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APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Colleen REILLY; Becky Biter; Rosalie Gross
v.
CITY OF HARRISBURG; Harrisburg City Council; Mayor Eric Papenfuse, in his official capacity as Mayor of Harrisburg Colleen Reilly and Becky Biter, Appellants
No. 22-1795
|
Argued on June 8, 2023
|
(Opinion Filed: July 10, 2023)

Appeal from the United States District Court for the Middle District of Pennsylvania (District Court No. 1-16-cv-00510), District Judge: Honorable Sylvia H. Rambo

Attorneys and Law Firms

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Before: HARDIMAN, AMBRO, and FUENTES, Circuit Judges

OPINION*

AMBRO, Circuit Judge

***1** Appellants Colleen Reilly and Becky Biter sued the City of Harrisburg, alleging that it restricts unconstitutionally their ability to have peaceful one-on-one conversations with pregnant women on the sidewalks outside abortion clinics. The District Court granted summary judgment for the City because there was no evidence it had a policy or custom prohibiting Reilly and Biter's activities. We agree and affirm.

I.

In November 2012, Harrisburg's City Council passed Ordinance No. 12-2012, entitled "Interference with Access to Health Care Facilities" ("the Ordinance"), which makes it illegal to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." Harrisburg, Pa. Mun. Code § 3-371.4 (2012). Beyond the text of the Ordinance itself, Harrisburg has not issued formal guidance on how it will enforce that measure. Instead, each individual police officer investigates and decides whether to issue a warning or citation, sometimes checking with a supervisor to receive guidance on how to respond.

Reilly and Biter oppose abortion and engage in sidewalk counseling, which they describe as peaceful

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

one-on-one conversations, prayer, and leafletting outside abortion clinics intended to dissuade patients from terminating their pregnancies. In July 2014, Reilly received a warning for her activities outside the Planned Parenthood facility. Two police officers arrived, and one of them—Officer Deborah Ewing—told Reilly to stay 25 to 30 feet away from the door and driveway. Officer Ewing was wrong to do so because the buffer zone extends only 20 feet and does not even apply to sidewalk counseling because it is not one of the four acts prohibited in the buffer zone: congregating, patrolling, picketing, or demonstrating. Still, the officer instructed Reilly to move and warned she would be "cited if she violates the [O]rdinance in the future." JA 292. On the record before us, Biter has never been cited or threatened with a citation.[1] In fact, on this record, not a single person has ever been cited for a violation of the Ordinance.

After the July 2014 incident, Reilly and Biter sued the City in the District Court for the Middle District of Pennsylvania, claiming that the Ordinance, as applied to them, violates their First Amendment rights to free speech, exercise, and assembly.[2] They

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[1] Some may question how Biter has standing when she has not received a warning for violating the Ordinance. A "realistic threat," however, "of the City's enforcement is sufficient for purposes of Plaintiffs' standing," even when the "record does not reflect any prosecution, arrest, or even citation." *Bruni v. City of Pittsburgh*, 941 F.3d 73, 84 n.12 (3d Cir. 2019). We conclude that the warning Biter's co-plaintiff and co-sidewalk counselor, Reilly, received is enough to make their shared fear of enforcement realistic.

[2] The initial complaint included a third plaintiff, Rosalie Gross, who has voluntarily dismissed her claims. In addition, a facial

moved for a preliminary injunction, which the Court denied. *Reilly v. City of Harrisburg*, 205 F. Supp. 3d 620 (M.D. Pa. 2016). On appeal to our Court, we vacated the order denying the preliminary injunction and remanded for the District Court to conduct the analysis anew applying the correct standard. *Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017). It again denied the motion for a preliminary injunction. *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 456 (M.D. Pa. 2018).

***2** Reilly and Biter appealed again. On the second appeal, we affirmed. *Reilly v. City of Harrisburg*, 790 F. App'x 468, 478 (3d Cir. 2019). In that decision, we clarified that the Ordinance does not prohibit sidewalk counseling because its plain terms prohibit only congregating, patrolling, picketing, and demonstrating, none of which covers peaceful one-on-one conversations or leafletting. *Id.* at 474 (citing *Bruni*, 941 F.3d at 86-88). The Supreme Court denied their petition for certiorari. *Reilly v. City of Harrisburg*, 141 S. Ct. 185 (2020) (mem.). On remand, the parties moved for summary judgment. The Court granted Harrisburg's motion and denied Reilly and Biter's cross-motion. They now appeal a third time.[3]

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challenge to the Ordinance was abandoned on appeal. Finally, though Reilly and Biter seek summary judgment on their free-exercise claim, the Court had dismissed the count for failure to state a claim, and that was not error; their complaint fails to plead facts that, taken as true, would make the City liable.

[3] The District Court had federal question jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review the grant of summary judgment *de novo*, applying the same standard as the District Court. *Sec'y U.S. Dep't of Labor v. Kwasny*, 853 F.3d 87, 90 (3d Cir. 2017). "Summary judgment is

II.

It is well-settled that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory," meaning a city is not liable under the statute for injuries inflicted solely by its agents or employees. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). But a city can be liable for a § 1983 violation "based upon a policy or custom of the city rather than upon the act of an individual city employee." *Porter v. City of Philadelphia*, 975 F.3d 374, 382 (3d Cir. 2020). Accordingly, whenever a First Amendment challenge is brought against a city, the first step is to determine what, if any, "official city policy or custom is at issue." *Id.* Only after identifying a policy or a custom do we "apply the correct First Amendment principles to [it]." *Id.*

A *policy* is a decision of a city's "duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403-04 (1997). The policy need not be in writing but must "establish fixed plans of action to be followed under similar circumstances." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). "[U]nder appropriate circumstances" a single decision by one policymaker with sufficient authority may be enough to create a policy. *Id.* at 480. The Supreme Court has cautioned, though, that a single action creates

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appropriate where, construing all evidence in the light most favorable to the nonmoving party, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(a)).

liability "only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481.

Separately, a *custom* exists when, although no policy has been formally approved by an appropriate authority figure, certain practices are so "permanent and well settled" as to have the force of law. *Monell*, 436 U.S. at 691. As relevant here, a custom cannot be proven by evidence of "a single incident of unconstitutional activity." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) ("[C]onsiderably more proof than the single incident will be necessary in every case to establish ... the requisite fault on the part of the municipality.").

The lesson of *Monell* and cases applying it is that a city must have been truly involved in a constitutional violation before it is liable. Specifically, a plaintiff must prove that the city itself, not just rogue individuals employed by it, engaged in "deliberate conduct" that was the "moving force" behind the alleged injury. *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (cleaned up).

***3** Here, the District Court was correct that Harrisburg has no policy or custom of over-enforcing the Ordinance to prohibit peaceful sidewalk counseling. The City issued no rules, proclamations, or edicts that could be considered a policy, other than the Ordinance itself, which is constitutional on its face under *Bruni*. *See* 941 F.3d at 91. Rather than setting a blanket policy, Harrisburg gives each police officer discretion to investigate and determine

whether a violation has occurred. Further, at oral argument Harrisburg's counsel explained that the Ordinance bans only the four listed activities, and they do not include peaceful sidewalk counseling. Finally, Reilly and Biter's evidence that Harrisburg admits that it had an *unwritten* enforcement policy also fails to establish a municipal policy. The litigation statements on which Plaintiffs rely show only that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014.

Nor is there a custom of restricting such counseling. The record does not reveal one citation or arrest. And although Reilly has evidence of a one-off improper warning in July 2014, she and Biter need "considerably more proof than [a] single incident" to trigger *Monell* liability. *Tuttle*, 471 U.S. at 824. On this record, they have not satisfied that burden.

Reilly and Biter may subjectively fear they will be cited or arrested, but that falls short under *Monell*. Harrisburg has no policy of prohibiting sidewalk counseling, and the appellants have not shown the existence of any custom. Thus the District Court correctly granted summary judgment for the City, and we affirm.

All Citations

Not Reported in Fed. Rptr., 2023 WL 4418231

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT PENNSYLVANIA.

Colleen REILLY, et al., Plaintiffs,
v.
CITY OF HARRISBURG et al., Defendants.
Civil No. 1:16-CV-510
|
Signed 03/28/2022

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Elizabeth Kramer, Frank J. Lavery, Jr., Lavery Law, Harrisburg, PA, for Defendants City of Harrisburg, Harrisburg City Counsel, Mayor Eric Papenfuse.

MEMORANDUM

SYLVIA H. RAMBO, United States District Judge

***1** Before the court are cross motions for summary judgment filed by Defendant City of Harrisburg ("City") (Doc. 133) and by Plaintiffs Colleen Reilly and Becky Biter (Doc. 138). For the reasons set forth below, the City's motion will be granted, and Plaintiffs' motion will be denied.

I. BACKGROUND

Plaintiffs are individual citizens of Pennsylvania who regularly engage in "sidewalk counseling" outside of two health care facilities in Harrisburg, Pennsylvania that provide, among other services, abortions.[1] Their sidewalk counseling activities include leafletting, prayer, and individual conversations with women who are attempting to enter the health care facilities in an effort to dissuade them from obtaining abortions. In November 2012, Harrisburg's City Council passed Ordinance No. 12–2012 entitled "Interference With Access To Health Care Facilities ("the Ordinance"), which makes it illegal to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." *See* Harrisburg, Pa. Mun. Code § 3-371 (2015), http://ecode360.com/13739606.

Plaintiffs' claims stem from one occasion on which the Ordinance was enforced against Reilly. At a two-day evidentiary hearing held before the court in 2017, Reilly testified that on July 2, 2014, shortly after she arrived at Planned Parenthood to sidewalk counsel women entering the facility, two police officers arrived on scene and one officer advised her that the Ordinance required her to stay 25 to 30 feet away from the entrances. (Doc. 69 at 336:11–337:20.) After Reilly moved to a location well outside the buffer zone, the officer instructed her more than once to continue moving farther away from the facility. (*Id.*; Doc 135-

[1] In 2017, during the pendency of this litigation, Hillcrest Women's Health Center closed indefinitely, but Planned Parenthood remains open.

18.) Reilly testified that she became frustrated with the officer and left the area. (Doc. 69 at 336:22–37:3.) A police report taken from the incident describes Reilly's activities as "handing out literature and talking to clients coming into the office," and indicates that the officer verbally warned Reilly that she would be "cited if she violates the ordinance in the future." (Doc. 60-3.) Reilly was never arrested or cited pursuant to the Ordinance. (Doc. 135 at ¶ 106; Doc. 153 at ¶ 106.)

