CASE NO. 18-2884
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COLLEEN REILLY and BECKY BITER,

Plaintiffs/Appellants,

v.

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

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-0510

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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DISCLOSURE STATEMENT

Pursuant to 3d Cir. R. 26.1.1, Plaintiffs-Appellants state that they are individuals, and, therefore, have no corporate affiliations or financial interests to report.

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GLOSSARY OF ABBREVIATED TERMS AND CITATION REFERENCES

In all citations to cases or record or other materials in this Reply Brief, unless otherwise indicated, all emphases are added, and all internal quotation marks, citations, and footnotes are omitted. In addition, the following abbreviated terms and citation references shall have the following meanings:

Ans.Br.: Answer Brief of Appellees filed March 11, 2019.

Buffer Zone Map: Map of Buffer Zone imposed by Ordinance at Planned Parenthood in Harrisburg, Pennsylvania. (JA091).

CCTR: Transcript of Harrisburg City Council Meeting where the Ordinance was considered and voted upon. This transcript appears within the Koplinski deposition transcript. (JA131-34.)

Defendants or **City:** Defendants-Appellees City of Harrisburg, the Harrisburg City Council, and Harrisburg Mayor Eric Papenfuse, in his official capacity.

Dkt.: Document filed on the District Court's docket. Unless otherwise noted, cited page numbers are to the document's native pagination, not the ECF-generated page numbers.

First PI Order: First Memorandum opinion (Dkt. 44; JA092-126) accompanying Order (Dkt. 45) denying Plaintiffs' Motion for Preliminary Injunction (Dkt. 3), prior to this Court's remand in *Reilly I*.

JA: Joint Appendix filed simultaneously with this Opening Brief.

OATR: Transcript of Oral Argument held by this Court in *Reilly I* (Appeal No. 16-3722) on March 21, 2017. (Dkt. 59-10; JA155-62).

Op.Br.: Plaintiffs-Appellants' Opening Brief filed December 14, 2018.

Ordinance: City of Harrisburg Ordinance No. 12-2012, Harrisburg Code Chapter 3-371, "Interference With Access To Health Care Facilities." (Dkt. 60-2; JA163-64)

PITR: Transcript of Preliminary Injunction Hearing (Dkts. 68-69) (excerpts provided at JA279-543).

Plaintiffs: Plaintiffs-Appellants Colleen Reilly and Becky Biter.

***Reilly I*:** This Court's precedential opinion in *Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017), *as amended* (June 26, 2017).

Second PI Order: Second Memorandum opinion (Dkt. 111; JA004-048) accompanying Order on appeal (Dkt. 12; JA003) denying Plaintiffs' Motion for Preliminary Injunction (Dkt. 3), after this Court's remand in *Reilly I*.

September 7 "Incident": Interaction between Plaintiff Biter and a Planned Parenthood patron on September 7, 2017, within the Ordinance buffer zone, captured on video by Planned Parenthood's security camera. The video was filed in two parts at dkts. 62-28 and 62-29. Placeholders for the videos appear at JA230-231. The video

files themselves were provided to this Court on flash drive, along with the Joint Appendix.

INTRODUCTION

Scarcity of words prevent Plaintiffs from addressing all of Defendants' feints, shunts, and chicanes. Suffice it to say Defendants went to great lengths to divert the Court from the most critical problems with Harrisburg's buffer zone Ordinance—the Ordinance's demonstrated (and admitted) content-prejudice, and the City's utter failure to narrowly tailor the Ordinance by considering even one alternative to its blanket speech ban. Plaintiffs devote as much of this reply as possible to these critical issues. The Court should reverse the district court's preliminary injunction denial, and remand the case to a new district judge with instructions to preliminarily enjoin the unconstitutional Ordinance.

ARGUMENT

I. PLAINTIFFS HAVE NOT WAIVED THEIR ARGUMENTS.

A. Defendants Invoke the Wrong Standard of Review, and Plaintiffs Sufficiently Argued the District Court's Factual Errors.

Defendants attempt to insulate the district court's erroneous factual findings by arguing that Plaintiffs "waived" argument under the "clear error" standard of review. (Ans.Br. 10.) Defendants fail for two reasons.

First, in this First Amendment case, this Court reviews factual findings under a **plenary** standard, not for "clear error." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002) (no deference accorded to district court

factual findings (other than credibility) in First Amendment preliminary injunction appeals); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (same). The case cited by Defendants, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 301-02 (3d Cir. 2013) (Ans.Br. 9-10), merely recites the **general** standards applicable to appellate review of orders granting or denying preliminary injunctions. *See id*. But in both *Tenafly* and *Child Evangelism*, this Court explained that the general standard does not apply in First Amendment cases:

> Ordinarily we will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error. **This case, however, involves First Amendment claims**, and the reaches of the First Amendment are ultimately defined by the facts it is held to embrace. **Therefore, we have a constitutional duty to conduct an independent examination of the record as a whole, and we cannot defer to the District Court's factual findings** unless they concern witnesses' credibility. Accordingly, **we examine independently the facts in the record and draw our own inferences from them**.

Tenafly, 309 F.3d at 156-57; *see also Child Evangelism*, 386 F.3d at 524 (same).

The district court here expressly noted that it was not making any credibility determinations because credibility issues "have little bearing on the disposition of the case" and, "**taking all Plaintiffs' testimony as true, the court's analysis would remain the same**." (JA046-47.) Accordingly, because this is a First Amendment

case, no deference at all is to be afforded to the district court's factual findings (as well as the legal findings).

In their opening brief, Plaintiffs cited this Court's *Reilly I* opinion specifically for the *de novo* **legal** review standard, and parenthetically quoted *Reilly I*'s similar recitation of the **general** standards. (Op.Br. 26.) Plaintiffs' oversight in citing the specific *Tenafly* and *Child Evangelism* plenary standard for **factual** findings is inconsequential because a party cannot "waive" the proper standard of this Court's review. *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 302 n.20 (3d Cir. 2010), *as amended* (Oct. 20, 2010) ("Nor can a party waive the proper standard of our appellate review."); *cf. Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) ("[A]s our sister circuits have held, 'parties cannot waive the proper standard of review by failing to argue it.'"). Moreover, the plenary "no deference" standard and the *de novo* standard advocated by Plaintiffs in their opening brief are functionally equivalent—neither affords any deference to the district court.

