. Once the moving party meets its initial burden, the burden then shifts to the nonmovant who must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations, speculations, unsupported assertions, or denials of its pleadings. *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001).

When deciding a motion for summary judgment, the district court "must credit the evidence of the non-moving party and draw all justifiable inferences" in favor of the nonmoving party. *Smith v. Maiorana*, 629 F. App'x 402, 404 (3d Cir. 2015). The nonmoving party is required to "point to concrete evidence in the record which supports each essential element of its case." *Black Car Assistance Corp. v. New Jersey*, 351 F. Supp. 2d 284, 286 (D.N.J. 2004). If the nonmoving party "fails to make a showing sufficient to establish the existence

of an element essential to that party's case, and on which . . . [it has] the burden of proof," then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-23. Further, in deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The nonmoving party cannot defeat summary judgment simply by asserting that certain evidence submitted by the moving party is not credible. *S.E.C. v. Antar*, 44 F. App'x. 548, 554 (3d Cir. 2002).

III. DISCUSSION

A. Section 1983 Analysis

Section 1983 "does not, by itself, confer any substantive rights; it only serves to enforce rights granted under the Constitution or federal law." *Burns v. City of Bayonne*, No. 12-6075, 2014 U.S. Dist. LEXIS 130872, at *22 (D.N.J. Sept. 16, 2014); *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). To establish a prima facie case under § 1983, "a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Mayer v. Gottheiner*, 382 F. Supp. 2d 635, 647 (D.N.J. 2005) (citing *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005)). To establish that a defendant violated a right secured by the Constitution, a plaintiff must demonstrate that the defendant deprived it of such right as charged in the complaint. *Salerno v. O'Rourke*, 555 F. Supp. 750, 757 (D.N.J. 1983); *Downey v. Coalition Against Rape and Abuse, Inc.*, 143 F. Supp.

2d 423, 437 (D.N.J. 2001) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)) (A plaintiff must "identify the exact contours of the underlying right said to have been violated.").

Here, it is undisputed that Defendant, City of Englewood, New Jersey, was acting under the color of state law when it adopted the Ordinance. Additionally, this Court finds that the facts recited above form the basis of Plaintiff's § 1983 claims that the Ordinance violates her rights under the First Amendment and the New Jersey Constitution.

B. The First Amendment

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. Plaintiff alleges that the Ordinance is restrictive under the First Amendment because it deprives "her freedom of speech while in a traditional public forum, including . . . her right to distribute literature and rosaries and have conversations with interested individuals" and "her freedom of assembly and association while in a traditional public forum." (Compl. ¶¶ 71, 75.)

1. Freedom of Speech

The Supreme Court has set forth the following three-pronged analysis to determine whether a litigant's free speech rights have been violated under the First Amendment: (1) "whether the speech is protected by the First Amendment;" (2) "determining the nature of the forum;" and (3) "whether the government's justifications for exclusion from the

relevant forum satisfy the requisite standard." *Marcavage v. City of Phila.*, 778 F. Supp. 2d 556, 564 (E.D. Pa. 2011) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). Plaintiff has submitted facts sufficient to establish the first two prongs under *Cornelius*. Defendant does not challenge the fact that the speech at issue is protected under the First Amendment, or that its Ordinance suppresses speech in a traditional forum. Therefore, this Court considers only whether the government's justifications for exclusion from the relevant forum satisfy the requisite standard, which, in this case, is intermediate scrutiny.

When a statute is content-neutral, courts apply intermediate scrutiny and ask whether it is "narrowly tailored to serve a significant governmental interest." *Bruni*, 824 F.3d at 363-64 (quoting *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 764 (1994)). The Ordinance is deemed content-neutral because it regulates the place where Plaintiff may engage in sidewalk counseling outside of the Clinic. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1053-54 (3d Cir. 1994) (explaining that a statute is content-neutral if it "merely restricts the total quantity of speech by regulating the time, the place, or the manner in which one can speak"). The Ordinance explicitly prohibits any person[1] within the City of Englewood from knowingly

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[1] Although the Ordinance carves out exceptions for law enforcement and employees or agents of the facility acting within the scope of their employment, these exceptions do not apply to Plaintiff or others similarly situated. *See* Englewood City Code § 307-3(B)(1)-(4).

entering or remaining "on a public way or sidewalk adjacent to a health care facility or transitional facility *within a radius of eight feet* of any portion of an entrance, exit, or driveway." *See* Englewood City Code § 307-3 (emphasis added). Importantly, the parties agree that the Ordinance is content-neutral.