In March 2016, Plaintiffs initiated this action and filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the Ordinance is unconstitutional on its face and as applied because it violates their First Amendment rights to free speech, free exercise, and free assembly, and their Fourteenth Amendment rights to equal protection and due process. (Doc. 1.) Plaintiffs also sought a preliminary injunction based on the alleged violation of their free speech rights. (Doc. 3.) Defendants opposed the preliminary injunction and moved to dismiss Plaintiffs' claims. (Docs. 15–16.) The court denied Plaintiffs' motion for a preliminary injunction and dismissed their equal protection, due process, and free exercise of religion claims. (Doc. 44, "*Reilly I*.") On appeal, the Third Circuit reversed the court's denial of a preliminary injunction and remanded for further consideration under the proper legal standard.[2] (Doc. 54-1, "*Reilly II*.") After conducting an evidentiary hearing and

[2] By that point, Defendants Harrisburg City Council and Mayor Papenfuse had been dismissed from the action, and one of the three original plaintiffs, Rosalie Gross, voluntarily dismissed her claims. (*Reilly I* at 25–27; Doc. 46.)

receiving supplemental briefing, the court again denied Plaintiffs' motion. (Doc. 111, "*Reilly III.*") The Third Circuit affirmed (Doc. 118-2, "*Reilly IV*"), and the Supreme Court subsequently denied Plaintiffs' petition for certiorari. (Doc. 121-1.) Without further developing the evidentiary record, Plaintiffs and the City filed cross motions for summary judgment, which have been fully briefed, and are ripe for review.

II. STANDARD OF REVIEW

***2** Federal Rule of Civil Procedure 56(a) provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A factual dispute is "material" if it might affect the outcome of the suit under the applicable substantive law and is "genuine" only if there is a sufficient evidentiary basis for a reasonable factfinder to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evaluating a motion for summary judgment, a court "must view the facts in the light most favorable to the non-moving party" and draw all reasonable inferences in favor of the same. *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005).

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. *See Celotex*, 477 U.S. at 324. "Once the moving party points to evidence demonstrating no issue of material fact exists, the non-moving party has

the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Azur v. Chase Bank, USA, Nat'l Ass'n*, 601 F.3d 212, 216 (3d Cir. 2010). The non-moving party may not simply sit back and rest on the allegations in its complaint; instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted); *see also Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001). Summary judgment should be granted where a 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 at trial." *Celotex*, 477 U.S. at 322–23. "Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Saldana*, 260 F.3d at 232 (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460–61 (3d Cir. 1989)).

"The rule is no different where there are cross-motions for summary judgment." *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). Denial of one motion does not necessitate a grant of the other, and the movants do not, by virtue of their cross motions, waive their right for the court to consider whether genuine issues of material fact exist. *Id.* (citing *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)). If neither party carries its burden,

the court must deny summary judgment. *See Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1023 (3d Cir. 2008).

III. DISCUSSION

Both motions request summary judgment on Plaintiffs' remaining § 1983 claims, which allege that the Ordinance violates First Amendment free speech and assembly rights, on its face and as applied.[3] Section 1983 provides citizens a civil cause of action for violations of their constitutional rights by persons acting under color of law. 42 U.S.C. § 1983. The distinction between facial and as-applied constitutional challenges "affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy," but the substantive rule of law is the same for both claims. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127–28 (2019) (internal quotation marks omitted).

A. The City is entitled to summary judgment on Plaintiffs' claims that the Ordinance facially violates free speech and assembly rights.

***3** In denying Plaintiffs' motion for a preliminary injunction, the court found that Plaintiffs' facial challenge to the Ordinance on free speech grounds

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[3] While Plaintiffs' motion also requests summary judgment on their free exercise claims, the court has already determined that the complaint failed to state a claim for violation of the free exercise clause (Doc. 44 at 24–25), notwithstanding a scrivener's error in the order denying dismissal. (*See* Doc. 45.) Count II will therefore be dismissed.

was unlikely to succeed on the merits because, even though Plaintiffs demonstrated a burden on speech, the City met its burden to show that the Ordinance is content-neutral and narrowly tailored to achieve a legitimate government interest. (*Reilly III* at 38.) The Third Circuit affirmed that the Ordinance does not apply to sidewalk counseling, is not content-based or vague or overbroad, and is narrowly tailored to survive intermediate scrutiny. (*Reilly IV* at 9–11, 14.) The Third Circuit further observed that, as in *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019), the Ordinance does not create a significant burden on speech, and the City showed through declarations, documentary evidence, and in-court testimony that the "restriction did not burden substantially more speech than ... necessary to further the government's legitimate interests." (*Id.* at 15 n.12, citations omitted.)

A statute's facial constitutionality is a legal issue, and no disputed facts remain that would impact the Ordinance's facial constitutionality and require factfinding by a jury. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 288, 296 n.41 (3d Cir. 2009) (deciding an ordinance's facial validity on the merits at the preliminary injunction stage as a matter of law). Presented with no additional evidence or argument to alter its prior conclusion, the court finds as a matter of law that the Ordinance is constitutional on its face and incorporates its prior analysis herein. (*Reilly III* at 17–38; *see also Reilly IV* at 9–16.) *See also Bruni*, 941 F.3d at 88–92 (affirming the facial constitutionality of a nearly identical ordinance). Accordingly, the City is entitled to summary

judgment on Plaintiffs' claims challenging the facial constitutionality of the Ordinance.[4]

B. The City is entitled to summary judgment on Plaintiffs' as-applied challenges based on free speech and assembly rights.

To succeed on a claim challenging the constitutionality of a statute's application, the Plaintiffs must show as a threshold matter "that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to [them]." *See McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014). In turn, the government has the ultimate burden of justifying its restriction based on the applicable level of scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*, 546 U.S. 418, 429 (2006). To impose liability on a municipality, Plaintiffs must demonstrate that it was the "moving force of the

[4] The Ordinance does not facially violate Plaintiffs' constitutional right to free assembly for substantially the same reasons. *See De Jong v. State of Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to th[at] of free speech."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying free speech principles to analyze restrictions on a gathering on the National Mall); *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 905 (W.D. Pa. 2020) ("Although the right to peaceably assemble is not coterminous with the freedom of speech, they have been afforded nearly identical analysis by courts for nearly a century."). Interpreting nearly identical language in *Bruni*, the Third Circuit found that a prohibition on "congregating" does not restrict one-on-one conversations, and that a prohibition on "patrolling" does not restrict people from walking alongside one another. *See Bruni*, 941 F.3d at 87. Here too, the Ordinance imposes a similarly limited and justified free assembly burden.

constitutional violation" through a custom, practice, or policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *see Brown*, 586 F.3d at 294 n.38.

The City does not argue any justification for restricting peaceful one-on-one conversations and leafletting, and it is thus entitled to summary judgment only if no reasonable jury could find that Plaintiffs' constitutionality protected activities were restricted under the color of law, or if no reasonable jury could find municipal liability under *Monell*.

***4** Plaintiffs' sidewalk counseling, to the extent it consists of peaceful one-on-one conversations and leafletting, is core political speech that merits the apex of constitutional protection.[5] To show that their protected activity was restricted, Plaintiffs point to a single incident in which they allege the Ordinance was improperly enforced against Reilly and argue that the resulting fear of prosecution has chilled, and

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[5] The Supreme Court has consistently affirmed that such speech must be protected. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint [ ] is the essence of First Amendment expression."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (characterizing "one-on-one communication" as "the most effective, fundamental, and perhaps economical avenue of political discourse"). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *McCullen*, 573 U.S. at 489. The court affirmed these core speech protections by interpreting the Ordinance narrowly to exclude sidewalk counseling as a matter of constitutional avoidance. (*See Reilly III* at 11 n.3, 20–21; *Reilly IV* at 9–10.) The City therefore cannot restrict Plaintiffs' engagement in these activities.

continues to chill, their speech.[6] (Doc. 154 at 10–12, 18–20.)

Even assuming that Plaintiffs' free speech was restricted, however, the City is nevertheless entitled to summary judgment because the record does not support a finding that the City was the moving force of the violation. Under § 1983, a municipality is not liable under a theory of *respondeat superior* for constitutional deprivations caused by its employees. *Monell*, 436 U.S. at 691. Rather, the plaintiffs must identify a municipal policy or custom to establish that, "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Berg v. Cty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)). Municipal custom is created when officials' practices are "so permanent and well settled" that they have the "force of law." *Monell*, 436 U.S. at 691. Municipal policy exists when a " 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) (quoting *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). The identified policy need not be in writing, but it must be "intended to, and [in fact], establish fixed plans of action to be followed under similar circumstances

[6] Although Biter concedes that the Ordinance was not directly enforced against her, she alleges that it is sufficiently likely the Ordinance would be unconstitutionally applied to her, and as such, she has "voluntarily curbed her protected counseling to avoid citation" based on Reilly's July 2, 2014 encounter. (Doc. 154 at 19; Doc. 69 at 283:21–289:17, 304:22–312:7, 315:18–317:10,333:4–334:1.)

consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (plurality opinion). In essence, for a municipality to be liable, "a direct causal link between the municipal action and the deprivation of federal rights" must exist. *Bd. of Cty. Comm'rs*, 520 U.S. at 404.

***5** Here, there is no evidence in the record of any relevant written or unwritten policy, other than the Ordinance itself, which is insufficient to impose liability given its facial constitutionality. *See Brown*, 586 F.3d at 292. The same is true with respect to custom, because even when viewing the facts in a light most favorable to Plaintiffs, the evidence shows nothing more than a single ad-hoc enforcement action undertaken by an individual municipal employee who lacked policymaking authority. *See Porter v. City of Philadelphia*, 975 F.3d 374, 384–85 (3d Cir. 2020) (finding that a municipal attorney's "unendorsed actions, without more, did not become municipal policy or give rise to municipal liability under *Monell*").

Nothing in the record suggests that the City or any of its policymakers directed or encouraged officers to enforce the Ordinance as prohibiting sidewalk counseling. Not a single person was arrested or cited

for violating the Ordinance in connection with sidewalk counseling, and there is no reason to believe any City policymaker knew or should have known that less formal enforcement against sidewalk counseling occurred. (*See e.g.*, Docs. 135-28, 135-29 (police incident reports showing that officers enforced the buffer zone against protestors, recognized their rights to protest outside the zone, and advised protestors not to trespass or harass clients and staff).)[7] Police Captain Moody's unrebutted testimony demonstrates that the City lacked a coordinated response to complaints about sidewalk counseling, and that the onus of interpreting and enforcing the Ordinance fell to individual officers and their immediate supervisors. (*See* Doc. 59-1 at 39:21–40:23, 89:2–91:12 (testifying that responding officers need to absorb all of the details necessary to determine whether the Ordinance is violated, and depending on the situation's complexity and the degree of discretion required, will consult a supervisor if available).) Any misapplication of the statute was therefore the product of discrete enforcement decisions by individual municipal employees rather than a "fixed plan[ ] of action" or a customary practice for which the City can be held liable. *See Pembaur*, 475 U.S. at 480–81.