Second, Defendants' "waiver" argument also fails because, even if clear error were the proper standard, Plaintiffs argued repeatedly throughout their opening brief that the district court erred factually. Defendants cite no law for their curious argument by implication that Plaintiffs must say "clear" or some other magic word

every time they demonstrate a factual error. Defendants' "clear error" waiver argument is, **clearly**, erroneous.

B. Plaintiffs Did Not Waive Any Arguments by Citing Better Authorities Than the District Court.

In yet another failing attempt to insulate the district court's order from scrutiny, the City argues that Plaintiffs waived their arguments on those points of the order ostensibly relying on *Hill v. Colorado* and *Brown v. Pittsburgh*. (Ans.Br. 9-10.) But Defendants cite no authority (nor could they) for the novel proposition that appellants who support their arguments with binding precedent, superseding or more apposite than the authorities cited in the order on appeal, waive their arguments because they did not cite the authorities relied on by the district court in error. To be sure, this Court's precedent rejects the proposition that avoiding waiver of an **argument** depends on citation of particular **cases**:

> Though it did not cite *Erie* or *Shady Grove*, Nuveen asserts that the implications of its argument were clear and that its citation of *Erie* now is a natural extension and refinement of its argument below. **An argument is not waived if it is inherent in the parties' positions throughout the case**.

Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 301 (3d Cir. 2012).

Though Plaintiffs' arguments need only be "inherent in [their] positions," *id.*, Plaintiffs arguments against the district court's ostensibly *Brown*- and *Hill*-informed conclusions are explicit, and rely on better authority. For example, in Plaintiffs'

discussion of content neutrality (Op.Br. 40-49), Plaintiffs argued extensively that the Ordinance is **not content neutral** under **more recent binding authorities** such as *McCullen v. Coakley*, 573 U.S. 464 (2014), *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *United States v. Marcavage*, 609 F.3d 264 (3d Cir. 2010), as well as other authorities more apposite than *Brown* and *Hill*.

Moreover, the district court cited *Hill* **only twice,** and fleetingly at that. (JA017, JA024.) The court first cited *Hill* in its discussion of content neutrality, for the point that police "can easily distinguish" speech prohibited by the Ordinance from permitted speech "without regard to the content of the speech." (JA017.) Plaintiffs, however, comprehensively demonstrated the error of the district court's supposition on this very point (Op.Br. 44-46), and cited the superseding opinion in *Reed*. *See Free Speech Coal., Inc. v. Attorney Gen.*, 825 F.3d 149, 160 n.7 (3d Cir. 2016) ("*Reed* represents a drastic change in First Amendment jurisprudence."); *Washington Post v. McManus*, 355 F. Supp. 3d 272, 296 (D. Md. 2019) ("*Reed* . . . was a watershed First Amendment case, refining the analysis of content-based regulations and cementing the primacy of the rule that such regulations receive strict scrutiny.").

The district court cited *Hill* again after supposing Plaintiffs have nothing to fear from the invisible boundaries of the Harrisburg buffer zone because the Ordinance punishes only "knowing" violations, apparently analogizing the similar

provision from *Hill*. (JA024.) But Plaintiffs demonstrated, with unrebutted testimony in **this** case, that police used the invisible Harrisburg boundary to intimidate and force Reilly well beyond the actual buffer zone, to a made-up boundary far from possible interaction with her intended audience. (Op.Br. 13, 37.) It was not necessary for Plaintiffs to name *Hill* to demonstrate these obviously distinguishable facts.

Defendants' waiver argument is even more ridiculous for *Brown*. Plaintiffs cite and argue *passim* from *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016), which this Court decided **after** *Brown*, and in which *Brown* was fully subsumed. Defendants can say nothing about *Brown* that was not addressed in *Bruni*, and consequently by Plaintiffs.

II. DEFENDANTS FAILED ATTEMPT TO REWRITE THE DISTRICT COURT'S REWRITE OF THE ORDINANCE PROVE THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE.

Plaintiffs demonstrated that the district court fundamentally and improperly rewrote the Ordinance by construing it to allow what Defendants repeatedly have said it prohibits: one-on-one counseling and leafletting within the buffer zone. (Op.Br. 27-30.) Now Defendants, in a failed attempt to reconcile their witnesses' and counsel's interpretation and enforcement positions with the district court's new construction, strain to rewrite the district court's rewrite (Ans.Br. 24-29), but only succeed in proving that the Ordinance is unconstitutionally vague. (Op.Br. 35-38.)

This Court should hold that the Ordinance substantially burdens Plaintiffs' protected speech notwithstanding the district court's unsanctioned re-construction (*see infra* pt. III), and also hold the Ordinance unconstitutionally vague because of it.

Under the district court's *sua sponte* narrowing construction, "the Ordinance does not, by its terms, prohibit many aspects of the 'counselling' touted by Plaintiffs. The Ordinance's aim is to restrict aggressive acts of demonstration and protest around the clinic property." (JA014.) "Put another way, the Ordinance does not specifically prohibit the type of expression that the *McCullen* Court found essential to the exercise of First Amendment rights." (JA024.) Thus, "[a] single individual **handing out fliers does not appear to fit within the actions prohibited by the Ordinance**. Individuals run afoul of the Ordinance only when they gather together in groups ('congregate')…within the buffer zone." (JA023-24.) And, "[Plaintiffs] may still...**individually enter the buffer zone as long as they are not protesting, demonstrating, patrolling, or congregating**." (JA043.)