The narrowly-tailored requirement guards against both censorship by the government, but also against attempts to silence speech for the sake of convenience. *McCullen*, 134 S. Ct. at 2534-35. By demanding narrowly-tailored means, intermediate scrutiny prevents the government from "too readily sacrificing speech for efficiency." *Id*. (internal quotations omitted). The means employed need not be the least restrictive or least intrusive options available. However, in light of the First Amendment interests at stake, the government is required to demonstrate "its serious consideration of, and reasonable decision to forego, alternative measures that would burden substantially less speech." *Bruni*, 824 F.3d at 367. Moreover, it is the government's burden to show that alternative measures would fail to achieve the government's interests, "not simply that the chosen route is easier." *Id*. (internal quotations omitted). For the reasons set forth below, this Court finds that the Ordinance is not narrowly tailored to serve a significant government interest.

i. The Ordinance is Overbroad[2]

Defendant did not create a targeted statute to address the specific issue of congestion or militant and aggressive protestors outside of the Clinic. Instead, Defendant created a sweeping regulation that burdens the free speech of individuals, not just in front of the Clinic, but at health care and transitional facilities citywide. To meet the narrowly-tailored requirement, Defendant must create an Ordinance that targets the exact wrong it seeks to remedy. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("[A] statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy."). Here, Defendant did not create the Ordinance with reasonable specificity to target the aggressive conduct taking place in front of the Clinic. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Moreover, because the record is devoid of any evidence of congestion or militant and aggressive protestors congregating outside of other health care and transitional facilities in Englewood, the Ordinance is overbroad. *See Stevens*, 559 U.S. at 473 (holding that a statute is overbroad and unconstitutional under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep"). Applying the Supreme Court's reasoning in *McCullen*, it can hardly

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[2] Defendant's argument, that Plaintiff's overbreadth claim was never asserted in her Complaint and is premature, is without merit. (Def.'s Opp'n Br. at 32.) Based on the allegations in her Complaint, this Court finds that Plaintiff did assert that the Ordinance was overbroad. (*See* Compl. ¶¶ 66, 69.)

be argued that the Ordinance is narrowly tailored. As in *McCullen*, the Ordinance creates a buffer zone around *all* health care facilities in the City, despite the fact that the evidence shows that the Ordinance was adopted in response to protestors outside of one specific health care facility – the Clinic. On this ground alone, Defendant's Ordinance violates the First Amendment.

ii. Less Restrictive Means Were Available

As an initial matter, Defendant bears the burden to show that alternative measures would fail to achieve its goal. *Bruni*, 824 F.3d at 367. Defendant's attempt to place the burden on Plaintiff to show she has not been affected is misplaced. Defendant did not employ alternative, less restrictive means that were available. Instead, Defendant puts forth speculative assertions that it tried and/or seriously considered less restrictive alternatives, such as increased police presence and injunctive relief, prior to adoption of the amended Ordinance. (Def.'s Opp'n Br. at 23-34.) Even "drawing all justifiable inferences in favor of Defendant," the record does not support that Defendant seriously tried or considered any less restrictive alternatives. *Smith*, 629 F. App'x at 404. Defendant does not "point to concrete evidence" that it seriously considered alternative measures, and reasonably rejected them. *Black Car Assistance Corp.*, 351 F. Supp. 2d at 386; *see also McCullen*, 134 S. Ct. at 2539. Indeed, Defendant did not prosecute any protestors for activities taking place on the sidewalk outside of the Clinic in the five years prior to the adoption of the Ordinance; and Defendant did not seek injunctive relief against

individuals whose conduct was the impetus for the Ordinance.

Moreover, Defendant fails to provide any reliable documentation or support for its assertion that although it "increased patrols of the . . . Clinic on Saturday mornings and on weekends . . . the City did not have the resources to have a continuous [police] presence at the site." (Def.'s Opp'n Br. at 28.) At deposition, Defendant's City Manager, Timothy J. Dacey, admitted that the City never undertook a cost study to determine the resources the City would need to pay for additional police coverage in front of the Clinic. (Dacey Dep. at 14:11-15:12.) Thus, Defendant cannot make a good-faith argument that it seriously considered and employed alternative measures before adopting the Ordinance.