Plaintiffs' arguments to the contrary lack merit, as they rely on the testimony of City representatives interpreting the Ordinance during litigation and

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[7] The only police incident report that plausibly shows enforcement against peaceful sidewalk counseling activities is the July 2, 2014 incident involving Reilly. (Doc. 60-3).

alleged ratification by the City Solicitor.[8] The City officials' after-the-fact interpretations of the Ordinance, which were formulated in response to hypothetical enforcement scenarios and pursuant to the City's litigation strategy of defending the Ordinance's constitutionality, do not meaningfully support that a municipal policy prospectively caused an unlawful restriction of speech.[9] Nor could the City

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[8] Specifically, at the preliminary injunction hearing, City Solicitor Neil Grover testified that the Ordinance would prohibit a person from engaging clinic clients in quiet conversation within the buffer zone and that the prohibition on congregating would proscribe two people from conversing while walking side-by-side in the buffer zone. (Doc. 68 at 122:20–25; Doc. 69 at 355:1–13.) Similarly, City Police Captain Deric Moody testified that engaging in quiet conversation with a clinic client within the buffer zone would violate the Ordinance. (Doc. 150-2 at 19:16–20:23.) In appellate briefing and at oral argument, the City's counsel argued that the Ordinance would prohibit Plaintiffs from engaging in sidewalk counseling within the buffer zone, handing out leaflets discouraging people from entering the clinic, and standing or walking with clinic clients while conversing within the zone. (Doc. 134-1 at 52; Doc. 59-10 at 31:20–32:20; Doc. 134-2 at 25.) Furthermore, after a perceived slackening of Ordinance enforcement following the United States Supreme Court's *McCullen* decision finding Massachusetts's statewide clinic buffer zone to be unconstitutional, Solicitor Grover reviewed the City's Ordinance in 2016 and determined that officers "should continue to enforce it as they were" before 2015. (Doc. 68 at 100:18–101:17.) *See McCullen*, 573 U.S. at 496–97.

[9] Plaintiffs cite to *Porter v. City of Philadelphia*, 975 F.3d 374 (3d Cir. 2020) to support the contrary. However, unlike in *Porter*, where the city representatives testified that a policy existed and therefore could have prospectively caused the free speech violation, Police Chief Moody and City Solicitor Grover were asked to interpret and apply the Ordinance to the hypotheticals posed by counsel during litigation. *Porter*, 975 F.3d at 383–84. As a matter of logic, their after-the-fact testimony concerning the

Solicitor, without knowledge of improper enforcement of the Ordinance against sidewalk counseling, have ratified the practice. *See Wallace v. Powell*, No. 3:09-CV-0291, 2009 WL 6850318 (M.D. Pa. Nov. 20, 2009) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)) (ratification under *Monell* requires knowledge and approval of the subordinate's decision and the basis for it).

***6** The evidence of a single officer enforcing the Ordinance against sidewalk counseling is not sufficient to support an inference that the City caused the officer's misapplication of the Ordinance. *Cf. McTernan v. City of York, PA*, 564 F.3d 636, 658–59 (3d Cir. 2009) (finding the plaintiff's allegations that officers violated his free speech did not raise an inference that city policymakers knew about or directed the conduct); *see also Porter*, 795 F.3d at 384–85 (finding no liability under *Monell* where the state actor who violated the plaintiff's free speech was not the final policymaker and there was no evidence that policymakers were aware of his conduct). Viewing all the evidence in a light most favorable to Plaintiffs and resolving all reasonable inferences in their favor, no reasonable jury could find that the City had a policy that caused the alleged violation. Therefore, the City's motion for summary judgment will be granted.[10]

City's interpretation does not support a finding that the City had a pre-existing policy that caused the violation.

[10] Plaintiffs' failure to produce evidence sufficient to support a finding that the City is liable under *Monell* for their free speech claim is also fatal to their free assembly claim. Therefore, the court will also grant summary judgment to the City on Plaintiffs' as-applied free assembly claim.

Finally, having determined that the record evidence is insufficient to support a finding that the City is liable for the alleged restriction of Plaintiffs' free speech and assembly rights, the court concludes there is no basis for granting summary judgment in Plaintiffs' favor, and their motion will be denied.

IV. CONCLUSION

For these reasons, the court will grant Defendant's motion for summary judgment and deny Plaintiffs' motion for summary judgment. An appropriate order shall follow.

All Citations

Slip Copy, 2022 WL 906205

APPENDIX C

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

CASE NO. 1:16-cv-00510-SHR
SYLVIA H. RAMBO, DISTRICT JUDGE

COLLEEN REILLY; BECKY BITER; AND
ROSALIE GROSS, PLAINTIFFS;
v.
CITY OF HARRISBURG; HARRISBURG CITY
COUNCIL; AND ERIC PAPENFUSE, IN HIS
OFFICIAL CAPACITY AS MAYOR OF
HARRISBURG, DEFENDANTS

DEPOSITION OF: NEIL A. GROVER, ESQUIRE

TAKEN BY: PLAINTIFFS

BEFORE: DIANE F. FOLTZ, RMR NOTARY
PUBLIC

DATE: AUGUST 14, 2017, 2:28 P.M.

PLACE: LAVERY LAW, 225 MARKET STREET,
HARRISBURG, PENNSYLVANIA

Veritext Legal Solutions
Mid-Atlantic Region
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

APPEARANCES:

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FOR - DEFENDANTS

ALSO PRESENT:

COLLEEN REILLY
BECKY BITER

* * *

Q Okay. Can you take a look at Exhibit 2. This document was previously marked and identified by Captain Moody as the buffer zone ordinance, officially titled Interference with Access to Health Care Facilities.

A Uh-huh.

Q Are you familiar with the ordinance?

A I am.

Q I want to draw your attention to Section 3-371.4 Restriction. This reads no person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility.

With respect to that language, how does the City of Harrisburg interpret the word congregate? What does that mean?

A That means to stand with two or more people in front of a facility for the purpose of -- usually some shared purpose, whether it's to make a statement or to -- or whatever.

Q Is it considered congregating when a -- when a person enters the buffer zone to speak to a client or patient entering or exiting the clinic?

A I would say if it's directly to speak to a person, then that could be congregating.

Q You say that could be congregating. What would make it congregating or would prevent it from congregating?

A It there was an actual interaction between the two individuals.

Q So two individuals passing each other on the sidewalk, not congregating, is that a fair assumption?

MR. LAVERY: Object to the form of the question.

BY MR. GANNAM:

Q Not interacting with each other?

MR. LAVERY: Object. The same objection.

THE WITNESS: I would say from the city's perspective that is not congregating if two people are passing by each other.

BY MR. GANNAM:

Q But if those two persons speak to each other and interact verbally, would the city consider that congregating?

A It could be congregating.

Q When you say it could be, are there circumstances where that would not be congregating?

A If they're not stopping, if they're moving in opposite directions and they just acknowledge each other's existence, they've interacted, but they've not congregated, but these are common sense from our point of view.

Q What if they're moving in the same direction, walking alongside each other interacting but not stopping?

A Interacting but not stopping? I don't know if that would be congregating. Part of it would be depending on the direction they're moving in. You know, there are at least three directions. There's crossing the sidewalk and there's coming to and from the entrance, which are two different things.

Q Suppose it's walking along the sidewalk in one direction or the other, would that be different from walking across the sidewalk?

MR. LAVERY: Object to form.

THE WITNESS: I'm not actually sure I understood your question, so --

BY MR. GANNAM:

Q Okay. You said there are three different

directions people could be --

A At least, yeah.

Q -- be moving. Right, at least. But generally speaking if two persons are having a conversation walking side by side moving in the same direction and not stopping, would that be considered congregating?

MR. LAVERY: Object to the form of the question.

THE WITNESS: If two people were walking in the same direction and let's say they're walking parallel to the building entrance on Second Street and they're talking about, you know, that they're -- you know, good morning, good afternoon, whatever, I don't know if those people would be considered congregating by any definition. If two people were talking about anything of substance, I think the answer is they're congregating.

BY MR. GANNAM:

Q What about how does the city interpret the word patrolling? What does that mean?

A Patrolling is walking back and forth in the same area.

* * *

APPENDIX D

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

CASE NO. 1:16-cv-00510-SHR
SYLVIA H. RAMBO, DISTRICT JUDGE

COLLEEN REILLY; BECKY BITER; AND
ROSALIE GROSS, PLAINTIFFS;
V

CITY OF HARRISBURG; HARRISBURG CITY
COUNCIL; AND ERIC PAPENFUSE, IN HIS
OFFICIAL CAPACITY AS MAYOR OF
HARRISBURG, DEFENDANTS

DEPOSITION OF: DERIC E. MOODY

TAKEN BY: PLAINTIFFS

BEFORE: DIANE F. FOLTZ, RMR NOTARY
PUBLIC

DATE: AUGUST 14, 2017, 9:18 A.M.

PLACE: LAVERY LAW, 225 MARKET STREET,
HARRISBURG, PENNSYLVANIA

Veritext Legal Solutions
Mid-Atlantic Region
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FOR - DEFENDANTS

ALSO PRESENT:

COLLEEN REILLY
BECKY BITER
NEIL A. GROVER, SOLICITOR, CITY OF HARRISBURG

* * *

BY MR. GANNAM:

Q Is it your understanding that if an individual were within that 20-feet buffer zone at one of the two clinics and was merely quietly engaging in conversation with a patient entering or leaving that clinic, would that violate the ordinance?

A Within the 20 feet? I would say it would if the statute says or if the ordinance says 20 feet. If they're within that 20 feet, then yeah, that would be -- that could be considered a violation.

Q Regardless of what the person is doing within the 20 feet or --

A Again I guess at that point you would have to really look at it like you said as what the person is doing for the -- if -- the simple answer is yes, it would be a violation. If it says 20 feet, it's technically a violation….

It's hard to -- I guess we could what if this, what if that. It all kind of depends on what we're called there for. Obviously if we're called there for a violation of the zone, then that's where the violation would be. Now, how that would be handled could be something as simple as asking people to step back within the zone area that they're supposed to be in, but I guess technically any person within that could be cited for a violation of this -- of this ordinance.

Q Would that include if a person merely entered the 20-foot zone and initiated a one-on-one conversation with a person about abortion?

MR. LAVERY: Objection. Asked and answered. But go ahead. You can answer it again.

THE WITNESS: I mean, my answer would remain the same. I mean, in review of this ordinance, technically it would be -- it's a violation again.

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No.: 16-3722

COLLEEN REILLY and BECKY BITER,
Plaintiffs/Appellants,

vs.

CITY OF HARRISBURG, ET AL.,
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA THE HONORABLE SYLVIA H. RAMBO, DISTRICT JUDGE

CIVIL CASE NO.: 1:16-CV-00510

ARGUED MARCH 21, 2017

The following pages constitute an excerpt of proceedings held in the above-captioned matter before the Honorable Circuit Judges Ambro, Roth and Jordan, held at United States Court of Appeals for the Third Circuit, 601 Market St, Philadelphia, PA 19106, beginning at 3:00 p.m., when were present on behalf of the respective parties:

APPEARANCES
On behalf of Plaintiffs/Appellants:

MARY E. MCALISTER, ESQUIRE
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Lynchburg, VA 24506

MATHEW D. STAVER, ESQUIRE
HORATIO G. MIHET, ESQUIRE (Argued)
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On behalf of Defendants/Appellees:
JOSHUA M. AUTRY, ESQUIRE (Argued)
FRANK J. LAVERY, JR., ESQUIRE
Lavery Faherty Petterson
225 Market Street, Suite 304,
P.O. Box 1245
Harrisburg, PA 17108

* * *

JUDGE JORDAN: Now, your whole argument depends on the assertion that this is a content-neutral ordinance, right?