The district court's reinterpretation of the Ordinance, though legally unsanctioned, would allow an individual sidewalk counselor to enter the buffer zone to provide a leaflet to, or peacefully counsel, another person on the sidewalk (*i.e.*, "the type of expression that the *McCullen* Court found essential to the exercise of First Amendment rights"). Thus, while the district court construes the Ordinance to prohibit "congregating" in the buffer zone, the court redefined "congregating" to

exclude a sidewalk counselor's peacefully communicating with another person, but apparently to include two or more sidewalk counselors grouped together.

But Defendants, in arguing that the district court's construction is not a rewrite of the Ordinance, engage in their own rewriting of the district court's construction: "While Plaintiffs could 'counsel' **by leafletting** individuals walking by them without congregating, **Plaintiffs would congregate if they stand or walk with someone else** inside the zone…." (Ans.Br. 25.) By way of illustration, Defendants said Plaintiff Biter violated the Ordinance when she "recently **congregated** in the zone," referring to the September 7, 2017 Incident where Biter entered the buffer zone outside Planned Parenthood and interacted with a weeping pregnant mother of twins. (Ans.Br. 28.) Plus, Defendants never disputed the admission of Solicitor Grover that, within the buffer zone, "If two people were talking about anything of substance, I think the answer is, they're congregating." (Ans.Br. 17-18.) Thus, Defendants read the court's construction still to prohibit an individual sidewalk counselor's entering the buffer zone to converse with another person, despite the district court's plain language to the contrary.

The upshot of the district court's and Defendants' irreconcilable constructions of the Ordinance is twofold: First, Defendants' line of argument admits the district court rewrote the Ordinance to prohibit less than what Defendants construe the Ordinance to prohibit. Whereas, the district court interprets the Ordinance to ban

"congregating," but **excludes** one-on-one sidewalk counseling from the term "congregating,' Defendants (now) interpret the Ordinance to ban "congregating" but **include** one-on-one counseling within the term "congregating." Second, Defendants' patently inconsistent argument that "the District Court's construction is permissible" (Ans.Br. 28) proves the Ordinance is hopelessly vague. How are Plaintiffs and other ordinary citizens supposed to know what is and is not prohibited by the Ordinance if Defendants cannot agree with the district court, or even with themselves?

Defendants do not offer any argument in response to Plaintiffs' argument and authorities that a federal court cannot interpret and narrowly construe a city ordinance when there is evidence of conflicting interpretation and application by the city. (*Compare* Op.Br. 30, *with* Ans.Br. 28-29.) *Cf. D'Angio v. Borough of Nescopeck*, 56 F. Supp. 2d 502, 507 (M.D. Pa. 1999) ("federal courts are unable to rewrite state statutes or local ordinances to supply limiting constructions to preserve their constitutionality" (citing *Triplett Grille, Inc. v. City of Akron*, 400 F.3d 129, 136 (6th Cir. 1994)). Contrary to Defendants' assertion (Ans.Br. 29), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), does not support Defendants because the *Ward* Court merely recognized a city's own narrowing construction and did not impose its own. Accordingly, Defendants have waived any argument in response. Moreover, Defendants' vagueness and overbreadth arguments (Ans.Br. 80-83)

completely ignore and sidestep Plaintiffs' argument that a law permits Defendants to conclude one-on-one counseling is prohibited, but at the same time permits the district court to conclude such counseling is allowed, must be unconstitutionally vague. Accordingly, Defendants again have waived any argument in response. The district court's blatant rewrite of the Ordinance is not legally sanctioned, even as it proves the Ordinance's vagueness.

III. THE ORDINANCE SUBSTANTIALLY BURDENS PLAINTIFFS' SPEECH, AND IT IS NOT CLOSE.

A. The Burden on Plaintiffs' Speech is Measured by How and Where Plaintiffs Determine They Need to Speak to Communicate Their Message.

Plaintiffs established that they do not want to be merely "conversational" on the sidewalk. Rather, they want to hand literature to persons, and to have the up-close and quiet conversations essential to sidewalk counseling outside abortion facilities. (Dkt. 88, 27–31; JA487-88 (Biter's confirming desire to speak in "soft, peaceful, and conversational tone"); JA473-74 ("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."); JA475 ("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.").) *See McCullen*, 134 S. Ct. at 2527 ("[P]etitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact . . . .").

Defendants' argument that Plaintiffs can still talk to people from outside the buffer zone "at a reasonable volume" is not only nonsensical, but it also proves too little. (Ans.Br. 39-41.) The constitutionality of the burdens on Plaintiffs' speech is not measured by what Defendants think is reasonable for Plaintiffs; it is measured by the burdens on the mode and manner of speech Plaintiffs have determined they need to communicate their message. *See McCullen*, 134 S. Ct. at 2535 ("The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'"); *id.* ("McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey."); *id.* at 2536 ("The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. . . .").

On 70 feet of public sidewalk outside Planned Parenthood, Plaintiffs cannot hand people literature or speak to them in the up-close and quiet manner their message requires. (Dkt. 88, 27–31; JA408-09 (Mauldin testimony that speaking in "louder than a conversational tone" required to communicate from inside buffer zone

to person outside buffer zone); JA436-38 (Stevens testimony on observing "quiet one-on-one conversation" before and after buffer zone enacted, but not within the buffer zone after enactment).) Harrisburg's Ordinance not only eliminates Plaintiffs' opportunities to use the public sidewalk to leaflet or quietly approach the half of Planned Parenthood patients who enter from the parking lot, it also eliminates any meaningful opportunity to leaflet or quietly approach the 30% of patients who approach Planned Parenthood on the 70 feet of restricted sidewalk from the north. (Dkt. 88, 27–31; JA510-11 (Biter testimony that approximately half of patients park in parking lot, while 20% approach by sidewalk from the south, leaving 30% approaching by sidewalk from the north).) At the northern edge of the buffer zone, 70 feet from the Planned Parenthood door, Plaintiffs cannot tell whether a passerby is going to the facility or somewhere else, and cannot walk with the person to quietly ask or find out. (JA507-09, JA479.) From the southern edge of the buffer zone, Plaintiffs are stuck curbside, 20 feet from the facility door, and cannot travel north to quietly meet a person coming from the north, even if Plaintiffs can surmise the person is headed for Planned Parenthood. (JA508-09, JA531.) The Ordinance's substantial burden on Plaintiffs' speech is undeniable.