For the foregoing reasons, the Ordinance violates the First Amendment.[3] Plaintiff's motion for summary judgment as to her freedom of speech claim under the First Amendment is granted.

2. Freedom of Assembly

The right to freely assemble on the public street and sidewalks is also afforded maximum constitutional protection. *McTernan v. City of York, PA.*, 564 F.3d 636, 645 (2009). As described above, courts apply intermediate scrutiny to content-neutral statutes when

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[3] This Court notes that the size of the buffer zone is not dispositive because Defendant has failed to meet its burden and show that the Ordinance is narrowly tailored to serve a legitimate governmental interest.

assessing whether the statute violates the First Amendment. Because this Court finds that the Ordinance is not narrowly tailored, Plaintiff's motion for summary judgment as to her freedom of assembly claim is granted.

C. New Jersey Constitution

For all of the reasons set forth in this Court's analysis under the First Amendment of the U.S. Constitution, the Ordinance also violates the New Jersey Constitution. N.J. Const. art. I, para. 6; *Twp. of Pennsauken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999). Like the U.S. Constitution, the N.J. Constitution protects freedom of speech from government interference. N.J. Const. art. I, para. 6 ("Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."). Because the New Jersey Constitution is "generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the [c]ourt's analysis." *Schad*, 733 A.2d at 1159. Therefore, Plaintiff's motion for summary judgment as to her freedom of speech claim under the New Jersey Constitution is granted.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment is **GRANTED**. Defendant's Cross-Motion for Summary Judgment is hereby **DENIED** as moot. An appropriate Order follows this Opinion.

s/ *Susan D. Wigenton*
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Magistrate Judge Leda D. Wettre
Parties

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Case No. 2:15-cv-03008 (SDW)(LDW)

[Filed November 14, 2017]

JERYL TURCO,
Plaintiff,

v.

CITY OF ENGLEWOOD, NEW JERSEY,
Defendant.

ORDER

November 14, 2017

WIGENTON, District Judge.

This matter, having come before this Court on Plaintiff Jeryl Turco's ("Plaintiff") Motion for Summary Judgment (ECF No. 43) and Defendant City of Englewood, New Jersey's ("Defendant") Cross-Motion for Summary Judgment (ECF No. 44), both pursuant to Federal Rule of Civil Procedure 56, and this Court having considered the parties' submissions, for the reasons stated in this Court's Opinion dated November 14, 2017,

IT IS on this 14th day of November, 2017,

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **DENIED** as moot.

This civil matter is hereby **CLOSED**.

s/ *Susan D. Wigenton*
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Magistrate Judge Leda D. Wettre
Parties

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3716

[Filed September 13, 2019]

JERYL TURCO,

v.

CITY OF ENGLEWOOD, NEW JERSEY
Appellant

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and SILER[1] Circuit Judges

The petition for rehearing filed by appellee 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 circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

[1] Judge Siler's vote is limited to panel rehearing only.

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/ Theodore A. McKee
Circuit Judge

Dated: September 13, 2019
Lmr/cc: Francis J. Manion
Donald A. Klein

APPENDIX J

City of Englewood, NJ

§ 307-3. Obstruction of health care facilities and transitional facilities. [Added 2-6-1990 by Ord. No. 90-2; amended 3-18-2014 by Ord. No. 14-11]

A. Definitions. As used in this section, the following terms shall have the meanings indicated:

HEALTH CARE FACILITY — As set forth in N.J.S.A. 26:2H-2.

TRANSITIONAL FACILITY — Community residences for the developmentally disabled and community shelters for victims of domestic violence as those terms are defined in N.J.S.A. 40:55D-66.2.

B. Within the City of Englewood, no person shall knowingly enter or remain on a public way or sidewalk adjacent to a health care facility or transitional facility within a radius of eight feet of any portion of an entrance, exit or driveway of such facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of such facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:

(1) Persons entering or leaving such facility;

(2) Employees or agents of such facility acting within the scope of their employment;

(3) Law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) Persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

C. The provisions of Subsection B shall only take effect during such facility's business hours and if the area contained within the radius and rectangle described in said Subsection B is clearly marked and posted.

D. A health care facility or a person whose rights to provide or obtain health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a health care facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

APPENDIX K

Def. Ex. P - Photo of Plaintiff (3d Cir. Appx700)