MR. AUTRY: Yes, Your Honor.

JUDGE JORDAN: Okay. So, why don't we talk for a minute about Reed v. Gilbert? Would the ordinance, as currently worded, would that apply to panhandling; somebody sitting on the curb and asking for money?

MR. AUTRY: The language is "congregate, patrol, picket, or demonstrate."

JUDGE JORDAN: Okay. So, panhandling isn't picketing or demonstrating or congregating, right?

MR. AUTRY: No, and it's probably not patrolling.

JUDGE JORDAN: Right. So, a person could panhandle, could ask for money. How about just a person soliciting business? Suppose that it were an accountant or heaven forbid a lawyer with leaflets, saying come use my services, would that be covered by the ordinance within 15 feet?

MR. AUTRY: It could potentially be demonstrating, depending on how they're doing it.

JUDGE JORDAN: How could that possibly be demonstrating? Just handing somebody a leaflet that says I'd like you to consider my business. Under what possible definition is that demonstration?

MR. AUTRY: Under that scenario, that would not be demonstrating.

JUDGE JORDAN: Okay.

JUDGE ROTH: What about --

JUDGE JORDAN: But the same person couldn't --

JUDGE ROTH: -- a labor union?

JUDGE JORDAN: -- do that right? Couldn't hand out a leaflet that said don't go in there because this is an abortion clinic, that's covered.

MR. AUTRY: I believe that would be covered, Your Honor.

JUDGE JORDAN: Okay.

JUDGE ROTH: What about a labor strike?

MR. AUTRY: That would be demonstrating and potentially picketing, depending on, if they're holding pickets.

JUDGE ROTH: So, it would be covered?

MR. AUTRY: And it could be congregating if there's --

JUDGE ROTH: Yeah.

MR. AUTRY: -- multiple --

JUDGE JORDAN: So --

JUDGE ROTH: So, it would be covered?

MR. AUTRY: Yes.

JUDGE ROTH: Yeah.

JUDGE JORDAN: -- stick with me on Reed, here, for a minute. So, if I can hand out a leaflet that says, come use the services of Ambro, Roth, and Jordan -- of course they probably don't want to be in the same firm with me, but assume they did.

JUDGE AMBRO: What's the firm about?

JUDGE JORDAN: Yeah. So, I could hand out a leaflet, that says that and describe my services, but I can't hand out a leaflet that says you shouldn't be getting an abortion. How is that not content-based?

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA HARRISBURG DIVISION

COLLEEN REILLY, ET AL

v.

CITY OF HARRISBURG, ET AL :

Case No 1:16-CV-00510
TRANSCRIPT OF PROCEEDINGS
PRELIMINARY INJUNCTION
DAY I OF II

Held before the HONORABLE SYLVIA H. RAMBO
October 31, 2017, commencing at 9:35 a.m.
Courtroom No. 3, Federal Building, Harrisburg,
Pennsylvania

APPEARANCES:
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For the Defendants

Proceedings recorded by machine shorthand; transcript produced by computer aided transcription.
Wendy C. Yinger, RMR, CRR
Official Court Reporter
wendy_yinger@pamd.uscourts.gov

* * *

Q. So is it your testimony that a person may enter the buffer zone and engage in a quiet conversation with a woman approaching the entrance to the abortion clinic?

A. No, but I do not believe that the fact that they can't walk in that area, just like they can't walk in a crosswalk to cross the street, curtails their activity.

* * *

APPENDIX G

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

COLLEEN REILLY; BECKY BITER; and ROSALIE GROSS,

Plaintiffs,

v.

CITY OF HARRISBURG; HARRISBURG CITY COUNCIL; and ERIC PAPENFUSE, in his official capacity as Mayor of Harrisburg,
Defendants.

VERIFIED COMPLAINT

Plaintiffs Colleen Reilly ("Reilly"), Becky Biter ("Biter"), and Rosalie Gross ("Gross") (collectively, "Plaintiffs"), hereby state this Complaint against Defendants City of Harrisburg, Pennsylvania ("City of Harrisburg"), Harrisburg City Council ("HCC"), and Eric Papenfuse, in his official capacity as Mayor of Harrisburg ("Papenfuse") (together, the "Harrisburg Defendants"), and allege:

PRELIMINARY STATEMENT

1. This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality,

facially and as applied, of City of Harrisburg Ordinance "Interference With Access To Health Care Facilities," Harrisburg City Code §§ 3-371 *et seq*. (hereinafter "the Ordinance"), which creates anti-speech buffer zones restricting free speech on public sidewalks, streets, and other public ways adjacent to health care facilities, including abortion clinics, throughout the City of Harrisburg. In the buffer zones established by the Ordinance, Plaintiffs and others who oppose the practice of abortion may not "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of any entrance to, exit from, or driveway of a health care facility."

2. Prior to the enactment of the Ordinance and continuing thereafter, Plaintiffs regularly engaged in peaceful pro-life sidewalk counseling through quiet one-on-one conversations with women and/or their partners, prayer, and distributing pro-life literature outside of the two abortion clinics in the City of Harrisburg. Through personal conversations and literature, Plaintiffs suggest alternatives to abortion. Plaintiffs continue to engage in their peaceful pro-life sidewalk counseling, prayer, and leafletting outside the abortion clinics in the City of Harrisburg. However, the buffer zones created by the Ordinance essentially preclude Plaintiffs from engaging in the intimate, conversational speech and leafletting with their intended audience. The Ordinance keeps their expressive activities a significant distance from the abortion clinics which substantially limits their speech and prevents their pro-life message and unamplified conversation from being effective.

3. Accordingly, the Ordinance, on its face and as applied to Plaintiffs, impermissibly restricts free speech activities on public sidewalks, streets, and other public rights of way which are regarded as traditional public fora, in which speech cannot be prohibited or restricted except in extraordinary circumstances through narrowly tailored regulations supported by compelling governmental interests. The Harrisburg Defendants have no justification for creating scores of anti-speech zones on public property across the City of Harrisburg where free speech rights are at their constitutional zenith, and ample less restrictive alternatives are readily available that do not curtail the speech of law-abiding citizens.

4. This case is directly controlled by a similar fixed buffer zone law struck down as unconstitutional by the United States Supreme Court in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). The Ordinance was enacted before the *McCullen* case was decided by the Supreme Court, and under that new binding and controlling precedent, it cannot survive legal challenge.

5. The Ordinance also cannot survive the more recent First Amendment decision from the United States Supreme Court in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), which establishes the controlling definitional framework for content based speech restrictions enacted by government.

6. Absent preliminary and permanent injunctive relief, Plaintiffs and other citizens will continue to suffer irreparable harm to their most cherished rights and liberties protected by the First and Fourteenth Amendments of the United States Constitution. In

comparison, the Harrisburg Defendants will suffer no injury from injunctive relief because there is no government interest in the enforcement of unconstitutional speech restrictions, especially content based restraints that target specific forms of speech and particular messages, as the Ordinance does on its face and as applied. Preliminary injunctive relief will ensure that robust speech and other constitutionally-protected expressive activities are preserved in the City of Harrisburg.

JURISDICTION AND VENUE

7. This civil rights action raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

8. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has authority to award the requested damages pursuant to 28 U.S.C. § 1343; the requested declaratory relief pursuant to 28 U.S.C. §§2201-02; the requested injunctive relief pursuant to 28 U.S.C. § 1343 and Fed. R. Civ. P. 65; and costs and attorneys' fees under 42 U.S.C. §1988.

9. Venue is proper in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) because all of the parties reside in this district and all of the acts described in the Complaint occurred in this district.

IDENTIFICATION OF PARTIES

10. Plaintiff Reilly is a citizen of the United States and a resident of Lebanon, Pennsylvania.

11. Plaintiff Biter is a citizen of the United States and a resident of Fayetteville, Pennsylvania.

12. Plaintiff Gross is a citizen of the United States and a resident of Lancaster, Pennsylvania.

13. Defendant City of Harrisburg is a municipal corporation existing under the laws and the Constitution of the Commonwealth of Pennsylvania and is a corporate entity capable of suing and being sued.

14. Defendant City of Harrisburg is responsible for enforcing the Ordinance against Plaintiffs and others within the corporate limits of the City of Harrisburg.

15. Defendant HCC is vested with the legislative power of the City of Harrisburg, and it enacted the challenged Ordinance on November 13, 2012.

16. Defendant Papenfuse is the Mayor of the City of Harrisburg and is sued in his official capacity as Mayor of the City of Harrisburg. In his official capacity as Mayor of the City of Harrisburg, Defendant Papenfuse is charged with executing and enforcing the ordinances of the City of Harrisburg, including the challenged Ordinance.

FACTUAL ALLEGATIONS

A. The Ordinance creates buffer zones restricting free speech in the City of Harrisburg.

17. On November 13, 2012, the HCC, as the governmental entity vested with the legislative power of the City of Harrisburg, adopted Ordinance No. 12-

2012 supplementing the Harrisburg Code of Ordinances, Title 3: Public Safety, Subtitle: General Offenses, Part 3: General Offenses, by adding Chapter 3-371, entitled "Interference With Access To Health Care Facilities." §§ 3-371 *et seq*., *available at* http://ecode360.com/13739606 (last accessed March 23, 2016) (a copy of which is attached hereto as Exhibit "1"). The Ordinance became effective on or about November 23, 2012.

18. The Ordinance was summarily adopted by the HCC at the behest of Planned Parenthood, an abortion provider who operates an abortion clinic within the City of Harrisburg, to categorically exclude anti-abortion speech around the abortion clinics located in the City of Harrisburg.

19. The Ordinance includes the following restriction:

> No person or persons shall knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility.

§ 3-371.4.A.

20. The Ordinance defines "Health care facility" as "any hospital, medical office, physical or psychological therapy facility or clinic licensed by the Commonwealth of Pennsylvania Department of Health."

21. According to the Pennsylvania Department of Health, there are at least seventy-eight (78) licensed health care facilities in the City of Harrisburg. *See* List of Health Care Facilities, generated via search on

Pennsylvania Department of Health website selecting "All" (from "Type of Facility" drop down list of options) and "Harrisburg" (from "City" drop down list of options), *available at* http://sais.health.pa.gov/commonpoc/content/publiccommonpoc/normalSearch.asp (last accessed March 23, 2016) (attached hereto as Exhibit "2").

22. The Ordinance does not define "congregate," "patrol," "picket," or "demonstrate."

23. The Ordinance purports to create "buffer zones" around any portion of every entrance, exit, and driveway of every building housing a "health care facility" in the City of Harrisburg.