B. Carving Out a Sliver of Curbside Sidewalk for Plaintiffs Does Not Save the Ordinance.

Defendants tout their magnanimity in allowing speech on a small, four-foot curbside sliver of sidewalk, 20 feet from Planned Parenthood's door. (Ans.Br. 31,

42.) Defendants argue this is enough (Ans.Br. 41-45), but it does not save the Ordinance.

From the far edge of the sidewalk where the sliver is located, Plaintiffs have testified, "It's very hard to have an intimate conversation." (JA480-81.) In the September 7, 2017 Incident, when Plaintiff Biter was attempting to communicate from that spot with a woman weeping near the door, Plaintiff Biter "couldn't hear what she was saying." (JA485-86.) As discussed *supra*, Plaintiffs want and need to leave the remote free speech zone so that they can effectively share the message they want to share with their intended audience, on the full width of the public sidewalk.

The only reason Plaintiffs stand in their chosen spots outside the buffer zone is because they are legally forced to stay there. (JA512-13; JA523; JA529; JA539-540.) "It is thus no answer to say that [Plaintiffs] can still be 'seen and heard' by women within the buffer zones." *McCullen*, 134 S. Ct. at 2537. If Plaintiffs are not able to share their message with women in close, quiet, arms-length conversations as they walk on the sidewalk, "then the buffer zones have effectively stifled [Plaintiffs]' message." *Id*.

C. Defendants' Mathematical Feints Cannot Reduce the 70 Feet of Public Sidewalk Cut Off by the Ordinance.

Plaintiffs demonstrated at the hearing and in their brief (Op.Br. 31-32) that the Ordinance blocks Plaintiffs from speaking on approximately 70 feet of public sidewalk in front of Planned Parenthood, which is at least 25% greater than the

"extreme" 56-foot Boston sidewalk blockage struck down in *McCullen*. *See* 573 U.S. at 473, 497. In response, Defendants attempt to subtract from the 70-foot span the portions of the **public sidewalk** that cross Planned Parenthood's 20-foot driveway and the neighboring 20-foot driveway to the north, and claim that Plaintiffs have no right to "block" or "stand in" driveways. (Ans.Br. 31-33.) The district court also adopted this rationale. (JA025.) Nonetheless, the assertion is ludicrous.

Defendants cite no legal authority or reasoned principle for the proposition that a public sidewalk ceases to be public sidewalk when it crosses a driveway. Indeed, the Supreme Court in *McCullen* expressly included the portions of sidewalks crossing driveways in its descriptions of the areas where speech was burdened by the unconstitutional Massachusetts buffer zone. *See* 573 U.S. at 474 ("covering more than 93 feet of the sidewalk (**including the width of the driveway**)"; *id*. ("each spanning approximately 100 feet of the sidewalk parallel to the street (**again, including the width of the driveways**)").

Defendants defy reality by arguing a sidewalk crossing driveways is not a sidewalk, because Plaintiffs cannot "block" or "stand in" the driveways. (Ans.Br. 31-32.) But the Ordinance is silent on driveways, nor have Plaintiffs ever sought the

right to block driveways.[1] Plaintiffs desire to **walk** on the sidewalk—to approach and walk with women headed to Planned Parenthood—and the unremarkable proposition that Plaintiffs cannot block driveways does not convert Harrisburg's public sidewalks into non-sidewalks where they cross driveways. If Defendants were concerned about driveway-blocking they could have banned blocking, or enforced Harrisburg's existing ordinances which already ban it.[2]

To further their sleight-of-hand diversion from the blocked 70 feet of public sidewalk, Defendants also construct an "admittedly complex" but wholly inconsequential math problem to argue that the Harrisburg buffer zone impacts less speech than *McCullen*'s.[3] (Ans.Br. 33-37.) But again, Defendants' argument does not add up. Plaintiffs are sidewalk counselors, who want to speak on the public sidewalk in front of Planned Parenthood, and not anywhere else at Planned Parenthood. The excess square footage of the Harrisburg and *McCullen* buffer zones (*i.e.*, the areas covering private property and roadway) is irrelevant to the constitutional question of how much public sidewalk is eliminated for speech. The

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[1] Harrisburg's Disturbing the Peace ordinance, Ch. 3-341, already prohibited the blocking of driveways before the Ordinance was enacted. Harrisburg Ord. 3-341.2.E ("Conduct is prohibited if . . . a person . . . Having no legal privilege to do so, **intentionally or recklessly obstructs any . . . public passage** . . . .").)

[2] *See* note 1, *supra*.

[3] Defendants' introduction of "admittedly complex" mathematics after the close of evidence, via internet calculators instead of an expert witness, is improper and should not be considered by this Court.

70 feet of Harrisburg's public sidewalk from which Plaintiffs' speech is excluded is the relevant area for constitutional purposes, not any other area covered by the buffer zone. This 70 feet eliminated from the Harrisburg sidewalk is larger than the 56 feet of Boston sidewalk blocked by the *McCullen* buffer zone, which the Supreme Court deemed "extreme" and unconstitutional. It, therefore, cannot be saved even by Defendants' fuzzy math.

IV. THE DEMONSTRATED AND ADMITTED CONTENT PREJUDICE OF THE ORDINANCE REQUIRES STRICT SCRUTINY, WHICH IT CANNOT PASS.

A. The District Court's First Content Neutrality Determination Was Not Binding on Remand.

The district court erroneously concluded the Ordinance is content neutral (JA011-19), and Plaintiffs demonstrate the district court's error in their brief (Op.Brief at 40-47.) Defendants, however, attempt to turn back the clock, and erroneously argue that the district court's content-neutral conclusion in the First PI Order was binding on the district court following this Court's reversal and remand. (Ans.Br. 23-24.) This Court's explicit instructions for remand, however, foreclose Defendants' argument:

> [O]n remand Defendants are afforded the opportunity to meet their burden of showing that the ordinance is **narrowly tailored appropriate to the government interest involved**. **The District Court can then consider anew the request for preliminary injunctive relief**. . . .

Reilly I, 858 F.3d at 180. To be sure, the principal issue on remand, and even now, is Defendants' utter failure to narrowly tailor the Ordinance. (*See infra* pt. V.) But the degree of narrow tailoring required depends on whether the Ordinance is content-based and subject to strict scrutiny, or content-neutral and subject to intermediate scrutiny. (JA011-12; Op.Br. 47-49.)

Moreover, a district court's factual findings in an interlocutory order denying a preliminary injunction are not binding on the court in later proceedings, and the conclusions of law entered at the preliminary injunction stage are not the law of the case. *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 466 n.3 (D.N.J. 1998). Even where law of the case applies, however, new evidence permits reconsideration of the same issue. *Judkins v. HT Window Fashions Corp.*, 624 F. Supp. 2d 427, 441 (W.D. Pa. 2009). As demonstrated, Defendants made numerous admissions of content prejudice **after** the First PI Order—at oral argument on Plaintiffs' appeal of that order, in subsequent discovery, and at the preliminary injunction hearing on remand—excepting the issue from the law of the case doctrine even if it applied. (Op.Br. 21-22, 44-47.)

Ultimately, the district court understood this Court's remand instruction, and properly rejected Defendants' law of the case argument below. (JA012.) This Court should similarly reject Defendants' defunct argument.

B. *Hill* Gives Way to *Reed*, and Is Distinguishable.

Defendants predictably seek refuge in *Hill v. Colorado*, which involved a law **other** than the Ordinance, and enforcers **other** than Defendants. The Court should reject the notion that *Hill* controls anything here. Initially, as this Court has observed, "[n]o buffer zone can be upheld *a fortiori* simply because a similar one was deemed constitutional, since the background facts associated with the creation and enforcement of a zone cannot be assumed to be identical with those of an earlier case, even if the ordinances in the two cases happened to be the same." *Bruni*, 824 F.3d at 372.

That said, regardless of any similarity in wording of the *Hill* regulation, *Hill* cannot rescue Defendants' Ordinance here because the enforcers in *Hill* did not admit so clearly that: (1) their buffer zone did not prohibit speech that is not "of substance"; (2) their buffer zone prohibited only some—not all—types and categories of speech that is "of substance"; and (3) their buffer zone was enacted specifically to resolve concerns regarding perceived undesirable effects of speech on sidewalk audiences; nor did *Hill* include actual application of the challenged law against sidewalk counseling. (Op.Br. 10-13, 20-21, 40-47.) Whatever slender reed of *Hill* may remain after *Reed*¸ it is not applicable here.

On the contrary, *Hill* was based upon the same essential premises that the district court relied on in initially determining the Ordinance was content-neutral,

which is the supposed ability of "law enforcement [to] determine whether the Ordinance is being violated by merely observing individuals within the restricted zones." *Bruni v. City of Pittsburgh*, 283 F.Supp.3d 357, 368 (W.D. Pa. 2017) (citing *Hill*, 530 U.S. at 721). Defendants can no longer maintain this position about their own Ordinance because they have already admitted that theirs is fundamentally different in interpretation, application, and enforcement, if not also in the letter.

Moreover, even if *Hill* was factually analogous after Defendants' admissions (and it is not), reliance on *Hill* in this Court is precarious without accounting for *Reed*'s "sea change in First Amendment law." *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017). In *Bruni*, this Court found "compelling" the "argument that *Reed* has altered the applicable analysis of content neutrality." 824 F.3d at 364. To be sure, at oral argument in the prior appeal in this case, after asking Defendants' counsel repeatedly what *Reed*'s and *Bruni*'s implications were for this case and not receiving a straight answer (JA161), Judge Jordan finally spelled it out:

> JUDGE JORDAN: -- *Bruni* takes *Reed* and understands it as affecting what went before, as undermining *Brown*['s holding that Pittsburgh's buffer zone was content-neutral], which did apply here, specifically. . . .
>
> . . . .
>
> JUDGE JORDAN: Indeed, **it is obviously content-based**, but *Reed* said you can't have signs that say -- you can't classify signs, as political signs, and then real estate signs, and then directional signs and have different things.

> So, if you can't categorize signs that way, how can you categorize speech, as picketing or demonstrating, or panhandling or soliciting for business, and not enter into the same realm that *Reed* says is forbidden?

(JA161-62.)

Defendants can no longer invoke *Hill* because Defendants' admissions about how they interpret, apply, and enforce their Ordinance makes it unique, and "obviously content-based." (*Id*.)

The City's argument that the Ordinance itself precludes content-discrimination (Ans.Br. 11) ignores the reality of the City's actual interpretation and application of it. The City's arguments regarding the Ordinance language "congregate" and "demonstrate" (Ans.Br. 17-21) likewise ignore the record. Defendants try to minimize as a far-off hypothetical Solicitor Grover's admission that two persons' "congregating" is defined by the substance of their conversation (Ans.Br. 17-18), but the "hypothetical" he answered (two persons having a

conversation on the sidewalk—i.e., sidewalk counseling) is precisely the context of the speech regulated in this case.[4]

As for "demonstrate," Plaintiffs reply herein only to Defendants' particularly tortured straw man argument: To avoid the consequence of admitting that a hypothetical accountant's or lawyer's leafletting within the Ordinance's buffer zone is acceptable to Harrisburg (JA160[5])—confirming that it is the content of Plaintiffs' leafletting that Harrisburg intended to censor—Harrisburg now argues that such business leafletting would be "demonstrating" if accompanied by "a used car lot's inflatable, arm-flailing tube-man." (Ans.Br. 19-21.) But Defendants' ("inflatable") straw man argument fails to negate Defendants' content-based admission that the Ordinance prohibits Plaintiffs, but not others, from leafletting outside Planned Parenthood. Plaintiffs do not seek to accompany inflatable tube men in the buffer