24. When a building that houses a health care facility has multiple entrances, exits, or driveways, the Ordinance creates multiple buffer zones, one for each entrance, exit, or driveway.

25. Thus, the Ordinance creates hundreds of anti-speech zones around the more than 75 licensed health care facilities throughout the City of Harrisburg.

26. In enacting the Ordinance, the HCC stated its "Findings and Purpose" in § 3-371.2, as follows:

> A. The Council of the City of Harrisburg recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is important for residents and visitors to the City. City Council further recognizes that the exercise of a person's right to protest or counsel against certain medical procedures is a First Amendment activity that must be balanced against another person's right

> to obtain medical counseling and treatment in an unobstructed manner.
>
> B. The City Council is aware of several instances in which police departments across the commonwealth, including the City of Harrisburg Bureau of Police, have been called upon to mediate disputes between those seeking medical counseling and treatment and those who would counsel against their actions in an effort to prevent violent confrontations which would lead to criminal charges.
>
> C. In order to promote the health and welfare of City residents and visitors to the City's health care facilities, as well as the health and welfare of those who may wish to voice their constitutionally protected speech outside of such health care facilities, the City finds that the limited buffer zones outside of health care facilities established by this chapter will ensure that patients have unimpeded access to medical services while protecting the First Amendment rights of demonstrators to communicate their message.

27. The Ordinance does not properly accommodate Plaintiffs' and others' First Amendment rights because the Ordinance has completely abolished free speech in traditional public fora used for the expression of ideas, debate, and protest—specifically,

public sidewalks and streets adjacent to health care facilities, including abortion clinics, throughout the City of Harrisburg.

28. The Ordinance prohibits Plaintiffs and others from effectively reaching their intended audience by prohibiting speech within 20 feet of any portion of every entrance, exit, and driveway to a health care facility, including abortion clinics, in the City of Harrisburg. The Ordinance has made the public sidewalks immediately adjacent to the abortion clinics in Harrisburg inaccessible for pro-life sidewalk counselors and others.

29. In effect, the anti-speech zones created by the Ordinance keep pro-life speech and messages more than 50 feet away in nearly every direction from the entrance of the two abortion clinics in the City of Harrisburg, and in some instances, more than 70 feet away from the abortion clinics' entrances.

30. No alternatives short of instituting the anti-speech buffer zones were considered by the HCC before adopting the Ordinance, at the request of Planned Parenthood.

31. The Ordinance provides no specific instances of violent conduct outside of health care facilities or of patients being hindered, prevented, obstructed, blocked or restricted from receiving health care services in the City of Harrisburg.

32. Instead, the Ordinance vaguely references that "police departments across the commonwealth, including the City of Harrisburg Bureau of Police, have been called upon to mediate disputes between those seeking medical counseling and treatment and those who would counsel against their actions in an

effort to prevent violent confrontations which would lead to criminal charges." § 3-371.2.B.

33. The Ordinance creates an exception to the anti-speech zones for "police and public safety officers, fire and rescue personnel, or other emergency workers in the course of their official business or to authorized security personnel, employees or agents of the hospital, medical office or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." § 3-371.4.A.

34. Thus, the exemption for employees extends to abortion clinic escorts or employees who escort, direct, or encourage patients to enter the abortion clinic, and the exemption immunizes any pro-abortion speech those persons make inside the restricted zones to the patients or to sidewalk counselors outside the abortion clinic.

35. The Ordinance purports to be content neutral by stating that "[t]he provisions of this section shall apply to all persons equally regardless of the intent of their conduct or the content of their speech." § 3-371.4.B.

36. In fact, however, as a result of the exception, employees and agents of health care facilities, who would be supportive of the abortions occurring at the facilities, are permitted to "congregate, patrol, picket and demonstrate" within the buffer zones and therein engage in expressive activity that supports the activities of the health care facility, including abortions at an abortion clinic, while Plaintiffs and others are prohibited from engaging in expressive activity, including, *inter alia*, speech that is critical of the procedures being undertaken at the abortion clinics.

37. None of the zones created by the Ordinance are designated by physical markings of any kind. Thus, no person, including law enforcement officials, can readily determine how far the zones extend. As a result, dependent upon how the anti-speech zones are measured, the reach of the buffer zone extends into the street.

38. Upon information and belief, the Harrisburg Defendants have selectively enforced the Ordinance by restricting speech only in zones surrounding abortion clinics but have not restricted speech nor attempted to restrict speech outside of other health care facilities that are also covered by the Ordinance.

39. The Ordinance penalizes those persons who knowingly congregate, petition, picket or demonstrate within 20 feet of any portion of an entrance, exit or driveway of any health care facility in the City of Harrisburg "by a fine of at least $50 for the first offense; a fine of at least $150 for a second offense within five years; and a fine of $300 for a third offense within five years. For fourth and subsequent offenses within five years the fine shall not be less than $300 and/or imprisonment for not more than 30 days." § 3-371.99.

B. Plaintiffs engage in free speech that is now restricted by the buffer zones created by the Ordinance.

40. Abortion is practiced in the City of Harrisburg at the Harrisburg Medical Center operated by Planned Parenthood at 1514 North Second Street, Harrisburg, Pennsylvania 17102 (hereinafter, the "Planned Parenthood Clinic"), and the Hillcrest

Women's Health Center at 2709 North Front Street, Harrisburg, Pennsylvania 17110 (hereinafter, the "Hillcrest Clinic").

41. The Planned Parenthood Clinic and Hillcrest Clinic each constitute a "health care facility" within the definition of the Ordinance as a medical facility or clinic licensed by the Commonwealth of Pennsylvania Department of Health. *See also* Exhibit 2 (identifying Hillcrest and Planned Parenthood Clinics as licensed abortion facilities in the City of Harrisburg).

42. The Planned Parenthood Clinic is a one-story building which sits right next to a main roadway. The clinic's building is similar to a storefront, with the entrance right on the public sidewalk. Facing the exterior of the building, the clinic's driveway is directly to the right of the building and leads to a parking lot in the rear of the building. Running parallel to the clinic's front entrance are a public sidewalk and the roadway. True and accurate pictures of the exterior of the Planned Parenthood Clinic are collectively attached to this Complaint as Exhibit "3."

43. The Hillcrest Clinic is a two-story building that sits on North Front Street, a three-lane thoroughfare. The building is set back on the property away from the public sidewalk. Facing the exterior of the building, the clinic's driveway is directly to the left of the building and leads to a parking lot in the rear of the building. Running parallel to the property on which the Hillcrest Clinic sits are a public sidewalk and roadway. True and accurate pictures of the exterior of the Hillcrest Clinic are collectively attached to this Complaint as Exhibit "4."

44. No physical markings demarcate the anti-speech buffer zones surrounding the entrances, exits, and driveways of the Planned Parenthood and Hillcrest Clinics.

45. At the Planned Parenthood Clinic, the buffer zones created by the Ordinance include the public sidewalk adjacent to the clinic. In effect, the buffer zones prohibit speech on a stretch of public sidewalk immediately adjacent to the clinic that extends greater than 70 feet.

46. The buffer zones established by the Ordinance prohibit sidewalk counselors from standing on any public sidewalk space in front of the Planned Parenthood Clinic, which prevents any sidewalk counselors from peacefully engaging in quiet, personal conversation with any clinic patients who arrive at the abortion clinic by vehicle and get dropped off at the curb and sidewalk immediately in front of the clinic, including those patients who wish to receive information from sidewalk counselors.

47. In front of the Planned Parenthood Clinic, the unmarked boundary lines for the multiple buffer zones created by the Ordinance extend into the street, dependent upon how the buffer zone is measured from the entrance. The street is a patently unsafe place to stand, and thus, sidewalk counselors must stand elsewhere to protect their own safety, which would not be necessary if the anti-speech zone did not exist.

48. On the side of the street where the Planned Parenthood Clinic is situated, the unmarked boundary lines for the buffer zones created by the Ordinance are directly in front of someone's home and more than 50 feet from the clinic's entrance in one direction, and, in another direction, directly in front

of another business and beyond a collection of trees and bushes that almost totally obstruct sidewalk counselors' view of the abortion clinic's entrance and simultaneously block them from view by anyone entering the clinic. Neither of these locations is an acceptable alternative position for sidewalk counselors to stand and engage in quiet, personal conversations and peaceful leafletting.

49. The buffer zone created by the Ordinance surrounding the driveway at the Planned Parenthood Clinic absolutely prevents sidewalk counselors from standing close enough to the driveway to hand out life-affirming literature to individuals arriving at the clinic by vehicle.

50. The buffer zones created by the Ordinance place sidewalk counselors far away from persons entering the Planned Parenthood Clinic and prohibit them from speaking in a conversational tone with persons entering the clinic, or distributing pro-life literature, or even distinguishing between abortion clinic visitors and pedestrians. These anti-speech zones essentially prevent sidewalk counselors from even starting a conversation with persons entering the Planned Parenthood Clinic without raising their voice.

51. At the Hillcrest Clinic, the buffer zones created by the Ordinance include the public sidewalk adjacent to property on which the clinic sits. In effect, the buffer zones prohibit speech on a stretch of public sidewalk adjacent to the property on which the clinic sits that extends greater than 50 feet.

52. The buffer zones established by the Ordinance prohibit sidewalk counselors from standing on a significant stretch of public sidewalk space in front of

the Hillcrest Clinic, which prevents any sidewalk counselors from peacefully engaging in quiet, personal conversation with any clinic patients who arrive at the abortion clinic by vehicle and get dropped off at the curb and sidewalk immediately in front of the clinic, including those patients who wish to receive information from sidewalk counselors.

53. In front of the Hillcrest Clinic, the unmarked boundary lines for the buffer zones created by the Ordinance force counselors to stand on public sidewalk space in front of another property or at the very edge of the abortion clinic's property. Neither of these locations is an acceptable alternative position for sidewalk counselors to stand and engage in quiet, personal conversations and peaceful leafletting.

54. The buffer zone created by the Ordinance surrounding the driveway at the Hillcrest Clinic prevents sidewalk counselors from standing close enough to the driveway to hand out pro-life literature to individuals arriving at the clinic by vehicle.

55. The buffer zones created by the Ordinance place sidewalk counselors far away from persons entering the Hillcrest Clinic and prohibits them from speaking in a conversational tone with persons entering the clinic or distributing life-affirming literature, or even distinguishing between abortion clinic visitors and pedestrians. These anti-speech zones essentially prevent sidewalk counselors from even starting a conversation with persons entering the Hillcrest Clinic without raising their voice.

56. The effect of the multiple buffer zones at the Hillcrest Clinic keep sidewalk counselors more than 70 feet from the entrance to the clinic, no matter where they stand. None of the locations is an

acceptable position for sidewalk counselors to stand and engage in quiet, personal conversations and peaceful leafletting.