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[4] The City tries to avoid Grover's admissions by arguing he was not the City's "designee" for purposes of the hearing (Ans.Br. 26.) But Grover was, in fact, one of the City's Rule 30(b)(6) designees for a deposition taken **for the purpose of the preliminary injunction hearing**. It was as the City's deposition designee that Grover gave his admissions, and it was that very deposition testimony given by Plaintiffs as evidence at the hearing. More importantly, Grover said what he said, Defendants did not offer someone else to speak for the City to contradict Grover, and Grover's high position in the City government (evidenced by his Rule 30(b)(6) designation in the first place) precludes any argument that his testimony does not bind the City in any event.

[5] ("'JUDGE JORDAN:. . . . So I could hand out a leaflet, that says that and describe my [legal] services, but I can't hand out a leaflet that says you shouldn't be getting an abortion. **How is that not content-based?**'")

zone; they wish to do just what Judge Jordan posited, and what Defendants' counsel clearly said would be prohibited. By Defendants' clear and binding admission, the Ordinance is a content-based restriction on speech by any definition, and one that clearly harms Plaintiffs.

C. After the District Court Overplayed Defendants' "Secondary Effects" Hand, Defendants Still Attempt to Hide Their Content-Based Cards.

Defendants' argument for content neutrality (Ans.Br. 14-17) amounts to a stealth invocation of the "secondary effects" doctrine. As explained by the district court below, which openly invoked the doctrine to save the Ordinance, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court recognized as constitutional the regulation of adult film theaters for the prevention of potentially harmful "secondary effects," such as crime and falling property values, that such theaters can have on a surrounding community. (JA013-14 (citing *Boos v. Barry*, 485 U.S. 312, 320-21).) Thus, the district court observed, the Court made a "distinction between a regulation based on content and a regulation dealing with 'secondary effects' caused by a particular type of establishment." (*Id.*) But, "'[l]isteners' reactions to speech are not the type of 'secondary effects' [the Supreme Court] referred to in *Renton*.'" (*Id.* (quoting *Boos*, 485 U.S. at 320-21).)

In their answer brief, Defendants do not identify the doctrine by name because it does not apply outside the context of "regulations affecting physical purveyors of

adult sexually explicit content." *Free Speech Coal.*, 25 F.3d at 161 ("*[I]f* the secondary effects doctrine survives, *Reed* counsels against expanding its application beyond the only context to which the Supreme Court has ever applied it . . . ."); *id.* at 163 ("*Reed* counsels against such a broad interpretation and we are obligated to follow its directives."); *see also Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1069 (3d Cir. 1994) ("[A] majority of the Supreme Court has never explicitly applied the analysis to political speech.") Nonetheless, it is clear Defendants intended to divert this Court from the substantial record evidence of Defendants' (and the Planned Parenthood authors') complaints of listeners' reactions to pro-life speech (*i.e.*, primary effects) to justify the Ordinance, by focusing instead on purportedly permissible objects of regulation such as crowding and obstruction (*i.e.*, secondary effects). (Ans.Br. 14-17.) The Court should not follow Defendants' diversion. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("[The county] contends that the ordinance is content neutral because it is aimed only at a secondary effect—the cost of maintaining public order. . . . The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation.")

The district court, for its part, overplayed Defendants' hand in trying to avoid the ubiquitous content-based, listener-reaction justifications for the Ordinance. Against uncontradicted record evidence that Planned Parenthood "protesters" maxed

out at "**two to four**" (JA397, JA423-24), the district court posited that "[t]he City sought to limit the areas in which any and all protesters could congregate around clinic entrances because **such large groups** tended to impede clinic visitors . . . ." (JA014.) And against the uncontradicted plethora of record evidence (Op.Br. 40-47) that the justification for the Ordinance offered by its Planned Parenthood authors, and received by the City Council in the Ordinance's legislative record, was to "**protect the dignity**" of listeners to pro-life speech on the sidewalk at Planned Parenthood (JA132), the district court posited that "the City did not seek to ban speech regarding abortion because it '**offended the dignity**' of those seeking to patronize the clinics." This Court should reverse the district court's patently erroneous determination of content neutrality.

D. Defendants Waived Argument in Response to Plaintiffs' Demonstration of the City's Content-Based, Listener-Reaction Justifications for the Ordinance.

In the category of arguments actually waived, Defendants declined in their brief to engage at all with Plaintiffs' extensive showing from the record that listener reaction **was** the City's primary justification for the Ordinance. (*Compare* Op.Br. 20-22, 40-43, *with* Ans.Br. 14-17.) Nor do Defendants attempt to explain their admissions in prior briefing that the City enacted the Ordinance to deal with the "volatile" situation created by angry listeners reacting to pro-life speech. (Op.Br. 21, 41.) By their silence, Defendants have said much, and have waived these arguments.

E. Defendants' Content-Based Ordinance Cannot Survive Strict Scrutiny, and Defendants Still Have No "Plan B."

As shown in Plaintiffs' brief, Defendants stake the future of the Ordinance on content neutrality, and have no "Plan B" for the strict scrutiny review required of content-based speech regulations. (Op.Br. 47-49.) It having been established that the Ordinance is a content-based speech restriction (*see supra* pts. III.A-D; Op.Br. 40-47), and that it cannot survive strict scrutiny (or even intermediate scrutiny, *see infra* pt. V; Op.Br. 49-60), this Court has all it needs to conclude Plaintiffs are likely to succeed on the merits of their First Amendment challenge and order the Ordinance enjoined. (Op.Br. 49.)

V. DEFENDANTS STILL FAIL NARROW TAILORING UNDER ANY STANDARD.

Narrow tailoring is the issue at the heart of this Court's *Reilly I* reversal and remand. Plaintiffs have already and painstakingly exposed Defendants' utter failure to narrowly tailor the Ordinance under any standard. (Op.Br. 49-60 (showing no evidence of problem justifying sidewalk counseling ban; no attempted prosecutions under numerous existing laws; no evidence of less restrictive alternatives closely, seriously, or otherwise considered).) As shown below, Defendants still have no answer.

A. Plaintiffs Do Not Concede Any Governmental Interest *Justifying the Ordinance*.

Defendants seek to shortcut the narrow tailoring analysis by claiming Plaintiffs concede Defendants' "important interests" justifying the Ordinance. (Ans.Br. 22-23.) This is false, and Defendants' fail the "significant governmental interest" prong of narrow tailoring under intermediate scrutiny. (Op.Br. 49-50.)

To be sure, a city "has a legitimate interest in protecting its citizens and ensuring that its streets and sidewalks are safe for everyone." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002). Conceding this unremarkable point, however, does not foreclose challenging "the sufficiency of evidence the government introduced justifying the necessity of the ordinance. In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification." *Id.*

As shown by Plaintiffs, Defendants have no interest—*i.e.*, no evidence of any justification—for banning peaceful sidewalk counseling along with the alleged conduct of the once-per-week, two-to-four protesters ostensibly justifying the Ordinance. (Op.Br. 49-50.) "First Amendment rights demand more than mere facial assertions. [T]he City cannot blindly invoke safety and congestion concerns without more." *Weinberg*, 310 F.3d at 1038.

B. Defendants' Excuses for Failing to Consider Alternatives are Foreclosed by *McCullen* and *Bruni*.

Defendants argument that "existing laws failed to deter" (Ans.Br. 51-53) lands right in the teeth of *McCullen*: "Given the vital First Amendment interests at stake, it is not enough . . . simply to **say** that other approaches have not worked." 573 U.S. at 496. To be sure, all Defendants have done is "to say" "existing laws failed to deter;" Defendants did not support their bald assertion with "a meaningful record," *Bruni*, 824 F.3d at 371, or any evidence at all. (Op.Br. 51-53.)

Importantly, as the district court found, Defendants did not even attempt "any prosecutions under [existing] statutes" (JA033) of the "two to four protesters" (JA397), and "did not consider personal injunctions against protesters" (JA038); nor did Defendants consider private FACE actions by Planned Parenthood or its patrons (JA330-31). Indeed, Defendants' entire consideration of FACE was Council Member Koplinski's floor speech, "simply to **say**," *McCullen*, 573 U.S. at 496, "I'm definitely very aware of . . . the shortcomings of FACE . . . ." (JA133.) But Koplinski (and by extension the City) was not "very aware" (and still isn't) of FACE's private causes of action for aggrieved facilities and patrons, foreclosing any notion that such remedies were considered. (JA330-31.) There is no question that, **if** the "two to four protesters" blocked access to Planned Parenthood prior to enactment of the Ordinance, the 24/7 surveillance video at the facility (Op.Br. 19-20) would have captured their wrongdoing and provided an evidentiary basis for a FACE action, or

a prosecution or targeted injunction under other existing law. If governments can fail to enforce their existing laws, and then use that failure "simply to say" that "existing laws failed to deter" bad conduct, no new law could ever fail for lack of narrow tailoring.

C. Defendants' Obligation to Narrowly Tailor the Speech Restrictions in the Ordinance Cannot Be Satisfied by After-the-Fact Rationalizations.

Having utterly failed to identify the "meaningful record" or "close[] examin[ation]" mandated by *Bruni* and *McCullen*, at the time the Ordinance was enacted, Defendants attempt to justify their failure by arguing the Ordinance works *now*. (Ans.Br. 57-59.) But just as 'simply saying' enforcement of other laws has not worked proves too little (*see supra* pt. IV.B), Defendants' after-the-fact rationalization proves too much—claiming that the Ordinance's burdens on speech are effective at restricting the speech Defendants want to restrict begs the questions of whether Defendants could have restricted less and whether Defendants were justified in restricting any speech at all; answering these questions is precisely the burden Defendants have failed to carry.

D. The City's Financial Mismanagement Does Not Relieve Its First Amendment Obligations.

Defendants' "fiscal crisis" argument (Ans.Br. 60-67) is another variation of the City's 'simply saying' existing laws have not worked, falling far short of First Amendment requirements. *See McCullen*, 573 U.S. at 496. Despite the district

court's erroneous, uncritical acceptance of Defendants' argument (Op.Br. 55-59), it is clear on the record that Defendants' financial mismanagement plays no part in the legislative record of the Ordinance. The upshot, that City Council Members 'already knew' about the City's financial crisis, is even less than 'simply saying' that existing laws have not worked. To be sure, Koplinski testified he could not "say for sure" whether any Council Member was aware of the financial receiver's report discussing use of police resources. (JA324-25.) It is a bridge too far to infer from the Council Members' uncertain (at best) knowledge of police resources that they nonetheless silently (but seriously) considered that the City's finances made enforcing existing laws impossible and required enactment of the Ordinance as the only solution. Such an inference is even more untenable given that the City's Police Chief **was in the room** during the only substantive consideration of the Ordinance, and **they asked him no questions about enforcing existing laws as an alternative**, even as they subsequently questioned him extensively about enforcing existing laws in connection with other agenda items, and even as he indicated that his department was ready, willing and able to step up enforcement of other City ordinances (*e.g.*, noise and trash).[6] (Op.Br. 56-58.)

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[6] To the extent Plaintiffs "admitted" Council Members "knew the city was in a financial crisis" (Ans.Br. 75), such knowledge is far short of seriously considering the effect of such a crisis on enforcement of existing laws or the need for the Ordinance in the form enacted.