57. The Planned Parenthood and Hillcrest Clinics practice abortion and perform abortion procedures on a weekly basis. The Planned Parenthood Clinic performs chemical abortions, and the Hillcrest Clinic performs surgical abortions.

58. Plaintiffs are Christian sidewalk counselors and pro-life advocates who are opposed to the practice of abortion on the basis of their sincerely held religious beliefs that it is the deliberate and intentional destruction of innocent human life.

59. Plaintiffs' religious beliefs compel them to counsel women about the true nature of abortion, to offer them alternatives to killing their unborn children, and to provide reasons for choosing life. Plaintiffs' religious beliefs also compel them to counsel women about the dangers to their health, safety, and well-being when they undergo an abortion, and other sociological dangers as well.

60. Plaintiffs, together with several others, have regularly maintained a presence on the public sidewalks and other public ways adjoining the Planned Parenthood and Hillcrest Clinics (in some instances for many years) in order to peaceably express their heartfelt message that abortion is the killing of a human child, to offer alternatives to those seeking abortions, and to pray both for, and with, the expectant mothers and for their unborn children.

61. Plaintiffs have regularly engaged in free speech on the public sidewalks and walkways outside of the Planned Parenthood and Hillcrest Clinics for years and prior to adoption of the Ordinance did not

observe any conduct which created any confrontation or impeded patients' access to the abortion clinics.

62. Through sidewalk counseling, Plaintiffs seek to have quiet and personal one-on-one conversations with, and to offer assistance and information to, women considering abortion so that they can make a more informed decision, in hopes that the expecting mothers (or couples) will change their minds and keep their babies.

63. Plaintiffs' assistance also includes providing women (or couples) with pamphlets describing local pregnancy resources, such as phone numbers of various abortion-alternative providers, and health information, such as the negative effects of an abortion and pictures of fetal development. Plaintiffs also pray for, and peacefully express a message of compassionate and caring support to, those entering and exiting the clinic.

64. Plaintiffs do not desire to engage in loud confrontations or any kind of harassment. Plaintiffs believe the most effective way of connecting with women and couples facing unplanned pregnancies and/or considering abortions is to engage in peaceful one-on-one conversations in a quiet tone of voice with a friendly demeanor, and to provide factual information in leaflets and handbills.

65. Plaintiffs' experience also demonstrates that the most effective locations from which to engage in their peaceful, pro-life sidewalk counseling, prayer, and leafletting is on the public sidewalks immediately outside and adjacent to the abortion clinics, and near the driveways. These are the exact areas of public space where Plaintiffs and other sidewalk counselors now cannot stand due to the Ordinance.

66. Plaintiffs have never blocked or impeded any pedestrian, clinic patient, clinic employee or anyone else during their sidewalk counseling.

67. Before the Ordinance was enacted, Plaintiffs Reilly and Gross would interact with abortion clinic visitors in a more meaningful way inside the public areas now prohibited, because they had the opportunity to speak with them face-to-face. Those public areas and walkways were not off limits for Plaintiffs and other sidewalk counselors.

68. Plaintiffs are aware of multiple persons who have changed their minds and decided against having an abortion after personally counseling them and/or providing them with pro-life literature. As such, in multiple instances, their speech within the public areas they can no longer enter was, literally, the difference between life and death for several unborn children.

69. Plaintiff Reilly is a regular sidewalk counselor outside the Hillcrest Clinic, and has been for more than ten years. She has also occasionally been a pro-life counselor at the Planned Parenthood Clinic. She primarily counsels on her days off from work in the public school system, during the summer months, and during the annual "40 Days for Life" campaigns.

70. Plaintiff Reilly has no criminal history, and has never been subject to any injunctions in connection with her sidewalk counseling outside the Harrisburg abortion clinics.

71. Prior to the enactment of the Ordinance, Reilly would generally stand on the public sidewalk next to the driveway entrance to the Hillcrest Clinic to distribute literature and speak to the people entering the clinic on foot or in cars moving down the driveway.

She was often able to give out three (3) to seven (7) pieces of literature per day in that manner, and have multiple personal conversations with individuals entering the Hillcrest Clinic each day she counseled.

72. After the enactment of the Ordinance, Reilly was forced to move outside the public areas where she normally stood, and more than 70 feet from the entrance to the Hillcrest Clinic and 20 feet from the driveway, which has significantly hindered and impeded her ability to counsel women seeking abortions and distribute pro-life literature. The distance makes it impossible for Reilly to hand literature to cars entering the driveway, and hinders her ability to engage in one-on-one personal conversations, even with those who want to receive her information and counseling. Moreover, Reilly cannot reach persons entering the driveway on foot without raising her voice, which, in her experience, may alarm the women and make them less receptive to her message.

73. As a result of the Ordinance, on the days she counsels at the Hillcrest Clinic, Reilly now has less than half of the number of personal conversations she used to have, and distributes less than half of the pieces of literature that she used to distribute before the enactment of the Ordinance. There are now days when she has no conversations and distributes no literature.

74. Plaintiff Biter is a regular sidewalk counselor outside the Hillcrest and Planned Parenthood Clinics. She has counseled approximately three days per week outside the Hillcrest Clinic for the last year, and approximately one day per week outside the Planned Parenthood Clinic.

75. Plaintiff Biter has no criminal history, and has never been subject to any injunctions in connection with her sidewalk counseling outside the Hillcrest Clinic.

76. Approximately twenty-five years ago, Biter had two abortions and, for many years thereafter, suffered utter grief, anguish and guilt until she found healing in the love, mercy, and forgiveness of God. She now oversees a pro-life religious ministry in Harrisburg known as Undefeated Courage, from which she provides pro-life counseling to women considering an abortion and pro-life counseling to women who have experienced an abortion, as she did. In her counseling outside the Harrisburg abortion clinics, Biter desires to share her personal experience with abortion in a one-on-one setting and also provide a plethora of pro-life literature to women considering abortions that explains the negative and detrimental health effects resulting from abortions.

77. Because of the nature of Biter's counseling, the Ordinance prohibits her from being close enough to women who are entering the Harrisburg abortion clinics to share her personal testimony. The anti-speech zones around the entrances, exits, and driveways of the Harrisburg abortion clinics created by the Ordinance prevents her from appropriately sharing her message of love, mercy, and forgiveness with those who are entering or exiting the abortion clinics. Without the Ordinance, she would be able to share her loving message and pro-life views motivated by her sincerely held religious beliefs with many more individuals who are entering and exiting the Harrisburg abortion clinics.

78. Plaintiff Gross is a regular sidewalk counselor outside the Planned Parenthood Clinic, and has been since approximately July 2012. She primarily counsels on the days when the clinic performs its weekly abortions.

79. Plaintiff Gross has no criminal history, and has never been subject to injunctions in connection with her sidewalk counseling outside the Planned Parenthood Clinic.

80. Prior to the enactment of the Ordinance, Gross' routine when counseling was to stand still on the public sidewalk adjacent to the front of the entrance to Planned Parenthood Clinic, and try to speak with the women and couples and offer them literature as they walked into the building.

81. Before the Ordinance took effect, Gross could speak to the abortion clinic visitors from a close conversational distance and volume. Gross could reach out to hand them literature when they walked by her. As many as eight out of ten women would accept pro-life literature, and, on average, she would usually have at least one or two personal conversations with clinic visitors she counseled at the Planned Parenthood Clinic.

82. Since the Ordinance took effect, Gross is forced to stand much farther away from the entrance to the Planned Parenthood Clinic and, as a result, abortion clinic visitors must come all the way to her in the unrestricted area to take her pro-life literature and to engage in a conversation. In her experience, unless her proffer of literature is placed near their hands, most passersby will not make the effort to take it.

83. Since the Ordinance has forced Gross to stand far from the clinic's entrance, very few woman have

ever walked all the way over to her to take literature or to speak with her. At most, only one out of ten women will now take her literature, and she has significantly fewer conversations because she is now forced outside the normal pathway of the abortion clinic visitors, nearly 50 feet from the entrance. There are now days when she has no conversations and distributes no literature. She must raise her voice in order for visitors to hear her, but she is afraid that doing so may alarm the women or make them feel uncomfortable.

84. The enactment of the Ordinance has made a big difference in Gross' ability to engage in personal conversations and leafletting, and has significantly hampered her ability to share her message and handout out literature to women who are interested in knowing all of their options and the health risks involved.

85. Abortion clinic employees or agents, standing inside the restricted zones, regularly threaten to call the Harrisburg police if Plaintiffs or other sidewalk counselors physically enter the unmarked restricted zones created by the Ordinance.

86. On occasion, Harrisburg police officers have come to the abortion clinics while Plaintiffs engaged in their peaceful pro-life sidewalk counseling, prayer, and leafletting. Upon information and belief, the Harrisburg police officers appeared at the abortion clinics based upon phone calls made by abortion clinic employees or agents who disagree with Plaintiffs' pro-life messages and viewpoints and are trying to chill Plaintiffs' speech and expressive activity.

87. The Harrisburg police officers who appeared at the abortion clinics while Plaintiffs were present have

never issued a citation to any of Plaintiffs, or any other sidewalk counselors who were also present at the same time, based upon the Ordinance. Each time a Harrisburg police officer has appeared, Plaintiffs, or any other sidewalk counselors who were also present at the same time, have been found to be in compliance with the Ordinance.

88. However, the presence of these Harrisburg police officers – either from responding to phone calls by abortion clinic employees or agents, or on their drive-by patrols past the abortion clinics – creates a reasonable belief in Plaintiffs that the Ordinance will be enforced against them if they engage in their peaceful pro-life sidewalk counseling, prayer, and leafletting inside the unmarked buffer zone established by the Ordinance.

89. On one occasion where the police appeared, a Harrisburg police officer told Plaintiff Reilly that there was a 25 to 30-foot buffer zone around the Planned Parenthood Clinic, and that the sidewalk adjacent to the clinic is not considered a public place except for the purpose of passing through the area. Due to this show of force, Plaintiff Reilly moved outside the area indicated by the officer.

90. On another occasion where the police appeared, a Harrisburg police officer angrily demanded that Plaintiff Gross give her name and home address, even though she was following the law. Plaintiff Gross gave the officer the information to avoid unnecessary confrontation.

91. On several occasions, individuals have threatened to call the police on Plaintiff Gross, even though she was following the Ordinance. These threats were always unsettling to her because the

Harrisburg police might show up at any time and confront her because persons in Harrisburg's abortion clinics did not like her pro-life speech.

92. Plaintiffs seek to refrain from entering within the prohibited zones out of fear that they would be arrested, fined and incarcerated for engaging in their pro-life and peaceful sidewalk counseling inside the zones.

93. The zones created by the Ordinance severely restrict Plaintiffs' ability to engage in sidewalk counseling, prayer, leafleting, and other expressive activities in such a manner as to effectively censor their pro-life message and prevent Plaintiffs from sharing their message with women who are entering the abortion clinics in the City of Harrisburg.

94. The Ordinance has cut off Plaintiffs' and other sidewalk counselors' abilities to communicate with their intended audience and has greatly reduced their meaningful opportunities to speak with women seeking abortions.

95. Plaintiffs consider it essential to their message to engage in sidewalk counseling with women, which requires engaging in close, calm, personal conversations with women entering the Planned Parenthood and Hillcrest Clinics. Their message of care, support and hope cannot be effectively communicated by raising their voice and yelling across a street, holding signs or using sound amplification equipment.

96. The Ordinance on its face and as applied forecloses Plaintiffs and others from reaching their intended audience of both women seeking abortions and the adults who accompany them into the clinic by completely prohibiting Plaintiffs' speech within 20

feet from any portion of every entrance to, exit from, and driveway of every health care facility, including the abortion clinics, in the City of Harrisburg.

97. The anti-speech zones created by the Ordinance make it all but impossible to initiate close, personal conversations or to pray with people visiting the abortion clinics, in particular, women seeking abortions. The Ordinance has caused these intimate conversations to be far less frequent and, as a result, the pro-life message of Plaintiffs substantially less successful.

98. The anti-speech zones created by the Ordinance make it substantially more difficult, if not impossible, to distribute literature to patients.

99. Plaintiffs' sidewalk counseling and leafletting approach can only be communicated through close, caring, and personal conversations.

100. The buffer zones created by the Ordinance make it impossible for Plaintiffs and others to distinguish between patients and pedestrians traveling near or to the health care facilities.

101. Plaintiffs have continued, and will continue, to go to the abortion clinics to counsel women seeking abortion and distribute pro-life literature.

102. Plaintiffs desire to engage in peaceful sidewalk counseling, prayer, and leafletting in the public areas within the buffer zones established by the Ordinance but fear legal consequences under the Ordinance for doing so, including fines, arrest, prosecution, and incarceration.

103. The penalties under the Ordinance substantially burden Plaintiffs' speech and religious exercise.

104. The anti-speech zones created by the Ordinance restrict free speech and leafletting on public sidewalks, streets, and other public ways outside an untold number of buildings with dentist offices, eye doctors, chiropractors, and other health services throughout the City of Harrisburg.

105. The anti-speech zones created by the Ordinance restrict the freedom of speech of many other citizens besides Plaintiffs.

106. The Ordinance chills the speech of Plaintiffs and others by threatening penalties and jail time for violations of the Ordinance.

107. All of the acts of the Harrisburg Defendants, their officers, agents, servants, and employees, as alleged herein, were conducted under color and pretense of the statutes, ordinances, regulations, policies, practices, customs, and usages of the City of Harrisburg.

108. The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury.

109. The public sidewalks and streets are traditional public fora for purposes of speech and other expressive activities protected by the First and Fourteenth Amendments to the United States Constitution.

110. The right to engage in peaceful expressive activity, assembly, and association in quintessential public fora is guaranteed by the Free Speech and Assembly Clauses of the First Amendment to the United States Constitution.

111. The right to peacefully distribute literature in quintessential public fora is guaranteed by the Free Speech and Free Press Clauses of the First Amendment to the United States Constitution.

112. The right to hold sincere religious beliefs on abortion and thereby to be compelled to communicate views on abortion to others in a caring, conversational and compassionate manner, and to pray with and share the good news of Jesus Christ with those who are going through crises, including unplanned pregnancies, is religious exercise protected by the Free Speech and Free Exercise Clauses of the First Amendment to the United States Constitution.

113. The First Amendment protects the right of every citizen to reach the minds of willing listeners, and to do so there must be an opportunity to win their attention.

114. Plaintiffs' expressive activities are constitutionally protected efforts to inform the citizenry regarding political, moral, and religious issues.

115. There is no right to be free of unwelcome speech on the public sidewalks, streets, and other public ways while seeking entrance to or exit from abortion clinics.

116. The fact that certain messages may be offensive to their recipients does not deprive them of constitutional protection.

117. The right to receive information is guaranteed by the First and Fourteenth Amendments to the United States Constitution.

118. The Ordinance infringes the rights of willing recipients to receive literature and oral

communications and therefore violates the First and Fourteenth Amendments to the United States Constitution.

119. The Ordinance chills and deters fundamental constitutional rights of Plaintiffs and third parties.

120. Plaintiffs have suffered, are suffering, and, absent injunctive relief, will continue to suffer irreparable injury to their constitutional rights from the Harrisburg Defendants' past actions and the threat of future application of the Ordinance to Plaintiffs.

121. Plaintiffs have no adequate remedy at law to correct the continuing deprivations of their most cherished constitutional liberties resulting from the existence, enforcement, and threat of enforcement of the Ordinance.

COUNT I — VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH UNDER THE UNITED STATES CONSTITUTION

122. Plaintiffs reallege all matters set forth in paragraphs 1-121 and incorporate them herein as if set forth in full.

123. Public sidewalks and streets are quintessential public fora for speech.

124. The Harrisburg Defendants' ability to restrict speech in public fora is extremely limited.

125. The Ordinance is a content based restriction on speech.

126. On its face, the Ordinance unconstitutionally defines regulated speech by

particular subject matter, and by its function or purpose.

127. As a content based speech restriction, the Ordinance does not serve a compelling state interest and is not the least restrictive means of achieving the Harrisburg Defendants' asserted interest.

128. The Ordinance creates an unconstitutional content and viewpoint based restriction on speech in that it was enacted and is applied so as to restrict pro-life speech and pro-life messages in traditional public fora while permitting speech supportive of abortion and critical of the pro-life message being communicated by Plaintiffs, and speakers not disfavored by the City of Harrisburg.

129. The Ordinance is also an unconstitutional content and viewpoint based restriction on speech because its stated findings and purpose establish a clear intent to restrict speech expressing views that do not support abortions.

130. The Ordinance is also an unconstitutional content and viewpoint based restriction on speech because it exempts activities, including the speech, of employees and agents of health care facilities who are assisting patients in the zones where speech is otherwise prohibited.

131. The Ordinance is also an unconstitutional content based restriction because the content of a person's speech must be examined in order to determine if it is prohibited.

132. The Ordinance burdens substantially more speech than is necessary to achieve any substantial and legitimate governmental interest.

133. The Ordinance is not a valid or reasonable time, place and manner regulation of free speech.

134. The Ordinance is not narrowly tailored.

135. The Ordinance does not serve a compelling, substantial, significant, or even legitimate or rational government interest which justifies the Ordinance's restrictions on speech in traditional public fora.

136. The Ordinance does not leave open ample alternative channels of communication for Plaintiffs to engage in peaceful sidewalk counseling, leafletting and other expressive activities.

137. There exist numerous alternative remedial measures, less restrictive of speech than the Ordinance, which the Harrisburg Defendants could have taken but did not attempt to take, and can still take, in order to protect their stated governmental interests.

138. The Ordinance, on its face and as applied, imposes an unconstitutional restriction on Plaintiffs' constitutionally protected free speech in traditional public fora, as secured by the First and Fourteenth Amendments to the United States Constitution.

139. The Ordinance is overbroad on its face and as applied because it prohibits speech and expressive activities of Plaintiffs and third parties not before the Court in the public areas restricted by the Ordinance.

140. The Ordinance is overbroad on its face and as applied because it prohibits speech and expressive activities at any "health care facility," of

which there are more than 75 such licensed facilities in the City of Harrisburg.

141. The Ordinance is overbroad on its face and as applied because it causes Plaintiffs and third parties not before the Court to refrain from constitutionally protected speech or expression.

142. The Ordinance is overbroad on its face and as applied because it sweeps within its reach a substantial amount of constitutionally protected speech by prohibiting an individual from congregating, patrolling, picketing, or demonstrating on a public sidewalk, street, or other public way within 20-feet of any portion of every entrance, exit and driveway of every building housing a health care facility in the City of Harrisburg.

143. The Ordinance is also overbroad on its face because it does not define the forms of speech that it purports to prohibit within the restricted areas and therefore vests unbridled discretion in government officials and law enforcement authorities tasked with enforcing the Ordinance, to determine what speech is restricted by the Ordinance and what expressive activity is prohibited.

144. The Ordinance is also overbroad on its face and as applied because it prohibits expressive activities in traditional public fora surrounding businesses and other establishments that are part of multi-use buildings which house health care facilities.

145. The Ordinance, both on its face and as applied, is impermissibly vague.

146. The Ordinance is unconstitutionally vague because it does not adequately advise, notify, or inform persons subject to prosecution under the Ordinance of its requirements.

147. The Ordinance is unconstitutionally vague because it lacks the clarity required of restrictions on protected speech and it fails to give fair notice to citizens on what it prohibits.

148. The Ordinance is unconstitutionally vague because it lacks any standards or criteria to impose speech zones under the Ordinance.

149. The Ordinance is unconstitutionally vague because it does not define "congregate," "patrol," "picket," or "demonstrate."

150. The Ordinance is unconstitutionally vague because it does not provide any minimal standards or criteria to guide those charged with enforcing it (*i.e.*, government officials and law enforcement) and thus gives them unbridled discretion to determine what speech activities are, and are not, permissible within the zones created by the Ordinance.

151. As construed and interpreted by the Harrisburg Defendants, the Ordinance leaves Plaintiffs and third parties not before the Court seeking to exercise their First Amendment rights to guess at its meaning, leaves police officers to differ as to its application, confers unfettered discretion upon its enforcers, and necessarily entrusts lawmaking to the moment-to-moment judgment of the police officers on their beat.

152. The Ordinance authorizes and encourages arbitrary and discriminatory enforcement, without establishing standards to guard against wrongful suppression of First Amendment rights.

153. The Ordinance is also discriminatory and an unconstitutional content and viewpoint based restriction on its face and as applied, because

employees and agents of health care facilities who engage in pro-abortion speech are permitted to speak within the buffer zones, but Plaintiffs and other third parties not before the Court are prohibited from engaging in their speech and pro-life messages in the same zones.

154. The Ordinance is also discriminatory and an unconstitutional content and viewpoint based restriction as applied, because it is selectively enforced only at the abortion clinics located in the City of Harrisburg, but not at other health care facilities in the City of Harrisburg.

155. The Ordinance is also discriminatory and an unconstitutional content and viewpoint based restriction because the Harrisburg Defendants prohibit Plaintiffs from engaging in any pro-life speech within the 20-foot buffer zones around every entrance, exit, and driveway to abortion clinics, or even from being within that zone at all, while at the same time permitting abortion clinic employees and escorts to congregate, patrol, picket and demonstrate within that zone and to engage in pro-abortion education, counseling, and demonstrating while there.

156. The Ordinance creates an impermissible prior restraint on constitutionally protected speech because it restricts speech in advance of expression in the public sidewalks and streets outside health care facilities, and other businesses and establishments, but provides no criteria to guide decision-makers in determining what speech is permissible.

157. The Ordinance imposes an impermissible prior restraint on the distribution of printed expression that is unconstitutional on its face and as applied because it contains no guidelines or

criteria to guide decision-makers on what literature may permissibly be distributed.