Moreover, Defendants' underlying argument that enforcing existing laws would have required more police (Ans.Br. 60) is unsupported by a meaningful legislative record. Defendants undertook no study, and otherwise made no meaningful attempt, to determine the fiscal impact of enforcing its existing laws. (JA332, 336, 450-51; Op.Br. 55-56.) Thus, there is no evidence of how using surveillance video created and maintained by Planned Parenthood (Op.Br. 19-20) would have impacted police resources, if at all, if used to support prosecutions or targeted injunctions under existing laws. Such video would obviate the need for police to witness violations of existing laws in order to prosecute them. (Op.Br. 54.) Defendants completely fail to engage with this critical fact.

Furthermore, on closer examination Defendants' fiscal crisis argument amounts to a cleverly disguised, but still unconstitutional, heckler's veto.

> [A] permit for a parade or other assembly having political overtones cannot be denied because the applicant's audience will riot. To allow denial on such a ground would be to authorize a "heckler's veto." **It follows pretty directly that a city cannot in lieu of denying the permit charge the applicant for the expense to the city of reining in the hecklers.**

Church of Am. Knights of Ku Klux Klan v. City of Gary, In., 334 F.3d 676, 680-81 (7th Cir. 2003). It also "follows pretty directly" that a city's imposing on a speaker the cost of managing listener reaction to speech, by prohibiting the speech rather than charging a fee, is no less an authorization of a heckler's veto. *Cf. Nationalist*

Movement, 505 U.S. at 134 ("[The county] contends that the ordinance is content neutral because it is aimed only at . . . the cost of maintaining public order. . . . The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation."); *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 251 (6th Cir. 2015) ("It is a police officer's duty to enforce laws already enacted and to make arrests for conduct already made criminal.") As shown *supra* (pts. IV.B, C), the express justification for the Ordinance at its inception and in its recitals is listener reaction. Defendants' imposing on Plaintiffs the still undetermined costs of Defendants' duty to enforce existing laws, in the form of the Ordinance rather than a fee, authorizes an unconstitutional heckler's veto.

VI. DEFENDANTS RESORT TO FALSE, *AD HOMINEM* ATTACKS ON PLAINTIFFS AND THEIR COUNSEL TO DISTRACT FROM DEFENDANTS' UNTENABLE POSITIONS.

Defendants' brief sections from "Plaintiffs' want to trespass" (Ans.Br. 45-47) through "Plaintiffs lack credibility" (Ans.Br. 47-50) are the ultimate diversion from what matters in this case, and are not worth this Court's time. Plaintiffs already burned over 3,000 words below responding to the same drive-by arguments, and the district court already rejected below the relevance of Defendants' attacks on Plaintiffs' credibility. (*Supra* pt. I.A.)

To the extent the Court is curious about Plaintiffs' responses, Plaintiffs commend to the Court Plaintiffs' post-hearing briefing below. (Dkt. 88, 76-80 ("Defendants Resort to False, *Ad Hominem* Attacks on Plaintiffs and Their Counsel to Distract from Defendants' Untenable Positions"); Dkt. 107-2, at 10-11 ("Defendants Misrepresent the Record to Maintain their False Assertion that Plaintiffs Want to Leave the Sidewalk to Trespass").) In short:

- Plaintiffs did not procure the absence of a witness; Defendants subpoenaed her the night before the hearing. (Dkt. 88, 76-79.)
- Plaintiffs do not want to trespass. (Dkt. 107-2, 10-11.)
- Plaintiffs did not lie about their conduct, hide behind dumpsters, or threaten daughters. (Dkt. 88, 80-87.)

VII. REASSIGNMENT.

Defendants seek to reduce Plaintiffs' reassignment request to a mere complaint about "adverse rulings" and "delay." (Ans.Br. 83-85.) Plaintiffs have shown much more. (Op.Br. 63-68.) The lengthy delay here was caused by the district court's repeated errors, which in turn were rooted in the court's unfair and unsupported enduring treatment of sidewalk counseling—"core political speech entitled to maximum protection," according to this Court, *Bruni*, 824 F.3d at 357—as a "euphemism" that Plaintiffs merely "tout" in order to throw "virulent invectives" at clinic visitors. (Op.Br. 66.) Defendants never engage with the clear

examples of bias, or at least the appearance of bias, demonstrated by Plaintiffs, such as the district court's transforming Plaintiffs' wish to "walk" and "converse" with "willing" women into a sinister wish to "follow" and harass "unconsenting" women (*id.*), while at the same time going to great lengths to re-write the Ordinance, to make it say what Defendants **even now** contradict (*e.g.*, no ban on one-on-one counseling), in order to save it for a second time. (Op.Br. 67; *supra* pt. II.) As shown by Plaintiffs, no remand should be necessary here for further injunctive relief proceedings because this Court has all that it needs to order such relief, but if anything substantive remains to be done, the case should be reassigned. (Op.Br. 63-68.)

CONCLUSION

For the foregoing reasons, and those in Plaintiffs' Opening Brief, this Court should reverse the District Court's preliminary injunction denial, and remand with instructions that this case be reassigned to another judge, preliminary injunctive relief be granted, and the case proceed to resolution on the merits.

Dated this May 23, 2019.

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d) and 46.1(e), the undersigned counsel certifies that he is a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as expanded by this Court's Order of May 16, 2019. Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 7,480 words.

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DATED this May 23, 2019

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CERTIFICATE OF SERVICE AND VIRUS CHECK

I hereby certify that on this May 23, 2019: (1) I caused **Plaintiff–Appellants' Reply Brief** to be filed electronically via the Court's CM/ECF system and to be served upon all counsel of record via Notice of Docket Activity through the Court's electronic filing system and that all counsel of record are electronic filing users; and (2) a virus check was performed on the Brief, no viruses were found, and that the antivirus software used was Microsoft Windows Defender.

/s/ Roger K. Gannam
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CERTIFICATE OF IDENTICAL COMPLIANCE

Pursuant to Local Rule 31.1(c) I hereby certify that the electronically filed version of Plaintiff–Appellants' Reply Brief is identical to the paper copies provided to the Court.

/s/ Roger K. Gannam
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