158. The Ordinance forecloses Plaintiffs and third parties from engaging in any First Amendment activities within the zone around the abortion clinics.

159. The Ordinance forecloses Plaintiffs' and third parties' ability to orally communicate in a normal conversational tone and from a normal conversation distance with both willing and unwilling listeners located within the zone around the abortion clinics.

160. The Ordinance forecloses Plaintiffs and third parties from standing within the zone near the path of oncoming pedestrians and other individuals and proffering their material.

161. The Ordinance effectively forecloses Plaintiffs' and third parties' ability to distribute literature to both willing and unwilling listeners located within the zone around the abortion clinics.

162. As a direct and proximate result of the Harrisburg Defendants' actions, policies, practices, and customs as alleged herein, Plaintiffs are chilled and deprived of their rights to free speech.

163. Plaintiffs have suffered, are suffering, and will continue to suffer irreparable harm to their First Amendment rights as a direct result of the Harrisburg Defendants' conduct and the existence, enforcement, and threat of enforcement of the Ordinance.

WHEREFORE, Plaintiffs respectfully pray for relief against the Harrisburg Defendants as hereinafter set forth in the prayer for relief.

COUNT II — VIOLATION OF THE RIGHT TO THE FREE EXERCISE OF RELIGION UNDER THE UNITED STATES CONSTITUTION

164. Plaintiffs reallege all matters set forth in paragraphs 1-121 and incorporate them herein as if set forth in full.

165. Plaintiffs have sincerely held religious beliefs which compel them to communicate their views on abortion to others in a caring, conversational and compassionate manner, and to pray with and share the good news of Jesus Christ with those who are going through crises, including unplanned pregnancies.

166. Plaintiffs' religious activities are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

167. The Ordinance, on its face and as applied, substantially burdens Plaintiffs' free exercise of their religious beliefs by prohibiting Plaintiffs from engaging in the kind of caring, conversational and compassionate interactions with women and their partners and friends who are facing crises, including unplanned pregnancies.

168. The Ordinance targets and singles out for discriminatory treatment persons who counsel against abortions.

169. The Ordinance, on its face and as applied, is not a neutral law of general applicability.

170. The Ordinance does not serve a compelling or even legitimate state interest and is not the least restrictive means of achieving the Harrisburg Defendants' asserted interest.

171. The Ordinance is not narrowly tailored.

172. The Ordinance is irrational, unreasonable, and imposes unjustifiable restrictions on constitutionally protected free exercise of religion.

173. Infringement of the right to free exercise of religion exercised in combination of other fundamental constitutional rights subjects the Ordinance to strict scrutiny review.

174. As a direct and proximate result of the Harrisburg Defendants' actions, policies, practices, and customs as alleged herein, Plaintiffs are chilled and deprived of their rights to freely exercise their religion.

175. Plaintiffs have suffered, are suffering, and will continue to suffer irreparable harm as a direct result of the Harrisburg Defendants' conduct and the existence, enforcement, and threat of enforcement of the Ordinance.

WHEREFORE, Plaintiffs respectfully pray for relief against the Harrisburg Defendants as hereinafter set forth in the prayer for relief.

COUNT III — VIOLATION OF THE RIGHTS TO FREEDOM OF ASSEMBLY AND ASSOCIATION UNDER THE UNITED STATES CONSTITUTION

176. Plaintiffs re-allege all matters set forth in paragraphs 1-121 and incorporate them herein as if set forth in full.

177. Public sidewalks and streets are quintessential public fora for speech.

178. Peaceful expressive activities, including oral communications and literature distribution, are rights guaranteed by the Free Speech and Press

Clauses of the First Amendment to the United States Constitution.

179. Peaceful use of public sidewalks and streets for the purpose of seeking political, social, moral, or religious change is a right guaranteed by the Free Assembly Clause of the First Amendment to the United States Constitution.

180. Peaceful grouping of two or more persons for the purpose of enhancing communicative efforts, *i.e.*, the right to associate, is guaranteed by the First and Fourteenth Amendments to the United States Constitution.

181. The Ordinance does not serve a compelling state interest nor is it the least restrictive means of achieving the Harrisburg Defendants' asserted interest.

182. The existence and enforcement of the Ordinance chills and deprives Plaintiffs of their rights to free speech, free press, free association, and free assembly protected by the First and Fourteenth Amendments to the United States Constitution.

183. Plaintiffs have suffered, are suffering, and will continue to suffer irreparable harm to their First Amendment rights as a direct result of the Harrisburg Defendants' conduct and the existence, enforcement, and threat of enforcement of the Ordinance.

WHEREFORE, Plaintiffs respectfully pray for relief against the Harrisburg Defendants as hereinafter set forth in the prayer for relief.

COUNT IV — VIOLATION OF EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION

184. Plaintiffs re-allege all matters set forth in paragraphs 1-121 and incorporate them herein as if set forth in full.

185. The Equal Protection Clause of the Fourteenth Amendment requires that the government treat similarly situated persons equally in the imposition of burdens or the distribution of benefits.

186. The Ordinance treats Plaintiffs differently than similarly situated people in that it penalizes Plaintiffs and others who want to espouse a message against abortion within 20 feet of any portion of every entrance, exit or driveway of a health care facility while permitting those who support abortion and are employed by or agents of Harrisburg's abortion clinics to freely espouse their views without restriction.

187. The Ordinance treats Plaintiffs differently than similarly situated people in that it penalizes Plaintiffs and others who are not employees of health care facilities by requiring that they only "congregate, patrol, picket or demonstrate" outside 20 feet of any portion of every entrance, exit or driveway of a health care facility while those who are employed by the health care facilities can "congregate, patrol, picket or demonstrate" without restriction.

188. The Ordinance violates various fundamental rights of Plaintiffs, such as the rights of free speech, free assembly, and free exercise of religion.

189. When government regulations, such as the Ordinance challenged herein, infringe on

fundamental rights, discriminatory intent is presumed.

190. The Harrisburg Defendants have intentionally discriminated against Plaintiffs by foreclosing their ability to communicate their message in public fora, despite having no compelling, substantial or rational reason to do so.

191. The Harrisburg Defendants have intentionally discriminated against Plaintiffs and other third parties not before the Court by targeting all individuals who counsel against abortion at abortion clinics, as evidenced, in part, by the "Findings and Purpose" section of the Ordinance.

192. The Ordinance violates Plaintiffs' equal protection guarantee by expressly allowing clinic employees to exercise free and unqualified speech within the zones while restricting Plaintiffs' expressive activities within the zones.

193. The Harrisburg Defendants can offer no compelling, important, or even rational interest to justify prohibiting Plaintiffs' or third parties' pro-life speech and expressive activities in the many traditional public fora adjacent to health care facilities throughout Harrisburg.

194. The Ordinance is not the least restrictive means and is not narrowly tailored to accomplish any permissible purpose sought to be served by the Harrisburg Defendants.

195. The Ordinance and the Harrisburg Defendants' actions pursuant to the Ordinance constitute a violation of Plaintiffs' right to equal protection on its face and as applied in violation of the Fourteenth Amendment to the United States Constitution.

196. The Harrisburg Defendants have caused, and will continue to cause, Plaintiffs to suffer undue and actual hardship and irreparable injury. Plaintiffs have no adequate remedy at law to correct the continuing deprivations of their most cherished constitutional liberties.

WHEREFORE, Plaintiffs respectfully pray for relief against the Harrisburg Defendants as hereinafter set forth in the prayer for relief.

COUNT V — VIOLATION OF DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

197. Plaintiffs re-allege all matters set forth in paragraphs 1-121 and incorporate them herein as if set forth in full.

198. The Ordinance impermissibly risks the violation of Plaintiffs' substantive and procedural due process rights by creating the substantial likelihood that the Ordinance will be applied contrary to its written terms by solely restricting speakers outside of abortion clinics, as shown by the appearances of Harrisburg police in response to calls made by pro-abortion minded employees and agents of Harrisburg's abortion clinics.

199. The Ordinance violates Plaintiffs' substantive and procedural due process rights in that it is applied contrary to its written terms by solely restricting speakers outside of abortion clinics.

200. The Ordinance fails to provide both substantive and procedural due process because it lacks sufficient notice by failing to make clear to Plaintiffs or to any ordinary person, by markings,

signage, or otherwise, where along the public fora each anti-speech zone begins or ends.

201. The Ordinance fails to provide both substantive and procedural due process because it lacks sufficient notice of penalties by providing for, at times, minimum fines, but no maximum.

202. The Ordinance is an irrational and unreasonable policy which imposes irrational and unreasonable restrictions on the exercise of Plaintiffs' constitutional rights.

203. The Harrisburg Defendants have violated Plaintiffs' due process rights by acting arbitrarily, capriciously, unreasonably, and with improper motives by selectively targeting pro-life speech, including that of Plaintiffs, outside of Harrisburg's abortion clinics by enactment and enforcement of the Ordinance.

204. The Harrisburg Defendants have violated Plaintiffs' due process rights by acting arbitrarily, capriciously, unreasonably, and with improper motives by selectively enforcing the Ordinance only against pro-life speech outside of Harrisburg's abortion clinics and not all other health care facilities in the City.

205. The Ordinance does not serve a compelling, important, or even rational reason to prevent Plaintiffs from engaging in their speech and peaceful expressive activities in traditional public fora.

206. The Ordinance violates Plaintiffs' substantive and procedural due process rights on its face and as applied in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray for relief against the Harrisburg Defendants as hereinafter set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the court assume jurisdiction over this action and order the following relief:

A. Declare that Harrisburg City Ordinance No. 12-2012, which is codified at Chapter 3-371 of the Harrisburg City Code of Ordinances, §§ 3-371 *et seq*., is unconstitutional on its face because it violates the constitutional rights guaranteed to Plaintiffs and others under the First and Fourteenth Amendments to the United States Constitution;

B. Declare that Harrisburg City Ordinance No. 12-2012, which is codified at Chapter 3-371 of the Harrisburg City Code of Ordinances, §§ 3-371 *et seq*., is unconstitutional as applied to Plaintiffs' expressive activities at the Planned Parenthood and Hillcrest Clinics in Harrisburg because it violates the constitutional rights guaranteed to Plaintiffs under the First and Fourteenth Amendments to the United States Constitution;

C. Enter preliminary and permanent injunctions enjoining and restraining the Harrisburg Defendants, their officers, agents, employees and others acting in concert with them from enforcing or threatening to enforce Harrisburg City Ordinance No. 12-2012, which is codified at Chapter 3-371 of the Harrisburg City Code of Ordinances, §§ 3-371 *et seq*., against Plaintiffs and other similarly situated individuals not before the Court;

D. Award Plaintiffs nominal damages against the Harrisburg Defendants for the violation of their federal constitutional rights;

E. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988; and

F. Grant such other and further relief as this Court deems necessary and proper.

JURY DEMAND

Plaintiffs demand a jury for all issues so triable.

DATED: March 24, 2016

Respectfully submitted:

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**Pro hac vice* petition forthcoming

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